

WTO ACCESSION AT ANY COST? EXAMINING THE USE OF WTO-PLUS AND WTO-MINUS OBLIGATIONS FOR LEAST-DEVELOPED COUNTRY APPLICANTS

I. INTRODUCTION

The World Trade Organization's (WTO) goal of liberalizing multilateral trade does not exist in a vacuum; that is to say, liberalizing trade is not an end in itself. The preamble to the Agreement Establishing the World Trade Organization ("Marrakesh Agreement"), explicitly states that "[t]he *Parties* to this Agreement, *recognizing* that their relations in the field of trade and economic [endeavor] should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand."¹ The belief that a liberal trade regime will confer these benefits upon those who become members has long propelled the multilateral trade regime's persistent objective of increasing its membership.² The trade organization to which members are acceding has changed significantly. Observers note that the creation of the WTO in 1994 represented a shift from a multilateral trading system based on diplomacy under the General Agreement on Tariffs and Trade (GATT) regime to one that operates under the rule of law.³

Despite this perceived tectonic shift in the nature of the regime to a more rule-based system, the accession process for applicant states under Article XII of the Marrakesh Agreement remains relatively vague and leaves little guidance as to the terms for admission. The increase in membership rules and the absence of guidance on attaining membership have caused the accession process to evolve into a time-consuming and complex negotiation. This absence also allows current member states to require applicants to adopt two types of accession measures: 1) commitments in a variety of areas not contemplated under the Multilateral Agreements, called "WTO-plus" obligations; and 2) commitments contemplated under the Agreements, but are harsher in nature, called "WTO-minus" obligations.⁴ These obligations become a part of a country's Protocol of Accession and can be enforced through the WTO's Dispute Settlement Body.⁵

The ability of member states to negotiate both types of terms with applicants has implications in the context of accession for the lesser- and least-developed

1. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1167 (1994) [hereinafter WTO Agreement].

2. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 9 (1989).

3. G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L. J. 829, 830-31 (1995).

4. Simon J. Evenett & Carlos A. Primo Braga, *WTO Accession: Lessons from Experience*, TRADE NOTE 22 (The World Bank Group, Washington, D.C.), June 6, 2005, available at <http://siteresources.worldbank.org/INTRANETTRADE/Resources/Pubs/TradeNote22.pdf>.

5. See WTO Secretariat, *Technical Note on the Accession Process*, WT/ACC/10/Rev. 3 (Nov. 28, 2005) [hereinafter *Technical Note on the Accession Process*].

countries (“LDCs”).⁶ Prominent critics of WTO-plus and WTO-minus obligations claim that these terms are harmful to LDCs in three principal ways. First, they place further developmental burdens upon acceding LDCs who already face the challenge of meeting the standard requirements set forth in the Marrakesh Agreement and the adjoining Multilateral Agreements.⁷ Second, they undermine the WTO’s own “special and differential treatment” measures meant to facilitate LDC integration into the trading system.⁸ Third, they undermine the overall character of the WTO as a legalized trading regime.⁹ Because WTO-plus and WTO-minus obligations are both perceived to have similarly detrimental effects upon acceding LDCs, many critics opt to simply conflate them as “WTO-plus” obligations.¹⁰ Some critics also believe that since WTO-minus obligations essentially require acceding LDCs to commit to more stringent terms than they are required to under WTO doctrine, they are considered *de facto* WTO-plus in nature.¹¹

This Comment, however, will argue that the WTO’s use of these terms reflects the limits of the institution’s legalistic character, in the area of accession and development. Critics who believe that WTO-minus provisions equate to

6. According to the WTO, developing countries are categorized as either “developing” or “least-developed.” It does not define the requisite criteria; rather, developing countries in the WTO are labeled on a self-selective basis, though this is not necessarily automatically accepted in all WTO bodies. WTO, Development—Who are the Developing Countries in the WTO?, http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (last visited Mar. 24, 2008). With regards to “least-developed” status, however, the WTO recognizes those countries which have received such designation from the United Nations (U.N.). Currently, thirty-two of the fifty countries designated by the U.N. as least-developed countries are WTO members. WTO, Understanding the WTO: The Organization—Least-developed countries, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last visited Mar. 24, 2008). See also UNCTAD, Africa, Least Developed Countries, Land-locked Developing Countries and Small Island Developing States, <http://www.unctad.org/Templates/StartPage.asp?intItemID=3617&lang=1> (last visited Mar. 24, 2008).

7. Celine Charveriat & Mary Kirkbride, *Cambodia’s Accession to the WTO: How the Law of the Jungle is Applied to One of the World’s Poorest Countries*, OXFAM (London, U.K.) Aug. 2003, available at http://www.oxfam.org.uk/what_we_do/where_we_work/cambodia/downloads/Cambodia_accession_facts_final_Aug21.pdf; Ratnakar Adhikari & Navin Dahal, *LDCs’ Accession to the WTO: Learning from the Cases of Nepal, Cambodia, and Vanuatu*, SOUTH ASIA WATCH ON TRADE, ECONOMICS, & ENVIRONMENT (SAWTEE), available at www.un-ngls.org/SAWTEE.doc (last visited Mar. 24, 2008); Agency for Int’l Trade Info. and Cooperation, *Rethinking Accession of LDCs to the WTO in Light of the General Council Decision of 10 December 2002*, Dec. 2005, at 4 [hereinafter *Rethinking Accession*].

8. Simon J. Evenett, *Summary of Participants’ Remarks and Recommendations, Accession to the WTO: Country Experiences and Technical Assistance*, GTZ-World Bank Workshop 3 (Nov. 17-19, 2004).

9. See Julia Ya Qin, “WTO-Plus” Obligations and Their Implications for the World Trade Organization Legal System, 37 J. WORLD TRADE 483, 485 (2003).

10. See Charveriat & Kirkbride, *supra* note 7, (referring to Cambodia’s lack of recourse to special and differential treatment as “WTO-plus”); Adhikari & Dahal, *supra* note 7, at 2 (referring to Nepal’s lack of recourse to special and differential treatment as “WTO-plus”); *Rethinking Accession*, *supra* note 7, at 4 (referring to the lack of special and differential treatment as “WTO-plus”).

11. *Id.*

WTO-plus obligations mistakenly assume that acceding LDCs possess a legal entitlement to the special and differential treatment provisions enacted in the Agreements and through relevant Ministerial Declarations and General Council Decisions. This assumption misperceives the purpose and standing of these documents with regards to their ability to confer rights of preferential treatment to LDCs. The provisions contained in WTO texts, such as the 2001 Ministerial Declaration on Trade Related Aspects on Intellectual Property (“TRIPS”), Public Health, and the 2002 General Council Decision on the Accession of LDCs, do not confer legal entitlements to acceding LDCs. Instead, they represent political commitments and inform policy development towards LDCs. This distinction is consistent with the Working Party on Accession’s (“Working Party”) ability to exercise discretion in applying special and differential treatment during the accession negotiations.¹²

Recognizing the difference between WTO-minus and WTO-plus obligations lays a foundation to dispel arguments that standardized accession terms should apply, that the Working Party should no longer be able to impose any *ad hoc* terms, and that all special and differential treatment provisions should become legal entitlements afforded to applicant LDCs. Corollary to this Comment’s descriptive argument, constraining the accession process within a more legalistic approach is not desirable from a normative perspective. First, maintaining Article XII’s relatively ambiguous language is important to uphold the WTO’s character as a “club,” for which members have an opportunity to negotiate the “price” of accession. This mechanism provides a necessary signal to LDCs that accession is conditioned upon the applicant’s commitment to engage in domestic economic and legal reforms.

Conducive to its character as a “club,” allowing the use of WTO-minus provisions gives the Working Party the flexibility to assess an LDC applicant on the basis of its economic and legal development level. These provisions reflect only a part of a larger package of measures designed to facilitate compliance to the Multilateral Agreements. They may also help deepen an acceding LDC’s internal reform process. Ironically, granting automatic special and differential treatment to acceding LDCs may actually perpetuate the disfavored concept of a “two-tiered” membership within the WTO, rather than eliminate it. In contrast, however, WTO-plus provisions may require a higher level of scrutiny because they often do not allow an LDC applicant to form proper expectations about the contributions of such terms to the cost of accession.

While the WTO accession consists of both bilateral negotiations with Working Party members to establish schedules of commitments in goods and services and a simultaneous multilateral negotiation to establish the rules for admission, this Comment will focus on the latter process.¹³ First, this Comment will describe the general process for states to accede to the WTO under Article XII of the Marrakesh Agreement and briefly trace the history behind accession.

12. See *infra* notes 138-40, 241-47 and accompanying text.

13. For a discussion of the difference between the rules negotiation aspect and the market access negotiation part of the process, refer to Qin, *supra* note 9, at 484.

Consideration will be given to the reasons why LDCs desire to submit themselves to the WTO's standards and obligations, despite their initial lack of adequate economic and political infrastructure, as well as the WTO's resultant developmental policy toward them. Next, the nature and use of WTO-plus and WTO-minus obligations toward LDCs will be examined by looking at the recent accession processes for Nepal and Cambodia, viewed by some as the "litmus test of the resolve of WTO members" to adopt a more development-friendly approach.¹⁴

This Comment will summarize why critics' conflation of WTO-plus and WTO-minus provisions is based upon faulty assumptions and outline the reasons why many of the WTO's well-recognized special and differential treatment policies do not have standing as legal rules. It will present the arguments, in consideration of the developmental aspects of WTO accession, which support the continued discretionary use of WTO-minus obligations. In conclusion, this Comment will raise a number of arguments that suggest a more scrutinizing approach towards imposing WTO-plus commitments upon LDCs.

II. BACKGROUND

A. *How States Accede to the WTO*

Article XII of the Marrakesh Agreement Establishing the World Trade Organization, the provision governing the accession process, states:

1. Any state or separate customs territory possessing full autonomy in its conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, *on the terms to be agreed between it and the WTO*. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.
2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by two-thirds majority of the Members of the WTO.
3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.¹⁵

Closely resembling Article XXXIII of the GATT 1947, upon which its wording has been based, Article XII is noted for its "brevity."¹⁶ Rather than providing guidance on the substance of the accession terms, Article XII leaves these aspects to case-by-case determinations between WTO members and

14. Tiziana Bonapace, *Accession to the World Trade Organization and Development Strategies: Experiences Emerging from the ESCAP Region*, in THE DOHA DEVELOPMENT AGENDA: PERSPECTIVES FROM THE ESCAP REGION 173, 179 (ESCAP Studies in Trade and Inv. No. 51, 2003).

15. WTO Agreement, *supra* note 1 (emphasis added).

16. WTO, Accessions: The Mandate—Relevant WTO Provisions, http://www.wto.org/english/thewto_e/acc_e/acc7_3_e.htm (last visited Mar. 24, 2008).

applicants.¹⁷ Nor does the WTO Secretariat's Note on Accession serve as a general policy statement of the process; rather, the Note claims to adhere to the decisions, procedures and customary practices established by the GATT 1947, in accordance with Article XVI of the Marrakesh Agreement.¹⁸

Acceding to the WTO can be characterized as a "process of negotiation—quite different from the process of accession to other international entities[,] . . . which is largely an automatic process."¹⁹ To initiate the process, a state or customs territory wishing to accede submits a formal written request to the WTO Director-General, who then circulates the request to all WTO members.²⁰ The General Council considers the request and establishes a Working Party to closer examine the application.²¹ The Working Party has the responsibility of determining the terms of accession and incorporating them in a draft Protocol of Accession, which is submitted to the General Council/Ministerial Conference.²² Any WTO member expressing interest can become a member of a particular applicant's Working Party.²³

Upon creation of the Working Party, the acceding state must complete and present a Memorandum on its Foreign Trade Regime to the Working Party, detailing all aspects of its trade and legal practices.²⁴ After the Memorandum has been circulated among all members of the Working Party, the Party and applicant engage in a question-and-answer dialogue regarding its contents, called the "fact-finding stage."²⁵ Upon satisfactory completion of this process, both sides commence a multilateral and bilateral negotiation process.²⁶ The bilateral negotiations phase occurs between the applicant and each Working Party member and involves the establishment of market access concessions and commitments in goods and service sectors.²⁷

The multilateral negotiations phase focuses on the rules established by the WTO agreements, which include provisions relating to goods, intellectual property, and other systemic issues relating to services.²⁸ During this period, the applicant's terms and conditions required for successful WTO entry are

17. *Id.*

18. WTO Secretariat, *Accession to the World Trade Organization, Procedures for Negotiations under Article XII*, WT/ACC/1 (Mar. 24, 1995), available at <http://www.wto.org> [hereinafter *WTO Accession Procedures*].

