

ADDIS ABABA UNIVERSITY
SCHOOL OF LAW AND GOVERNANCE

ACCELERATED ACCESSION OF LEAST DEVELOPED COUNTRIES TO
WTO UNDER THE 2002 AND 2012 GUIDELINES

By

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May, 2017

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A THESIS SUBMITTED TO THE SCHOOL LAW AT ADDIS ABABA UNIVERSITY
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE
DEGREE OF LL.M IN HUMAN RIGHTS

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DECLARATION

I, Betelhem Tariku Tafere, hereby declare that this dissertation is my own original work and has never been presented in any other institution. I also declare that where sources are used, they are duly acknowledged.

With Regards!

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ACKNOWLEDGEMENT

It's my pleasure to recognize and thank the people who have been there for me in all aspect of life and academic thrive but God is my primary guide and I would love to thank him for getting me this far. My advisor has helped me a lot and pushed me to utilize my potential. My parents and my husband have also been there for me through thick and thin. So thank you everyone.

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ACRONYMES

ASCM	Agreement on Subsidies and Countervailing Measures
AoA	Agreement on Agriculture
EBRD	European Bank for Reconstruction and Development
EC	European Commission
EFTA	European Free Trade Association
EU	European Union
GATT	General Agreement on Trade and Tariffs
GATS	General Agreement on Trade in Services
GDP	Gross domestic product

IMF	International Monetary Fund
LDC	Least developed country
MFTR	Memorandum on Foreign Trade Regime
MFN	Most favoured nation
NAMA	Non agricultural market access
ODC	Other duties and charges'
PDR	People's Democratic Republic
PCT	Patent Cooperation Treaty
UN	United Nations
UNCTAD	United Nations Conference on trade and development
UPOV	International Union for the Protection of New Varieties of Plants
US	United States
SPS	Sanitary and Phytosanitary
S&D	Special and differential treatment
TBT	Technical Barriers to Trade
TRIM	Trade related Investment Measure
TRIPS	Trade related Intellectual Property Rights
WIPO	World Intellectual Property Organization
WIPO	World Intellectual Property Organization
WP	Working party
WTO	World Trade Organization

CHAPTER ONE

GENERAL FRAMEWORK OF THE RESEARCH

1.1 Background and Justification

Trade is and has always been the backbone of any country's economy. Although there are imbalances in the gains from trade, no single country is self-sufficient to fulfill the demand of its population. Therefore, trade ensures the availability and diversity of goods and services with a competitive price. Having recognized that trade is indispensable to any nation; countries have been using bilateral agreements as bases of trade between themselves for a long time. Since the end of the Second World War a multilateral agreement has been established to regulate cross-border trade among nations, first in the form of the General Agreement on Trade and Tariffs (GATT) and later, the World Trade Organization (WTO).

WTO has the objective of liberalizing multilateral trade, based on the belief that the liberalization of trade brings multiple of benefits to the world population. To this end, the preamble to the Agreement Establishing the WTO (Marrakesh Agreement), provides that "the Parties to this Agreement, recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand." Countries also join WTO based on the belief that a liberal trade regime will confer these benefits.¹ More specifically, membership to the WTO may have benefits of "(a) strengthening of domestic policies and institutions for the conduct of international trade in both goods and services; (b) improvements in the ease and security of market access to major export markets and (c) access to a dispute settlement mechanism for trade issues".² Whether each of these benefits will accrue from a WTO accession alone could be a subject of debate but despite the debate the number of WTO Members continues to rise reaching 162 now.³

¹ Hussen Ahmed Tura, *Making the WTO work for Ethiopia lessons from Cambodia and Nepal*, at <http://www.abiysinialaw.com>, (accessed December 20, 2014)

² Constantine Michalopoulos, *WTO accession* (world bank, June 2001), at http://info.worldbank.org/etools/docs/library/89443/Tu_0601/Michalopoulos2.pdf, (accessed June 7, 2015)

³ WTO, *understanding the WTO*, (2016), https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, (accessed on March 20, 2016)

Before 1997, there were two ways of becoming a WTO member provided by WTO Agreement. The first “original membership was provided for in article XI of the WTO Agreement and allowed contracting parties to the GATT 1947 to join the WTO by :

- Accepting the terms of the WTO agreement and the multilateral trade agreements and
- Making concessions and commitments for both trade in goods and services⁴

The second way of becoming a WTO member is through accession. The Marrakesh Agreement provides “*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*”⁵, leaving the actual procedures of accession to negotiation between WTO and the applicant.

The process of accession to the WTO can be divided into an introductory phase of formalities and three substantive phases.⁶ “The three substantive phases involve: (a) the applicant's preparation of a Memorandum on the Foreign Trade Regime describing in detail its policies and institutions that have a bearing on the conduct of international trade; (b) the members' fact finding phase; (c) the negotiation phase.”⁷ Throughout these phases the applicant is faced with meeting the requirements of the WTO and demands from Members⁸ with no right to ask for any commitment from existing members in return.

Typical accession negotiations even when there are no major setbacks take long, often taking more than a decade.⁹ “Least developed countries (LDCs); in particular lack the administrative capacity to conduct the complex negotiations to develop and apply the necessary changes in national legislations and practices.”¹⁰

“LDCs are a group of countries which have been recognised as least developed, by the United Nations organization, in terms of their low GDP per capita, their weak human assets and their

⁴ Peter Van Den Bossche, *The law and policy of the world trade organisation: texts, cases and materials*, at 110 (Cambridge University press, second edition 2008)

⁵WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4, at article XII (1999, 1867 U.N.T.S. 154, 33 I.L.M. 1144, 1994)

⁶ Michalopoulos, *supra* note 2

⁷ *Id*

⁸ *Id*

⁹ *Id*

¹⁰ Bossche, *supra* note 4

high degree of economic vulnerability.”¹¹ A number of the WTO Agreements recognize the need to treat LDCs with special and preferential treatment and with regard to accession the Doha Ministerial Declaration states that accession of LDCs was a priority and pledged to work to facilitate and accelerate negotiations with acceding LDCs.¹² Subsequently, specific guidelines on accessions of LDCs were adopted in December 2002.¹³ At the Eighth WTO Ministerial Conference in December 2011, trade ministers decided to “further strengthen, streamline, and operationalize the 2002 LDC accession guidelines,”¹⁴ The General Council formally approved new guidelines on 25 July (2012) establishing benchmarks on goods and services, as well as elements on special and differential treatment, transition periods, transparency, and technical assistance.¹⁵

Currently 34 LDCs are members of WTO and 8 others are in the process of (accession).¹⁶ Since the adoption of the Guidelines, six LDCs have acceded to the WTO, Nepal, Samoa, Vanuatu and Cambodia before July 2012 and Lao Peoples Democratic Republic and Yemen after (2012).¹⁷ An overview of the commitments taken by these countries and the duration of the accession negotiations triggers a question as to the difference these Guidelines have brought in the LDCs accession.

1.2 Statement of the problem

WTO should be a place where the economy of its members improves through fair competition and the commitments taken up should be drivers of that change. For that to happen terms of accession should be definite and clear so that the accession process is precise and every member has a fair shot at the opportunities presented by the organization. However the lack of this clear accession terms for new members has made it very difficult for new comers to compete in equal

¹¹ One world Nations online, Least developed countries (2014), at http://www.nationsonline.org/oneworld/least_developed_countries.htm, (accessed December 20, 2015)

¹² International center for trade and sustainable development (November 2012), an analysis of the WTO accession guidelines for Least Developed Countries, at <http://www.ictsd.org/downloads/2012/11/an-analysis-of-the-wto-accession-guidelines-for-least-developed-countries.pdf>, (accessed December 26, 2014)

¹³ Id

¹⁴ Id

¹⁵ Id

¹⁶ WTO, *Understanding the WTO: The organization, least developed countries* (2015), at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm, (accessed December 20,2014)

¹⁷ WTO, *Understanding the WTO: The organization, Members and observers* (2015), at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, (accessed June 6, 2015)

terms with other members. LDCs particularly, lack the resource and expertise to negotiate good terms of accession as a result of which accessions get dragged out for decades that the claimed preferential treatment of the WTO, towards these countries is proving ineffective. Even if the guidelines for accessions of least-developed countries were adopted in December 2002 and allegedly improved in 2012, the experiences of the list developed countries that acceded after 2002 shows us that accession is still a political rather than a legal matter.

Even with the revision in 2012, the new LDC accession guidelines have however been criticized claiming that these guidelines could seriously harm, rather than help, the LDCs in their accession process.

1.3 Research questions

This study has analyzed the problems stated above and answers the following questions:

- What are the underlining principles of the 2002 and 2012 Guidelines?
- What are impacts of WTO accession to an LDC?
- Have the Guidelines been used in the accession negotiations of LDCs?
- What are the weaknesses of the Guidelines and its application to actual cases and how can they be improved?

1.4 Objective of the research

The general objective of the study is to assess the state of play of LDCs accession to the WTO and evaluate the impacts of the 2002 and 2012 accession guidelines on accession of LDCs. The specific objectives of the study are:

- To examine the WTO rules on accession;
- To describe challenges faced by LDCs in the accession;
- To analyze the terms of accession of LDCs in the light of the 2002 and 2012 Guidelines and assess whether or not the terms of the Guidelines are implemented.
- To come up with recommendations for improvement of the LDCs accession process.

1.5 Significance of the study

It is indicated above that trade plays a vital role in a country's economy and survival. It is thus evident that WTO as an organization that regulates the trade relations of countries all over the world is also a significant player in one country's development as is the process of membership to the organization. The membership process and the amount of obligation conferred by it will surely determine how successful a country will be in achieving the goal it set out to accomplish. Going hand in hand is also the issue of time and the resource and expertise that is needed to get a good deal out of the process of the membership negotiation. List developed countries with the obvious shortcomings of resources and expertise suffer from a lengthy accession processes and "WTO+" obligations they are unable to fulfill. The 2002 and 2012 accession guidelines for LDCs have allegedly tried to solve this problem. Although the area of accession has been researched a lot, less attention has been given to the effect the guidelines have on accessions after them. This study has examined how these guidelines have performed on actual cases of accession after their formulation and therefore will

- Contribute to the realization of the much needed special and preferential treatment towards LDCs.
- Serve as a bed rock for utilization of the guidelines in the ongoing accession of Ethiopia and other LDCs to the WTO and its acceleration.
- Indicate a much suited solution to make LDCs welcome to the organization.

1.6 Scope and limitation

This study is limited to the accession issues that happened after the 2002 accession guidelines. Even though it included some comparisons of the pre 2002 and pro 2002 accessions it has not seen the details of accessions before 2002, where the first guideline was formulated. The study is also limited that it only sees accessions of least developed countries and the problems posed by the WTO system against their speedy accession.

In addition although the special and preferential treatment conferred to LDCs in the organization is a base for the guidelines the study only focuses on the guidelines themselves rather than referring to these rights directly as it is difficult to put each one into a concrete claim against the organization.

At the end of the study, series of recommendations are forwarded for a better fitted interpretation of the special and preferential treatment, least developed countries are conferred with in all the WTO agreements and towards an accelerated and fair accession. However the study did not formulate a hard and fast rule for the accession of LDCs in the future.

1.7 Methodology

This study is all about the effect the 2002 and 2012 accession guidelines have on the actual cases of least developed countries acceding to the WTO. Accordingly, literature review, legal analysis and case analysis are the major research methods that are to be adopted in conducting this research. A comparative approach has also been used to show the state of play of the accession following the adoption of the Guidelines.

