



**ADDIS ABABA UNIVERSITY
COLLEGE OF GRADUATE STUDIES
SCHOOL OF LAW**

**Ethiopia's Accession to the WTO and the Telecom Sector:
Can Ethiopia Accede without Liberalization?**

**Dissertation Submitted in Partial Fulfillment of the Requirements for the
Masters of Laws Degree in Business Law**

**By
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Advisor

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May 2014

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Declaration

I, Hika Zerihun Lamu, declare that the work presented in this dissertation is original and has never been presented to any other University or Institution. Where other people's works have been used, these have been duly acknowledged.

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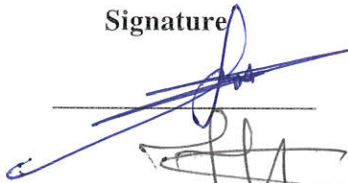
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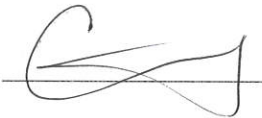
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ACRONYMS AND ABBREVIATIONS

ADLI	Agricultural Development Led-Industrialization
AT	Annex on Telecommunication
BTA	Basic Telecommunications Agreement
CDP	UN Committee for Development Policy
ECCSA	Ethiopian Chamber of Commerce and Sectoral Association
EFOSSNET	Ethiopian Free & Open Source Software Network
EICTDA	Ethiopian Information and Communications Technology Development Agency
EPA	Ethiopian Privatization Agency
ETA	Ethiopian Telecommunication Agency
ETA	Ethiopian Telecommunication Authority
ETC	Ethiopian Telecommunication Corporation
EU	European Union
EVI	Economic Vulnerability Index
FDRE	Federal Democratic Republic of Ethiopia
GATS	General Agreement on Trade in Service
GATT	General Agreement on Tariffs and Trade
GMPCS	Global Mobile Personal Communications by Satellite
GTP	Growth and Transformation Plan
HAI	Human Asset Index
IBRD	International Bank of Reconstructions and Development
IBTE	Imperial Board of Telecommunications of Ethiopia
ICT	Information and Communication Technology
IF	Integrated Framework
ITTC	International Telephone and Telegraph Corporation
ITU	International Telecommunications Union
LDCs	Least Developed Countries

MCIT	Ministry of Communication and Information Technology
MFN	Most Favored Nation
MFTR	Memorandum on the Foreign Trade Regime
MoT	Ministry of Trade
NGBT	Negotiating Group on Basic Telecommunications
PTT	Post, Telegraph and Telephone
RP	Reference Paper
STD	Special and Differential Treatment
TO	Telecommunication Operators
U.S.	United States
UNDP	United Nations Development Program
UR	Uruguay Round
USAID	United States Agency for International Development

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Abstract

Ethiopia has applied for membership of the World Trade Organization (WTO) and its accession process is currently in progress. Despite this, the country is referring some service sectors, like the telecom, as untouchable and, as a result, their liberalization seems improbable. This dissertation is therefore intended to inspect the country's policy position on telecom liberalization and the implications such policy has at the WTO fora. Concerning service liberalization, there are in fact WTO laws that allow flexibility for Least Developed Countries (LDCs) to maintain their domestic policy autonomy to certain extent. However, a careful look at accession processes and telecom commitments experience of some recently acceded countries are antithesis to these WTO credos. Though Ethiopia has not submitted its initial service offer and a bilateral negotiation has not commenced yet, it has been told by some WTO Member countries to reconsider its policy on the telecom sector. The research, thus, examines the possibility for Ethiopia to accede to the organization while still sticking to its current policy position. To such end, it came to conclusion that it is hardly possible for the country to join the organization while keeping the status quo.

Key words: Ethiopia, World Trade Organization (WTO), Telecommunication, Liberalization, Least Developed Countries (LDCs)

CHAPTER 1

INTRODUCTION

1.1. Background

Following the end of a centrally planned economy in 1991, Ethiopia has embarked on taking different reform measures in its economy, including in its domestic and foreign trade, along the lines of the market economy. To mention some of the reform measures: tariff structures have been simplified and the levels have been significantly reduced, prices have largely been deregulated, export subsidies have been eliminated, the seed and agricultural input sectors have been liberalized and opened to the private sector, and subsidies for agricultural input such as fertilizer, herbicide and insecticide have been abolished.

Realizing joining the WTO will further strengthen these economic reforms and thereby contribute to the country's development by increasing access to foreign markets that also results in increased foreign and domestic investment, Ethiopia officially applied to become the WTO member on 13 January 2003 after being an observer for six years, since 25 September 1997.

Despite the fact that the country is committed itself in making wide range of economic reforms and trade liberalizations, there are still a number of economic sectors that it regards as 'untouchable' due to their 'particular and strategic importance'. Telecommunication sector, *inter alia*, is at the heart of these unchallenged sectors.

WTO founding and guiding principles, on the other hand, demand acceding countries make market access commitments in goods and in services along other non-discriminatory and transparency commitments. WTO expects full market liberalization in most sectors. This liberalization may be implemented at one shot or progressively.

The purpose of this paper is, therefore, to inspect the current policy position of Ethiopia on telecommunication service liberalization and investigate whether there is a room in the WTO rules and practices that allow flexibility for accommodation individual acceding country's policy position to resist liberalization in the so-called sensitive areas.

1.2. The Research Problem and Questions

Ethiopia's decision to accede to the WTO has raised important issues such as whether it is ready to liberalize sensitive sectors like telecommunication industry, which are traditionally closely overseen and tightly controlled. Evidences show that the country insisted on not to liberalize the sector. Actually, accession does not automatically impose a duty on the acceding country fully liberalize its service sectors 'as that country has the right to progressively open them. Nonetheless, due to intense pressure from incumbent Members as a result of complexity of accession process, as well as, owing to the reason that acceding countries need to obtain concessions from other countries with whom they trade, most of the LDCs that have recently acceded to the WTO chose to make more service commitments including their telecommunication sector.

Hence, there are some imperative questions needed to be researched regarding the attempt of Ethiopia to accede to the WTO while still having stubborn position in avoiding telecom liberalization. In effect, this paper examines the following research questions:

1. What do the current policy position of the country look like regarding liberalization of the telecom sector?
2. Are there WTO rules or practices that allow countries to accede while still having no intention to liberalize sensitive sectors like telecommunication?
3. What lessons can be drawn from other LDCs that are recently acceded?
4. Finally, is it possible for Ethiopia to accede to the WTO without liberalizing the telecom sector?

1.3. The Research Objective and Significance

It has been years since Ethiopia started a process of joining the WTO. However, in all these years, little or no progress has been made towards the liberalization of its key service sectors, notably the telecommunication industry. This is what stimulated this research, as the researcher believes that such position of the country along other reasons contributes to its prolonged accession process. Thus, the research is substantiated by the need to know Ethiopia's position in making liberalization commitments in its telecommunication services sector, the pressure from

other Member countries, and whether the country can accede while still keeping *status quo*. Hence, it targets to attain the following objectives:

1. It aims at giving insight knowledge about the country's policy position in liberalizing the telecommunication sector.
2. It aims at indicating different WTO rules that allow flexibility for acceding LDCs in order for such countries avoid taking certain service liberalization commitments.
3. It targets at showing the paradox existing between the so-called safeguarding WTO rules for acceding LDCs and the trend practiced so far in their accession process.
4. Finally, it aims at showing the possibility for Ethiopia to accede to the WTO despite the fact that the country is not in the position to liberalize the telecom sector.

The research is, therefore, helpful in providing knowledge about telecom policy stance of the country and the WTO expectation, while at the same time is useful in giving direction for the country in its effort to become a part of the biggest multilateral trading system of the world.

1.4. The State of Literature and Research Methodology

The research is carried out making the use of qualitative research methodology. In so doing, both primary and secondary data is drawn on. To this end, the following methods are employed.

Interviews:

Sample people from Ministry of Trade (MoT), Ethiopian Telecommunication Agency (ETA), and Ethiopian Privatization Agency (EPA) were interviewed. As this was conducted by way of face-to-face interview, it helped in obtaining primary data.

Secondary data:

Even though, there are some literatures written in respect of LDCs' accession to the WTO and their telecom service commitments elsewhere, no such literature exists in connection with Ethiopia except for a report of Ministry of Trade (MoT) that reviewed impacts of WTO accession on Ethiopia's telecommunication service sector. The report is concerned with inspecting the impacts of the country's accession on the telecom service sector by making an assumption that the country liberalizes the sector, whereas, the research at hand, assesses

whether it is possible for Ethiopia to accede to the WTO without making market commitment in the telecom sector. Hence, the point of departure of this research is visible.

In writing this research, thus, along the report mentioned different literatures from international legal and non-legal instruments, scholarly writings, books, reports, journals, and policy papers dealing with telecommunication liberalization as well as LDCs WTO accession process are consulted. Particularly, WTO documents like; the GATS, the WTO Basic Telecommunications Agreement (BTA), the WTO Reference Paper (RP), WTO Ministerial Decisions, Guidelines for Accession of LDCs, WTO case laws (the Telemex Case) and various Ethiopian Laws dealing with the Telecom Sectors and Investment are seen. These materials are contextualized to fit in with the subject of the study. Cases of different LDCs that have recently acceded to the WTO are also examined.

1.5. The Limitations and Scope of Research

The nature of the research is the one that requires the researcher observe and consult different domestic and international organizations as well as variety of documents. However, due to access, financial and time constraints the research is confined to examination of certain carefully selected documents and domestic institutions. Furthermore, observation is limited to domestic organizations like Ministry of Trade (MoT), Ethio Telecom, Ministry of Communication and Information Technology (MCIT) [the Telecommunication Agency (ETA)], and the Ethiopian Privatization Agency (EPA).

The research is concerned with examining the current position of Ethiopia in liberalizing telecommunication sector, assessing the WTO rules as well as practices in tolerating individual acceding country's policy autonomy during accession process, and finally inspecting WTO rules on telecom commitments. It does not deal, however, with the overall impact of the WTO accession on the country. Nor does it concerned with examining benefits and costs that the country assumes by the liberalization the telecom sector.

1.6. Organization of the Research

This research work comprises five chapters each of which is in turn divided into sections and sub-sections. The second chapter addresses the policy of the country on telecom liberalization. It

discusses the history, legal and regulatory frameworks, the investment environment, and the current liberalization policy on the telecom sector. The third chapter focuses on examination of WTO rules that apply on acceding LDCs. It discusses the WTO accession process, different Special and Differential Treatment (SDT) rules for accession of the LDCs and challenges of the accession of LDCs. It also addresses the current accession process of Ethiopia. The emphasis of chapter four is discussion of WTO telecom commitments, accession experience of some LDCs, and WTO expectation from acceding LDCs. The chapter explains various WTO rules on telecommunication, such as the General Agreement on Trade in Service (GATS), GATS Annex on Telecommunication (AT), the Reference Paper (RP) and others. It also discusses telecommunication policy and commitment experience of recently acceded LDCs and draw lessons for Ethiopia. Finally, it inspects what the WTO expects from acceding LDCs like Ethiopia in their accession process in general and liberalization of their service sector in particular. This chapter determines the core issue of this paper, whether it is possible for the country to accede to the organization while still avoiding liberalization of the telecom sector. The fifth chapter provides conclusion and recommendations. It summarizes the study and indicates the measures to be taken by the country and the WTO.

CHAPTER 2

2. AN OVERVIEW OF TELECOMMUNICATION SECTOR IN ETHIOPIA AND THE COUNTRY'S POLICY POSITION ON ITS LIBERALIZATION

2.1. History of Ethiopian Telecommunication Sector

The history of telecommunications in Ethiopia, from its introduction to the present day, spans one hundred and ten years. However, very little of this history has been documented. The history of the country's telecommunications sector can be roughly divided into the 'Early Years', a 'Post Italian War Period', the 'Derg Regime' and the 'Current Regime'.

2.1.1. The Early Years (1894-1942)

In 1894, Emperor Menelik II introduced telecommunication service in Ethiopia when the construction of the telephone line was commenced.¹ The first major telephone line construction spanned a total distance of about 477 kilometers and connected Harar, a major trade center in the eastern region, with Addis Ababa, the capital city. The line, which took only two years to construct, also interconnected small towns situated along the route. Immediately after the telephone line, a telegraph line was installed following the construction of the first and only railway line in the country, the Ethio-Djibouti railway. Within two years, an 880-kilometer north-south telephone line connecting Asmara the capital of Eritrea, to Addis Ababa was constructed and made operational in 1904.²

International communication services, however, took longer to develop. Until the end of 1930, Asmara and Djibouti, both under colonial rule at the time, were the only two locations with international connections.³

Administratively, at first, from 1890 up to 1907, the management of the service was under the Imperial Court of Menelik II, in the name of the 'Central Administration of Telephone and Telegraph System of Ethiopia'. Mr. Stevenin, a French citizen, was appointed as the General Manager of the service. From 1907-1909 the service was renamed as 'The Central

¹ [http:// www.ethiotelecom.et/companyprofile2013.html](http://www.ethiotelecom.et/companyprofile2013.html)

² Abii Tsigie and Girma Feyissa, 'Telecommunications In Ethiopia: Past, Present, And Future', <http://www.vii.org/papers/ethiopia.htm>

³ *Ibid.*

Office of Post, Telegraph and Telephone (PTT) System of Ethiopia'. It was administered by Emperor Menilik's advisor, Mr Al Fred Ilg, a Swiss citizen. Then in 1910, the service was renamed as 'Ministry of Post, Telegraph and Telephone (PT and T)'. First, it was administered by Mr. Leo Shafno, a French citizen and then replaced by the first Ethiopian administrators Lij Gizaw Bezabih, Lij Beyene Yimer and their successors consecutively.⁴

Meanwhile, hostilities among the competing colonial powers like Britain, France, and Italy were growing in the Horn of Africa, putting Ethiopia's sovereignty and independence in a precarious position. The Emperor was forced to move fast and took action to safeguard the country's sovereignty. Ethiopia, consequently took steps to free itself from a dependence on the foreign administration of its international traffic by becoming member of both of the League of Nations and, since 1932, the International Telecommunications Union (ITU). By 1934, Ethiopia had established direct radiotelephone links with Cairo, Djibouti, Aden, and London and soon after established a radio communications-training center for Ethiopians in order to replace the expatriates handling the nation's traffic (which included confidential state affairs).⁵

2.1.2. The Post War Restoration (1942-1952)

After the independence from the Italian occupation, the re-established Ministry of PT and T took over the running of Telephone, Telegraph and Radio communications. It, therefore, rehabilitated the network of the whole country.⁶

However, the task of rehabilitating the damaged infrastructure in all sectors of Ethiopia's economy was huge and almost insurmountable. Since funds and skilled labor were unavailable in sufficient numbers, international aid agencies had to be approached. In April and May 1950, first International Bank of Reconstructions and Development (IBRD) mission (which consisted of the organization's founder, Eric Beecroft, and other bank officials) came to Ethiopia to conduct an investigation of the possibility of reforming the ministry and creating an organization entrusted with the sole responsibility of restoring and extending Ethiopia's telecommunications services. The technical part of their study was actually made by a group of experts of the International

⁴ Ethio telecom, *supra* note 1.

⁵ Abii, *supra* note 2.

⁶ Ethio telecom, *supra* note 1.

Telephone and Telegraph Corporation (ITTC). The study proposed a short-term (three-year) US\$2.2 million investment program to be carried out as an initial rehabilitation project. It also proposed the establishment of a semiautonomous telecommunications body charged with the maintenance and development of the country's telecommunications network.⁷

Establishment the Imperial Board of Telecommunications of Ethiopia (BTE)

Under the Imperial Regime, the Imperial Board of Telecommunications of Ethiopia (IBTE) was established by the proclamation No. 131 on October 15, 1952. The main purpose of the Board, as stated in its establishment charter of article 5, was 'to rehabilitate, extend, repair and maintain the telecommunication facilities of Ethiopia and to engage in the business of telecommunication for profit'. It was also mandated to act as an agent for the Ethiopian government in all matters relating to telecommunications services in and outside the country and to establish appropriate training procedures and a training institute for present and future board personnel.⁸

In addition to these specific objectives, the IBTE's overall purpose was to provide and efficiently maintain satisfactory telecommunications services for the public. In order to achieve these objectives and meet the ever-growing demand for services, the IBTE has periodically undertaken structural reforms and modifications to its organization.⁹

2.1.3. The Dergue Regime (1974-1991)

Under the Dergue regime, in October 1975, the Ethiopian telecommunications was renamed as 'The Provisional Military Government of Socialist Ethiopia Telecommunication Services'. January 1981, it was then renamed again as 'Ethiopian Telecommunication Authority (ETA). It retained its name as ETA up to November 1996. At this period, technology wise, the telecommunication services had made a major changes.¹⁰

⁷ Abii, *supra* note 2.

⁸ Imperial Board of Telecommunications Establishment Proclamation No. 131/1952, Art. 5

⁹ Abii, *supra* note 2.

¹⁰ Ethio telecom, *supra* note 1:

2.1.4. The Current Regime (1991-Present)

Under the Federal Democratic Republic of Ethiopia (FDRE), on November 1996, Proclamation No. 49/1996 established two separate independent entities namely, the Ethiopian Telecommunications Authority (ETA) and the Ethiopian Telecommunications Corporation (ETC).¹¹ As a telecom operator, the task of ETC is provision of telecom service, whereas, ETA is entrusted to the duty of overseeing and regulating the service's provision by telecom operators. In 2010, both ETC and ETA were restructured. The former was changed to Ethio Telecom, while the latter became a department under the newly created Ministry of Communication and Information Technology and named as ICT Standardization and Regulatory Directorate.¹² Ethio telecom's recent experience is its action of contracting out its management to France Telecom.

2.2. Ethiopia's Current Telecom Service Environment

Having knowledge of the current legal and regulatory framework of the telecom sector is somehow useful inferring the policy position of the government regarding the sector. In this section, the researcher presents an overview of Ethiopia's telecom sector's current legal and regulatory environment.

Ethiopia is the last country in Africa to allow a national monopoly on all telecom services including fixed, mobile, Internet and data communications.¹³ The former ETC, now Ethio-telecom, is the sole government owned provider of these services. ETA was the organ responsible for regulation of the sector since 1996 to 2010. However, starting from 2010, the task of regulating the sector was given to the Ministry of Communication and Information Technology ICT Standardization and Regulatory Directorate.¹⁴ Ethio Telecom reports to the Ministry of Communication and Information Technology (MCIT), while the regulator is the ministry itself, through the department of ICT Standardization and Regulatory Directorate.¹⁵

¹¹Telecommunication Proclamation No. 49/1996, *Federal Negarit Gazeta*, 3rd Year, No 5.

¹² Ethio-telecom, *supra* note 1.

¹³Ethiopian Chamber of Commerce & Sectoral Associations(ECCSA) 'WTO Accession of Ethiopia: Regulation and Openness of Ethiopia's Services Sectors' Private Sector Position PAPER, Addis Ababa Ethiopia, July, 2013, p. 19

¹⁴ Before 2010, Ethiopia Telecommunication Agency (ETA) was an organ responsible for regulation of the telecom sector. Since then it was restructured and renamed as ICT Standardization and Regulatory Directorate and became part of Ministry of Communication and Information Technology as a consequence of enactment of **Proclamation No. 691/2010** which provides for Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia.

¹⁵ Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010, *Federal Negarit Gazeta*, 17th Year, No. 1, Art. 35 (d)

2.2.1. Legal and Regulatory Framework

Ethiopia's current legal and regulatory framework for the telecommunications sector consists of the following basic instruments:

Proclamation No. 49/1996

The proclamation as amended by Proclamation No. 281/2002 provides for the Regulation of Telecommunications. It establishes the Ethiopian Telecommunication Agency (ETA) and describes, *inter alia*, its powers, duties, management, and budget as well as licensing requirements and conditions. Later on Article 3 to 9 of the Proclamation, which provide for matters like structure, objectives, power and duties, management and budget of the ETA were repealed by Proclamation No. 691/2010, A proclamation to Provide for Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia.¹⁶ After enactment of the latter, ETA ceased to exist and its power and duties are given to Ministry of Communication and Information Technology.

Council of Ministers Regulation No. 10/1996

The regulation provides for the establishment of the Ethiopian Telecommunications Corporation (ETC). It was later amended by Council of Ministers Regulation No. 99/2004, which was enacted for the objective of increasing the authorized capital of ETC.

Council of Ministers Regulations No. 47/1999

This one is promulgated to provide for the regulation of telecommunication services, which contains provisions on licensing, technical standards for telecommunications networks and services, and frequency management.

Investment Proclamation No. 769/2012

At first proclamation No. 280/2002 provides that telecommunication services are areas of investment reserved for the government or domestic or foreign joint ventures with the government. Nevertheless, the proclamation is not in force as it was repealed by Investment

¹⁶ *Ibid.*

Proclamation No. 769/2012.¹⁷ All the same, both proclamations prescribe identical idea on nature of investment on telecommunication.

Directives

Furthermore, several directives clarify specific licensing and technical regulatory matters. These are the Resale and Tele centre Directive (November 2003); the Cable, Wireless Local Loop, Switching and Terminal Equipment Maintenance Directive (November 2003); the Radio Regulations Directive (September 2005); the License Fee Directive (2004); and the Value Added Services Directive (August 2005) and many more were issued. The Council of Ministers sets policy for the sector¹⁸ while the Ministry of Communications and Information Technology drafts, implements, and enforces policies and laws.¹⁹

2.2.2. The Ethiopian Telecom Sector Regulatory Organs

Since establishment the current regime, FDRE, two regulatory institutions were created to oversee and regulate the telecom sector. These are Ethiopian Telecommunication Agency (ETA) from 1996 to 2010, and the Ministry of Communication and Information Technology ICT standardization and Regulatory Directorate, since 2010. Under this section, discussions about the structure, powers, duties and the like of the country's telecom regulatory institutions, are in order.

A. Ethiopian Telecommunications Agency (ETA)

As discussed earlier, Proclamation No. 49/1996 created Ethiopian Telecommunication Agency (ETA) as an independent regulatory agency.²⁰ ETA's powers and duties include licensing providers of fixed, mobile, data network, and Internet services; monitoring and allocating spectrum; and regulating tariffs.²¹ It had also the power to collaborate in drafting sector policy with the then Ministry of Transport and Communications²² and other institutions as part of the

¹⁷ Investment Proclamation No. 769/2012, *Federal Negarit Gazeta*, 18th Year, No. 63, Article 40 (1)(d)

¹⁸ Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, *Federal Negarit Gazeta*, 1st Year, No. 1, Article 77.

