

Challenges of “On Terms to Be Agreed” in WTO: LDC’s Experiences for Ethiopian

Solomon Girma

LL.B (Haramaya University), LL.M (Addis Ababa University), Senior Lecturer of Law at Madda Walabu University, School of Law

Abstract

Ethiopia has been in the process of accession to the WTO since January 2003. Accession to the WTO is not an end by itself but it’s a key element for speed up national development goal directly or indirectly. Indeed, lessons from recently accessed countries indicate that, the WTO accession process is quit complex and demands well preparation in order to take decisions on trade policy reforms to meet the requirement of accession. Thus, this article examines the experience of Least Developed Countries which has been finalized their WTO accession process i.e. Cambodia, Nepal, and Yemen. Finally, the article has found that, in toting up to personal knowledge and skill of negotiators, Ethiopia shall bargain after deep studies on the commitment packages to reduce possible challenges and to prepare for remedy by formalizing institutional mechanisms open for stakeholder’s participation.

Key terms: WTO Accession Process, Experiences of LDC’s, Ethiopia Accession

DOI: 10.7176/JLPG/86-02

Publication date: June 30th 2019

Acronyms

GATT	General Agreement on Tariffs and Trade	WTO	World trade organization
TRIPs	Trade Related Aspects of Intellectual Property	LDCs	Least Developed Countries
MFTR	Memorandum on the Foreign Trade Regime by the Acceding Country	UNCTAD	United Nation Conference on Trade Development
UNDP	United Nation Development Program		

1. INTRODUCTION

The World Trade Organization (WTO) provides the institutional and legal foundation for the new multilateral trading system being January 1995.¹ WTO agreement² recognized two ways of membership. The first membership is commonly known as “original members.” Original members are contracting parties of the old GATT (1947) which was opened for limited period at the establishment of WTO. The second membership is “Membership by Accession” i.e. the process of new applicant becoming a member through terms of negotiation with original members.³ 164 members since 29 July 2016, with dates of WTO membership and there are currently 47 least-developed countries on the UN list, 36 of which to date have become WTO members.⁴

However, it is not surprising that there is no definition of a developing country under WTO set up.⁵ It may be so because there is no uniform of development among the developing countries and there is various stage of development among the developing countries.⁶ As it has been seen from experience of newly- acceding country to WTO, they could be forced “to undertake obligations” (often called, “WTO-plus obligations”) and they get hold of less-than full rights that subsist within the system (often called “WTO- minus right”).⁷

In response to WTO-plus/minus criticism, the Doha Ministerial Declaration⁸ pledge a special procedures to accelerate the accession of LDCs.⁹ In 2002, WTO General Council was passed a decision which was designed to

¹ Croome Jone, *Guide to the Uruguay Round Agreement*, Kluwer Law International (1999),p.1

² Since **Marrakesh Agreement** Establishing the World Trade Organization is not only cover WTO institutional set up but also all Uruguay Round Agreements attached as Annexes, for the purpose of this article it will be referred as WTO agreement.

³ WTO agreement article XII, Any state or customs territory having full autonomy in the conduct of its Trade policies may become a member (“accede to”) the WTO, but all WTO members must agree on the terms. This is done through the establishment of a working party of WTO members and through a process of negotiations. See WTO agreement available at http://www.wto.org/english/thewto_e/acc_e/acc_e.htm.

⁴ This data was taken from WTO official website on membership profile, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. (Accessed on 8 June 2019).

⁵ Manjula Garu, *supra* note 5, p.343

⁶ *Ibid*.

⁷ Melaku Geboye, *Ethiopians Reluctant Move to Join the WTO: A Preliminary Look at Legal and Institutional Implications of Accession*, Journal of Ethiopian law (2008), p. 33

⁸ See Article 42 of Doha Ministerial Declaration (2001). Available http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm. (Accessed on, 12 November 2018).

