I Need Some More Kava!

Reviewing the Stress of Pacific Small Island Developing States wishing to Accede to the World Trade Organisation

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Dedication

Dedicated to my beloved brother, Matthew Waugh. Your life, empathy, kindness, exuberance, and in particular your dedication to helping others was my inspiration for writing a dissertation on this topic.

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Glossary of Terms

COMESA: Common Market for Eastern and Southern Africa.

CPR: Comprehensive Reform Programme.

DSB: Disputes Settlement Body.

DSU: Disputes Settlement Unit.

FTA: Free Trade Agreement.

GATT 1947 or Original GATT: General Agreement on Tariffs and Trade 1947.

GATT 1994 or GATT: General Agreement on Tariffs and Trade 1994.

GATS: General Agreement on Trade in Services 1994.

GNI: Gross National Income.

ICJ: International Court of Justice.

ITO: International Trade Organisation.

LDC: Least Developed Country.

MFN: Most-Favoured-Nation.

OCTA: Office of the Chief Trade Adviser.

PACER Plus: Pacific Agreement on Closer Economic Relations Plus.

P-SIDS: Pacific Small Island Developing States.

RTA: Regional Trade Agreement.

SIDS: Small Island Developing State.

SPS Agreement: Agreement on the Application of Sanitary and Phytosanitary Measures.

TBT Agreement: Technical Barriers to Trade Agreement.

TRIMS: Agreement on Trade-Related Investment Measures.

TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights.

UN: United Nations.

UNCDP: United Nations Committee for Development Policy.

UNCTAD: United Nations Conference on Trade and Development.

UNDP: United Nations Development Programme.

UN-OHRLLS: UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States.

VCLT: Vienna Convention on the Law of Treaties.

WTO: World Trade Organisation.

WWII: World War 2.

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Abstract

The World Trade Organisation (WTO) is nearing global membership. Most of those that are not yet members of the WTO are Developing Countries and Least Developed Countries (LDCs). Within these categories of economically disadvantaged countries are those that are often the most disadvantaged; Small Island Developing States (SIDS). At a time when the WTO is threatened by a legitimacy crisis, and faces possible collapse due to USA pressure, the discussion of the elements of procedural fairness are being brought to the forefront. This paper will look at the current accession process of the WTO. The discussion will be supported by an empirical analysis of SIDS which have acceded to the WTO, to see whether the process has achieved the desired outcomes for these countries; the systematic fairness of accession as well as the pragmatic economic reality will be focused upon. To further illustrate the importance of the accession process, commonly suggested alternatives to WTO accession as well as the benefits for P-SIDS acceding to the WTO will be briefly analysed. The substantive arguments will then be concluded with reference to the empirical analysis. Finally, this paper will look at what reforms could be recommended to ensure that the accession process is systematically fair while still being pragmatic.

Introduction

"The successful conclusion of any accession is driven primarily by the choices and efforts made by individuals. Without the Human Element, the accession negotiation process would become a purely technical procedure that can get easily get stuck. While technical expertise is critical, it is not what takes the process across the finish line."[1]

While discussing the accession process to the WTO and issues of systematic fairness associated therein, this statement should be kept in mind.

Without human negotiators and people backing the ideas and goals of accession to the WTO, membership will not be achieved. It is important to realise this truth; that any recommended change or overhaul to the status quo must be done with the backing and support of the politicians, trade negotiators, specialists, and diplomats involved in the process.

Although this important point is not being ignored in the duration of this paper, the general focus is to analyse the implications of the WTO's legal framework for accession, and whether it has delivered what it has purported to do; achieve economic expansion and facilitation of world trade to achieve the development and affluence of all its member nations.[2]

The specific focuses of this paper are to critically analyse this framework of accession and evaluate the empirical evidence of accessions to date to see what they are, in reality, achieving. This empirical analysis will be framed in light of Small Island Developing States (SIDS); many of which are yet to accede to the WTO. Chapter 1 begins with a background to developing countries (including Pacific-SIDS) and the WTO, including a description of the accession framework and arguments for and against its current form. Chapter 2 then undertakes an empirical analysis of the accession experiences of Vanuatu, Tonga and the Seychelles. Given the shortcomings that this analysis will uncover, time is then taken in Chapter 3 to review

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[1] Ellen Johnson Sirleaf and Axel M. Addy '*Accession of Liberia: An Agenda for Transformation'* in Alexei Kireyev and Chiedu Oaskwe (eds) *Trade Multilateralism in the Twenty-first Century: Building the Upper Floors of the Trading System through WTO Accessions* (Cambridge University Press, New York, 2018) 207 at 219.

[2] See Marrakesh Agreement Establishing the World Trade Organization 1867 UNTS 154 (Opened for signature 15 April 1994, entered into force 1 January 1995), [*hereinafter Marrakesh Agreement or WTO Agreement*] at 154 (chapeau).

possible alternatives to WTO accession, and consider whether Pacific-SIDS (P-SIDS) are actually in a position to benefit from WTO membership. In Chapter 4, the discussion returns to the accession framework, analysing arguments for and against the framework in light of the findings of Chapters 2 and 3. The analysis will evaluate whether accession to the WTO is valuable to P-SIDS within the current framework, and if any systematic changes are needed to ensure that these small economies will receive the purported benefits of accession.

The conclusions of this paper may be surprising. Whilst being mindful of geopolitical and economic realities, the issues isolated and the changes suggested are intended to be valuable in addressing P-SIDS' concerns surrounding the WTO system. Furthermore, if significant reforms of the current system are made in light of recent geopolitical unease regarding world trade,[3] these suggestions could help the investment and participation of these nations in this process.

Chapter 1: Background to Developing Countries, what is the World Trade Organisation, and how does a country obtain membership?

1.1. *Introduction to Chapter 1*

In order to analyse any questions that could arise from SIDs obtaining membership to the World Trade Organisation (WTO), the nature of both developing countries in general (and SIDS in particular) and the WTO must be understood. This chapter will begin by outlining what developing countries are, what the WTO is, how it came to be, and why it matters.

The remainder of Chapter 1 will be dedicated to looking at what issues have arisen or could arise in the course of countries acceding to the WTO. Both positive and negative perspectives of the accession process will be discussed.

[3] The United States (USA) is currently threatening to pull out of the WTO which may well undermine and cripple the system; see generally Anwarul Hoda '*Where Is US Trade Policy Headed Under the Trump Administration*?' in Rajat Kathuria and Prateek Kukreja (eds) *20 Years of G20: From Global Cooperation to Building Consensus* (Springer, Singapore, 2019) 81 at 81-92.

1.2. *Developing Countries, Least Developed Countries and Small Island Developing States*

Developing Countries are loosely defined by international law. For the purposes of this paper, the definitions will be discussed in light of the WTO. Under the WTO, Developing Countries are self-designated.[4] If a country designates itself as developing, it can receive extra benefits and owe fewer stringent obligations. However, before they receive benefits, their status can be challenged by the other members.[5] This can lead to a strange phenomenon where countries, which objectively appear to be developed, designate themselves as developing.[6] For example, Singapore, a country with a booming economy and high standard of GNI per capita, is in the position where they classify themselves as developing in the WTO.[7]

Generally, a Developing Country is one which has relatively low indicators of development on the New Human Development Index; meaning that life expectancy, standard of education, and GNI are lower than the top tier countries on this index. These countries often experience higher levels of poverty, lower levels of health and education and have a general need to improve quality of life for their citizens.[8]

Developing Countries can be contrasted with LDCs. These countries are clearly defined at international law as being countries who have very poor indicators of human development.[9] These countries have more special consideration under WTO General Council decisions and other general WTO agreements.[10]

Small Island Developing States are a subset of the above two classifications which do not fit well within either, as they have unique difficulties. These difficulties include a lack of trade diversification, having very small economies in many cases, and being isolated from much of

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[4] WTO "Who are the developing countries in the WTO?" (2019) <www.wto.org/english/tratop_e/devel_e/d1who_e.htm>.
[5] See WTO *Who are the Developing Countries in the WTO*, above n 4.
[6] Fan Cui "Who Are the Developing Countries in the WTO" (2008) 1 LDR 123 at 123-152.
[7] Fan Cui *Who are the Developing Countries in the WTO*, above n 6, at 126-132.
[8] United Nations, Country Classification (2014) UN <www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf>.
[9] United Nations Committee for Development Policy "List of Least Developed Countries (as of December 2018)" (2018) UNDP <www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf>.
[10] See *Accession of Least-Developed Countries,* WT/L/508, 20 January 2003 (Decision of the General Council); and *Accession of Least-Developed Countries Addendum*, WT/L/508/Add.1, 30 July 2012 (Decision of the General Council).

the rest of the world. P-SIDS, which are a subset of SIDS, have an even higher degree of isolation than other SIDS.[11] Although many SIDS fall within the framework of LDCs, there is still a number which are Developing Countries and some which are considered to be developed.[12]

These extra challenges that SIDS face will be viewed in light of the WTO accession process to see if these special considerations are being adequately accounted for and whether, under the current framework, accession to the WTO would be beneficial for SIDS.

In the WTO Agreements, as alluded to above, there is an ability for Developing Countries, and especially LDCs, to get Special and Differential Treatment (SDT), as well as negotiate such SDT in their Accession Protocol.[13] This SDT usually comes in the form of allowing a country a longer period of time to bring its regulatory framework into conformity with the rules of the WTO Agreement, or not requiring countries to have the same number of commitments under those rules.[14] This SDT point needs to be kept in mind when analysing the current model of accession and associated issues.

1.3. *The World Trade Organisation at a Glance*

The WTO is an international institutional organisation which, at the date of publication, has 164 members,[15] with a further 22 countries at various points of the accession process.[16] Originally, a vision for an international body governing world trade was suggested at the end

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[11] Richard L. Bernal '*Special and differential treatment for small developing economies*' in Roman Grynberg (ed) *WTO at the Margins: Small States and the Multilateral Trading System* (Cambridge University Press, Cambridge, 2006) 309 at 330-339.
[12] UN-OHRLLS "SIDS Countries Ranked According to UNDP Human Development Index Report 2011" (2011) UN-OHRLLS <unohrlls.org/UserFiles/SIDS%20HDI%20RANKING.pdf>; However, note there is 2018 update HDI list without the convenience of a SIDS specific list, see United Nations Development Programme-Human Development Reports "Human Development Indices and Indicators 2018 Statistical Update" (2018) UNPD <hdr.undp.org/sites/default/files/2018_human_development_statistical_update.pdf>.
[13] WTO "Special and Differential Treatment Provisions" (2019) WTO <https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm >; WTO "Technical Cooperation: Examples of Provisions for Differential and More Favourable Treatment of Developing Countries" (2019) WTO <www.wto.org/english/tratop_e/devel_e/teccop_e/s_and_d_eg_e.htm>.
[14] Richard L. Bernal *Special and differential treatment for small developing economies*, above n 11, at 339-347.
[15] WTO "Members and Observers" (2019) WTO <www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.
[16] WTO "Summary Table of Ongoing Accessions" (2019) WTO <www.wto.org/english/thewto_e/acc_e/status_e.htm>.

of WWII in the form of the International Trade Organisation (ITO).[17] While the ITO was never agreed upon, the nations who did wish to make this agreement work collectively decided to form a treaty to regulate trade among themselves.[18] This agreement was named the *General Agreement on Tariffs and Trade* (GATT 1947).[19] The GATT 1947 was the precursor to the WTO; its articles and reasoning still exist and form the foundation of the regulation of world trade today.

Many countries desired trade benefits that the GATT offered, and therefore wished to accede to this agreement. In the Uruguay Round of trade negotiations, concluding in 1994, the members of the GATT managed to realise the spirit of the ILO by establishing the WTO.[20] At the point of establishment of the WTO,[21] there were 124 member states party to the agreement.[22]

All of the negotiations and agreements were conducted on the understanding of a single undertaking. This understanding means that to obtain membership to the WTO, including through accession, a country must agree to all of the multilateral agreements such as the GATT, GATS, and the Trade Related Aspects of Intellectual Property Rights (TRIPS).[23]

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[17] WTO "The GATT years: from Havana to Marrakesh" (2019) WTO <www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm>.
[18] Richard Toye '*The International Trade Organisation'* in Martin Daunton, Amrita Narlikar, and Robert M. Stern (eds) *The Oxford Handbook on the World Trade Organisation* (Oxford University Press, Oxford, 2012) 85 at 85-89; The International Trade Organisation (ILO) was an intellectual predecessor of the WTO. Alongside other similar international economic institutions such as World Bank and International Monetary Fund (IMF), the ILO was considered as another specialised UN agency to govern the world economy. However, the agreement was not ratified due to domestic concerns that are traditionally attributed to USA protectionism. Notwithstanding the validity of that narrative, there was likely failing on multiple parties in that negotiation.
[19] General Agreement on Tariffs and Trade (Signed 30 October 1947, provisionally entered into force 1 January 1948) 55 UNTS 187 [hereinafter *GATT 1947* or *Original GATT*]; this was superseded by the General Agreement on Tariffs and Trade, Marrakesh Agreement Establishing the World Trade Organization Annex 1A 1867 UNTS 187 (Opened for signature 15 April 1994, entered into force 1 January 1995) [hereinafter *GATT 1994* or *GATT*].
[20] Richard Toye *The International Trade Organisation*, above n 18, at 96-100; It is worth noting that the ITOs dispute resolution process mechanism was to be held through the International Court of Justice (ICJ). These advisory opinions of the ICJ were to be considered binding on ILO matters under the agreement. Hence, the original world trade framework would have been far more integrated into the UN framework than transpired under the GATT 1994 and further with the WTO.
[21] *The WTO Agreement*, above n 2.
[22] *The GATT years: from Havana to Marrakesh*, above n 17.
[23] WTO "Understanding the WTO: A Navigational Guide" WTO <www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm>.