19. WTO, *Accession: Explanation—How to become a member of the WTO*, http://www.wto.org/english/thewto_e/acc_e/acces_e.htm (last visited Mar. 24, 2008).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *WTO Accession Procedures*, *supra* note 18, at 2.

25. *Id.* at 3.

26. *Id.* It is noted, however, that the fact-finding stage and the negotiations phase may often overlap.

27. *Id.*

28. *Id.*

established.²⁹ The issue of whether an acceding state can commit to the WTO rules is perceived as a “matter of common concern;” the principal objective of the multilateral negotiation is to determine how an applicant’s regime can be brought into conformity with the rules, to the extent that they do not already comply.³⁰ Despite the breadth of WTO rule obligations to be negotiated, the official document on accession provides little substantive detail regarding this part of the process.³¹

The final accession package, submitted to the General Council or Ministerial Conference for both adoption and approval by the applicant’s own domestic legislature, includes a Working Party Report containing a summary of the proceedings, a Protocol of Accession outlining the agreed upon terms of accession, and a draft Decision.³² The Protocol often incorporates whole paragraphs of accession commitments that have been outlined in the earlier Working Party Report.³³ These commitments have legal consequences and can be enforced through the WTO’s Dispute Settlement Mechanism.³⁴ While they mostly include an agreement by the applicant to abide by WTO rules and disciplines, they may also assume several other forms, including:

- obligations not to have recourse to specific WTO provisions (such as transition periods on Customs Valuation and TRIPS); . . .
- obligations to abide by terms defined by the commitment paragraph and not contained in WTO Multilateral Agreements (e.g., timeframe for accession to Plurilateral Trade Agreements).³⁵

Therefore, the conditions under which an acceding state can become a WTO member are not explicitly set forth in the Multilateral Agreements; rather, each applicant’s accession process will yield a different blueprint of rights and duties.

The open-ended character of the WTO accession process is rooted in the organization’s previous incarnation as the GATT regime. Under the GATT 1947, Article XXXIII represented only one way in which a government could become a “contracting party” to the GATT.³⁶ Under Article XXXIII, accession was based

29. *WTO Accession Procedures*, *supra* note 18, at 2.

30. *Technical Note on the Accession Process*, *supra* note 5, at 13.

31. *See id.* It has also been noted by the Secretariat that the official document “contain[s] fewer details concerning the negotiating phase of the process than about the earlier fact-finding phase and the last phase in which the results of the negotiation are formalized and put into effect, the main aim of that document being to define the framework for the negotiations between WTO members and the acceding government.” *Id.* at 12.

32. *Id.* at 12.

33. The Protocols may also incorporate commitment paragraphs of a particular applicant’s Working Party Report by reference. *Id.*

34. *Technical Note on the Accession Process*, *supra* note 5, at 14.

35. *Id.*

36. Previously, states could become a subsequent “contracting party” to the GATT through Article XXVI, where a government receives sponsorship from another government from whom they have obtained independence. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF THE*

“on terms to be agreed between such governments and the CONTRACTING PARTIES.”³⁷ The modern WTO accession process was developed over the years in the GATT regime.³⁸ Protocols of Accession in the GATT regime occasionally allowed deviations from the Agreement on an individual basis in the form of “reservations.”³⁹

From a substantive perspective, however, the scope of the GATT’s objectives and operation were more limited in nature than that of the WTO.⁴⁰ The latter is not only governed today by the principles set forth in the GATT 1947, but also the Multilateral Agreements.⁴¹ Under the GATT, challenges arising from the accession process centered more upon the negotiations of tariff concessions between the applicant and other GATT members.⁴² Given the expansion of certain areas of WTO-established rules and regulations, acceding to the WTO involves the successful negotiation of a significantly greater number of issues.⁴³ Accordingly, the increase in WTO obligations has led to diminished flexibility in the negotiation of an acceding state’s membership commitments.⁴⁴ Furthermore, the increased number of regulated areas affords WTO members a broader base from which to

GATT 90 (1969).

37. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

38. Craig VanGrasstek, *Why Demands on Acceding Countries Increase over Time: A Three-Dimensional Analysis of Multilateral Trade Diplomacy*, in WTO ACCESSIONS AND DEVELOPMENT POLICIES 115, 121 (United Nations Conference on Trade and Development ed., 2001).

39. See *id.* at 124 (noting deviations made in the GATT accession agreement for Poland, Romania and Hungary).

40. See KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 17 (1970) (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.”).

41. 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. General Agreement on Trade and Tariffs, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreements on Trade in Goods, 33 I.L.M. 1125 (1994) [hereinafter GATT 1994]. The other multilateral agreements annexed to the WTO cover a wide range of areas, including: intellectual property (TRIPS); investment measures (TRIMS); and sanitary and phytosanitary measures (SPS Agreement). For the complete annex, see WTO: The Legal Texts—the WTO Agreements, http://www.wto.org/english/docs_e/legal_e/legal_e.htm#finalact.

42. See JACKSON, *supra* note 36, at 94-95. In a three-dimensional analysis of the GATT that demonstrates the trade regime’s priorities in trade relations, GATT accessions were pre-occupied with considerations of reducing the “height,” representing the “tariff wall,” and the most traditional concern. Van Grasstek, *supra* note 38, at 117.

43. Victor Ognitvsev, Eila Jounela & Xiaobing Tang, *Accession to the WTO: The Process and Selected Issues*, in WTO ACCESSIONS AND DEVELOPMENT POLICIES, *supra* note 38, at 172-73; see also Anna Lanoszka, *The World Trade Organization Accession Process: Negotiating Participation in a Globalizing Economy*, 35 J. WORLD TRADE 584, 584 (2001) (noting that the WTO’s enlarged regulatory scope has the potential to influence a member’s domestic economic environment).

44. Ognitvsev, Jounela & Xiaobing, *supra* note 43, at 172-73.

seek concessions.⁴⁵

Given the changes in the trading system and the types of obligations that members of the WTO must assume, the process by which states accede to the WTO is fundamentally different than it was under the GATT regime.⁴⁶ The demographic makeup of the states that are acceding to the WTO has also changed. The accession process has now become a primary tool for developing and nonmarket economies to join the multilateral trading system.⁴⁷ Since the founding of the WTO, twenty-one countries have acceded under Article XII.⁴⁸ Today, twenty-nine nations are currently engaged in accession negotiations or will begin shortly, of which ten are identified as LDCs.⁴⁹ Article XII exposes these states to an involved and strenuous accession process that will scrutinize their developmental level as well as their domestic political and economic regimes.

B. Why Do LDCs Join the WTO?

Given the fact that their economies can generally be described as export-driven via a small number of primary commodities or services, the reasons that LDCs decide to accede to the WTO may not be initially obvious.⁵⁰ Despite the fact that the WTO's LDC-members continue to face difficulties in meeting their obligations,⁵¹ many other factors compel self-subjection to the long and complex accession process. Over the last two decades, developing countries have ascribed to the belief that integration into the world economy yields increased economic growth.⁵²

Testimonies from recently acceded members and current applicants demonstrate that economic and political incentives exist for joining the WTO.

45. See *id.* at 185-86.

46. Not only was the accession process mainly limited to tariff negotiations for LDCs that became members to the GATT, but the majority of developing countries actually *succeeded*, rather than *acceded* to GATT status. LDCs that succeeded under Article XXVI:5(c) were able to achieve *de facto* GATT status upon obtaining independence. See GATT, *supra* note 37, art. XXVI:5(c). Under the GATT, this process, from being a *de facto* member to becoming a full Contracting Party, was one that "involved much less stringent scrutiny of [the applicant's] trade regime and fewer new commitments than did the ordinary accession process of GATT Article XXXIII." This method of membership is not available for applicants to the WTO. VanGrasstek, *supra* note 38, at 123.

47. See VanGrasstek, *supra* note 38, at 122.

48. WTO, *supra* note 6.

49. These countries include: Afghanistan; Bhutan; Cape Verde; Ethiopia; Laos; Samoa; Sao Tome & Principe; Sudan; Vanuatu; and Yemen. *Id.*

50. See generally VanGrasstek, *supra* note 38, at 130-131.

51. PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 695-96 (2005).

52. Yongzheng Yang, *Completing the WTO Accession, Negotiations: Issues and Challenges*, 22 *WORLD ECON.* 513, 513 (1999). According to UNCTAD, the associated major advantages of WTO membership include the expansion of trading opportunities for members; creation of a more secure and predictable trading environment; acquisition of rights embodied in the Agreements; improved transparency among trading partners; and access to the WTO dispute settlement mechanism. Ognivtsev, Journela, & Xiaobing, *supra* note 43, at 176-77; see also Constantine Michalopoulos, *WTO Accession, in DEVELOPMENT, TRADE, AND THE WTO* 61, 61 (Bernard Hoekman, Aaditya Mattoo, & Philip English, eds., The World Bank 2002).

Some states believe that WTO membership can help expedite or even initiate internal domestic legal and economic reform.⁵³ Committing to WTO rules is not a simple process; certain economic, legislative, and judicial reforms must first occur domestically in order to fulfill WTO obligations and expedite the accession process itself.⁵⁴ Additionally, internal reform undertaken by LDCs, combined with accession itself, can produce greater transparency, ultimately facilitating greater foreign investment inflows.⁵⁵ Many LDCs hope that WTO membership will help them overcome impediments to economic development and their least-developed status.

Many states also believe that WTO membership protects their interests relative to other developed countries.⁵⁶ LDCs acceding to bilateral trade agreements without WTO membership do not receive the benefits of negotiating within the parameters and limitations of the WTO agreements.⁵⁷ Furthermore, they do not have the judicial means to seek resolution of trade disputes with fellow trade partners.⁵⁸ The WTO grants all members the opportunity to participate

equally in a forum that makes collective trade decisions, thus creating a more predictable and stable trading environment regardless of status.⁵⁹

On a superficial level, LDCs may feel politically pressured to join the multilateral trading system⁶⁰ and believe that joining will enhance their standing in

53. Rubens Ricupero, *Introductory Remarks by the Secretary-General of UNCTAD*, in WTO ACCESSIONS AND DEVELOPMENT POLICIES, *supra* note 38, at 3, 5. For example, Laos has stated that WTO membership would “offer an opportunity to accelerate the economic reform process undertaken by the Lao government.” WTO News: Laos: WTO membership will accelerate economic reform, http://www.wto.org/english/news_e/news04_e/laos_28oct04_e.htm (last visited Mar. 21, 2008). According to Dr. Raymond Krommenacker, the accession process may compel developing states to reduce or eliminate economic distortions and also become more efficient to compete with imported products. Raymond Krommenacker, WTO Reg'l Coordinator for Asian and Pacific Econ., Keynote Speech at the Asian Development Bank Intensive Course on Accession, WTO and Acceding Countries: Prospects and Challenges 7 (Mar. 7, 2006).

54. See Ricupero, *supra* note 53, at 5-6; see Lanoszka, *supra* note 43, at 596 (stating that states have to “create completely new institutions, draft new laws, design procedures for their enforcement, and train experts that would be responsible for ensuring the speedy and lawful administration of all relevant regulations”).

55. Krommenacker, *supra* note 53, at 7.

56. John Walley, *What are the Developing Countries' Interest in Joining the WTO?*, in JOHN H. JACKSON, WILLIAM DAVEY, & ALAN SYKES, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT 1177, 1177-82 (2002).

57. See Antoni Parenti, *Accession to the World Trade Organisation: A Legal Analysis*, 27 LEGAL ISSUES ECON. INTEGRATION 141, 152 (2000) (emphasizing that terms of accession are limited to the requirements contained within the WTO Agreement).

58. Walley, *supra* note 56, at 1180. Exports are concentrated on a few product lines, so there is typically substantially more volatility in developing country in terms of trade. Because the latter is more economically small, leverage in global negotiations is limited. *Id.* at 1177-82. Therefore, an LDC's inherent economic characteristics will likely put them in a disadvantageous position during trade negotiations without conducting them under the auspices of WTO membership.

