Society of International Economic Law

Online Proceedings
Working Paper No. 2010/29

SECOND BIENNIAL GLOBAL CONFERENCE
JULY 8 - 10, 2010
THE UNIVERSITY OF BARCELONA
AND ITS IELPO PROGRAMME

THE PRINCIPLE OF FAIRNESS AND WTO ACCESSION – AN APPRAISAL AND ASSESSMENT OF CONSEQUENCES

DERK BIENEN
MANAGING PARTNER, BKP DEVELOPMENT RESEARCH & CONSULTING

MAMO E. MIHRETU
PRINCIPAL, THE AFRICA GROUP , LLC

June 30, 2010

Published by the Society of International Economic Law

with the support of the University of Missouri-Kansas City (UMKC) School of Law

This paper can be downloaded free of charge from:
http://www.ssrn.com/link/SIEL-2010-Barcelona-Conference.html

C/O LAW DEPARTMENT
London School of Economics
Houghton Street
London
WC2A2AE

THE PRINCIPLE OF FAIRNESS AND WTO ACCESSION – AN APPRAISAL AND ASSESSMENT OF CONSEQUENCES

Derk Bienen[*]
Mamo E. Mihretu[**]

Abstract

Developing country members of the WTO benefit from special and differential treatment, a flexible application of WTO principles and rules according to their developmental needs and capacities. However, there has been widespread criticism that special and differential treatment is not granted to acceding countries – almost all of which today belong to the group of developing countries. If anything, it is argued, these countries receive an "inverse" special and differential treatment as a result of which they are compelled to offer further reaching liberalisation commitments than WTO members themselves.

The main criticism is that both the procedure and outcomes of accession negotiations do not fully take into account the demands of fairness. With regard to procedural fairness, acceding countries have to undergo a long, resource consuming and cumbersome process since the end of the Uruguay Round, from which WTO founding members were spared. Fairness of outcomes – or substantive fairness – is lacking because accession countries have to liberalise more than WTO incumbent members.

The main argument of the paper is that WTO accessions since 1995 indeed lack both procedural and substantive fairness. Central to our conception of fairness is a demand to avoid bias in accession negotiations, taking note of the interests and concerns of acceding countries and in particular the need to avoid being influenced by member countries' unrestrained vested interest. The main problem, we submit, is that accession rules, although elaborate and specific regarding procedural matters, do not prevent WTO members from capitalising on their bargaining power vis-à-vis acceding countries, which in turn leads to unfair outcomes of the accession process. Finally, the paper shows how the lack of fairness in accession contributes to the WTO's growing "legitimacy crisis".

[*] Managing Partner, BKP Development Research & Consulting, Contact: d.bienen@bkp-development.de.
[**] Principal, The Africa Group, LLC, Contact: mamo@theafricagroup.com.

1 INTRODUCTION

The intellectual foundation of the multilateral trading system is that economic development is best achieved through non-discriminatory trade patterns and progressive and reciprocal reduction of trade barriers. During the GATT negotiations in 1947 the view was accepted that the principle of equality of treatment among countries makes little sense when countries are economically unequal. This understanding gave way to the inclusion of preferential treatment of developing countries (also called special and differential treatment) into the legal structure of the GATT, and later, WTO system.[1]

Whatever the merits of the economic arguments for and against special and differential treatment, developing country members of the WTO, and especially least-developed countries (LDCs), benefit from less than full reciprocity in concession, complete exemptions from some commitments, transitional time periods and a flexible application of WTO principles and rules according to their developmental, financial and trade needs and capacities.

However, there has been widespread criticism that special and differential treatment is not granted to acceding countries[2] – all of which today belong to the group of developing countries.[3] If anything, it is argued, these countries receive an "inverse" special and differential treatment as a result of which they are compelled to offer further reaching liberalisation commitments than WTO members themselves. Such criticism is voiced not only by acceding countries, development activists and globalisation critics but, with varying degree, also by researchers and international organisations.[4]

[1] See Hudec (1987) for an analysis of the role of developing countries in the GATT system. He in particular notes that the identity of developing countries in the GATT system was primarily a matter of their demanding non-reciprocal and preferential treatment, to which developed countries responded only grudgingly.

[2] 25 countries have acceded to the WTO since its establishment in 1995, bringing its membership to a total of 153. A further 29 countries have applied for membership. Twelve of them are LDCs.

[3] The WTO divides its membership into three groups: developed countries, developing countries, and least developed countries. However, the WTO has no precise definition of "developing countries"; it is left to the members' self- selection. For the purpose of this paper, a country is considered as a developing country if it appears on the OECD DAC list of ODA recipients (effective from 2006). Regarding least developed countries, Article XX:2 of the Marrakesh Agreement accepts the United Nations' designation of a country as least developed for the purpose of WTO Agreements.

[4] The OECD Trade Directorate, for example, states, with regard to trade in services that "the flexibility for developing countries to open fewer sectors and liberalise fewer types of transactions has not been as prevalent in the accession process to date (OECD 2006). Also see the various contributions in UNCTAD (2001). Among critical research contributions, see Marchetti (2004), Evenett and Braga (2005) and Grynberg et al. (2006).

In a nutshell, the main criticism is that accession countries are treated *unfairly* by members. The principle of fairness is violated both by the accession procedure and by accession outcomes. With regard to procedural fairness, acceding countries have to undergo a long, resource consuming and cumbersome process (cf. Kavass 2007) since the end of the Uruguay Round, from which WTO founding members, including those that had acceded to the GATT before the end of the Uruguay Round, were spared. Fairness of outcomes – or substantive fairness – is lacking because accession countries have to liberalise more than WTO members.

The discourse about fairness and WTO accession leads a number of tricky questions: Why do fairness considerations matter in membership negotiation? What are the demands and requirements of fairness as applied to multilateral trade relationships? What methodological approaches inform the fairness discourse? How does one measure whether accession negotiations are becoming more or less "fair"? What are the dimensions of the concept of fairness? Is fairness to be found in procedural rules, substantive norms or economic outcomes? To address these questions, we start with the assumption that the concept of fairness is demonstrably important as only a trading system that its members perceive as fair can command acceptance, compliance and most importantly legitimacy.

The main argument of this paper is that WTO accessions since 1995 indeed lack both procedural and substantive fairness, the latter being at least in part a consequence of the former. The main problem, we argue further, is that accession rules, although elaborate and specific regarding procedural matters, do not address the fundamental differences between members and accession countries, i.e. they do not prevent that WTO members (and in particular powerful members) capitalise on their bargaining power vis-à-vis acceding countries, which in turn leads to unfair outcomes of the accession process. We will then show how the lack of fairness in accession contributes to the WTO's growing "legitimacy crisis" (Elsig 2007).

It should be noted that the purpose of this paper is not discuss the pros and cons of liberalisation and special and differential treatment[5]. It is rather to analyse the current

[5] Indeed, some argue that demanding non-reciprocal and preferential treatment is not in the interest of developing countries as it will be unfruitful both to support developing country reforms and to discipline developed country restrictions aimed at developing countries (cf. Hart/Dymond 2003; Tang/Wei 2006; Finger 2008). Acceding countries, the argument goes, should use international rules and bindings as leverage to support their own internally-driven reforms, to overcome generations of accumulated protection, to lock in reforms against the backsliding that had undone previous reforms. By going back to the traditional idea of special and

accession procedures and their consequences. If anything, the paper is in favour of an effective WTO, i.e. to be an efficient forum for members to discuss and negotiate trade issues[6] and "provide a structured and functionally effective way to harness the value of open trade to principle and fairness" (Sutherland et al. 2004: 15).

The remainder of this paper is organised as follows: In Section 2 we present, drawing from literature on political philosophy, an analytical framework for the fairness discourse as applied to WTO membership and accession, before summarising in section 3 the fairness discourse that has taken place in the GATT/WTO system. Section 4 is the core part of the paper, where we evaluate the fairness of WTO accession negotiations from both procedural and distributive points of view. In particular, we argue that the WTO accession process lacks procedural fairness and leads to unfair accession outcomes. In section 5 we briefly discuss the consequences of the identified fairness deficit before concluding with some brief recommendations.