⁹ Melaku Geboye, *supra* note 9, p. 33

streamline and facilitate the accession process for LDCs.¹ The adoption of this Decision has been followed by the successful accession of Cambodia and Nepal in 2003, the first and so far the only LDCs to join the WTO since its establishment in 1995.² On the other hand, based on recommendations made by the sub-committee on LDCs, General Council has adopted a new guideline for LDCs accession in July, 2012. After two years later of the adoption, on 26 June 2014 Yemen became 160th WTO member. In view of the fact that, WTO Agreement package provides little direction on how negotiations should have been conducted. Because, it simply stated possibility of accession once the state or a separate customs territory agreed on “terms to be agreed between them and the WTO”.³

“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.”⁴

Meanwhile, the predictable terms and the automatic process of membership on other international institutions, accession to the WTO involve a series process of bilateral and multilateral negotiations and decisions of the Working Party by consensus.⁵ These days, the WTO accession process initiated by filing of an application by acceding country and the establishment of a working party. The accession process is carried out on two parallel and often overlapping tracks a multilateral track that aims to find out the relevant laws, policies and practices of the acceding country and ensure they are brought into conformity with WTO rules and a bilateral track that aims to exact as may specific commitments from the acceding country as are deemed reasonable by each member of working party.⁶

Ethiopia applied for the accession to the WTO in January 2003, and WTO’s General Council has established a Working Party. Ethiopia submitted a Memorandum of Foreign Trade Regime of the country for the consideration of WTO members. Until December 2012 the working party has met three times and Ethiopia is in the process of responding to its fourth set of questions from WTO members about the workings of its economy and trade regime.⁷ Thus, this article aims to examine experience of Cambodia, Nepal, and Yemen to draw a lesson to Ethiopia.

2. Methodology

This research is conducted based on doctrinal legal research methodology. In this research, qualitative research methodology has been employed; variety of data sources including laws, cases, publications and other relevant academic literatures has been analyzed. WTO laws are also examined in detail, however, as the quantity of available LDC experiences are few in number, the article assess the accession process of Cambodia, Nepal, and Yemen.

3. LITERATURE REVIEW

3.1. The Accession of Cambodia

Cambodia applied for the membership of WTO in 1994.⁸ Following the Doha Declaration of November 2001 that eased membership conditions for least developed countries, Cambodia’s membership was finally approved in September 2003 at the Cancun Ministerial Conference.⁹ Cambodia agreed to an overall average bound duty rate of 20 percent, whereas the average rate of duty actually applied in 2003 was 16.5 percent. For agricultural products, Cambodia agreed to a simple-average bound rate of 28 percent, which was higher than the average applied rate of 19 percent in 2003 and peak bound rates for the most sensitive agricultural products were 50–60 percent and the lowest bound rates were 5 percent.²¹

For industrial products, the average bound rate was 18 percent, compared with the rate actually applied in 2003 of 16 percent. Peak bound rates were 50 percent, and the lowest rates, 0 percent.²² Cambodia was not required significant reductions in tariffs upon WTO accession because of unilateral tariff reductions undertaken

¹ *Ibid.*

² *Ibid.*

³ Adhikari and Navin Dahal, *Making WTO Membership Work for Least-developed Countries: Lessons from Nepal and Cambodia* (2008), p. 3

⁴ Article XII(1) of Agreement Establishing the World Trade Organization (1994)

⁵ Elias N. Stebek, *WTO Accession in the Ethiopian Context: A Bittersweet Paradox*, Mizan Law Review (2007), p.107

⁶ Melaku, *supra* note 6, p.31

⁷ Tilahun Esmael, *Ethiopia’s WTO Accession and Financial Services Liberalization: Striking the Balance Between Trade Liberalization and Domestic Policy Space*, Mizan Law Review volume (2012) p.208

⁸ WTO home page, Cambodia and the WTO members’ information/Cambodia. Available at http://www.wto.org/english/res_e/booksp_e/casestudies_e/case8_e.htm. (Accessed on, 7 June 2019).