Unlike the GATT which was a trade treaty which was extended to become a quasi-international trading body, the WTO was set up as a complete institution to manage the members' interests, negotiate with others, make specific commitments through consensus of its members, as well as manage disputes through the newly formed Disputes Settlement Body (DSB).[24] The WTO was formed on the underlying understanding of establishing a rules-based trading system which would allow legal avenues to manage disputes between members as well as ensure equal treatment between members.[25] However, this equal treatment does have allowances for more lenient treatment in regards to Developing Countries.[26] This rules orientated approach of the WTO has been considered to be one of the most important achievements in international law since WWII. [27]

These advancements have led to a far more rigorous system of governance being imposed on its members for the facilitation of trade than would have existed in the WTO's absence. Furthermore, it was intended that there be subsequent rounds of negotiations to create other multilateral agreements.[28]

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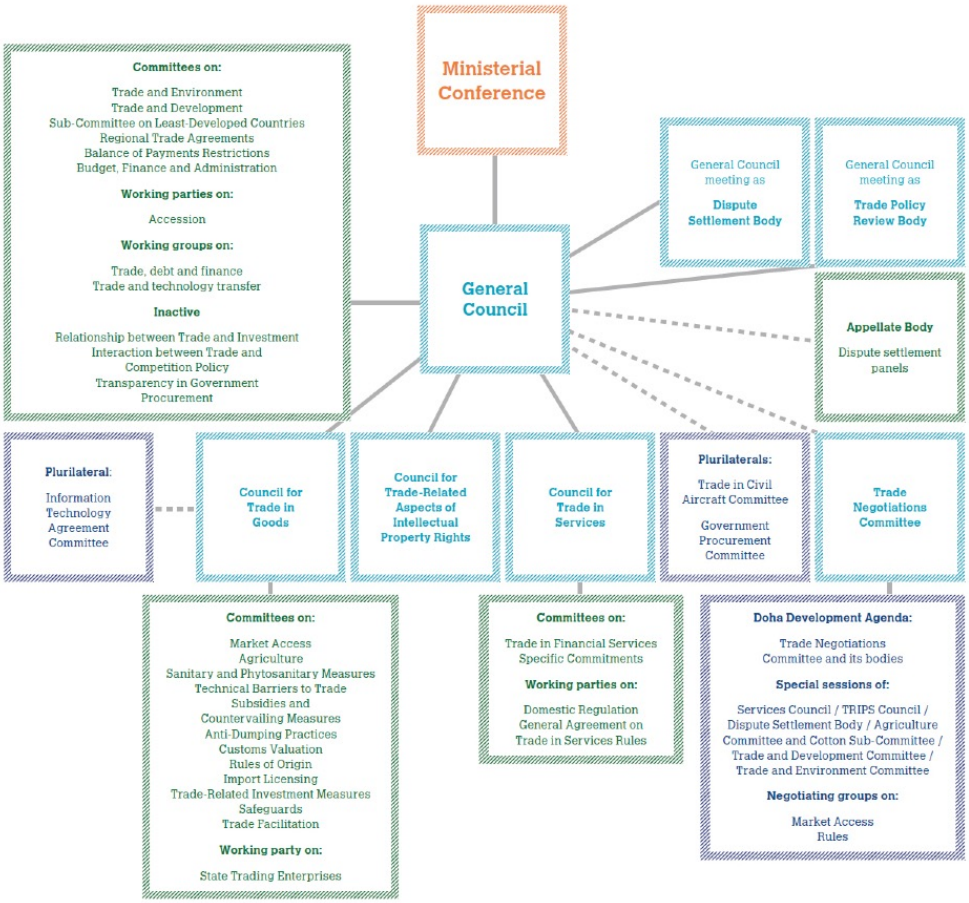
[24] Valerie Hughes '*WTO Rule-making: WTO Accession Protocols and jurisprudence'* in Uri Dadush and Chiedu Osakwe (eds) *WTO Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty* (Cambridge University Press, Cambridge, 2015) 309 at 311-313.
[25] WTO "The Marrakesh Declaration of 15 April 1994" (2019) WTO <www.wto.org/english/docs_e/legal_e/marrakesh_decl_e.htm>; Note that there is allowance for more lenient application of the rules when applying them to Developing Countries.
[26] WTO *The Marrakesh Declaration*, above n 25.
[27] Ernst-Ulrich Petersmann '*The GATT Dispute Settlement System 1948-1995: An Overview*' in Ernst-Ulrich Petersmann (ed) *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (Kluwer Law International, London, 1997) 67 at 84.
[28] *Understanding the WTO: a Navigational Guide*, above n 23.



(Figure 1.1). [29]

The WTO is a member organisation in its entirety. This means that every part of it is a function of the collective agreement of its members. Figure 1.1. shows that the Ministerial Conference, which is when envoys from all members formally meet, can delegate powers to the General Council. The General Council delegates are authorised on behalf of members to make decisions in their interest. The DSB is a function which is delegated by members to individuals in order to resolve disputes.

The DSB is split into two stages; a disputes settlement panel to hear the initial dispute made up of ad hoc panellists, and an Appellate Body to hear appeals. The latter is made up of seven permanent members. These dispute settlement procedures allow for members to bring disputes against each other in a formalised 'legal' manner; with outcomes being determined in

[29] WTO "WTO Organization Chart" (2019) WTO <www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm>.

accordance with rules and in reference to prior decisions of the DSB.[30] This is one of the biggest points of difference with the WTO compared to other areas of international law; there is a formalised system of disputes settlement that is largely divorced from general power politics, allowing for smaller countries and economies to force the larger to 'play by the rules'. Despite this formalised legal dispute mechanism, there are still issues of enforcement for developing and small economies.

The outcome of winning a case in the DSB is a declaration that the opposing country is not in compliance, and if they fail to bring themselves into such compliance, the ability to 'legally' impose trade countermeasures on the offending members.[31]

Furthermore, the committees and various working parties are simply groups of individuals with delegated power within the WTO framework. Hence, WTO committees are simply performing a function on behalf of the General Council.[32] Furthermore, the WTO Secretariat only performs administrative and advisory functions since it has no decision-making power.[33]

The *WTO Agreement* Article XI(1) allows the members of the GATT 1947 to become the original members of the WTO without undertaking any negotiation or commitments beyond those negotiated during the Uruguay Round.[34] This right was further extended to other members of the European Communities who were not members of the GATT 1947 It is also worth noting that under Article XI there is also an exception as to how terms will apply to states that are recognised by the UN as LDCs.[35]

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[30] WTO "Understanding on Rules and Procedures Governing the Settlement of Disputes" (2019) WTO <www.wto.org/english/docs_e/legal_e/28-dsu_e.htm#16>.
[31] WTO "Understanding the WTO: Settling Disputes, a Unique Contribution" (2019) WTO <www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm>.
[32] WTO "Whose WTO is it Anyway?" WTO <www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm#council>.
[33] WTO "Overview of the WTO Secretariat" WTO <www.wto.org/english/thewto_e/secre_e/intro_e.htm>.
[34] *The WTO Agreement,* above n 2, at art 11(1).
[35] *The WTO Agreement*, above n 2, at art 11(2): "The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities." This means that LDCs which were GATT 1947 members could accede to the WTO with fewer commitments than the original membership.

Meanwhile, under the *WTO Agreement* Article XII, new members can only accede to the WTO based on the terms agreed between the State (or independent customs territory) and the WTO membership:[36]

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

It is also important to acknowledge that eight years after the WTO was formed, a decision was made by the WTO General Council concerning the accession of LDCs. This clarification to Article XII(1) was crucial for encouraging LDCs to accede to the WTO.[37]

The rest of this chapter will outline the process and bring clarity to the debate surrounding the Article XII accession process in relation to P-SIDS.

1.4. *Why is it Beneficial for Developing Countries to Accede to the WTO?*

Before beginning to understand the debate as to the functioning of the Article XII process, the commonly stated motivations for acceding will be briefly outlined. Many of these reasons will be examined in-depth in Chapter 4.

The main motivation for accession is to access the reciprocal agreements such as the GATT and GATS in order to be on a more even standing in world markets. It is purported that doing

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[36] *The WTO Agreement,* above n 2, at art 12(1).
[37] WTO *General Council Accession of Least-Developed Countries and Addendum*, above n 10.

so will make a country more competitive, which will help developing economies transform into developed economies and, consequently, raise the standard of living.[38]

Furthermore, the acceptance of WTO obligations can be used to enhance a nation's stability by combating regionalism or separatism by way of ensuring the country's economic direction is in line with the central government's wishes.[39]

Developing Countries wanting to ensure they are taken seriously on an international stage often want to join the WTO as a form of rite of passage as it were. This powerful display of a nation's sovereignty can in and of itself be a compelling reason for a country to join. [40]

Moreover, Developing Countries will gain access to the Disputes Settlement Body (DSB). The DSB is an important function of the members of the WTO.[41]

1.5. *The WTO Article XII Accession Procedure*

The WTO accession process, since its creation in 1994 has had 36 completed accessions, and a further twenty-two accessions currently sitting at various stages of the process.[42]

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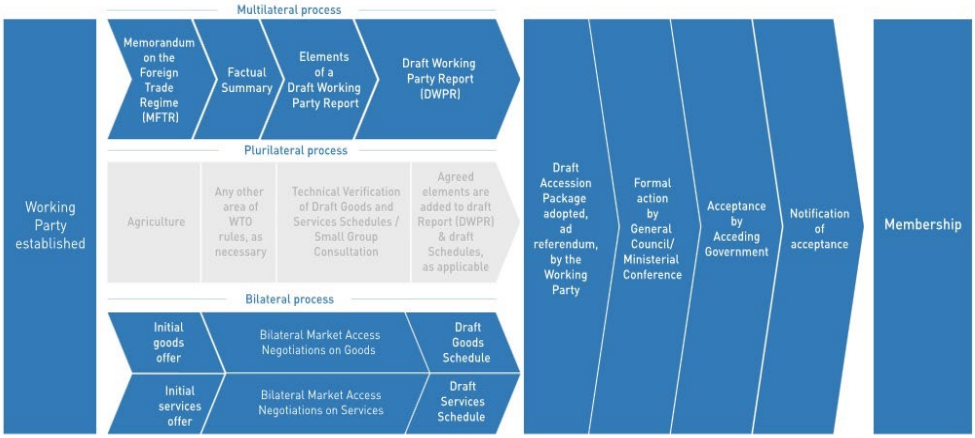
[38] See Mona Haddad, Claire H. Hollweg, and Alberto Portuagal-Perez '*The structural reform implications of WTO accession'* in Uri Dadush and Chiedu Osakwe (eds), *Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty* (Cambridge University Press, Cambridge, 2015) 81 at 81-121.
[39] Rolf J. Langhammer and Matthias Lücke "*WTO Accession Issues"* (1999) 22 World Econ 837 at 866.
[40] José E. Alvarez '*Have International Organizations Improved Treaty-making?'* in José E. Alvarez (ed) *International Organisations as Law makers* (Oxford University Press, Oxford, 2006) 338 at 362.
[41] Refer to Figure 1.1. for clarification as to how it sits within the WTO Framework.
[42] WTO "WTO Accessions" (2019) WTO <www.wto.org/english/thewto_e/acc_e/acc_e.htm>.

As stated above, the accession process under Article XII is ambiguous as to what terms need to be negotiated.[43] The process requires countries which wish to be a member to negotiate their own terms of accession with the WTO membership. This takes many steps and involves complicated 'train tracks' as it involves multilateral, bilateral, and plurilateral negotiation, as well as domestic negotiation to be completed by the state wishing to accede.[44] Figure 1.2 shows the involved process which these accessions take with the exclusion of the necessary domestic reforms required to come into compliance with the various WTO obligations.



(Figure 1.2.).[45]

The accession negotiation process takes on average 10 years to complete.[46] It begins with a state indicating that they wish to accede to the WTO.[47] After this, a Working Party for that nation's accession is set up.[48] This is a very involved process which involves thorough fact-finding and intensive negotiation.[49]

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[43] *The WTO Agreement*, above n 2, at art 12(2).
[44] Petra Beslać and Chiedu Osakwe '*The evolution of the GATT/WTO Accession Protocol: legal tightening and domestic ratification'* in Uri Dadush and Chiedu Osakwe (eds) *WTO Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty* (Cambridge University Press, Cambridge, 2015) 348 at 355-359.
[45] WTO "WTO Accession Process at a Glance" (2019) WTO <www.wto.org/english/thewto_e/acc_e/process_glance_e.htm>.
[46] Uri Dadush and Chiedu Osakwe '*A reflection on accessions as the WTO turns Twenty'* in Uri Dadush, and Chiedu Osakwe (eds) *WTO Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty* (Cambridge University Press, Cambridge, 2015) 5 at 5.
[47] *The WTO Agreement,* above n 2, at art 12(1).
[48] Peter John Williams '*Accession Process: The procedures and how they have been applied'* in A Handbook on Accession to the WTO (Cambridge University Press, Cambridge, 2009) 22 at 26-34;The Working Party is made up of the members who are negotiating multilaterally with the country wishing to accede.
[49] See Petra Beslać and Chiedu Osakwe *The evolution of the GATT/WTO Accession Protocol: legal tightening and domestic ratification*, above n 44.

As a result of these intensive negotiations, acceding members often have to sign up to more exesive or strict commitments than existing members. For example, China in their accession protocol had to commit to several extra commitments ('WTO-Plus') e.g. allowing public consultation and a reasonable period of time for the public to comment on proposed changes to regulatory areas affecting trade.[50]

While China had more WTO-Plus obligations than most, many other examples are available.[51] For example, the Separate Customs Territory of Chinese Taipei was pressured, as a part of their Accession Protocol, to change its media laws and regulations to allow for alcohol to be advertised in all forms of media.[52]

1.6. *The 'Legal' Significance of Various WTO Documents*

Before analysing the arguments on the WTO accession process, it must first be understood why accession commitments are important within the WTO framework. It is helpful to outline the 'legal' status of various WTO documents and procedures generally so as to understand the many different options and tools available to members within the WTO framework; for example what legal weight do Decisions of either the Ministerial Council or General Council have, and what is the effect of Working Party Reports and the Accession Protocol Agreement on WTO law?[53]

It has been found that, since they are adopted by consensus, or at very least by a supermajority, Ministerial Decisions, under the rules of general treaty interpretation, can be viewed as a

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[50] Julia Ya Qin ''*WTO-Plus' Obligations and their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protoco*l' in Carlos A. Primo Braga and Olivier Cattaneo (eds) *The WTO and Accession Countries: Critical Perspectives on the Global Trading System and the WTO* (Edward Elgar Publishing Limited, Cheltenham, 2009) Vol 1 235 at 243- 262.
[51] Steve Clairnovitz '*Mapping the Law of WTO Accession'* in Carlos A. Primo Braga and Olivier Cattaneo (eds) *The WTO and Accession Countries: Critical Perspectives on the Global Trading System and the WTO* (Edward Elgar Publishing Limited, Cheltenham, 2009) Vol 1 274 at 337-340.
[52] Steve Clairnovitz, *Mapping the Law of WTO Accession,* above n 51*,* at 338; *The Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu*, WT/TPKM/18, 5 October 2001 (Report of the Working Party) at [21]; Chinese Taipei is also known as the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu.
[53] See generally Valerie Hughes, *WTO Rule-making: WTO Accession Protocols and jurisprudence,* in Uri Dadush and Chiedu Osakwe (eds) *WTO Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty* (Cambridge University Press, Cambridge, 2015) 309, at 309-348.

subsequent agreement of interpretation on the existing articles or decision. In practice, Ministerial Decisions will be used to help interpret rules and clarify issues surrounding existing rules in certain circumstances rather than replace or override the terms of a document themselves.[54] Furthermore, since Ministerial Decisions can also have a legal effect on treaty interpretation, members should have substantive involvement within the WTO decision making framework in order to ensure their interests are advanced. As will be seen later in this chapter and in Chapter 4, change may be needed surrounding this issue to ensure systematic fairness to new members, especially SIDS.