2 THE CONCEPT OF FAIRNESS AND THE MULTILATERAL TRADING SYSTEM

Defining fairness is not, by any means, an easy task.[7] It is often argued that the concept is elusive, subjective and ultimately meaningless.[8] This perhaps explains the traditional reluctance to engage in a fairness discourse. What is considered fair or unfair arguably varies over time, between cultures and indeed individuals depending on personal beliefs. However, it is less difficult to determine the preconditions that must be met if a discourse on fairness is to be held. To inform our understanding of the principles and demands of fairness, one can also

differential treatment, negotiators would misconceive the real benefit of WTO membership and mismanage the accession process. Rather, acceding countries are advised to commit to wider and deeper policy reforms than the countries that joined the GATT during 1990-1994.
We acknowledge that many WTO related policy reforms might improve the business environment and WTO accession might indeed give a powerful guarantee to investors that there will be no policy reversals. Indeed, some governments legitimately pursue WTO accession as a credible means of gaining an enhanced international reputation, which in turn will help these countries attract solid investment by translating concessions into international legal commitments. However, we believe when it comes to *additional* commitments, acceding countries should be free to *flexibly choose* any set of policies if these commitments are useful in enhancing a country's development.

[6] The functions of the WTO are defined in Art. III of the Marrakesh Agreement Establishing the WTO.

[7] Milton Friedman, for example, observes: "There is no objective standard of 'fairness.' 'Fairness' is strictly in the eye of the beholder […] To a producer or seller, a 'fair' price is a high price. To the buyer or consumer, a 'fair' price is a low price. How is the conflict to be adjudicated?" (Milton Friedman, Newsweek, July 4, 1977, quoted in Konow 2008: 1).

[8] Konow (2008) notes that "the abandon with which people wield fairness arguments, often on opposite sides of the same issue, contributes, no doubt, to the impression reflected in this refrain."

draw useful insights from political philosophy in particular by examining the way the notion of fairness has been used over time and how it has been related to norms of the multilateral trading system.

Philosophers and social scientists have long been discussing approaches to identify what is fair and the principles that guide unbiased fairness. Three prominent approaches which can be usefully applied for our purpose include John Rawls' *original position*, Adam Smith's *impartial spectator model* and Thomas Franck's conceptualisation of fairness.

The Rawlsian *original position* has dominated most of the normative fairness discourse in political philosophy, law and economics over the past decades. In the *Theory of Justice,* Rawls (1971) developed a thought experiment called the original position. This is a hypothetical state in which self interested individuals initially choose the principles that guide the basic structure of society behind a "veil of ignorance" of any particulars related to themselves, including information about their future position in that society, personal identities or their respected vested interests. Rawls argues that, under such conditions, there would be a high level of agreement regarding the principles of justice, which guarantees equal basic liberties and would protect the interests of the least well off member of society. Impartiality and reciprocity have central places in the Rawlsian framework. Rawls views the foundational idea of justice in terms of the demands of fairness.

Central to the idea of fairness is a demand to avoid bias in our evaluations, taking note of the interests and concerns of others as well, and in particular the need to avoid being influenced by our respective vested interests, or by our personal priorities, eccentricities or prejudices. Fairness, as Amartya Sen (2009: 54) pointed out, can be seen as a demand for impartiality.

When applied in the context of the WTO trading system and WTO accession, the Rawlsian framework of fairness implies that the benefits and burdens of the trading regime ought to be distributed initially in accordance with an equality principle that would treat all members of the WTO similarly and without distinction. However, one must also point out the difference principle in Rawls' formulation of 'justice as fairness', according to which, in the distribution of benefits and burdens, concern for the most vulnerable members of the trading regime should be taken into account. Similarly, the Rawlsian *original position* is clear in the high value it attaches to the notion of impartiality in evaluating just outcomes.

A different approach to assessing fairness is the impartial spectator model, which can be traced to Adam Smith's *Theory of Moral Sentiments* (1790). The impartial spectator model assumes considering the positions of the affected parties and our interests from "a certain distance from us". The requirement here is, as pointed out by Adam Smith, to judge one's own conduct as we imagine an impartial spectator would examine it. The "reflective device" of the impartial spectator requires us to use a thought experiment that goes beyond reasoning that may be constrained by local conventions of thought, and to examine deliberately, as a procedure, what the accepted convention would look like from the perspective of a "spectator at a distance" (Sen 2009: 125), by removing ourselves from our natural situation.

What is strikingly common between the Rawlsian original position and Adam Smith's impartial spectator is the need for reasoned engagement on an impartial basis. Smith's model implies that the procedures and outcomes of WTO accession can be considered as fair if they would be viewed as fair by impartial persons with no vested interest. The determination of fairness elicits the judgments of impartial spectators, rather than implicated stakeholders. The impartial spectator approach will help us transcend our blinders and gives us an opportunity to scrutinise the influence of vested interests but also the impact of entrenched culture and custom. An impartial spectator theory of fairness is a promising approach to address a broad range of issues including fairness questions related to WTO accession.

In contrast to Smith and Rawls – and not very surprisingly, given the fact his background in international law – Thomas Franck's conceptualisation of fairness as developed in *The Power of Legitimacy among Nations* (1990) and *Fairness in International Law and Institutions* (1995) does not only consider the distributive aspects of fairness ("justice") but also procedures ("legitimacy"): "The fairness of international law, as of any other legal system, will be judged, first by the degree to which the rules satisfy the participants' expectations of justifiable distribution of costs and benefits, and secondly by the extent to which the rules are made and applied in accordance with what the participants perceive as right process" (1995: 7).

Regarding the former, Franck's concept of fairness draws heavily on Rawls – his description of both the key fairness principle to be applied (the "maximin" principle) and the first precondition for a distributive fairness discourse ("moderate scarcity" of the object to be

allocated) are based on Rawls' *Theory of Justice* (1971). A second precondition for fairness is the existence of a community (Franck 1995: 9ff). Both of these preconditions are met in multilateral trade issues: the WTO constitutes the community, and the potential gains resulting from trade liberalisation are moderately scarce, which leads to a discussion of the just allocation of these gains.

With regard to procedural fairness, Franck discusses several indicators which influence the perception of a rule as being fair. Some of these – determinacy, symbolic validation and coherence – are useful instruments which help us analyse to what extent WTO rules on accession are fair.

Determinacy is "the ability of a text to convey a clear message, to appear transparent in the sense that one can see through the language of a law to its essential meaning" (Franck 1995: 30). In this sense, we will have to ask to what extent rules on WTO accessions are determinate – clear and transparent. Only if acceding countries know ex ante what is expected from them in order to become WTO members the rules on accession guarantee determinacy. The rules will be applied according to normative standards, and non-compliance with these standards by both acceding countries and WTO members in the accession process can easily be determined.

The second indicator for fair procedures, symbolic validation, means the extent to which a rule "has attributes, often in the form of cues, which signal its significant part in the overall system of social order" (Franck 1995: 34). In the case of WTO accession we need to ask to what extent rules on accession have been symbolically validated – what is their status in the WTO legal system?

Thirdly, a rule is "coherent when its application treats like cases alike and when the rule relates in a principled fashion to other rules of the same system" (Franck 1995: 38). Thus, WTO rules on accession are coherent if they treat acceding countries like members – provided they are similar based on certain criteria – and if they do not differentiate among acceding countries (again, provided they are similar). Obviously, it will be important to clearly identify the criteria based on which countries will be considered as like cases.

If we distinguish between two dimensions of fairness, we also need to address how they relate to each other. Precisely, we need to ask two questions.[9] First, do procedural and substantive fairness always reinforce each other? Secondly, which of the two dimensions is the more important one?

With regard to the first question, although potential trade-offs between procedural and substantive legitimacy – i.e. cases where increased democracy in the process leads to less efficient outcomes – cannot be discarded[10], as we shall see below in the case of WTO accessions an increase in procedural fairness can be expected to positively impact on output legitimacy or distributive fairness. At a general level, Franck argues that there is such a positive relation between procedural and distributive fairness because a "system of rules, when it is perceived as legitimate and secures compliance, distributes equally to all participants in that regime the benefits of conflict resolution and order, which in turn may conduce to secondary 'goods' such as economic growth" (1995: 22).