¹⁹ Definition of Powers and Duties of the Executive Organs Proclamation (2010), *supra* note 15, Article 10

²⁰ Telecommunication Proclamation 1996, *supra* note 11.

²¹ *Id.*, Article 6

²² Ministry of Transport and Communication is now nonexistent as it was split into Ministry of Transport and, Ministry of Communication and Information technology since the coming in to force of Proclamation No. 691/2010, A proclamation to Provide for Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia

executive organ of the government.²³

Powers and Duties of ETA

Pursuant to its establishing Act, ETA had the following powers and duties. Ensuring that telecommunication services are operated in a manner that will best serve and contribute to the country's economic and social development; Specifying technical standards and procedures for the provision on telecommunication services; Ensuring that telecommunication services conform to the specified standards of quality; Regulating tariffs relating to basic telecommunication services; Licensing and supervising operators of telecommunication services; Regulating types of telecommunication equipment which may be connected to a telecommunication system; To authorizing and supervising the use of frequencies allotted to Ethiopia. Where authorized by the Minister (Ministry of Communication and Transport), subject to the appropriate laws and government directives to represent the Government in international conferences and international organizations concerned with telecommunications; and to follow up the implementation of treaties dealing with telecommunications to which Ethiopia is a party. To collaborate with educational institutions in order to promote technical education in the fields of telecommunications. To collect license fees in accordance with the rate approved by the Ministry; to own property, to enter into contracts and to sue and be sued in its own name; and perform such other related activities as may be necessary for the attainment of its objectives.²⁴

Administration of ETA

ETA was financed from the Treasury and was tightly bound by government rules and procedures on funding, salaries, hiring, and firing. The government not only controlled ETA's budget, but also determined which policy initiatives of the then Ministry of Transport and Communications and general targets ETC will pursue.²⁵

ETA used to report directly to the then Minister of Transport and Communication and was subject to his or her "general directives." Consistent with the ETA's functions as described in the Proclamation, the organizational emphasis is on technical regulation. ETA however lacked a

²³ The Ethiopian Information and Communications Technology Development Agency (EICTDA) may also participate in drafting policy. However, the private sector and other stakeholders are not included.

²⁴ Telecommunication Proclamation (1996), *supra* note 11, Article 6

²⁵ This shows that ETA lacked structural, financial and decision-making autonomy, which brought about the issue of independence of the regulatory organ. See Richard Self, et al (2007), 'Impact of WTO Accession on Ethiopia's Telecommunication Services Sector', Revised Final Report, (Nathan Associates Inc.), p. 16

separate division or unit for economic regulation, something essential for any regulator in a liberalized telecommunications environment. The Planning and Research Service was handling economic regulation, it was an area that required strengthening, especially in a costing and tariff setting. Consumer protection is another area not addressed in the Proclamation.²⁶

Activities of ETA

ETA was monitoring telecommunications service quality by imposing quality and equipment standards on ETC and equipment importers. Each year, ETA used to inspect ETC's various networks and compares findings with standards that were annexed to the license of these companies, as a basis for warning the company or penalizing it. Poor service quality can be cause for revoking ETC's license, but in practice, this has never happened and will not likely to happen.²⁷

ETA's quality standard monitoring program was mandated to provide the basis for detecting adverse effects of nonstandard network components and end user terminals to eliminate imperfections affecting telecommunications services. The ETA must have approved any communications equipment for civil use before it passes through customs. Here, enforcement is limited to legally imported telecommunication equipment. While regulations require that ETC respect quality standards, ETA was unfortunately not sufficiently well organized and staffed to enforce these quality standards.²⁸

B. The Ministry of Communication and Information Technology (MCIT)

The Ministry of Communication and Information Technology is established by proclamation No. 691/2010, a proclamation to provide for definition of powers and duties of the executive organs of the Federal Democratic Republic of Ethiopia.²⁹ The former Ministry of Transport and Communication was split and, as a result, and Ministry of Communication and Information Technology was born. As mentioned before, the ICT Standardization and Regulatory Directorate of the Ministry took over the job of regulating the telecom sector after the cessation of the ETA. Issuance of proclamation No. 691/2010 did not repeal proclamation 49/1996 that established the

²⁶ *Ibid.*

²⁷ Interview with Ato Balcha Reba, Director of ICT Standardization and Regulatory Directorate, Ministry of Communication and Information Technology, December 26, 2013 at 10:00 am.

²⁸ Self, *supra* note 25, p. 17

²⁹ Definition of Powers and Duties of the Executive Organs Proclamation (2010), *supra* note 15, Article 9 (12)

ETA as the whole. It rather transferred the applicability of rights, duties, powers, and other matters stipulated in the latter proclamation to MCIT. Nonetheless, part of the proclamation, *i.e.*, Article 3 to 9, is repealed. Hence, in effect, the matters discussed under the sub section ETA more or less apply to MCIT, as there is no substantial difference between the two.

Powers and Duties of the Ministry

According to proclamation No. 691/2012, the ministry is entrusted to the following powers and duties. These include promoting the expansion of communication services and the development of information technology. To set and implement standards to ensure the provision of quality, reliable and safe communication and information technology services. To regulate the rate of telecommunication service charges. To license and regulate telecommunication and postal service operators. To ensure the technical compatibility of telecommunication equipments. To facilitate the creation of institutional capacity for the effective implementation of information technology development policy. To assign and monitor government domain names and register addresses to develop and coordinate government institutions' information system. To coordinate all stakeholders for the creation and proper utilization of country code top level domain, and facilitate the proper implementation of same. To facilitate the creation of fast and affordable information access. To follow up, and provide necessary support for, the implementation of modern information network between and within federal and regional government institutions. To ensure mission critical systems and services in public sector are computerized and online services are gradually available to users. To ensure the integration and interoperability of operational and forthcoming computer networks and applications. To support the coordinated and secured information flow and exchange between government institutions, follow up their proper applications.³⁰

In addition to these power and duties, as described above, the ministry is also given the powers and duties that were previously given to the Ethiopian Telecommunication Agency (ETA).³¹ Within the Ministry, it is the ICT standardization and regulatory Directorate that is mandated to exercise the powers and duties that were formerly given to ETA.³²

³⁰ Definition of Powers and Duties of the Executive Organs Proclamation (2010), *supra* note 15, Article 24 (1)

³¹ *Ibid.*

³² Reba, *supra* note 27.

2.3. Existing Telecommunication Investment Environment

Under this section, the current telecom sector investment arena as well the laws enacted to regulate investment activities are highlighted. Ethio Telecom is the country's exclusive provider of local, domestic, and international voice services, as well as mobile cellular, Internet, and telex and telegraph services.³³ Only a few telecommunications subsectors have so far been opened to private sector provision and, in some cases, to competition. Sale of customer premises equipment, virtual internet services³⁴, resale of telephone³⁵, facsimile, and internet services, provisioning of Global Mobile Personal Communications by Satellite (GMPCS) services but only in cooperation with Ethio telecom are service areas that have been liberalized by proclamation No. 281/2002.³⁶

Ethio Telecom outsources some services, such as the distribution of SIM cards, to private persons. These represent very small segments of the market and the number of alternative service providers is limited. However, some institutions, *inter alia*, the United Nations Economic Commission for Africa offices and the World Bank have been granted permission to operate their own satellite connections.³⁷

The Government of Ethiopia requires Ethio Telecom to meet targets for efficiency, quality, and telecommunications infrastructure expansion. The government also requires Ethio Telecom to meet the government's goals for universal access.³⁸

2.3.1. The Investment Proclamation

Investment Proclamation No. 769/2012, which repealed Proclamation No. 280/2002 (as amended in 2003), is the main legal framework for foreign and domestic investment in Ethiopia. Ethiopian legislation does not contain a specific law for foreign investment. Foreign and domestic investors are broadly treated equally, but some exceptions apply.

³³ Self, *supra* note 25, p. 14

³⁴ Federal Democratic Republic of Ethiopia, Ministry of Infrastructure, Value Added Services Directive No. 2/2005

³⁵ Federal Democratic Republic of Ethiopia, Ministry of Infrastructure, License Directive for Resale and Tele center in Telecommunication Services No. 1/2002

³⁶ Self, *supra* note 25, p. 15.

³⁷ *Ibid.*

³⁸ Federal Democratic Republic of Ethiopia, Growth and Transformation Plan (GTP) 2010/11-2014/15, Volume 1: Main Text, Ministry of Finance and Economic Development, November 2010, Addis Ababa, p. 75.

The Proclamation provides for investment areas reserved for the government, for joint ventures with the government, for domestic investors, for Ethiopian nationals, and for foreign investors. Investment in telecommunication services is reserved for the government or a domestic or foreign joint venture with the government.³⁹ Nevertheless, some telecommunication activities are open to domestic investors (e.g., resale and tele center services, cable installation and maintenance, wireless local loop, call center, and virtual ISPs). Global mobile personal communication by satellite (GMPCS) service has been licensed to other entities provided that the licensee works in cooperation with Ethio telecom.⁴⁰

Criteria for Investment Permit

The proclamation describes domestic investor as an Ethiopian or a foreign national treated as a domestic investor as per relevant law, which includes the government, public enterprises as well as cooperative societies established as per relevant law.⁴¹ A foreign investor, on the other hand, is expressed as a foreigner or a company owned by foreign nationals who has invested foreign capital in Ethiopia. The proclamation also states that an Ethiopian national permanently residing abroad who prefers to be treated as a foreign investor falls under this category.⁴² Pursuant to the proclamation, foreign investors, domestic and foreign investors making investments in partnerships, foreign nationals that are treated as domestic investors pursuant to Article 2 (5) the proclamation, and domestic investors investing in the areas eligible for incentives are required to obtain investment permits.⁴³

The Proclamation sets a minimum investment capital of US \$ 200,000 to be allocated to a single investment project realized by a foreign investor.⁴⁴ If the investment is undertaken jointly with a domestic investor, the minimum requirement falls to US \$150,000.⁴⁵ In engineering, architectural, or related technical consultancy services, technical testing and analysis or in publishing works, the minimum capital requirement is US \$100,000 (if wholly foreign-owned) or US \$ 50,000 (if foreign-domestic joint venture).⁴⁶ A foreign investor is

³⁹ Investment Proclamation (2012), *supra* note 17, Article 6 (2)

⁴⁰ Telecommunication (Amendment) Proclamation No. 281/2002, *Federal Negarit Gazeta*, 8th Year, No. 28

⁴¹ Investment Proclamation (2012), *supra* note 17, Article 2 (6)

⁴² *Id.*, Art. 2 (7)

⁴³ *Id.*, Art. 12 (1)

⁴⁴ *Id.*, Art. 11(1)

⁴⁵ *Id.*, Art. 11(2)

⁴⁶ *Id.*, Art. 11 (3)

exempt from the minimum capital requirement if he reinvests profits or dividends.⁴⁷

Foreign investors may fully remit profits and dividends, principal and interest payments on external loans, payments related to a technology transfer agreement, proceeds from the sale or liquidation of an enterprise, and proceeds from the transfer of shares to domestic investors.⁴⁸

2.3.2. Impact of Ethiopian Regulation on Foreign Telecom Providers

Nothing in the telecom regulations (Proclamation No. 49/1996 and Regulation No. 47/1999) distinguishes domestic from foreign licensees or applicants for operator or service provider licensees, except in the case of virtual Internet and call center services, which require evidence that the applicant is an “Ethiopian national” or “a foreign national of Ethiopian origin.”⁴⁹ As for supply modes, the only service specifically prohibited in the Proclamation 49/1996 is “call back,” which is a Mode 1 (cross-border supply) service.⁵⁰

In conclusion, except for the provision of virtual Internet and call center services, nothing in ETA’s rules and procedures distinguishes foreign and domestic operators and service providers with respect to licensing and supervisory functions.⁵¹

2.3.3. Telecom Privatization Movement in Ethiopia

The government largely favors preserving the state monopoly for provision of telecommunications services. Historically, the government has been opposed to multiple providers and is wary of foreign market entrants. However, in the interest of fully tapping network capacity, the government appears willing to allow limited competition in the provision of some value-added services. As long as Ethio-telecom is not challenged, the government is comfortable allowing certain services in the sector to be open to competition,⁵² but it has not demonstrated any urgency or set timelines for further reform.

Privatization remains an unappealing option for the telecommunications sector in Ethiopia. The

⁴⁷*Id.*, Art. 11 (4)

⁴⁸*Id.*, Art. 26(1)

⁴⁹ Value Added Services Directive (2005), *supra* note 34

⁵⁰ Callback might also be considered to be a Mode 3 (commercial presence) service if were marketed from within the country. *See Self, supra* note 25. *See also*, GATS, Art. 1(2), for details of modes of service supplies

⁵¹*Self, supra* note 25, P. 31

⁵² Telecommunication (Amendment) Proclamation 2002, *supra* note 40.

lack of political will is most likely a result of the failed 1999-2003 effort to sell 30 percent of ETC to a foreign investor, an effort initiated by the Ethiopian Privatization Agency. According to an October 1999 ETC Profile released by the Ethiopian Privatization Agency:

*The government's conviction is that the transformation of the sector in Ethiopia must be in line with a sector strategy with the objective of transforming telecom infrastructure and at the same time attracting the key players, namely, private investors. It is thus looking for a strategic partner committed to the goals for this sphere of business. And by creating a strategic partnership through transferring partial ownership of the public operator to an international company or a consortium, ETC will enhance its capacity in terms of capital, technology and management.*⁵³

At the time, the policy priorities of achieving universal access and gradual liberalization were also reflected in the privatization initiative.⁵⁴ Despite hiring an international consulting firm to assist with due diligence, asset valuation, financial audits, financial restructuring, business valuation, engagement strategy, company analysis, sector analysis, and a demand and traffic study, the government declined bids from eight firms/consortiums as unsuitable and cancelled the privatization initiative.⁵⁵

The government's policy has been to re-make Ethio-telecom into an efficient, competitive, and profitable state-owned company and to proceed, at this point, without introducing competition into the sector. Ethio-telecom has hired international telecommunications experts to work side-by-side with Ethio-telecom officials to develop and implement a program for management reform and systems process re-engineering. The program identifies reforms and establish regulations, departments, and manpower necessary to develop a crosscutting management system that will help Ethio-telecom supervise projects and provide customer service according to international standards.⁵⁶ The result of this reform was the 2010 contracting out of the management of the company to French telecom.

⁵³ Self, *supra* note 25, p. 28

⁵⁴ Ethiopian Privatization Agency, Ethiopian Telecommunications Corporation Profile, October 1999.

⁵⁵ Self, *supra* note 25, p. 29

⁵⁶ *Ibid.*

2.4. Telecommunications Policy Atmosphere

This section is devoted to discussions of the country's policy documents. It starts with analysis of ICT policy document and then concluded by assessing the plans targeted by Growth and Transformation Plan (GTP) for the telecommunication sector.

2.4.1. The ICT Policy

The Council of Ministers formulates communications sector policy and strategy in Ethiopia.⁵⁷ The Ministry of Communication and Information Technology has the power and duty to prepare draft policies and laws concerning the sector, and is entrusted with implementing policies and laws relating to the sector.⁵⁸

Various sectors' development policies of the country, like Rural Development Policy and the Industrial Development Strategy, stress the importance of telecommunications in achieving to general development. The importance of universal access means the government should retain the monopoly. It is believed universal access can be achieved only through a monopoly structure.⁵⁹

Ethiopia's National Information and Communications Technology (ICT) Policy was first drafted and submitted to the Council of Ministers in 2002.⁶⁰ In 2003, the government adopted an ICT policy and established the Ethiopian Information and Communications Technology Development Agency (EICTDA). The agency updated the ICT policy and submitted it to the Council of Ministers.⁶¹ The policy acknowledges the shortcomings and limitations of the telecommunications network, namely that it was only designed for voice communications, that its coverage is concentrated in cities and towns. It also admits that penetration for both fixed and mobile services is very low. It recognizes the potential of ICT for achieving rapid and sustainable socioeconomic development and for sustaining a robust democratic system and good governance in Ethiopia and outlines specific actions for ICT education and training, the provision of electronic government services at all levels of government to all citizens, and the

⁵⁷ Constitution 1995, *supra* note 18, Article 77

⁵⁸ Definition of Powers and Duties of the Executive Organs Proclamation 2010, *supra* note 15, Article 10

⁵⁹ Self, *supra* note 25, p. 34

⁶⁰ Abebe Chekol, 'Ethiopian Free & Open Source Software Network (EFOSSNET)', www.efossnet.org. pdf.pl accessed on December 19, 2013

⁶¹ Self, *supra* note 25, p. 34

promotion of ICTs in delivering health services, agriculture, and commerce. The policy also recognizes the importance of a well developed, easily accessible, and modern network over which services and applications can be delivered to all parts of the country.⁶² It foresees participation of the private sector in building the network and in developing and delivering ICT services and applications.⁶³

The network needs to be developed under appropriate legal and regulatory frameworks to facilitate the development, utilization and application of ICT in all spheres of life. The policy highlights the experience of other developed and developing countries where ICT investments have been made to meet the socioeconomic objectives of poverty reduction, economic development, and improved delivery of health and education services, social inclusion, and effective, accountable, democratic government.⁶⁴

The policy made development, expansion, and access to ICT a national priority. The government plans to employ ICTs extensively to fight poverty and modernize the economy through the Agricultural Development Led-Industrialization (ADLI). The government recognizes it as the key driver and facilitator for transforming Ethiopia's predominantly subsistence-agriculture economy and society into an information and knowledge based economy and society, effectively integrated into the global economy. This ICT-led development strategy hinges on creating an effective national fiber-optic network and providing universal service to rural areas. This network is expected to expand vital connectivity in rural areas while improving the quality of domestic and international links in developed cities. Carefully orchestrated deregulation and partial opening of the telecommunications sector to participation by the private sector is intended to increase access and improve service quality.⁶⁵

2.4.2. The Growth and Transformation Plan (GTP)

Ethiopia's national development objectives are enshrined in its Growth and Transformation Plan (GTP), the framework for development policies and programs for the period 2010/11 to 2014/15.

⁶²Government of the Ethiopian Federal Democratic Republic, ICT Policy, http://www.eictda.gov.et/Downloads/Policies/ICT_Policy_English.pdf

⁶³ Self, *Supra* note 25, p. 35

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

The key telecommunication objectives underlined by GTP are ensuring a competitive (in terms of prices and quality) and secure telecom services, and build a far reaching national capacity in telecom development and management. Emphasis is on finalizing the construction on going network infrastructure and application to expand services. A need-based network may also be expanded. As to GTP the rural universal telecommunication access program will be expanded and the quality of the fixed line, mobile phone, and internet and data service provision improved and maintained. An environment conducive to use of the latest telecommunication technologies will be created. A fair and economical utilization of national frequency spectrum, telecommunication numbers and internet provider addresses is ensured. Illegal telecommunication activities will be prevented.⁶⁶

Furthermore, the GTP aims to expand coverage of telecommunications in Ethiopia by increasing fixed line density to about 3.4 percent and mobile coverage to 45 percent, and to expand rural telecom access within 5 km radius of services to 100 percent by 2014/15.

Table 2-1: Presents GTP targets for telecommunications sub sectors.

Description of Targets	2009/10	2014/15
1. Number of fixed line telephone subscribers (mln)	1	3.05
2. Fixed line telephone density (%)	1.36	3.4
3. Number of mobile telephone subscribers (mln)	6.52	40
4. Mobile telephone coverage (%)	8.7	45
5. Number of internet service subscribers (mln)	0.187	3.69
6. Rural telecom access within 5 km radius of services (%)	62.14	100
7. Wireless telecom service coverage (%)	<50	90
8. Global link capacity (Gb/s)	3.255	20

Source: The Growth and Transformation Plan

⁶⁶ GTP, *Supra* note 38, p. 76

The GTP identifies three key implementation strategies to reach the targets stated in the *Table 2-1*. First, the national telecom company will be reformed such that it is transformed to have an institutional capacity that delivers high quality and competitive services. The telecommunication provider will be fundamentally upgraded to meet international standards using the services of reputable foreign companies. The second strategy concerns the establishment and effective enforcement of comprehensive policy and regulatory frameworks to prevent and control illegal activities in the industry. An effective mechanism for control and prevention of illegal telecommunication activities will be put in place to ensure telecommunications security. Finally, all initiatives in the industry will be designed and executed such that they promote the domestic production ICT goods (inputs, components, etc) and domestic delivery of ICT services during the GTP period.⁶⁷

2.5. Current Policy Position on Liberalization Ethiopia's Telecom Sector

The focus of this chapter has been to investigate the country's telecom liberalization policy stance. The sections discussed so far, in one way or another, are helpful to draw what the position of the country look like regarding the issue of telecom liberalization. To further have clarity of this position; the researcher believes that this section is of great importance as it provides a detailed government and other stakeholders views on liberalization of the telecom sector.

2.5.1. The Government Policy Position on Telecom Liberalization

Based on interviews made by writers of a report titled 'Impact of WTO Accession on Ethiopia's Telecommunication Services Sector', which was prepared by Ministry of Trade (MoT), there is a conclusion that the government largely favors preserving the state monopoly.⁶⁸ It does not favor allowing multiple telecommunications providers, and is wary of potential foreign market entrants. Nevertheless, in the interest of tapping full network capacity, it will allow limited competition in the provision of certain value-added services. The government is comfortable choosing which services in the sector will be liberalized, but does not feel any urgency and has not set timelines for further reform.⁶⁹ The following sub sections demonstrate various government organs stance on liberalizing the sector.

⁶⁷ *Ibid.*

⁶⁸ Self, *Supra* note 25, p. 35

⁶⁹ *Ibid*

Positions by the Prime Ministers

The government believes that the monopoly is the most dependable way of extending basic connectivity to every region.⁷⁰ In his interview with *Financial Times*, the late Prime Minister *Meles Zenawi* reaffirmed the government's reluctance to open up the sector to private sector participation, saying,

*"Mobile telephony is 'license to print money in Africa'." He further reasoned, "The issue is how you use that money. Do you use it to build less profitable but in the long term more important infrastructure?" The government intends to keep the monopoly and finance telecommunications infrastructure projects from revenues generated by ETC.*⁷¹

The current Prime Minister, *Ato Haile-Mariam Desalegn*, also shares the same position regarding the liberalization of the sector. For instance, *Reuters* made this position clear on its website as of July 10, 2013 when it reported as follows:

*Speaking at a National Business Conference Forum which was held at the United Nations Economic Commission for Africa in the Ethiopian capital on June 27, 2013, Prime Minister Hailemariam Desalegn said the telecom sector generated around 6 billion birr (\$321 million) a year, which the government uses for railway projects. Ethiopia plans to build 5,000 km of railway lines by 2020. "Therefore, the telecoms sector will remain in government hands for years to come".*⁷²

The prime ministers repeatedly and unequivocally expressed their positions that there is no room for the liberalization of the sector. They both defended their stance on the grounds of provision of universal access and generation revenues for cross subsidization of different developmental infrastructures, be it telecommunication infrastructure or the extensive railway lines.