It has also been found by various WTO Dispute Panels and Appellate Body Reports, that with regards to Accession Working Party Reports and Accession Protocols, there needs to be a circumstantial assessment as to whether other WTO principles should be incorporated into them.[55] For example, exceptions to GATT obligations such as that for measures necessary to protect public morals, may not apply to any additional commitments agreed to under accession protocols.[56] Some DSB decisions have suggested that such other WTO instruments and principles should be read into Accession Protocols, while others have found the opposite;[57] it is a highly circumstantial assessment based on the specific wording of the Accession Protocols.[58]

Of most importance to this paper is the fact that Accession Protocols and Working Party Reports, including any WTO-Plus condition agreed to therein, are enforceable in WTO dispute settlement proceedings.[59] These conditions are to be interpreted in accordance with the customary interpretation rules of Public International Law as codified by the *Vienna Convention on the Law of Treaties*.[60] Hence, any extra conditions pursuant to an Accession Protocol will have continuing legal weight as part of that member's WTO obligations.

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[54] *United States- Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012 (Report of the Appellate Body) at [269].
[55] Valerie Hughes *WTO Rule-making: WTO Accession Protocols and jurisprudence,* above n 24, at 334-345.
[56] GATT, above n 19, at Annex 1A art 20(a).
[57] See Valerie Hughes *WTO Rule-making: WTO Accession Protocols and jurisprudence,* above n 24, at 334-345.
[58] At 334-345.
[59] *China - Measures Affecting Imports of Automobile Parts* WTO/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009 (Report of the Appellate Body).
[60] Vienna Convention on the Law of Treaties 1155 UNTS 331, (Signed, 23 May 1969, entered into force 27 Jan. 1980). [hereinafter VCLT 1969].

1.7. *The WTO Agreement Article XII: Strengths and Weaknesses*

There is a substantial body of literature surrounding Article XII of the *WTO Agreement* and the associated economic, political and legal implications of accession.

Although there is a vast array of positive literature written by individuals involved in the WTO process, there is also a significant degree of criticism from authors more distanced from the process; especially from those who value systematic consistency, fairness and justice e.g. academics, NGOs and trade negotiators.[61]

In order to contribute to this argument in the context of P-SIDS, the existing arguments on the topic must first be examined.

1.7.1. *Arguments in Favour of the Article XII Framework*

The literature endorsed by the WTO secretariat raises some significant arguments. [62] These arguments highlight why the WTO accession process may not be as unfair as would first be assumed; especially considering that acceding countries are conceding additional obligations not imposed on the original membership which are enforceable in the DSB.

The WTO accession framework has been lauded as a great success for developing economies and participants. It is suggested by the WTO Director General himself that accession to the WTO is vital to the economic development of countries.[63]

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[61] See Julia Ya Qin *"WTO-Plus" Obligations and their Implications for the World Trade Organization Legal System*, above n 50, at 243-262.
[62] See generally Chiedu Osakwe '*Contributions and Lesions from WTO Accessions: The present and future of the rules-based multilateral trading system*' in Uri Dadush and Chiedu Osakwe (eds) *WTO Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty* (Cambridge University Press, Cambridge, 2015) 219 at 219-308; Nannan Gao and Fangying Zheng '*The WTO-Plus Obligations: Dual Class or a Strengthened System?'* in Alexei Kireyev and Chiedu Oaskwe (eds) *Trade Multilateralism in the Twenty-first Century: Building the Upper Floors of the Trading System through WTO Accessions* (Cambridge University Press, New York, 2018) 357 at 357-368.
[63] Roberto Azevêdo*' Foreword*' in Alexei Kireyev and Chiedu Oaskwe (eds) *Trade Multilateralism in the Twenty-first Century: Building the Upper Floors of the Trading System through WTO Accessions* (Cambridge University Press, New York, 2018) xiii at xiv.

It is argued that extra requirements put on Article XII acceding members are designed to fill gaps in the original agreement.[64] It is said that these additional requirements result in a firmer and more liberalised legal and regulatory framework for the WTO than the original members. This could solve the issues which plague the original membership and enhance trading relationships between these new countries and the WTO membership.[65]

Furthermore, WTO membership accessions are unique when compared to other comparable international frameworks. There are the four 'train tracks' in order to negotiate accession: domestic, bilateral, plurilateral and multilateral (see Figure 1.2). This means that there needs to be flexibility within an Accession Protocols. The argument is that no one country is the same, especially with regards to their domestic framework. Hence, these WTO-Plus conditions are needed to ensure that new members are adhering to the WTO philosophy and goals within the context of their domestic framework.[66]

Another argument is that the WTO is seen as a public good by its membership that must be protected. The WTO establishes a rules-based system with a dispute settlement body to facilitate disagreements, as opposed to leaving disagreements governed by general politics or complex negotiations involving other non-trade related interests. [67] Hence, any extra protections, such as non-trade related WTO-Plus conditions of accession, are for ensuring the continuation of a well-functioning system. This argument, in particular, is attacked by those against the framework as will be discussed below.

Those who work within the WTO secretariat also suggest that any WTO-Plus obligations to which acceding members agree should not be viewed in a negative light; negotiation is a process of give and take and should be viewed as such.[68]This is further justified by the fact that

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[64] See Chiedu Osakwe *Contributions and Lesions from WTO Accessions: The present and future of the rules-based multilateral trading system,* above n 62, at 245-251.
[65] At 245-251.
[66] See Chiedu Osakwe *Contributions and Lesions from WTO Accessions: The present and future of the rules-based multilateral trading system,* above n 62, at 228; WTO Agreement, above n 2, at 154 (chapeau), art 3; The WTO philosophy being the removal of barriers to trade as well as facilitation of free trade and development.
[67] Steve Clairnovitz *Mapping the Law of WTO Accession,* above n 51*,* at 337-340; Due to strengthening the current framework through accession packages, other political negotiations would not be needed to advance these non-trade related concessions of member states.
[68] See Nannan Gao and Fangying Zheng *The WTO-Plus Obligations: Dual Class or a Strengthened System?,* above n 62, at 358-359.

'WTO-minus' concessions such as the SDT treatment provisions for Developing Countries somewhat offset these more onerous obligations in the short run.[69]

Furthermore, it is said that the drawn-out accession process under Article XII for the acceding countries encourages bipartisan commitment to reforms of their domestic institutional and economic structures, which in turn empirically appears to have substantially helped these countries' development indicators substantially.[70]

This argument is touched upon by other authors as a strong supporting point for WTO accessions.[71] Additionally, there is a large body of literature, which while not without dissenters, suggesting that the economics of accession is positive in the long run.[72]

Although these arguments appear to be empirically true, it does not automatically follow that the process of accession through the Accession Protocols and the Working Party reports is one which should be considered to be a good procedure that is systematically fair and desirable.

1.7.2. *Arguments Against the WTO Article XII Framework*

There are strong views in literature against the current accession process; especially in regards to the perceived lack of substantive fairness as well as other problematic areas, such as the fact that there are different and inconsistent measures being applied to different countries in the process.[73] Moreover, while there is general agreement in the literature that accession helps the

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[69] At 358-359.
[70] Mona Haddad, Claire H. Hollweg, and Alberto Portuagal-Perez *The structural reform implications of WTO accession*, above n 38, at 97-121.
[71] Patrick Low '*Is the WTO Doing Enough for Developing Countries?*' in George A. Bermannan, Petros C. Mavroidis (eds) *WTO Law and Developing Countries* (Cambridge University Press, New York, 2007) 342 at 324-358.
[72] Alexei Kireyev and Mustrapha Sekkate '*WTO Accessions: What does the Academic Literature Say?'* in Uri Dadush and Chiedu Osakwe (eds) *WTO Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty* (Cambridge University Press, Cambridge, 2015) 198 at 198-216; Since this paper does not purport to analyse complex econometric arguments, it will be assumed that the analysis published by this reference is at least one valid interpretation of the reality of accession to the WTO.
[73] See D. Bienen and M. Mihretu "*The principle of fairness and WTO accession: an appraisal and assessment of consequences"* (Paper presented by London School of Economics and Political Science, Society of International Economic Law Working Paper 2010/29 at the Second Biennial Global Conference, The University of Barcelona, 2010).

economic performance of a country in the long run,[74] in the short run there are substantive direct and indirect costs of accession which may hinder economic success; such as diplomatic missions to Geneva in order to represent their interests, the cost of determining the changes and implementation of new regulatory frameworks and legislation etc.[75] Although these costs are not necessarily a procedural fairness issue, on a pragmatic level these are still direct requirements of being able to participate in the WTO system.[76]

The critiques of the process do not stop there. There are strong arguments that WTO-Plus conditions of accession lack procedural fairness and consistency.[77] Due to the nature of the system of Article XII, current WTO members can exert undue power upon acceding members in order to achieve more stringent concessions.[78] It is argued that by treating members differently, that the 'rule of law' (all countries being treated equally under the WTO system) on which the WTO prides itself, is undermined in the accession process.[79]

Also a point of concern is the fact that the accession negotiation process allows members to put undue political pressure on a acceding country without having proper regard to that country's development position or needs.[80] This can happen due to the rule of consensus in WTO law, as large nations can veto membership unless the acceding country meets their demanded concessions.[81] This indicates, as was the case of Lao PDR's accession, that the acceding country needs to have negotiating prowess to be able to assert their development needs; rather than hope that other WTO members will act in a way which advances their development interests in accordance with the wider WTO, as well as UN, trade development

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[74] Contrast L.A. Winters and P.M.G Martins "When comparative advantage is not enough: Business costs in small remote economies" (2004) 3 World Trade Rev 347; It is again worth noting that while this view does have much academic support, it is not a unanimous position among economists and development theorists.
[75] See Mona Haddad, Claire H. Hollweg, and Alberto Portuagal-Perez *The structural reform implications of WTO accession*, above n 38, at 81-121.
[76] At 81-121.
[77] See Julia Qin "*The Conundrum of WTO Accession Protocols: in search of legality and legitimacy"* (2015) 55 Va J Int'l L 369 at 435-446.
[78] See D. Bienen and M. Mihretu *The principle of fairness and WTO accession: an appraisal and assessment of consequences,* above n 73.
[79] See Julia Qin *The Conundrum of WTO Accession Protocols: in search of legality and legitimacy,* above n 77*,* at 435-446; Contrast Alexei Kireyev and Mustrapha Sekkate *WTO Accessions: What does the Academic Literature Say?*, above n 72, at 204-207.
[80] Khemmani Pholsena and Buavanh Vilavong '*Questions from 2013 WTO Accession of Lao PDR: Specific commitments and the integration of least-developed countries into the global economy*' in Uri Dadush and Chiedu Osakwe (eds) *WTO Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty* (Cambridge University Press, Cambridge, 2015) 545 at 545-557.
[81] Or in rare cases, a vote of 75% in favour of an agreement is enough; *Whose WTO is it Anyway*, above n 29.

scheme during the negotiation process.[82] As will be seen in Chapter 2, this pressure is not usually levied against small countries due to any trade interests the other WTO members have in them.

Another related legal critique is that the entire accession process violates the general WTO rule of non-discrimination between nations; in particular the Most-Favoured-Nation (MFN) rule which says that countries cannot treat one WTO member less favourably than another.[83]

It is worth noting that there are SDT provisions to assist countries accede, especially in regards to assistance in meeting the requirements of a new member's Accession Protocol.[84] However, the way the provisions are framed means that there is very little assistance that WTO members are compelled to give acceding countries under the WTO Agreements or any subsequent Ministerial Decisions.[85] Notwithstanding this, it should be noted that these concerns are not as dire for LDCs, as the General Council has made two decisions to help those acceding members get the help required.[86]

Another problem that acceding small economies face is that there is usually undue negotiating pressure to conclude the accession agreements quickly. Hence, concessions that would, nor should necessarily be made are, agreed to in order to promptly conclude the negotiations.[87]

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[82] Khemmani Pholsena and Buavanh Vilavong *'Questions from 2013 WTO Accession of Lao PDR: Specific commitments and the integration of least-developed countries into the global economy',* above n 81, at 556; *WTO Agreement*, above n 2, at 154 (chapeau).
[83] Julia Qin *The Conundrum of WTO Accession Protocols: in search of legality and legitimacy*, above n 77; However, there are exceptions for FTAs within these rules see WTO "Principles of the Trading System" (2019) WTO <www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm>.
[84] See GATT, above n 19.
[85] Edwini Kessie '*The Legal Status of Special and Differential Treatment*' in Ernst-Ulrich Pettersmann and James Harrison (eds) *Reforming The World Trading System: Legitimacy, Efficiency, and Democratic Governance* (Oxford University Press, New York, 2005) 12 at 12-35.
[86] As mentioned above, these General Council Decisions carry interpretive legal weight in the WTO DSB; See *Accession of Least-Developed Countries*, above n 10; *United States- Measures Affecting the Production and Sale of Clove Cigarettes*, above n 54, at [296].
[87] Atsuyuki Oike '*WTO Accession Negotiations from a Negotiator's Perspective'* in Alexei Kireyev and Chiedu Oaskwe (eds) *Trade Multilateralism in the Twenty-first Century: Building the Upper Floors of the Trading System through WTO Accessions* (Cambridge University Press, New York, 2018) 250 at 250-265.

1.7.3. *Conclusion on the Theoretical Arguments For and Against the Current Framework*

This section has shown that there are valid arguments for both sides of this debate; those in favour are focused on purported economic success and pragmatism and those against are assessing the substantive fairness and systematic cohesion within the WTO system. After the following empirical analysis, Chapter 4 will critically analyse these arguments and reach a conclusion on which is stronger.

Chapter 2: Empirical Analysis of SIDS Accessions to the WTO

2.1. *Introduction to Chapter 2*

Before any analysis on the merit of these arguments is conducted, it is useful to frame them in light of accessions by countries which are the focus of this paper; namely P-SIDS.