If this is true, the second question is of lesser importance. Nevertheless, it has been pointed out that procedural fairness often matters more than substantive fairness. An example described by Shor (2007) is arbitration where awards are driven more by perceived fairness of the process than the award size. At the same time, Franck shows that equity considerations have become increasingly important in the international allocation of resources (1995: 56ff). An example is the introduction of the Generalised System of Preferences as a corrective distributive instrument to one of the GATT's core principles, the most favoured nation (MFN) principle.

To summarise, following Franck we can distinguish two dimensions of fairness, procedural fairness ("legitimacy") and substantive fairness ("distributive justice")[11]. For the fairness discourse related to WTO accessions we take a broad view of fairness by taking into account both procedural and distributive concerns. The procedural aspect of fairness relates to rules governing the right process and in particular the ability of all participants to have input or "voice" in the process. In the context of WTO accession we need to analyse whether or not

[9] Note that Elsig, drawing on Fritz Scharpf's earlier work (1999), calls for the need "to apply a dynamic view of input and output legitimacy to overcome a rigid dichotomy" (2007: 88).
[10] See the brief review of literature and cases in Elsig (2007: 88). Franck also points out that procedural and substantive fairness may not always coincide (1995: 22ff).
[11] Similar dichotomies are input and output legitimacy (Scharpf 1999, also see Elsig 2007) or structural and material issues (Weiler 2000).

the set of rules which guide the accession process can be considered, or are perceived as, fair. The distributive aspect of fairness refers to the outcome of the accession procedure, i.e. the breadth and depth of commitments the acceding country is undertaking, and whether or not this corresponds to principles and criteria of fairness.

3 FAIRNESS CONSIDERATIONS IN THE GATT/WTO CONTEXT

3.1 Equality of Members

Fairness considerations are reflected in a number of GATT/WTO norms, which require all members who benefit from the trading system to reciprocally contribute their share. From a narrow point of view, the GATT/WTO regime already embodies requirements of fairness through the requirements of non-discrimination embodied in the most-favored-nation, transparency, and national treatment norms, as well as the norm of promoting procedural fairness in dispute settlement proceedings and reciprocity. Taken together, these norms attempt to ensure reasonable equality among members so that no member is enriched at the expense of the other. As Beviglia Zampetti notes in his study of the history of the US Trade Policy (2006) the US pushed for multilateral, non-discriminatory and reciprocal trade precisely because that conforms to the US understanding of fairness. [12]

The first principle of fairness embodied in the GATT/WTO system thus is that members, in line with the equality principle applied in international law, are to be treated equally.

The question then becomes whether this understanding of the notion of fairness also entails distributive justice or whether further arrangements are required beyond mere formal equality. Indeed, the first principle of fairness over time has been complemented by a second principle which takes into account differences in economic development, thus treating unequal Members unequally.

3.2 Flexibility Conditions for Developing and Least Developed Countries

Developing countries never accepted the level playing field understanding of fairness and argued that “it was neither realistic nor fair to expect poor countries with fragile economies

[12] Beviglia Zampetti notes that the British had a broad understanding of fairness and wanted to keep their colonial preferential regime. The preferential trading arrangement is justified among others to help develop undeveloped – hence unequal – poor colonies.

[…] to compete on equal terms with industrial countries" (Beviglia Zampetti 2006: 163). Many delegates from developing countries argued that equality of treatment is equitable only among equals. Thus, developing states pushed for what came to be known as "special and differential" treatment. Eventually, developing states were exempted from the GATT's prohibition of export subsidies, and in 1964, GATT parties adopted three articles under the rubric "Trade and Development." Significantly, these new articles endorsed a form of "non-reciprocity" – in particular, that developing countries would not be expected to reciprocate when developed states reduced tariffs and other barriers to trade. In 1979, GATT parties adopted the "Enabling Clause," which authorised developed countries to extend differential and more favorable treatment to the exports of developing countries. In addition, the principles of non-reciprocity and special and differential treatment enabled developing countries to make only limited market-access commitments and relatively few tariff commitments in GATT negotiations during the 1960s and 1970s.

What is more, the community of states has set various examples of what is considered fairness in international trade. In 1971, the Generalised System of Preferences (GSP) was introduced based on the argument "that the trading system must take into account that equal treatment of unequal economies tended to perpetuate unfair inequalities" (Franck 1995: 426). The GSP was later complemented, based on the same rationale, by a variety of measures granting special and differential treatment to less-developed economies in the multilateral trading system – such as longer transition periods or the concept of non-reciprocity in trade negotiations with developed countries.

Today, the flexibility conditions for certain WTO members are contained in the WTO legal texts, different Ministerial Declarations, and the Decisions of the General Council. The WTO has classified special and differential treatment provisions into five main groups[13]: Provisions aimed at increasing trade opportunities through market access, provisions requiring WTO members to safeguard the interest of developing countries; provisions allowing flexibility to developing countries in rules and disciplines governing trade measures; provisions allowing longer transitional periods to developing countries; and provisions for technical assistance.

[13] WTO, Special and Differential Treatment for Least-Developed Countries, Note by the Secretariat (5 October 2004), WT/COMTD/W/135.

All WTO Agreements recognise the specific trade, development and financial needs of developing and least-developed countries.[14] With regard to trade in goods, Article XXXVI(8) of the GATT provides that developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less developed contracting parties. According to the WTO Secretariat[15], this provision was taken into account during the negotiations in the Uruguay Round as reflected both in the extent of bindings on industrial products and the average level of tariffs of the developing country members.

Regarding trade in services, the main legal bases for flexibility conditions for developing country members are Articles IV and XIX (2) of the General Agreement on Trade in Services (GATS). Article XIX (2) stipulates that

> "[t]here shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV."

Article IV of the GATS stresses the aim to progressively increase the participation of developing, in particular least developed, GATS members in world trade. One of the main issues under Article IV is the strengthening of developing countries' domestic services capacity, efficiency and competitiveness.

Articles IV and XIX (2) have been further specified in the Guidelines and Procedures for the Negotiations on Trade in Services of March 2001 (S/L/93) and the Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services of September 2003, which state:

> "4. Members shall take into account the serious difficulty of LDCs in undertaking negotiated specific commitments in view of their special economic situation, and therefore shall exercise restraint in seeking commitments from LDCs. In particular, they shall generally not seek the removal of conditions which LDCs may attach when making access to their markets available to foreign service suppliers to the extent that those conditions are aimed at achieving the objectives of Article IV of the GATS.

[14] Commentators argue, however, that most of the provisions relating to developing countries and least developed countries are “best endeavour” (Panagariya 2002: 1207) and “remarkably vague and ‘aspirational’ in approach” (Jackson 1997: 319). In relation to the WTO Dispute Settlement Mechanism, these provisions are unenforceable as they are expressed in imprecise and hortatory language (Olivares 2001; also see Kessie 2000).

[15] WTO Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions, Note by the Secretariat (25 October 2000), WT/COMTD/W/77, p. 15.

> 5. There shall be flexibility for LDCs for opening fewer sectors, liberalising fewer types of transactions, and progressively extending market access in line with their development situation. LDCs shall not be expected to offer full national treatment, nor are they expected to undertake additional commitments under Article XVIII of the GATS on regulatory issues which may go beyond their institutional, regulatory, and administrative capacities. In response to requests, LDCs may make commitments compatible with their development, trade and financial needs and which are limited in terms of sectors, modes of supply and scope." (TN/S/13)

Furthermore, members are asked to give special priority to effective market access in sectors and modes of supply of export interest to LDCs (TN/S/13 §§6ff), and to provide technical assistance to LDCs (TN/S/13 §12).

The General Council Decision of 1 August 2004 and the Hong Kong Ministerial Declaration provide for more flexibility for WTO developing and least developed member countries. In agriculture, LDCs are not required to undertake reduction commitments (§26). In non-agricultural market access, LDCs are required neither to apply the formula nor to participate in the sector approach. Developed-country members, and developing-country members declaring themselves in a position to do so also agree to implement duty-free and quota-free market access for products originating from LDCs (§47). In trade facilitation, LDCs will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

Last but not least, special and differential treatment was not only granted regarding the material outcomes of negotiations but also, although to a lesser extent, regarding *procedural aspects*. Thus, developing countries may receive legal advice by the WTO Secretariat in disputes. They may also benefit from technical assistance in order to formulate their negotiating positions and participate in negotiations.