⁷⁰*Ibid*, In the words of a senior official, "Cross- subsidy is possible in the case of monopoly of the sector by ETC. If the basic telecommunications services are open for other operators, there is no room for cross- subsidization. After we connect all kebeles [and universal access is achieved], the private sector would be able to maximize value-added services. The private sector, not the government, is better positioned to maximize value-added services."

⁷¹ *Id*, p. 36

⁷² Aaron Maasho, Ethiopia expected to join WTO in 2015: [http://www.reuters.com/article/2013/07/10/us-ethiopia-trade-See also http://www.ethiopianbusinessreview.com/index.php/focuss/item/211-private-sector-echoes-wto-recommendations](http://www.reuters.com/article/2013/07/10/us-ethiopia-trade-See%20also%20http://www.ethiopianbusinessreview.com/index.php/focuss/item/211-private-sector-echoes-wto-recommendations) accessed on December 31, 2013

Positions by Ethio Telecom Officials

The Ethio-telecom, while aware of its limitations and weaknesses in providing certain services, seeks to retain its position, monopoly. Officials interviewed⁷³ agreed that ETC is burdened with expansion of infrastructure while trying to improve the quality of services provided to customers. They also agreed that the provision of limited “downstream” services would be an excellent entry point for the private sector. They favor the introduction of a competitive reform policy that gives ETC sufficient time to increase efficiency and service quality under the supervision of the ETA. ETC officials are reluctant to suggest the amount of time required for allowing fully open, market- driven competition in the sector.⁷⁴

In the long run, Ethio Telecom plans to divest itself of value-added services and serve as a network operator. It recognizes the need to prepare for a situation that will include a second network provider at some indefinite point. Nevertheless, for the time being, it seeks to maintain the cross-subsidies and the monopoly privileges it enjoys.⁷⁵

The government views its policy prescriptions as pragmatic. From its perspective, no viable alternatives exist for providing telecommunication services. Its own massive expansion projects aim to achieve 100 percent penetration of basic telecommunications services for the entire country (universal coverage). Thus, any liberalizing reforms should be small-scale and incremental in increasing coverage and penetration. According to the government, allowing peripheral competitive services is a practical way to open the sector to competition and improve services. These initiatives are to be highly specialized and limited so any failure will not lead to major national setbacks in the telecommunications sector and successes will provide opportunities for the private sector to enter the sector and assist in the country’s development.⁷⁶

In sum, the government does not intend to change its policy stance beyond downstream services liberalization before attaining universal coverage objectives and the like.

⁷³Self, *Supra* note 25, *Note*: The interviews were conducted by authors of a report ‘*Impact of WTO Accession on Ethiopia’s Telecommunication Services Sector*’ that was submitted to Ministry of Trade in 2007.

⁷⁴*Id.*, p. 36

⁷⁵*Ibid.*

⁷⁶*Id.*, p. 37

Position by Telecom Regulatory Bodies (ETA and MCIT) Officials

Although inclined to support additional reform and opening of the sector, ETA officials interviewed⁷⁷ do not advocate true competition for ETC. As a regulatory agency, ETA understands the importance of regulatory capacity in administering a competitive telecommunications industry. At this point, however, ETA admittedly lacks the capacity to oversee full competition and liberalization.⁷⁸

An interview made with Director of Ministry of Communication and Information Technology ICT Standardization and Regulatory Directorate, the organ responsible for regulation of the telecommunication sector after cessation of the ETA, Ato Balcha Reba, made it clear that the regulatory body is not in a position to regulate the sector if foreign telecom operators are to be allowed in. He is of opinion that too much has to be done in terms of building up the capacity and independence of the regulatory body before rushing to liberalizing the sector. He further assured the researcher that there is no intention on the part of the government of Ethiopia to fully liberalize the telecom sector recently.⁷⁹

2.5.2. The Position of the Private Sectors on Telecom Liberalization

Representing private sectors, Ethiopian Chamber of Commerce and Sectoral Association (ECCSA) presented a position paper on Regulation and Openness of Ethiopia's Service Sectors with an objective of fostering discussion about the private sector's opinions on Ethiopia's WTO accession process. ECCSA and International Trade Center (ITC) organized the event, at Hilton Hotel on June 28, 2013. It brought together private business people, officials from ECCSA, including Mulu Solomon, ECCSA's president and Malcolm Mckinnon, chief executive of ITC and an international negotiator of WTO, who has a decade of experience in the field.⁸⁰

The Position Paper evaluated the openness of the services sector, which represent 46 Pct of the country's GDP. It recommends that in Ethiopia's offer to WTO members it should consider opening up professional services like architecture, accountancy and legal services to foreign investors. The Position Paper suggested opening up computer, construction, distribution,

⁷⁷ *Supra* note 73.

⁷⁸ Self, *Supra* note 25, p. 37

⁷⁹ Reba, *Supra* note 27.

⁸⁰ <http://www.ethiopianbusinessreview.com/index.php/focuss/item/211-private-sector-echoes-wto-recommendations>

education and health services. Some of these services are already open for foreign investment. It also suggests that the government should officially announce that these sectors are open to foreigners.⁸¹

As far as telecommunication services are concerned, a realistic assessment of the private sector is that one efficient and competent network provider is enough. Besides, this will also ease the worries of government on security issues. In addition, the private sector believes there will be little interest in building infrastructure for a large country like Ethiopia. The focus is expected on services that will rely on already existing infrastructure/network. In this connection, the Government's delegation of some of its current responsibilities, in providing services, is crucial. If by choice, the Government is going to hold on to the network, it should be held to performance standards. Moreover, providers that work downstream should be allowed and should be accountable for failures. In general, coordinate/network provision and service has to be separated. One of the ways this can be done successfully is to create a competitor to the incumbent provider. This does not mean that the incumbent (Ethio-telecom) has to be liberalized or privatized.⁸²

According to the private sectors, liberalization in the immediate future seems unlikely because of the Government's insistence on universal access to rural areas and the profit motive of multinationals which supposedly does not address this. The 2009/2010 Ethiopia ICT sector performance review argues that another obvious reason why the Government would like to retain the state-owned enterprise in its interest in recouping the massive investment it made in recent years and repay the US\$1.5 billion loan from China.⁸³

When compared to other regional countries, it appears that Ethiopia, by holding on to its monopoly, is losing money. Telecom sector development in countries that have liberalized the sector, like Kenya and Uganda, shows that the Ethiopian Government loses tax revenues of at least US \$ 0.5 billion per year by not opening its communication sector for investment. In general, the contribution of the communications sector to the economy remained just

⁸¹ECCSA, *supra* note 13.

⁸²*Id.*, p. 20

⁸³*Ibid.*

under 2% which is low compared to the regional average 4%.⁸⁴ Hence, as far as revenue loss from liberalization is concerned, the private sector considers that liberalization by holding on to coordinates/network will not affect the revenue the Government is getting. The rate could be determined with Government participation. But then again, the Government can also recover possible lost revenue through licenses and spectrum fees as a percentage of revenue.⁸⁵

Another important point that was made by the private sector is the low capacity of the regulator. The private sector fully agrees that regulatory capacity in telecom is absolutely important that needs to be strengthened over a transitional period.⁸⁶

In addition to the private sector position paper presented by ECCSA, almost all users of Ethio-telecom services interviewed expressed dissatisfaction with Ethio telecom, and that in the absence of competition the company will not change. These users want lower tariffs, faster access, more bandwidth, and better customer service. Who provides the services does not matter to them.⁸⁷ Those already participating in the downstream services and suppliers of telecommunication equipment interviewed expressed interest in fully opening the sector. They all seek better and more reliable service at lower costs. The private sector hopes for an enabling environment for multiple operators. Some are also interested in the opportunities to enter this market.⁸⁸ In conclusion, the government has made it clear that it will think about contemplating liberalization of the telecommunications sector only after nationwide expansion of basic telecommunications infrastructure is complete and the goal of universal access is maintained. This policy stance is apparently based on the assumption that providing rural service is inherently unprofitable and that no mechanism exists for inducing the private sector to provide such service. However, this defense seems not tenable, as some other countries have achieved universal access by creating a Universal Access Fund to which all operators contribute a small portion of revenues to subsidize certain projects, such as ensuring that every person has reasonable access to a public telephone.⁸⁹

Using income from Ethio-telecom as a revenue for funding projects like construction of railways,

⁸⁴ *Ibid*

⁸⁵ *Id*, p. 21

⁸⁶ *Ibid*.

⁸⁷ *Id*, p. 38

⁸⁸ *Self, supra* note 25, p. 37

⁸⁹ *Ibid*.

telecom infrastructures and recouping the already invested funds on expansion of the telecom infrastructure is another point of argument raised by the government to justify the monopoly of the sector. Private sectors, however, dismisses such excuse by providing tangible statistical evidence that show Ethiopia is losing revenue that it could have got had it liberalized the telecom sector.

Security is another sensitive area that holds back the government from committing itself to liberalize the sector. Here again, the private sectors argue that the problem of security can be eased if government owns that efficient and competent network provider and then liberalize provision of services, both basic and value added.⁹⁰

2.6. Conclusion

Despite it's a century old history, not enough is recorded about Ethiopian telecom sector. Throughout its history the structure and nature of the sector's administration differ from one regime to another, however, one thing remains common and unchanged, *i.e.*, it is a nationally owned sector and no completion is allowed. The current investment proclamation makes it clear that telecom sector is a kind of investment in which an individual investor, whether foreign or domestic, can invest in joint venture with the government. However, the practice so far shows that the government has turned down about eight offers in this respect. The government insisted that the sector is not the nature of business in which liberalization is allowed. It argues that universal access and cross subsidization are the major reasons why it retains the ownership of the sector and does not allow competition. To the contrary, the private sectors argue in favor of liberalization of the sector. They believe quality and inexpensive telecom service can only be provided if competition is allowed. They dismiss the fear of the government about universal access, cross subsidization and security issues by presenting empirical data of neighboring WTO member countries that show Ethiopia is losing benefits by clinging on its stubborn policy of non-liberalization of the sector.

⁹⁰ECCSA, *supra* note 13, p. 20

CHAPTER 3

THE WTO RULES ON ACCESSION OF LDCs

3.1. Legal Foundation of the WTO Accession

Prior to starting the WTO Accession Process, countries may decide to become WTO observers. Observer status is not obligatory and is not a precondition to WTO Membership. 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.”⁹¹ The status is granted initially for five years and observers are expected to take a decision on accession within that period. Observers have the right to observe meetings of all WTO bodies except for some like meetings of the Committee on Budget, Finance and Administration. They have access to the main WTO document series and may request technical assistance from the WTO Secretariat. Observers have an obligation to make a financial contribution for the services provided to them.⁹² Once the observer country or any other that wish to join the club decide to accede the organization, its accession will be conducted in accordance with the WTO rules discussed as follows.

The core and major WTO rules governing accession is prescribed under Article XII of the Marrakesh Agreement Establishing the World Trade Organization, hereinafter called the WTO Agreement. The provision reads,

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

⁹¹WTO (1996), *Rules of Procedure for Meetings of the General Council*, WT/L/16, Annex 2.

⁹²*Ibid*

3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.⁹³

Article XII does not give any membership criteria, since it simply states that accession is to be conducted on 'terms to be agreed' by negotiation. It neither provides the procedure for negotiation.⁹⁴ This signal is perhaps the most problematic legal aspect of the accession process. No guidance is given on the 'terms to be agreed', these being left to the negotiations between the WTO Members and the Candidate. Furthermore, the Article does not identify any concrete steps, nor does it provide any advice when it comes to the procedures to be used for negotiating the terms of accession.⁹⁵ Accordingly, this failure of the article leaves the door wide open to drawn-out, decade-long, and burdensome accession experiences.⁹⁶

Since the WTO is an inter-governmental organization, which does not have any power to negotiate accession agreement with the aspirants, it is the member countries that dictate the terms and conditions for such entry.⁹⁷ Article XII is being interpreted by the developed member countries as providing them *Carte Blanche* to impose unreasonable conditions (often known as "WTO plus" conditions) on the acceding countries. For all practical purpose, the accession process has become akin to obtaining the membership to a golf club where the existing members decide the terms and conditions. Those members who agree to comply with the requirements will be admitted to the club and those who cannot do so, will never be admitted at all!⁹⁸ In other words, the negotiations are only one-way and a candidate has no much alternatives than accepting the proposals made by incumbent Member countries.

⁹³WTO (1994), *Marrakesh Agreement Establishing the World Trade Organization*, Art. XII

⁹⁴Ratnakar Adhunkari and Navin Dahal, *LDCs' Accession to the WTO: Learning from the Cases of Nepal, Cambodia and Vanuatu*, SAWTEE, Kathmandu, p. 1., available at <http://www.unnngls.org/SAWTEE.doc>

⁹⁵*Id.*, p. 2.

⁹⁶Hussien A. Tura, *Making the WTO Accession Work for Ethiopia: Lessons from Cambodia and Nepal*, p. 5. Available at <http://www.abysnialaw.com>

⁹⁷Adhunkari *Supra* note 94, p. 2.

⁹⁸*Ibid.*

3.2. The WTO Accession Process

Different scholars have divided WTO Accession phases differently, some to four stages others to six stages. The researcher follows the latter one in his attempt to show the processes an acceding country must go through before fully completing its accession. These are:

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; and
6. Approval of the accession by the General Council or Ministerial Conference

In the first stage, a country wishing to become a member of the WTO submits an application to the WTO General Council. The formal request for accession from the applicant government must contain a statement that the candidate wishes to accede to the Marrakesh Agreement and become a WTO Member, pursuant to Article XII, which regulates the process of accession. It is then distributed to all WTO Members and placed on the agenda of the next General Council Meeting.⁹⁹

In the second stage, after the acceptance of the formal request a Working Party for Accession is established "to examine the application of the candidate under Article XII and to submit to the General Council/ Ministerial Conference recommendations which may include a draft Protocol of Accession."¹⁰⁰ Any Member of the WTO can become a member of the Working Party for Accession, depending on its interests. WTO Members can choose to join at any stage before the completion of the Working Party for Accession mandate. This means that the size and composition of Working Parties for Accession vary from candidate to candidate. After consultations with the candidate and members, the Chairman of the WTO General Council appoints the Chairman of the Working Party for Accession, who is usually an ambassador resident in Geneva.¹⁰¹ The accession process is now institutionalized and it will be conducted

⁹⁹WTO, *Accession: Explanation - How to become a member of the WTO*, available at http://www.wto.org/english/thewto_e/acc_e/acces_e.htm

¹⁰⁰ WTO (1995), *Accession to the WTO, Procedures for Negotiations under Article XII*, WT/ACC/1.

¹⁰¹ *Supra* note 99

through the Working Party for Accession.

The third stage is submission of Memorandum of The Foreign Trade Regime. The Memorandum of the Foreign Trade Regime is a standardized document which describe the foreign trade regime. It contains information on the Economy, Economic Policies and Foreign Trade; the Framework for Making and Enforcing Policies Affecting Foreign Trade in Goods and Services; Trade Related Aspects of Intellectual Property Rights Regime; Trade-Related Services Regime and Institutional Base for Trade and Economic Relations with Third Countries. It is supplemented by statistical information about trade, a List of Laws and Legal Acts, a List of Foreign Trade Agreements and questionnaires about Import Licensing and Customs Valuation Procedures, State Trading Enterprises, Technical Barriers to Trade, Sanitary and Phytosanitary Measures, Domestic Support and Export Subsidies in Agriculture, Trade in Services and Trade Related Aspects of Intellectual Property Rights.¹⁰² The candidate also submits an Initial Schedule for Tariff Concessions for Goods and Initial Schedule on Specific Commitments in Services. All of these documents are submitted to the WTO secretariat who then distributes them to WTO Members.¹⁰³

After receiving these documents, interested WTO Members submit questions in writing regarding the candidate's foreign trade regime. When the candidate answers these questions, also in writing, the first meeting of the Working Party for Accession can be held. In practice, negotiations can start at this point but the candidate will be asked more questions between and during the following meetings of the Working Party for Accession. After several meetings, and if progress has been made, the WTO secretariat prepares an informal 'Factual Summary of Points Raised' in order to consolidate all the information presented by the candidate. The purpose of this Summary is to facilitate the work of the Working Party for Accession, to make the process more transparent and to be a base for a draft 'Report of the Working Party for Accession'.¹⁰⁴

The fourth step, negotiation, is the core phase that tests the endurance and bargaining power of an acceding country. Negotiations on terms of accession are divided into four main segments, which are conducted simultaneously: multilateral negotiations on the rules to be accepted;

¹⁰²WTO (1995), *Supra* note, 100

¹⁰³Ivan Marković(2009), *How to Join The World Trade Organization: Some Aspects of The Accession Process*, Economic Annals, Volume LIV, No180, University of Balgrade, p. 121

¹⁰⁴*Ibid.*

plurilateral negotiations on agricultural domestic support and export subsidies; bilateral negotiations on concessions on goods and on specific commitments on services. The results and taken commitments from all these negotiations, multilateral, plurilateral and bilateral, are applied equally to all WTO Members in compliance with the most favored nation (MFN) principle.¹⁰⁵

Multilateral negotiations on the rules are negotiations on terms, conditions and possible transitional periods for all legislative or structural changes necessary for the adoption and implementation of WTO rules and procedures by the candidate. These negotiations are conducted multilaterally between the candidate and all members of the Working Party for Accession. Plurilateral negotiations on agricultural domestic support and export subsidies are conducted between the candidate and interested members of the Working Party for Accession. The purpose of these negotiations is to bring the candidate's level of agricultural domestic support and export subsidies into compliance with the WTO Agreement on Agriculture. They also deal with Sanitary and Phytosanitary Measures and Technical Barriers to Trade.¹⁰⁶

Negotiations on concessions on goods and negotiations on specific commitments on services are conducted bilaterally between the candidate and each separate member of the Working Party for Accession. Every bilaterally reached agreement is signed and sent to the WTO Secretariat where it remains confidential. After bilateral agreements have been completed with all members of the Working Party for Accession, the WTO Secretariat uses them to prepare a single, consolidated draft of Goods Schedule and a single, consolidated draft of Service Schedule. In accordance with the most favored nation (MFN) principle, the Goods Schedule is consolidated on the lowest tariff level for each tariff line and the Service Schedule is consolidated on the least restrictive level for each service sector. When completed, the draft Schedules are formally circulated to all members of the Working Party for Accession for review and verification.¹⁰⁷

In the fifth stage, after the conclusion of all negotiations the Report of the Working Party for Accession is adopted with the consensus of all members of the Working Party for Accession. It summarizes all negotiations held within the Working Party for Accession and is annexed with the 'Consolidated Schedule of Tariff Concession for Goods' and 'Consolidated Schedule on

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Id.*, p. 122

Specific Commitments in Services'. The entire package is referred to as the 'Protocol of Accession' and it is then submitted to the General Council or the Ministerial Conference.¹⁰⁸

The last stage of the accession process is the adoption of the 'Protocol of Accession' and the approval of the accession by the General Council or Ministerial Conference with the consensus of all WTO Members. The Protocol specifies the date until which it is open for acceptance by the candidate, by signature or ratification. While a period of three to six months is usual, in practice it is the candidate who proposes the length of time needed to complete its internal procedures. The candidate becomes a WTO Member thirty days after accepting the Protocol of Accession. This period is allowed in order to give WTO Members time to take any action necessary to apply the WTO Agreement to the new Member.¹⁰⁹

3.3. WTO Rules on Accession of Least Developed Countries (LDCs)

The LDCs are granted special recognition in the WTO, and, at least in principle, enjoy special flexibilities in the implementation of WTO Agreements, including through Special and Differential Treatment (S&D) Provisions.¹¹⁰ The researcher consider it wise to cast light on the meaning of Least Developed Countries (LDCs) before rushing to discuss these safeguarding WTO rules, which in fact is the main issue to which this chapter is devoted.

3.3.1. Least Developed Counties (LDCs) Described

The WTO recognizes as least-developed countries (LDCs) those countries, which have been designated as such by the United Nations. There are at present 49 LDCs on the United Nation (UN) list.¹¹¹ The UN committee for Development Policy (CDP) understands LDCs as low-income countries suffering from severe structural impediments to sustainable development. The CDP uses three criteria for identifying countries as LDCs: gross national income per capita, the human asset index (HAI) and the economic vulnerability index (EVI). Both HAI and EVI are composed of several indicators.¹¹²

¹⁰⁸ WTO (1995), *Supra* note 100

¹⁰⁹ *Ibid.*

¹¹⁰ <http://www.wto.org>

¹¹¹ *Ibid.*

¹¹² http://www.un.org/en/development/desa/policy/cdp/ldc_info.shtml

The LDC category was established in 1971 and its membership has changed over time. LDCs have exclusive access to specific international support measures, mostly in the areas of trade and official development assistance. The CDP reviews the list of LDCs every three years. On that basis, it advises the Economic and Social Council of the United Nations which countries should be added to the list and which countries could be graduated.¹¹³

Similarly, WTO rules draw a distinction between the broad group of developing countries and sub-group of LDCs, with the 34 WTO members, as of 2013, that are defined to fall in the latter category being exempted from some requirements or otherwise treated differently. However, in the case of accession the distinction is not as sharp with the process having been at least lengthy and demanding for several LDCs as it has been for the other developing and transitional economies that acceded since 1996 until now. The commitments made by LDCs have often been as substantive as those demanded of other acceding members.¹¹⁴

3.3.2. Special and Differential Treatment

The universe of special and differential treatment consists enormous provisions spread across the different Multilateral Agreements on Trade in Goods; the General Agreement on Trade in Services; The Agreement on Trade-Related Aspects of Intellectual Property; the Understanding on Rules and Procedures Governing the Settlement of Disputes; and various Ministerial Decisions. Of these provisions, 107 were adopted at the conclusion of the Uruguay Round, and 22 apply to least developed country Members only.¹¹⁵

SDT provisions can generally be classed in five main groups: provisions aimed at increasing trade opportunities through market access; provisions requiring WTO Members to safeguard the interest of developing countries; provisions allowing flexibility to developing countries in rules and disciplines governing trade measures; provisions allowing longer transitional periods to developing countries; and provisions for technical assistance.¹¹⁶

¹¹³*Ibid.*

¹¹⁴Adhikari, *Supra* note 94, p. 1

¹¹⁵WTO (2000), *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WT/COMTD/W/77, para 2.