As will be discussed, P-SIDS have gone through significant amounts of stress to gain WTO membership. For most P-SIDS accession has been a very onerous process which has not necessarily delivered the result which they envisioned. This chapter will look at three countries within the SIDS category. Firstly, it is useful to examine the accession, suspension and eventual renegotiation of Vanuatu's accession. Next, Tonga's accession to the WTO will be discussed. This chapter will conclude with a brief analysis of the Seychelles' accession. While the Seychelles is not a P-SIDS, its accession illustrates some important themes coming out of SIDS accessions generally.

It is worth noting that the following observations were made from sources which are reasonably critical of the WTO. Consequently, their commentary as to the cause of the failings for Vanuatu and Tonga should be taken with a degree of caution. Notwithstanding this potential bias, the evidence surveyed is likely viable due to the fact that Vanuatu did in fact withdraw their accession for a time, and the authors who conducted this evidential research held interviews

with government officials themselves or obtained their information from primary government sources.[88]

2.2. *Observations from the Accession of Vanuatu*

Vanuatu is a particularly useful example for framing arguments surrounding the accession process. This is because many of the above theoretical arguments against the process were a substantive cause of the country's accession bid being suspended for a time.[89]

The reasons for Vanuatu's first accession attempt initially were to enhance trade relationships with their largest trading partners, access the DSB, as well as ensure that they were not left behind as a country when the rest of the world was heading toward a globalised trading scheme. Hence, Hence, iit was a mix of internal interests as well as external pressure from trading partners, which motivated Vanuatu's accession.[90]

The first accession bid began shortly after the formation of the WTO in 1995. This was a particularly onerous process for a multitude of reasons. In 2001 Vanuatu withdrew the Working Party report and suspended their accession until 2007 when they began a renegotiation and finally acceded in 2011.[91]

The WTO was not popular with many business owners in Vanuatu.[92] This general scepticism was reinforced by the fact that the WTO Working Party for Vanuatu endorsed the Comprehensive Reform Programme (CRP), which was perceived to have been a failure and a

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[88] See Daniel Gay '*Vanuatu's Suspended Accession Bid: Second Thoughts*?' in Carlos A. Primo Braga and Olivier Cattaneo (eds) *The WTO and Accession Countries: Critical Perspectives on the Global Trading System and the WTO* (Edward Elgar Publishing Limited, Cheltenham, 2009) Vol 2 147; Roman Grynberg and Roy Mickey Joy '*The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System*' in Roman Grynberg (ed) *WTO at the Margins: Small States and the Multilateral Trading System* (Cambridge University Press, Cambridge, 2009) 693; Joanne Wallis "Friendly islands' in an unfriendly system: Examining the process of Tonga's WTO accession" (2010) 51 Asia Pac Viewp 262.
[89] Daniel Gay *Vanuatu's Suspended Accession Bid: Second Thoughts*? above n 88, at 147-148.
[90] At 151-156.
[91] See Daniel Gay *Joining the World's Economic Parliament: Vanuatu's WTO accession package explained* (Pacific Institute of Public Policy, July 2011) at 1-15.
[92] See Daniel Gay *Vanuatu's Suspended Accession Bid: Second Thoughts*?, above n 88, at 154.

waste of funds for the Vanuatuan Government.[93] Because of the perceived failure, the WTO lost much public and technical support in Vanuatu.[94]

This was not helped by the fact that in the timeframe of the original accession bid, Vanuatu was politically unstable; they had nine governments over that time.[95] Furthermore, at the time of suspension, there was going to be an election. Hence, due to domestic pressure from businesses on the Minister of Trade, the accession bid was abandoned for a time.[96]

There was an issue of government communication for the accession bid as well. Politicians and civil servants were not in agreement on the WTO, nor was there enough consultation between these two groups, and within the groups, about the negotiation position.[97]

Vanuatu had a very small, resource-scarce team working on the accession bid, which had very little to do with the rest of the workings of the government.[98] The permanent negotiating team for this accession was made up of only five members.[99] This meant that the team, which already had a relative lack of experience in negotiation and a lack of WTO legal expertise, were stretched very thin as a team. Furthermore, the fact that the accession bid was made before the 2002 General Council decision on LDCs meant that there was very little certainty on what was or was not going to happen in terms of special and differential treatment after their accession; e.g. what levels of technical support they should expect to receive.

The accession team was further hamstrung by the fact that Vanuatu did not at the time have a permanent mission to Geneva; meaning that their access to conversations with other WTO members' trade officials was limited as was their access to the WTO secretariat. This combined with their limited finances meant that their efforts were seeing little reward.[100]

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[93] Daniel Guy "The emperor's tailor: an assessment of Vanuatu's Comprehensive Reform Program" (2004) 19(3) PEB 22 at 35-36; The CRP was a loan package with many different aims and recommendations for reform. The issue lay with the fact that the overview was too wide, and required too much reliance on the government's cooperation with the private sector. This package was largely unsuccessful in its aims.
[94] Daniel Gay *Vanuatu's Suspended Accession Bid: Second Thoughts*?, above n 84, at 147-148.
[95] At 151.
[96] At 151.
[97] At 151-153.
[98] See generally at 147-156.
[99] At 152.
[100] See At 151-153.

Another major issue for the Vanuatu team was that the technical assistance they were receiving from WTO officials was perceived to be pushing agendas of particular members, not acting independently as in theory they were supposed to.[101] This perception was further entrenched by actions of Australia and New Zealand's High Commissions to Vanuatu, both of which were (at least perceived to be) pushing their own agendas on their accession bid, rather than merely offering assistance to advance Vanuatu's interests.[102]

All this grew to generate a large degree of discontent within Vanuatu. This was worsened due to NGOs' and the private sectors' concerns in conjunction with media attention suggesting that the supposed benefits of joining the WTO would not be true for Vanuatu due to their size.[103]

One of, if not the largest, issues in the negotiation process, was the fact that large WTO members, particularly the USA, but also the EC, were pushing for maximum concessions on tariffs as well as other areas, such as elimination of export subsidies. These were seen domestically to be unrealistic and unacceptable demands for Vanuatu.[104]

These demands were perceived to be very heavy handed, not at all in Vanuatu's best interests, and unfair given the concessions were far steeper than those imposed on the current membership.[105] These WTO-Plus demands were seen to be the single biggest factor that brought down the negotiations for the original accession bid.[106]

Equal access to sale of land to private investors was an issue which the USA was particularly concerned with in relation to the services schedule negotiation, however, due to Vanuatu's cultural system of land ownership, such liberalisation to allow for foreign ownership was not possible.[107] Due to this, much larger concessions were made on tariffs than would have been made otherwise; again this was in large part due to a lack of negotiation expertise.[108] These

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[101] See generally at 153-154.
[102] At 155-156.
[103] At 154-155.
[104] At 156.
[105] See Roman Grynberg and Roy Mickey Joy *The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System*, above n 88, at 703-711.
[106] See at 693-714.
[107] Daniel Gay *Vanuatu's Suspended Accession Bid: Second Thoughts*?, above n 88, at 158; *Draft Report of the Working Party on the Accession of Vanuatu: Draft Schedule of Specific Commitments on Services,* WT/ACC/VUT/13/Add.2, 16 October 2001 (Draft Report of the Working Party).
[108] At 158.

concessions were many and viewed to be unsustainable in the long run by politicians.[109] There was also a lack of attention paid to the services access negotiation due to lack of negotiating expertise and realisation of the importance of services; due to this inattention, concessions on services access were incredibly liberal.[110]

Despite these issues, the accession bid was still pursued due to the desire to enter the multilateral trading regime; specifically it was thought the protection of a rules-based system and access to an effective DSB that WTO membership offers would help Vanuatu operate more successfully in the global economy.[111]

Hence, Vanuatu's officials were forced to make concessions that politicians were not prepared to sustain in the long run, and which were greater than many developed and developing WTO members.[112]

As can been seen, a combination of arguments against joining the WTO was the eventual reason that this particular accession bid failed. The largest factor appears to be that the demands placed on Vanuatu were simply too much for the government to legitimately agree to in good faith to advance the best interests of their people. Consequently, these WTO-Plus terms of accession were both empirically too much for a P-SIDS like Vanuatu to agree to, as well as politically unviable.

The demands on Vanuatu by the large WTO members were not placed due to any substantive trade related interest in the country, rather they were to limit any systematic precedential effect on the accession negotiation procedure which could result from being too lenient on them; specifically to ensure large non-member countries did not see WTO membership as something to be gained without significant concessions.[113]

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[109] At 149-151; See Roman Grynberg and Roy Mickey Joy *The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System*, above n 88, at 709-711.
[110] Daniel Gay *Vanuatu's Suspended Accession Bid: Second Thoughts*?, above n 88, at 156-158.
[111] At 151.
[112] At 159.
[113] See Roman Grynberg and Roy Mickey Joy, *The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System*, above n 88, at 711-713.

This shows that the WTO system, which was perceived as and is purported to be a rules-based system that simply governs trade, did not, in this instance, live up to this perception. The fact that many political interests of individual members as well as trade partners were being heavily advanced, was one of the driving factors of discontent in Vanuatu. This was compounded by the fact that, as both an LDC and a P-SIDS, Vanuatu lacked expertise and funds to deal with such a legally, economically, and politically complex process.

Vanuatu eventually did accede in 2011. The new terms of accession were far more favourable than those they were being asked to agree to in the original accession bid.[114] Notwithstanding these more favourable terms, there are some concessions that are still WTO-Plus in the fact that they were not terms asked of original members,[115] nor were they terms of accession that necessarily helped the WTO or Vanuatu.[116]

2.3. *Lessons from Tonga's Successful, but Onerous WTO Accession*

Tonga's accession to the WTO has been somewhat controversial. Some authors are of the opinion that Tonga's Accession Protocols were particularly onerous and had many concessions and WTO-Plus obligations that would not help the country.[117]Again pressure from development partners was one of the main driving factors of seeking membership to the WTO.[118]

Despite this, some authors have observed that accession would likely reinforce domestic policy reforms and fuel private sector investment in Tonga, which in turn would likely raise the overall

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[114] See Daniel Guy *Joining the World's Economic Parliament*, above n 91; Roman Grynberg and Roy Mickey Joy, *The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System*, above n 88, at 703-710; Daniel Gay, *Vanuatu's Suspended Accession Bid: Second Thoughts*?, above n 88, 147-158.
[115] For example, there were concessions regarding the government procurement policy which original members were not required to make. There was no transition period for the TRIMS agreement measures. Furthermore, there was a backtracking on a policy giving some islands economic independence in the form of free industrial zones from the rest of Vanuatu, they agreed that all WTO rules would apply to any such zones should they be implemented; *The Accession of Vanuatu to the World Trade Organisation*, WT/ACC/VUT/17, 11 May 2011 (Report of the Working Party) at [101]-[108]; Agreement on Trade-Related Investment Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A 1868 UNTS 286 (Singed 15 April 1994, entered into force 1 January 1995) [Hereinafter TRIMS Agreement].
[116] See generally Daniel Gay *Joining the World's Economic Parliament* above n 91, at 1-15.
[117] See Joanne Wallis *Friendly islands' in an unfriendly system*, above n 88, at 262.
[118] At 263.

employment rates in the country.[119] Furthermore, it has been acknowledged by even the most critical authors of their accession, that Tonga could benefit from greater access to the multilateral forum of trade as well as MFN rules under the WTO agreements.[120] However, the former has been questioned due to the resource constraints of Tonga as a SIDS.[121] Finally, it is argued that a substantial benefit of Tonga acceding to the WTO is the fact that it will allow for there to be less of a power imbalance in later regional trade agreements that they wish to enter into [such as the recently agreed upon PACER PLUS] as well as their ability to gain access to the WTO DSB.[122]

These positive outcomes of Tonga's accession aside, it is worth noting that not all was smooth in their accession process, nor was the result empirically very favourable to Tonga. It has been noted that during their accession process, the USA and EC sought to extract as many concessions from Tonga as they could.[123] This was not helped by the fact that under the UN system, Tonga was not classified as an LDC.[124] The lack of LDC status also has been a hinderance when attempting to obtain any SDT allowances. This is because they were not covered by the General Council Decision on LDCs. [125] Hence, Tonga was persuaded to agree to much shorter transition periods for implementation and reform of domestic legislation than would have been had they been covered by the General Council decision on LDC.[126]

The technical assistance offered to Tonga in the accession process was also seen to be woefully inadequate at best, as the assistance offered was far too generic; although it was better than assistance offered to Vanuatu in their first accession bid.[127] Furthermore, since there is no obligation on other states to offer such technical assistance, the assistance that is offered, as has been said to be the case in the accession of Tonga, is often wholly inadequate to assist the country's officials and businesses which need it most.[128]

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[119] At 263.
[120] At 263.
[121] At 263.
[122] See At 263; see also Edward D. Mansfield and Eric Reinhardt "Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Arrangements" (2003) 57 Int Organ 829 at 829-826.
[123] Joanne Wallis *Friendly islands' in an unfriendly system*, above n 84, at 263.
[124] CDP *List of Least Developed Countries*, above n 9.
[125] See WTO General Council *Accession of Least-Developed Countries and Addendum,* above n 10.
[126] Joanne Wallis, *'Friendly islands' in an unfriendly system*, above n 88, at 271-272.
[127] At 273.
[128] At 273-274.

Tonga made many concessions that were onerous in comparison to other accessions; including very low bound tariff rates, many services commitments, agreement to WTO obligations that were not even yet confirmed, as well as an obligation to consult foreign corporations when creating new laws which may affect trade.[129] The latter of these is particularly concerning considering it gives more power to foreign corporations to influence Tongan laws than the people themselves; due to Tonga's less than democratic system of government.[130] However, Tonga did reject the demand to sign up to the plurilateral agreements under the WTO system.[131]

Even when looked at in light of other agreements such as Vanuatu's eventual accession, as well as Fiji's, and Nepal's, all of which had similar negotiating power on the world stage, Tonga's commitments appear to be excessive.[132]

The fact that Tonga agreed to bind their tariffs at such a low rate has been criticised as removing any flexibility that they may have to raise government revenue quickly later if needed, as well as diminishing negotiating leverage in other trade deals they may wish to make in the future.[133] While this decision was in large part due to the negotiating pressure of the USA and EC, it should not be forgotten that Tonga itself decided to take a very liberal negotiation stance when it came to lowering tariff rates and granting general concession.[134] This driving philosophy, which appears to have been driven by a general commitment to neoliberal economic ideals, was one of the main reasons such concessions were able to be extracted from Tonga.[135]

Given Tonga's P-SIDS status, it should be noted that many of the supposed benefits may not come to fruition. For example, the idea that there will always be advantages to gaining private

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[129] At 266.
[130] At 265.
[131] At 265-267; They rejected a request to agree to Plurilateral Agreement on Government Procurement; Agreement on Government Procurement, Marrakesh Agreement Establishing the World Trade Organization Annex 4(b) 1915 UNTS 103 (Signed 15 April 1994, entered into force 1 January 1995), [hereinafter GPA 1994].
[132] Joanne Wallis, *'Friendly islands' in an unfriendly system*, above n 88, at 265; Daniel Gay, '*Joining the World's Economic Parliament,* above n 91, at 1-15.
[133] See generally Joanne Wallis *Friendly islands' in an unfriendly system*, above n 88, at 269.
[134] At 265.
[135] At 265-269.

sector development as well as opening up trade may not be entirely true of countries such as P-SIDS which are so small they may not be able to compete on a global scale at all.[136]

While the service sector was already beginning to be quite liberalised before the WTO accession bid, it is worth noting that there was 'encouragement' from Tonga's largest donors of aid, Australia and New Zealand.[137] This again, while not as conclusively as the previous example in Vanuatu, shows that foreign governments are not being impartial actors during this accession process.