Least developed countries receive extra attention by the WTO, surpassing the provisions for developing countries. As an example, the WTO work programme for LDCs adopted in 2002 includes provisions for improved market access, more technical assistance, support for agencies working on the diversification of least-developed countries' economies; help in following the work of the WTO; and a speedier membership process for least-developed countries negotiating to join the WTO.

In a nutshell, the understanding of fairness in international trade issues has gradually been evolving to address both equity and distributive justice issues. Developing countries came to see differential treatment as an "instrument in achieving a more 'equitable' trading system, where equity means a move from formal equality towards substantive equality" (Beviglia Zampetti 2006: 169).

The second principle of fairness as shared by the WTO members is based exclusively on a country's development status. Other criteria, such as economic importance, play no role.[16] However, there is neither a definition of how the development status should be measured, nor is there a list of developing countries which would be eligible to benefit from special and differential treatment, nor can a linear relationship between the development status and the degree of special and differential treatment be deduced from the WTO agreements and policy statements.

4 ARE WTO ACCESSIONS FAIR?

As we have seen in the previous sections, there are two notions of fairness in the WTO system. The first is based on the equality of treatment of the Members. However, this first principle is complemented by a second principle which grants different treatment to members, establishing a clear link between the extent of special and differential treatment and the development status. Special and differential treatment goes farthest for least developed countries. Non-LDC developing countries only receive a less preferential treatment. These differences are but the negative formulation of the definition of fairness mentioned above: the less equal economies are (in terms of their development status), the less equal are they treated in the international trading system.

Taken together, these principles mean that countries which have the same development status are treated equally by the WTO and its members in terms of flexibility provision, while the general rules of the system apply uniformly to all members. It should also be noted that the special and differential treatment of LDCs is not restricted to LDC members of the WTO, e.g. LDCs benefit from the GSP regardless of whether or not they are WTO members.

[16] E.g. there is no evidence in statements by the WTO that large economies were expected to engage in deeper liberalisation.

According to the first fairness principle acceding countries, upon becoming members of the WTO, must be treated as all other members. The rules of the system must be applied uniformly regardless of whether a country has just joined or is a founding member. Secondly, unequal treatment under the flexibility provisions must be applied exclusively based on the development status of members, again regardless of the time of accession.

The question then is: at which point in time must principles of fairness begin to be applied to acceding countries? When do acceding countries become part of the community in which the fairness discourse takes place – only at the time of accession or already with the submission of the accession application? It seems clear to us, based on the requirement of the coherence of rules, that acceding countries must be considered as part of the community already from the date they apply for accession. Otherwise, if they were treated differently as acceding countries and members, this would mean an incoherent application of the special and differential treatment provisions. The only difference between a country during and after the accession phase is its legal membership status, but all economic and social indicators as well as its developmental status, which forms the basis of special and differential treatment, remain the same.

4.1 Procedural fairness

As we have seen in section 3 the WTO system has developed a number of instruments which correspond to the application of the principle of procedural fairness in the multilateral trading system. Legal advice and technical assistance are available for developing and least developed countries. However, these provisions are applied only to countries which are already members of the WTO. The question thus arises if the procedures which acceding countries have to undergo as part of their accession to the WTO also fulfil fairness criteria.

Accession to the WTO reflects an institutional specificity that is very much different from membership in other international organisations such as the UN, World Bank, IMF etc. The latter generally operate under a principle by which all sovereign States have a presumptive right of membership save intractable and difficult political problems. Unlike in the WTO, accession to these international organisations involves little or no formal scrutiny of the candidate country's existing laws and policies and much less demands for changes in these laws and policies. The process of acceding to the WTO on the other hand is a one-sided affair

in the sense that all of the requests and demands coming from the existing members and the full burden of adjustment falling on the acceding country. Accession to the WTO seems more like "the hazing rituals of college fraternities" (VanGrasstek 2001: 78) and is comparable to membership in the European Union, which generally requires major realignments of a country's laws, policies and institutions. The applicant is not entitled to request any benefits other than those provided in the WTO agreements on MFN basis – which is a result of decades of multilateral liberalisation – nor can it seek any more concessions and commitments from existing members. On the other hand it is required to conform to the rules of the WTO agreements and to make specific concessions on tariff rates, commitments on agricultural subsidies and trade in services. In the end, WTO accession requires considerable alignment of national legislation with WTO rules and commitments.

Article XII of the Marrakesh Agreement establishing the World Trade Organisation establishes a framework within which accession negotiations are conducted. It simply requires that the terms of accession should "be agreed between [the acceding country] and the WTO." The spare language of this accession clause does not specify the precise commitments expected from acceding countries or the scope and extent of demands that could be made. Nor does it provide any procedures to be used for negotiating these terms, everything being left to agreement in individual accession working parties and bilateral negotiations.

There is a strong similarity with the corresponding accession clause of GATT Article XXXII[17]. The main difference between GATT and the WTO is the issue of accession via the sponsorship of another government. The WTO put an end to accession of separate customs territory through "sponsorship" of another country. Separate customs territories can now join the WTO only on their own capacity. However, nothing much is said in both about the rules to be followed during accession negotiations. This is a loophole that has been largely, but not completely, closed by guidelines prepared by the WTO Secretariat codifying the practice emerging from accession negotiations[18]. These guidelines set out the procedures and define

[17] GATT Article XXXII reads: "A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and contracting parties. Decisions of the Contacting Parties under this paragraph shall be taken by a two-thirds majority".

[18] WT/ACC/1 of 24 March 1995. The legal basis of these guidelines arguably is Art. XVI.1 which provides that "except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947".

the different stages in the accession process[19]: application, establishment of a working party, collection of factual information on acceding government's trade regime, negotiation of terms of accession, completion of the working party mandate, adoption of working party report by the General Council, entry into force of the Protocol of Accession.

The core of the accession negotiations lies in the determination of the terms of accession. In actual fact, the terms of accession contain the "membership fee" that the acceding country will pay to be able to join the WTO. The terms of accession as set out in the Protocol of Accession are the main outcome of the accession negotiations. As Lanoszka puts it:

> "Article XII does not stipulate any membership criteria, and this signals perhaps the most problematic legal aspect of the accession process [...] no guidance is given on the 'terms to be agreed', these being left to negotiations between the WTO members and the candidate. Furthermore, Article XII does not identify any concrete steps, nor does it provide any advice when it comes to the procedures to be used when negotiating the terms of accession."[20]

Article XII indeed gives members the *carte blanche* even to impose unreasonable conditions on acceding countries, as it does not specify, as it is, the level of commitments, the scope and extent of demands that can be placed on acceding countries. This ambiguity puts the accession process in a strictly negotiating than rule-compliance context. In other words, Article XII falls short of complying with one of the basic indicators of fairness, i.e. determinacy.

A large part of the accession commitments are standard. The rules-related commitments that most acceded countries made can be classified into three categories: (1) the commitments to abide by the existing WTO rules; (2) the commitments about the recourse to particular WTO provisions; such as transitional periods and developing country status under certain agreements; and (3) commitments to abide by rules created by the commitment paragraphs and not contained in the Uruguay Round Agreements, which relate to privatisation, state trading, and membership in other Plurilateral Trade Agreements (WT/ACC/7/Rev.2).

[19] WT/ACC/1 is supplemented by four technical notes by the Secretariat. These are WT/ACC/4 (Information to be provided on Domestic Support and Export Subsidies in Agriculture), WT/ACC/5 (Information to be provided on policy measures affecting trade in services), WT/ACC/8 (Information to be provided on policy measures with respect to SPS and TBT issues) and WT/ACC/9Corr.1 (Information to be provided on the implementation of TRIPS Agreement).

[20] Lanoszka (2001: 589). The WTO Secretariat similarly observed that "perhaps the most striking thing about WTO Article XII is its brevity. It gives no guidance on the 'terms to be agreed' these being left to negotiations between the WTO members and the applicant. Nor does it lay down any procedures to be used for negotiating these terms, these being left to individual working parties to agree. In this, it follows closely the corresponding article XXXIII of GATT 1947" (WTO Secretariat, WT/ACC/7/Rev.2, 01 November 2000).

While compliance with each of the main WTO Agreements is non-negotiable, concessions and commitments in goods and specific commitments in services are negotiable bilaterally with interested members. More specifically, the level of bound tariffs for imports of goods, the degree of limitations in service schedules, and transition (phase-in) periods are largely determined through bilateral negotiations.