59. Ricupero, *supra* note 53, at 5.

60. See *id.* (noting that accession to the WTO should not be seen as an end in itself);

the world.⁶¹ Acting on perceived political pressure to join the WTO, however, often leads countries to inadequately contemplate the short-term economic costs and benefits of accession.⁶² This failure to adequately measure the consequences exacerbates the fact that LDCs are already seldom prepared domestically to accede to the WTO.⁶³ Additionally, internal political pressures do not contribute to the economic and social calculus involved with accession and may enhance the difficulty of the process for all parties.⁶⁴

C. WTO and the Promotion of Development Among LDCs

WTO membership does not automatically guarantee that the benefits of multilateral trade will be apportioned equitably, especially with respect to developing or least-developed countries.⁶⁵ Questions about how to promote economic development among LDC members has evolved into a complex debate, starting from the inception of the GATT.⁶⁶ Today, the issue of development is of great significance. This is most likely due to the fact that about two-thirds of the WTO's approximately 150 members are considered LDCs.⁶⁷

The GATT 1947 recognized the potential adverse effects that multilateral trade could impose upon its lesser-developed members. Article XVIII, for example, reflected the attitude that LDCs should receive greater latitude than developed members to utilize certain measures such as quantitative restrictions to protect its infant industries and correct balance-of-payment issues.⁶⁸ The

Evenett, *supra* note 8, at 2 (stating that some countries see joining the WTO as a political act); Evenett & Braga, *supra* note 4 (stating that many nations join the WTO for political reasons).

61. Lanoszka, *supra* note 43, at 585, 596; see Ognitvsev, Jounela, & Xiaobang, *supra* note 43, at 177.

62. Lanoszka, *supra* note 43, at 585, 596; see Ognitvsev, Jounela, & Xiaobang, *supra* note 43, at 177; Evenett, *supra* note 8, at 3. Samnang Chea & Hach Sok, *Cambodia's Accession to the WTO: 'Fast Track' Accession by a Least Developed Country*, in MANAGING THE CHALLENGES OF WTO PARTICIPATION (Peter Gallagher, Patrick Low & Andrew L. Stoler eds., 2005), available at http://www.wto.org/english/res_e/booksp_e/casestudies_e/case8_e.htm.

63. States, however, often recognize this reality; accordingly, one of their objectives to join the WTO is to spur the domestic reform process. Evenett, *supra* note 8, at 2.

64. See Daniel Gay, *Vanuatu's Suspended Accession Bid: Second Thoughts?*, in MANAGING THE CHALLENGES OF WTO PARTICIPATION, *supra* note 62, available at http://www.wto.org/english/res_e/booksp_e/casestudies_e/case43_e.htm.

65. The preamble to the Marrakesh Agreement further states that WTO members "[r]ecogniz[e] further that there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with their needs of economic development" WTO Agreement, *supra* note 1, pmbl; see also JACKSON, *supra* note 36, at 628-68.

66. DAM, *supra* note 40, at 225-26; see also JACKSON, *supra* note 36, at 628-38.

67. WTO, Understanding the WTO: Developing Countries Overview, http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm (last visited Mar 24, 2008).

68. See JACKSON, *supra* note 36, at 235. Article XVIII, paragraph II of the GATT states: [t]he 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

Contracting Parties subsequently took a number of steps to support LDCs,⁶⁹ including the creation of the Committee on Trade and Development in 1964, which focused on the issues of developing countries and the adoption of GATT Articles XXXVI-XXXVIII, which rhetorically espoused a more proactive approach to helping developing countries.⁷⁰ Given this “passive legislative approach” to the issue, many of these measures lacked the substantive bite that developing nations were anxious to obtain, yet developed members were unwilling to concede.⁷¹

Currently, the WTO agreements include many provisions that give LDCs special rights or extra leniency, referred to as “special and differential treatment.”⁷² The idea of nonreciprocity lies at the core of special and differential treatment and is described by the WTO as “developed countries grant[ing] trade concessions to developing countries [that] they should not expect . . . in return.”⁷³ Many such measures are embedded in the other multilateral agreements, granting LDCs extra time to fulfill their commitments, conferring protection upon LDCs when other developed members enact trade measures, and granting special access to technical assistance.⁷⁴ Furthermore, several of the agreements recognize the developmental needs of LDCs within their respective preambles.⁷⁵ Therefore, WTO members must consider the economic development of LDC members, while exercising their membership rights and obligations.

Agreement.

GATT, *supra* note 37, art. XVII, ¶ II.

69. See generally JACKSON, *supra* note 36, at 229-56.

70. Michael Hart & Bill Dymond, *Special and Differential Treatment and the Doha “Development” Round*, 37 J. WORLD TRADE 395, 400-401 (2003).

71. Jackson states that Part IV of the GATT, when adopted, merely led observers to conclude that less-developed countries “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. JACKSON, *supra* note 36, at 237-41.

72. WTO, *supra* note 67.

73. *Id.*

74. For a summary of the special and differential treatment granted to LDCs in the WTO, refer to Committee on Trade and Development, *Note by the Secretariat: Special and Differential Treatment for Least-Developed Countries*, Annex, WT/COMTD/W/135 (October 5, 2004) [hereinafter *Special and Differential Treatment Note*].

75. Agreement on the Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter TRIPS]; Agreement on Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter SPS Agreement]; Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994); Agreement on Trade-related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter TRIMS]; General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter GATS].

The rhetoric substantiating the WTO's role in facilitating LDC economic development persists despite the overwhelming recognition that the gains of joining the multilateral trading system are not automatic for LDCs and the fact that WTO member rights and obligations are intended to accommodate development.⁷⁶ In 2001, the Doha Development Agenda ("DDA") was enacted at the WTO's Fourth Ministerial Conference.⁷⁷ The DDA is arguably the WTO's most significant recognition to date of the importance of special and differential treatment and the need to improve its implementation.⁷⁸

One of the reasons that the WTO has attached such significance to the DDA's objectives in recent years is due to its recognition that a majority of future acceding states will be LDCs saddled with similar developmental issues.⁷⁹ Accordingly, many developed states have implicitly suggested that such issues should be addressed in a manner favorable to LDC applicants during the WTO accession process. For example, at the Third United Nations Conference on the Least Developed Countries ("LDC-III"), Canada, the European Union, Japan, and the United States disseminated a communication directly dealing with the accession of LDCs.⁸⁰ This communication stated that "full use of the flexibility foreseen under the WTO Agreement" would be applied towards the accession process for LDCs.⁸¹ Furthermore, "[w]hile the goal should be the adoption of WTO provisions upon accession, these transitional periods may be applied to the acceding LDCs upon request."⁸² In response to these discussions at LDC-III, the WTO Secretariat, at the behest of the WTO Sub-Committee on Least-Developed Countries, produced a

76. See Hart & Dymond, *supra* note 70, at 412 (stating that "[m]ost developed countries, unwilling for political reasons to take on this file, will acquiesce in the adoption of pious resolutions . . . that are long on process and rhetoric and short on commitments and programmes that make economic and development sense").

77. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Ministerial Declaration].

78. For more information regarding its specific provisions, refer to *id.*

79. WTO, *supra* note 6.

80. European Commission, Trade Development: Communication from Canada, European Communities, Japan and United States on the Accession of LDCs to the WTO as a Contribution to the 3rd U.N. Conference on the Least Developed Countries, May 17, 2001, http://ec.europa.eu/trade/issues/global/development/wto_nego/backgrm3_en.htm.

81. *Id.*

82. *Id.*

factual note acknowledging a lack of uniform agreement regarding the WTO's policy towards acceding LDCs and the use of special and differential treatment.⁸³

At Doha, the Ministers further mandated the Committee on Trade and Development to examine the operation of the special and differential treatment provisions.⁸⁴ Subsequently, with reference to the DDA, the General Council established "simplified and streamlined" accession procedures for LDCs.⁸⁵ In addition to constructing special guidelines for market access and trade-related technical assistance, the Decision establishes specific provisions to follow with regards to imposing the WTO rules upon acceding LDCs.⁸⁶ These provisions include applying special and differential treatment to all acceding LDCs, granting transitional periods and arrangements in accordance with each acceding state's needs, and restricting the use of optional Plurilateral Trade Agreements and market access initiatives as a precondition to accession to the Multilateral Trade Agreements.⁸⁷ The Decision sought to provide a mechanism for achieving the goals of the DDA, while accommodating the LDCs' developmental levels in the accession process.

In this process, Working Parties grapple with the reality that LDC applicants do not possess the adequate technical knowledge and understanding of the WTO agreements and the implications of accession on their domestic economy.⁸⁸ Given this lack of expertise, LDCs generally do not possess an adequate negotiation strategy based on their national development goals.⁸⁹ Therefore, Working Party members often bear a greater role in setting forth membership terms and conditions.⁹⁰ In the process, they must attempt to balance the need to impose domestic reform requirements within a short time period, while also providing some leeway in their conditions, to alleviate the difficulty incurred by LDCs in assuming comprehensive and extensive reforms.⁹¹

Counter to the idea of promoting economic development through trade via special and differential treatment, many developed states have asserted that a large root of LDCs' developmental problems has resulted from trade strategies pursued

83. Sub-Committee on Least Developed Countries, Note by the Secretariat: Status of Least-Developed Countries Accession to the World Trade Organization, ¶¶ 9-10, WT/LDC/SWG/IF/11/Rev.2 (Apr. 19, 2001).

84. WTO, Work on Special and Differential Provisions, http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (last visited Mar. 24, 2008).

85. General Council Decision, WTO, Accession of Least-developed Countries Decision of December 10, 2002, WT/L/508 (Jan. 20, 2003) [hereinafter Accession of LDCs].

86. *Id.*

87. Accession of LDCs, *supra* note 85, ¶ 1(II).

88. See Gay, *supra* note 64 (noting that Vanuatu's negotiators lacked experience and the Council of Ministers understood neither the proposed accession package nor the role of the WTO).

89. *Id.*

90. *Id.*

91. According to the WTO Secretariat, the accession process involves striking a balance that accommodates the special situation of the acceding government on the one hand, while maintaining the credibility of the WTO system on the other. See *Technical Note on the Accession Process*, *supra* note 5, at 36.

throughout the 1960s and 1970s.⁹² According to them, extending privileges in the form of special and differential treatment to these states contributed to a free rider problem.⁹³ LDCs received the benefits as GATT Contracting Parties, yet could still effectively evade their obligations and isolate themselves.⁹⁴ As a result of this phenomenon, many developed states have adopted a more scrutinizing attitude towards granting preferential treatment and expect that applicants will show the willingness to fully comply with the WTO agreements.⁹⁵

This lack of consensus among current members means that the WTO continues to encounter difficulties in successfully maintaining a balance of its expectations towards acceding LDCs.⁹⁶ This struggle arose in the process of implementing the developmental objectives in the Singapore Agenda during the 1996 Ministerial Conference. Many developed countries had trouble recognizing that LDC members were having difficulty fully complying with newly-created WTO obligations.⁹⁷ At the same time, developing countries voiced their frustrations with perceived difficulties in meeting WTO obligations.⁹⁸ Despite the WTO's positive response to the growing concerns over LDCs contained in the Doha Ministerial Declaration in 2001 and the subsequent Doha Work Program of 2002,⁹⁹ the further reactions varied.¹⁰⁰ Some members believed that these developments demonstrated the WTO's ability to evolve into a multilateral institution capable of assuming complex issues of development into its work.¹⁰¹ Other members, however, felt that the WTO had still avoided tackling the larger issue of establishing a proper balance in dealing with LDCs.¹⁰²

III. THE PROBLEM OF WTO-PLUS & WTO-MINUS OBLIGATIONS

The question of promoting development and facilitating LDCs' implementation of WTO obligations underlie the accession process. LDCs realize that the terms accepted during accession will impact their implementation success and their own internal social and economic progress.¹⁰³ As a general matter, an acceding government's outstanding trade policies are otherwise measured against

92. VanGrasstek, *supra* note 38, at 125.

93. *Id.*

94. *Id.*

95. WTO members have stated that acceding governments must show their willingness to "comply fully with WTO rules upon accession. . . [they] are not, *a priori*, opposed to transition periods, provided that there is a clear justification for them." See *Technical Note on the Accession Process*, *supra* note 5, at 37-38.

96. Peter Sutherland, *The Doha Development Agenda: Political Challenges to the World Trading System—A Cosmopolitan Perspective*, 8 J. INT'L ECON. L. 363, 364-65 (2005).