¹¹⁶WTO (2004), *Special and Differential Treatment for least-developed Countries*, WT/COMTD/W/135, para 1.

WTO Agreements, Ministerial Decision and Declarations as well as Decisions of General Assembly and other bodies recognize the particular trade, development and financial needs of developing country Members, including the least developed among them. These documents address many issues of the developing as well as LDCs. Though the provisions of SDT normally apply to developing and LDCs WTO members, a fraction of these rules also apply to acceding LDCs with a view of streamlining their accession process. Hence, for interest of this paper, the scope of discussion is confined to the provisions of SDT that directly address accession of LDCs to the WTO.

3.3.3. Accession of LDCs to the WTO

The Work Program for the LDCs attaches high importance to the accession of LDCs to the WTO. The Sub-Committee on LDCs monitors the progress in the accession of LDCs, including based on periodic Secretariat reports on the state of play of LDC accessions. The Chairpersons of LDCs' Accession Working Parties occasionally come to the Sub-Committee to brief Members on the progress made in their respective Working Parties. In so doing, the Sub-Committee serves as a forum where acceding LDCs and Members exchange views and share experiences. Since 2009, regular dialogues, in particular under the aegis of the Sub-Committee, are held between acceding LDCs and WTO Members to deepen engagement on LDCs' accessions and to build on efforts for strengthened transparency.¹¹⁷

Accession, as discussed above, is a complex and time-consuming exercise. It requires considerable human and institutional capacity to effectively participate in the accession process. Given the cumbersome and onerous procedures, the acceding LDCs have sought a more streamlined process of accession, under terms consistent with their development, financial and trade needs and commitments not higher than those of LDC Members in the WTO. As a result, and pursuant to the calls made at the Doha Ministerial Conference in 2001, WTO Members in 2002 adopted the Guidelines on LDC Accessions, which are aimed at accelerating and facilitating the accession of LDCs, and sets out Guidelines with respect to: market access; WTO rules; the process; and trade-related technical assistance and capacity building. The guidelines

¹¹⁷ WTO E-Learning 12, *Detailed Presentation of the Least Developed Countries in the WTO*, p. 5, Available at <http://www.wto.org>.

were later supplemented by the new 2012 guidelines.¹¹⁸ Details of these guidelines are discussed in the following section.

3.3.3.1. The Accession Guidelines for LDCs

The European Community proposed in 1999 that a 'fast-track' procedure be established to facilitate the accession of LDCs.¹¹⁹ This proposal suggested that the accession of LDCs could be expedited by agreeing with other WTO working party Members on a range of minimum criteria and a flexible, streamlined approach that would speed up the process for them all without discrimination. It contemplated LDC tariff binding at level something like 30% across the board with a limited number of higher tariffs on 'exceptional' products; higher binding on agricultural products, and no commitment on domestic support and export subsidies. It also called for service commitments in at least three service sectors, with the European Community attaching great importance to good commitments in Mode 3 (commercial presence) in particular or foreign capital participation and employment requirements and in Mode 4 (movement of personnel). The proposal provided for the automatic applicability of transition periods agreed in the Uruguay Round for LDCs towards full compliance with WTO Agreements.¹²⁰ However, the proposal did not get far at that time due to opposition from the United States.

Nevertheless, at the end of the day, realizing that the accession process of the WTO is onerous for the LDCs that lack the human resources and technical capabilities required by the process, in 2001 member countries have agreed to facilitate and accelerate the LDCs' accession process. In effect, the 2001 Doha Ministerial Conference included Paragraph 42 in its Declaration, which states that:

*"...Accession of LDCs remains a priority for the Membership. We agree to work to facilitate and accelerate negotiations with acceding LDCs. We instruct the Secretariat to reflect the priority we attach to LDCs' accessions in the annual plans for technical assistance..."*¹²¹

¹¹⁸ *Ibid*

¹¹⁹ WTO (1999), *Preparation for the 1999 Ministerial Conference: Accession to the WTO – Communication from the European Communities*, WT/GC/w/153

¹²⁰ *Ibid*.

¹²¹ WTO (2001), *Doha Ministerial Declaration*, WT/MIN(01)/DEC/1, para 42.

Not only have member countries agreed to facilitate and simplify the accession process for LDCs, they have also agreed to look into other issues such as market access and technical assistance. It is believed that this has led to specific guidelines for the accession of LDCs, which were approved by the General Council Decision in 2002.¹²²

A WTO Work Program for LDCs was launched following the Doha Ministerial Conference, leading to the adoption by the General Council of the Guidelines for the Accession of LDCs in December 2002. In the Guidelines, members agreed that negotiations for the accession of LDCs should be facilitated and accelerated through simplified procedures. The guidelines stipulated that members were to exercise restraint in seeking market access concessions from acceding LDCs, but also that LDCs were to offer reasonable concessions commensurate with their individual development, financial and trade needs.¹²³ However, the actual results did not suggest much favoritism to the most of LDCs that fully completed their accession to the WTO by the end of 2012, nor to the LDCs that are currently on the process of accession.¹²⁴

At the 2011 Ministerial Conference, ministers tasked the Sub-Committee on LDCs to develop recommendations to bolster and make specific the 2002 guidelines. The new guidelines, which were then adopted in July 2012, are generally aimed at limiting the commitments that LDCs are obliged to make, while also providing for transparency in the negotiations and provision of technical assistance.¹²⁵ The most precise parts of the guidelines establish principles and benchmarks for LDCs' market access on goods and services. For goods commitments, they state that some flexibility should be provided and negotiations should ensure the appropriate balance between predictability of tariff concessions of acceding LDCs and their need to address specific constraints or difficulties as well as to pursue the legitimate development objectives. They also recognize that each accession is unique and tariff concessions could vary depending on the LDCs' individual circumstances.¹²⁶

Acceding LDCs are still required to bind all of their agricultural tariff lines, but may do so at

¹²²Tura, *Supra* note 96, p. 6

¹²³WTO (2002), *Guidelines for Accession of Least-Developed Countries*, WT/L/508

¹²⁴Adhikari, *Supra* Note 94, p. 12.

¹²⁵WTO (2012), *Recommendations by the Sub-Committee on LDCs to General Council to Further Strengthen, Streamline and Operationalize the 2002 LDCs Accession Guidelines*, WT/COMTD/LDC/21.

¹²⁶WTO (2012), *Accession of Least-Developed Countries*, WT/L/508/Add.12.

overall average rate of 50 percent. On non-agricultural tariff lines, they are generally to bind 95 percent of their tariff lines at overall average rate of 35 percent; alternatively, they may undertake comprehensive bindings and in exchange will be afforded proportionately higher overall average rates as well as transition periods of up to ten years for up to 10 percent of their tariff lines. On service commitments, the guidelines recognize the serious difficulty of acceding LDCs in undertaking commitments, in view of their special economic situation and their individual development, financial and trade needs, and provide flexibility for acceding LDCs for opening fewer sectors, liberalizing fewer types of transactions and progressively extending market access in line with their development situation. They are not expected to offer full national treatment, nor are they required to undertake commitments on regulatory issues, which may go beyond their institutional, regulatory, and administrative capacities. The guidelines provide more specifically for reasonable offers from LDCs that are commensurate with their individual development, financial and trade needs. Further, they provide assurance that the LDCs will not be required to undertake commitments beyond those that have been committed by existing WTO LDC members, nor in sectors and sub-sectors that do not correspond to their individual development, financial and trade needs.¹²⁷

In the area of services, the 2012 guidelines identify a series of principles, along with defining some limits that shall inform accession talks. They, however, fall short of establishing measurable and clearly enforceable benchmarks as in the case of goods. For instance, they simply provide that “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 situations”. In addition, they simply state that “acceding LDCs will not be expected to offer national treatment, or undertake additional commitments under Article XVIII of the General Agreement on Trade in Service on regulatory issues which may go beyond their institutional, regulatory and administrative capacity”, without, however, stating a clear established standard for enforcement of such privileges.¹²⁸

This lack of clear benchmark on services, has been criticized by some trade observers and LDCs

¹²⁷ *Ibid.*

¹²⁸ Paola Ghishu (2013), *LDCs Accession to the WTO*, in “Charting the Course of WTO membership for LDCs”, Bridges Africa, Vol 2, ICTSD, Geneva, p. 5, available at <http://www.ictsd.org>

officials, who claimed that more might have been needed to ensure LDCs not face overly stringent requests in that area. They are of opinion that the proposed benchmarks are a missed opportunity, the text clearly shows that no serious effort has been made to show either the importance of services for development of the countries concerned or to find some common ground on what would be a reasonable approach to services negotiations.¹²⁹

The text also includes sections on transparency, SDT, and technical assistance.

3.3.3.2. Technical Assistance to Acceding LDCs

Almost every important WTO Agreements provides for technical assistance provisions.¹³⁰ The main aim of technical assistance or capacity building provisions in the WTO Agreement is to help the developing and LDCs Members to participate in the WTO process and to integrate more easily in to the mainstream of the multilateral trading system. These provisions provides for trade-related technical assistance by developed Members to developing Members, either on a bilateral basis or through the WTO or other international organizations.¹³¹ Among many others, the WTO bodies provide technical assistance in the preparation of market access offers in goods and services negotiations; provision of data on trade flows, tariffs and non-tariff measures; technical assistance in preparations for reviews under the Trade Policy Review Mechanism (TPRM) and so on.¹³² The Committee on Trade and Development (CTD) review periodically the technical cooperation program of the WTO.¹³³

As regards the application of this assistance to acceding LDCs, the 2002 guidelines for Accession of LDCs discussed above state 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 with the multilateral trading system;

¹²⁹*Ibid.*

¹³⁰*A Study on Special and Differential Treatment in WTO Agreements*, Center for Research and Training, AALCO Secretariat New Delhi, p. 27, available at: <http://ssrn.com/abstract=887860>.

¹³¹*Ibid.*

¹³²WTO (1994), *Secretariat Note on Technical Cooperation with Developing Countries*, COM.TD/W/511.

¹³³ <http://www.wto.org>

Effective and broad-based technical cooperation and capacity building measures shall be provided, on a priority basis, to cover all stages of the accession process. It has to be provided right from the preparation of documentation to the setting up of the legislative infrastructure and enforcement mechanisms, considering the high costs involved and in order to enable the acceding LDC to benefit from and comply with WTO rights and obligations.”¹³⁴

Though there is positive trend in technical assistance in the WTO, the effort is still not enough to redress the difficulties and concern faced by the LDCs. This is mostly due to insufficiency in the budget allocated for technical assistance programs, incapacity of the WTO Secretariat to meet the growing demand, and nonobligatory nature of most of the technical assistance provisions in WTO Agreement.¹³⁵ More importantly, a large part of the technical assistance activities done by WTO Secretariat comprises seminars, which may be useful only in the initial stages. Further, the WTO provisions dealing with technical assistance do not address the issue of capacity building activities in the domestic level, such as creating infrastructure and meeting expenditure involved in implementing various agreements, technical assistance in drafting legislations involving implementation of commitments in WTO agreements and creating technically skilled work force to deal with WTO matters. This failure, among others, put the LDCs’ trade regulatory institutions like Telecommunication Regulatory Organs in disadvantageous position to regulate businesses once they are liberalized, due to lack of capacity. In effect, the absence of WTO provisions dealing with technical assistance to address the matter of domestic capacity building activities has adverse effect on the business providers and consumers in particular and the LDCs’ economic stability in general. Moreover, there is also need to strengthen the negotiation capacity of developing and LDCs in the WTO.¹³⁶

3.4. Challenges of LDCs’ WTO Accession Process

Countries applying for WTO membership have to face a complex and, in most cases, long process. Applicants often need to implement substantive reforms to align their domestic institutions and policies with WTO disciplines. LDCs lack the capacity to engage effectively in

¹³⁴WTO (2002), *Supra* note 123

¹³⁵ www.southcentre.org

¹³⁶ AALCO, *Supra* note 130

these negotiations due to the absence of trained personnel, not to mention institutional and financial constraints.¹³⁷

The very source of most challenges presented by the WTO Accession of LDCs' 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. Since it is the general understanding that WTO Members have already undertaken a significant level of commitments, it is up to the candidate to offer commitments and reach the WTO standards. Therefore, the negotiations are only one-way and the candidate can merely take and fulfill requests and not make them.¹³⁸

This Article's ambiguity places the whole accession process in a strictly negotiating rather than rule-compliance context. Acceding countries are put in a situation where they have to negotiate every issue relevant to accession, and they are pressed to accept higher commitments. In fact, acceded LDCs have had to accept commitments far beyond those accepted by the original WTO LDC members, including:¹³⁹

- (i) non application of the rights under WTO Agreements available to WTO members such as transition periods, and tariffication and special safeguards for agricultural products (this could be defined as "WTO-minus");
- (ii) areas not covered by WTO Agreements such as commitments on privatization, investment regime and bindings of export tariffs (defined as "WTO-plus"); and
- (iii) a higher level of concessions and commitments on goods and services than those accepted by participants in the Uruguay Round (UR), such as 100 per cent bindings of industrial tariffs, lower tariff concessions, wider coverage of specific commitments on services, and participation in the "Plurilateral Agreements".

Similarly, research conducted by Ratnakar Adhikari and Navin Dahal on accession of LDCs shows that in the WTO accession process, the requests made to Acceding LDC candidates are greater than the disciplines for existing LDC WTO Members. Tariff rates for goods must be considerably lower, services market must be more open and any transitional period must be

¹³⁷Simon Evenett and Carlos Braga (2005), *WTO Accession: Lessons from Experience*, in "Accession to the WTO: Country Experiences and Technical Assistance", (Silke Trumm ed.), Deutsche Gesellschaft für, Eschborn, p. 35.

¹³⁸WTO (1994), *Supra* note 93

¹³⁹Jolita Butkeviciene, *et al.* (2001), *Terms of WTO Accession*, in "WTO Accessions and Development Policies", UNCTAD, New York and Geneva, p. 155.

shorter in order for the candidate to become a WTO Member.¹⁴⁰ One can conclude, therefore, that WTO accession process is inherently power based and the very antithesis of the WTO's credo.¹⁴¹

Efforts made by the organization either through Doha Ministerial Declaration that demand Members commit themselves to accelerating the accession of LDCs¹⁴² or through issuance of accession guidelines for LDCs by the General Council to accelerate and streamline LDCs accession process,¹⁴³ brought no change as LDCs, which are currently in the process of accession, continued to face the problems mentioned earlier. Despite resounding rhetoric, LDCs' accession process continues to be highly protracted, politically demanding and frustrating.¹⁴⁴

3.5. Current Status of Ethiopia's WTO Accession Process

Owing to the fact that Ethiopian Government has decided to promote and strengthen trade by joining the multilateral trading system, two years after the establishment of the WTO, on 25 September 1997, Ethiopia submitted an application to the World Trade Organization (WTO) for an observer status. It is believed that such status would help the Government of the country familiarize itself with the rules and procedures of the organization. On 22 October 1997, the WTO General Council approved the request for Observer Status.¹⁴⁵

The first five years were not sufficient enough to begin the accession process, therefore, Ethiopia requested for an extension of the observer status which was submitted to the General Council on 25 December 2001, before it was due to expire in October 2002. Between the years 1997-2003, an impact assessment study had been undertaken by a committee composed of relevant government organizations, the private sector, academia and other relevant stakeholders to identify the cost benefit analysis of joining the WTO on Ethiopia's economic policies, strategies, laws and regulations. The outcome of the study indicated that the benefits of joining the WTO

¹⁴⁰ See entire text of Adhikari, *Supra* note 94

¹⁴¹ Roman Grynberg and Roy Mickey Joy (2000), *The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System*, Journal of World Trade, Vol. 34(6), Kluwer Law International, London, p. 159.

¹⁴² WTO (2001), *Supra* note 121

¹⁴³ See WTO (2002), *Supra* note 123, and WTO (2012), *Supra* note 126.

¹⁴⁴ Adhikari, *Supra* Note 94, p. 10.

¹⁴⁵ የንግድ ግንኙነትና ድርድር ዳይሬክቶሬት፣ የዓለም ንግድ ድርግትን በተመለከተ እስካሁን የተከናወነና ወደፊትም የሚከናወን ተግባራት፣ የንግድ ሚኒስቴር፣ ሚያዝያ 2003፣ አዲስ አበባ

outweigh the cost the country will pay in implementing the WTO agreements and therefore recommended the government to apply for accession.¹⁴⁶

On 13th January 2003, the Government of Ethiopia submitted an official request to the Director General to accede to the WTO pursuant to Article XII. On 10 February 2003, A Working Party was established to examine Ethiopia's accession process and Mr. Neil McMillan of UK was appointed as Chairperson of the Working Party in May 2003.¹⁴⁷

Pursuant to the establishment of the Working Party, Ethiopia started drafting its Memorandum on the Foreign Trade Regime (MFTR), a document consisting of the details on the country's existing trade-related policies, laws, regulations and procedures. As a result, National Steering Committee and a Technical Committee had been set up, drawn from a relevant trade related government institutions. The National Steering Committee is chaired by the Ministry of Trade and is represented by members drawn from various relevant line ministries and institutions. The Ministry of Trade has taken the lead to coordinate in order to play an active role in every respect regarding WTO accession.¹⁴⁸

The draft MFTR, prepared by the technical committee had been brought to the attention of the National Steering Committee for endorsement and then, had been submitted to the Council of Ministers for the final approval. After the Council of Ministers approved the MFTR, the document was submitted to the Director General of the WTO on 22 December 2006. The document was then distributed to all Member States on 25 January 2007.¹⁴⁹

In February 2007, Ethiopia received the first round 202 questions from the government of the United States of America and 17 questions from Canada. Replies to the questions were prepared and submitted to the WTO Secretariat in January 2008 and then the first Working Party meeting was held in 16 May 2008.¹⁵⁰

After the first Working Party Meeting, in the Second round 144 questions were received from USA, Canada and the European Union from June to August 2008. The replies to this second

¹⁴⁶ *Ibid.*

¹⁴⁷ <http://www.wto.org>

¹⁴⁸ *የጥገና ሪፖርት*; *Supra* note 145

¹⁴⁹ <http://www.wto.org>

¹⁵⁰ *Ibid*

round of questions were made in 16 March 2009. Third round of questions was also followed to which Ethiopia has replied in February and May 2012.

To date, the country has received fourth round of questions and is on the process of preparing replies for the fourth working party meeting. It is also preparing initial offer on service sector, which is thought to be submitted in near future. The country did not enter the stage of bilateral negotiations yet.¹⁵¹ It planned to accede to the WTO at the end of the Growth and Transformation Plan (GTP) period, *i.e.*, is 2015¹⁵², though the country did not enter bilateral negotiation stage yet, the crucial phase of WTO accession process that takes more time.

3.5.1. Arrangements Made By Ethiopia

Since accession to and membership in the WTO is a delicate, complex, and cumbersome procedure, Ethiopia has been making certain arrangements that help it somehow tackle these problems and thereby realize its ambition of joining the club. To this effect, since the beginning of its effort to integrate itself to the multi lateral trade regime, the country has embarked on building its capacity to negotiate by taking necessary measures by instituting separate organ for the job. In addition, it has also been working on identifying its trade-related laws and regulations with a view of harmonizing them to the WTO legal regime. The following topics provide brief highlights on these arrangements.

Capacity-Building Activities

With a view of curbing problems relating to inexperience of government organs in participating in multilateral as well as bilateral negotiations, the country has undertaken various capacity-building activities. Among many, the establishment of a separate and appropriate unit that closely follows up the overall accession process is the most crucial one.

To that effect, the Ministry of Trade had instituted a new organizational structure, and a WTO Affairs Department has been set up. The Department's mandate covers all matters associated with the WTO on both the domestic and international fronts. Constituted by three teams (Trade in Goods, Trade in Services, and Trade-Related Aspects of Intellectual Property Rights), the

¹⁵¹Interview with Mr. Geremew Ayalew, Trade Relation and Negotiation Directorate, Director General, Ministry of Trade (MoT), April 14, 2014, at 2:30 PM

¹⁵²Interview with Mrs. Belaynesh Bahiru, Trade Relation and Negotiation Directorate, Expert, Minister of Trade (MoT), April 14, 2014, at 2:00 PM

Department has the onerous task of coordinating all issues pertaining to Ethiopia's accession to the WTO and beyond. More specifically, the Department has the following three core coordination functions: internal dissemination of information, preparation of and packaging for negotiations, and facilitation of a meaningful allocation of technical assistance. A number of capacity building and awareness-creation activities have been undertaken since the establishment of this Department within the Ministry.¹⁵³

Identification of Trade Laws

The tasks of identifying and reviewing all trade-related Ethiopian laws and regulations for the sole purpose of clarifying their compatibility with WTO Agreements are further areas of concern in the preparation of Ethiopia's accession to the WTO. Cognizance of this, international and domestic lawyers have been recruited with financial support from the USAID. Over the past years, the Legal Team was able to review such areas as the Import-Licensing Regime, the Investment Regime, the Foreign Exchange Regime, Trading Rights, the Customs Law, Intellectual Property Rights, the Ban on the Export of Raw Hides and Skins, the Ban on the Import of Used Clothing and Seed Technology.¹⁵⁴

3.5.2. An Assessment of the Actual Use of Technical Assistance by Ethiopia

Since the start of its accession process, Ethiopia has made many partners that are providing it with various kinds of Technical Assistances. Among others, the EU, the USAID, the World Bank, the UNDP and the WTO itself are the prominent bodies that have been conducting different projects that help the country accede to the WTO with little difficulties. For instance, EU has funded the Second Degree (Master) program in cooperation with Addis Ababa University in the streams of Applied Trade Policy Analysis, and Competition and Regulatory Economics, which trained more than sixty two (62) professionals. The program has phased out in 2013, after being in operation for four years. The USAID has established a project called USAID-Ethiopia WTO Accession Plus Project that has made more than fifty (50) legal reviews, which address the compatibility of Ethiopian laws with that of the WTO. The project has phased out in 2012. In addition, among its other activities, the World Bank has funded impact

¹⁵³*How to Optimize Advantages of Accession to the World Trade Organization and Measures to be taken to Meet Possible Challenges*, p. 64, Available at <http://www.ethiopianchamber.com/Data/Sites/1/psd-hub-publications>

¹⁵⁴*Ibid*

assessment studies of the WTO accession in more than twenty (20) sectors including the telecommunication service sector.¹⁵⁵

Different technical assistances including national, regional and international trainings and conferences were also organized in which many professionals participated and have been participating. Assistance was also made in awareness creation activities conducted in more than eighteen towns in cooperation with the Ethiopian Economic Association, the Ethiopian Chamber of Commerce and the Ministry of Trade.¹⁵⁶

Insufficiency of budget allocated for technical assistances, lack of the capacity of the WTO Secretariat to meet the growing demand, the non obligatory nature of the technical assistance provisions in the WTO, and absence of WTO technical assistance provisions that address issues of capacity building at domestic level are the core shortcomings of the WTO technical assistance scheme. Regarding Ethiopia, as to Ato Lisanework, however, there are no limitations on the behalf the WTO as well as other partners so far. He said that the technical assistance scheme is demand driven. These partners provided the country with assistance, which is more than demanded. The problem is, rather, Ethiopia's lack of capacity to manage and effectively use them. Hence, Ethiopia did not use of the technical assistances at its disposal due to its own limitations.¹⁵⁷ The other problem related to incapacity of the country to use available technical assistance is the inability of the Ministry of Trade WTO Reference Office to hold on trained professionals who often leave the office for other jobs. This makes it difficult for the office to have trained work force needed in the course of negotiations.¹⁵⁸

The country has not so far demanded technical assistance to help it build its service sector regulatory institutions like the National Bank and Telecommunication Regulatory Organ. The rationale behind it is that the country has not submitted its initial service offer and thus it is not at the stage of requesting such assistance since the issue of whether or not such sectors are going to be liberalized is yet to be known. Despite absence of WTO technical assistance provisions that cover building of capacity at domestic level, Ato Lisanework is of opinion that Ethiopia would

¹⁵⁵ Interview with Mr. Lisanework Gorfu, Trade Relation and Negotiation Directorate, Head of Multilateral Trade Relations Department, Ministry of Trade (Mot), on May 12, 2014.