The specific trade, development and financial needs of developing country members, including LDCs, are generally recognised by WTO Agreements. This follows from the provision that "Special and Differential Treatment, as set out in the Multilateral Trade Agreements, Ministerial Decisions, and other relevant WTO legal instruments, shall be applicable to all acceding LDCs, from the date of entry into force of their respective Protocols of Accession" (WT/L/508, p. 2). Moreover, the General Council Decision of 10 December 2002 on the Accession of Least Developed Countries (WT/L/508) establishes a number of guidelines to simplify and streamline LDC accession negotiations. The main guidelines include:

- "WTO Members shall exercise restraint in seeking concessions and commitments on trade in goods and services from acceding LDCs, taking into account the levels of concessions and commitments undertaken by existing WTO LDC Members
- acceding LDCs shall offer access through reasonable concessions and commitments on trade in goods and services commensurate with their individual development, financial and trade needs [...]
- transitional periods/transitional arrangements foreseen under specific WTO Agreements, to enable acceding LDCs to effectively implement commitments and obligations, shall be granted in accession negotiations taking into account individual development, financial and trade needs" (WT/L/508, pp. 2-3).

Again, the determinacy of these rules is limited, as it is virtually impossible to judge if a WTO member or acceding countries complies with them. In fact, it has been pointed out that adherence to the LDC guidelines has been highly questionable and "unlike in WTO negotiations, applicants have been treated in the same way irrespective of their size, income, and significance in global trade" (Grynberg et al. 2006: 5).

The flexibility provisions laid out in the WTO agreements are binding rules[21] which WTO members have to respect, and least developed acceding countries have indeed referred to

[21] The main S&D provisions include: (1) Agriculture: exemption from reduction commitments for LDCs on the issue of export subsidies (Article 9.4 of AoA), *de minimis* (Article 6.5 (b)); (2) SPS: 2/5 years transitional period (Arts. 10, 14); (3) TBT: particular account to be taken of LDCs in TA, special time-limited exceptions from TBT Agreement obligations (Arts, 11 and 12); (4) TRIMs: 7 year transitional period for elimination of TRIMS for

these conditions during accession negotiations. In the following section we will assess to what extent flexibility provisions have had an impact on negotiation outcomes.

How can the substantive "differential treatment" of acceding developing countries be explained? Adhikari and Dahal's conclusion of their analysis of LDCs' accession experience is that the "WTO accession process is inherently power based and the very antithesis of the WTO's credo. Indeed, the acceding countries do not receive what they deserve but what they negotiate" (2003: 9). In a similar vein, Marchetti (2004) explains the comparatively ambitious commitments of acceding countries with the nature of accession negotiations, during which the terms of accession are negotiated in detail between the acceding country and WTO members.

Indeed, in reality despite the LDC Guidelines and S&D provisions in different WTO Agreements, acceding countries are not granted preferential treatment automatically, if at all. For example, the request for transition period will not be accepted unless accompanied by legislative action plans irrespective of the relevant provisions in different WTO Agreements.

The underlying reason for lopsided outcomes is that the procedure governing WTO accession is not well defined in legal terms and the accession process is unfair as a result. At the heart of these explanations is that accession procedures do not ensure procedural fairness, in the sense of section 2 above. The basic rules – notably Article XII of the Marrakesh Agreement – lack *determinacy*, and to the extent that they have been further specified by the WTO Secretariat, there has been no *symbolic validation*, i.e. the status of the specifications in the WTO legal system is low. There is no such thing as a "WTO Agreement on Accessions" which would further explain and specify the meaning of Article XII. Finally, *coherence* of the rules for LDC and S&D during and after accession is limited, as the application of S&D treatment only begins with membership but does not apply during the accession process.

LDCs (Article 5); (5) Customs Valuation: 5 year transition period (Article 20.1); (6) Import Licensing, 2 year transition period for some provisions (footnote 5 of Article 2.2); (7) Subsidies and Countervailing Measures: LDCs exempt from (1) prohibition of export subsidies, (ii) eliminating subsidies contingent upon the use of domestic over imported goods for 8 years, (8) TRIPS: 4/10 year transition period (Article 65.2, 66.1).

4.2 Substantive fairness

In order to assess to what extent WTO accessions comply with principles of substantive fairness we compare commitments which acceding countries have made during accession, both in terms of market access and rules commitments, with commitments made by and rules applicable to WTO members. We also compare commitments made by acceding countries over time in order to assess the extent to which accession countries have been treated alike.

Indicators which are often used to measure the "cost of accession" refer to market access commitments of acceding countries in good and services trade, as well as "WTO-plus" and "WTO-minus" commitments with regard to the application of WTO rules. Regarding trade in goods, important indicators are the binding coverage (i.e. the percentage of tariff lines for which tariffs have been bound), the average level of bound tariffs, and the tariff "water" or binding overhang (i.e. the difference between bound and applied tariffs). In services trade, the breadth of commitments is usually (rather crudely) measured by the number of sectors in which a country has made commitments. Finally, for the assessment of "WTO-plus" and "WTO-minus" commitments no statistical indicator exists, so that these can only be analysed in case studies. In this paper, we assess substantive fairness primarily using descriptive statistics of commitments in goods and services.

Fairness between WTO members and accession countries

An obvious criterion for assessing whether accession countries are treated fairly is to compare the extent of their commitments with those of comparable WTO members.

Acceding countries make more extensive commitments than comparable economies that have been WTO members prior to 1995. In a recent paper the OECD states:

> "The post-Uruguay Round accession countries have also committed in many more sub-sectors than the averages for the 'least-developed' (24) and 'developing and transition economy' (104) categories. Further, the results of recent econometric research suggest that, at a highly disaggregated level, Post-Uruguay accession countries have on average made two and half times more commitments than existing Members [...]. This pattern of commitments could suggest that [...] the flexibility for developing countries to open fewer sectors and liberalise fewer types of transactions has not been as prevalent in the accession process to date." (OECD 2006: 18)[22]

[22] Furthermore, although developing country Members and especially LDC Members have committed significantly fewer services sectors than developed countries, "in certain sectors (e.g. cross-border trade in

Furthermore, Marchetti finds that "acceding countries, mostly low- and middle-income countries, undertook more ambitious commitments than many participants in the Uruguay Round" (Marchetti 2004: 10). Grynberg et al. state that "WTO members in general, and the Quad in particular, use their unique negotiating position, by virtue of inherent flaws of the accession process, to win ever greater concessions from acceding countries, irrespective of their size and economic significance, in the course of their accession to the WTO" (2006: 1 et passim). Similarly, Evenett and Braga note:

> "For both agricultural and non-agricultural goods the average tariff binding that acceding countries were allowed is falling over time and is now at levels well below those agreed by developing countries in the Uruguay Round. In short, from a 'mercantilistic' perspective, the relative price of WTO accession is high (in comparison to Uruguay Round commitments made by peer nations) and growing over time" (Evenett/Braga 2005: 3)

Table 1 and The story is similar concerning service commitments. Taking the number of services sub-sectors committed by countries as a proxy for the "price" of WTO membership, acceded countries have made substantially more extensive commitments than original WTO Members, regardless of their development status (**Fehler! Ungültiger Eigenverweis auf Textmarke.**). For example, LDCs that were founding members made commitments in 20 sectors, whereas acceded LDCs committed 89 sub-sectors.

Table 2 present the commitments made by countries according to their WTO membership and developmental status – Table 1 presents simple average bound tariffs for goods and The story is similar concerning service commitments. Taking the number of services sub-sectors committed by countries as a proxy for the "price" of WTO membership, acceded countries have made substantially more extensive commitments than original WTO Members, regardless of their development status (**Fehler! Ungültiger Eigenverweis auf Textmarke.**). For example, LDCs that were founding members made commitments in 20 sectors, whereas acceded LDCs committed 89 sub-sectors.

Table 2 the number of services sectors, at the most disaggregate level of the WTO services sectoral classification (MTN.GNS/W/120), in which countries have made commitments in any of the modes of supply.

---

financial services and audiovisual services) developing, or least-developed, countries have undertaken more liberal commitments than developed countries" (OECD 2006: 18).