CHAPTER TWO

ACCESSION TO THE WTO: GENERAL CONSIDERATIONS

2.1 The rules and process of accession to the WTO

Although GATT 1947 was never established as an international organization it regulated international trade relations from 1947 to 1995.¹⁸ It was a system based on multilateral trade negotiations conducted in negotiating rounds during which eight rounds of multilateral trade negotiations were organized.¹⁹ “The last one, the Uruguay Round, which lasted for eight years, led to the establishment of the WTO”.²⁰

“Despite this perceived tectonic shift in the nature of the regime to a more rule- based system, the accession process under Article XII of the Marrakesh Agreement remains relatively vague and leaves little guidance as to the terms for admission” causing the accession process to become a lengthy and complex phenomenon.²¹

The lion’s share of WTO’s effort to regulate accession goes to article XII of the Marrakesh Agreement which was modeled on Art XXXIII of the GATT 1947, which regulated accession to the GATT.

Article XII states “*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*” giving no guidance on the terms to be agreed or the procedures to be followed.

¹⁸ Ivan Markovic, *How to join the world trade organization: some aspects of the accession process*, at 117 (January – March 2009), at <http://www.doiserbia.nb.rs/img/doi/0013-3264/2009/0013-32640980116M.pdf>, (accessed on June 30, 2015)

¹⁹ Id

²⁰ Id

²¹ Nhan Nguyen, *WTO accession at any cost? Examining the use of WTO-plus and WTO-minus obligations for the least developed country applicants*, TEMPLE INT’L & COMP. L.J, at 243 (2008), at <http://www.temple.edu/law/ticlj/ticlj22-1Nguyen.pdf>, (accessed on July 21, 2015)

This provides flexibility to make room both for the specific needs of the acceding government and the credibility and viability of the rule based WTO system making each accession unique.²²

“Although Article XII does not prescribe specific procedures to join the Organization, a set of procedures have been developed by the Secretariat in consultation with WTO Members and also through customary practice”²³.

Although it’s not obligatory or a precondition to WTO membership countries may decide and are encouraged to become WTO observers before starting the WTO Accession Process²⁴. Its purpose is “to allow a government to better acquaint itself with the WTO and its activities, and to prepare and initiate negotiations for accession to the WTO Agreement.”²⁵ As they develop a familiarity with WTO requirements, they may start unilaterally changing their foreign trade regime in anticipation of the accession process.²⁶

“The accession process can be divided into six stages:

1. Submission of the formal request for accession by the applicant government;
2. Establishment of a Working Party for Accession;
3. Submission of the Memorandum of the Foreign Trade Regime;
4. Negotiations on terms of accession;
5. Adoption of the Report of the Working Party for Accession;
6. Approval of the accession by the General Council or Ministerial Conference”²⁷

The process of becoming a WTO member is rather a negotiation than it is an accession which allows countries to become a member automatically.²⁸ The first step of accession to the WTO

²² WTO E- learning, *accession to the WTO* (April 2013), at https://ecampus.wto.org/admin/files/Course_425/CourseContents/ACC-E-R4-Print.pdf, (accessed on July 13)

²³ Id

²⁴ WTO, the accession process- the procedures and how they have been applied, (2015), https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c4s2p1_e.htm (accessed on June13, 2015)

²⁵ WTO, *Rules of Procedure for Meetings of the General Council* - WT/L/161, Annex 2, (July 25th 1996), WTO Database

²⁶The International Economic Study Center, *chapter five, WTO accession*, at <http://internationalecon.com/wto/ch5.php> (accessed on June 27, 2015)

²⁷ Markovic , Supra note 18 at 119

involves the submission of a formal request to the director general of the WTO, expressing the interest of the candidate to become a WTO member,²⁹ which will then be distributed to all WTO members to be discussed in the next general council meeting.³⁰

The second step will be the establishment of a Working Party for Accession, which will evaluate the application of the candidate to accede to the WTO in light of Article XII and “submit to the General Council/Ministerial Conference recommendations which may include a draft Protocol of Accession.”³¹ Any Member of the WTO can become a member of the Working Party for Accession and choose to join at any stage before the completion of the Working Party report.³² “Observers in the Working Party for Accession can be representatives of the United Nations (UN), United Nations conference on trade and development (UNCTAD), international monetary fund (IMF), World Bank, World Intellectual Property Organization (WIPO), European bank for reconstruction and development (EBRD) and European free trade association (EFTA).”³³ The Chairman of the WTO General Council then appoints the Chairman of the Working Party for Accession.³⁴

“The procedures followed by accession Working Parties are based on WTO document WT/ACC/1 entitled “Accession to the WTO, Procedures for Negotiations under Article XII” of 24 March 1995.”³⁵

The Working Party process is divided into three distinct phases, Phase one involves the collection of factual information on the trade regime of the applicant.³⁶ This phase is about evaluating the candidate’s potential to comply with WTO agreements.³⁷ This is done through

²⁸ WTO, *Accession: Explanation—How to become a member of the WTO*, at http://www.wto.org/english/thewto_e/acc_e/acces_e.htm (accessed on July 21)

²⁹ Id

³⁰ Markovic, *supra* note 18, at 119

³¹ Id

³² Id

³³ Id

³⁴ See WTO, *Marrakesh Agreement, interpretation and application of Article V:1* at https://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_03_e.htm (accessed on June 20, 2015) and Id at 120

³⁵ WTO, *supra* note 24

³⁶ Id

³⁷ International Institute for Sustainable Development, *Accession to the World Trade Organization* at 5 (September 2002)

submission of a Memorandum containing a detailed description of its foreign trade regime by the candidate and the submission of written questions to the applicant by the Working Party in return.³⁸

On phase two, Working Parties negotiate the terms of accession relating to goods, trade related intellectual property rights (TRIPS) and services take place multilaterally in each Working Party.³⁹ “Consultations and negotiations with the applicant on the level of agricultural support and export subsidies, sanitary and phytosanitary (SPS), technical barriers to trade (TBT), or even TRIPS take place plurilaterally, i.e. in a group consisting of the members of the Working Party interested in these issues.”⁴⁰. At the same time bilateral negotiations will go on between the applicant and interested working party members on access to its market for goods and services.⁴¹

With phase three the text of the draft Report is finalized in the Working Party.⁴² This includes the commitments on the general rules to be accepted by the acceding country and a draft Protocol of Accession.⁴³ “The results of the bilateral negotiations on goods and services and of the plurilateral consultations and negotiations on agricultural support are consolidated in draft multilateral Goods and Services Schedules, reviewed by the Working Party and annexed to the text of the draft Report.”⁴⁴ The Working Party then agrees the draft Report as a whole and forwards it to the General Council/Ministerial Conference for adoption.⁴⁵

On the last stage of the accession process the Protocol of Accession is adopted, which must be approved by the General Council/Ministerial Conferences by two-thirds majority.⁴⁶ The accession package consists of the report of the working party, the goods and services schedules and the accession protocol.⁴⁷ The report and draft protocol must be adopted by the General Council/Ministerial Conference by a two-thirds majority^{48,49}. “The candidate becomes a WTO

³⁸ WTO, supra note 24

³⁹ Id

⁴⁰ Id

⁴¹ Id

⁴² Id

⁴³ Id

⁴⁴ Id

⁴⁵ Id

⁴⁶ Markovic, supra note 18

⁴⁷ Stephen Gramling, *The WTO accession process: explanations and reflections* (May 2009)

⁴⁸ Id

Member thirty days after accepting the Protocol of Accession.”⁵⁰ This period is allowed in order to give WTO Members time to take any action necessary to apply the WTO Agreement to the new Member⁵¹ like formulating new laws and applying new commitments due on accession.

2.1.1 The shortcomings of the accession process to the WTO

Promotion of peace and smooth relation, dispute settlement mechanism, provision of choice and quality, a rule based system, income generation, lesser cost of living, efficiency, economic growth and the creation of good governance are claimed by the WTO to be the benefits of becoming a member to the organization⁵². Be that as it may there are several problems with the process of membership as well as the membership itself, including the time it takes to become a member.

“Most challenges presented by the WTO Accession Process originate from Article XII of the Marrakesh Agreement itself because it does not define precisely the number and the level of the candidate’s future obligations.”⁵³ Countries which are already WTO members have undertaken commitments upon entrance and hence it’s only up to the candidate to make commitments upon its accession but requests for commitments are usually greater for new candidates.⁵⁴ “Tariff rates for goods must be significantly lower, services market must be more open and any transitional period must be shorter in order for the candidate to become a WTO Member.”⁵⁵

Transitional periods needed to adjust to the agreed terms of accession are being shortened to the extent of none and the requirements of a market economy are being pushed on candidates even though WTO agreements don’t require it.⁵⁶

The WTO allows subsidies to agriculture that are not trade-distorting, known as “Green Box” subsidies.⁵⁷ “Green Box subsidies include a wide range of publicly funded measures including

⁴⁹ But there is a custom of consensus decision making in the organization.

⁵⁰ Id

⁵¹ Id

⁵² WTO, 10 benefits of the WTO trading system, at

https://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b00_e.htm, (accessed on October 10, 2015)

⁵³ Markovic, Supra note 18, at 122-127

⁵⁴ Id

⁵⁵ Id

⁵⁶ Id

research and development, pest control, general and specialist training, extension and advisory services, inspection services for health and sanitary reasons etc”.⁵⁸ Candidates often have to commit not to increase the level of Green Box subsidies, which can cause problems with their agricultural strategies and strategies for the development of rural areas.⁵⁹

On the other hand “Amber Box” subsidies including market price support, non-exempt direct payments, non-exempt subsidies and input subsidies are to be lowered within the phase-out period according to WTO rules⁶⁰. But these periods are becoming shorter for new and acceding members, “which can cause difficulties for domestic agricultural production”.⁶¹

During bilateral negotiations candidates are pushed into binding all their tariffs at an applied rate which creates stiff tariff policy and a significantly lower tariff compared to original WTO members.⁶² New WTO members have also taken up higher levels of commitments in the area of services.⁶³ Full market access and national treatment commitments are expected in all service sectors with only few exceptions and shorter transition periods.⁶⁴

In addition candidates often pushed to take on commitments that go beyond what is required by WTO rules.⁶⁵ “These commitments are called “WTO-plus commitments” and cover issues such as transparency, foreign investment, economic reform, government procurement, privatization, elimination of price controls on goods and services, and compliance review.”⁶⁶ Candidates are also pushed to accept conditions that will make them surrender certain rights embodied in WTO Agreements.⁶⁷ “These commitments are called “WTO-minus commitments” and concern trade

⁵⁷ Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, at Annex 2, (33 (1999), 1867 U.N.T.S. 410).

⁵⁸ Markovic, *supra* note 18, at 123

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Markovic, *Supra* note 18, at 124

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Julia, Ya Q., “WTO-Plus” Obligations and their Implications for the World Trade Organization legal System, *An Appraisal of the China Accession Protocol*, at 483–522(2003)

⁶⁶ *Id.*

⁶⁷ *Id.*

remedies, i.e. antidumping, anti-subsidy and safeguard measures, transitional periods, development and special and differential treatment provisions.”⁶⁸

This liberalization is not without consequence as it exposes their economies to unprecedented international competition, which leaves domestic companies pressured to lower prices eventually leading to higher levels of unemployment in the country.⁶⁹

The current financial and global economic crisis is an indication that countries need to protect their economies which is the case even for developed countries.⁷⁰ On the other hand acceding countries continue to be pressured to liberalize their economies even further.⁷¹

In addition to all these problems created by the system and existing WTO members, acceding members are also to blame since they often do not consult national stake holders in the process of negotiating WTO commitments. Their parliaments, business, civil societies are left out in the process, which makes it very difficult to know and abide by the obligations created through membership to the WTO.

In general the accession process is lengthy, unfair, burdensome, a power play and more importantly development unfriendly especially for those who hoped to join the multilateral trade system to reform and advance their trade policies towards economic growth.