97. *Id.*

98. Eugenia McGill, *Poverty and Social Analysis of Trade Agreements: A More Coherent Approach?*, 27 B.C. INT'L & COMP. L. REV. 371, 375 (2004).

99. Doha Ministerial Declaration, *supra* note 77.

100. McGill, *supra* note 98, at 375.

101. *Id.* at 375-76 (citations omitted).

102. *Id.*

103. Murray Gibbs, *Introduction to WTO ACCESSION AND DEVELOPMENT POLICIES*, *supra* note 38, at xix-xx.

the standard WTO agreements during accession.¹⁰⁴ Countries will engage in domestic reform in order to comply with the agreements as much as possible.¹⁰⁵

A. Defining the Terms

Since it is unlikely that all aspects of an LDC's trade regime will be in full compliance, the Working Parties often impose special terms that can be described in one of two ways: terms which are based upon existing WTO provisions but are more stringent ("WTO-minus" conditions), or terms not found in any of the WTO multilateral agreements, yet are imposed as a precondition to membership ("WTO-plus" conditions).¹⁰⁶ "Minus" terms include accession commitments that provide applicants less benefits from certain WTO provisions, such as special and differential treatment, than other current members.¹⁰⁷ "Plus" terms represent precise commitments that all other current states (developed or developing) are not subject to as WTO members.¹⁰⁸ These negotiated rule amendments are incorporated into specific Commitment Paragraphs contained in each acceding state's Protocol of Accession.¹⁰⁹ They also have the same status and legal effect as the rest of the WTO agreements and are enforceable through the Dispute Settlement Mechanism.¹¹⁰

Given that the WTO itself does not explicitly define "WTO-plus" and "WTO-minus" obligations, a search for consensus among scholars and critics regarding which terms are designated as "plus" or "minus" has contributed to different views on their legitimacy. As a baseline matter, the WTO makes a distinction between obligations that preclude recourse to its preferential treatment provisions and obligations that are not contained in the Multilateral Agreements, thus exceeding them.¹¹¹ In the latter category, plus obligations have ranged from accepting terms concerning the reform of state-owned industries ("SOEs") to the acceptance of the

WTO's Plurilateral Agreements, which is otherwise not mandatory for member

104. *Technical Note on the Accession Process*, *supra* note 5, at 13; *see also* Michalopoulos, *supra* note 52, at 65.

105. *See Technical Note on the Accession Process*, *supra* note 5, at 14 (noting that commitment paragraphs in Protocols of Accession consist of obligations to comply with WTO rules, which may identify national measures that will be amended to ensure conformity); Ad Hoc Expert Group Meeting of the Secretary-General of UNCTAD, *Summary of Meeting, Issues and Problems Arising from the Integration of Countries into the Multilateral Trading System*, in WTO ACCESSION AND DEVELOPMENT POLICIES, *supra* note 38 at 9, 11 (recognizing that acceding countries will implement accession terms and conditions that it accepts via national legislation) [hereinafter *Summary of Ad Hoc Meeting*]; Lanoszka, *supra* note 43, at 577-78 (suggesting that compliance to WTO legal rules will compel applicants to commit to internal reforms).

106. Jolita Butkeviciene, Michiko Hayashi, Victor Ognitvsev & Tokio Yamaoka, *Terms of WTO Accession*, in WTO ACCESSION AND DEVELOPMENT POLICIES, *supra* note 38, at 230, 232.

107. *Id.*

108. *Id.* at 236; Qin, *supra* note 9, at 489.

109. *Technical Note on the Accession Process*, *supra* note 5, at 14.

110. *Id.*; Qin, *supra* note 9, at 509; Lanoszka, *supra* note 43, at 583.

111. *See supra* note 35 and accompanying text.

states.¹¹² Several groups adopt similar conceptions of these terms.¹¹³

Other groups, however, use the term “WTO-plus” to also encompass commitments in the former category.¹¹⁴ For example, the Agreement on Sanitary and Phytosanitary Measures allows LDC members a transition period of five years from the date of its entry into force, to fully comply with its provisions.¹¹⁵ If an acceding LDC is accorded a transition period that is less than stipulated in the Agreement, then this will be considered a WTO-plus commitment.¹¹⁶ According to these critics, such a term is considered “plus” because it essentially requires the acceding state to achieve compliance in less time.¹¹⁷

B. Rationale for WTO-plus and WTO-minus Obligations

The motives behind imposing these obligations vary in nature. According to the WTO Secretariat, the goal during the rules negotiation process is “to establish [whether] the Applicant’s regime conforms to WTO rules and, in particular, how it is to be brought into conformity where necessary.”¹¹⁸ WTO-plus and -minus obligations can be utilized to bring an acceding state in line with WTO rules, especially in the case of LDCs. The use of WTO-minus obligation often reflects the Working Party’s calculation that a particular applicant does not need the full benefit of certain special and differential treatment provisions and can comply with the WTO agreements, based on their current level of development.¹¹⁹ Different rationales exist for the use of WTO-plus obligations.¹²⁰ For some countries such as the People’s Republic of China, their imposition reflected the insufficiency or inadequacy of standard WTO rules in regulating its immense trade regime.¹²¹ Others believe that imposing more stringent terms may even help further the WTO’s institutional mechanisms and minimize self-interested behavior.¹²²

Prior to China’s Protocol of Accession in 2001, few WTO-plus obligations existed that had a significant impact upon acceding states.¹²³ With the onset of the China Protocol, however, the Working Party on China’s accession introduced “plus” obligations in a wide scope of different areas, including requirements on the administration of the domestic trade regime; commitments to developing a market

112. Qin, *supra* note 9, at 489, 506.

113. *Id.* at 488-89; Evenett & Braga, *supra* note 4; Butkeviciene, Hayashi, Ognitsev & Yamaoka, *supra* note 106, at 230, 231.

114. Adhikari & Dahal, *supra* note 7, at 2; Charveriat & Kirkbride, *supra* note 7; *Rethinking Accession*, *supra* note 7, at 3.

115. SPS Agreement, *supra* note 75.

116. See Charveriat & Kirkbride, *supra* note 7 (noting that Cambodia’s requirements on data protection are “TRIPS-plus”).

117. *Id.*

118. *Technical Note on the Accession Process*, *supra* note 5, at 13.

119. *Id.* at 15.

120. Qin, *supra* note 9, at 488-89.

121. *Id.* at 489.

122. Horst Siebert, *What Does Globalization Mean for the World Trading System?*, in *FROM GATT TO THE WTO: THE MULTILATERAL TRADING SYSTEM IN THE NEW MILLENNIUM* 137 (Kluwer Law, 2000).

123. Qin, *supra* note 9, at 483.

economy; and agreements to open up certain sectors to foreign investors.¹²⁴ In the wake of this unprecedented reliance upon WTO-plus obligations, the WTO's influx development policy, and the large number of LDC applicants,¹²⁵ attention has focused upon the question of whether Working Parties will resort to "plus" and "minus" obligations on a more frequent basis in the future.¹²⁶

C. Criticisms, Responses, and Calls for Entitlement

Some hesitance to the idea of imposing these obligations stems from the fact that these obligations are generally stringent from a developmental perspective. Therefore, utilizing them as conditions to membership for LDCs creates a fundamental tension between the WTO's commitment to accommodate members' developmental needs and goals, and the need to particularize the terms based on each LDC's development level with a mind towards closer integration.¹²⁷ Rather than reflect a true bilateral negotiation process, many of these maximal commitments may seem forced upon applicants during accession.¹²⁸ Accordingly, many view them as a way for developed member states to protect their own interests, or to allow them to extract preferential advantages in future trade with a particular acceding state.¹²⁹ Thus, imposing such terms and conditions unnecessarily increases the price of WTO accession and represents "an abuse of economic power," especially when they are applied "to small island developing economies and LDCs."¹³⁰

In the case of WTO-minus obligations, critics further argue that legitimate claims for special and differential treatment have been denied to the acceding LDCs that actually need them.¹³¹ Some WTO members contend that acceding states should not be subjected to more stringent obligations than present WTO Members, especially LDC members who are current beneficiaries of special and differential treatment.¹³² The basis for their claim lies in the fact that the 2002

124. *Id.*

125. Post-China's accession, Nepal and Cambodia are the first and second LDCs that have acceded to the WTO. Currently, ten LDCs are engaged in the accession process. According to the WTO, this represents one-third of all acceding governments. *Technical Note on the Accession Process*, *supra* note 5, at 31.

126. See Qin, *supra* note 9, at 519. This fear also exists in the context of WTO-minus obligations. Charveriat & Kirkbride, *supra* note 7.

127. *Technical Note on the Accession Process*, *supra* note 5, at 36-37. See KAMAL MALHOTRA ET AL., MAKING GLOBAL TRADE WORK FOR PEOPLE 79 (2003), available at http://www.rbf.org/usr_doc/Making_Global_Trade_Work.pdf (stating that mechanisms for meeting WTO Agreements are often at odds with allowing developing countries to develop more "appropriate and relevant policies" which reflect more "important development priorities").

128. Evenett, *supra* note 8, at 2.

129. Qin, *supra* note 9, at 510-11; OXFAM INTERNATIONAL, OXFAM BRIEFING PAPER 79: MAKE EXTORTION HISTORY: THE CASE FOR DEVELOPMENT-FRIENDLY WTO ACCESSION FOR THE WORLD'S POOREST COUNTRIES (2005), available at http://www.oxfam.org.nz/imgs/pdf/bp79_make_extortion_history.pdf.

130. *Technical Note on the Accession Process*, *supra* note 5, at 37.

131. *Id.*

132. *Id.*

Declaration on the Accession of LDCs, which states that all special and differential treatment provisions are to be applied to LDCs that accede in the future,¹³³ confers a right to receive this treatment.¹³⁴ Limiting the receipt of this treatment, by methods such as granting shorter transition periods, denies acceding LDCs this legal right that others have received. This denial even promotes the idea of a second-class citizenship in the WTO, defying the goal of integration of all acceding members into the WTO.¹³⁵

Other WTO members, however, hold the opposite view that acceding governments do not possess an automatic right to the special and differential treatment laid down in the WTO agreements for original members, particularly with respect to transition periods to comply with WTO standards.¹³⁶ The justification for this dual treatment has been that LDCs acceding since the WTO's creation have had an opportunity to familiarize themselves with WTO obligations, unlike GATT members who did not have that chance upon the WTO's establishment.¹³⁷ Therefore, the desire to preclude acceding LDCs from availing themselves of transition periods, for example, reflects a belief among several members of the WTO that use of special and differential treatment should not be needlessly perpetuated among the membership.

Working Parties value their ability to subjectively assess an LDC's readiness to join the WTO and consider it an integral part of the process that has developed over time.¹³⁸ A part of their subjective assessment consists of the information received from the applicant's questionnaire and the subsequent question-and-answer period to determine whether or not plus and minus obligations are necessary to facilitate accession.¹³⁹ Hence, the WTO accordingly acknowledges that it has not established a unified position on the issue of WTO-plus or -minus obligations.¹⁴⁰ With regard to WTO-minus provisions, Working Parties have not shown a full commitment to applying the provisions of the 2002 Decision.¹⁴¹ Therefore, states are now more aware of the benefits they can achieve by

133. Accession of LDCs, *supra* note 85, at 2.

134. Adhikari & Dahal, *supra* note 7, at 2; Charveriat & Kirkbride, *supra* note 7; *Rethinking Accession*, *supra* note 7, at 3.

135. Evenett & Braga, *supra* note 4. Some WTO members have raised the concern that certain aspects of the accession process could lead to two classes of membership. See *Technical Note on the Accession Process*, *supra* note 5, at 37. Julia Qin has raised a similar concern in the context of WTO-plus obligations. Qin, *supra* note 9, at 513.

136. *Technical Note on the Accession Process*, *supra* note 5, at 13.

137. *Id.*

138. The WTO Secretariat's *Procedures for Negotiations under Article XII* does not elaborate upon the scope or form of the multilateral rules negotiations portion of the accession process. *Technical Note on the Accession Process*, *supra* note 5, at 12. Applicants are required to create and submit a long and detailed memorandum on the applicant's trade regime, which the Working Party will use to negotiate the terms of accession. See *WTO Accession Procedures*, *supra* note 18. In practice, rules negotiation has developed into an informal, yet extremely time-consuming phase of the process. Michalopoulos, *supra* note 52, at 65. According to Peter Van den Bossche, this observation is the result of "hard bargaining" on the part of the Working Party. VAN DEN BOSSCHE, *supra* note 51, at 111.