Table 1: Bound and applied tariffs (all goods), by level of development and WTO member status

WTO Member Status		LDC	Developing countries	Developed countries	All countries
WTO Original Members	Av. Bound Tariff (%)	64.2	43.6	11.5	38.4
	Av. MFN Applied Tariff (%)	13.0	10.4	5.5	9.4
	Av. Bound/Applied Tariff	5.6	5.0	2.3	4.3
	No. of countries	*30*	*57*	*40*	*127*
Acceded countries	Av. Bound Tariff (%)	20.3	11.8	9.7	12.4
	Av. MFN Applied Tariff (%)	12.4	6.8	5.7	7.3
	Av. Bound/Applied Tariff	1.6	2.0	1.7	1.9
	No. of countries	*3*	*17*	*5*	*25*
Observer & acceding countries	Av. Bound Tariff (%)	..	..	..	..
	Av. MFN Applied Tariff (%)	15.0	10.9	20.4	13.4
	Av. Bound/Applied Tariff	..	..	..	..
	No. of countries	*12*	*14*	*4*	*30*
Non-Members	Av. Bound Tariff (%)	..	..	..	..
	Av. MFN Applied Tariff (%)	..	..	..	..
	Av. Bound/Applied Tariff	..	..	..	..
	No. of countries	*5*	*7*	..	*12*
All countries	Av. Bound Tariff (%)	60.2	36.3	11.3	34.1
	Av. MFN Applied Tariff (%)	13.3	9.7	6.1	9.6
	Av. Bound/Applied Tariff	5.2	4.3	2.2	3.9
	No. of countries	*50*	*95*	*49*	*194*

Source: Authors' calculations based on WTO World Tariff Profiles 2009 (WTO Membership status: WTO; Development status: OECD DAC List of Aid Recipients effective from 2006).

Table 1 shows that average bound tariffs of acceded countries are substantially below those of founding WTO members.[23] This finding holds both for all countries (12.4% average bound tariff of acceded countries vs. 38.4% of members) and each group of countries based on their development status. Acceded LDC and developing countries also have lower applied tariffs than their peers who are founding WTO members. Finally, the binding overhang of acceded countries is significantly lower than that of original members, and the differences are highest for LDCs: whereas founding least-developed WTO members could increase their average applied tariffs by a factor of 5.6 without having to consider any compensation to WTO trading partners, acceded LDCs could do so only by 1.6. This means that acceded countries have given up a substantial amount of trade policy space in exchange of WTO membership, a cost that founding members did not have to pay.

These findings are corroborated by Grynberg et al. (2006) who also provide additional evidence for the fact that acceding countries are treated less favourably than founding WTO members. Thus, binding coverage of acceding countries is 99.97% compared to 75.12% of original WTO members (2006: 29). Furthermore, "all acceding countries have a lower average tariff rate compared to the average of founding WTO members at a similar level of economic development" (2006: 34).

[23] Table 1 presents average tariffs across all goods. The findings are however robust if disaggregated between agricultural and non-agricultural goods.

The story is similar concerning service commitments. Taking the number of services sub-sectors committed by countries as a proxy for the "price" of WTO membership, acceded countries have made substantially more extensive commitments than original WTO Members, regardless of their development status (**Fehler! Ungültiger Eigenverweis auf Textmarke.**). For example, LDCs that were founding members made commitments in 20 sectors, whereas acceded LDCs committed 89 sub-sectors.

Table 2: Services commitments, by level of development and WTO member status (no. of sub-sectors with commitments, at the most disaggregate level)

WTO Member Status	LDC	Developing countries	Developed countries	All countries
WTO Original Members	19,4	34,0	89,7	48,4
Acceded countries	89,3	93,9	106,4	95,8
All countries	25,7	47,8	91,5	56,2

Source: Authors' calculations based on Grynberg et al. (2006) and services commitment schedules of Saudi Arabia, Viet Nam, Tonga, Ukraine and Cape Verde (WTO Membership status: WTO; Development status: OECD DAC List of Aid Recipients effective from 2006).

Although, as Evenett and Braga (2005) rightly point out, the number of services sectors committed is a crude measure for the price of accession, it nevertheless shows that founding members and accession countries at the same development status are treated differently. Furthermore, the authors are currently in the process of measuring services commitments in a more detailed way, and first results of that research confirm the finding that acceding countries' commitments in services are not only more extensive (in terms of sector coverage) but also deeper (in terms of removal of barriers to market access).

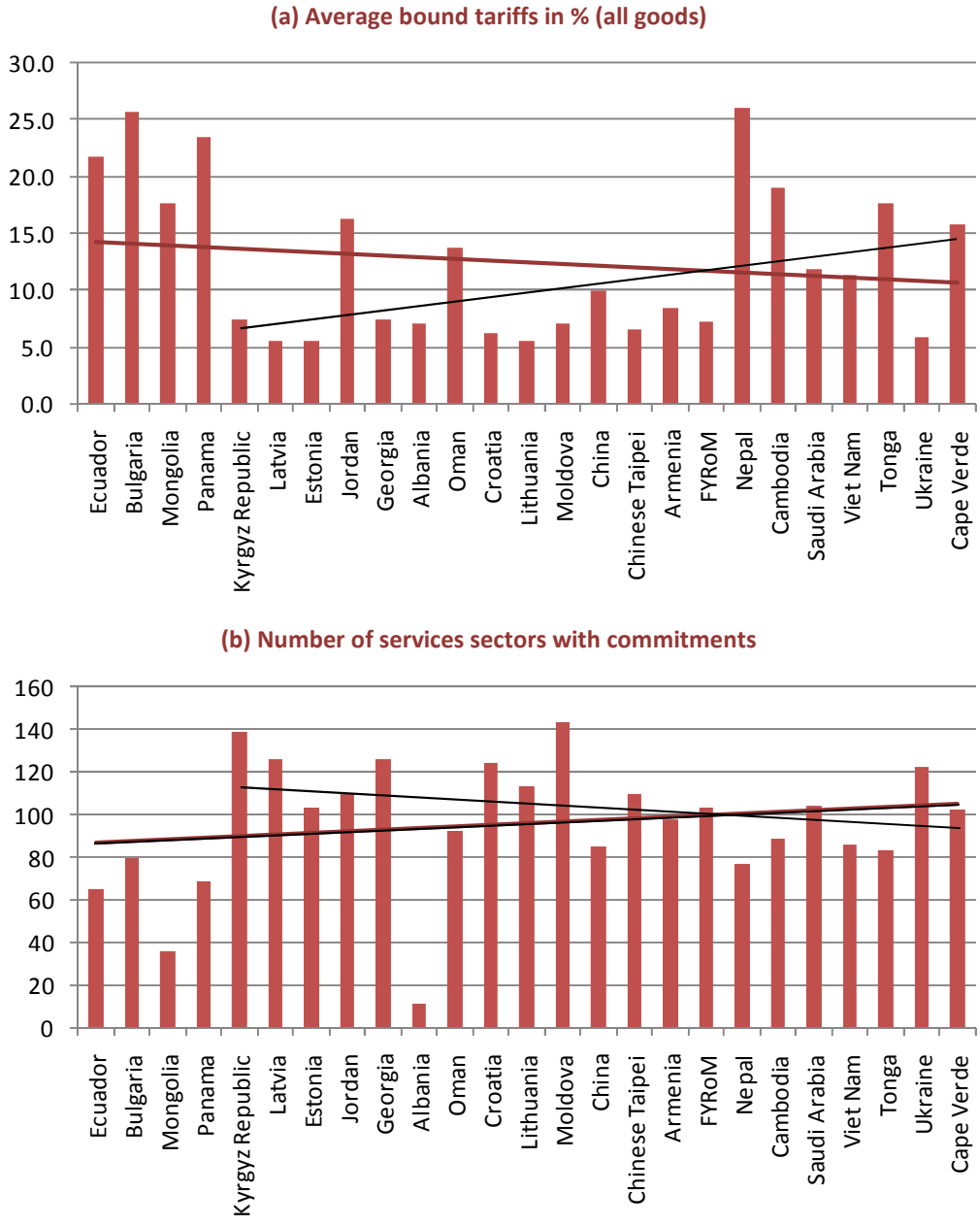
Fairness among accession countries

It has been argued that accessions have become increasingly difficult and recent accession countries have had to offer further commitments than earlier accessions (VanGrasstek 2001). This finding is confirmed by Evenett and Braga who observe that "there is clear evidence that the price of accession – expressed in terms of the extent of market access concessions made by acceding countries – is growing over time" (2005: 3; also see Grynberg et al. 2006: 37f.).