There are other issues surrounding Tonga's accession. The single undertaking of the WTO agreements could mean that the Tongan Government feels far more constrained in public policy options for dealing with health-related issues, such as obesity, as banning or limiting certain products may cause threats of legal action in the DSB by trade partners.[138] Even if this concern can be countered by the fact that exceptions exist within WTO law to allow for countries to make decisions based on the grounds of public morals and the protection of human health, it is possible countries such as Tonga will feel threatened by the risk of a challenge to such a decision by other WTO members due to their economic constraints in defending a dispute on account of them being a P-SIDS.

Hence, issues surrounding power imbalance in the negotiation and accession process were one of the main reasons why Tonga made as many concessions as it did. Although Tonga's status as a Developing Country as opposed to an LDC was one of the reasons such concessions were in fact sought, the main motivation for extracting such concessions again appears to be for large trading states wishing to set a precedent for accession.[139]

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[136] However, analysing this argument in terms of the empirical economic rationale is beyond the scope of the dissertation and would require detailed econometric analysis. This point is merely to illustrate that there is concern that the supposed benefits and economic rationale for liberalising trade may not be true for a country like Tonga; See L.A. Winters and P.M.G Martins *When comparative advantage is not enough: Business costs in small remote economies,* above n 74, at 347–383.
[137] Joanne Wallis *Friendly islands' in an unfriendly system,* above n 88, at 269-270.
[138] At 271; It is worth noting that it is merely a threat of legal action, not necessary one which would be successful in a dispute under WTO law. Under the GATT, and similarly, the GATS, there are articles allowing for implementing 'inconsistent' policies on the grounds of public morals. The GATT 1947 as incorporated in the WTO Agreement Annex 1A, above n 19, at art 20(a)-20(b); General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B 1869 UNTS 183 (Singed 15 April 1994, entered into force 1 January 1995) art 14(a) [hereinafter GATS].
[139] Joanne Wallis *Friendly islands' in an unfriendly system,* above n 88, at 265.

Therefore, Tonga is another example of the accession process not working well for P-SIDS when viewed in the greater scheme of their resources and position in world trade. While Tonga was more open to such wide ranging liberalisation than Vanuatu, there are still the issues highlighted above.

2.4. *Curiosities from the Seychelles Accession Package*

The accession of the Seychelles is worth briefly discussing. Although this is not a P-SIDS nor is it an LDC, its accession still illustrates similar points surrounding SIDS generally which were highlighted above.

To be successful, the Seychelles had to rely on the support from the Commonwealth as well as various other development institutions.[140] Furthermore, they needed a substantial degree of technical assistance from the WTO as they did not have the relevant expertise to implement the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) or Technical Barriers to Trade Agreement (TBT Agreement) measures which they agreed to as a part of their accession package.[141]

It should be noted, that like the arguments for the accession of Vanuatu and Tonga, many positive benefits for the Seychelles could be obtained by the private sector investment that WTO membership can bring; accession would bring increased certainty for investment.[142] It again was argued that the reason for accession was that if there is strong political support and backing, the accession to the WTO membership can be a vehicle for domestic reform processes; such as technical health and safety measures as well as and biosecurity legislation and regulation. Furthermore, as with other SIDS, they wished to gain access to the DSB.[143]

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[140] Pierre Laporte, Charles Morin, and Cillia Mangroo '*The WTO Accession of Seychelles: Lessons from a Small Island Economy'* in Alexei Kireyev and Chiedu Oaskwe (eds) *Trade Multilateralism in the Twenty-first Century: Building the Upper Floors of the Trading System through WTO Accessions* (Cambridge University Press, New York, 2018) 235 at 240-243.
[141] Pierre Laporte, Charles Morin, and Cillia Mangroo *The WTO Accession of Seychelles: Lessons from a Small Island*, above n 140*,* at 235-249; Agreement on the Application of Sanitary and Phytosanitary Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A 1867 UNTS 493 (Singed 15 April 1994, entered into force 1 January 1995) [Hereinafter the SPS Agreement]; Agreement on Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A 1868 UNTS 120 (Singed 15 April 1994, entered into force 1 January 1995) [Hereinafter the TBT Agreement].
[142] Pierre Laporte, Charles Morin, and Cillia Mangroo *The WTO Accession of Seychelles: Lessons from a Small Island Economy*, above n 140, at 242-248.
[143] At 236-241.

However, it was also noted that due to the Seychelles' size, they needed so much technical, financial and resource assistance, that their government was being influenced by many different actors in order to obtain said assistance.[144] The difficulty with this is that while it was successful for the Seychelles' accession, there was not an obligation through the WTO accession process to offer this assistance to them; only after accession is it likely to be given.[145] Whether assistance was provided during accession was at the whim of their trade partners; such as technical and media assistance by the Government of Oman.[146] Again, procedurally the Seychelles were disadvantaged due to their lack of negotiating power, and were not given much SDT during the process outside of assistance from their aid partners.

2.5. *Summation of Empirical Analysis*

These three case studies show a common trend. P-SIDS are being taken advantage of and not treated in accordance with the systematic fairness that they should be able to expect from the WTO system given the claims of it being a system of rules and non-discriminatory treatment. The results show that empirically the systematic process of accession to the WTO has problems when dealing with P-SIDS and SIDS generally.

Chapter 3: Alternatives to acceding to the WTO: are there substitutes for WTO membership?

3.1. Introduction to Chapter 3

Before returning to the arguments in Chapter 1 about the merits and weaknesses of the WTO's accession framework, it is worth stopping at this point to address an important question arising from both the theoretical arguments and empirical analysis; if this process has the potential of

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[144] At 236.
[145] The WTO agreement, above n 2, at art 12; GATS, above n 138, at art 4, 25.
[146] Also worth noting is that the United Nations Conference on Trade and Development, as well as the Commonwealth and WTO secretariat, along with the Centre on WTO law, and COMESA members gave assistance to the Seychelles during their accession process; Pierre Laporte, Charles Morin, and Cillia Mangroo *The WTO Accession of Seychelles: Lessons from a Small Island Economy*, above n 140, at 240-242.

being systematically unfair and may not deliver on the purported economic and systematic benefits for P-SIDS, why bother?

The short answer is that it will ultimately be worse for a P-SIDS if they do not accede to the WTO. There is a large amount of political pressure from close trading and development partners to liberalise their economies so they will not be as dependant on those who are currently assisting them.[147] Furthermore, in a world in which almost all countries are members of the WTO, these countries will start to not only be left behind economically, but also be unable to stop other trading countries taking advantage of them even more by using political pressure when negotiating trade deals; being a member of the WTO will mitigate these problems.[148] However, as will be argued in Chapter 4 below, without sufficient reforms being made, acceding to the WTO has the potential of causing other serious problems in the short run which may hinder P-SIDS from reaching the expected long run benefits.

Before the analysis of arguments on this topic is commenced, two other options will be briefly examined; not joining any multi-country agreement and independently making bilateral trade deals with individual partners of their specific choosing, and joining Regional Trade Agreements (RTAs) such as PACER Plus. Following this, it will be examined whether the purported benefits of gaining membership to the WTO are applicable for a P-SIDS. To analyse these options, the yet to accede P-SIDS of Kiribati will be used as a hypothetical example. Kiribati is small nation with only just over 100,000 in population and a small, but significant, amount of exports and imports.[149]

3.2. Not Joining any Multi-Country Agreements

Given the issues highlighted in Chapters 1 & 2, the option is open to SIDS to simply not join any multi-country trade agreements. Any trade agreements would be made on a bilateral basis

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[147] Joanne Wallis *Friendly islands' in an unfriendly system*, above n 88, at 274; see Daniel Gay, *Vanuatu's Suspended Accession Bid: Second Thoughts*?, above n 88, at 151-156; see also Helen Hawthorne "Acceding to the Norm: Accession of LDCs to the WTO" (2009) 4 HJD 7 at 7.
[148] This is said with the assumption that the current issues with the USA and the WTO will be resolved and the WTO system will not be undermined or collapse by blockage by the USA of appointing a judge to the Appellate Body; see Philip Blenkinsop "WTO chief sees no end in sight to U.S. blockage" Thompson Reuters Business News (Online ed, United States, 22 February 2019).
[149] UNCTAD "General Profile: Kiribati" (17 August 2019) United Nations Conference on Trade and Development Statistics < https://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/296/index.html>.

e.g. the Government of Kiribati could make a bilateral trade agreement with Australia or New Zealand independently. This allows Kiribati to have the ability to determine its domestic policy (such as on tariffs, tax, subsidy, and quality control) without fear of any regional or multilateral repercussions for breaching such an agreement. It would also reduce the risk of short term economic collapse of domestic industry through too quick liberalisation of domestic law, and therefore reduce the risk of greater reliance on aid partners such as New Zealand and Australia; as suggested above and below as being a potential consequence of joining the WTO.[150]

However, this itself poses issues. Firstly, even more so than WTO accession where multiple members are involved in accession negotiations which have various degrees of relationship with the country attempting to acceded, in bilateral treaty negotiations a P-SIDS such as Kiribati would have little help from other countries when negotiating with a large economy.[151] Therefore, a P-SIDS would have an even higher risk of power politics determining the terms of a bilateral treaty obligations.[152] Unlike in the WTO where small countries can form negotiating groups to keep a larger country from unilaterally advancing their interests, in a bilateral arrangement, a country such as Kiribati would have to rely solely on their own negotiators skill to achieve the desired results.

Secondly, without any reciprocal trade agreements with multiple countries, it will be power politics that determines the outcome of a problem should one arise, irrespective of any arbitration measures in the agreement. Take the example of Kiribati and its largest export market Mexico.[153] If Mexico and Kiribati entered into a bilateral agreement, and Mexico started to violate the agreement, apart from political negotiation and the inherent power imbalances associated therein, Kiribati would have very little ability to ensure that they honour their agreement.

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[150] See generally L.A. Winters and P.M.G Martins When comparative advantage is not enough: Business costs in small remote economies, above n 74; Chapter 2 and 3.
[151] WTO "Membership, alliances and bureaucracy" (2019) WTO <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm>.
[152] See Frank. R. Pfetsch "Power in International Negotiations: Symmetry and Asymmetry" (2011) 16(2) Négociations 39 at 39-56; While there is still a possibility that there will be a mutually beneficial arrangement in a bilateral negotiations (a 'win-win' deal'), unbalanced agreements are more likely to occur when a there are only two parties with differing levels of power.
[153] OEC "What does Mexico import from Kiribati?" (17 August 2019) The Observatory of Economic Complexity < https://oec.world/en/visualize/tree_map/hs92/import/mex/kir/show/2017/>. Mexico is the largest single importer Kiribati goods and services (35% of total Kiribati's exports).

Furthermore, having to negotiate and administer multiple bilateral agreements would put just as much, if not more expenses on a P-SIDS with limited resources; both financial and human capital.

Therefore, a SIDS may expose itself to more risk by simply conducting bilateral agreements as opposed to regional or multilateral agreements.

3.3. Joining a RTA such as PACER Plus

This option is one which may be very attractive to P-SIDS due to the fact that it is an agreement which governs their specific concerns and conditions with their trade partners of choice, and involves those which are in their direct trading sphere of influence. An agreement such as PACER Plus allows a P-SIDS such as Kiribati to only have to negotiate and agree on conditions with countries which have a direct interest in their exports and imports. These countries can more easily agree to special exceptions, since the agreements are made together and are not subject to a stringent accession process if they are a founding member of the agreement.[154] This also allows for more flexibility, as most of the member nations of an agreement such as PACER Plus recognise the inherent problems such as the remoteness of P-SIDS and their susceptibility to natural disaster and economic shocks; for example Article IX(2)(b) of PACER Plus recognises a unique situation of Kiribati and allows them to exceed their base rate in the case of an Industry Development Measure.[155] Furthermore, RTAs can allow for a more systematically fair accession process than the WTOs Article XII.[156]

However, RTAs are not free from drawbacks in comparison to the WTO agreements. WTO membership allows a country to be part of mutually agreed upon trading terms applicable for all members. While it has been seen that these terms may be unduly harsh or even systematically unfair, it remains that this system allows for better trading access globally than

[154] Pacific Agreement on Closer Economic Relations Plus [2017] ATNIF 42 (signed 14 June 2017, not yet in force) [Hereinafter PACER Plus].
[155] PACER Plus, above n 154, Chapter 2 art 9(2)(b)(ii); Kiribati has an allowance of applying to the joint committee for an Industry Development Measure for up to twenty-five years after the agreement entering into force; the exception is in recognition of the fact that Kiribati's customs duty base rates were all applied at zero. An Industry Development Measure is a tool to depart from the regular scheduled reduction commitments to advance industries which are of importance to a member country. For a full explanation see generally PACER Plus, above n 154, Chapter 2 art 9.
[156] PACER Plus, above n 154, Accession: Chapter 15 Article 9.

RTAs do.[157] Being a member of the WTO may open up further trading partners than they could access through their limited regional or bilateral interactions. Furthermore, if a country is not covered by the WTO rules, trading effectively with potential new large country trading partners may be difficult due to the power disadvantage as above in the bilateral negotiations.