139. See *Technical Note on the Accession Process*, *supra* note 5, at 9-13.

140. *Id.* at 38.

141. See *infra* Section VII.B and accompanying text.

successfully acceding to the WTO, but often cannot predict the types of obligations that they must assume in order to realize those benefits, making it more difficult to calculate the exact cost of accession.

At the same time, it is also difficult, given the different levels of development among acceding LDCs, to come up with a standard uniform accession protocol. As the WTO states, “the balance in each accession should be to accommodate the special situation of the acceding government on the one hand, while maintaining the credibility of the WTO system on the other.”¹⁴² Critics have called for fundamental reform to the WTO’s approach to accession.¹⁴³ On a basic level, critics desire to implement a more rigid and uniform character to the process through rule compliance measures, which will reduce the use of negotiation.¹⁴⁴ Accordingly, this involves tight restrictions on the use of WTO-plus obligations,¹⁴⁵ based on the notion that rule commitments should not be more stringent than the provisions in the Multilateral Agreements.¹⁴⁶

Furthermore, critics call for enforcement of the provisions of the General Counsel’s 2002 Decision, which would automatically grant the same level of special and differential treatment contained in the Multilateral Agreements to all future acceding LDCs from the date of their accession.¹⁴⁷ Additionally, the special and differential treatment provisions contained in relevant Ministerial and General Council texts should also possess binding application.¹⁴⁸ As a result, acceding LDCs would not be accepting excessively harsh commitments, but ones more appropriately tailored to their developmental needs.¹⁴⁹

IV. THE EXPERIENCE OF LDCs IN WTO ACCESSION

A. Cambodia

Cambodia, affected by war and domestic upheaval in the last twenty-five years, is one of the poorest and least developed states in both East Asia and the world.¹⁵⁰ According to Cambodia’s trade representatives, “integration into the

142. *Technical Note on the Accession Process*, *supra* note 5, at 36.

143. MALHOTRA ET. AL, *supra* note 127, at 81; Charveriat & Kirkbride, *supra* note 7; Adhikari & Dahal, *supra* note 7, at 11; *Rethinking Accession*, *supra* note 7, at 3; Qin, *supra* note 9, at 521.

144. MALHOTRA ET. AL, *supra* note 127, at 81. *See also* Butkeviciene, Hayashi, Ognitvsev, & Yamaoka, *supra* note 106, at 231 (claiming that Article XII’s ambiguity has led to a strictly negotiation rather than rule compliance); Qin, *supra* note 9, at 521 (advocating less member-specific rule making).

145. Qin, *supra* note 9, at 521.

146. *Id.*

147. MALHOTRA ET. AL, *supra* note 127, at 81; Charveriat & Kirkbride, *supra* note 7; Adhikari & Dahal, *supra* note 7, at 2; Butkeviciene, Hayashi, Ognitvsev, & Yamaoka, *supra* note 106, at 231; OXFAM INTERNATIONAL, *supra* note 129, at 4, 30; *see also* Michalopoulos, *supra* note 52, at 69 (arguing the possible merits of “standardizing transition periods for acceding countries”).

148. Adhikari & Dahal, *supra* note 7, at 11; MALHOTRA ET. AL, *supra* note 127, at 79.

149. *Id.*

150. *See generally*, U.S. Department of State, Background Note—Cambodia,

world economy” by means of WTO accession represented “a powerful instrument to alleviate poverty and the main driving force for socio-economic development.”¹⁵¹ Although it attempted to align its domestic trade regime to WTO rules during the process, Cambodia also called upon the Working Party to show “flexibility” in setting the membership commitments and to extend special and differential treatment.¹⁵² The Working Party recognized that Cambodia needed further progress to comply internally with WTO rules and principles, but some members also stated an intention to account for Cambodia’s status as a least-developed country in creating the terms of accession.¹⁵³ Thus, Cambodia’s accession in 2004 had particular significance because it represented one of the first LDCs to accede to the WTO since its creation in 1995.¹⁵⁴

Despite the mutual importance placed upon accession by Cambodia and the WTO, the resulting terms of the negotiation were not received with equal favor. Cambodia’s Protocol of Accession, like those of many other previously acceding states, set forth several country-specific commitments on the rules governing its WTO membership not contained in the Multilateral Agreements.¹⁵⁵ For example, Cambodia agreed to provide periodic reports to WTO members on the progress of its efforts to privatize its state-owned enterprises.¹⁵⁶ Such a WTO-plus measure is based on precedent; other acceding states such as China, Mongolia, and Bulgaria have assented to similar provisions in their respective Protocols of Accession.¹⁵⁷ Other measures in the Protocol, however, led the Cambodian Commerce Minister Cham Prasidh to remark that “the package of concessions and commitments that [we] have to accept certainly goes far beyond what is commensurate with the level of development of a least developed country like Cambodia.”¹⁵⁸

Under the Agreement for TRIPS, for example, Cambodia made rules commitments deemed by some as excessive relative to their LDC member status.¹⁵⁹ With regard to pharmaceutical patents, the 2001 Doha Declaration on the TRIPS Agreement and Public Health states that LDC members would be allowed until January 1, 2016 to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement.¹⁶⁰ In contrast, Cambodia ultimately agreed to adhere to a

<http://www.state.gov/r/pa/ei/bgn/2732.htm> (last visited Mar. 24, 2008).

151. Working Party on the Accession of Cambodia, *Report of the Working Party on the Accession of Cambodia*, WT/ACC/KHM/21, 2, ¶ 6 (Aug. 15, 2003) [hereinafter *Cambodia Working Party Report*].

152. *Id.* at 2, ¶ 7.

153. *Id.* at 2, ¶ 8.

154. Cambodia would have been the first LDC to accede to the WTO, had it not been for its domestic legislature, which created gridlock in the approval process of its Protocol of Accession. Chea & Sok, *supra* note 62.

155. *Cambodia Working Party Report*, *supra* note 151, at 6-50. For concise access and a full list, refer to *Technical Note on the Accession Process*, *supra* note 5, Annex 3, at 46-197.

156. *Cambodia Working Party Report*, *supra* note 151, at 5, ¶ 25.

157. *Technical Note on Accession Process*, *supra* note 5, at 49-54.

158. Andrew Walker, *Cambodia and Nepal win WTO entry*, BBC NEWS, Sept. 12, 2003, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/business/3102720.stm>.

159. *Cambodia Working Party Report*, *supra* note 151, at 36-48.

160. World Trade Organization, Ministerial Declaration of 20 November 2001,

January 1, 2007 deadline for compliance to the entire TRIPS Agreement.¹⁶¹ Before arriving at this date, Cambodia had originally requested a transition period for TRIPS compliance that would expire in 2009.¹⁶²

In the area of intellectual property, others have criticized Cambodia's obligation to provide protection for a period of five years against the "unfair commercial use" of undisclosed test data contained in applications submitted to its regulatory agency seeking marketing approval of pharmaceutical or agricultural chemical products.¹⁶³ According to Cambodia's Protocol of Accession, "unfair commercial use" translated into an agreement to disallow any individual, other than the applicant, to rely upon the data in seeking approval for his or her product.¹⁶⁴ The five-year period would begin on the date that Cambodian authorities had granted marketing approval to the company that originally produced the data for its own product.¹⁶⁵ Such a measure would prevent, for example, Cambodia's regulatory agency from using the data to evaluate a similar, generic version of the product for approval. According to critics, this restriction would essentially hinder the production or import of generic medicines, forcing those producers to either wait five years or recreate the data themselves.¹⁶⁶ While Article 39.3 of the TRIPS Agreement contemplates protection, it does not require a specific time period or exclusive right for the protection of such data.¹⁶⁷ This requirement also prevailed, despite the fact that the Declaration on the TRIPS Agreement and Public Health states that LDCs would not be required to implement

WT/MIN(01)/DEC/2, ¶7, 41 I.L.M. 746 (2002) [hereinafter Declaration on TRIPS and Public Health]. Part II of the TRIPS Agreement addresses standards for the availability, scope, and use of intellectual property rights. TRIPS, *supra* note 75. Sections 5 and 7 of Part II set forth WTO members' rights and obligations concerning patents and the protection of undisclosed information, respectively. *Id.* §§ 5, 7.

161. *Cambodia Working Party Report*, *supra* note 151, at 244, ¶ 204. The TRIPS Agreement states existing LDC members were not required to apply its provisions for a period of 10 years from the date of the Agreement's application. TRIPS, *supra* note 75, pt. VI, art. 66. Developed country members had to fully apply the TRIPS Agreement since January 1, 1996. *Id.* pt. 6, art. 65. Therefore, existing LDC members did not have to fully comply under the original terms of the agreement until January 1, 2006. Under the guidelines of the General Council's Decision on the Accession of Least-Developed Countries, Cambodia presumably could have received a full transition period until 2013 to implement TRIPS.

162. Working Party on the Accession of Cambodia, *Draft Report of the Working Party on the Accession of Cambodia*, WT/ACC/SPEC/KHM/4/Rev.1, 59, (Jun. 19, 2003) [hereinafter *Draft Cambodia Working Party Report*].

163. Charveriat & Kirkbride, *supra* note 7.

164. *Id.*

165. *Id.*

166. *Id.*

167. Article 39.3 of the TRIPS Agreement states:

Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

TRIPS, *supra* note 75, pt. 2, § 7, art. 39.

Sections 5 and 7 of Part II of the TRIPS Agreement (in which Article 39 is contained) or enforce such rights contained within them, until January 1, 2016.¹⁶⁸

Cambodia's conditions for WTO membership also stipulated that it would become a signatory to the Patent Cooperation Treaty ("PCT") upon accession.¹⁶⁹ The PCT, handled by the World Intellectual Property Organization (WIPO) and not the WTO, aims to provide a unified system under which patent applicants can file one international application that would have force in the designated Contracting States.¹⁷⁰ Recent reform efforts under the PCT have aimed to "streamline and simplify" procedures for patent applications by eliminating duplicate patent examination procedures and reducing filing costs.¹⁷¹

Such efforts at harmonizing a global patent system, however, have created concerns that developing country members such as Cambodia might lose the flexibility and exceptions for patent rules afforded to them as WTO members under the TRIPS Agreement.¹⁷² Furthermore, some fear that a global patent system will lead to a corresponding administration system that might ultimately render national patent offices less significant and less responsive to a developing country's interests.¹⁷³ Because the General Council stated that being a signatory to the Plurilateral Agreements should not be imposed as a condition to membership,¹⁷⁴ requiring Cambodia to accede to a WIPO-affiliated agreement has been labeled a "plus" provision.

Regarding agriculture, Cambodia also agreed to bind its agricultural export subsidies to zero and not pursue any future export subsidies upon accession.¹⁷⁵ Currently, Cambodia's agriculture industry represents a significant portion of its economy, accounting for 34.5% of its gross domestic product (GDP) in 2003.¹⁷⁶ Furthermore, over 80% of the population resides in rural areas and depends mainly on agriculture as a means of living.¹⁷⁷ While the WTO has attempted to promote more market transparency in this sector through regulating market access restrictions, domestic supports, and export subsidies by members, it also acknowledges the potential difficulties that LDCs would face in terms of

168. Doha Ministerial Declaration, *supra* note 77, ¶ 7.

169. *Cambodia Working Party Report*, *supra* note 151, at 37, ¶ 172.

170. Carlos Correa & Sisule Musungu, *The WIPO Patent Agenda: The Risks for Developing Countries*, at 7-9 (The South Centre, Trade-Related Agenda, Development and Equity Working Papers, No. 12, 2002), available at <http://www.southcentre.org/publications/workingpapers/wp12.pdf>.

171. *Id.* at 9.

172. For further discussion of the conflict between PCT reform efforts and the TRIPS Agreement, see *id.* at 22-27.

173. *Id.*; Charveriat & Kirkbride, *supra* note 7.

174. Charveriat & Kirkbride, *supra* note 7; see also *supra* note 8 and accompanying text.

175. *Cambodia Working Party Report*, *supra* note 151, at 35-36, ¶ 164.

176. UNCTAD, Statistical Profiles of the Least Developed Countries, Cambodia (2005), http://www.unctad.org/sections/ldc_dir/docs/ldcmisc20053_cmb_en.pdf.