Using the same indicators as above, we do not find a strong support of the hypothesis that the cost of accession is growing over time. Although, if all 25 accessions since 1995 are taken into account, there is a limited linear trend toward lower average bound tariffs and more extensive commitments in services (Figure 1), this finding crucially depends on the inclusion of the first four acceded countries – Ecuador, Bulgaria, Mongolia and Panama – which

acceded under generous terms when compare to later accession countries. If they are not included in the analysis, there is actually a trend towards lower commitments. Nevertheless, this can be explained by the fact that three of the last six accessions were LDC, not by a general trade towards leniency. Therefore, in sum, accessions today do not seem to be more costly than in the late 1990s, with the exception of the first for accessions.

Figure 1: Development of the cost of accession over time

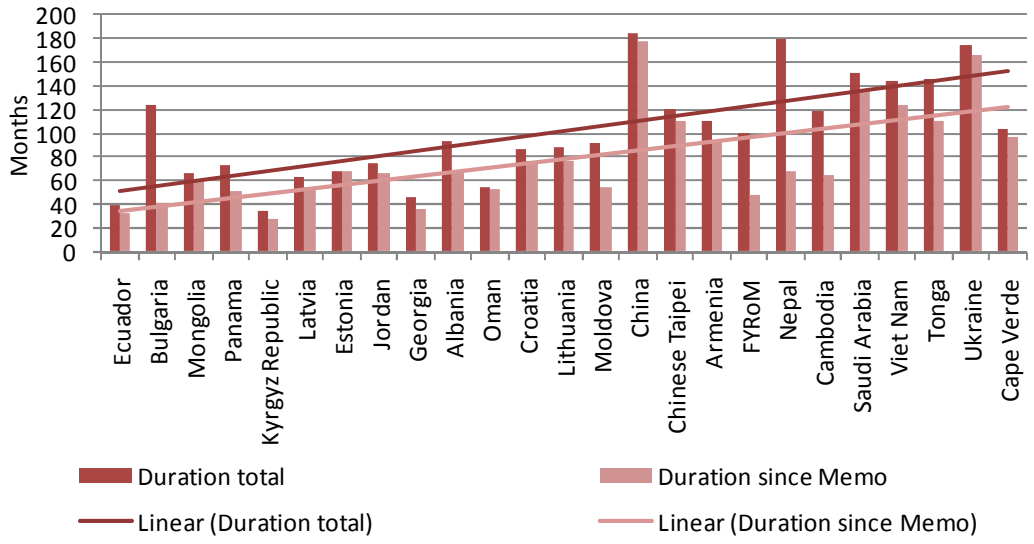


Source: Authors' calculations based on WTO.

However, there is a clear trend towards longer accessions. Regardless of whether one takes the application or submission of the memorandum of the foreign trade regime, which triggers

the start of the actual negotiation process, as the starting point of the accession process the average duration of accessions has increased substantially over time (Figure 2).

Figure 2: Duration of WTO accessions, by date of membership



Source: Authors' calculations based on WTO.

These results pose one question: Why are increasingly long accession negotiations needed to arrive at comparable conditions for accession? Two possible explanations can be offered. Either members are expecting increasingly extensive commitments from acceding countries, or acceding countries are increasingly aware of the differential (unfair) treatment applied by (some) WTO members, and are unwilling to engage in farther reaching commitments than member countries which have a comparable economic structure or level of development. Whichever of the two explanations is right – both show that there is a fairness issue.

Finally, fairness is violated by a lack of coherence across different cases of accession: Although it is true that commitments made by Cambodia and Nepal (which are LDCs) are amongst the most limited of the panel countries, the level of Vietnam's (which is not an LDC) commitments is comparable. On the other hand, Vanuatu's (which is an LDC) failed accession in 2001 has often been cited as an example where WTO members have abused their bargaining power to pressurise the acceding country into excessive commitments not in line with its domestic policy, nor with its development status (cf. Gay 2005). One could add that Cape Verde's accession commitments – Cape Verde's accession was negotiated under the country's LDC status – are substantially higher than those of Nepal and Cambodia: bound tariffs are lower and more sectors have been scheduled. Thus, there is differentiated treatment

within the group of LDCs, and the tendency appears to be towards more extensive commitments in that group.

5 CONSEQUENCES OF THE FAIRNESS DEFICIT

The findings of the previous chapter can be summarised in one short sentence: accession to the WTO lacks both procedural and substantive fairness. The consequences of this fairness deficit are potentially serious, both for acceding countries and, more importantly, for the WTO itself.

First, demands of WTO members for widespread liberalisation commitments to be undertaken by the accession country lead to extended negotiations, which in turn add to the cost burden of the accession country, considering the extensive resources required in terms of staff time and financial resources (e.g. for travels to Geneva[24]). It could be argued that these resources could be more efficiently spent, especially taking into account the resource constraints that many of the acceding countries face.

Even though assistance is often provided by donors for implementing reforms, such assistance comes through other channels, not the WTO, which adds the additional burden to accession countries of having to engage in overlapping negotiations.

A second consequence may be the withdrawal of accession applications. Usually, accession costs are not taken into account in cost-benefit analyses of WTO membership undertaken by acceding countries, but if they are, the long and cumbersome accession procedure may alter the assessment of the net benefits of WTO membership and, if membership costs are deemed to outweigh benefits, accession countries might refrain from pursuing membership further. This is not all that unlikely especially because tangible benefits of WTO membership are usually limited and uncertain, contrary to costs (both accession costs and membership costs induced by extensive commitments).

Third, even if accession negotiations are successfully concluded, some of the commitments that accession countries are expected to undertake, notably related to trade in services, require

[24] Gay (2005) estimates the total costs of Vanuatu missions to Geneva in relation to its (failed) WTO accession at USD 150 thousand.

comprehensive reform efforts in order to make domestic systems compatible with liberalised services sectors. Accession countries are thus confronted with the necessity for complex multiple sector reforms which they might not have the capacity to implement (cf. Grynberg et al. 2006: 52f). It should also be noted that such an outcome is not in line with the WTO's flexibility provisions which state that developing countries are not supposed to engage into anything that is beyond their capacity.

Furthermore, if accession countries feel to have been pushed into commitments by WTO members, they might only implement half-heartedly, or not at all, because they do not believe in them (cf. Finger/Schuler 2000; Grynberg et al. 2006). At worst, this may lead to sectors might end worse off compared to the pre-accession status if opening comes without commensurate reform. Also, the 'locking in' effect of WTO accession, commonly seen as one of the main benefits of WTO membership, might not be achieved.

Finally, and most importantly from a systemic perspective, the fairness deficit in accession negotiations undermines the credibility of the WTO. If the members of an organisation do not hesitate to use their leverage to pressurise an acceding country to the maximum, it can be expected that trade negotiations *within* the organisation are ruled by the same principles.

If such disillusionment with the WTO becomes widespread, this jeopardises the efficiency and effectiveness of trade negotiation processes and hence the WTO in general. Indeed, the criticism of WTO accessions is complemented by a more general criticism of the WTO which has led to a veritable legitimacy crisis of the WTO. Despite special and differential treatment "the least developed and other low-income countries still cannot act as equal partners in the system [...]. This creates important legitimacy concerns for the institution" (Elsig 2007: 87).

6 CONCLUSIONS AND RECOMMENDATIONS

As we have shown in this paper, the accession process to the WTO lacks procedural fairness, and neither can the accession outcomes negotiated under such rules be considered as fair – acceding countries have been treated differently, in a negative sense, than their peer WTO founding members. This has had a negative effect on both acceding countries and the WTO itself. The following recommendations might contribute to overcoming the legitimacy

concerns which have arisen as a result of violating principles of fairness in the WTO accession process.

First, procedural fairness could be strengthened by improving the determinacy, symbolic validation and coherence of WTO rules on accession. Determinacy would be enhanced if Article XII of the Marrakesh Agreement were specified in more detail, e.g. by establishing criteria for the accession "terms to be agreed." Specification of these terms would also contribute to a treatment of acceding developing and least developed countries which would be coherent with the special and differential treatment of developing and least developed members.[25] Finally, once developed in detail, rules on accession could be symbolically validated if they were elevated into a "WTO Agreement on Accession" which would become part and parcel of the WTO rules.