¹⁵⁶ *Ibid*

¹⁵⁷ *Ibid*

¹⁵⁸ Interview with Mrs. Belaynesh Bahiru, Trade Relation and Negotiation Directorate, Expert, Minister of Trade (MoT), May 8, 2014

use demand for such capacity building as a bargaining chip if Member states are going to insist liberalization of sensitive areas like telecommunication sector in the course of negotiations.¹⁵⁹

3.6. Conclusion

The legal framework of the WTO accession is enshrined under Article XII of the Marrakesh Agreement. The article provides that '*Any state or separate customs territory ... may accede to this Agreement, on the terms to be agreed between it and the WTO*'. It is blamed for its ambiguity and lack of negotiating guidelines, which left a room for the WTO Members to decide the fate of the acceding country in series of accession negotiations. The situation is worse while it comes to acceding LDCs, who lack strong bargaining power and as result take onerous commitments. After recognizing this problem, the WTO decided to facilitate and accelerate negotiations with acceding LDCs on 2001 Doha Ministerial Meeting. As a result, the 2002 Guidelines for Accession of LDCs were issued to further facilitate and accelerate negotiation of accession of LDCs through simplified procedures. The guidelines were supplemented by 2012 guidelines, which aimed at limiting the commitments that LDCs are obliged to make while also providing for transparency in negotiations and provisions of technical assistance. However, they fall short of establishing measurable and clearly enforceable benchmarks in the case of service commitments. Despite the issuance of these guidelines, however, acceding LDCs continued to face complicated and burdensome accession processes. Ethiopia is also in the process of WTO accession since 2003 after spending six years as an observer. The country has gone through some stages and now on the fourth round of questions and replies stage. According to some officials, the country has a plan to accede to the WTO at the end of the period of Growth and Transformation Plan (GTP), which is 2015, though this time schedule seems too short given the slow pace of the country's accession process.

¹⁵⁹ Gorfu, *Supra* Note 155.

CHAPTER 4

The Accession Experience, Telecom Commitments and WTO Expectations

4.1. WTO Regime on Telecom Commitments

4.1.1. Rationales for the Inclusion of Telecommunications Services in the WTO

Several factors may have contributed to the reasons for incorporation of telecom services in to the WTO. Among such reasons, the following are thought to be the prominent for inclusion of the telecommunication sector into the trade policy framework.¹⁶⁰

First, the WTO provided a suitable form for negotiations. In 1986, a number of developed countries felt that the traditional forum for international telecommunications negotiations, the International Telecommunications Union (“ITU”), was not an appropriate place in which to discuss liberalization initiatives. The vested interests in the ITU, *i.e.*, governments, most of which control the national Telecommunication Operators (“TO”), were used to discussing technical issues, such as radio frequency allocation, in a spirit of cooperation. Some felt that the introduction of competition, and the advent of many private suppliers of telecommunications services, did not fit into this tradition.¹⁶¹

Second, it was felt by developed countries that the negotiating techniques of the GATT were appropriate for the objectives they pursued. The global framework would give them more opportunity to achieve results, since cross- sectoral deals might be struck.¹⁶²

Having unsuccessfully resisted the inclusion of services in the Uruguay Round, the developing countries did manage to put services on a separate track in an attempt to prevent cross-linkages between traditional GATT issues and services.¹⁶³ These circumstances undoubtedly led to more protracted negotiations on telecommunications. Consequently, no agreement on basic

¹⁶⁰Marco Bronckers and Pierre Larouche (2008), *A Review of the WTO Regime for Telecommunications Services*, in “The World Trade Organization and Trade in Services”, (K. Alexander & M. Andenas, eds.), Martinus Nijhoff, p. 319, Available at SSRN: <http://ssrn.com/abstract=1995658>

¹⁶¹Peter Holmes, Jeremy Kempton and Francis McGowan (1996), *International Competition Policy and Telecommunications—Lessons from the EU and prospects for the WTO*, 20 Telecommunications Policy, 757–8.

¹⁶²Bronckers, *et al.* (2008), *supra* note 160, p. 320.

¹⁶³Bernard M. Hoekman and Michel M. Kostecki (2001), *The Political Economy of the World Trading System*, (2nd ed.), Oxford University Press, New York, p. 249

telecommunications was reached by 1994 for signature as part of the WTO Agreement. This issue was accordingly entrusted to an *ad hoc* negotiating group, the Negotiating Group on Basic Telecommunications (NGBT).¹⁶⁴

Third, the original GATT appeared to provide a tested framework for negotiations on the liberalization of telecommunications services. The GATT framework for goods contained some fundamental liberalization principles (MFN, national treatment, tariff bindings, etc.). These tested principles might provide a road map to the telecommunications negotiators and could reinforce the commitments ultimately agreed.¹⁶⁵

Lastly, the proponents of including telecommunications in the Uruguay Round were attracted by the dispute settlement procedures available in the GATT. While these procedures could be criticized, they were at least used and thus helped to further trade liberalization. In contrast, the dispute settlement provisions of the ITU have not been used once since 1947.¹⁶⁶

4.1.2. History of the WTO Telecommunications Negotiations

Negotiations on telecommunication lasted for slightly more than a decade, from 1986 to 1997.¹⁶⁷ These negotiations are discussed under two subsections depending upon the developments it achieved chronologically; from 1986 to conclusion of the GATS in 1994 and post 1994 achievements.

From 1986 to the Conclusion of the GATS in 1994

Discussions on telecommunications began in 1989. Since the United States was the most advanced country in terms of telecommunications liberalization at the time, it will come as no surprise that their perspective and their agenda initially dominated the talks. For instance, at the persistence of the United States a distinction between basic and value-added services was introduced to structure the discussions.¹⁶⁸ Negotiations on value-added or enhanced services went relatively easily.

¹⁶⁴Bronckers, *et al.* (2008), *supra* note 160, p. 320.

¹⁶⁵*Ibid.*

¹⁶⁶*Ibid.*

¹⁶⁷Jonathan D. Aronson (1997), *Telecom Agreement Tops Expectations*, in "Unfinished Business: Telecommunications after the Uruguay Round 15"(Gary C. Hufbauer and Erika Wada, eds.), Institute for International Economics, Washington DC, p. 15

¹⁶⁸Bronckers, *et al.* (2008), *Supra* note 160, p. 321

Nonetheless, difficulties arose with respect to basic telecommunications services. Many U.S. operators were eager to be able to enter foreign markets and invest abroad, since they felt comparatively more advanced than their foreign competitors.¹⁶⁹ Yet, the United States was reluctant to open its market, the largest in the world, as long as other markets were dominated by legal monopolists, which could frustrate the efforts of U.S. firms abroad and also potentially engage in anti-competitive practices affecting the U.S. market. The United States argued that it was not going to open its market as long as its telephone operators were not granted reciprocal access to markets of similar size to the United States. This became known as the issue of *critical mass*. Without a sufficiently large number of market access commitments from its trading partners, the United States was unwilling to make a move.¹⁷⁰

In the end, the Uruguay Round produced a framework agreement on trade in services.¹⁷¹ WTO Members gave specific market access commitments in a variety of sectors.¹⁷² With respect to telecommunications services, a number of countries made commitments, but they were mostly limited to so-called value-added services only. No agreement was reached on basic telecommunications.

Post 1994 Achievement

Failing to address the issue of basic telecommunication service while concluding GATS in 1994, a Decision on Negotiations on Basic Telecommunications was taken at the end of the Uruguay Round, whereby a Negotiating Group on Basic Telecommunications was created (“NGBT”) with a mandate to conclude an agreement by April 30, 1996. WTO Members agreed to a standstill during the upcoming round of telecommunications negotiations; they would not seek to improve their negotiating position or leverage by the introduction of new measures.¹⁷³ An Annex on Negotiations on Basic Telecommunications was also attached to the GATS in order to extend the time limit for filing exemptions to Article II of the GATS (most-favored nation treatment) in the

¹⁶⁹*Ibid*

¹⁷⁰ Holmes, *et al.* (1996), *Supra* note 161, p. 764

¹⁷¹ Peter Van den Bossche (2005), *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge University Press, Cambridge

¹⁷² Bernard M. Hoekman, (1996), *Tentative First Steps: An Assessment of the Uruguay Round Agreement on Services*, in “The Uruguay Round and the Developing Countries” (Will Martinand L. Alan Winters, eds.), Cambridge University Press, Cambridge.

¹⁷³ WTO, *Decision on Negotiations on Basic Telecommunications*, par. 7.

telecommunications sector until the end of the telecommunications negotiations.¹⁷⁴

However, telecommunications negotiations broke down in the spring of 1996, when the United States bowed out. The United States explained their refusal to conclude an agreement by claiming that a *critical mass* of market access commitments, notably from developing countries, had not been reached.¹⁷⁵ Members of the NGBT agreed however to extend the deadline in order to try to salvage the negotiations. The effect of both the Decision on Negotiations on Basic Telecommunications and the Annex on Negotiations on Basic Telecommunications were extended in substance to February 15, 1997 by the Decision on Commitments in Basic Telecommunications of April 30, 1996.¹⁷⁶

The NGBT was turned into the Group on Basic Telecommunications ("GBT"). In contrast to the NGBT, where some countries were participants and others observers, the GBT was open to all WTO Members as participants.¹⁷⁷

Between April 1996 and the new deadline, a lot of effort was spent on improving existing offers and obtaining new offers. The United States and the EU were particularly looking for concessions in the Asia-Pacific region. As a result of this pressure, but also because of their own perception that deregulation would be in their own interest, several countries in the region presented revised or new liberalization offers. In November 1996, the United States and the EU also improved their offers, as further enticement to the others.¹⁷⁸

At last, 32 of the 34 offers that had been tabled in April 1996 were revised, and 21 new offers were submitted, bringing the total number of schedules of commitments to 55, accounting for 69 countries (the fifteen countries of the EU being included in a single schedule). On February 15, 1997, an agreement was reached between the participants on these commitments. The 55 schedules were attached to a brief document which became the Fourth Protocol to the GATS. The Fourth Protocol entered into force on February 5, 1998.¹⁷⁹

¹⁷⁴ GATS, *Annex on Negotiations on Basic Telecommunications*, par 1.

¹⁷⁵ Bronckers, *et al.* (2008), *Supra* note 160, p. 322

¹⁷⁶ WTO (1996), *Decision on Commitments in Basic Telecommunications*, WTO/S/L/19.

¹⁷⁷ Bronckers, *et al.* (2008), *Supra* Note 160, p. 323.

¹⁷⁸ *Ibid*

¹⁷⁹ <http://www.wto.org>

4.1.3. An Overview of Telecommunications in the GATS

Having already discussed the rationale for incorporating telecom service liberalization and history of its negotiation in the previous section, in this section, the researcher addresses issues like the Framework Articles of the GATS, the Annex on Telecommunications (AT) and the Schedule of Specific commitments. He also attempts to shed a light on the commitments of the Fourth Protocol of February 15, 1997 as well as on the Telecom Reference Paper (RP), which constitutes an additional telecom commitment.

First, however, it is important to define what telecommunication is and explain the distinction that has been drawn between “basic” and “value-added” telecommunications. Hence, in this immediate sub-section, telecommunication is defined and the distinctions between basic and value-added telecommunication services are made.

4.1.3.1. Scope and Definition of Telecommunications Sector

The scope and definition of Telecommunication may differ depending on the way a particular country or interested body views it. For the purpose of this paper, however, the researcher sees at scope and definitions given under the WTO documents and Ethiopian laws.

The telecommunications sector plays a dual role in economic activities, not only itself a distinct circle in economic system but also a supplying means for other sectors. The telecommunications sector includes both service and equipment and relates to several WTO agreements. On the equipment side, the GATT schedules of tariff concessions and developments in the Agreement on Technical Barriers to Trade (Standards) are both important.¹⁸⁰ Additionally, GATS puts trade in telecommunications services, both basic and value-added, within the ambit of the multilateral trading system.¹⁸¹

The GATS Participant countries agreed to set aside national differences in basic telecommunications definition and negotiated in both public and private telecommunications services involving transmissions of customer supplied information. Participants agreed that basic telecommunications services provided over network infrastructure as well as those

¹⁸⁰ *Ibid*

¹⁸¹ Chun Hung Lin (2009), *Conceptual Appraisal of Trade in Service on Telecommunications under WTO Legal System*, Miskolc Journal of International Law, Vol. 6, No. 1, Miskolc, p. 88, Available at <http://www.mjil.hu>

provided through resale would both fall within the scope of commitments.¹⁸² As a result, market access commitments will cover cross-border telecommunications supply (mode 1) and services provided through the establishment of foreign firms, or commercial presence (mode 3).¹⁸³

Under the GATS Annex on Telecommunications (AT), “telecommunications” means the transmission and reception of signals by any electromagnetic means. “Public telecommunications transport service,” means any telecommunications transport service required, explicitly or in effect, by a Member to be offered to the public generally. Such services may include telegraph, telephone, telex, and data transmission typically involving the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer’s information. “Public telecommunications transport network,” means the public telecommunications infrastructure that permits telecommunications between and among defined network termination points.¹⁸⁴

Due to the differences of definitions in each country, some members hoped to limit certain coverage on telecommunications but some wanted to expand telecommunication categories. Thus, an open and flexible schedule was achieved to fit those requirements and series of mutual agreements replaced a more detailed multilateral one in Annex and commitments.¹⁸⁵

Definition of telecommunication under Ethiopian law is somehow similar to the GATS’ Telecommunication Annex. The Ethiopian telecommunication proclamation No 49/1996 defines telecommunication as;

“the emission, transmission or reception, through the agency of electricity or electromagnetism, of any sounds, signs, signals, writing, images or intelligence of any nature by wire, radio, optical or other electromagnetic systems whether or not such signs, signals, writings, images, sounds or intelligence have been subjected to rearrangement, computation or other processes by means in the course of their transmission, emission or reception”.¹⁸⁶ There is no substantial difference between the two definitions except for the latter is more detailed and illustrative.

¹⁸²<http://www.wto.org/wto/services/tel.104.htm>

¹⁸³GATS, Art. (2)

¹⁸⁴GATS, *Annex on Telecommunications*, par 3

¹⁸⁵Lin (2009), *Supra* note 181, p. 88

¹⁸⁶Telecommunication Proclamation (1996), *Supra* note 11, Art 2(1)

4.1.3.2. The Distinction between Basic and Value-added Telecommunications

As a preliminary matter, a distinction between “basic” and “value-added” telecommunications has unfortunately been introduced in the GATS framework.¹⁸⁷ “Basic” and “value-added/enhanced” telecommunications are essentially U.S. regulatory categories introduced for the purposes of delineating US Federal Communication Commission (FCC) jurisdiction in the course of the computer inquiries. In the United States, basic services are defined as “the offering of transmission capacity for the movement of information”, while enhanced services are “any offering over the telecommunications network, which is more than a basic transmission service”.¹⁸⁸ The FCC exerts jurisdiction over the former but not the latter. The distinction is thus a technical one, whereby basic services are those where the service provider offers little more than a clear communications path to the customer. It does not reflect any inherent difference between the two groups of services. The distinction is rather a way to draw a line between what the FCC perceived as a competitive sector and one that still required regulation.¹⁸⁹

The distinction between basic and value-added services is not present to the same extent in all telecommunications regulatory frameworks. In the EC, this distinction is no longer made.¹⁹⁰

In the original outline for services schedules, telecommunications services were divided into fifteen sub-headings. Later, the distinction between basic and value-added services was made by separating the sub-headings into two groups for the purposes of negotiation, the latter being treated in the original GATS, the former being left for further negotiations within the NGBT (and later the GBT). The Decision on Negotiations on Basic Telecommunications defines “basic telecommunications” as “telecommunications transport networks and services”, a definition which comes closer to the U.S. approach.¹⁹¹ NGBT and GBT participants were, however, unable to agree on a more precise definition of basic services, and in fact did not incorporate a definition of basic services in their respective schedules. Whilst the United States uses the sub-headings as an exhaustive list of what is covered under “telecommunications services”, the EC and its Member States see these sub-categories as illustrations of a broader definition, which is included

¹⁸⁷ Bronckers, *et al.* (2008), *Supra* note 160, p. 324

¹⁸⁸ *Ibid*

¹⁸⁹ *Ibid*

¹⁹⁰ Pierre Larouche (2000), *Competition Law and Regulation in European Telecommunications*, Hart Publishing, Portland, p. 20

¹⁹¹ WTO, *Decision on Negotiations on Basic Telecommunications Services*, par 1

at the beginning of their commitments.¹⁹²

Now that commitments have been made for both basic and value-added telecommunications, a full set of commitments is present and there is no need to distinguish further between the two categories if no substantive consequences are attached to the distinction. Nevertheless, the basic/value-added distinction appears in the Reference Paper agreed by the GBT. This distinction stems from the idiosyncrasies of U.S. telecommunications regulation, may cause complications, and may have outlived its usefulness given that no substantive consequences are attached to the distinction. It could be eliminated from the GATS framework.¹⁹³

While we come to our country, Ethiopian laws do not provide clear and detailed distinction between basic and value added telecommunication service except for illustrating services that fall under these categories respectively. The telecommunication proclamation No 49/96 describes basic telecommunication services simply as telephone, telegram and telex services.¹⁹⁴ While the Value Added Services Directive No. 2/2005 merely defines the value added service license to include only call centers and virtual Internet service licenses.¹⁹⁵

It seems that these definitions are narrow in scope and various telecommunication services might have been left out, especially from the latter category. The researcher believes that this is the reason that initiated Working Party on Accession of Ethiopia to raise question No. 174 on the first round of questions and replies. The question at stake reads as, "*Does Ethiopia consider call centers and virtual ISPs to be the only value-added services?*" The answer forwarded on behalf of Ethiopia was affirmative.¹⁹⁶

4.1.4. Overview of GATS

The General Agreement on Trade in Services (GATS) is an annex to the Agreement Establishing the WTO concluded on April 15, 1994. It is a comprehensive legal framework, which covers many service activities including telecommunications, finance, maritime, energy, business, education and environment and excluding "services supplied in the exercise of

¹⁹²Bronckers, *et al.* (2008), *Supra* note 160, p. 325

¹⁹³*Ibid*

¹⁹⁴Telecommunication Proclamation (1996), *Supra* note 11, Art 2(3)

¹⁹⁵Value Added Services Directive (2005), *Supra* note 34, Art 2(5)

¹⁹⁶WTO (2008), *Accession of Ethiopia*, WT/ACC/ETH/4

government authority”¹⁹⁷. Unlike GATT which requires Members to accept the entire package of agreements, GATS requirements are based on a “positive list” approach in which Members only undertake specific commitments in the sectors that they listed in their schedules. According to GATS, progressive liberalization is to be achieved through successive rounds of multilateral negotiations.¹⁹⁸ In doing so, special attention is given to individual developing and least-developed countries who shall have appropriate flexibility for opening fewer sectors, liberalizing fewer types of transactions, progressively extend their market access in accordance with their development level.¹⁹⁹

4.1.4.1. GATS Framework

GATS framework includes the following parts: Part I and II provide general rules and principles with respect to liberalization of trade in services. These parts cover all sectors and include; the most-favored nation treatment obligation;²⁰⁰ transparency²⁰¹ reduction and elimination of non-tariff barriers in domestic regulations;²⁰² prevention of anti-competitive practices;²⁰³ and obligations to developing countries.²⁰⁴ Part III and IV of GATS provide a framework for the negotiations of specific market access commitments of individual members. These parts include; market access²⁰⁵ and national treatment obligations²⁰⁶. Both general obligations and specific commitments are subject to certain exceptions under GATS. Part V concerns about dispute settlement and enforcement of obligations. Part VI covers definitional issues in the application of the GATS. In addition, there are Annexes on exemption from MFN treatment, movement of persons, financial services, telecommunications and air transport services.

¹⁹⁷Official documents of WTO including General Agreement on Trade in Services (GATS), GATS Annex on Telecommunications, Reference Paper, available at <http://www.wto.org>

¹⁹⁸GATS, Art X

¹⁹⁹*Id.*, Art XIX:2

²⁰⁰*Id.*, Art. II

²⁰¹*Id.*, Art. III

²⁰²*Id.*, Art. IV

²⁰³*Id.*, Art. VIII

²⁰⁴*Id.*, Art. IV

²⁰⁵*Id.*, Art. XVI

²⁰⁶*Id.*, Art. XVII

4.1.4.2. Modes of Service Supply

Instead of defining services, the GATS choose to describe the mode by which they are supplied. Hence, to have a clear understanding of the term 'service' the researcher deems essential to find the meaning of the term elsewhere and point out some of its characteristics as well.

The term has a variety of meanings, dependent upon the context or the sense in which used. Among many definitions given to the term by the *Black's Law Dictionary*, the following definition corresponds the context, which the GATS presumably need to address. The dictionary defines service as, "things purchased by consumers that do not have physical characteristics".²⁰⁷ Services can also be defined as, "activities that add value either directly to another person or to a good belonging to another person"²⁰⁸.