RTAs usually have dispute settlement arrangements which, while similar to the WTO's, only govern that agreement and bind those particular parties.[158] However, empirically they are not often used if there is an option to use the WTO DSB.[159] While using the WTO DSB means they cannot get a ruling on anything that is WTO-Plus or WTO-Minus that is included in their RTA, it does mean that countries have fewer opportunities to exert unhelpful power politics within a dispute context.[160] However, if one party in a dispute is not a WTO member, it would need to be heard under the RTA's specific disputes procedure.[161] Bringing a dispute under a RTA specific dispute mechanism is not usually as advantageous to a country as bringing the dispute before the WTO DSB, as there is less confidence in reports produced by the RTA mechanism.[162] Furthermore, bringing a dispute under a RTA will likely incur a higher political cost on the member bringing the dispute than would be the case if it was heard in the WTO DSB; due to the fact that there are fewer countries party to the RTA, and hence, bringing a dispute is likely to raise tensions between the countries involved more than a WTO dispute would.[163] Therefore, access to the WTO DSB is a benefit which would be lost if a country only was a member of an RTA.

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[157] For example, Kiribati would be able to have stronger trading relationships, without the same concern of power politics coming into play, with countries such as Mexico, the EU as well as USA. There would also be no issue of not having fair market access to those outside the scope of a limited regional agreement. Moreover, it would limit the many costs for small economies face when entering the many necessary individual or regional trade agreements.

[158] Chang-FA Lo '*Dispute settlement under free trade agreements: its interaction and relationship with WTO dispute settlement procedures*' in Yasuhei Taniguchi, Alan Yanovich and Jan Bohanes (eds) *The WTO in the twenty-first century* (Cambridge University Press, Cambridge, 2007) 457 at 468-471; There are some differences, e.g. the WTO has an Appellate Body to appeal from panel decisions.

[159] See Chang-FA Lo *Dispute Settlement under free trade agreements*, above n 158, at 466-471.

[160] At 466-471. Due to this reliance on the WTOs DSB irrespective of RTA mechanisms, there is a high degree of trust and legitimacy usually placed on the Panel and even more so the Appellate Body conclusions.

[161] Geraldo Vidigal "Why Is There So Little Litigation under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement" (2017) 20 J Int Econ Law 927 at 927-950.

[162] See generally Geraldo Vidigal *Why Is There So Little Litigation under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement*, above n 161, at 927-950.

[163] See Amelia Porges '*Disputes Settlement'* in Jean-Pierre Chauffour and Jean-Christophe Maur (eds) *Preferential Trade Agreement Policies for Development: A Handbook* (The World Bank, Washington DC, 2011) 467 at 492; There is also a view that the collective peer pressure of countries will mean that there is a higher likelihood of success in a WTO DSB against a large country.

While the aim of this dissertation is not to discuss the merits or drawbacks of being a member of an RTA over that of the WTO, this short commentary is simply to illustrate that completely ignoring the WTO in favour of other options is not as wise as it prima facie appears to be. Notwithstanding these arguments, entering into an RTA or the WTO should not be viewed in a dichotomy paradigm. They are not mutually exclusive and should be viewed as working in tandem.[164]

3.4. Are P-SIDS Able to Gain the Benefits Which the WTO Offers?

Given that it has been determined that completely ignoring the WTO in favour of other arrangements is likely not preferable for a P-SIDS, it should be determined whether the current system allows for P-SIDS to gain the purported benefits of the WTO system. While there are those who have argued that accession to the WTO may not deliver on its promise of economic advancement due to the flawed economic premise when discussing P-SIDS,[165] and those who believe that accession is merely a needed political reality to appease aid donors and strong trading partners,[166] most of the literature both for and against the Article XII process agrees that in the long run, even for P-SIDS, having a voice in the WTO, access to the DSB, along with a way of entrenching domestic reforms are reason enough to recommend joining the WTO.[167] However, there has been some significant criticism even of these agreed upon purported benefits of accession in of themselves.

3.4.1. Having a Voice in the WTO After Gaining Accession

As was seen in all three empirical examples, although having a voice in the WTO and, consequently, being able to be a part of the development of multilateral reforms to world trade

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[164] See *WTO Agreement*, above n 2, at 154 (chapeau); See PACER Plus, above n 154, at 4-5 preamble. The aims of the agreements, while fundamentally similar, are attempting to achieve subtilty different outcomes, the former; global free trade and global development of economies and the latter; to achieve closer regional ties, removal of barrios while affording flexibility for development.
[165] See L.A. Winters and P.M.G Martins *When comparative advantage is not enough: Business costs in small remote economies,* above n 74, at 347–383.
[166] See also Joanne Wallis *Friendly islands' in an unfriendly system,* above n 88, at 274.
[167] See Joanne Wallis *Friendly islands' in an unfriendly system*, above n 88, at 263; Daniel Gay *Joining the World's Economic Parliament,* above n 91, at 1-15. It is worth noting that while the argument that the current accession process helps entrench domestic policy by having WTO-Plus conditions enforced internationally was rebutted as a reason for having the accession process stay the same, it does not follow that the ability to entrench domestic policy through accession is not a good reason for acceding at all.

is on paper a desirable benefit of obtaining membership, the reality is that there is significant cost to a country that wishes to do so. Having a permanent mission to Geneva near the WTO headquarters is needed to effectively participate in WTO decision making, and in turn effectively influence General Council decisions through participation in committees and councils on areas of their interest. Hence, the issue of a lack of diplomats, as well as having international missions to other countries can be a significant hindrance to taking full advantage of membership. However, there is precedent for SIDS members to band together in order to represent each other's interests in the WTO.[168] Despite this ability for P-SIDS to enter into joint representation, since Developing Countries do not have completely aligned interests with each other, this is a poor substitute for having their own delegates engage in negotiations.[169] For example, if Fiji was being held out to represent Kiribati's interests in the WTO committees, they may put forward propositions which favour Fiji more than Kiribati. Although they have similar interests, there are services and goods over which they compete the global market such as Non-Fillet Frozen Fish. [170]

Hence, due to the high cost as seen in the case of Vanuatu and the Seychelles, a new acceding P-SIDS such as Kiribati may not be able to effectively lobby for their interests within the WTO even if they acceded. Furthermore, even if P-SIDS did have a mission to Geneva, such representation still requires resources and expertise. Hence, domestic knowledge and human resource constraints can hinder successful lobbying in their overseas mission; as was seen in the cases of both Vanuatu and the Seychelles.[171] Notwithstanding these criticisms, they will still have more say in the multilateral trading system than they would if they were not a member of the WTO.

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[168] Chakriya Bowman "Case Study 33 The Pacific Island Nations: Towards Shared Representation" (2019) WTO <www.wto.org/english/res_e/booksp_e/casestudies_e/case33_e.htm>.
[169] See Ransford Smith "WTO Doha Round: Small Economies and Their Interests" (2009) 55 CTHT 1 at 4-5.
[170] OEC "Fiji profile" (17 August 2019) The observatory of Economic Xomplexity <www.oec.world/en/profile/country/fji/>; OEC, Kiribati profile, (17 August 2019), The Observatory of Economic Complexity <www.oec.world/en/profile/country/kir/>.
[171] Pierre Laporte, Charles Morin, and Cillia Mangroo *The WTO Accession of Seychelles: Lessons from a Small Island Economy*, above n 140, at 235-249; Daniel Gay *Vanuatu's Suspended Accession Bid: Second Thoughts*?, above n 88, at 148-155.

3.4.2. Access to the DSB

While access to the WTO DSB prima facie appears to be a sound argument for a P-SIDS to accede to the WTO, it also is not one which is immune from criticism. Concerns have been raised that while access to the DSB is in theory is beneficial, in practice it is so expensive for P-SIDS to bring a claim that it does not have the desired level of impact often thought.[172] This is due to the fact that the WTO system has become so complex and legalised that expert trade lawyers are needed to begin to understand the processes.[173] These lawyers are often very expensive. Even large trading nations such as the USA and EC are using private sector expertise to help with disputes, and they can source from their own territory, unlike most P-SIDS.[174] Hence, there is some doubt as to whether it is financially feasible to bring a successful claim against a large trading nation. While some authors have rightly pointed out that Developing Countries have had success in bringing claims against larger countries in the DSB, there is also acknowledgment that there is an imbalance of expertise and capacity which may affect the ability of a small economy to bring a case.[175] Furthermore, if a P-SIDS was successful in the DSB against a large trading country, the latter may not be able to be affected in any meaningful way from the imposed trade countermeasures in the absence of voluntary compliance.[176]

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[172] Marc Busch and Eric Reinhardt '*Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement*' in Daniel Kennedy and James Southwick *(*eds) *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge University Press, Cambridge, 2002) 457 at 457–481.
[173] See Gregory C. Shaffer *Defending interests: Public-Private Partnerships in WTO Litigation* (The Brookings Institution, Washington D.C., 2003).
[174] See generally Gregory C. Shaffer *Defending interests: Public-Private Partnerships in WTO Litigation*, above n 173.
[175] Christina L. Davis. '*Do WTO Rules Create a Level Playing Field for Developing Countries? Lessons from Peru and Vietnam*' in John S. Odell (ed) *Negotiating Trade: Developing Countries in the WTO and NAFTA* (Cambridge University Press, Cambridge, 2006) 219 at 228-231.
[176] See Hunter Nottage '*Commonwealth Small States and Least- developed Countries in World Trade Organization Dispute Settlement*' in Teddy Y. Soobramanien and Laura Gosset (eds) *Small States in the Multilateral Trading System: Overcoming Barriers to Participation* (Commonwealth Secretariat, London, 2015) 80 at 91-94. While this may not always be the case empirically, it is certainly a risk when it comes to small developing economies bringing action against large developed economies.

It is also worth noting that empirically, only one SIDS has ever been a complainant in a DSB mechanism dispute against any country.[177] However, there have been some SIDS which have made some use of the DSB process by being third parties.[178]

While this does not completely undermine the potential larger impact that being part of the WTO and having access to the DSB will have, it does raise doubt as to whether access to the DSB should be the primary motivation for joining the WTO. The threat of DSB action as well as the feeling of being bound by the WTO agreements may be enough to deter a breach of the agreement by a larger country such as Mexico.[179] However, for a country like Kiribati to be able to effectively engage in disputes, they would likely need to hire trade experts from overseas which, when contending with a highly funded team of a rich country, may be a higher cost than a P-SIDS can afford to pay.

3.4.3. The Entrenchment of Liberal Domestic Economic Policy

One of the best arguments for the current accession process is again used for motivation for joining the WTO. This is that it will entrench domestic policy reform to help development.[180] As will be seen in Chapter 4, this argument is better placed here. There is empirical evidence to suggest that GATT/WTO accession is correlated with growth.[181] This is an attractive pragmatic, economic reason to accede to the WTO and implement such reforms for Developing Countries.

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[177] *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* ("US-Gambling"), WT/DS285/R, adopted on 10 November 2004 (Report of the Panel), as modified by *United States – Gambling*, WT/DS285/AB/R, adopted on 7 April 2005 (Report of the Appellate Body).
[178] WTO "Disputes Settlement: The Disputes, Disputes by Members" (2019) WTO <www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm>.
[179] OEC *What does Mexico import from Kiribati?*, above n 153; Mexico is largest importer Kiribati goods and services (35% of total Kiribati's exports).
[180] Mona Haddad, Claire H. Hollweg, and Alberto Portuagal-Perez *The structural reform implications of WTO accession,* above n 38, at 82-87.
[181] See generally Mona Haddad, Claire H. Hollweg, and Alberto Portuagal-Perez *The structural reform implications of WTO accession*, above n 38, at 81-121; see also Alexei Kireyev '*The Macroeconomic Implications of WTO Accession*' in Uri Dadush and Chiedu Osakwe *WTO* (eds) *Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty* (Cambridge University Press, Cambridge, 2015) 122 at 129-132.

Therefore, like the case of Tonga,[182] and as many WTO theorists point out,[183] by acceding to WTO, politically contentious liberal development policies are more likely to be upheld by subsequent governments or regimes than if they are simply a domestic government's policy. This is very beneficial in countries which are politically volatile or in periods of transition.[184]

For a country like Kiribati, which has very low development indicators, entry to the WTO may help them commit to and entrench policies that will help development. However, this will likely only be successful if they are not being pressured into obligations which will cause short run problems of liberalising trade that in turn cripples their economy and development before the long term benefits can manifest.

3.5. Findings of Chapter 3

It has been seen that joining the WTO is an opportunity which should not be rejected in favour of either bilateral trade relationships or being party to a RTA. However, it has also been shown that the benefits of acceding to the WTO are not as attractive as they initially seem. Although access to the WTO DSB has benefits for a P-SIDS that are preferable over a RTA dispute settlement mechanism, it has been shown that this should not be the sole reason for seeking membership. Furthermore, effective participation in the WTO may be difficult. There are two largest benefits to accession: membership to the WTO will markedly assist in domestic bipartisan commitment to economic reform policies which will likely help P-SIDS develop, and wider trade access will be available to P-SIDS than is possible by being a member of a

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[182] Joanne Wallis, *'Friendly islands' in an unfriendly system,* above n 88, at 263.
[183] See Patrick Low *Is the WTO Doing Enough for Developing Countries?*, above n 68, at 324-358; See generally Mona Haddad, Claire H. Hollweg, and Alberto Portuagal-Perez *The structural reform implications of WTO accession,* above n 35, at 81-121.
[184] It is worth noting that it is very difficult to say what the true effect of accession to the WTO would be for an P-SIDS in the long run; see Roman Grynberg and Mohammad A. Razzaque '*The Trade performance of small states*' in Roman Grynbery (ed) *WTO at the Margins: Small States and the Multilateral Trading system* (Cambridge University Press, Cambridge, 2006) 164 at 177, 215-220; The data presented in this paper argues that the drop in SIDS share exports as a percentage world trade in primary industries is of particular concern, as it is combined with a drop in their absolute exports generally. This is similar to the argument raised that SIDS are inherently uncompetitive; compare L.A. Winters and P.M.G Martins *When comparative advantage is not enough: Business costs in small remote economies,* above n 74, at 347–383;
For the sake of argument, it will be assumed that in the long run such benefits will result from WTO accession by a SIDS, but without sufficient short run assistance, such long run benefits may be unlikely; see Pierre Encontre "*The vulnerability and resilience of small island developing states in the context of globalization*" (1999) 23 Nat Resour Forum 261 at 268-269.

RTA. However, in order to reach this expected long run success, there needs to be assurance that onerous commitments in the WTO accession process will not cripple the economy of a country such as Kiribati wishing to accede in the short run.