When it comes to the specific issue of time, the average time taken between the establishment of the accession working party and actual accession approval by a General Council or Ministerial meeting is ten years, the shortest being three years in the case of Kyrgyz republic to the longest, twenty years in the case of Seychelles.⁷² Some applications go as far as the late 1980s (e.g., Algeria) or early 1990s (e.g., Belarus).⁷³

The reasons for the excessive delay of WTO accession might be attributed to the candidate itself or the weakness of the WTO accession system but the process of accession is naturally

⁶⁸ Id

⁶⁹ Markovic, supra note 18, at 125

⁷⁰ Id

⁷¹ Id at 126

⁷² Id

⁷³ World Bank, *WTO accession: lessons from experience* (June 6, 2005)

lengthy.⁷⁴ Adding on that is of course the lack of an organised system of technical assistance by the WTO system and its requirement of fulfilling the specific commercial interest of all interested WTO members.⁷⁵ In addition to the above mentioned complexities of accession which are also causes of delay, there are extensive legislative requirements that need to be met prior to accession and legislative processes are inherently time consuming, acceding countries have weak institutional capacities, WTO does not provide much technical assistance and accession requires that the specific commercial interests of all members are addressed which frequently requires extensive and time consuming negotiations.⁷⁶ The preparation of the memorandum, answer and question process and the negotiation phases are all time consuming which is then worsened by the lack of resource and knowhow of the acceding countries.

2.1.3 The problems posed by the process towards LDCs

“Given the fact that their economies can generally be described as export-driven via a small number of primary commodities or services, the reasons that LDCs decide to accede to the WTO may not be initially obvious.”⁷⁷ Despite the fact that the WTO’s LDC-members continue to face difficulties in meeting their obligations, many other factors compel self-subjection to the long and complex accession process.⁷⁸ Over the last two decades, developing countries have ascribed to the belief that integration into the world economy yields increased economic growth.⁷⁹

“Testimonies from recently acceded members and current applicants demonstrate that economic and political incentives exist for joining the WTO”.⁸⁰ Many states also believe that WTO membership protects their interests relative to other developed countries.⁸¹ LDCs acceding to

⁷⁴ Constantine Michalopoulos, *WTO accession for countries in transition*, (June 1998) at https://books.google.com.et/books?id=e4kadWAg9lwC&pg=PP4&lpg=PP4&dq=WTO+accession+is+time+consuming&source=bl&ots=sY7qvWhOgn&sig=Dwdlvf2pFXrB6NRORIXrKi_XAbQ&hl=en&sa=X&ved=0CCoQ6AEwAmoVChMII5OChtn2yAIVyVOUCh1OIQIO#v=onepage&q=WTO%20accession%20is%20time%20consuming&f=false (accessed on August 21, 2015)

⁷⁵ Id

⁷⁶ Id

⁷⁷ Nguyen, *Supra* note 21

⁷⁸ Id, at 250

⁷⁹ Id

⁸⁰ Id

⁸¹ Id

bilateral trade agreements without WTO membership do not receive the benefits of negotiating within the parameters and limitations of the WTO Agreements.⁸² Furthermore, they do not have the judicial means to seek resolution of trade disputes with fellow trade partners.⁸³

LDCs may feel politically pressured to join the multilateral trading system and believe that joining will enhance their standing in the world.⁸⁴ Acting on perceived political pressure to join the WTO, however, often leads countries to inadequately contemplate the short-term economic costs and benefits of accession.⁸⁵

“Committing to WTO rules is not a simple process; certain economic, legislative, and judicial reforms must first occur domestically in order to fulfill WTO obligations and expedite the accession process itself.”⁸⁶LDC or developing countries may not be benefited from WTO membership right away and hence GATT 1947 and the current WTO agreements all recognize the through formulating special and differential treatment provisions.⁸⁷

Although difficulties of accession apply to all developing countries and countries with economies in transition, it should be recognised that the challenges are particularly difficult for LDCs which have extremely weak human and institutional capacities and limited technical know-how and financial resource.⁸⁸

“The accession negotiations are being carried out against the background of imbalance in the WTO rights and obligations themselves.”⁸⁹ For example developed countries that continue to subsidize their production and export of agricultural products are asking acceding countries to commit themselves to forgoing such measures.⁹⁰ Acceding countries have been asked to accept plurilateral Agreements contained in annex 4 of the WTO, acceptance of which is optional.⁹¹ In

⁸² Id

⁸³ Id

⁸⁴ Id

⁸⁵ Id

⁸⁶ Id, at 251

⁸⁷ WTO, *Understanding the WTO: Developing Countries Overview*, (2015) [at http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm) (accessed on June 3, 2015)

⁸⁸ Id

⁸⁹ United Nations, *United Nations conference on trade and development, WTO accessions and development policies* (2001, New York and Geneva)

⁹⁰ Id

⁹¹ Id

some cases acceding countries have been pushed to bind trade elements of structural adjustment programme agreed to with the IMF/world bank, although some of the practices discouraged under such programmes are perfectly legitimate under the WTO Agreement.⁹²

Similarly in addition to the general perception among developing countries that the provisions for S&D in the Multilateral Trade Agreements are inadequate, especially those regarding transitional periods, it has proven very difficult for acceding developing countries to benefit at least from such provisions.⁹³ Acceding LDCs face the apparent reluctance of some WTO members to automatically extend to them the S&D provisions specifically provided for LDC's in the WTO Agreements.⁹⁴ This implies that acceding LDCs must negotiate with the WTO members to benefit from such provisions on a case by case basis.⁹⁵ For these reasons and others the WTO secretariat and members have introduced accession guidelines for simplified and accelerated accession of LDCs.

2.2 The 2002 and 2012 accession guidelines

2.2.1 The 2002 guideline

“Following the Doha Ministerial, a WTO Work Programme for LDCs was launched.”⁹⁶ “The implementation of this Programme led to the adoption by the General Council of the Guidelines for the Accession of LDCs in December 2002.”⁹⁷ These guidelines were formulated with the aim of facilitating and accelerating negotiations though simplified and streamlined accession procedures⁹⁸.

With regard to market access, the guideline provides, WTO Members are to “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

⁹² Id, at XIX

⁹³ Id

⁹⁴ Id

⁹⁵ Id, at XXI

⁹⁶ Subcommittee on least developed countries, *WTO wok programme for the least developed countries on 28, June 2013*, [WT/COMTD/LDC/11](#) (2, July, 2013)

⁹⁷ WTO, *handbook on accession to the WTO, the basic rules*, at https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c2s4p1_e.htm, 2015 (accessed on June 22, 2015)

⁹⁸ Id

LDCs' Members".⁹⁹ At the same time acceding LDCs are expected to offer "reasonable market access concessions and commitments on goods and services commensurate with their individual development, financial and trade needs", in line with relevant WTO provisions on goods and services.¹⁰⁰

In the area of WTO Rules, the Guidelines state 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.¹⁰¹ The Guidelines provide that "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"¹⁰² and that "these transitional periods/arrangements shall be accompanied by Action Plans for compliance with WTO rules, supported by Technical Assistance and Capacity Building measures for the acceding LDCs".¹⁰³ Finally under this heading, the Guidelines make clear that "commitments to accede to any of the WTO plurilateral trade Agreements or to participate in other optional sectoral market access initiatives shall not be a precondition for accession to the Multilateral Trade s of the WTO" but "WTO Members may seek to ascertain acceding LDCs interests in the plurilateral trade agreements".¹⁰⁴

Regarding the "process of accession", the Guidelines state that the good offices of the Director-General shall be available to assist acceding LDCs and chairpersons of the LDCs' accession Working Parties in implementing this decision and call for continued efforts to expedite and streamline the process of accession.¹⁰⁵

The Guidelines then goes on to lay down that targeted and coordinated technical assistance and capacity building shall be provided by the WTO and other relevant multilateral, regional and

⁹⁹General council, *Decision of December 10, 2002, Anex 4: Guidelines for the accession of least developed countries*, WT/L/508, at I paragraph 1, (20 January 2003)

¹⁰⁰Id, at I paragraph 2

¹⁰¹Id, at II paragraph 1

¹⁰²Id, at II paragraph 2

¹⁰³Id, at II paragraph 3

¹⁰⁴Id, at II paragraph 4

¹⁰⁵Id, at III paragraph 1

bilateral development partners, on a priority basis, to assist acceding LDCs.¹⁰⁶ Assistance shall be accorded with the objective of effectively integrating the acceding LDC into the multilateral trading system. Technical assistance and capacity building is to cover all stages of the accession process, i.e. from the preparation of documentation to the setting up of the legislative infrastructure and enforcement mechanisms.¹⁰⁷

The implementation of these Guidelines is reviewed regularly and the results of these reviews are included in the Annual Report of the Committee on Trade and Development to the WTO General Council.¹⁰⁸

These guidelines were just a restatement of the general principles laid down in several WTO Agreements and lack the clarity to actually be enforced and applied on actual cases of accession.

2.2.2 The need for reform in 2012: what changes were introduced?

On December 2011, the Ministerial Conference decided to give the mandate to the Subcommittee on LDCs to “develop recommendations to further strengthen, streamline and operationalize the 2002 Guidelines”.¹⁰⁹ The 2002 Guidelines were open for various interpretations and lacks an enforceable element to it.¹¹⁰ The work on benchmarks was supposed to fill in those blanks and provide better protection from unreasonable requests of WTO members in negotiations, while still guaranteeing a result which would be both development friendly and a contribution to global market openings.¹¹¹

In July 2012, the WTO General Council formally approved new guidelines for LDC accession¹¹², which establish benchmarks on goods and services as well as elements on S&D, transition periods, transparency, and technical assistance. These new guidelines are intended to further strengthen, streamline, and operationalize the 2002 LDC accession guidelines and

¹⁰⁶ Id, at IV paragraph 1

¹⁰⁷ Id, at IV paragraph 2

¹⁰⁸ Id

¹⁰⁹ IDEAS, *Centre's comments on the recommendations on strengthening, streamlining and operationalization of 2002 LDC Accession Guidelines*, ([WT/COMTD/LDC/W/55/Rev.2](#))

¹¹⁰ Id

¹¹¹ Id

¹¹² WTO, *members streamline accession for poorest countries* (July 6 2012), at https://www.wto.org/english/news_e/news12_e/acc_03jul12_e.htm (accessed on June 20, 2015)

facilitate LDC accession to the WTO.¹¹³ “In fact, with the establishment of qualitative and quantitative benchmarks in the areas of goods and services they provide a reference framework during the bilateral and multilateral talks with WTO members”¹¹⁴.

The solution suggested and pushed by LDCs was Multilateralising accession negotiations, which would reduce the autonomy of WTO members to request for commitments beyond the candidate’s economic capacity, which was apparent in bilateral.¹¹⁵ This idea was opposed by developed countries including the US and finally rejected in favor of the primacy of bilateral and plurilateral negotiations and is reflected in the Addendum in several places:

- Para 3c notes that *‘Establishing benchmarks on average bound rates does not prejudice the right of Members to negotiate the level of bound rates in individual lines of interest to them’*.
- Footnote 1 of the Addendum states that *‘market access negotiations shall proceed bilaterally on the basis of requests from WTO Members or on the basis of offers from an acceding LDC’*.
- The Addendum further strengthens its position by stating *‘Benchmarks do not stipulate minimum or maximum bound tariffs to be undertaken by any acceding LDC’*. (Para 3c, WT/COMTD/LDC/W/55/Rev.2). i.e. despite these benchmarks, the final tariff levels would still be a matter of negotiations.¹¹⁶

The 2012 accession guideline is meant to have the same standing as the 2002 LDC Accession Guidelines. It would not supersede or replace the Guidelines but would further strengthen, streamline, and operationalize the 2002 LDC accession guidelines and facilitate LDC accession to the WTO. It is therefore important to see if the 2012 guideline agrees with the principles and guidelines that were set out in the 2002 accession guideline and to the needs of LDCs.