177. SOUTHEAST ASIA COUNTRY UNIT, EAST ASIA AND PACIFIC REGION, THE WORLD BANK, REP. NO. 29950-KH, CAMBODIA COUNTRY PROCUREMENT ASSESSMENT REPORT (2004), available at http://www-wds.worldbank.org/servlet/WDSPContentServer/WDSP/IB/2004/09/30/000012009_20040930132721/Rendered/INDEX/299500KH.txt.

implementing the provisions of the Agreement on Agriculture.¹⁷⁸ Accordingly, the Agreement's provision on Special and Differential Treatment states that "[l]east-developed country Members shall not be required to undertake [tariff and domestic support] reduction commitments."¹⁷⁹ With reference to this specific provision, Cambodia opposed the deprivation of its ability to utilize domestic export subsidies in order to support its agricultural industry.¹⁸⁰ Given that much of Cambodia's future economic development revolves around strengthening this industry, the Working Party has been criticized for failing to grant benefits favorable to LDCs under the Agreement.¹⁸¹

B. Nepal

Nepal is a small land-locked country that reported a per capita GDP of \$245 in 2004¹⁸² and conducts a majority of its trade with India.¹⁸³ Nepal originally applied for GATT membership in 1989, but for various reasons did not fully accede to the multilateral trade regime until April 2004.¹⁸⁴ According to the Nepalese government, the country had faced a large degree of economic and political instability, but it hoped to overcome these problems by promoting domestic development via "integration into the world economy."¹⁸⁵ During the process of accession, Nepal hoped that its membership commitments would be "consistent with the capacity of a land-locked LDC" and account for its developmental needs.¹⁸⁶ Furthermore, it also expected that its terms of accession would reflect the General Council's 2002 Decision on the Accession of LDCs.¹⁸⁷ In the Working Party's view, "economic, intellectual and moral arguments, including the credibility of the WTO, justified according special and differential treatment similar to that enjoyed by other LDCs in the . . . WTO Agreements."¹⁸⁸ Thus, Nepal adopted the view that, as an acceding LDC, it was entitled to specific

178. The WTO posits that it "allows some flexibility in the way commitments [of the Agreement on Agriculture] are implemented." World Trade Organization, *Agriculture: Fairer Markets for Farmers*, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm (last visited Mar. 24, 2008).

179. Agreement on Agriculture, *supra* note 75, art. 15(2).

180. Charveriat & Kirkbride, *supra* note 7.

181. *Id.*

182. UNCTAD, *LANDLOCKED DEVELOPING COUNTRIES: FACTS AND FIGURES 38* (2006), available at http://www.unctad.org/en/docs/ldc20062_en.pdf.

183. UNCTAD, *STATISTICAL PROFILES OF THE LEAST DEVELOPED COUNTRIES, NEPAL* (2005), available at http://www.unctad.org/sections/ldc_dir/docs/ldcmisc20053_nep_en.pdf.

184. P.R. Rajkarnikar, *Nepal: The Role of an NGO in Support of Accession*, in *MANAGING THE CHALLENGES OF WTO PARTICIPATION*, *supra* note 62, available at http://www.wto.org/english/res_e/booksp_e/casestudies_e/case30_e.htm (last visited Mar. 16, 2008). Although the General Council approved Nepal's membership in 2003, it did not become an official member until April 23, 2004, when it was ratified by Nepal's domestic legislature. *Id.*

185. Working Party on the Accession of Nepal, *Report of the Working Party on the Accession of Nepal*, WT/ACC/NPL/16, 2, ¶ 5 (Aug. 28, 2003) [hereinafter *Nepal Working Party Report*].

186. *Id.*

187. *Id.*

188. *Id.* at 2-3, ¶ 8.

provisions affording it special and differential treatment. Nepal's accession process, however, was retrospectively attacked for its lack of full commitment to these stated ideals, even among those groups that supported its accession.¹⁸⁹

Although the Working Party attempted to establish other "plus" conditions upon Nepal's entrance into the WTO, Nepal ultimately avoided incorporating some of them into its final accession package.¹⁹⁰ According to Dinesh Chandra Pyakhuryal, Secretary of the Ministry of Industry, Commerce, and Supplies, Nepal declined to adopt some of the Plurilateral Agreements upon accession, including the Agreement on Government Procurement, against the request of the Working Party during the negotiations.¹⁹¹

Perhaps a more controversial aspect of the process, however, involved the Working Party's last-minute attempt to condition Nepal's membership upon its matriculation to the International Union for the Protection of New Varieties of Plants ("UPOV"), which exists as a convention to WIPO.¹⁹² The UPOV convention provides intellectual property protection to plant breeding processes and promotes the development of new plants by breeders.¹⁹³ Nepal, however, was concerned that such membership in the short term would harm its indigent farmers, who depended upon their ability to engage in the small-scale production, use, and sale of seeds, considered protected varieties under the Convention.¹⁹⁴ Nepal successfully resisted the inclusion of this extra commitment into its final Protocol of Accession.¹⁹⁵ Instead, taking into account its national interests, it agreed only to explore the possibility of joining UPOV at a future date.¹⁹⁶ Although Nepal felt that it managed to accede under generally favorable terms,¹⁹⁷ the Working Party's requests indicate that future acceding LDCs may not assume that their respective Working Parties will, from the outset, adopt the General Council's Decision on the

189. South Asia Watch on Trade, Economics and Environment (SAWTEE), a non-governmental organization (NGO), supported Nepal's accession to the WTO. See Rajkarnikar, *supra* note 184. SAWTEE, however, criticized the use of "WTO-plus" conditions, rather than special and differential treatment, in Nepal's Protocol of Accession. See Adhikari & Dahal, *supra* note 7, at 2.

190. *Nepal Rejects WTO-plus Commitments*, THE KATHMANDU POST, Aug. 18, 2003, available at <http://www.nepalnews.com.np/contents/englishdaily/ktmpost/2003/aug/aug18/economy.htm>. Several other "WTO-plus" obligations imposed upon Nepal involve the negotiation of its agricultural tariff bindings and scheduled commitments in the area of services. Adhikari & Dahal, *supra* note 7, at 5. Such issues are beyond the scope of this article. See *supra* note 13 and accompanying text.

191. *Nepal Rejects WTO-plus Commitments*, *supra* note 190.

192. Adhikari & Dahal, *supra* note 7, at 8.

193. INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS, UPOV PUBLICATION NO. 437(E), WHAT IT IS, WHAT IT DOES, (2007) available at <http://www.upov.int/en/about/pdf/pub437.pdf>.

194. For a discussion of the costs of UPOV membership to Nepal, see Policy Brief: UPOV Faulty Agreement and Coercive Practices (No. 5, 2003) 4-5, available at: <http://www.sawtee.org/pdf/publication/policybriefupov.pdf>; see also Rajkarnikar, *supra* note 184.

195. *Nepal Rejects WTO-plus Commitments*, *supra* note 190.

196. *Nepal Working Party Report*, *supra* note 185, ¶ 122, at 40.

197. See *Nepal Rejects WTO-plus Commitments*, *supra* note 190 (noting statements by Secretary at the Ministry of Industry, Commerce and Supplies Dinesh Chandra Pyakhuryal noting Nepal's success in resisting several WTO-plus obligations).

Accession of Least-Developed Countries as a baseline framework for their negotiated entry into the WTO.

V. MAINTAINING USE OF WTO-PLUS AND WTO-MINUS OBLIGATIONS

A. *Distinguishing WTO-plus from WTO-minus Obligations*

It is imperative that a distinction remain between WTO-plus and WTO-minus obligations. “WTO-plus” should include commitments which are not, at a minimum, conceptually acknowledged in the WTO agreements so that they are not perceived to exceed them. “WTO-minus” obligations, conversely, should encompass accession terms which establish *de facto* obligations exceeding the principles in the WTO agreements—such as granting shorter transition periods. Maintaining this distinction avoids problems of interpretation and thus disagreement about whether a minus commitment is so stringent as to constitute a plus commitment.¹⁹⁸ These definitions also comport with the WTO’s stated categories of accession terms.¹⁹⁹ In the context of LDC accessions, recognizing the difference between “WTO-plus” and “WTO-minus” obligations helps to establish a framework from which to contend that a *per se* rule should not exist against imposing accession conditions which provide less special and differential treatment than the WTO’s official guidance on development.

B. *Legal Rights to Special and Differential Treatment*

From a legal perspective, the general use of minus obligations in an accession package should not be construed by future LDC applicants as a deprivation of a particular “right” to receive special and differential treatment as a WTO member. Rather, as a WTO member, an acceding state possesses the right, to have “full application to their country of the WTO Agreements”²⁰⁰ For example, the transitional periods granted in the various Multilateral Agreements were intended to start from the date that the Agreements first applied to the entire WTO.²⁰¹ Furthermore, the text of the Agreements does not suggest automatically granting future LDC members the same transition period to fully implement its provisions.²⁰² This fact is consistent with the view that the transition periods were intended for GATT LDC members to adjust their trade regimes to meet the

198. See Evenett & Braga, *supra* note 4.

199. See *supra* note 35 and accompanying text.

200. Parenti, *supra* note 57, at 155. An exception applies in the case of Article XIII of the WTO Agreement, titled the “Non-Application of Multilateral Trade Agreements between Particular Members,” which allows an existing WTO member to refuse application of the agreements between itself and an acceding state, provided that they duly notify the Ministerial Conference prior to the latter’s matriculation. WTO Agreement, *supra* note 1, art. XIII, ¶ 3.

201. *Special and Differential Treatment Note*, *supra* note 74, at 1 n.2.

202. See *id.* (indicating that only LDCs who had membership status at the WTO’s inception could therefore exercise the full transition periods set forth in the Agreements, starting from their date of entry into force); *Technical Note on the Accession Process*, *supra* note 5, at 13 (stating that the Working Parties have the task of applying special and differential treatment on a case-by-case basis).

exponential growth in obligations brought about by the Multilateral Agreements.²⁰³ Accordingly, the WTO Secretariat has stated that transition periods are not “automatic” entitlements within the process of accession under Article XII.²⁰⁴ Thus, conditioning Nepal and Cambodia’s accession upon agreeing to implement the entire TRIPS Agreement by 2007 is consistent with the relevant WTO legal texts.

The relevant provisions of the General Council’s Decision on the Accession of Least-Developed Countries²⁰⁵ contemplate applying special and differential treatment to acceding LDCs as of their date of membership. These provisions should not also provide future acceding LDCs with a legal entitlement, particularly with regard to transitional periods. First, the Decision provides that its “guidelines” are provided with a mind to “accelerate” the actual accession process.²⁰⁶ Second, the use of “transitional periods/transitional arrangements under specific WTO Agreements” is qualified in two respects: (1) that such periods “take into account individual development, financial and trade needs;” and (2) if granted, will “enable acceding LDCs to effectively implement commitments and obligations.”²⁰⁷ Therefore, granting legal status to automatic special and differential treatment to all acceding LDCs was not contemplated by the WTO pursuant to its Doha Development Agenda.²⁰⁸ Instead, the Working Parties operate from a presumption that applicants bear primary responsibility for implementing domestic reforms needed to comply with the Multilateral Agreements *before* attaining membership.²⁰⁹ Therefore, special and differential treatment is not a right arising from accession but a secondary instrument which facilitates accession.²¹⁰

The Ministerial Declarations and Decisions, along with General Council Decisions, also do not definitively provide legal rights and obligations to member states.²¹¹ These documents may be seen as conferring commitments that are

203. See *supra* notes 40-43 and accompanying text.

204. *Technical Note on the Accession Process*, *supra* note 5, at 2.

205. Accession of LDCs, *supra* note 85, at 2.

206. *Id.* at 2.

207. *Id.*

208. The preamble to the General Council’s decision references the Doha Ministerial Declaration, which represents the foundation to the WTO’s development agenda. See World Trade Organization: Doha Development Agenda, Negotiations, Implementation, and Development Gateway, http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Mar. 21, 2008).

209. According to the WTO Secretariat, “[t]he experience of governments that have negotiated their accession under Article XII of the WTO Agreement shows that Members are not, a priori, opposed to transitional arrangements, but that Applicants must demonstrate that they have done as much as possible to bring their system in line with WTO requirements before making a request for a transition period.” *Technical Note on the Accession Process*, *supra* note 5, at 15.