Services possess three main characteristics that make them very different from goods; they are intangible, though often incorporated in tangible products; they are non-storable; and they involve a simultaneous action between the service provider and the service consumer. Unlike goods production, ownership of a service is not transferred during the process of service provision. Thus services cannot be stored; rather, the service supplier stores instead the capacity to provide the service at the point in time where he/she will have access to a service demander. This inability to be stored means that services are produced and consumed simultaneously.²⁰⁹

Though the GATS does not define service, the definition of the four modes of supply it asserted is considered to be one of the most distinguishing features of GATS. These modes of supply are:

Mode 1- Cross-border supply is defined as the supply of service from the territory of one member to that of another member. This is considered to be an important mode in telecommunications sector today because international calls from country to country fall into this mode.²¹⁰

Mode 2- Consumption abroad deals with the cases in which the customer of a member country

²⁰⁷ Henry C. Black (ed.) (1990), *Black's Law Dictionary*, 6th ed., West Publishing Co., St. Paul, Minn. p. 1369

²⁰⁸ Tony Warren (1995), *The Political Economy of Trade in Services Policy: An Examination of the GATS Schedules of Commitment*, paper written for the Australia- Japan Research Centre, Australian National University, p. 2.

²⁰⁹ Sherry M. Stephenson (1999), *Approaches to Liberalizing Services*, World Bank Policy Research Working Paper No. 2107, p. 4, Available at <http://www.ssrn.com/abstract=604917>

²¹⁰ *Id*, Art I (2) (a)

goes to another member country to consume services.²¹¹

Mode 3- Commercial presence is defined as the supply of a service from one member's service supplier through commercial presence in territory of another member. This is considered to be the most important mode in telecommunications sector when many developed countries would like to establish branches in other countries to provide services or construct telecommunications infrastructure.²¹²

Mode 4- Movement of natural persons is defined as the supply of services by a supplier of one country in another country through the presence of natural persons. In telecommunications sector, a relevant case occurs when an employee of a telecommunications provider travels to another country to provide services.²¹³

4.1.5. GATS Annex on Telecommunication

Telecommunications is a specific sector, which affects all economic and social activities. Recognizing the specificities of the sector, by the end of the Uruguay Round, member signed the GATS Annex on Telecommunications (AT) which applies to all measures of a member that affect access and use of public telecommunications transport networks and services.²¹⁴

An AT, attached to the GATS, concerns "access to and use of public telecommunications transport networks and services".²¹⁵ It is based on the recognition that telecommunications are an essential tool for other economic activities, such as banking.²¹⁶ It therefore set forth certain principles to make sure that concessions on other services would not be frustrated by a lack of progress on telecommunications negotiations. In other words, the AT can be seen as a general insurance policy for suppliers of other services that they would have access to the requisite telecommunications networks and services in WTO countries.²¹⁷

The AT does not contain or lead to any market access or national treatment obligation. It is not to

²¹¹*Id*, Art I (2) (b)

²¹²*Id*, Art I (2) (c)

²¹³*Id*, Art I (2) (d)

²¹⁴ Nguyen Thi Ha Thao (2005), *A Study on Vietnam's Telecommunications Industry Towards Joining the WTO*, Thesis Submitted to School of Public Policy And Management, KDI (Unpublished), p. 46

²¹⁵ GATS, *Annex on Telecommunication*, par 2(a).

²¹⁶*Id*, par 1

²¹⁷ Bronckers, *et al.* (2008), *Supra* note 160, p 325-326

be interpreted to require WTO Members to allow the provision of telecommunications services beyond the commitments they have already made in their respective schedules.²¹⁸ The AT is only applied once a WTO Member has offered specific commitments in a given service sector.²¹⁹

It is therefore comparable to the general GATS obligations, which apply in addition to the specific commitments made in schedules.²²⁰

4.1.5.1. Legal Structure of GATS Annex on Telecommunications

GATS contains several annexes including air transport, financial services, movement of natural persons, and telecommunications. The GATS Annex on Telecommunications provides specific rights to services and services suppliers with respect to access to and use of, the public telecommunications transport networks and services. However, the Annex does not cover the provisions of telecommunications by a foreign supplier. It addresses access to telecommunications by services users who have rights under the Agreement.²²¹ The Annex requires each Member to ensure that all service suppliers seeking to take advantage of scheduled commitments are accorded access to and use of public basic telecommunications, both networks and services, on a reasonable and non-discriminatory basis.²²²

The Annex is composed of seven paragraphs. The objectives of the Annex are “to recognize its dual role as a distinct sector of economic activity and as the underlying transport means for other economic activities” and “to elaborate upon the provisions of the Agreement with respect to access to and use of public telecommunications transport networks and services.”²²³ The Annex applies to all participants’ measures concerning access to and use of public telecommunications transport networks and services, and covers government measures relating to all providers of public basic telecommunications services including public and private owned operators.²²⁴ This

²¹⁸GATS, *Annex on Telecommunication*, par 2(c)

²¹⁹*Id.*, par. 5(a)

²²⁰Lee Tuthill (1996), *Users’ Right?: The Multilateral Rules on Access to Telecommunications*, Telecommunications Policy 88, Econ Paper, vol. 20, issue 2, Orebro University, Orebro, p. 94, Available at http://econpapers.repec.org/article/eeetelpol/v_3a20_3ay_3a1996_3ai_3a2_3ap_3a89-99.htm

²²¹Terence P. Stewart (1996), *The World Trade Organization: The Multilateral Trade Framework for the 21st Century and US Implementing Legislation*, American Bar Association Section of International Law and Practice, p 544,

²²²<http://www.wto.org.wto/services/tel.07.htm>

²²³GATS, *Annex on Telecommunications*, par 1

²²⁴Lin (2009), *Supra* note 176, p. 87

Annex does not apply to measures affecting the cable or broadcast distribution of radio or television programming. It requires the participant to authorize service suppliers of any other participants to establish, construct, acquire, lease, operate, or supply telecommunications transport networks or services, other than as provided for in its Schedule; or not offered to the public generally.²²⁵ The Annex also applies to telecommunications within countries or across borders between and among defined network termination points. Different from other GATS Annexes, the Annex on Telecommunication emphasizes access and use rather than supply or provision aspects.²²⁶

The AT imposes some obligations regarding the transparency of tariffs and other terms and conditions relating to public telecommunications transport networks and services.²²⁷ It is also of interest to note that developing countries can claim an exception to the AT in order to strengthen their domestic telecommunications infrastructure or their participation in international negotiations on telecommunications.²²⁸

4.1.6. WTO Basic Telecommunications Agreements

The WTO Basic Telecommunications Agreement (BTA), simply known as the fourth protocol, which was put into force on February 5, 1998, was signed in 1997 by 69 countries, which occupy over 90% of global telecommunications service revenue.²²⁹ According to the Agreement, all signatory members are required to implement pro-competitive telecommunications regulations and schedule binding, most-favored-nation commitments with respect to market access, investment as well as regulatory principles. Telecommunications carriers of signatory countries also ensure access to local, long-distance, international service markets through all means of network technology.²³⁰

The Basic Telecommunications Agreement includes the following documents:²³¹

- The Fourth Protocol to the General Agreement on Trade in Services

²²⁵GATS, *Annex on Telecommunications*, par 2

²²⁶G Russell Pipe (1994), *Uruguay Round Trade Agreement Provisions Affecting Telecommunications; Strategic Planning Unit*, International Telecommunication Union (ITU), Geneva, p. 11

²²⁷GATS, *Annex on Telecommunications*, par 4

²²⁸*Id*, par 5(g)

²²⁹<http://www.wto.org>

²³⁰Thao (2005), *Supra* note 209, p 49

²³¹*Ibid*

- The Reference Paper on Pro-competitive Regulatory Principles
- Fifty-five supplementary schedules of commitments;
- Nine lists of most-favored nation (MFN) exemptions;
- Two notes on the scheduling methodology of the Chairman of the WTO's Working Group on Basic Telecommunication.

4.1.7. Commitments in the Fourth Protocol

The "Fourth Protocol to the General Agreement on Trade in Service" was issued on April 30, 1996 as the second Ministerial Decision on Commitments on Basic Telecommunications. Under the Fourth Protocol, WTO members with schedules attached to it could add or modify national schedules and lists of MFN exemptions. Members, which had not submitted national schedules and lists of MFN exemptions to the Fourth Protocol, could do it until 30 November 1997. If by 1 December 1997 the Protocol had not been accepted by all Members concerned, those Members which have accepted it by that date might decide whether the Protocol would enter into force on 1 January 1998.²³²

The Fourth protocol embodies market access and national treatment commitments as well as a negotiated set of pro-competitive regulatory principles contained in a reference paper, which are discussed in the following sub topics.

4.1.7.1. Market Access and National Treatment Commitments

At the end of the day, fifty-five schedules of specific commitments were attached to the Fourth Protocol, accounting for 69 countries, with the EC and its Member States presenting a single schedule.²³³

From these 55 schedules:²³⁴ Forty-seven schedules (for 61 countries) contained commitments to liberalize at least partially the provision of voice telephony. Two countries only committed to liberalize voice services to closed user groups. International voice services were liberalized in 42

²³²WTO (1996), *Fourth Protocol to the General Agreement on Trade in Services*, S/L/20, par 3

²³³<http://www.wto.org>

²³⁴William J. Drake and Eli Noam (1997), *Assessing the WTO Agreement on Basic Telecommunications*, in "Unfinished Business: Telecommunications after the Uruguay Round", (Gary C. Hufbauer and Erika Wada, eds.), Institute for International Economics, Washington DC, p. 41

schedules (56 countries), national long-distance services in 37 schedules (41 countries), and local services in 41 schedules (55 countries). A large number of commitments (for 25 countries), were phased in after the entry into force of the Fourth Protocol: for instance Spain (December 1998), Ireland, Portugal, Argentina and Singapore (2000), and Greece (2003); Forty-nine schedules (63 countries) included commitments on data transmission services. Forty one schedules (55 countries) on leased lines, 46 schedules (60 countries) on cellular/mobile telephony services, 45 schedules (59 countries) on other types of mobile services (mobile data, paging), 37 schedules (51 countries) on mobile satellite services or transport capacity and 36 schedules (50 countries) on fixed satellite services or transport capacity.²³⁵ OECD Members, with the exception of Switzerland and Turkey, liberalized all of the services mentioned above.

Of the 55 schedules annexed to the Fourth Protocol, 42 (covering 56 countries) contained a commitment to permit foreign ownership or control of all telecommunications services and facilities. These 56 countries account for 97 percent of the total basic telecommunications services revenue of WTO Members.²³⁶

However, certain significant WTO Members retained a foreign investment limit, notably India, South Africa, Turkey and many of the “Asian tigers” (Indonesia, Malaysia, the Philippines and Thailand). Others left foreign investment limits on certain services, including important players such as Brazil, Canada, France, Israel, Mexico and Portugal. Moreover, certain countries retained limits on foreign participation in the local incumbent Telecom Operators (TO), including Australia, Japan and New Zealand.²³⁷

So many issues arose with respect to the scheduling of commitments. First, there was discussion on whether to differentiate according to whether competition would take place only at the services level (resale) or also at the infrastructure level (“facilities-based competition”). The key issue is whether, and if so how much, control should be retained over the construction of infrastructure. Many countries, especially developed ones, have a well-established telecommunications infrastructure. Since it is not necessary to construct a parallel infrastructure everywhere, competition could have been limited to resale only. On the other hand, certain

²³⁵*Ibid*

²³⁶<http://www.ustr.gov>

²³⁷Bronckers, *et al.* (2008), *Supra* note 160, p 329

countries, mostly developing ones, wanted to promote the expansion of their telecommunications infrastructure and were only inclined to allow facilities-based competition. Ultimately, it was agreed in the GBT that market access commitments would extend both to facilities-based and resale competition.²³⁸

Second, many countries participating in the telecommunications negotiations conditioned their market access offers on the availability of frequencies. This could be seen as a factual statement reflecting the scarcity of a natural resource, or a broad reservation that allowed national or political preferences and thereby undermined market access commitments. To avoid any misunderstanding, it was indicated that frequency availability ought not to be mentioned in the market access commitments, since it is covered by the general GATS framework for domestic regulation.²³⁹

Finally, the privatization of State-owned enterprises is a matter that falls outside the purview of the GATS.²⁴⁰ Accordingly, neither the GATS nor the Fourth Protocol contained any provision on the privatization of State-owned TOs. Hence, even if many States made commitments to open their markets to foreign investment, a local TO may remain beyond the reach of a foreign investor as long as the State does not decide to privatize it. A State remains free not to privatize a State-owned local TO fully, so in practice foreign participation in the local TO can be limited.²⁴¹

4.1.8. Additional Commitments on Regulatory Principles: The Reference Paper

The Reference Paper (RP) represents the regulatory component of the basic telecommunications agreement. It is a set of common guidelines for a regulatory framework that countries should follow to support the transition of the telecommunications sector to a competitive marketplace and to guarantee effective market access and foreign investment commitments. It was adopted in full or in part by 61 signatories to the basic telecommunications agreement as additional commitments in application of article XVIII of GATS. Once adopted, the principles of the

²³⁸*Ibid*

²³⁹GATS Art VI., See also *Chairman's Note on Market Access Limitations on Spectrum Availability*, S/GBT/W/3 (February 3, 1997)

²⁴⁰Bronckers, *et al.* (2008), *Supra* note 160, p. 330

²⁴¹*Ibid*

reference paper become binding commitments and enforceable through dispute settlement under WTO.²⁴²

The objective of the reference paper is twofold. First, it aims to provide foreign service providers with regulatory safeguards to guarantee that monopolies or former monopolies do not abuse their market power to undermine competition. Second, it aims to provide a harmonized set of regulations in order to minimize the phenomenon of asymmetric regulation.²⁴³

The RP could be characterized as a policy document, a common framework during the negotiations leading up to the 1997 agreement guiding the parties' individual commitments. As such, parties were free to deviate from the RP, to select particular issues from it and to rephrase certain obligations in their individual Schedules.²⁴⁴ While most WTO Members participating in the Telecommunications Agreement ultimately agreed to follow the RP, a number of them did make slight or more important modifications when formulating their additional commitments.²⁴⁵

4.1.8.1. Principles of the Reference Paper

Until recently, the telecommunications sector in most countries were operated under a legal monopoly regime whereby one or a few operators held the exclusive right to provide telecommunications services. Whenever liberalization occurs, the former monopoly operator is by definition usually the dominant player on the market. It is in many ways advantaged, if only because its network is already in place and it has a strong customer base. Usually, it also wields more political influence than any entrant does. The RP, thus, contains a core of principles designed to ensure that the advantages of the former monopoly operator are not used to the detriment of new entrants on the telecommunications markets.²⁴⁶

The reference paper deals with six regulatory principles. The first two (competitive safeguards and interconnection) apply to the regulation of "major suppliers", while the last four (universal

²⁴²Reference Paper, *full text*

²⁴³Bronckers, *et al.* (2008), *Supra* note 160, p 330.

²⁴⁴Lee Tuthill (1997), *The GATS and New Rules for Regulators*, Telecommunications Policy, Vol 21, No. 9/10, Elsevier Science Ltd., London, p 783, Available at http://www.wto.org/english/tratop_e/telecom_e/workshop_dec04_e/rules_regulators.pdf

²⁴⁵Ted Ringrose (2001), *The Impact on Asian Telecommunications Markets*, in "Trade & Telecoms 103", (Mark Clough ed.), p. 106–108

²⁴⁶Bronckers, *et al.* (2008), *Supra* note 160, p 330

service, licensing, independence of the regulator and allocation of resources) deal with general regulatory issues.

A. Competitive Safeguards

As a general principle, the RP contains a commitment to enact appropriate measures to prevent anti-competitive practices by major suppliers.²⁴⁷ In the specific case of service providers holding a monopoly or exclusive rights, the obligations of the RP complement those of the GATS.²⁴⁸ Anti-competitive practices are not defined in the RP but specific lists are given.

Among all possible anti competitive practices, the reference paper calls the members' attention to three particularly important ones, which should be forbidden under national regulation. Those are engaging in anti-competitive cross-subsidization, using information obtained from competitors with anti-competitive results and not making available to other service suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.²⁴⁹

Cross-subsidization is not defined, but for the qualification "anti-competitive". Generally speaking, cross-subsidization consists in the use of profits derived from a profit making area of operation to finance and sustain loss-making areas.²⁵⁰ In the telecommunications industry, the practice of cross-subsidization has long been practiced both in developed and developing countries and evolved as a common business practice and an explicit policy by telecommunications enterprises. In this sector, profits in long distance and business markets go to cross subsidize the losses in local and residential markets. The system of cross subsidization in the telecommunications sector has been closely related with the support of the social goal of universal service.²⁵¹

It can become anti-competitive when the operations in the profit-making area are conducted pursuant to exclusive or special rights or when the major supplier in question holds a dominant

²⁴⁷Reference Paper, par. 1(1)

²⁴⁸GATS, Article VIII

²⁴⁹Reference Paper, par 1(2)

²⁵⁰Boutheina Guermazi, *Exploring the Reference Paper on Regulatory Principles*, p. 4 Available at www.wto.org/English/tratop_e/serv.../guermazi_referencepaper.doc

²⁵¹*Ibid*

position in the profit-making area. If cross-subsidization is to be prevented, an appropriate regulatory framework must be developed. In order to be able to monitor whether any cross-subsidization occurs, one of the first regulatory elements required is that the major supplier in question implement an appropriate accounting system, with regular reporting and disclosure requirements.²⁵²

Telecommunication Operators typically operate at many levels in the telecommunications sector. They will, for instance, both supply leased lines to data communications providers in order to enable them to complete their network, and at the same time offer data communications in competition with those providers. In such a case, in the course of supplying leased lines to its competitor, an operator is likely to obtain information from the competitor which is often precise enough to identify the customers of the competitor or to guess the intentions of a competitor. If that information is relayed to the retail division of the TO, it can be used for anti-competitive purposes. Here as well, structural measures, such as the legal separation of business divisions operating in different markets may be necessary, although the RP does not mention this point.²⁵³

RP also obliges a major supplier to disclose technical and commercial information to third parties that want to provide a certain service. Non-compliance of a major supplier to disclose such technical and commercial information would be treated as anti-competitive practice.²⁵⁴

B. Interconnection

The reference paper defines interconnection as the "Linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier".²⁵⁵ Interconnection in this context means the commercial and technical arrangements under which service providers connect their equipment, networks and services to enable customers to have access to the customers, services and networks of other service providers. Interconnection is granted between telecommunication service providers.²⁵⁶

²⁵²Bronckers, *et al.* (2008), *Supra* note 160, p. 335

²⁵³*Ibid*

²⁵⁴Reference Paper, par 1 (2) (c)

²⁵⁵*Id.*, par. 2.1

²⁵⁶Guerhazi, *Supra* note 250, p. 6

The RP enumerates the parameters of the obligation to ensure interconnection, namely:²⁵⁷

- Interconnection must be made at any technically feasible point.
- The terms, conditions and rates must be “non-discriminatory”, and the quality of interconnection, “no less favorable” than that provided to subsidiaries, affiliates or third parties.
- Interconnection must be provided in a timely fashion.
- The rates must be cost-oriented.
- The terms, conditions and rates must be transparent and reasonable, having regard to economic feasibility;
- There must be “sufficient” unbundling, so that there is no need to “pay for network components or facilities” that are not required.
- Interconnection must also be provided upon request at points other than those provided to the majority of users, subject to charges for additional facilities.

RP imposes a general duty of non-discrimination and the public availability of interconnection agreements or standard offers.²⁵⁸ It also requires the creation of dispute settlement mechanisms in case of disagreement with a major supplier on the terms, conditions and rates for interconnection.²⁵⁹

C. Universal Service

Liberalization of international trade in telecommunications services brings issues of universal service to the forefront in any discussion on regulatory safeguards. Concerns were raised that foreign operators will be only interested in profit making section of the market. The fear of cream skimming is not chimerical. Indeed, with the opening up of the market for competition including foreign competition, it is very difficult to prevent skimming practices unless vigorous regulatory measures are taken. By allowing countries to impose any kind of universal service obligations (USO), the reference paper already ascertains that USO obligations are not *per se* prohibited.²⁶⁰ The reference paper lays down a detailed legal regime for acceptable universal service

²⁵⁷Reference Paper, par 2.2

²⁵⁸*Id.*, par 2.2 and 2.4 respectively

²⁵⁹*Id.*, par. 2.5

²⁶⁰*Id.*, par 3

obligations.²⁶¹

No definition or parameters for universal service are, provided in the RP, expressly leaving this question to each WTO Member. Parties to the Fourth Protocol, however, agree that their rules on universal service will be transparent, non-discriminatory, competitively neutral and not unduly burdensome.²⁶²

Concerning the definition of universal service, it has been rightly concluded by a study on universal service conducted by ITU that there are as many definitions of universal service as there are regulators.²⁶³ Despite this variety, universal service is a broad aspiration of public policy in almost every country and there are several basic elements to the definition of universal service can be found in most countries. Those elements are availability, accessibility and affordability of telecommunications services.²⁶⁴

The application of universal service schemes has also given rise to some friction at the international level. In the EC, Member States must include a specific set of services in the universal service obligations that they impose on one or more service providers. Member States may then set up a cost recovery mechanism for the extra costs associated with universal service, in the form of an industry fund. These costs are to be recovered from the other providers of public networks and services in the country in question.²⁶⁵

The U.S. approach to universal service, in contrast, provides for a larger class of services that can be funded *via* a universal service mechanism. Moreover, that mechanism consists of a supplementary charge on access to local networks. This charge is due irrespective of where the other end of the call is, *i.e.*, international operators must also pay it when they access local networks to terminate international calls. In other words, foreign telecommunications operators are contributing to universal service in the United States. The EC has voiced its dissatisfaction

²⁶¹ Guerhazi, *Supra* note 150, p. 11

²⁶² Reference Paper, par 3

²⁶³ International Telecommunications Union (ITU) (1998), *Universal Access*, World Telecommunications Development Report. Available at <http://www.itu.int/pub/D-IND-WTDR-2010/en>

²⁶⁴ Sean Siochru (1996), *Telecommunications and Universal Service: International experience in the Context of South African Policy reform*, International Development research Center, Ottawa, Available at <http://library.umac.mo/ebooks/b11695572.pdf>

²⁶⁵ Bronckers, *et al.* (2008), *Supra* note 160, p. 341

with this aspect of U.S. telecommunications law.²⁶⁶

D. Licensing

Disciplines on licensing differ from country to country according to the level of market openness and the level of commitments to open competition in the domestic market. Many countries are waiving the licensing requirements for certain type of service especially value-added services. While others still require licensing for any kind of service. Although licensing is one of the most widely accepted and practiced regulatory exercises in most countries, licensing can become an important weapon at the disposition of national administrations wishing to restrict market entry by foreign operators. There exist numerous scenarios where licensing regime can be used as an important regulatory tool to erect market entry barriers. These include restriction of number of licenses, recourse to lengthy, complicated and non-transparent procedures, as well as opting for outrageous license fees to discourage entrants.²⁶⁷

By taking into account the problems of licensing stated in the above paragraph, the RP, thus, contains commitments on the public availability of licensing criteria, time periods required to decide on a license application and terms and conditions of individual licenses. Reasons are to be given when licenses are denied.²⁶⁸

The provisions in the RP concerning licensing are limited. As a result, some major issues are not addressed. The RP does not attempt to define the situations in which a license can be required, nor does it outline the terms and conditions that should or should not be found in a license. Licensing can become a substantial barrier to cross-border trade, since a service provider can be subject to fairly different licensing conditions from one country to the other, even if each country applies an even-handed licensing process. Moreover, when the scope of activities for which a license is required is defined broadly and the time period for issue of a license is relatively long, new market entrants are penalized by having to wait while the incumbent catches up. The RP does not address these issues. The GATS general proportionality rule could, however, perhaps be used to keep disproportionate licensing requirements in check.²⁶⁹ Conceivably, the provisions of

²⁶⁶*Ibid*

²⁶⁷Guermazi, *Supra* note 250, p. 9

²⁶⁸Reference Paper, par 4

²⁶⁹Bronckers, *et al.* (2008), *Supra* note 160, p. 343, *See also* GATS, Art VI

the AT dealing with permissible conditions on access and use, though not dealing with licensing conditions, could also be used to supplement the proportionality principle in this respect.²⁷⁰

There is no provision for the mutual recognition of licenses in the RP. The GATS merely encourages the mutual recognition of licenses, while it does contain a non-discrimination obligation.²⁷¹ In the telecommunications sector in particular, it is very important to be able to operate globally, *i.e.*, at both the international and domestic levels. It is however understandable that the RP does not touch upon this issue.²⁷²

The RP only contains an obligation to provide reasons when a license is denied²⁷³, but not in cases when a license is granted with conditions that the applicant may not desire.