⁹ Fuzhi Cheng, *Cambodia’s WTO Accession*, Cornell University (2007), p.3

in the 1990s²³ In terms of market access in services; foreign involvement was generally permitted except in a very limited number of areas where local initiatives might be threatened.²⁴In terms of subsidies, Cambodia agreed to comply with the Subsidies Agreement from the Protocol of Accession and export subsidies in agriculture at zero and not to apply such subsidies in the future.¹

Additionally, Cambodia was granted four transition periods, delaying implementation of TRIPS (excluding pharmaceuticals and agricultural chemicals) until January 1, 2007; the Agreement on Technical Barriers to Trade (TBT) (product standards and technical regulations ensuring the safety of products) until January 1, 2007; the Agreement on Sanitary and Phytosanitary Measures (SPS) (measures to protect the health of people, plants, and animals) until January 1, 2008; and the Agreement on Customs Valuation until January 1, 2009.²⁵

3.2. The Accession of Nepal

Nepal application for accession was filed in 16 May 1989 and re-applied on 5 December 1995 and became the 147th member of the WTO on 23 April 2004. Nepal is the first LDC to join the WTO through the full working party negotiation.² Nepal was granted a transition period until 1 January 2007 for implementing four WTO agreements: The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), the Agreement on Customs Valuation, TBT and SPS.³ Nepal was able to bind its average tariff on agricultural products at 42 per cent and 24 per cent for non agriculture. Nepal has opened up 11 services sectors and 70 sub-sectors. Nepal is required to introduce or amend 37 different policies, legislations and rules in order to fulfill Nepal commitment on goods, services or intellectual property regime as a Member of the WTO.⁴

Notwithstanding the shortcomings, stakeholder participation during Nepal's accession process, helped negotiators to avoid joining International Union for the Protection of New Varieties of Plants, maintain higher bound tariffs on agricultural commodities, develop conditions for opening up services sectors and build public opinion.⁵ According to the Legislative Action Plan (LAP), Nepal was to enact 10 new laws/regulations, amend 25 existing laws/regulations, ratify three international Conventions and establish two enquiry points.⁶

3.3. The Accession of Yemen

Yemen applied for WTO membership on 12 April 2000 and the Working Party was established on 17 July 2000.⁷ WTO Ministers adopted Yemen's WTO terms and conditions of entry at the 9th Ministerial Conference in Bali, Indonesia on 3-6 December 2001 and 26 June 2004, the WTO welcomed Yemen as its 160th member. Yemen would apply an average final bound rate (effectively maximum rates) of 21.1 per cent for all products (24.9 per cent on average for agricultural products, and 20.5 per cent for the rest).⁸ Yemen would bind its agricultural export subsidies at zero upon accession and agreed to implement the Customs Valuation Agreement by 31 December 2016. By 1 January 2017, Yemen would eliminate certification and notarization requirements for exports to the country. Technical Barriers to Trade Agreement and the Sanitary and Phytosanitary Measures Agreement will be implemented by 31 December 2016. Yemen also has made specific commitments in all 11 core services sectors and 78 sub-sectors.

4. RESULT AND DISCUSSION

Cambodia was required to prepare voluminous and complex documentation regarding its trade regime for goods and services, and has engaged in lengthy negotiations with the WTO Member Countries, both at the bilateral and multilateral level.⁹ In the Services Offer, the challenges lie in its understanding on the policy and economic implications arising from the various services sector commitments like telecom, financial services and professional services.¹⁰ Moreover, Cambodia had to ensure that its concessions and commitments made under the WTO accession process are consistent with other international obligations.

Since the accession process of the WTO membership is challenging and prolonged due to lack of clear

¹ *Ibid.*

² WTO home page, Nepal and the WTO members' information/Nepal, available at http://www.wto.org/english/thewto_e/ccountries_e/nepal_e.htm. (Accessed on, 12 September 2019).

³ Ratnakar Adhikar, *et al.*, *Ensuring Development-Supportive Accession of LDCs to the WTO: Lessons from Nepal*, South Asia Watch on Trade, Economics & Environment (2008), p.31.