Chapter 4: Analysis of arguments regarding WTO accession and suggestions for change

4.1. Introduction to Chapter 4

Since acceding to the WTO is still a valid policy option for P-SIDS due to the likely long-run success, so long as onerous commitments are not imposed in the short-run, the various arguments set out in Chapter 1 regarding the Article XII accession process need to be analysed in light of the benefits of accession and empirical analysis of accession experiences to date. This analysis will be followed by suggestions for changes to the WTO accession framework. After assessing the various suggestions for change, there will be a primary option for reform advanced.[185]

4.2.Critical Analysis on the Arguments For and Against the Article XII Process.

There have already been other authors who have given their opinion on such arguments.[186] However, the majority of those authors did so from within the WTO framework or looking at the impact of accessions on LDCs generally, not for the purpose of looking at their implications for P-SIDS and future accessions. Hence, it is the purpose of this dissertation to attempt to contribute to this literature with a specific focus on the Article XII process in terms of P-SIDS; namely, whether the accession process is fair and reasonable, or whether changes need to be made. Although there have been some general observations surrounding SIDS and WTO accession, these have not been focused on specific substantive fairness of the process.[187]

[185] See Chapter 4.4.
[186] See for example Alexi Kireyev and Mustrapha Sekkate *WTO Accessions: What does the Academic Literature Say,* above n 72, at 198 and following.
[187] See Andrew D. Mitchell and Joanne Wallis "Pacific Pause: The Rhetoric of special & differential treatment, the reality of WTO accession" (2010) 27 WisIntLJ 663 at 663-706.

However, the following input, while made in light of P-SIDS, is largely applicable to any Developing Country.

There are some very valid arguments raised for and against the status quo of accessions under Article XII and subsequent WTO General Council Decisions. For the purposes of this dissertation, it is worth discussing these arguments and commenting generally upon their merits with regards to a well-functioning legal system that adheres to the rule of law. Although the following discussion is based on the merits of the argument from a critical legal perspective, it will be addressed in such a way that does not ignore the policy considerations and underlying philosophy of the WTO.[188]

When discussing the merits of critical arguments, the economic successes of accession for new members must not be ignored , hence, any critique of this system must be taken in light of the long term successes accession to the WTO has had for these countries. Furthermore, the general political considerations and the fact that the WTO does still work within the larger international framework are also relevant considerations.

As noted above, most supporters of the WTO accession system are those who work directly inside it. Hence, a degree of bias may be inherent in their writing. Notwithstanding the potential bias, these authors raise valid arguments and offer an inside perspective that should not be ignored.

The first argument discussed is that of the economic success of countries which have acceded to the WTO. While this argument does carry some pragmatic weight in an ‘if it isn't, broke don't fix it' manner, it is not a critical academic argument about the functioning of the accession process. As noted by some of the critiques in Chapter 1, merely because a country has been successful after a process, does not inherently mean that the process is good or should not be improved.

[188] *The Marrakesh Declaration of 15 April 1994*, above n 25: The WTO was founded upon the idea that Trade should be conducted within a rules-based system away from the wider political realm of general international law. The WTO sought to provide a body and framework around which barriers to trade could be eliminated by consensus.

Some of the more convincing arguments in favour of the current framework are those raised by Osakwe.[189] The fact that every country which is wishing to accede is in a different procedural domestic and international position means that imposing extra or different requirements on them may be necessary for the proper functioning of the WTO. Further, the idea put forward that membership is seen as a 'public good' that must be protected holds some weight. The members of the Original GATT had rigorous negotiations before they came to an agreement in 1947, as did those countries that were involved in the Uruguay Round leading to the establishment of the WTO. Hence, to say that a different set of commitments should not be imposed would be a potential fallacy as a political reality.

However, how one should view the WTO's place in international law will determine the strength of this argument. Should the WTO be viewed as an independent international legal organisation that is separate from General Public International Law with the inherent political power, state action, multiple different treaties, and interests which governs it, or should the WTO be viewed as merely a specialised forum in which international law is conducted?

If one views the WTO agreement as separate from general Public International Law and its accession process as being endogenous, the argument surrounding the political reality is less convincing. This is because there is still the issue of non-discrimination between members and the unfairness of imposing extra obligations not being fair on new members;[190]which undermines the legitimacy of the WTO framework.

However, if one views the WTO as a specialised forum in which General Public International Law is applied, the argument goes further towards being convincing. The fiction of the WTO being an organisation that is essentially an independent legal system governed by principles of systematic legal fairness is removed to reveal the political reality and the WTO's place under a general system of Public International Law with its many competing areas and interests which need to be considered.

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[189] See generally Chiedu Osawke *Contributions and Lesions from WTO Accessions: The present and future of the rules-based multilateral trading system,* above n 62.
[190] See Julia Qin *The Conundrum of WTO Accession Protocols: in search of legality and legitimacy*, above n 77, at 435-446.

Even if this latter argument was to be accepted, the problem of power being exerted by existing members against acceding states still remains; this is empirically happening irrespective of how one views the WTO system.[191] Although these power dynamics may be more excusable from a systematic perspective if the latter argument is accepted, it does not negate the empirical disadvantage SIDS have, nor the members' commitment to helping countries pursue economic development through the WTO agreement.[192]

It is not this dissertation's purpose to examine the many debates surrounding the intersection between WTO law and general Public International Law.[193] This point is worth noting going forward, as the argument does appear to hold more weight if the latter view of the WTO's place in International Law is taken.

Another major argument that has been raised in favour of the current system, is that WTO-Plus terms of accession are helping drive the WTO forward and fill gaps in the original agreement; however this also appears to falter upon closer inspection. There are legitimate concerns raised surrounding the more onerous terms that Developing Countries and LDCs are being asked to commit to through negotiation that the original members do not have to comply with. The justification given for these new obligations does not hold the legitimate critical weight needed to impose more onerous terms on new members if it does not also bind the current members; it merely means the current members get better trade terms than they would have with each other under the WTO.[194] If this reasoning was truly valid, then it would make more sense for existing members to introduce these more onerous conditions under a multilateral negotiating

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[191] D. Bienen and M. Mihretu "*The principle of fairness and WTO accession: an appraisal and assessment of consequences"* (Paper presented by London School of Economics and Political Science, Society of International Economic Law Working Paper 2010/29 at the Second Biennial Global Conference, The University of Barcelona, 2010); Although this unfairness to LDCs is lighter, it is not removed as shown by Vanuatu's eventual accession package; See *Accession of Least-Developed Countries and Addendum,* above n 10; See *The Accession of Vanuatu,* above n 114, at [101]-[108].

[192] See *The WTO Agreement*, above n 2, at 154 (chapeau).

[193] See Emmanuel Voyiakis '*Of Foxes and Hedgehogs: Some Thoughts About the Relationship Between WTO Law and General International Law'* in Colin B Picker, Isabella D Bunn, and Douglas W Arner (eds) *International Economic Law: The State and Future of the Discipline* (Hart Publishing, Portland, 2008) 107 at 107-120; There is much jurisprudential debate surrounding how the relationship between the WTO law and General International Law should be viewed. However, there does appear to be agreement on the fact that the WTO DSB decisions are largely made independently of other international legal treaties or principles. While the VCLT is used for guidance in how to interpret treaties, other general considerations of general Public International Law are not often factored into WTO DSB decisions.

[194] WTO-Plus terms help WTO law and rules move forward and help with further liberalisation of trade; See Chiedu Osakwe *Contributions and Lesions from WTO Accessions: The present and future of the rules-based multilateral trading system,* above n 62, at 245-251.

round as a collective whole, not attempt to exert their near ultimate power advantage against these small developing countries.

The suggestion that any more onerous WTO-Plus terms are offset by SDT provisions again simply does not hold under scrutiny. Even the authors who make this point concede that the SDT provisions do not completely offset the WTO-Plus conditions.[195] Furthermore, for Developing Countries, and to a lesser extent LDCs, the SDT treatment and assistance provisions do not truly oblige members of the WTO to give help to these acceding members.

The core theme of the criticism comes down to this; making new members sign up to more onerous obligations through the accession process is inherently unfair. This is a critical issue when the system is one that is purported to be a system of fairness. While the authors and officials who have worked inside the WTO do not believe this to be a problem due to the flexibility the accession process provides, and that any unfairness is negated by the fact that these agreements are consensually entered into after rigorous negotiation, this does not address the concerns raised by others; namely that most of the world's largest trading powers are already members of the WTO and, as seen, any negotiation process must satisfy all members, including these large powers.

Therefore, any new country wishing to join will be at a major power disadvantage in the negotiation process. Furthermore, due to the need for better trade access, these smaller economies may sign up to obligations which are not in their interests out of sheer necessity for their economic development; as is seen with Tonga's accession. To gain fair access for their goods and services into large trading nations, and to some degree to ensure they obtain the right to enforce that access through the DSB, many of these Developing Countries feel obligated to join the WTO.

The best argument against this legal criticism comes in the form of pragmatism. Due to the multiple tracks of negotiations and the WTO-Plus obligations,[196] countries in the accession process are more inclined to make and stick to structural, legal, and institutional reforms that

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[195] Nannan Gao and Fangying Zheng *The WTO-Plus Obligations: Dual Class or a Strengthened System*?, above n 62, at 364.
[196] See Figure 1.2.

benefit their country economically as well as politically. As has been seen, this is an often cited reason for accession, and one which prima facie appears to be empirically true. Furthermore, governments who want to make reforms but lack domestic support to do so, can rely on these international obligations as a reason to implement them if they come under domestic opposition.

If the WTO's only purpose was to advance trade liberalisation with all the political implications and various other considerations attached, then this argument, combined with the empirical evidence of a correlation between economic growth and WTO accession,[197] would be somewhat persuasive for the status quo.

However, the WTO holds itself out to be an international institution that seeks to uphold the principle of non-discrimination and emphasises the value of a rules-based system. While there are goals of removing barriers to and facilitating free trade, as well as helping countries reach their economic potential,[198] this is purported to be done within a consistent, systematically fair framework. Consequently, there is a problem to be discussed.[199]

Unlike in other areas of Public International Law which, as stated above, has a wide range of considerations attached and draws from many different sources to come to conclusions, International Trade Law is largely endogenous.[200] Substantive legal fairness is held by the WTO in high regard due to the consistency of judicial decisions in the DSB and the commitment in the WTO agreements to non-discrimination and equal power among its members. Hence, arguments about how the system should operate, including those surrounding accession, should be framed in light of these specific qualities of the WTO.[201]

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[197] Alexei Kireyev *The Macroeconomic Implications of WTO Accession*, above n 181, at 129-132; see Mona Haddad, Claire H. Hollweg, and Alberto Portuagal-Perez *The structural reform implications of WTO accession*, above n 38.
[198] See *The WTO Agreement*, above n 2, at 154 (chapeau).
[199] Roman Grynbery and Roy Mickey Joy *The accession of Vanuatu to the WTO*, above n 88, at 711-714.
[200] Emmanuel Voyiakis *Of Foxes and Hedgehogs,* above n 193, at 107-120.
[201] This argument could have also been framed in the wider debate as to whether the WTO has 'hard law' or 'soft law' in an international legal context; see Andrew T. Guzman and Timothy L. Meyer "International Common law: The Soft Law of International Tribunals" (2008) 9 Chi J Int'l L 515 at 528-531.

The original members to the GATT, as well as those who became members to the WTO agreement through the Article XI process after the Uruguay Round concluded in 1994, largely get to dictate through the Article XII accession process what commitments and concessions a new member will need to make before they can join. Hence, there is an inherent degree of systematic unfairness in the process. While the current Article XII process may be politically desirable, it is not desirable from a perspective of having a coherent system of rules and fairness.

When an international legal institution is committed to the appearance and practice of a viable problem-solving mechanism for trade and disputes, a degree of certainty and consistency is needed and the legal dimension of the system should take precedence over more political considerations. Otherwise, it will start to erode its own legitimacy, as has been discussed in the failed initial accession bid of Vanuatu.

For the members to ensure the system has the legitimacy it seeks, they should not be using the WTO Agreement Article XII process to exert unfair bargaining power over acceding countries, even if it is done with the view of filling the gaps left by the original agreement between founding members, or to ensure that those countries attempting to accede make the reforms that will likely push their economy in the right direction for development.

Therefore, the counters to the criticisms of the process simply do not hold up well under critical analysis when viewing the WTO system in light of its stated purpose. They are arguments made by way of political and economic opportunism. The criticisms arise because the WTO holds itself out to adhere to a system of fairness and non-discrimination; it is held to be distanced from the many other considerations that form part of wider General Public International Law.

4.2.1. Conclusion on the WTO Accession Process Arguments

It has been seen that there are valid criticisms of the Article XII accession process. While the arguments in favour of the current system do hold sway from an empirical and pragmatic perspective, they do not address the underlying concerns that have been raised. They merely point to the fact that perceived ‘good’ outcomes are being achieved currently. While this in

some cases appears to be true,[202] it does not hold that such outcomes would be negatively affected by reforms to change the system to address these concerns raised.

Changes are desirable in order for the process to be consistent with what the WTO holds itself out to be and to address concerns of legitimacy which it is facing.

4.3.Options for Change

Due to the conclusion on the systematic unfairness of the accession process, as well as the inevitability of SIDS joining either the WTO or any new international organisation formed in the future to replace the WTO, changes to Article XII are needed. Even without the added P-SIDS complexity, Article XII is in critical need of reform for the WTO to have the legitimacy it strives for. However, with the added consideration that accession to the WTO may cripple (or at best cause an even greater dependence on foreign aid) a P-SIDS in the short run if too many onerous obligations are asked of them during the accession negotiations, it should be obvious that reforms need to take place.

Some authors have considered the question of how to change the system in order to make it more fair for acceding countries, and how to ensure SIDS are not as disadvantaged through the accession. The following recommendations will attempt to synthesise these past suggestions and then offer a modified and unique solution to the problem outlined above in light of the arguments for a P-SIDS accession.

4.3.1. Suggestions of Reform in the Literature and Empirical Analogies

Firstly, it has been suggested that SIDS should be given a unique status in the WTO. A General Council decision would, similar to the 2004 and 2012 decisions on LDCs, ensure that SIDS' distinct issues were considered when taking into account what was being asked of them during

[202] Arvind Subramanian and Shang-Jin Wei '*The WTO promotes trade, strongly but unevenly'* in Carlos A. Primo Braga and Olivier Cattaneo (eds) *The WTO and Accession Countries: Critical Perspectives on the Global Trading system and the WTO* (Edward Elgar Publishing Limited, Cheltenham, 2009) Vol 1 145 at 145-169; More empirical research as to the successes of these recently acceded states would be needed to see whether or not it was true, which goes beyond the scope of this dissertation.

accession negotiations.[203] While this may be politically problematic, it would create a distinct category of small economies to allow for more or different SDT provisions when acceding.