210. *Id.*

211. See VAN DEN BOSSCHE, *supra* note 51, at 54 (stating that twenty-seven Ministerial Decisions and Declarations which formed the Final Act together with the final WTO Act “do not generate specific rights and obligations for WTO Members which can be enforced through WTO dispute settlement”); *id.* at 123 (stating that “it is not clear whether this very broad power to make decisions, in fact, enables the Ministerial Conference to take decisions which are *legally binding* on WTO members”). Because the General Council possesses the powers of the Ministerial

political, rather than legal in nature.²¹² Furthermore, mandating that these provisions be automatically granted for each acceding LDC might achieve the goal of creating “simplified and streamlined accession procedures”²¹³ and remedy bargaining asymmetries between the applicant and Working Party.²¹⁴ These mandates would have unintended consequences concerning the rule of law in the WTO. These relevant provisions, derived from WTO-body Decisions and Declarations, would be inserted into the Protocols of Accession which already have legally binding status as attached annexes to the WTO agreements.²¹⁵ A situation could indirectly arise where certain provisions, intended to have been applied on an evaluative basis, would attain a *de facto* legal quality, enforceable through the Dispute Settlement Procedure.²¹⁶ This result would unintentionally enhance the Ministerial Conference’s ability to change the legal rights and obligations incurred by acceding states.²¹⁷ Removing the Working Party’s discretionary power to grant or limit special and differential treatment to acceding LDCs would create a loophole in the WTO’s institutional framework.

C. Maintaining Use of WTO-minus Obligations

Maintaining the relative ambiguity in WTO accession necessarily preserves a fundamental characteristic of the multilateral trade regime. The ambiguity and leeway afforded to the WTO to operate free of particular rules in this area reflects the fact the trade regime partially retains its character as a “club,” rather than an institution in which membership does not rest upon fulfilling economic criteria.²¹⁸

Conference during the time between the latter’s infrequent meetings, it is assumed that its Decisions do not provide a legally binding effect. *Id.* at 124. This power should be distinguished from its ability to effect legal changes—the Ministerial Conference has the power to adopt legally binding amendments to the Agreements. WTO Agreement, *supra* note 1, art. XI.

212. *See id.* at 123 (statement by Pieter-Jan Kuijper, former Director of the WTO Legal Affairs Division, implying that the Ministerial Conference’s Decisions and Declarations may represent political commitments); Hart & Dymond, *supra* note 70, at 398 (arguing that historically, governments of advanced developing countries have been prepared to offer special and differential treatment as more of a political gesture.); MARY E. FOOTER, AN INSTITUTIONAL AND NORMATIVE ANALYSIS OF THE WORLD TRADE ORGANIZATION 7 (2006) (referring to WTO declarations and decisions as “soft law instruments”).

213. Accession of LDCs, *supra* note 85, at ¶ 1.

214. *See* Bonapace, *supra* note 14, at 177 (noting that since acceding states are “outside the system,” they have no bargaining rights); OXFAM INTERNATIONAL, *supra* note 129, at 4 (recognizing a “power imbalance inherent in the current system”); Evenett & Braga, *supra* note 4 (describing a possible characterization of the accession process as a “one-sided power play”); Lanozka, *supra* note 43, at 590 (stating that the Working Party possesses the right to conduct the accession negotiations “in the way they deem relevant and appropriate”).

215. *See supra* notes 33-34 and accompanying text.

216. *Id.*

217. *See generally Cambodia Working Party Report*, *supra* note 151 (demonstrating the many domestic legislative commitments made by the Cambodian government in order to conform to Multilateral Agreements).

218. *See, e.g.* U.N. Charter art. 4, ¶ 1 (“Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter . . .”). The U.N. currently has 192 members. United Nations Member States, <http://www.un.org/members/list.shtml> (last visited Mar. 24, 2008). The WTO, however, also

Although many scholars have noted that the WTO, and multilateral trade generally, is informed by and increasingly thrives on a legal character and rule of law,²¹⁹ accession is an aspect of the multilateral trade regime that maintains the principles perpetuated under the GATT.²²⁰ The imposition of negotiated WTO-minus provisions demonstrates that the WTO is, “after all, a club . . . it has criteria set for membership, and these criteria are intended to promote trade liberalization in member economies. Without these criteria, the club would lose its value.”²²¹ Such “criteria” relates to the long-held and universally accepted idea that to become a member of the WTO, an acceding country should “pay” an “entry fee.”²²² This entry fee is for the right to enjoy the fruits of previous rounds of multilateral trade negotiations in which the acceding member did not take part.²²³

This enduring perception of a “fee” is closely tied to the WTO’s emphasis that to attain the benefits of WTO membership, applicants still must bear primary responsibility for their fate through enacting domestic economic and legal reforms.²²⁴ Removing the Working Party’s flexibility to adopt minus provisions would likely simplify accession negotiations, but potentially de-signify other components of the process.²²⁵ Automatically granting special and differential treatment would also distort an acceding LDC’s disposition for implementing reforms,²²⁶ thereby reducing the incentive to minimize the level of truly necessary preferential treatment based on its current capabilities and needs.²²⁷ Consequently,

possesses a similar goal of attaining broad membership. *See Technical Note on the Accession Process*, *supra* note 5, at 36 (documenting WTO members’ appreciation that many states continue to engage in the accession process).

219. Qin, *supra* note 9, at 486-87; Shell, *supra* note 3, at 830.

220. Parenti, *supra* note 57, at 157; Simon Lacey, *The View from the Other Side of the Table: WTO Accession from the Perspective of WTO Members*, in *NEW REFLECTIONS ON INTERNATIONAL TRADE* (Jeremy Streatfeild & Simon Lacey, eds., 2007), available at www.spp.nus.edu.sg/docs/wp/wp2006a.pdf.

221. Yang, *supra* note 52, at 415. *But see* MALHOTRA ET AL., *supra* note 127, at 86 (implying that a “new scenario where developing countries are full shareholders” has replaced the club model).

222. Gibbs, *supra* note 103, at 219. *See* Parenti, *supra* note 57, at 155 (stating that the “joining country must pay the ticket for the train”).

223. Gibbs, *supra* note 103, at 219.

224. *See* Krommenacker, *supra* note 53 (stating that the WTO does not want states to look towards it as a “charity”); Parenti, *supra* note 57, at 155 (emphasizing that the WTO does not primarily serve as a developmental institution).

225. *Technical Note on the Accession Process*, *supra* note 5, at 11. If uniform types of special and differential treatment will be applied without negotiation during accession, then the information about each particular trade regime’s economic and domestic legal regimes obtained during the question-and-answer period would have less usefulness as a matter of determining where each country’s economic status at the time of accession. *See supra* note 139 and accompanying text.

226. *See* Victor Mosoti, *The Legal Implications of Sudan’s Accession to the World Trade Organization*, 103 AFR. AFF., 269, 272 (2004) (stating that the lack of motivation might leave domestic laws “un-evaluated, un-reformed and disused for a long time” and remove a sense of urgency to change them); Hart & Dymond, *supra* note 70, at 396 (arguing that the benefit of domestic reform would be compromised by granting developing country members full application of special and differential treatment, thus avoiding full compliance with the agreements).

227. *See* Michalopoulos, *supra* note 52 (arguing from a normative perspective that acceding

this outcome would force current WTO members to assume unnecessary burdens created by non-reciprocal obligations.²²⁸ Furthermore, the aforementioned benefits derived from accession would be significantly impaired.²²⁹

Allowing flexibility and acceptance of WTO-minus provisions, rather than structuring them around automatic entitlements, would augment other components of the accession process. For instance, Cambodia's commitment to fully implement TRIPS by 2007 seems slightly harsh when viewed as a stand-alone commitment;²³⁰ but compliance with this accession term is supported by a comprehensive Action Plan for Implementation. This plan consists of Cambodia's commitment to enact domestic laws and regulations aimed at establishing an intellectual property regime.²³¹ Therefore, this minus-provision itself is not an arbitrary term imposed by the Working Party; rather, it is a reflection of a larger process of legal and economic reform that is internal to the LDC applicant and welcomed by most applicants as the first step towards WTO accession.²³² In addition, maintaining flexibility in this area allows the Working Party to assess the effectiveness of special and differential treatment based on the experience of other LDC members. Therefore, the Working Party is able to decide whether it is appropriate to incorporate these terms into an applicant's terms of accession.²³³

While automatically granting special and differential treatment to acceding LDCs does not preclude them from undertaking domestic economic and legal reforms, framing the process to promote a shorter timeframe will help solidify the applicant's commitment to domestic reform and full compliance with the Multilateral Agreements.²³⁴ Granting unwarranted special and differential

states should focus and identify the weak areas of their domestic infrastructure that compel the use of "suitable" special and differential treatment); Ognitsev, Jounela & Xiaobing, *supra* note 43, at 172 (insisting that accession must be seen as an essential part of national development policy objectives).

228. The preamble to the WTO Agreement states that the organization's objectives are achieved through means of "entering into reciprocal and mutually advantageous arrangements." WTO Agreement, *supra* note 1, pmb.

229. See *supra* note 53 and accompanying text.

230. See *supra* note 161.

231. *Cambodia Working Party Report*, *supra* note 151, at 45-46.

232. *Id.* at 1-2, ¶¶ 4-6; see also Hart & Dymond, *supra* note 70, at 396 (noting that the primary benefit from WTO membership has always been "support-through rule development and enforcement—for domestic economic policy reform, a benefit that accrues whether a country is in the early or more advanced stages of economic development, high-income or low income").

233. A WTO Working Party would have the ability to examine the past mixed record that special and differential treatment has had thus far for other LDCs, such as Bangladesh, and opt to rely on different measures in accession negotiations. See Hart & Dymond, *supra* note 70, at 410.

234. Evenett & Braga, *supra* note 4. Aside from the uncertainty about the price of accession, another significant concern involves the lengthy duration of the process. Michalopoulos, *supra* note 52, at 65; VAN DEN BOSSCHE, *supra* note 51, at 111; Adhikari & Dahal, *supra* note 7, at 2; *Technical Note on the Accession Process*, *supra* note 5, at 37; Bonapace, *supra* note 14, at 177. This issue raises the question of whether expecting a developing country's officials and civil society to sustain interest in a process that could take a decade and involves considerable complexity in return for uncertain and deferred rewards is the best way to organize the WTO accession process. Evenett & Braga, *supra* note 4. Yet, it may be argued that lengthening the time for compliance, without regard to the applicant's developmental

treatment might otherwise undercut the benefits that WTO rules provide.²³⁵ Because domestic reform is a precursor to accession,²³⁶ using minus provisions to establish a target date for compliance will accelerate these reforms. Such a target date also allows for states to lock in those reforms.²³⁷ Furthermore, the prospect of the Working Party's ability to use minus provisions can enhance the applicant's desire to and leverage in bargaining for greater technical assistance from the WTO.²³⁸ Therefore, WTO-minus provisions are intertwined with, and can augment, aspects of the accession process that have even greater implications for an LDC applicant's development.²³⁹

levels and domestic reform processes, would also extend the uncertainty associated with the cost of accession. This extension might have the same effect and would "give opponents of trade and investment reforms a golden opportunity to exaggerate the negative and undermine support for the accession process." *Id.*

235. See Hart & Dymond, *supra* note 70, at 396 (arguing that the "GATT/WTO rules make it more difficult for governments to acquiesce to domestic protectionist pressures").

236. Sutherland, *supra* note 96, at 369.

237. Lanoszka, *supra* note 43, at 578.

238. If pressed to accept expensive rules-related commitments, applicants should at a minimum insist on technical assistance to mitigate the implementation costs. Making the most of WTO accession requires making the most of technical assistance offered to applicants. Evenett & Braga, *supra* note 4. For a detailed discussion about the role of technical assistance in the accession process, refer to *Technical Note on the Accession Process*, *supra* note 5, at 33-36; see also Hart & Dymond, *supra* note 70, at 408-09 (emphasizing the importance of technical assistance as an important part of a LDC's "balanced package of measures" toward fully complying to the WTO rules); Mosoti, *supra* note 226, at 282 (suggesting that Sudan could use the accession process to solicit greater capacity-building and technical assistance).

239. *Technical Note on the Accession Process*, *supra* note 5, at 33; Doha Ministerial Declaration, *supra* note 77, ¶¶ 38-41 (reaffirming the need for technical assistance).