⁴ *Ibid.*

⁵ Rajkamikar, P.R. *Nepal: The Role of an NGO in Support of Accession*. WTO (2005) as cited in Ratnakar Adhikar, *et al.*, *Ensuring Development-Supportive Accession of LDCs to the WTO: Lessons from Nepal*, South Asia Watch on Trade, Economics & Environment (2008), p.33

⁶ *Ibid.*, at 37

⁷ WTO home page Yemen and the WTO members' information/ Briefing note: Yemen's accession to the WTO, available at http://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_acc_yemen_e.htm. (Accessed on, 13 November 2018).

⁸ *Ibid.*

⁹ Fuzhi Cheng, *supra* note 18, p.4

¹⁰ *Ibid.*

guidelines in Article XII of Marrakesh Agreement on “terms to be agreed between acceding country and WTO,”¹ Ethiopia has been passing throughout multifaceted steps like Cambodia though the WTO consented to simplify and streamline the negotiation process for LDCs. Opening the services sector like telecom, financial services for negotiation is also required. Compatibility and consistency of commitment with other international obligations including regional trading arrangements will also increase burden. Therefore, Ethiopia has a possibility of WTO-plus obligations and WTO- minus right in accession process.

More importantly Cambodia has less capability to become major players in the world market or power to disrupt other WTO member’s domestic markets was contribute a large impact to facilitate and expedite the accession process.² On the other hand, Cambodia’s unilateral tariff cuts and both legislative and institutional improvements before accession have been a key step to successfully accede.³ A group of experts from UNCTAD offered extensive technical advice to Cambodian negotiators while other bilateral and multilateral donors provided some (albeit limited) help to the government in conducting its accession negotiations,³² Opportunities like unilateral tariff cuts and legislative and institutional improvements before accession also still in the hands of Ethiopia which is a good lesson from Cambodia.

Additionally, Ethiopia has a potential to use the existing and even ask new technical advice from different international organization, donators, and WTO. Unlike Cambodia, Ethiopia has potential to learn from the experiences of different states that join after old GATT. Finally for Ethiopia, technical assistance is vital not only at the stage of accession process but also to implement accession commitments of LDCs as well as to reap the benefits of WTO membership.³³ In the negotiation process, states make sure that terms and conditions of accession shall be compatible with its national development goals by taking into account the desire for policy space, institutional and infrastructure capacity.⁴ In this regard Nepal was mistaken by accepting some commitments incompatible with her national development goal.⁵

Nepal’s commitments in the WTO reveals that accession package is more stringent than that of other least-developed WTO Members and even many developing countries.⁶ Despite weak institutional capabilities, limited technical know-how and financial resources, Nepal was able to negotiate a fairly respectable accession package.⁴¹ As reviled from Nepal Experience scarifying own national development policy without considering the adverse effect of such commitment which amount negative gain, then careful examination on the impact of a given commitment in the future should be considered before interring into the commitment.

On the other hand, UNDP gave significant technical assistance to Nepal including support in the preparation of negotiating documents, commissioning some background papers, building negotiating capacity and promoting public awareness of WTO membership. Active participation of different stakeholders also have a positive side in mitigating burden of commitment even if the majority of stakeholders felt that they were left out from the accession process due to the lack of institutionalized mechanism for engagement. The role of active stake holder’s participation in the Nepal accession process was a good experience for Ethiopia. In order to benefit from the above experiences, Ethiopia shall formalize and institutionalize stakeholder participation that mitigate burden of commitment. Asking technical assistance is also another lesson.

Yemen WTO accession process becomes stringent even when it compared with Cambodia and Nepal even if the 2012 accession guideline is exist. Special and differential treatment arrangements have lost their objective in case of Yemen. Very short grace period has been granted for the implementation. Since Yemen experience is recent experience and Ethiopia should design competing strategy to mitigate such kind of harsh commitments package. The EU has been supporting Yemen's accession to the WTO since 2003. The EU Trade Related Assistance for Yemen (so called TRAY) has support relevant institutions in implementing the commitments undertaken upon accession. Ethiopia has also a potential to ask different technical assistance with regards to accession process and implementation of commitments. Building new mechanisms and finding sufficiently trained individuals is also required to begin the final deal.