¹¹³ General council, *Accession of least developed countries, Decision of July 25, 2012*, WT/L/508/Add.1, paragraph 1, (July 13, 2012)

¹¹⁴ Paolo Ghisu, *LDCs accession to the WTO, Bridges Africa*, (22 July, 2013), at <http://www.ictsd.org/bridges-news/bridges-africa/news/lcbs-accession-to-the-wto>, (accessed on August 2, 2015)

¹¹⁵ South center, *Operationalizing the 2002 LDC accession guidelines: an analysis*, at 6 (July 2012, Geneva, Switzerland), at http://www.southcentre.int/wp-content/uploads/2013/08/AN_Operationalising-the-2002-LDC-Accession-Guidelines_EN.pdf (accessed on June 13, 2015)

¹¹⁶ *Id.*, at 7

➤ Goods benchmarks

According to the new guidelines, acceding LDCs shall bind all agricultural tariff lines at an overall average rate of 50 percent.¹¹⁷ This level is about 28 percentage-points lower than the average of the 30 LDCs which joined the organisation in its early years, but 18 percentage-points higher than the recently acceded LDCs.¹¹⁸ The benchmark of 50% is much lower than the average of 76.1% of all existing LDC members or 79% with respect to original LDC members, and compared to these rates, it is not to the advantage of the acceding LDCs.¹¹⁹

The 2002 LDC Accession Guidelines states that LDCs' market access commitments shall take into account the levels of concessions and commitments undertaken 'by existing WTO LDCs' Members'.¹²⁰ If we are to interpret this as the average of existing LDCs' commitments, in agriculture, this would imply 100% binding and an average bound agricultural tariff of 76.1%.¹²¹

With regard to non agricultural market access (NAMA), the guidelines provide two options: acceding LDCs can bind 95 percent of their NAMA lines at an overall average rate of 35 percent, or they can undertake more comprehensive binding coverage at higher overall average rates, to be agreed with WTO members.¹²² Acceding LDCs that choose to undertake this second option enjoys a transition period of 10 years for a maximum of 10 percent of their tariff lines before binding them.¹²³ In addition, the tariff lines to be unbound in NAMA are not through self-selection but are subject to negotiations¹²⁴

If we are to interpret the 2002 LDC Accession Guidelines as the average tariff of existing LDCs' commitments in NAMA, this would imply a binding coverage for NAMA of 51.6%, and an average bound NAMA tariff of 42.9%.¹²⁵

➤ Services benchmarks

¹¹⁷ General council, supra note 113, at Paragraph 5

¹¹⁸ Ghisu, supra note 114

¹¹⁹ Id, at 13

¹²⁰ General council, supra note 99, at paragraph 1

¹²¹ South center, supra note 115, at 18

¹²² General council, supra note 113, at paragraph 7

¹²³ Id, at paragraph 7(ii)

¹²⁴ Id, at Paragraph 4(a)

¹²⁵ South center, supra note 115

Since Service benchmarks are more difficult to interpret in quantitative terms, the guidelines set out principles that are meant to guide accession talks and set limits on request for commitments.¹²⁶ However important service is the proposed text fails to clarify and set a benchmark on the area of service.¹²⁷

According to the decision, WTO members “shall take into account the serious difficulty of acceding LDCs in undertaking commitments, in view of their special economic situation and their individual development, financial and trade needs.”¹²⁸ Therefore, “there shall be flexibility for acceding LDCs for opening fewer sectors, liberalizing fewer types of transactions, and progressively extending market access in line with their development situation.”¹²⁹ Acceding LDCs shall not be expected to offer full national treatment, nor are they expected to undertake additional commitments under Article XVIII of the GATS.”¹³⁰

“Commitments from acceding LDCs may vary depending on each country’s particular circumstances.”¹³¹ Furthermore, it “shall have the flexibility to undertake commitments, iwhether full or partial, under different modes of supply,” along with having “the flexibility to phase in such commitments over an adequate period of time.”¹³² Finally, “acceding LDCs shall not be required to undertake commitments in services sectors and sub sectors beyond those that have been committed by existing WTO LDC Members,” and countries “shall exercise restraint in seeking commitments in trade in services from the acceding LDCs.”¹³³

The agreed text fails to recognize the significance of service negotiations by providing repetition of the old and unclear benchmarks that proved ineffective in the past.¹³⁴ The addendum states: “no commitments in services sectors and sub- sectors that go beyond what has been committed by existing WTO LDC members”. At first glance this benchmark might seem beneficiary to the interest of LDCs but it could be interpreted to mean that LDCs will have to take on

¹²⁶ IDEAS, supra note 109

¹²⁷ Christophe Bellman, Paolo Ghisu and Anne Katrine Pfister, An analysis of the WTO accession guidelines for least developed countries, (November 2012)

¹²⁸ General council, supra note 113 Paragraph 8(a)

¹²⁹ Id, at Paragraph 8(b)

¹³⁰ Id

¹³¹ IDEAS, supra note 109

¹³² General council, supra note 113, paragraph 11

¹³³ Id, at paragraph 12

¹³⁴ IDEAS, supra note 109

commitments up to the level that the LDC with the highest level of commitment has undertaken and might actually limit the ability to negotiate a better deal.¹³⁵ In these sense it is disappointing that the principles as well as the benchmarks on services did not go beyond what is already stated in other WTO agreements and the 2002 guidelines.¹³⁶

➤ **Transparency in accession negotiations**

The guideline provides that “The Accession Working Parties will continue to provide the forum for Members and acceding LDCs to collectively review the bilateral market access negotiations on goods and services, Members shall refrain from reopening the accession package once negotiations have been completed and consolidated schedules circulated for verification at the level of the Working Party.”¹³⁷

Again, here another important aspect of bilateral negotiations that could have helped LDCs get a better deal was left unclear.¹³⁸ “The provisions of using offices of the chairs of Subcommittee, or reporting on the progress of discussions were all available and used even before the decision was made.”¹³⁹ Instead the enforcement of these provisions was left to peer pressure amongst nations, which has proven ineffective in past encounters.¹⁴⁰

➤ **Special and differential treatment and transition periods**

S&D provisions and transition periods are general principles that guide accession negotiations.¹⁴¹ Indeed, the text reaffirms that S&D, as guaranteed in multilateral trade agreements, ministerial decisions, and other WTO legal instruments, shall be applicable to LDCs in the process of accession.¹⁴² Moreover, “requests for additional transition periods/arrangements beyond the ones foreseen under specific WTO Agreements shall

¹³⁵ Id

¹³⁶ Id

¹³⁷ General council, supra note 113 at paragraph 14

¹³⁸ IDEAS, Supra note 109

¹³⁹ Id

¹⁴⁰ Id

¹⁴¹ Bellman et al. Supra note127, at 11

¹⁴² General Council, supra note 113

be favorably considered on a case-by-case basis,”¹⁴³

Transition periods are very important because it is a period in which the acceding country implements its accession commitments.¹⁴⁴ “In the Uruguay Round, all countries including developed countries were given transition periods.”¹⁴⁵ For example, the Agreement on Agriculture provided transition periods of 6 years for developed countries and 10 years for developing countries to implement their commitments.¹⁴⁶ This implies even developed countries enjoyed transitional periods to implement their commitments and thus LDCs deserve even longer transitional periods to adjust to the WTO system.¹⁴⁷

The area of transitional periods was another failed opportunity where the drafters did not provide specific transition periods for LDCs to meet their obligations. Like other areas in the guideline the principles outlined are simply repetitions of unenforceable principles.¹⁴⁸ With regard to agriculture, there are no transition periods under the 2012 guidelines.¹⁴⁹ “Regarding non-agricultural goods, all acceded countries so far have bound all import tariffs, except the Kyrgyz Republic (which acceded in 1998), which bound 99.9% of all tariff lines, and Nepal, which bound 99.3% of its tariff lines.”¹⁵⁰ However, the 2012 LDC Accession Guidelines benchmarks provide for slightly more flexibility.¹⁵¹ In NAMA, an acceding LDC has two choices: 1) it can bind 95% of tariff lines and 2) it can bind more than 95%.¹⁵² In the second situation, the LDC can have a transition period of 10 years for 10% of their tariff lines. In the first situation, the Addendum is silent on the matter of transition periods. This might be taken to mean that there are no transition periods for agriculture, not when countries undertake 95% NAMA binding coverage and transitional periods are incentives so that LDCs bind more than 95% of their tariffs.¹⁵³

¹⁴³ Id

¹⁴⁴ South center, supra note 115

¹⁴⁵ Id

¹⁴⁶ Agreement on agriculture, supra note 55, article 15(2)

¹⁴⁷ South center, supra note 115

¹⁴⁸ Id

¹⁴⁹ Id

¹⁵⁰ Derk Beiben, *what can least developed countries acceding to the world trade organization learn from acceded countries?* at 16 (05 February, 2014)

¹⁵¹ Id

¹⁵² IDEAS, supra note 109

¹⁵³ Id

However Footnote 1 of the draft Addendum states that the negotiations on bound tariff rates will be ‘in accordance with established procedures and practice’. This could mean transition periods would be provided since this has been the practice.¹⁵⁴ But since it is not clearly stated in the addendum each individual LDC has to fight to get adequate transition periods.¹⁵⁵ In general this lack of clarity could lead to more complexity which in turn means lengthy processes of accession and potentially less transition period for acceding LDCs.

Technical assistance

The text also emphasizes the need for enhanced technical assistance and capacity-building “to help acceding LDCs to complete their accession process, implement their commitments and to integrate them into the multilateral trading system.”¹⁵⁶ The WTO secretariat is to provide technical assistance to acceding countries on the base of their direct inputs in order to enhance greater coordination and an effective delivery of assistance programmes.¹⁵⁷ “The creation of new aid functions and monitoring mechanisms to be added to the WTO portfolio are largely functions that should be done by development agencies which have been created for that purpose.”¹⁵⁸ There is a risk that this decision will further bureaucratize technical assistance rather than creating more efficiency.¹⁵⁹ Therefore acceding LDCs should prioritize their technical assistance needs which should be demand driven and different on a case by case basis¹⁶⁰

“UNCTAD, the World Bank, the European commission (EC), Switzerland, the United States (US) as well the WTO, all have programs to provide technical assistance on various aspects of the accession process and especially in the preparation of the initial country Memorandum.”¹⁶¹ There are also problems where technical assistances are provided, which might

¹⁵⁴ Id

¹⁵⁵ Id

¹⁵⁶ Bellman et al. supra note 127, at 11

¹⁵⁷ General council, supra note 113, paragraph 22

¹⁵⁸ Bellman et al. supra note 127, at 11

¹⁵⁹ Id

¹⁶⁰ Id

¹⁶¹ Michalopoulos, supra note 74, at 9

lead to delay due to lack of coordination among donors, among aid agencies and trade negotiators or because consultants suggest that acceding countries agree to a higher level of commitment.¹⁶²

¹⁶² Id

CHAPTER THREE

ACCESSION OF LDCs TO THE WTO AFTER THE 2002 AND 2012 ACCESSION GUIDELINES: THE PRACTICE

3.1 Introduction

This chapter deals with actual cases of accession to the WTO by LDCs after the formulation of 2002 and 2012 accession guidelines. The previous chapters analyzed the challenges of the accession process and this chapter will show how these challenges affected the process of accessions of LDCs.

As mentioned above 34 LDCs are currently members of WTO and 8 others are in the process of (accession).¹⁶³ Since the adoption of the Guidelines, six LDCs have acceded to the WTO, Nepal, Samoa, Vanuatu and Cambodia before July 2012 and Lao Peoples Democratic Republic and Yemen after (2012).¹⁶⁴ In this chapter we will be looking at the case of some of these countries to determine if their accession commitments are in line with the guidelines.