Following through on critics' demands to create a legal entitlement by eliminating the use of WTO-minus provisions would also fundamentally alter the WTO's desire to retain flexibility on the issue of promoting development through trade. The WTO historically has not elaborated on members' legal rights and obligations in the area of special and differential treatment.²⁴⁰ While the WTO has provided enormous policy guidance toward facilitating development through special and differential treatment,²⁴¹ a Working Party still retains a large "margin of appreciation" under Article XII to assess an LDC's capacity to immediately comply with the Multilateral Agreements.²⁴² Each acceding state initially sits at a different level of economic and political development, giving way to the WTO to "operate on a case-by-case basis" when negotiating the terms of accession.²⁴³ Again, the manifestation of special and differential treatment represents one of many different accession terms that may be established in order to bring the applicant's regime into conformity with the Multilateral Agreements.²⁴⁴ Neither LDC applicants, nor critics, should anticipate the WTO's development-friendly literature as creating a legal constraint upon the Working Party's flexibility to negotiate the terms of accession under Article XII.

Critics argue that depriving acceding LDCs the special and differential treatment afforded to current members will create a two-tier membership system. Contrary to the critics' argument,²⁴⁵ the ultimate goal of WTO membership is to be able to reach full compliance with the Multilateral Agreements.²⁴⁶ Ironically, the critics' demand that the special and differential treatment provisions be applied to each LDC from their respective dates of entry, could, in fact, serve to perpetuate a second tier class.²⁴⁷ Acceding countries have had time to digest the rules and begin

240. See e.g. SPS Agreement, *supra* note 75, art. 10(1) (members are to "take into account special needs . . . of LDC Members"); TBT Agreement, *supra* note 75, art. 12(2) ("[M]embers shall give particular attention to developing Members' rights and obligations and shall take into account the special development, financial and trade needs of developing Members"); GATS, *supra* note 75, art. IV(3) ("particular account" to be taken of LDCs' difficulties in accepting negotiated commitments owing to particular development trade and financial needs"). Although Article XI:2 of the WTO Agreement frames the parameters around which the Working Party negotiates the terms of accession with LDCs, it has a "simple programmatic value and is therefore difficult to qualify in legal terms." See Parenti, *supra* note 57, at 152.

241. See generally *Special and Differential Treatment Note*, *supra* note 74.

242. Parenti, *supra* note 57, at 152.

243. Lanoszka, *supra* note 43, at 590; *Technical Note on the Accession Process*, *supra* note 5, at 13-14; see also Hart & Dymond, *supra* note 70, at 409 (stating that the needs and capacities of countries vary widely and the one-size-fits-all approach is no longer appropriate).

244. Hart & Dymond, *supra* note 70, at 409 (discussing a "balanced package" of measures that include commitments to implement WTO rules and obligations, "temporary adjustments" based on a country's development level, and technical assistance).

245. See *supra* note 135 and accompanying text.

246. *Technical Note on the Accession Process*, *supra* note 5, at 13; VAN DEN BOSSCHE, *supra* note 51, at 110.

247. For example, if State A acceded to the WTO after the Agreements' entry into force and received five years to implement the SPS Agreement, per its terms, then this would delay the point at which all members would comply with the Agreement. Furthermore, there is inequity in the idea that "providing generous transition periods at a time when the transition periods for other

the process of reform.²⁴⁸ Within this period of time, countries have the opportunity to reform their domestic regimes and consult the WTO before acceding and being required to comply with the obligations.²⁴⁹ This is not to say, however, that LDC applicants should be deprived of such provisions in all circumstances. Rather, LDCs focus on assessing the terms that will promote their own domestic reforms and should not base their expectations upon terms of other current members.²⁵⁰

D. Applying Higher Scrutiny to WTO-plus Obligations

Although WTO-minus obligations in Protocols of Accession are acceptable, applying WTO-plus obligations on acceding LDCs deserves heightened scrutiny. WTO-minus provisions are generally grounded in established WTO-principles, which remain “unchallenged as a framework for economic progress.”²⁵¹ In contrast, WTO-plus commitments are rarely founded in the rules of the Multilateral Agreements.²⁵² Even without WTO-plus obligations, LDC applicants face the daunting challenge to accelerate domestic legal and economic reform to adhere to the Multilateral Agreements within a relatively short time period.²⁵³

Within the set of challenges faced by an acceding LDC, one of the prominent issues to be addressed during accession is that states must develop proper expectations in accordance with negotiating their rights and responsibilities as a WTO member.²⁵⁴ Imposing WTO-plus obligations upon acceding LDCs, therefore, would arguably decrease their ability to form comprehensive expectations about the cost of becoming a WTO member and thus increase the difficulty of successfully completing negotiations.²⁵⁵ An increase in uncertainty

countries that are already members are expiring would create inequities between existing and new members.” Michalopoulos, *supra* note 52, at 69; *see also* Hart & Dymond, *supra* note 70, at 415 (stating that an unintended effect of the proliferation of special and differential treatment has been the development of a second-class citizenship).

248. *See supra* note 137 and accompanying text.

249. *Id.* Hostility to the request of transition periods stems from the fact that members feel that accessions tend to require more than five years to complete; therefore, they feel that acceding states have an adequate amount of time to bring its domestic legislation into conformity with WTO rules. Lacey, *supra* note 220, at 8.

250. Bonpace, *supra* note 14, at 179.

251. Sutherland, *supra* note 96, at 365.

252. The case of China's accession to the WTO best demonstrates the wide range of WTO-plus obligations that a Working Party can implement during the process. *See* Qin, *supra* note 9, at 491-509; Butkeviciene, Hayashi, Ognitvsev, and Yamaoka, *supra* note 106, at 236-256.

253. Lanoszka, *supra* note 43, at 588.

254. In the extreme case of Vanuatu, the lack of preparation, knowledge, and communication led to the development of inadequate expectations about the accession process and a subsequent suspension of its bid. *See* Gay, *supra* note 64.

255. *See* Qin, *supra* note 9, at 513 (stating that the WTO legal system must possess “transparency” and “clarity” in order to function effectively); *Summary of Ad Hoc Meeting*, *supra* note 105, at 11 (noting the importance of avoiding states from acceding to the WTO at “any cost”); Evenett & Braga, *supra* note 4 (stating that an important step to improving the accession process involves applicants forming realistic expectations of what the accession process involves). It could be argued in response that based on the numerous accession negotiations that have occurred thus far since the WTO's creation, future applicants could anticipate the types of plus commitments that might be requested of them. For example, China had a plus commitment regarding members' right of appeal. Qin, *supra* note 9, at 496. This commitment later appeared,

about the types of commitments an LDC can expect to make corresponds with greater uncertainty about the success of accession in general.²⁵⁶

Given that the details of the WTO accession process are already secretive in nature,²⁵⁷ allowing WTO-plus obligations to be imposed makes it difficult to determine the intentions behind the plus obligation. If these intentions are consistent with the WTO objective of trade liberalization, then the obligations can be perceived to strengthen, rather than weaken, the provisions of the Multilateral Agreements.²⁵⁸ In some cases, the obligations allow the WTO to overcome certain issues that are not covered by the WTO Multilateral Agreement, but nonetheless need to be addressed in the context of a state's trade regime.²⁵⁹ Therefore, they can produce positive results.

At the same time, however, some terms might be imposed according to the self-interests of various Working Party members.²⁶⁰ Allowing particular WTO members to impose binding obligations based on self-interest defies one of the major reasons that LDCs aspire to join the WTO in the first place.²⁶¹ Additionally, allowing another member's self-interest to implement plus obligations contradicts the basic principles upon which the organization was founded.²⁶² To address this issue, each Working Party should provide in its Report a clear statement of the expected benefits of the plus obligation and how fulfilling that commitment will facilitate compliance with the Multilateral Agreements.²⁶³

In some cases, the Working Party has imposed obligations upon LDCs that explain ambiguous provisions in the Multilateral Agreements;²⁶⁴ these types of accession terms should also receive a level of scrutiny similar to WTO-plus obligations. Although these terms are founded in the WTO rules, the specific scope of the agreed upon commitment is the product of adhering to Working Party criteria. For example, the request that Nepal join the UPOV was an attempt to

in identical language, in Nepal's Working Party Report. See *Nepal Working Party Report*, *supra* note 185, at 11, ¶ 31. This would still require, however, that Nepal anticipate that the Working Party would find enough similarities between the state of its judicial system and China's system to warrant the same plus commitment.

256. Evenett & Braga, *supra* note 4.

257. See *Summary of Ad Hoc Meeting*, *supra* note 106, at 10 (calling for increased transparency in the accession process).

258. Qin, *supra* note 9, at 511-12.

259. *Id.*

260. See Qin, *supra* note 9, at 510-511 (claiming that major trading powers imposed WTO-plus conditions in order to further their interest in trade relations with China); Rajkarnikar, *supra* note 184 (noting that Nepal received pressure at the final stage of accession negotiations from one trading partner country). Kevin Conway, *WTO Accession: Tough Love or a Heavy Hand?*, Dec. 13, 2005, available at http://www.idrc.ca/en/ev-91906-201-1-DO_TOPIC.html.

261. See *supra* note 56 and accompanying text.

262. WTO Agreement, *supra* note 1, pmbl.

263. Qin, *supra* note 9, at 521.

264. See *supra* note 163 and accompanying text regarding Cambodia's obligation to provide IP protection against "unfair commercial use" of undisclosed test data over a five-year period. TRIPS Article 39.3 itself does not mandate a specific time period. TRIPS, *supra* note 75, art. 39.3.

specify the level of protection to plant varieties established under TRIPS Article 27.3(b).²⁶⁵ Article 27.3(b), however, does not give details about what constitutes an “effective” *sui generis* system of protection.²⁶⁶ Since membership to UPOV is not mandatory under the Multilateral Agreements²⁶⁷ and Nepal had agreed to enact domestic legislation addressing protection of plant varieties,²⁶⁸ the rationale for promulgating these types of terms should be clearly publicized by the Working Party. At best, the Working Party should consider allowing applicants in such cases the flexibility to create their own domestic systems of protection, thereby allowing acceding LDCs to consider their national priorities.²⁶⁹

VI. CONCLUSION

Although the WTO has evolved into a multilateral trading system operating under the rule of law, the process under Article XII of the Marrakesh Agreement for states to become members of the organization remains largely ambiguous. This ambiguity has, and will continue to have, implications for the conditions by which LDCs, which make up a majority of current applicants, join the WTO. Since the WTO's creation in 1995, the Working Parties on Accession have required applicants to adopt WTO-plus and WTO-minus obligations.

Critics who contend that minus obligations are the same as plus obligations, because they require acceding LDCs to do more than they are required as WTO members, fail to recognize that limits exist to the WTO's character as a highly legalized regime. They base their arguments on the misconstrued belief that special and differential treatment measures are legally binding on acceding members, when these treatment provisions are only binding on current LDC members. Furthermore, other preferential treatment provisions contained in General Council and Ministerial texts represent normative commitments that the Working Party can apply when it deems appropriate, in light of an applicant's needs.

From a normative perspective, the Working Party should maintain its flexibility in administering WTO-minus obligations upon acceding LDCs; that is, they should not be legally bound to grant special and differential treatment as rights. Such a move fundamentally alters the idea of the WTO as a “club” for which a fee must be paid by the acceding state. Removing the flexibility to decide whether to afford special and differential treatment would have a detrimental effect upon the pace and scope of domestic reform that the applicant is required to

undertake. Contrary to popular opinion, applying these benefits on an automatic basis would actually serve to perpetuate the idea of a two-tiered membership within the WTO.

WTO-plus obligations, in contrast, should be applied with caution and

265. “Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.” TRIPS, *supra* note 75, art. 27.3(b).

266. Mosoti, *supra* note 226, at 270.

267. See *supra* note 192 and accompanying text.

268. *Nepal Working Party Report*, *supra* note 185, at 42.

269. Mosoti, *supra* note 226, at 270.

exposed to greater scrutiny. Currently, such commitments are either not directly tied to specific provisions in the Multilateral Agreements, or expand only upon ambiguous provisions. Therefore, the obligations could be imposed out of another WTO member's self-interest and be antithetical to the LDC's development goals. Such obligations also make it even harder for LDC applicants to anticipate the costs of WTO accession. In conclusion, a distinction must be maintained between WTO-plus and WTO-minus provisions.

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