¹ Hussein Ahmed, *Making the WTO accession work for Ethiopia: Lessons from Cambodia and Nepal* , P. 11. Available at SSRN: <http://ssrn.com/abstract=2293007> (Accessed on, 10 November 2014).

² Siphana *Cambodia Enters the WTO: Lessons Learned for Least Developed Countries*, Research Policy Brief (2005), as cited in Fuzhi Cheng, *Cambodias WTO Accession*, Cornell University (2007), p.3

³ Hussein Ahmed, *supra* note 29 p.7-11

⁴ United Nations Department of Economic and Social Affairs (UN-DESA), *Nepal’s accession to the World Trade Organization: case study of issues relevant to least developed countries*, Excerpt from Posh Raj Pandey et al (2011), p.3

⁵ One of the most controversial issues during Nepal’s accession process was that it was asked to join UPOV. Agreeing to this could have led Nepali farmers to compromise their traditional right to save, exchange, replant and sell seeds For instance contrary to Article 15 of the Agreement on Agriculture (AoA) which excludes LDCs from all reduction commitments under the Agreement, Nepal has withdrawn the right to subsidize agriculture exports. On the other hand Nepal did not have any TRIMs at the time of accession, but was asked to make a commitment not to introduce any such measures in the future.

⁶ Ratnakar Adhikar, *et al, supra* note 23, p.50

5. CONCLUSION

Despite the WTO accession guidelines, LDCs have long complained that WTO members routinely ask them to take on commitments beyond their capacities during the bidding process.⁴⁶ These commitments also tend to exceed those required from LDCs and other developing countries that joined the organization in its early years.⁴⁷ Even though this perceived tectonic shift in the nature of the regime to a more rule-based system, the accession process for applicant states under Article XII of the Marrakesh Agreement remains relatively vague and leaves little guidance as to the terms for admission.⁴⁸ The experience of Cambodia, Nepal and Yemen also affirm the above stated fact. Ethiopia as an applicant to join WTO has not far from the existing reality.

Undeniably, like Cambodia Nepal and Yemen, Ethiopia is more expected to be asked to liberalize its services sectors including the one that the government currently considers as the key sectors such as financial, telecom, professional, distribution, education and others for foreigners' involvement and competition. Short term transition period to implement accession commitments and less benefit from special and differential treatments is also a current trend in WTO accession process.

To mitigate WTO plus obligation and minus right, apart from personal knowledge and skill of negotiator, Ethiopia should negotiate in well planned manner with deep studies on potential areas of commitment. Formalized institutional mechanism for stakeholder's participation is also a key instrument to reduce burden comes from WTO accession.

6. RECOMMENDATION

Accession process is not the only mandate of negotiators but also it is a concern of different stakeholders including private stake holders and donors. Thus, in addition to active participation of different stakeholders, Government of applicant state must have clear political commitment on the process. Building new mechanisms and finding sufficiently trained individuals are also required to deal membership negotiations. For LDCs like Ethiopia, bilateral negotiations with WTO Member States on market access must not undermine the long-standing interests of the state because once state become member, mandatory principles of WTO become enforced and members states are required to act in accordance with those principles. Build political support for accession among key WTO members working simultaneously at all.

The acceding state must give due attention on legal frameworks whether compatible with WTO guiding rule or not at accession stage, and even after accession successive legal reform will be needed to cope up new changes in international trading system. Since LDCs are now facing serious capacity constraints while preparing a complex and detailed MFTR, responding to the questioning raised by members, submitting good and service offer proposal and conducting lengthy bilateral negotiation, technical assistance is mandatory during the accession process. This technical assistance must also extend in post accession i.e. implementation period.

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