3.2 Nepal

Process of accession

“Nepal is a small land-locked country situated between China and India that reported a per capita gross domestic product (GDP per capita) of \$245 in 2004”¹⁶⁵ and “conducts a majority of its trade with India.”¹⁶⁶ In 1989 Nepal applied for accession to the General Agreement on Tariffs and Trade and a working party was established on June 1989¹⁶⁷ and got its observer status in 1993.¹⁶⁸

¹⁶³ WTO, supra note 16

¹⁶⁴ WTO, supra note 17

¹⁶⁵ UNCTAD, *LANDLOCKED DEVELOPING COUNTRIES: FACTS AND FIGURES 38* (2006), at http://www.unctad.org/en/docs/ldc20062_en.pdf (accessed on August 10, 2015)

¹⁶⁶ UNCTAD, *STATISTICAL PROFILES OF THE LEAST DEVELOPED COUNTRIES, NEPAL* (2005), at http://www.unctad.org/sections/ldc_dir/docs/ldcmisc20053_nep_en.pdf. (accessed on August 10, 2015)

¹⁶⁷ WTO, *Accessions, Nepal* (2015) at https://www.wto.org/english/thewto_e/acc_e/a1_nepal_e.htm (accessed on August 16, 2015) and WTO document WT/ACC/NPL/16

¹⁶⁸ P. R. Rajkarnikar*, *MANAGING THE CHALLENGES OF WTO PARTICIPATION: CASE STUDY 30, Nepal: The Role of an NGO in Support of Accession* at https://www.wto.org/english/res_e/booksp_e/casestudies_e/case30_e.htm, (accessed on August 5, 2015)

Nepal submitted its Memorandum of Foreign Trade Regime (MFTR) in 1998¹⁶⁹ and held five rounds of bilateral negotiations and attended three Working Party meetings throughout its process accession to the WTO.¹⁷⁰ The fifth Ministerial Conference in Cancun approved the terms of accession of Nepal and offered membership.¹⁷¹ On April 23, 2004 Nepal became the first LDC to join the WTO through accession.¹⁷² As the first LDC to the organization, Nepal and its process of accession can offer a lot of lesson to other LDCs wishing to accede to WTO. Upon transformation of the GATT to WTO a lot was altered in terms of what an acceding country should and should not accept upon accession. Hence acceding countries need to be systematic in times of negotiations and Nepal's experience can be of help to these countries especially to LDCs.

Nepal's Accession commitments and their impact on the economy

The decision of the General Council dated 10 December 2002 on accelerated Accession of the LDCs states that

“WTO Members shall exercise restraint in seeking concessions and commitments on trade in goods and services from acceding LDCs, taking into account the levels of concessions and commitments undertaken by existing WTO LDCs' Members.” and “Acceding LDCs shall offer access through reasonable concessions and commitments on trade in goods and services commensurate with their individual development, financial and trade needs, in line with Article XXXVI.8 of GATT 1994, Article 15 of the Agreement on Agriculture, and Articles IV and XIX of the General Agreement on Trade in Services.”¹⁷³

“In the late 1990s Nepal was at an early stage of industrialization and saw tariffs as one way of securing room for its nascent industries to grow and become more competitive”¹⁷⁴.Accession

¹⁶⁹See. Working Party on the Accession of Nepal, *Accession of Nepal, Memorandum on the Foreign Trade Regime*, WT/ACC/NPL/2 (10 august 1998)

¹⁷⁰ Ratnakar Adhikari and Navin Dahal, *LDCs' Accession to the WTO: Learning from the Cases of Nepal, Cambodia and Vanuatu*, South Asia Watch on Trade, Economics & Environment (SAWTEE)

¹⁷¹ Id

¹⁷²WTO, supra note 167

¹⁷³ General Council, supra note 114, at paragraph 1

¹⁷⁴ Posh Raj Pandey, Ratnakar Adhikari and Swarnim Waglé, *Nepal's accession to the world trade organization, case study of issues relevant to least developed countries*, at 10 (November 2014) at , at

negotiations were particularly important because the sector engaged over 80 per cent of the rural labor force and contributed nearly 40 per cent of the GDP.¹⁷⁵

In the final package, Nepal ended up binding 100 percent of its tariff lines on agriculture products and 99.3 per cent of its tariff lines on non-agricultural products, except for a few tariff lines.¹⁷⁶ In agriculture goods, Nepal's bound average tariff is 41.5 per cent with a tariff peak of 200 percent in tobacco and a bound tariff above 25 per cent, for more than 90 per cent of the tariff lines.¹⁷⁷ Nepal bound its industrial tariff at an average at 23.6 per cent with the highest tariff binding of 80 per cent in automobiles.¹⁷⁸

In the area of services Nepal wanted to retain some policy flexibilities to protect sectors dominated by small, self-employed service providers.¹⁷⁹ However "Nepal was asked to undertake commitments on almost all service sub-sectors but rejected the request to open sectors which could have an adverse impact on the socio-economic situation."¹⁸⁰ Nepal ended up opening 11 major sectors and 77 sub-sectors,¹⁸¹ constituting 48 percent of all the sub-sectors in the WTO categorization.¹⁸² Nepal was further asked to allow up to 100 per cent equity participation by foreigners within a period of five years, for all the sectors it made commitment.¹⁸³ In the final accession package, Nepal capped foreign investment in most sectors at 51 per cent, at 66-67 per cent in some and at 80 per cent in two sectors.¹⁸⁴

For a highly agricultural country and an LDC like Nepal, these commitments are not reflections of the restraint in market concession stipulated in the guideline and considerate of their

http://esango.un.org/ldcportal/documents/10179/22301/Nepal_Acceding%20to%20the%20WTO.pdf, (accessed on August 11, 2015)

¹⁷⁵ Working party on the accession of Nepal, *report of the working party on the accession of the kingdom of Nepal*, WT/ACC/NPL/16, paragraph 4 (28 August 2003) (hereinafter Nepal working party report)

¹⁷⁶ Working Party on the Accession of Nepal - *Report of the Working Party on the Accession of the Kingdom of Nepal - Schedule of Commitments on Goods, Addendum*, WT/ACC/NPL/16/Add.1 (August 28, 2003)

¹⁷⁷ Id

¹⁷⁸ Id

¹⁷⁹ Posh Raj et al. supra note 174 at 5

¹⁸⁰ Id

¹⁸¹ *Nepal working party report*, supra note 175

¹⁸² Id

¹⁸³ Posh Raj et al. supra note 174

¹⁸⁴ Id

developmental needs. High commitment plays into more vulnerability of local producers and difficulty to develop as a nation for a country with less to export than import.

The decision of the General Council dated 10 December 2002 on accelerated Accession of the LDCs states 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;”*¹⁸⁵

The decision also specified that technical assistance be provided to facilitate LDCs’ accessions: Thus, section IV stated that:

“Targeted and coordinated technical assistance and capacity building, by WTO and other relevant multilateral, regional and bilateral development partners, including inter alia under the Integrated Framework (IF), shall be provided, on a priority basis, to assist acceding LDCs. Assistance shall be accorded with the objective of effectively integrating the acceding LDC into the multilateral trading system;

In the first WP meeting, the Nepali delegation indicated its desire to utilize the special and differential treatment provision referred to in Article XI.2 of the Agreement Establishing the WTO (which states that ‘the least developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities’) and also in Article IV.3 of the GATS (which states that ‘particular account shall be taken of the serious difficulty of the least developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs’).¹⁸⁶ However, developed country WP members were of the view that all provisions of special and differential treatment were not automatic and had to be negotiated¹⁸⁷.

¹⁸⁵ General council, supra note 99, at paragraph 2

¹⁸⁶ Id

¹⁸⁷ Posh Raj et al. supra note 174

Nepal requested that the Working Party grant a transitional period for full implementation of the Agreement on Customs Valuation, the WTO Agreement on Technical Barriers to Trade (until 1 January 2007), Agreement on Sanitary and Phytosanitary (until 1 January 2007) Measures and the TRIPS Agreement (until 31 December 2006).¹⁸⁸ However, WTO members argued that transition periods could not be granted automatically.¹⁸⁹ “Nepal was required to provide information on the current status of legislative work and a detailed action plan for completing implementation within the timeframe of the transition period.”¹⁹⁰ Nepal was allowed a transition period of only one year and eight months to fully implement the Agreement on Customs Valuation¹⁹¹ and two years and eight months for TRIPS Agreement compared to transition periods of 5 and 11 years respectively for these Agreements enjoyed by the original LDC members.¹⁹²

According to the TRIPS Agreement, LDCs are provided transition period up to 1 January 2007 for the implementation of the Agreement.¹⁹³ However, Nepal was asked to implement the non-discrimination provisions (most favoured nations and national treatment) contained in the TRIPS Agreement right from the date of accession.¹⁹⁴ Moreover, the developed countries did not make any reference to Declaration on TRIPS and Public Health adopted by the trade ministers at Doha in November 2001 in the Working Party Report.¹⁹⁵

Although the Working Party attempted to establish “plus” conditions upon Nepal’s entrance into the WTO, Nepal ultimately avoided incorporating some of them into its final accession

¹⁸⁸ *Nepal working party report*, supra note 175

¹⁸⁹ Ramesh Bikram Karky, *note on Cambodia’s and Nepal’s accession to the World Trade Organization, annual survey of international and comparative law*, at 212 (volume 10, August 23, 2015), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2649656 (accessed on June 20, 2015)

¹⁹⁰ Id

¹⁹¹ Working Party on the Accession of Nepal - *Accession of the Kingdom of Nepal - Action Plan on the Implementation of the Agreement on Customs Valuation*, WT/ACC/NPL/15 (05/05/2003)

¹⁹² Karky, supra note 189

¹⁹³ TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197, Article 66.1 (1994) [hereinafter TRIPS Agreement], which was extended twice with the TRIPS council decision on 29, November, 2005 and 11, June, 2013

¹⁹⁴ Adhikari et al. supra note 170

¹⁹⁵ Id

package.¹⁹⁶ Nepal declined to adopt some of the Plurilateral Agreements upon accession, including the Agreement on Government Procurement, against the request of the Working Party during the negotiations.¹⁹⁷ Perhaps a more controversial aspect of the process, however, involved the Working Party's last-minute attempt to condition Nepal's membership upon its matriculation to the International Union for the Protection of New Varieties of Plants ("UPOV"), which exists as a convention to WIPO.¹⁹⁸ The UPOV convention provides intellectual property protection to plant breeding processes and promotes the development of new plants by breeders.¹⁹⁹ Nepal, however, was concerned that such membership in the short term would harm its indigent farmers, who depended upon their ability to engage in the small-scale production, use, and sale of seeds, considered protected varieties under the Convention.²⁰⁰

Although Nepal successfully resisted the inclusion of this extra commitment into its final Protocol of Accession²⁰¹ the Working Party's requests indicate that future acceding LDCs may not assume that their respective Working Parties will, from the outset, adopt the General Council's Decision on the Accession of Least-Developed Countries as a baseline framework for their negotiated entry into the WTO.²⁰²

Nepal was called upon to make commitments that were more stringent than those made not only by LDCs who joined WTO at its inception but also by many developing country Members. Many of the commitments requested were not commensurate with the level of economic development, the human and technical capacity and the trade needs of an LDC.²⁰³

Looking at the actual effect of WTO accession, we can take the years before and after WTO accession and the amount of export and import within those years. During the six years prior to Nepal's accession to WTO, Nepal has imported 118 billion NRs²⁰⁴ and exported 51.3 billion

¹⁹⁶ THE KATHMANDU POST, *Nepal Rejects WTO-plus Commitments*, (August 18, 2003)

¹⁹⁷ Id

¹⁹⁸ Nguyen, *supra* note 21

¹⁹⁹ Id

²⁰⁰ Id

²⁰¹ THE KATHMANDU POST, *supra* note 196

²⁰² Nguyen, *supra* note 21

²⁰³ Posh Raj et al, *supra* note 174, at 4

²⁰⁴ NRs stands for Nepal Rupees

NRs having a trade deficit of 67.1 billion NRs²⁰⁵. In the six years post WTO accession the country's import rose to 206.6 billion NRs while its export only rose to 60.8 billion NRs, leaving it with trade deficit of 145.2 billion NRs.²⁰⁶ In addition Nepal's export could not be diversified but rather concentrated to its export to India after joining WTO.²⁰⁷

During the same years the number of FDI companies registered annually in Nepal was 79 in pre accession period on average, which increased to 146 in post accession period.²⁰⁸ Similarly, on average the FDI amount was doubled in post accession period (average annual FDI amount was 2057.68 million rupees in pre accession period, which was increased to 4527.08 million rupees in post accession period). The number of employment opportunities created in FDI industries was also almost doubled in the post accession period.²⁰⁹

Generally, we can say the expected outcomes of becoming a WTO member did not materialize for Nepal in the years after its accession to the organization. The cause for this failure could be that Nepal did not get the special and differential treatment it deserved as an LDC. The accession guideline's suggestions that an LDC be treated according to its developmental needs were not met and the case of Nepal is a clear indication of deviation from the guidelines. It is apparent that there were some advantages to becoming a member but there is a long way to go for Nepal to truly benefit from WTO.