E. Independence of the Regulatory Authority

Establishing a regulatory framework for telecommunications sector requires in addition to setting substantive rules such as those pertaining to interconnection, universal services, licensing etc., the design of the regulatory institutions. A regulatory entity is a crucial factor in the liberalization of telecommunications services. The role of a regulator as a referee in enforcing rules between market players is crucial for a successful competitive market.²⁷⁴

Pursuant to the RP, signatories to the Fourth Protocol are bound to guarantee the separation of the regulatory authority from any supplier of basic telecommunications services, as well as the regulatory authority's impartiality.²⁷⁵

There is however no provision in the RP analogous to the requirement in EC law that, when the TO is state-owned or state-controlled, the regulatory authority should also be structurally separated from the government department that exercises ownership and control functions over the TO. Indeed, when the local TO is State-owned but autonomous, two sometimes distinct sets of interests may conflict with the regulatory authority: the interests of the TO itself as a business, and the interests of the government as the owner of the TO. Even if the regulatory authority is

²⁷⁰ *Ibid*, See also GATS, Annex on Telecommunication, par. 5.(e) and (f).

²⁷¹ GATS, Art. VII

²⁷² Bronckers, *et al.* (2008), *Supra* note 160, p. 343

²⁷³ Reference Paper, par 4

²⁷⁴ Guermazi, *Supra* note 250, p. 12-13

²⁷⁵ Reference Paper, par. 5

independent from the TO as a business, it can still conflict with the interests of the government as owner, for instance when privatization is taking place.²⁷⁶

The RP is silent on some important issues as well, such as the circumstances in which recourse to an independent authority must exist, except in the case of interconnection disputes²⁷⁷, or the standing requirements for foreign entities before the independent authority.

F. Allocation and Use of Scarce Resource

Scarce resources in this context refer to spectrum allocation, numbering and right of way. In most countries of the world, allocation and use of scarce resources are regulated to ensure that they are wisely and equitably shared between interested parties.²⁷⁸ The RP includes commitments to allocate and use frequencies, numbers, rights of way and other scarce resources in an objective, timely, transparent and non-discriminatory manner, with a reservation for national security interests applicable to the secrecy of certain frequency allocations.²⁷⁹

The Reference Paper and the GATS Annex on Basic Telecommunication were first tested and interpreted by the WTO Dispute Settlement Mechanism (DSM) on the US Mexico case. Since, the findings of the WTO panel have further implications, the researcher consider it prudent to highlight the facts and flaws of the case in order to draw some lessons from it in the following section.

4.1.8.2. The Telmex²⁸⁰ Case

The Telmex was the first case of the World Trade Organization Dispute Settlement Mechanism (WTO DSM) on telecommunications services and the first on services only. The findings of the Panel contain interpretations of the General Agreement on Trade in Services (GATS), especially in the Annex on Telecommunications and in the Reference Paper, which sets regulatory

²⁷⁶ Bronckers, *et al.* (2008), *Supra* note 160, p 343

²⁷⁷ Reference Paper, par 2.5

²⁷⁸ Guermazi, *Supra* note 250, p. 10

²⁷⁹ Reference Paper, par 6

²⁸⁰ WTO (2004), *Mexico–Measures Affecting Telecommunications Services: Panel Report*, WT/DS204/R, (Hereinafter *Telmex*)

principles. Although these interpretations strictly apply only to the case examined and affect only the parties to the dispute, they may have implications for other countries.²⁸¹

Background of the Dispute

After many unsuccessful attempts to settle the issue through bilateral efforts, the United States (US) requested consultations under the aegis of the WTO in August 2000. Consultations did not solve the issues raised and in February 2002 the US formally requested the Dispute Settlement Body (DSB) the establishment of a Panel.

The specific public telecommunications services subject to the claims were voice telephony, circuit-switched data transmission and facsimile services, both “facilities-based” and by a “commercial agency”.²⁸² The US alleged that Mexico had failed to open its cross border telecommunications market as mandated by the GATS, on the grounds that Mexico:

- Failed to ensure that Telmex (its major telecommunications supplier) provides interconnection of US cross-border suppliers of these services on terms, conditions and cost-oriented rates that are reasonable, in accordance with Section 2 of its Reference Paper commitments
- Failed to maintain appropriate measures to prevent Telmex from engaging in “anticompetitive practices”, since regulations empowered Telmex to fix rates for international interconnection on behalf of all suppliers in the market, resulting in a cartel, contrary to Section 1 of its Reference Paper commitments
- Failed to ensure access by US suppliers to public telecommunications networks in Mexico, thus preventing them from providing non-facilities based services within Mexico (through commercial agencies) and international simple resale. This was inconsistent with Articles 5(a) and 5(b) of the GATS Annex on Telecommunications.

The Panel's Findings

As previously stated, this was the first dispute to deal solely with trade in services under the GATS that was brought before the WTO DSM. For this reason, the interpretations reached by

²⁸¹ Luis Armando López Linaldi(2009), *The Mexico — Telecoms Case: What Lessons Can Be Drawn for South Asian Countries?*, CUTS International, Additional Background Paper, Geneva, p. 1.

²⁸² Telmex, par. 7.22-7.23

the Panel were the first ever made and may impact to some extent other countries that have already made commitments on the Telecommunications sub-sector.

i. Cross-Border Services

One of the key issues that the Panel had to address was whether the services at issue were supplied cross-border. The US claimed that Mexico had failed to ensure that Telmex provide interconnection to US basic telecommunications suppliers on a cross-border basis with cost based rates and reasonable terms.²⁸³ According to the US, the services at issue are supplied cross border within the meaning of GATS article I:2 (a) because facilities-based operators in the territory of the US deliver traffic consisting of these services from US customers to the Mexican border where, under Mexican law, the traffic is transferred to Mexican operators, who then terminate the US operators' traffic, consisting of the services at issue, in Mexico. Regarding non-facilities-based operators (commercial agencies), if permitted by Mexican regulations, they would also supply services on a cross-border basis into Mexico. The US concluded by stating that the use or not of a supplier's own facilities in the market from which the service is supplied determines whether the service is facilities-based or non facilities based.²⁸⁴

Mexico's arguments were that its GATS schedule contains no specific commitments that would trigger the Section 2 commitments in the Reference Paper, and that in any case, the Reference Paper provisions on interconnection do not extend to services which originate abroad, or are subject to international accounting rates.²⁸⁵ Mexico continued to state that the services at issue were not supplied cross-border in accordance with the terms of GATS article I:2(a) because the essential nature of the services at issue is the transmission of customer data. According to Mexico, in order to transmit customer data cross-border "from" one Member "into" another Member, the supplier must *itself transmit* the customer data within the territory of that other member.

The Panel concluded that a telephone call originated in the US and terminated in Mexico was indeed a cross-border service irrespective of whether the US firm had its own facilities in Mexico or made arrangements with Mexican firms to carry the call from the border to its final

²⁸³ *Id.*, par. 7.18

²⁸⁴ *Id.*, par. 7.25

²⁸⁵ *Id.*, par. 7.18

destination. In other words, according to the Panel it was not necessary that the services be provided by the US supplier itself within Mexican territory.

The Panel explained that the supply of *"...telecommunications services normally involve or require the linking with another operator to complete the service, and the operation, or presence in some way, of the supplier on both ends of the service cannot therefore be a necessary element of the definition of cross-border supply"*.²⁸⁶

The Panel continued with its reasoning and further stated that *"More generally, a supplier of services under the GATS is no less a supplier solely because elements of the service are subcontracted to another firm, or are carried out with assets owned by another firm. What counts is the service that the supplier offers and has agreed to supply to a customer"*.²⁸⁷

ii. Cost-Oriented Interconnection

Section 2.2 of the Reference Paper requires that *"Interconnection with a major supplier be ensured at...cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require..."*. The U.S. presented several estimations of the cost incurred in terminating international calls in Mexico, based on available information including Telmex's domestic interconnection charges, and argued that the settlement rates that US companies were required to pay were above each of these cost estimates - on average 2.5 times higher.²⁸⁸

Mexico did not offer comments on the specific methods of evaluating costs and settlement charges presented by the US, nor did it take up the Panel's invitation to submit its own calculations.²⁸⁹ Rather than challenge the cost figures presented by the US, Mexico argued that the settlement rates pertained to the international accounting rate regime, not an interconnection regime. At the time negotiations on basic telecommunications services came to closure in 1997, an unbinding understanding had been reached among the negotiating parties that accounting rates

²⁸⁶*Id.*, par. 7.40

²⁸⁷*Id.*, par. 7.42

²⁸⁸*Id.*, par 7.187

²⁸⁹*Id.*, par 7.188

would not be used as a basis of disputes. Otherwise, most countries would have found it necessary to file exemptions to MFN treatment under GATS Article II.

The Panel concluded that the difference between these costs and the settlement rates was “...unlikely to be within the scope of regulatory flexibility allowed by the notion of cost-oriented rates...”²⁹⁰ of the Reference Paper. In reaching this conclusion, the Panel emphasized that only costs directly incurred in providing interconnection are relevant. The Panel did not endorse any particular costing model, and recognized that more than one costing methodology could be used. The Panel, however, found that the accounting rate regime is subject to the discipline of cost-based interconnection for countries that have adopted the Reference Paper. While the 1997 understanding prevented disputes arising under the GATS framework agreement from different accounting rates with different countries, it did not exempt countries from any of their obligations, including cost-based interconnection, once they had also adopted the Reference Paper.

iii. *Anti-competitive Practices*

Section 1.1 of the Reference Paper establishes that “*Appropriate measures shall be maintained for the purposes of preventing suppliers who, alone or together, are a major supplier from engaging or continuing anti-competitive practices*”. The US argued that the term “anticompetitive practices” encompasses, at a minimum, practices usually proscribed under national law: abuse of dominant position, monopolization and cartelization. The US also argued, far from proscribing such behavior, Mexico maintains measures that require Mexican telecommunications operators to adhere to a horizontal price-fixing cartel led by Telmex.²⁹¹

On the other hand, Mexico’s arguments were that its Reference Paper commitments apply only to matters within its border, and not to services supplied under an accounting rate regime. In any case, Mexico contended that it had put in place “appropriate measures” to prevent anticompetitive practices under its general competition laws. According to Mexico, the International Long-Distance (ILD) rules are aimed at increasing competition by stopping new entrants from being undercut on pricing, and by preventing foreign operators from dictating prices to their Mexican affiliates. Mexico continued to state that the US had not shown that

²⁹⁰*Id.*, par 7.203

²⁹¹*Id.*, par. 7.222

Telmex was a "major supplier" in the relevant market, and behavior legally required under Mexican law could not be an "anticompetitive practice".²⁹²

The Mexican rules for international telephone service required that the Mexican operator with the largest outgoing traffic over an international route should negotiate the settlement rate for terminating incoming calls over that route, and required this rate to apply to all operators ('uniform settlements rates').²⁹³ Since Telmex had the most outgoing traffic in all routes to the US, it was in practice the sole negotiator of settlement rates that applied as well to its competitors. The rules also required that incoming calls be distributed for termination among Mexican operators in proportion to each operator's outgoing traffic ('proportional return'). Mexican operators being offered more than their share of incoming calls should route them over to another operator or compensate it for the difference in revenue.

The Panel found that uniform settlement rates and proportional returns required Mexican operators to engage in practices that were tantamount to a cartel and hence were anticompetitive and for this reason, Mexico had not taken measures to prevent such practices. Contrary to Mexico's arguments, the Panel also clarified that the anticompetitive practices concerned fell within the scope of the Reference Paper even when they were mandated by internal law. The Panel referred to the importance of the commitments made by WTO members under the Reference Paper and it stated that "*International commitments made under the GATS 'for the purpose of preventing suppliers... from engaging in or continuing anticompetitive practices' are ... designed to limit the regulatory powers of WTO members. Reference Paper commitments undertaken by a Member are international obligations owed to all other Members of the WTO in all areas of the relevant GATS commitments.*"²⁹⁴ Moreover, the Panel found that Telmex was a "major supplier" given the ability Telmex had to affect the terms of participation through use of its position in the relevant market, which the Panel found to be the termination in Mexico of the services at issue.²⁹⁵

²⁹² *Id.*, par. 7.223

²⁹³ Linaldi(2009), *Supra* note 281

²⁹⁴ Telmex, par. 7.244

²⁹⁵ *Id.*, par. 7.227

iv. Application of the Annex on Telecommunications

The US claimed that Mexico had not met its obligations under Section 5 of the GATS Annex on Telecommunications because it had not ensured that US suppliers of basic telecommunications services have access to and use of Mexico's public telecommunications transport networks and services. The US, in particular, argued that Mexico did not permit interconnection of US suppliers on reasonable terms and conditions, contrary to Section 5(a), and prohibited altogether access to private leased circuits, contrary to Section 5(b).²⁹⁶

Mexico argued that the Annex did not apply to the access to and use of public telecommunications transport networks and services for the supply of basic telecommunications services. Further, Mexico reiterated that it had not made any commitments on cross-border supply; either for facilities-based suppliers or for commercial agencies, and that it therefore had no Annex obligations related to such services.²⁹⁷

The Panel noted that Section 5(a) of the Annex states that the obligation to ensure access to and use of public telecommunications transport networks and services shall apply for the benefit of "any service supplier of any other Member" for the supply of "a service included in its schedule".²⁹⁸ This means that if a WTO member includes in its schedule of commitments basic telecommunication services, the annex will automatically apply to those services.

The Panel considered that access rates were not charged "reasonable", and for this reason, Mexico had not met its obligations under Section 5(a) to ensure that such access rates are "reasonable". With regard to the US claims under Section 5(b), the Panel analyzed whether Mexico's behavior was allowed under the limitations recognized in Section 5(g). However, the Panel noted that Mexico's Schedule of Specific Commitments did not include any limitations referring to Section 5(g) or to the development objectives mentioned therein. The Panel considered that without such limitations in Mexico's Schedule, Section 5(g) does not permit a departure from specific commitments that Mexico has voluntarily and explicitly scheduled.²⁹⁹ The Panel concluded that, by failing to ensure that commercially present commercial agencies of the United States have access to and use of private leased circuits and are permitted to

²⁹⁶ *Id.*, par. 7.270

²⁹⁷ *Id.*, par. 7.272

²⁹⁸ *Id.*, par. 7.281

²⁹⁹ *Id.*, par. 7.388

interconnect these circuits to public telecommunications transport networks and services or with circuits of other service suppliers, Mexico had failed to meet its obligations under Section 5(b) of the GATS Annex on Telecommunications.³⁰⁰

According to Sections 5(a) and 5(b) of the Annex on Telecommunications when a country commits to open up a particular market (e.g. financial services), foreign suppliers of these services are entitled to use the host country's telecommunications networks and services to pursue their business. The Panel clarified that interconnection and the ability to interconnect and lease circuits were forms of 'access' to the services at issue, and therefore the provisions in the Annex applied to them.

Mexico was not happy with the WTO ruling for obvious reasons. However, even the US was unhappy as the panel sided with Mexico regarding International Simple Resale (ISR) (use of leased lines to carry cross-border calls), since Mexico had not undertaken commitments on cross-border market provision of non-facilities based services. Nevertheless, instead of going for an appeal, they reached an agreement in early June 2004 to resolve their ongoing WTO dispute over international communication services. The agreement implements recommendations included in the WTO Panel report released on April 2, 2004. The Main Features of the Agreement Notified to the WTO Dispute Settlement Body are:

- Mexico will remove the provisions in its Law relating to the proportional return system, uniform tariff system, and the requirement that, the carrier with the greatest proportion of outgoing traffic to a country negotiate the settlement rate on behalf of all the Mexican carriers for that country. Both countries believe that the elimination of these provisions will allow the competitive commercial negotiations of international settlement rates.
- Mexico will allow the introduction of resale based international telecommunications services in Mexico by 2005, in a manner consistent with Mexican law.
- The US recognizes that Mexico will continue to restrict ISR to prevent the unauthorized carriage of telecommunications traffic.

³⁰⁰ *Id*, par. 7.389

Flaws of the Case

The Telmex decision points to certain fundamental flaws in the WTO system, as some experts have found out some fundamental flaws in the way the case has been handled. These flaws are stated below:³⁰¹

- Panels are asked to interpret and clarify provisions about which they have little expertise. While they can call on experts to help them, most are reticent to do so.
- Panels are bound by the Dispute Settlement Undertaking, which prohibits them from adding to or diminishing the rights and obligations in the agreements, so that they do not upset the 'security and predictability' of the multilateral trading system.
- The panels' take to what they think is the safest route, turning to dictionaries to define key words. These are often terms of art, about which there is much debate.
- The panel report stated clearly that its findings apply solely to the specific case of Mexico brought before it.
- Although the parties claimed not to be satisfied with all aspects of the panels' findings, neither party elected to take the panel decision to the WTO Appellate Body. As a result, the WTO's Dispute Settlement Body adopted the panel report, by consensus.
- Some believe that the panel had been exceedingly weak in terms of economic and competition analysis of the matter at issue.

The panel adopted a wide interpretation of what constitutes anti-competitive practices. It ruled that a cartel is a type of practice against which appropriate preventive measures should be maintained, although this is not explicitly mentioned in the reference paper.³⁰²

Lessons from the Case

The lesson learnt from the dispute is that, the dispute settlement bodies cannot responsibly tackle the problems of anti-competitive practices in a satisfactory manner. The panel had to grapple with the complex issue of private agreements and hybrid government-private arrangements as the new barriers to a liberalized marketplace, in a vacuum where international competition rules do

³⁰¹Philip Marsden (2004). *WTO Decides First Competition Case-with Disappointing Results*, Competition Law Insight, Informa Professional, London, Available at http://www.ucl.ac.uk/laws/conferences/regulated-industries/R04_marsden.pdf.

³⁰²Sonali Singh (2006), *The Telmex Dispute at the WTO: Competition Makes a Backdoor Way*, CUTS International, Geneva, Briefing Paper, No. 1/2006, p. 4.

not exist. The stretching of judicial creation runs the risk of undermining the legitimacy and integrity of the WTO.³⁰³

In other words, many weaknesses in reasoning and inadequate competition analysis have been identified. The WTO's legislative arm could offer more guidance on the objects and intended application of the competition provisions in the Reference Paper, but that is not likely to happen any time soon, and would also not help correct the dangerous precedent that the Telmex case sets.³⁰⁴

4.1.8.3. Ethiopia's Telecommunication Regulatory Position in Relation to the Reference Paper

The former Ethiopian Telecommunication Agency "ETA" (now restructured as ICT standardization and Regulatory Directorate) was established in 1996 prior to the establishment of the WTO Basic Telecommunication Agreement (BTA) in 1998. Hence, it is necessary for the government to review the relevant proclamations to be in conformance with WTO. It should however be noted that Ethiopia did not become member of the WTO yet but is on accession process. This section views comparative analysis of the Ethiopian telecommunication regulations with that of Reference Paper (RP).