Secondly, SDT could be made mandatory during the accession process within certain parameters. This has been described as operational SDT.[204] This would mean that when a country is undergoing their accession process, an independent panel of experts would determine whether such a clause in their accession agreement would be detrimental to their development or not, specific to that acceding country's circumstances. However, this gives a substantial amount of power to economic experts and may undermine the strength of WTO law to begin with.[205] Alternatively, there could be agreed upon economic criteria by WTO members beforehand.[206] This would incorporate SDT into WTO accession law as part of the binding agreement, without the need for additional experts to decide on a case by case basis. While this approach is not as flexible and may not account for all individual measures and circumstances of an acceding country, it would likely be far more feasible politically from the WTO membership.

Thirdly, it has been argued the WTO accession process should move to a two tier model, away from the current SDT model. This is similar to what was allowed under the GATT.[207] It would allow for Developing Countries, if they met certain criteria, to not have to follow the single undertaking and therefore not agree to all the WTO agreements; for example if they would highly benefit from acceding to the GATT and GATS but the TRIPS Agreement would put unnecessary strain on a country they could simply accede to the former agreements but not the

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[203] Andrew D. Mitchell and Joanne Wallis *Pacific Pause: The Rhetoric of special & differential treatment, the reality of WTO accession*, above n 187, at 696-700.
[204] At 703-705.
[205] At 704-705.
[206] Andrew D. Mitchell and Tania Voon "Operationalizing Special and Differential Treatment in the World Trade Organization: Game Over?" (2009) 15 Glob Gov 343 at 347-352; see also Alexander Keck and Patrick Low '*Special and Differential Treatment in the WTO: Why, When, and How*?' in Simon J. Evenett and Bernard M. Hoekman (eds) *Economic Development and Multilateral Trade Coopetition* (The World Bank and Palgrave Macmillan, Washington DC, 2006) 147 at 175–6, 178–9, and 182.
[207] Andrew D. Mitchell and Joanne Wallis *Pacific Pause: The Rhetoric of special & differential treatment*, above n 187, at 705-706; see also Aaditya Mattoo and Arvind Subramanian "The WTO and the poorest countries: the stark reality" (2004) 3 World Trade Rev 385 at 399-407.

latter.[208] While this model could be highly beneficial in the short run, it would likely be more beneficial economically to have the single undertaking due to the long term benefits.

Fourthly, an expansion of compensation and technical assistance initiatives has been advocated.[209] Although there are already such initiatives set up within the WTO structure to some extent for countries who are already members of the WTO,[210] these technical assistance mechanisms or 'aid for liberalization programmes' could, if coordinated correctly, offset those affected most from trade liberalisation; e.g. those countries such as P-SIDS which may not be able to reach the long run economic promises that liberalisation offers due to the short run costs associated with the same liberalisation. While this option could have some political difficulty with the governments which give the most foreign aid to Developing Countries and LDCs, it would likely be less contentious than the above two tier system of the multilateral agreements due to the continued adherence to the liberalisation philosophy of the WTO.

This latter point could be assisted by an independent advisory office, similar to the Office of the Chief Trade Advisor (OCTA), which was designed to assist with the PACER Plus negotiations and was owned by all members but impartial to interests.[211] Of particular note of this office was the fact that it was the largest and most affluent members of the suggested PACER Plus agreement under negotiation which paid for the OCTA.[212] While such an office could be difficult to implement in the context of almost all of the world's countries, the success of this advisory agency which assisted with PACER Plus negotiations may be a model which could be replicated on a larger scale to assist any country in the accession process.

Finally, the last analysed suggestion in the literature worth mentioning is that of a general panel of independent experts for accession similar to that of the Disputes Settlement Panels that would produce a report of compliance with WTO rules. These reports would replace the

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[208] General Agreement on Trade-Related Aspects of Intellectual Property, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C 1869 UNTS 299 (Singed 15 April 1994, entered into force 1 January 1995) [Hereinafter TRIPS Agreement].
[209] Andrew D. Mitchell and Joanne Wallis *Pacific Pause: The Rhetoric of special & differential treatment*, above n 187, at 701-703; see also Aaditya Mattoo and Arvind Subramanian *The WTO and the poorest countries: the stark reality*, above n 207, at 399-407.
[210] WTO "Trade for Aid" (2019) WTO < www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm>.
[211] Tony Angelo "Pacific Island Forum 2009" (2009) 7 NZYIL 2009 271 at 273.
[212] Pacific Island Forum "Office of the Chief Trade Adviser for Forum Island Countries" *Pacific Scoop* (Online Ed, Wellington, 31 March 2011) <www.pacific.scoop.co.nz/2011/03/office-of-the-chief-trade-adviser-for-forum-island-countries/>.

multilateral Working Party process as the basis for negotiations of changes to the countries' trade regimes, whilst still allowing for the membership to ensure that new acceding members are being reviewed.[213] This would stop WTO-Plus demands from being made, whilst also ensuring advancement of the necessary reforms. Another way to support this change would be to only allow those who supply more than a de minimis amount of trade to the country acceding at the negotiating table.[214] This would stop large economies of the WTO, such as USA, EC, and China, placing unnecessary demands upon new acceding members in respect of which they have little or no trading interest.[215]

4.4. Proposal for Reforms

To ensure its own survival, the WTO needs to reform. Alternatively, a new world trading system is likely to emerge. Hence, the following suggestions, which once upon a time would have been ignored, have now become very relevant to the system.

4.4.1. Why Changes to the Article XII Process are a Viable Solution

While many of the authors of such suggestions have indicated that reform would be politically impossible due to it giving nothing to the current members, but everything to those acceding,[216] this view is now likely misguided. Such views were expressed at a time when the WTO's power was consolidated by a few large countries with less involvement from small and Developing Countries. Furthermore, there were still many acceding members who were of strategic concern to these major powers.

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[213] Roman Grynberg, and Joy Roy Mickey *The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System,* above n 88, at 711-714.
[214] De minimis is a concept within WTO jurisprudence (Panel and Appellate Body decisions) for which allows for a country to have a nominal level of favouritism which is unlikely to distort trade, e.g. application of trade policy instruments such as domestic taxes see *Japan — Taxes on Alcoholic Beverages Report of the Panel* ("Japan — Alcoholic Beverages II"), WT/DS8/R, WT/DS10 /R, WT/DS11/R, adopted 11 July 1996 (Report of the Panel) at [6.33]. Here this concept is similarly being employed. This means that if a level of total trade with that member country, from the country acceding perspective, is less than 5-10% then that member will be not be given a voice in the accession Working Party.
[215] Roman Grynberg *The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System The accession of Vanuatu,* above n 88, at 713.
[216] At 713.

Although in the past the highly technical procedures, legal negotiation and power imbalances would have made it unlikely that changes could be made to the accession process,[217] the current world environment lends itself towards reform to ensure legitimacy of a system which is challenged.[218]

4.4.2. Primary Recommendations

When analysing the preceding suggestions for changes to the Article XII process, one thing is clear; the system can change in a way which protects members' interests while ensuring that those acceding are treated in a rules-abiding manner within the WTO context. Another point is also clear, only one change to the system is unlikely to achieve the desired result.

While a return to the two-tier GATT style system may be desirable in the short run for P-SIDS to ensure they do not agree to irrelevant or unduly difficult concessions, in the long run this option is suboptimal. This is due to the fact that the long run, economic benefits of accession to liberal terms will likely enhance their ability to develop at a desirable rate.[219]

The suggestion of setting up a panel of experts would be desirable; as it would further negate the chances of unnecessary and unrealistic WTO-Plus conditions being pushed on acceding countries. However, this would mean that members' representatives themselves would not be able to engage as thoroughly in the process. There would need to be a significant level of political agreement in the WTO membership to make this suggestion feasible. If the below suggestions are included in provisions concerning SDT, as well as incorporation of the 'aid for liberalization' scheme, there would be a legal framework which protects acceding economies interests by ensuring a fair and rules-based accession process.

A combination of, and slight alteration to, the remaining suggestions will likely reap the best results legally, economically, and politically for both current members of the WTO as well as P-SIDS and other small economies which would struggle under the accession process.

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[217] See at 713.
[218] See above Anwarul Hoda *Where Is US Trade Policy Headed Under the Trump Administration*?, above n 3, at 81-92; see also Philip Blenkinsop *WTO chief sees no end in sight to U.S. blockage* above n 148.
[219] Again, it is worth keeping in mind that all do not share this view.

To begin with, incorporating SDT in the WTO Agreement's accession provisions if certain economic and development indicators are met would do two things: firstly, it will assist those countries such as Kiribati, who would struggle to develop under too quick liberalisation; secondly, it would give assurance to current members that the system was not allowing for easier access to the WTO than should be granted in most cases. While recognition of small vulnerable economies would be desirable,[220] the new SDT provision should be tailored with such economies in mind. If the SDT provision is incorporated into the accession process with parameters such as size of population, remoteness etc, the problem of formal recognition of the group within WTO law as 'Developing Country', LDC, or even 'SIDS' would not be as necessary, as they will already be gaining extra help through a purely technocratic, endogenous WTO definition. This would negate potential political issues of a general definition of a country's stage of development or arguments over what status a country holds. These SDT points should be mandatory if the threshold is met and any WTO-Plus provisions not in compliance with them in the Accession Protocol should be found to be ultra-vires if challenged.

This should be coupled with a provision that ensures more technical assistance and development aid from members is given if the acceding member agrees to more than the standard WTO obligations. In essence, this would provide incentive for countries to liberalise even more, which, as seen above, is a long stated reason for imposing WTO-Plus obligations on acceding countries. While the exact amount of liberalisation would be subject to negotiation, there should be general terms in the amended provision that states that the higher amount of liberalisation agreed to, the more aid and technical assistance will be given; thus the system would retain some of the members' negotiating power. While there could be concerns that any aid given may not be used effectively or will be embezzled by corrupt officials, and that technical assistance will not go to the right areas, such concerns could be mitigated.

Like the OTCA in the PACER Plus negotiations, a new independent advisory post could be set up to have trade experts give technical assistance and advice as to how to best use aid given. Unlike the OCTA which was established solely for Pacific nations during the PACER Plus negotiations, this new branch of the WTO could have multiple regional offices with permanent stations around Developing Countries e.g. one in the Pacific, another in North Africa/the

[220] In order to include the Landlocked Developing Countries.

Middle East, and another in Central Africa etc. All this combined would also likely offset the concerns that liberalisation would not be beneficial for small economies in the short run, as they can make up the shortfall of their economy through this increased aid and assistance in order to reach the long run goals.

Regarding this assistance, there should be a percentage from the general membership given towards this extra assistance. This means that more than one or two close members have to give assistance. However, an extra provision should be given to say that those members who benefit most from the country's accession should give a certain percentage more assistance than the other members.[221]

While these seem like simple changes, the results would likely mean that P-SIDS, as well as struggling developing economies generally, are not being disadvantaged. While it is not outlawing WTO-Plus conditions, it is providing safeguards against undue political pressure to agree to them, while also providing incentive to these countries to liberalise more than they need to under the agreement in order to help them develop. Furthermore, it would give more liberal trade access for the rest of the WTO members.

Conclusion

It has been shown that the WTO members are currently not acting in accordance with what the organisation holds itself out to be. While the WTO claims to be rules-based and fair, when looking at the accession process it can be seen that it is currently not acting this way towards countries who wish to accede to it. Although there are valid arguments in favour of the current system, it has been shown that they are largely economic or political in nature and do not hold well under scrutiny; the arguments do not negate the fact that the process lacks rules and systematic fairness. When analysed, the arguments against the current system accessions outweigh those in favour. Accession to the WTO is currently a game of power politics in which the membership will always win, and as was shown in the cases of Vanuatu and Tonga in

[221] In the case of Kiribati for example, Australia, New Zealand and Japan, China, and Fiji; see generally Asian Development Bank "Development Coordination" (2019) Asian Development Bank <www.adb.org/sites/default/files/linked-documents/44281-014-dc.pdf>; see also OEC "Kiribati Profile" (2017) OEC < https://oec.world/en/profile/country/kir/#Imports.

particular; SIDS and other small economies are generally the losers. While not bidding for membership is an option for those yet to accede, the reality is that in the long run, in order to develop their economies efficiently and participate effectively in global trade, as well as appease their aid partners, accession to the WTO is likely inevitable. Again, while simply acceding to RTAs could be preferable in the short run, it is also likely beneficial from both an economic and political view point to accede to the WTO in the long run.

However, due to the current unfairness and high cost of the accession process which in turn has a chance of causing economic failure, it cannot be recommended that accession to the WTO is desirable for P-SIDS in the short run.

It is due to this apparent paradox of a serious potential of short run economic harm, and the likelihood of long term economic success resulting from a country acceding to the WTO, that reforms are needed.

Developing Countries which have already acceded under this current Article XII process may be somewhat unhappy about the recommended changes to the accession process; since they were not given any further special treatment or incentives to liberalise their trade regime further. Notwithstanding this, given that there is discussion surrounding reforms, and these suggestions are but one aspect of a wider institutional reform needed to entrench the WTOs legitimacy, it is plausible that even if these countries were unhappy, that a new member would be treated in a more fair manner. The human factor must not be forgotten. Political and technocratic support for such changes are needed for successful reforms. In light of the legitimacy crisis the WTO faces, it is suggested that such support could be mustered.

Therefore, to solve the problems discussed, this dissertation recommends that the following reforms of Article XII be adopted. Firstly, compulsory SDT should be given for acceding countries (should they meet certain development indicators), and secondly an ‘aid for liberalisation’ system to encourage deeper trade liberalization policy should be introduced. These in tandem would likely achieve desirable development results for those wishing to accede, as well as address many of the concerns of the current membership surrounding the protection of their system by still allowing for negotiation flexibility. It is suggested that if such reforms were made, developing countries should be able to achieve the long run benefits of trade, even if they are P-SIDS.

Such changes will help the WTO achieve its goal of universal membership as well as fix many of the legitimacy problems,[222] while still encouraging broad trade liberalisation by acceding countries and advancing the guiding free trade philosophy of the WTO. By adopting such changes, the WTO can achieve its original mandate; to facilitate rules-based trade and encourage economic advancement of developing countries.

Implementing such changes would relieve the stress of accession and allow for the freer flow of trade in regions such as the Pacific, allowing for P-SIDS to specialise in producing goods and services and reap the economic benefits of lower barriers to world trade.

[222] In particular, it will adequately address those related to WTO-Plus terms of accession.

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