3.3 Cambodia

With an estimated average per capita income of US\$300, Cambodia is the poorest and least developed country in the East Asian region, and one of the poorest in the world.²¹⁰ The Government of the Kingdom of Cambodia applied for accession to the World Trade Organization in October 1994.²¹¹ At its meeting on 21 December 1994, the Preparatory

²⁰⁵ Bikash Thapa, *The World Trade Organization and its impact to Nepal* (June 7, 2010), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1621756, (accessed on July 2015), table 1

²⁰⁶ Id, table 2

²⁰⁷ Id

²⁰⁸ Id, table 3

²⁰⁹ Id

²¹⁰ EIC, *Cambodia's Economic Developments and Reform Progress in 2003-2004*, EIC Economic Watch, (1, October 2004)

²¹¹ Working Party on the Accession of Cambodia, *Report of the Working Party on the Accession of Cambodia*, WT/ACC/KHM/21 (August 15, 2003)(hereinafter Cambodia Working Party Report)

Committee for the WTO established a Working Party to examine the application of the Government of Cambodia to accede to the World Trade Organization.²¹²

In June 1999 Cambodia submitted its MFTR to the Working Party, describing, among other things, its economy, economic policies, domestic and international trade regulations, and intellectual property policies.²¹³ In May 2001, Cambodia started a series of bilateral negotiations with WTO members, in particular, Australia, the EU, and the United States.²¹⁴

On October 13, 2004 Cambodia became the second LDC to accede to the WTO since its transformation from the GATT in 1995.²¹⁵

Cambodia's accession package is also full of WTO+ and WTO–commitments. For example, the 30 percent average bound tariff rate for agricultural commodities in Cambodia is significantly lower than that in other LDC members.²¹⁶ For example, Bangladesh, a GATT contracting party and one of the 32 LDC WTO members, has an average bound tariff rate of 200 percent.²¹⁷ In terms of peak tariffs, Cambodia, a country where the majority of the population is employed in the agricultural sector, has been asked to provide less protection to its sensitive agricultural sectors than Canada, the EU, and the United States.²¹⁸ The peak tariff for agricultural commodities in Cambodia was set at 60 percent, compared with 120 percent in Canada, 252 percent in the EU, and 121 percent in the United States. For sensitive products such as rice, a tariff bound of 40 percent was established.²¹⁹ Such a low bound tariff rate could limit Cambodia's ability to protect against import surges in its most important agricultural commodity.²²⁰

²¹² Working Party on the Accession of Cambodia, *Accession of Cambodia, Memorandum on the Foreign Trade Régime*, WT/ACC/KHM/2 (22, June, 1999)

²¹³ Fuzhi Cheng, *Cambodia's accession to the WTO*, edited by Per Pinstруп-Andersen and Fuzhi Cheng, Cornell university, at 3, (2007)

²¹⁴ Id

²¹⁵ Id

²¹⁶ Per Pinstруп Anderson and Fuzi Cheng, *Case studies in food policy for developing countries*, volume III, Institutions and international trade policies, at 44 (2009)

²¹⁷ Id

²¹⁸ Cheng, supra note 213

²¹⁹ Id

²²⁰ Id

In the area of intellectual property, others have criticized Cambodia's obligation to provide protection for a period of five years against the "unfair commercial use" of undisclosed test data contained in applications submitted to its regulatory agency seeking marketing approval of pharmaceutical or agricultural chemical products.²²¹ According to Cambodia's Protocol of Accession, "unfair commercial use" translated into an agreement to disallow any individual, other than the applicant, to rely upon the data in seeking approval for his or her product.²²² Such a measure would prevent, for example, Cambodia's regulatory agency from using the data to evaluate a similar, generic version of the product for approval.²²³ According to critics, this restriction would essentially hinder the production or import of generic medicines, forcing those producers to either wait five years or recreate the data themselves.²²⁴

Cambodia's conditions for WTO membership also stipulated that it would become a signatory to the Patent Cooperation Treaty ("PCT") upon accession.²²⁵ The PCT, handled by the WIPO and not the WTO, aims to provide a unified system under which patent applicants can file one international application that would have force in the designated Contracting States.²²⁶ Recent reform efforts under the PCT have aimed to "streamline and simplify" procedures for patent applications by eliminating duplicate patent examination procedures and reducing filing costs.²²⁷

Because the 2002 accession guideline stated that being a signatory to the Plurilateral Agreements should not be imposed as a condition to membership, requiring Cambodia to accede to a WIPO-affiliated agreement can be labeled a "plus" provision.²²⁸

Regarding agriculture, Cambodia also agreed to bind its agricultural export subsidies to zero and not pursue any future export subsidies upon accession.²²⁹ Currently, Cambodia's

²²¹ Celine Charveriat & Mary Kirkbride, *Cambodia's Accession to the WTO: How the Law of the Jungle is Applied to One of the World's Poorest Countries*, (London, U.K., August 2003),

²²² Id

²²³ Id

²²⁴ Id

²²⁵ *Cambodia Working Party Report*, supra note 212, at 37, 172.

²²⁶ Carlos Correa & Sisule Musungu, *The WIPO Patent Agenda: The Risks for Developing Countries*, at 7-9 (The South Centre, Trade-Related Agenda, Development and Equity Working Papers, No. 12, 2002)

²²⁷ Id, at 9

²²⁸ Nguyen, supra note 21, at 264

²²⁹ *Cambodia Working Party Report*, supra note 212

agriculture industry represents a significant portion of its economy, accounting for 34.5% of its GDP in 2003.²³⁰ Furthermore, over 80% of the population resides in rural areas and depends mainly on agriculture as a means of living.²³¹ The Agreement's provision on Special and Differential Treatment states that "least- developed country Members shall not be required to undertake [tariff and domestic support] reduction commitments."²³² Given that much of Cambodia's future economic development revolves around strengthening this industry, the Working Party has been criticized for failing to grant benefits favorable to LDCs under the Agreement.²³³

In the areas of services, Cambodia was asked to undertake commitment on audio-visual and distribution services, on which none of the incumbent LDCs have undertaken any commitment. Cambodia did succumb to the pressure of developed countries.²³⁴

During the accession process, Cambodia was under strong pressure from the developed countries to forgo the right to use export subsidies in industrial sectors, which are allowed for LDCs under the Agreement on Subsidies and Countervailing Measures. Cambodia finally managed to retain this right.²³⁵

In addition, Cambodia agreed to eliminate agricultural export subsidies by binding them at zero,²³⁶ although under the AoA LDCs were not required to undertake any commitments on export subsidies.²³⁷ This provision effectively seals off Cambodia's right under the AoA to introduce export subsidies on any agricultural product in the future should this be necessary in order to protect the livelihoods of poor farmers or to achieve development priorities.²³⁸

²³⁰ UNCTAD, *Statistical Profiles of the Least Developed Countries, Cambodia* (2005),

http://www.unctad.org/sections/ldc_dir/docs/ldcmisc20053_cmb_en.pdf. (accessed on August 5, 2015)

²³¹ SOUTHEAST ASIA COUNTRY UNIT, *EAST ASIA AND PACIFIC REGION*, THE WORLD BANK, REP. NO. 29950-KH, CAMBODIA COUNTRY PROCUREMENT ASSESSMENT REPORT (2004)

²³² Agreement on Agriculture, *supra* note 57, at article 15(2)

²³³ Charveriat et al, *supra* note 221

²³⁴ Adhikari et al, *supra* note 170

²³⁵ *Cambodia Working Party Report*, *supra* note 212, at 2, 6

²³⁶ *Id*

²³⁷ Agreement on Agriculture, *supra* note 57, at Article 15 (2)

²³⁸ Cheng, *supra* note 213

Cambodian Commerce Minister Cham Prasidh remarked that “the package of concessions and commitments that [we] have to accept certainly goes far beyond what is commensurate with the level of development of a least developed country like Cambodia.”²³⁹

Although it attempted to align its domestic trade regime to WTO rules during the process, Cambodia also called upon the Working Party to show “flexibility” in setting the membership commitments and to extend special and differential treatment.²⁴⁰ The Working Party recognized that Cambodia needed further progress to comply internally with WTO rules and principles, but some members also stated an intention to account for Cambodia’s status as a least- developed country in creating the terms of accession.²⁴¹

Cambodia’s Protocol of Accession, like those of many other previously acceding states, set forth several country-specific commitments on the rules governing its WTO membership not contained in the Multilateral Agreements.²⁴² For example, Cambodia agreed to provide periodic reports to WTO members on the progress of its efforts to privatize its state-owned enterprises.²⁴³ Such a WTO-plus measure is based on precedent; other acceding states such as China, Mongolia, and Bulgaria have assented to similar provisions in their respective Protocols of Accession.²⁴⁴

The most prominent features of the SD associated with Cambodia’s accession are the longer implementation periods for TBT (2007),²⁴⁵ SPS (2008),²⁴⁶ Customs Valuation (2009),²⁴⁷ and TRIPS (2007).²⁴⁸ In contrast, existing LDC members had until 2016 to implement TRIPS, for instance and LDCs are meant to have a longer period.

²³⁹ Andrew Walker, *Cambodia and Nepal win WTO entry*, BBC NEWS, (Sept. 12, 2003), <http://news.bbc.co.uk/go/pr/fr/-/1/hi/business/3102720.stm>. (accessed on August 8, 2015)

²⁴⁰ *Cambodia Working Party Report*, supra note 212, at paragraph 7

²⁴¹ Id

²⁴² Id, at 6-50.

²⁴³ Id at 5, 25.