An alternative proposal for reforming the accession process is brought forward by Grynberg et al. They recommend that a "panel of experts examining the WTO compatibility of the applicant's trade and industrial regime could be introduced instead of the self-interested Working Party system" (2006: 53). This proposal would certainly be a major improvement over the current system as it would replace much of the power based accession negotiations. However, this system would still not be a remedy for shortcomings in procedural fairness, as it would neither ensure coherence across accessions nor establish a clear and transparent set of criteria for accessions. Moreover, bargaining over accession commitments would probably be replaced by bargaining over the composition of the panel of experts – and again acceding countries would have little if any leverage in these negotiations.

With regard to substantive fairness, accession countries should not be asked to commit to more than comparable economies that are already WTO members. This means that, in addition to the procedural specifications for accessions as defined by the WTO Secretariat, there should also be a yardstick regarding the degree of commitments expected from acceding countries. This recommendation is similar to the special and differential treatment provisions according to which developing countries should not be asked to commit to more than they can handle according to their state of development and in line with their development goals.

[25] Similar recommendations have also been made by Grynberg et al. who recommend that "at the very least, vulnerable small states should be allowed to have easy entry into the WTO and to access the same special and differential treatment as is enjoyed by other WTO LDC members" (2006: 53). Note, however that the term "vulnerable small states" would require clarification. Also, the fairness aspect that like cases should be treated alike is not made explicit in this recommendation.

However, it goes further in providing criteria, by comparison with similar economies, for assessing of what extent of commitments could be expected from the acceding country. This is not to say that acceding countries should concede as little as possible and make these concessions only after ensuring that they are unavoidable, and try if possible to construe any commitments narrowly. Indeed, one of the opportunities that WTO accession entails is that acceding countries can lock in reform commitments. However, reform commitments must originate from within the acceding country rather than be imposed (or be felt to be imposed) by the WTO or its members. The art here is to find the right balance between the use of the WTO as a platform for change and the fairness of the process. Developing countries should be allowed to try, and so learn from their own mistakes. Acceding countries can be warned of the difficulties of maintaining a particular policy measure (usually protectionist measures) but be allowed to maintain them if they wish (as that would be fair given similar treatment in the past).

In a similar vein, sector reforms (especially reforms of services sectors) should be addressed outside of the WTO context, in the forums devoted to such reforms, and in cooperation with the development partners, unless they are clearly related to trade issues. This has already been proposed in the Sutherland Report (Sutherland et al. 2004: 35ff.). Thus, WTO-plus and WTO-minus commitments should be avoided. Acceding countries should be expected to assume those obligations that are mandatory while other liberalising measures should not be insisted on if acceding countries show resistance against them and if members with a comparable development status have not undertaken comparable commitments.

REFERENCES

Adhikari, Ratnakar/Dahal, Navin 2003: LDCs' Accession to the WTO: Learning from the Cases of Nepal, Cambodia and Vanuatu, Kathmandu: South Asia Watch on Trade, Economics & Environment (SAWTEE).

Beviglia Zampetti, Americo 2006: Fairness in the World Economy: US Perspectives on International Trade Relations, Cheltenham, UK/Northampton, Mass.: Edward Elgar.

Elsig, Manfred 2007: The World Trade Organization's Legitimacy Crisis: What Does the Beast Look Like?, Journal of World Trade 41(1): 75-98.

Evenett, Simon J/Braga, Carlos A: WTO Accession 2005: Lessons from Experience, World Bank International Trade Department Trade Note 22, 06 June 2005.

Finger, J. Michael 2008: Developing Countries in the WTO System: Applying Robert Hudec's Analysis to the Doha Round, in: World Economy 31(7): 887-904.

Finger, J. Michael/Schuler, Philip 2000: Implementation of Uruguay Round Commitments: The Development Challenge, in: World Economy 23(4): 511-525.

Franck, Thomas M. 1990: The Power of Legitimacy Among Nations, New York etc.: Oxford University Press.

Franck, Thomas M. 1995: Fairness in International Law and Institutions, Oxford etc.: Clarendon.

Gay, Daniel 2005: Vanuatu's Suspended Accession Bid: Second Thoughts?, in: Gallagher, Peter/Low, Patrick/Stoler, Andrew L (eds.): Managing the Challenges of WTO Participation – 45 Case Studies, WTO/Cambridge UP, Case Study 43. Also available at http://www.wto.org/english/res_e/booksp_e/casestudies_e/case43_e.htm

Grynberg, Roman/Dugal, Manleen/Razzaque, Mohammad A. 2006: An Evaluation of the Terms of Accession to the World Trade Organization. A Comparative Assessment of Services and Goods Sector Commitments by WTO Members and Acceding Countries, Commonwealth Economic Paper No. 73, London: Commonwealth Secretariat.

Hart, Michael/Dymond Bill 2003: Special and Differential Treatment and the Doha "Development" Round, in: Journal of World Trade 37(2): 395-415.

Hudec, Robert E. 1987: Developing Countries in the GATT Legal System, Aldershot/Brookfield: Gower.

Jackson, John H. 1997: The World Trading System. Law and Policy of International Economic Relations, 2nd ed., Cambridge, Mass.: MIT Press.

Kavass, Igor I 2007: WTO Accession. Procedure, Requirements and Costs, in: Journal of World Trade 41(3): 453-474.

Kessie, Edwini 2000: Enforceability of the Legal Provisions Relating to Special and Differential Treatment under the WTO Agreements, in: Journal of World Intellectual Property 3(6): 955–975.

Konow, James 2008: Is Fairness in the Eye of the Beholder? An Impartial Spectator Analysis of Justice, Social Choice and Welfare 33(1): 101-127.

Lanoszka, Anna 2001: The World Trade Organization Accession Process: Negotiating Participation in a Globalizing Economy, in: Journal of World Trade 35(4): 575-602.

Marchetti, Juan A. 2004: Developing Countries in the WTO Services Negotiations, WTO Staff Working Paper ERSD-2004-06, Geneva, 20 September 2004.

OECD 2006: Special and Differential Treatment under the GATS, OECD Trade Policy Working Paper No. 26 (TD/TC/WP(2005)24/FINAL), 26 January 2006.

Olivares, Gustavo 2001: The Case for Giving Effectiveness to GATT/WTO Rules on Developing Countries and LDCs, in: Journal of World Trade 35(3): 545-551.

Panagariya, Arvind 2002: Developing Countries at Doha: A Political Economy Analysis, in: The World Economy 25(9): 1205-1233.

Qin, Julia Ya 2003: "WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System, in: Journal of World Trade 37(3): 483-522.

Rawls, John 1971: Theory of Justice, Cambridge, Mass: Harvard University Press.

Scharpf, Fritz W. 1999: Governing in Europe. Effective and Democratic? Oxford: Oxford University Press.

Sen, Amartya 2009: The Idea of Justice, Cambridge, Mass.: Harvard University Press.

Shor, Mikhael 2007: Rethinking the Fairness Hypothesis: Procedural Justice in Simple Bargaining Games, December 2007, Available at SSRN: http://ssrn.com/abstract=1073885.

Smith, Adam 1790: The theory of moral sentiments, or, An essay towards an analysis of the principles by which men naturally judge concerning the conduct and character, first of their neighbours, and afterwards of themselves, London.

Sutherland, Peter et al. 2004: The Future of the WTO. Addressing Institutional Challenges in the New Millenium. Report by the Consultative Board to the Director-General Supachai Panitchpakdi, Geneva: WTO.

Tang, Man-Keung/Wei, Shang-Jin 2006: Does WTO Accession Raise Income? When External Commitments Create Value, NBER Working Paper, Available online at http://www.nber.org/~wei/data/tang&wei2006/WTO-Accession_journal_version_060706.pdf.

VanGrasstek, Craig 2001: Why demands on acceding countries increase over time: A three-dimensional analysis of multilateral trade diplomacy, in: UNCTAD: WTO Accessions and Development Policies, New York and Geneva: UN, 78-95.

Weiler, Joseph 2000: Cain and Abel – Convergence and Divergence in International Trade Law, in Weiler, Joseph (ed.): The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade. Oxford: Oxford University Press.