²⁴⁴ WTO Secretariat, Technical Note on the Accession Process, WT/ACC/10/Rev. 3, (Nov. 28, 2005)

²⁴⁵ Working Party on the Accession of Cambodia - *Accession of Cambodia - Action Plan for the Implementation of the TBT Agreement - Revision*, WT/ACC/KHM/14/Rev.1(March 03, 2003)

²⁴⁶ Working Party on the Accession of Cambodia - *Accession of Cambodia - Action Plan for the Implementation of the SPS Agreement – Revision*, WT/ACC/KHM/15/Rev.1(March 03, 2003)

²⁴⁷ Working Party on the Accession of Cambodia - *Accession of Cambodia - Action Plan for the Implementation of the Customs Valuation Agreement – Revision*, WT/ACC/KHM/13/Rev.1(March 03, 2003)

²⁴⁸ Working Party on the Accession of Cambodia - *Accession of Cambodia - Action Plan for the Implementation of the TRIPS Agreement - Revision*, WT/ACC/KHM/16/Rev.1 (March 03, 2003)

“According to available estimates, the cost of implementing such agreements is around US\$100 million, in addition to the other costs associated with post-accession adjustments and yet the Working Party rejected the Cambodian negotiators’ demand for technical assistance in implementing the four agreements.”²⁴⁹

Cambodia was granted four transition periods, delaying implementation of TRIPS until January 1, 2007; the Agreement on TBT until January 1, 2007; the Agreement on SPS until January 1, 2008; and the Agreement on Customs Valuation until January 1, 2009.²⁵⁰

Under the Agreement for TRIPS, for example, Cambodia made rules commitments deemed by some as excessive relative to their LDC member status.²⁵¹ With regard to pharmaceutical patents, the 2001 Doha Declaration on the TRIPS Agreement and Public Health states that LDC members would be allowed until January 1, 2016 to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement.²⁵² Instead Cambodia finally agreed to implement the TRIPS Agreement by January 1, 2007.²⁵³ Cambodia had originally requested a transition period for TRIPS compliance that would expire in 2009.²⁵⁴ “This WTO– requirement will prevent Cambodia’s regulatory authority from using test data to assess bio-equivalent generic drugs and will thereby slow down the production or import of generic versions of the medicines, which could have serious negative implications for public health in Cambodia”.²⁵⁵

3.4 Analyses of the guidelines, commitments made by LDCs and the effect they have on the accession period

As the topic suggests this paper is about the time it takes for LDCs to accede to the World Trade Organization and the impact the 2002 and 2012 accession guidelines had on the accession process and the time it takes to accede to the organization. Although it may seem that time is the essential factor, accession commitments and the economic needs of LDCs is the main concern

²⁴⁹ Pinstруп et al. supra note 216, at 46

²⁵⁰ Cheng, supra note 213, at 4

²⁵¹ *Cambodia Working Party Report*, Supra note 212, at 36-48

²⁵² World Trade Organization, *Ministerial Declaration of 20 November 2001*, WT/MIN(01)/DEC/2, 7, 41 I.L.M. 746

²⁵³ *Cambodia Working Party Report*, Supra note 205, at 244 and 204.

²⁵⁴ Working Party on the Accession of Cambodia, *Draft Report of the Working Party on the Accession of Cambodia*, WT/ACC/SPEC/KHM/4/Rev.1, at 59, (June 19, 2003)

²⁵⁵ Cheng, supra note 207, at 9

for this paper since it is those factors that make accession lengthy or fast. Bellow is the summary of the time taken by LDCs to accede to WTO.

LDCs who acceded to WTO after 2002	The time it took to acceded to WTO
Nepal	15 years
Cambodia	19 years
Vanuatu	17 years
Samoa	14 years
Lao people's republic	16 years
Yemen	13 years

Table 1. The time it took for LDCs to accede to WTO after the 2002 accession guidelines

The reason for delay of the negotiation process could be two sided. One is from the negotiator's side where it delays the process basically because it lacks the required knowledge, experience, resource and limited analytical capacities.²⁵⁶ This kind of delay is dealt by the accession guidelines in that it addresses the need for technical assistance. The second portion of the reason for lengthy accession process is the shortcoming of the WTO system allowing every member to negotiate the terms of accession individually, where they fail to agree on a common approach on terms of accession.²⁵⁷ This approach of accession negotiation is often manifested through demands by some members, higher levels of obligations and commitments than the level of commitments made by original WTO members.

Therefore let us examine the guidelines in all the areas where it attempted to make reforms and examine its effectiveness on the actual cases of LDCs who have acceded to WTO after 2002.

Goods and services

²⁵⁶ Sok Siphana, lessons from Cambodia's entry into the World Trade organization, Asian Development bank institute, Tokyo, Japan (2005), at X

²⁵⁷ Id

LDCs who acceded to WTO after 2002	Market access commitments		Service commitments
	Agricultural	Non agricultural	
Nepal	41.5%	23.6%	11 sectors 77 subsectors
Cambodia	30%	18%	10 sectors 72 subsectors
Vanuatu	43.6%	39.1%	10 sectors 72 subsectors
Samoa	26.6%	20.4%	10 sectors 81 subsectors
Lao people's republic	19.2%	18.7%	10 sectors 79 subsectors
Yemen	25%	20.6%	11 sectors 78 subsectors

Table 2. Summary of accession commitments taken up by LDCs after the 2002 accession guidelines

When the 2002 accession guidelines were formulated no clear indication or benchmark was given as to what should and should not be asked of acceding LDCs. It was a mere indication that existing members should be considerate of the needs of LDCs and that demands for commitments should be a reflection of that consideration. Since that did not stop existing members from asking more onerous obligations and commitments, the 2012 accession guidelines was formulated in a way that includes some reference points of tariff demands that are believed to be considerate of LDC's economic and social needs. Even these references were not without problems since they were criticized for being higher than what is taken up by original members not to mention that they were mere reference points. Even with all these problems these reference points were not formulated in all areas of commitments and obligations since services and transitional periods were left to individual member state merits. In these areas the guidelines turned out to be mere repetitions of the 2002 guidelines which simply stated that existing members be considerate.

The average agricultural tariff line provided by the guidelines is 50% while the average agricultural tariff for original members is 79% and 76% for original LDC members. There is a reason to believe that the reference point used by the guidelines is this average tariff, because the

2002 accession guideline mentioned that it's asking for reform "*taking into account the commitments undertaken by LDC WTO Members at similar levels of development*"²⁵⁸.

On the other hand the average Agricultural tariff commitments take up by LDCs even after 2002 is 31% in average. Therefore not only is 50% agricultural tariff inappropriate compared to the 76% that would have been the proper interpretation of the 2002 accession guideline, the 50 % stipulated by the 2012 accession guidelines could not be met through the actual accession negotiations that took place after the guidelines.

Coming to NAMA, the proper interpretation of the 2002 accession guidelines also differs from the 2012 accession guidelines in that it would be binding coverage for NAMA of 51.6%, and an average bound NAMA tariff of 42.9%. The 2012 accession guidelines provide two options: acceding LDCs can bind 95 percent of their NAMA lines at an overall average rate of 35 percent, or they can undertake more comprehensive binding coverage at higher overall average rates, to be agreed with WTO members. The guidelines fail to meet these standards of making the reference points similar to accession commitments of original LDC WTO members. Looking at the actual NAMA of the LDCs who have acceded after 2002 even these numbers couldn't be met since their NAMA is 23.4% in average.

Services, as I mentioned earlier was a missed opportunity by the formulators since we can't find any tangible and enforceable reference point on the guidelines. Service is a very important and significant part of an economy. It would become a serious reason for a country to face a lengthy and burdensome accession negotiation and a great example of such matter would be Ethiopia, which claims to be protective of its telecommunication and the financial sector, all of which fall in the service sector. Most LDCs generate their revenues from tariffs and some government owned sectors that generate a lot of profit. Therefore it wouldn't be surprising if they try to protect these sectors and their tariff lines. Compared to original WTO members who only took commitments to open up 6 sectors and 42 subsectors in average the service sectors and subsectors LDCs are being forced to open up is not according to their economic needs.

Generally the guidelines fail to address the need of LDCs to protect their economy, through either failing to address issues or failing to enforce what they promise as reference points. And

²⁵⁸ Supra note 99, at paragraph 1

thus the lengthy, costly and exhausting negotiations LDCs have to go through and the final commitments they agree to undertake have not been solved by the guidelines.

Perhaps the other issue related to this matter is the economic benefit of becoming a WTO member, which is arguable, especially for LDCs. There are different views on this area. There are those who think that economic reforms following WTO membership could be really beneficial and those who believe it has no direct relationship with economic growth or even maybe come harmful to the acceding country. There is no extended study on this matter but it is apparent that there can be benefits to becoming a member to achieve a needed policy reform particularly for countries that lack good governance and struggle to engage in reforms without a third party enforcement. At the same time rapid opening up and liberalization of the economy might lead to an unprecedented international competition, leading to unemployment and social instability, especially for LDCs whose economies largely depend on micro businesses. In addition once market access tariff is agreed on the tariff flexibility the country use to exercise will vanish. Tariff might be a source of revenue for the government in these type of economies. Overall the significant reforms LDCs are asked to undergo results in a lengthy accession process as it could narrow the policy space of LDCs and force them to agree to what they would otherwise never have done.

Transitional periods and Special and Differential Treatments

The need for transitional periods is indisputable because it's the time a country needs to adjust to the laws of WTO as well as the commitments it has agreed to in the accession process. Without transitional periods acceding countries will be at the merit of the dispute settlement body for not implementing its agreements as soon as it becomes a member of WTO. For an LDC which still lacks the expertise and resource to change its laws and policies within a short period of time, transitional periods are not privileges but rather a necessity.

Again the guidelines have missed the opportunity to interpret this need of transitional periods into an enforceable reference point. The only transitional period mentioned by the 2012 accession guideline is on NAMA where a country has to bind 100% of its NAMA tariff lines in which case they will have a transitional period of 10 years. This statement is criticized for being limiting. Both the 2002 and 2012 accession guidelines refer to specific WTO agreements and the transitional periods provided by them but LDCs are being forced to forgo those rights

provided by the agreements through bilateral agreements. For example Nepal agreed to implement TRIPS in two years and eight months and Customs Valuation in one year and eight months, while original LDC members enjoy transitional period until 2021 for TRIPS and five years for Customs Valuation. Lao People's Republic and Yemen both agreed to implement TRIMS agreement from the date of accession, while original LDC members enjoy seven years transitional period.

All these WTO+ commitments and WTO- rights are one of the main reasons why accessions are taking more than 10 years on average for LDCs to accede to WTO and become part of the international trade society and the guidelines have failed to make a significant contribution to eliminate these issues and accelerate the accession process for LDCs.

On the other hand almost all WTO agreements recognize the need for special and differential treatment towards LDCs. The 2002 and 2012 accession guidelines are also an extension of this right that LDCs have due to their special and sensitive economic needs. Although the guidelines also reaffirm this need by pointing out that all special and differential treatments will be applied from the date of accession, there is a practice of stripping LDCs of the rights they are entitled to exercise after accession through the process of accession negotiation. Therefore the guidelines should have reaffirmed the need for special and differential treatment in a way that allows LDCs to exercise them even during the accession process if these rights are to be exercised in a way they are intended by the drafters of WTO agreements. This discrepancy between original LDC WTO members and acceding LDCs could lead to being a ground for unfair competition between countries of the same economic development.

Most LDCs who have acceded to the WTO have relinquished their rights of not being pushed to signing plurilateral agreements as a condition for accession, have been forced to agree to stop agricultural export subsidies from the date of accession or have agreed to one or another WTO+ condition they didn't have to because the guidelines do not extend these special and differential treatments for acceding countries during their accession. Agricultural export subsidies for example are issues of great sensitivity for LDCs whose majority population depends on agriculture for living. At the same time countries with very developed economies enjoy the right to keep these subsidies for some time after becoming a member of the organization.

Technical assistance

Technical assistance is the other solution suggested by the guidelines as a way to accelerate the accession process and it is apparent that LDCs need technical assistance since the other reason for delay is the lack of expertise and resource to speed up the process. There are efforts being made by WTO and other organizations to assist acceding LDCs to the international trading system but the weakness comes in at the effectiveness and coordination of these assistances and ultimately the time it takes for an LDC to accede effectively. Besides this point some LDCs have reportedly been denied of technical assistance for integration to the system (E.g. Cambodia).

3.5 Ethiopia's ongoing accession to WTO

In the 1940s, when WTO's predecessor, the GATT, was established, Africa's only independent country, Ethiopia, had an invitation to join but Ethiopia never accepted that invitation.²⁵⁹ The current Ethiopian regime applied for membership as part of its plan to transform the country from a socialist economy to a market oriented one.²⁶⁰ The country with its economy mostly dependant on export of few unprocessed agricultural products, its interest in accession may not be apparent at first glance. Despite the seemingly unimportant accession, Ethiopia joined WTO as an observer in 1997 and applied for membership in 2003 and has yet to complete the process of accession.²⁶¹

The working party for Ethiopia was established on February 2003 and the memorandum of foreign trade was submitted in December 2006.²⁶² In 2007 Ethiopia received the first round of questions and submitted its replies in 2008.²⁶³ On the same year the first working party meeting was held on Ethiopia's accession.²⁶⁴

²⁵⁹ Fortune magazine, WTO membership for Ethiopia debated, *reporter Ayenew Haileselassie (June 25, 2016)*<http://addisfortune.net/articles/wto-membership-for-ethiopia-debated/> (accessed on July 2016)

²⁶⁰ Henok Birhanu Asmelash, On Ethiopia's Long Walk To WTO Membership, University of Saint Gallen, Law and Economics Research Paper series, Working Paper no.2014-06 (November 2104), at 1

²⁶¹ *Id.*, at 6

²⁶² *Id.*, at 7

²⁶³ *Id.*

²⁶⁴ *Id.*, footnote 36

The last working party meeting on Ethiopia's accession was held in March 2012.²⁶⁵ Delays on the accession process are attributed to the understandable cautionary actions of the government trying to protect its economy and its sensitive sectors from international competitions that they are not prepared to resist.²⁶⁶ Initial Market access offers on goods was submitted to WTO in February 2012 but plans to submit market access offers on services has been delayed,²⁶⁷ which has become barriers for the accelerated accession of Ethiopia to WTO. Ethiopia as an LDC could not bear to open up more sectors and accept more onerous terms of accession than original members of the WTO. Thus we will be examining if the above discussed accession guidelines could be of any help to speed up and make Ethiopia's accession a better one.

Currently Ethiopia's overall maximum applied tariff rates are at 35% and its average applied tariff is 22.1% which is very low.²⁶⁸ At first glance, the numbers provided by the guidelines seem very good for Ethiopia and much higher than those undertaken by other LDCs but they are barely "reference points", with no guarantee that Ethiopia will not be forced to bind its tariff rates below the benchmarks.²⁶⁹ Even with the benchmarks intact Ethiopia will lose its freedom to increase its tariff rates in times of need.²⁷⁰

When it comes to NAMA the same advantages present themselves to Ethiopia with respect to the benchmarks. Ethiopia's current maximum and average applied NAMA tariff rates are 35% and 16.6% which are respective of and lower than the numbers in the benchmarks for NAMA.²⁷¹ To this end if Ethiopia decides to bind 95% of its NAMA it could use the 5% to protect areas of trade, which are sensitive to the economy.²⁷² But this will entail loss of transitional periods as the benchmarks only stipulated transitional periods for those who bound 100% of their NAMA.²⁷³ In this sense the benchmarks are hurting the chances of LDCs to get transitional periods.²⁷⁴ In addition there is also the lack of enforceability of the provisions of the

²⁶⁵ Id, at 8

²⁶⁶ Id at 9, 10

²⁶⁷ Id, at 8

²⁶⁸ WTO, ITC, UNCTAD, world tariff profiles 2016 (2016), at

https://www.wto.org/english/res_e/booksp_e/tariff_profiles16_e.pdf, (accessed on December 20, 2016)

²⁶⁹ Henok, supra note 260, at 17

²⁷⁰ Id

²⁷¹ WTO et.al, Supra note 268

²⁷² Henok, supra note 260, at 18

²⁷³ General council, supra note paragraph 7(ii)

²⁷⁴ Henok, supra note 260, at 19

guidelines since they are merely benchmarks and not minimum or maximum standards.²⁷⁵

Services, which are the main reason that Ethiopia could not accede to the WTO in time, were left neglected by the guidelines. Service sectors like telecommunication and the financial sector have not been open to foreign investment due to the belief of the government that Ethiopia's economy has not fully transitioned to a market economy and that the government needs to play a major role in doing so. The benchmarks failed to establish enforceable benchmarks which may mean that accession process will continue to be lengthy for LDCs. In general it is unlikely that Ethiopia will be able to accede to the WTO without making some commitments in telecommunication or financial sectors since it is the experience of other LDCs who have acceded before Ethiopia.²⁷⁶

In addition to Ethiopia's reluctance to open up its sectors, lack of resource to bring its trade laws in line with WTO agreements is one of the reasons for delay in Ethiopia's accession.²⁷⁷ Therefore the need for technical assistance becomes apparent in this area of the accession process as is stipulated in the 2002 and 2012 accession guidelines.²⁷⁸

²⁷⁵ Id, at 20

²⁷⁶ Id, at 24

²⁷⁷ Id, at 12

²⁷⁸ Id

CHAPTER FOUR

CONCLUSION AND RECOMMENDATION

4.1 Conclusion

WTO is the only international organization regulating multilateral trade which makes it the ultimate place to be for countries who seek to accelerate domestic economic, legal and institutional reforms and create a stable business environment.

It is said that “the establishment of WTO in 1995, represented a shift from a multilateral trading system based on diplomacy under the GATT regime to one that operates under the rule of law”.²⁷⁹ On the other hand the rules on accession to the organization have proven to be insufficient since the Marrakesh Agreement does not specify the terms of accession to the WTO. The level of commitment that needs to be taken, the time needed to accede to the WTO, what could and could not be asked of acceding countries is all decided through the bilateral, plurilateral and multilateral negotiations between acceding countries and existing WTO members who are interested in the particular accession.

LDCs, which are granted this position recognizing their need for support and special treatment, are also forced to go through the same procedure of negotiation which requires an ample amount of expertise, time and money, making the outcome even more unsuited to their economic position. The special and differential treatments conferred to them by the multilateral agreements had to be negotiated and most of the time taken from them, making the accession process lengthy and very difficult for LDCs. WTO-plus obligations and WTO-minus rights are imposed on them even after the long and complex process of accession they have to go through making it impossible for them to benefit from WTO membership. At the same time existing WTO members enjoy very little membership commitments compared to acceding members solely due to the fact that they are founding members.

The 2002 LDC Accession Guidelines address issues of Special and Differential Treatment provisions making clear that they also apply to acceding LDCs; and accession to plurilateral agreements or to participate in other optional sectoral market access initiatives shall not be a

²⁷⁹ Nguyen, *supra* note 21 at 20

precondition for accession to the Multilateral Trade Agreements of the WTO. The guidelines also address the issues of technical assistance to comply with WTO rules, transitional periods and most importantly restraint in market concessions to simplify and accelerate the accession of LDCs to the WTO.

These guidelines are too general and lack clear benchmarks to actually affect the accession processes, market concessions and the time it has taken to accede to the WTO for LDCs. For such reasons the guidelines were improved in 2012, to include provisions of good benchmarks, principles on service market access, transitional periods, transparency, special and differential treatment and technical assistance.

The 2012 guideline also failed to give clear benchmarks on all areas except goods, which are also being criticized for being too far apart from the commitments of existing members. Even with the new guidelines in place, there are no clear mechanisms to stop market concessions beyond what is stated in the guidelines, since most negotiations are bilateral. One of the requests of LDCs was that negotiations be made multilateral if the guideline is to be implemented, which was rejected by developed nations.

Since 2002, six LDCs (Nepal, Cambodia, Vanuatu, Samoa, Lao People's Republic and Yemen) have acceded to the WTO. Looking at their accession commitments we can see that the terms in which they acceded into the WTO are very high compared to the commitments of existing members and not in line with the 2002 accession guidelines.

In addition to market access conditions, many recently acceded LDCs have agreed to commitments not required by WTO Agreements ('WTO-plus) and agreed to waive their rights to certain WTO provisions ('WTO-minus') that are available to existing LDC Members. Certain Special Differential Treatment provisions for existing WTO LDC Members were also waived by recently acceded LDCs.

Therefore although it's hard to assess the effectiveness of the 2012 accession guideline, we can see that the 2002 guideline has not been applied in its true sense. There are improvements here and there with regard to technical assistance and the 2012 good benchmark is a better commitment than any of the commitments these six LDCs have agreed to in their terms of accession but there is concern that this benchmarks are not enough and may have the tendency

to limit LDCs to negotiate a better term of accession. In addition the lack of clarity in other areas might mean the remaining LDCs wishing to accede to the WTO might be bullied in these areas leading to a lengthy and unfair accession.

4.2 Recommendations

Based on the findings of the research, the solutions are both in the hands of the acceding country and existing WTO members for an accelerated accession process. Although there are flaws in the system and I will be making a suggestion on the procedures of accession, WTO is more a table, where countries gather and talk around, rather than an organ that has power to make decisions independent of its members. Therefore most solutions are dependent on the will of member countries as well as acceding countries and their willingness to accelerate the process of accession.

1. Acceding countries need to be prepared

Countries wishing to accede to WTO should make all the preparations needed to take on the accession process and follow through every step of the accession with the aim of acceding as fast as possible. To do that acceding countries need to

- Identify areas that require focus with respect to their own interest and time
- Get the politics of accession in order- since accession needs to be approved by the country's parliament and then supported by the stake holders, the accession process should be guided by policy makers at the highest levels and stake holders should be informed of the accession process
- Seek technical assistance both from WTO secretariat and other independent organs to guide them through the accession process
- Assign people of great technical and negotiation skills for the accession process

2. Original members have to be considerate

The ideal solution would be that original members and how they interact with acceding LDCs be reformed in a way that the perspective level of and prospects for development of the applicant country are more thoroughly considered. Original members need to realize that piling on

commitments and denying LDCs of the special treatment they deserve is not a healthy way to carry on accessions. These countries will eventually fail to apply their commitments since it's beyond their capacity.

3. A separate accession agreement

The root of the problems to a lengthy, complex and costly accession is the lack of specify in the accession provisions of the Marrakesh Agreement. At the time of transformation from the GATT to the WTO these issues may not have been very apparent to the legislators but accession has proven to be difficult ever since. Therefore establishing a new and broad ranging agreement on accession specifying the level of commitments is a vital solution for both LDCs and other acceding countries who are seeking to join the organization on similar footing with the original members.

4. Regulate bilateral negotiations

One of the big reasons that the 2002 and 2012 accession guidelines are not being applied properly on LDC accessions is the lack of transparency when negotiating on accession commitments. This happens mostly in bilateral negotiations between original members and acceding countries behind closed doors. The 2012 accession guideline reaffirms the need for these bilateral negotiations by stating “market access negotiations shall proceed bilaterally”. Thus these bilateral negotiations need to be regulated in a way that takes into account the accession guidelines.

5. Trade regime evaluation by independent experts

If it becomes impossible for any of the above solutions to be implemented, one must find a way to work with the existing system. A less radical solution would be to evaluate the acceding government's trade regime by a panel of independent experts instead of interested members who make concessions based on their interests rather than the necessity of the acceding country. This panel of independent experts could as well make recommendations on what should and should not be asked of an acceding country to be used as a reference point in the process of accession.

6. Organised system of technical assistance

Even with all the difficulties involved in the accession process, countries with better financial and technical capacities have acceded faster and have gotten better deals than LDCs. This implies that the accession process and commitments taken are directly related to the knowhow and resource of the acceding country. Therefore WTO should provide organised technical assistance programs for LDCs both on accession and implementation of accession commitments on different levels from trainings to an actual hand in the negotiation process.

7. Revision of the guidelines

The guidelines, although a good start are results of compromise by LDCs of their rights to special and differential treatment. The benchmarks are not enforceable and when they are they are bellow what is thought to be the interpretation of these rights. In addition to other mechanisms of enforcement these bench marks need to be clear and reflective of the developmental needs of the countries as well as the true interpretations of special and differential treatment rights found on all WTO agreements

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