Competitive safeguards

While compared to the Reference Paper, ETA will demand relatively comprehensive data from operators that will allow it to determine unfair business practices. ETA has extensive authority to enforce its decision that includes shutting down the offending operator. In doing so, it is obligated to give adequate notice to the offending operator to conform.³⁰⁵

Interconnection agreements

Regulation 47/1999 provides that all operators should make interconnection available to other operators by making technical inter-operability and availability conducive for interconnection. In principle, the interconnection will be negotiated among and between the operators based on

³⁰³ Lee Kathy Y (2005), *The WTO Dispute Settlement and Anti-Competitive Practices: Lessons Learnt From Trade Disputes*, The University of Oxford Centre for Competition Law and Policy Working Paper (L) 10/05, Available at www.competitionlaw.ox.ac.uk/lawvle/users/ezechia/CCLP%20L%2010-05.pdf

³⁰⁴ Singh (2006), *Supra* note 302, p. 6

³⁰⁵ Telecommunication Service Council of Ministers Regulations No. 47/1999, *Federal Negarit Gazeta*, 5th Year No. 20, Art 11

broad principles set out by ETA. Should the operators disagree, then ETA will arbitrate and make a bidding decision. However, until the principles are published it is not possible to confirm if the same conform to the WTO.³⁰⁶

Universal service

This is not specifically cited but will be negotiated as part of the license rollout targets. The Agency has a discretion to attach the condition of universal access while issuing license which oblige the operator demanding license provide services to rural or other specified areas.³⁰⁷ Specifically, roll-out target take into account the growth of telephone penetration rate; the reduction of long waiting list; extension of telephone services to rural areas; the provision of new and enhanced services; the creation of modern and reliable network; and business plan for the licensee.³⁰⁸ Failure of the licensee to fulfill rollout target may bring about revocation of its license by the Agency.³⁰⁹

Independent regulator

Regulation 47/1999 gives the Ministry of Transport and Communications power to issue directives without recourse to decisions of ETA. Without distinction on whether the directives are of policy or operational nature, the Ministry is practically directing the sector without involving of ETA³¹⁰. This raises the question of decision-making independence of the ETA. The government ownership of the main operator would ordinarily make the interest of main operator override the interests of upcoming private sector operators once licensed.³¹¹ In its former structure, the ETA somehow relatively enjoyed financial independence as its budget was drawn from government subsidy, license fee and other sources and deposited in a bank account opened by the name of the Agency to be expended for carrying out of its activities.³¹² However, since the ETA is restructured as ICT Standardization and Regulatory Directorate under the newly established Ministry of Communication and Information Technology by enactment of Proclamation No. 691/2010, the regulator operates totally on the budget of the Ministry and is

³⁰⁶ *Id.*, Art 56

³⁰⁷ Telecommunication Proclamation (1996), *supra* note 11, Art 11(2)

³⁰⁸ Telecommunication Service Regulations (1999), *supra* note 305, Art 49

³⁰⁹ *Id.*, Art 11(1)

³¹⁰ *Id.*, Art 57

³¹¹ *Communications Industry Regulation in Ethiopia*, available on <http://www.mbendi.com/indy/cotl/govc/af/et/p0005.htm>

³¹² Telecommunication Proclamation (1996), *supra* note 11, Art 8 and 9

actually a department within the Ministry.³¹³ On top of that, the regulator as well as the government owned telecommunication operator (Ethio telecom) is accountable to the Ministry. This shows that Ethiopia has a lot to do in establishing independent regulator to make it compatible with the standards set out in the RP.

Public availability of licensing criteria

Regulation 47/1999 has set out a relatively clear licensing process. Investors have a clear understanding of the criteria to apply for operation of services in the country. While compared to the RP, the regulation mentioned provides very detailed and unequivocal licensing procedures regarding license's application, grant, refusal, contents, amendment, duration, renewal, revocation, termination and fees for its issuance as well as duties of licensee.³¹⁴

Allocation of scarce resources

ETA is to publish a framework for access to radio spectrum. In principle, it is intended that the spectrum be utilized efficiently, orderly and in an effective manner. Access to other resources like numbering plan, rights of way etc are not decided upon.³¹⁵

4.1.9. The General GATS Obligation that Apply to the Telecommunication Sector

With the Fourth Protocol, the GATS now contain a complete set of specific commitments on telecommunications. In addition, as mentioned above, certain general obligations of the GATS come into play only when specific commitments are made for a given sector, relating essentially to domestic regulation.³¹⁶ Hence, in this section the application of these general obligations to the telecommunications sector, in light of specific commitments is reviewed. For the sake of convenience, the MFN obligation,³¹⁷ which can apply independently of any specific commitment, is also discussed.

³¹³Proclamation for Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia No. 691/2010, Art 35(1)(d) repealed Art 3-9 of Telecommunication Proclamation No 49/1996 which relatively somehow used to provide for institutional and financial independence of the ETA.

³¹⁴Telecommunication Service Regulations (1999), *supra* note 300, Part II (Art 3-13). *See also*, Telecommunication Proclamation (1996), *supra* note 11, Part III (Art 10 and 11).

³¹⁵*Id*, Part VI (Art 52-55). *See also*, Telecommunication Proclamation (1996), *supra* note 11, Art 16

³¹⁶ GATS, Art VI

³¹⁷ *Id*, Art II

4.1.9.1. The Most-Favored-Nation ("MFN")

In general, the MFN obligation applies to every measure concerning trade in services,³¹⁸ and it would accordingly apply to measures concerning telecommunications services as well. It obligates WTO members to accord other members treatment no less favorable than that accorded to any other country.³¹⁹ Therefore, if a member engages in liberalization in a sector and extends a benefit to some of its trading partners, it must give the same treatment to all of its trading partners. However, the GATS Annex on Negotiations on Basic Telecommunications provided that the MFN obligation would only enter into force for basic telecommunications after the market access negotiations were completed or appeared to remain unsuccessful.³²⁰ Nonetheless, since the Fourth Protocol was issued as a result of negotiations on basic telecommunication, the MFN obligation now applies to basic telecommunications as well.

Article II of the GATS allows some exemptions to MFN treatment under the conditions which include: exemptions granted for more than 5 years shall be reviewed by the Council for Trade in Services; exemptions should not last for more than 10 years; and exemptions must be subject to future negotiations. Any exemptions must be approved under the waiver procedures according to the Article IX (3) of the WTO Agreement.³²¹

WTO Members are allowed to apply measures in derogation of the MFN obligation, provided that they were identified during the negotiations and listed in an annex to the GATS. These derogations are then subject to periodical review and must in principle be terminated at the latest ten years after the entry into force of the WTO Agreement, i.e., on January 1, 2005.³²² The Annex on Negotiations on Basic Telecommunications has similarly extended the deadline for so-called "Article II Exemptions" on basic telecommunications until the conclusion of the negotiations. Indeed, Article II Exemptions were also negotiated within the NGBT and GBT at the same time as specific commitments.³²³

Once a complete set of specific commitments relating to telecommunications is in place, the

³¹⁸ *Id.*, Art II: 1

³¹⁹ *Id.*, Art II

³²⁰ GATS, *Annex on Negotiations on Basic Telecommunication*, par 1

³²¹ GATS, *Annex on Article II Exemptions*

³²² GATS, Art. II:2, in conjunction with Annex on Article II Exemptions, par. 3 and 6.

³²³ Bronckers, *et al.* (2008), *Supra* note 160, p. 348

general MFN obligation of the GATS creates a so- called *free rider* problem. Indeed, even if only 69 of the 130 WTO Members made specific commitments on telecommunications at the time of the Fourth Protocol, the benefit of these commitments must be extended to all WTO Members pursuant to the MFN obligation. Even among the 69 countries that participated in the NGBT and GBT, the commitments are by no means symmetrical. If Canada, for example, limited foreign ownership of facilities- based service providers to 46.7 percent (direct and indirect), a country such as the Netherlands, which fully removed all restrictions must allow Canadian investors to buy a majority in a facilities-based telecommunications provider. These free rider effects explain why a critical mass of acceptable offers was considered to be so important. If the free rider effect was thought by a Member to be too substantial, an Article II Exemption could still be used, but only on a temporary basis. The United States, for instance, “retaliated” against the perceived shortcoming of the Canadian commitment mentioned above by filing an Article II Exemption on foreign ownership of U.S.-based companies active in certain satellite services.³²⁴

4.1.9.2.Domestic Regulation

GATS requires that all members administrate the measures affecting trade in services in a reasonable, objective and impartial manner. In addition, necessary disciplines are to be developed to remove unnecessary barriers relating to qualification requirements and procedures, technical standards and licensing requirements. The WTO Members should establish international standards and criteria for recognition.³²⁵

The GATS obligations regarding domestic regulation distinguish between “committed services” (services for which specific commitments have been made) and other services. All measures affecting services generally must be published.³²⁶ Moreover, for committed services, any new law or regulation, or amendment of existing rules, which significantly affects the trade of services in that sector must be notified to the WTO, though prior consultation is not required.³²⁷ Furthermore, in committed sectors, the WTO Member concerned must administer all regulations

³²⁴*Id.*, p. 349.

³²⁵GATS, Art VI

³²⁶*Id.*, Art III.1

³²⁷*Id.*, Art III.3

of general application in a reasonable, objective and impartial manner.³²⁸

WTO Members are also bound to institute review procedures before independent instances for administrative decisions affecting trade in services.³²⁹ A service supplier who files an application to operate in a WTO Member in a “committed sector” is entitled to a decision within a “reasonable period of time”. At “any time” when so requested the WTO Member shall “without undue delay” inform the applicant of the status of his application.³³⁰

In essence, licensing requirements should not restrict trade unnecessarily. Whenever a WTO Member has given commitments on telecommunications services, its licensing requirements are subject to a form of proportionality test, *i.e.*, objective and transparent criteria, not more burdensome than necessary to ensure quality of service, not in themselves a restriction on supply. No WTO Member can undermine these commitments through the imposition of unnecessarily cumbersome licensing requirements, at least when such requirements would be new or unexpected.³³¹

4.1.9.3. Government Procurement

The scope of GATS is limited in an important respect. The general MFN principle, as well as specific commitments relating to market access and national treatment, does not apply to government procurement of services. Negotiations on this subject started in 1995, though no timetable was set for their completion.³³² It is envisaged by the Members that the negotiations on government procurement will be completed at the same time as the overall negotiations on services liberalization that restarted in 2000.³³³

For foreign suppliers of telecommunications services this gap can have considerable impact. Governments are probably the largest single customer for telecom services in any country. The political expediency to purchase locally is supplemented by an economic interest, as long as

³²⁸*Id.*, Art VI.1

³²⁹*Id.*, Art VI.2

³³⁰*Id.*, Art VI.3

³³¹*Id.*, Art VI.5

³³²Patrick Low *et al.*, (1997), *Government Procurement in Service*, in Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement 225 (Bernard M. Hoekman and Petros C. Mavroidis, eds.)

³³³*Ibid*

governments retain an important stake or share in the local TO.³³⁴

4.2. WTO Expectations

WTO rules and procedures that elaborate the organization's expectations from acceding countries, particularly LDCs, are immensely vast. As discussed throughout this paper, the expectation from any acceding country, whether developed or LDC, is basically trade liberalization for market access. During the course of liberalization, however, acceding countries are also expected to meet some fundamental obligations that make sure just and equal playing ground is provided to all Member countries. Most Favored Nation (MFN), National Treatment (NT) and transparency are, *inter alia*, the major obligations to which such countries are anticipated to commit themselves. However, since much of these issues are touched upon in the previous sections, the scope of this section is limited to WTO rules that are peculiar to acceding LDCs in their effort to liberalize the service sector in general and the telecommunication sector in particular.

In effect, among these specific rules the prominent are; the GATS rules that expect LDCs' flexibility to progressively open fewer sectors and liberalize fewer transactions in their process of accession; and the Guidelines for Accession of the LDCs, which intend to simplify and streamline LDCs' accession to the club. Although the rules require the incumbent members to make things easier for acceding LDCs in their effort to join the organization, the reality on the ground is paradoxical. These safeguarding rules and their problems in implementation are discussed as follows.

4.2.1. Progressive Opening of Fewer Sectors and Liberalization Fewer Transactions (GATS Article XIX)

Overview of Progressive Liberalization

"Progressive Liberalization" standard is articulate under Art. XIX, in Part IV of the GATS. Both Part IV of the GATS and its Preamble underscore Members' choice to allow a very broad scope for the new multilateral framework governing trade in services, as no services sector is *a priori*

³³⁴Bronckers *et al.*, (2008), *Supra* note 160, p. 352

excluded. This means that each services sector is to be progressively liberalized as a result of the negotiations that Members will hold pursuant to Art. XIX.³³⁵

The principle of progressive liberalization is an integral part of the services negotiations. It informs the GATS objective of promoting liberalization of trade in services. Indeed, negotiations on trade in services have striven for the expansion of trade in services “under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners and the development of developing countries” from the outset.³³⁶ The second paragraph of the GATS Preamble also makes it clear that the principle of progressive liberalization forms part of the object and purpose of the GATS. Progressive liberalization allows Members initially to include fewer services sectors in their Schedules of Commitments and gradually add new liberalization commitments and open more sectors. At the same time, progressive liberalization aims to reduce or phase out limitations, terms, conditions and qualifications impeding market access and national treatment.³³⁷

Art. XIX, entitled as “Negotiation of Specific Commitments” clarifies the manner in which negotiations under GATS should proceed in order progressively to achieve higher levels of liberalization and, at the same time, identifies various factors that should be taken into account during the future negotiations on services. These factors include notably respecting Members’ national policy objectives and their level of development, and ensuring appropriate flexibility for developing countries and LDCs indeed. The provision, along with Art. IV, constitutes a development-friendly set of provisions laid down in the GATS and should be read together.³³⁸

Sovereignty and Development Friendly Liberalization

Negotiating rounds in the services sector should take into account national policy objectives and the Members’ level of development. The respect of Members’ national policy objectives usually refers to the recognition of Members’ right to regulate and to introduce new regulations to attain such objectives. Therefore, Art. XIX:2 suggests that the liberalization process should not put in jeopardy Members’ regulatory autonomy when this autonomy allows Members to attain their

³³⁵Panagiotis Delimatsis, *Article XIX GATS: Negotiation of Specific Commitments*, p. 1, <http://www.ssrn.com/abstract=1280263>

³³⁶GATT (1987), *The Uruguay Round: Decisions of 28 January 1987*, GATT/1405

³³⁷Delimatsis, *Supra* note 335, p 2

³³⁸Group of Negotiations on Services (1990), *The Uruguay Round: Note on the Meeting of 7-11 May 1990*, MTN.GNS/33.

legitimate policy objectives. The third and fourth Paragraphs of the Preamble to the GATS also lend support to this conclusion. As to the respect of the Members' development level, it can refer to the overall level of development of a given Member, but it can also relate to an individual sector.³³⁹

Provisions laid down under second sentence of Art. XIX:2, allows for developing and LDCs Members offering to open *fewer sectors and liberalizing fewer transactions* than developed countries.³⁴⁰ According to some officials, the statement '*...opening fewer sector, liberalizing fewer transaction....*' is ambiguous and need to be clarified as it set no clear benchmark or no definition of the term '*few*' is provided.³⁴¹ In this respect, Art. IV is inextricably linked to Art. XIX, as the latter provision somehow operationalizes the former with respect to GATS negotiations. In the Uruguay Round, and the subsequent negotiations on basic telecommunications and financial services, developing countries availed themselves of the flexibility accorded pursuant to Art. XIX:2.³⁴²

Specifically, in accordance with the article, these countries are permitted to liberalize their services markets at their own pace. Importantly, they can condition access to a given services sector on the achievement of one of the objectives set out in Art. IV:1.³⁴³ The most relevant of the three objectives listed in Art. IV:1 is the strengthening of the countries' domestic services capacity, its efficiency and competitiveness.

Yet, Art. XIX:2 would not cover a demand from developing and LDCs that developed countries liberalize services sectors and modes of supply of export interest to developing countries. Such a demand would come exclusively within the ambit of Art. IV:1(c).

Despite this WTO expectation, in principle in fact, allowing LDCs to open fewer sectors, liberalize fewer types transactions, as addressed repeatedly, experience of almost all the LDCs acceded since incorporation of the organization shows that these countries made commitments to in liberalizing most of the sectors save for some exceptions. Rather than the rules that are ought

³³⁹Delimatsis, *Supra* note 335, p 4

³⁴⁰*Ibid*

³⁴¹Ayalew, *Supra* note 151

³⁴²Council for Trade in Services (1999), *Recent Developments in Services Trade, Overview and Assessment, Background Note by the Secretariat*, S/C/W/94.

³⁴³GATS, Art IV

to be applicable, it is a series of bilateral negotiations that decides the extent of service liberalization of acceding LDCs undertake. Indeed, the acceding countries do not receive what they deserve but what they negotiate.³⁴⁴

4.2.2. Acceleration of LDCs' Accession (The Accession Guidelines for LDCs)

In addition to expecting LDCs to progressively open fewer sectors, liberalize fewer types of transactions, the WTO also expects these countries to become its members through simplified and streamlined procedures. In the Doha Ministerial Declaration in 2001, Members have agreed to accelerate the accession of LDCs.³⁴⁵ In addition to this, a year later in 2002, the General Counsel succeeded in issuing the 2002 Accession Guidelines for the LDCs to accelerate and stream line the accession processes of the LDCs. These guidelines were later supplemented by other guidelines in 2012.³⁴⁶

The main objective of these documents is to simplify LDCs' accession to the WTO by requiring members to exercise restraint in seeking market access concessions from acceding LDCs, provided that the LDCs were also to offer reasonable concessions commensurate with their individual development, financial and trade.³⁴⁷

Here also, regardless of the fact that these documents demand the incumbent Members to limit themselves from requiring unreasonable market concessions, the Members keep on demanding more commitments from the LDCs in their effort to join their club. Hence, despite resounding rhetoric, LDCs' accession process continues to be highly protracted, politically demanding and frustrating.³⁴⁸

4.3. Accession Experience of Some Selected LDCs

A number of LDCs including Ethiopia are currently negotiating their accession to the WTO. The researcher believes learning from Cambodia, Vanuatu and Nepal's telecom commitment experience is vital to ensure that the new LDC member gains maximum benefit from its WTO membership.

³⁴⁴Adhikari *et al*, *Supra* note 94, p. 9

³⁴⁵WTO (2001), *Supra* note 121, par 9 and 42

³⁴⁶WTO (2002), *Supra* note 123 and WTO (2012), *Supra* note 126

³⁴⁷WTO (2002), *Supra* note 123

³⁴⁸Adhikari *et al*, *Supra* note 94, p. 10

Hence, the overview of the model countries' accession process and telecommunication commitments are discussed as follows.

4.3.1. Cambodia

Cambodia was the second LDC to become a WTO member, joining in October 2004. Cambodia has undertaken market access commitments in at least one sub-sector under each of 11 different services heading under the WTO classification. These are business services; communications services; construction and related engineering services; distribution services; education services; environmental services; financial services; health-related services; tourism and travel services; recreational services; and transport services.³⁴⁹

Cambodia initially offered very minimal commitment under telecommunication sub-sector in its service offer schedule. Most of the negotiating members generally showed a keen interest in Cambodia's effort in legislative reform in the sector and the regulations of the market. While they appreciated Cambodia's efforts fully liberalize value-Added services, they were disappointed that no commitments had been made with regard to basic telecommunications. Given the fundamental importance of this sector for the entire business community, they believed that the Government should consider liberalizing the entire sector and provide full market access and national treatment on all basic telecommunication services.³⁵⁰

Most of the negotiating members requested that all market access and national treatment limitations be removed by 2008, including any foreign equity limitations applied. They requested Cambodia to accelerate the end of the monopoly operation in telecoms from 1 January 2009. In addition, most members suggested Cambodia adopt and implement the "Telecoms Reference Paper".³⁵¹

The initial response of Cambodia was to inform the members that the Government had entered into a long-term contract with investors in the telecoms sector for a domestic market that is very small. Therefore, it would be difficult to fully liberalize this sector because the Government would be unable to assess the long-term investment for the new investors in this particular

³⁴⁹ Sok Siphana (2005), *Lessons from Cambodia's Entry into the World Trade Organization*, Asian Development Bank Institute. ADBi Publishing, Tokyo, p. 51

³⁵⁰ *Id*, p. 61

³⁵¹ *Ibid*

business. Moreover, it was not possible for Cambodia to offer full market commitments on basic telecommunication service at this stage since the legislative and regulatory frameworks were not yet in place.³⁵²

After long and tiresome negotiations, Cambodia has assumed significant commitments in telecommunications. As to its schedule of commitments, regarding basic services, the current obligation is to permit cross-border communications through leased circuits from Telecom Cambodia, the government-owned telephone company. Beginning in 2009, there will be no limitations on basic services under the cross-border mode of supply. Commercial presence is reserved to Telecom Cambodia. Also in 2009, joint ventures will be permitted, allowing Cambodians to own up to 49 percent of the equity share. There are no conditions or limitations on value-added services. Cambodia has assumed all Reference Paper obligations, and has made an additional commitment that mobile services operators can use the technology of their choice in offering cellular services. While Cambodia offers more generous market access for basic services than is provided by its WTO commitments, these obligations offer a predictable environment by 2009, in light of the undertakings it has assumed in the WTO. Of greatest immediate significance is that new operators are in a regulatory environment made more predictable by obligations undertaken through the Reference Paper.³⁵³

4.3.2. Vanuatu

Vanuatu began the process of seeking accession to the WTO in 1995, narrowly missing the deadline for gaining automatic membership. However, it was not until 1997 that it focused on the accession process.³⁵⁴ As an LDC with a tiny economy, Vanuatu does not have any major trading partners, let alone any of the world's major economies. Therefore, when it presented its initial offer to the WTO in time for the Seattle Ministerial Conference in 1999, Vanuatu expected that its offer might simply be accepted as it stood and membership granted. However, the Working Party considered the offer unacceptable, despite the fact that Vanuatu's proposed commitments extended well beyond those of existing LDC members. Vanuatu was sent back to

³⁵² *Ibid*

³⁵³ Self, *Supra* note 25, p. 58

³⁵⁴ <http://www.wto.org>

the drawing board.³⁵⁵

As it set about improving its offer, Vanuatu came under strong pressure from the Working Party to make deeper liberalization commitments on goods and services, as well as undertake major commitments in relation to its intellectual property regime. The rationale for this pressure appears to relate less to the attractiveness of Vanuatu's small market, and more to the 'ratchet' process, whereby an accession package by one country can be used as a minimum threshold in subsequent accession negotiations.³⁵⁶

The draft Working Party report that resulted contained many commitments that went well beyond what even the richest WTO members had agreed to, especially in sensitive sectors like essential services such as health care, education and telecommunications. At the last minute, literally days before the Doha Ministerial Conference, Vanuatu realized the implications of some of the proposed commitments, and requested a delay in the process.³⁵⁷

Vanuatu's negotiators struck the best deal they could in the circumstances despite suspending accession in 2001 and renegotiating a decade later. Bigger developed nations like the US negotiated hard against Vanuatu, failing to stick by an earlier commitment to go easy on LDCs. For Vanuatu to reject the package after so many years of talks would not only undermine Vanuatu's reputation on the international stage, but might open the possibility of being forced into membership on worse terms in the future, perhaps as a condition of an IMF or Asian Development Bank (ADB) loan, should the government run out of money.³⁵⁸

Vanuatu managed to renegotiate its original 2001 package, making specific market-opening commitments on 10 services sectors and 72 sub-sectors such as accounting, architectural services, engineering, telecommunications, audio-visual, hospital and social services, tourism and travel, and air transport. This is a marked improvement on its earlier package, when Vanuatu would have been obliged to make service sector market-opening commitments in 18

³⁵⁵Oxfam Briefing Paper (2005), *Make Extortion History*, Oxfam International, p. 10, available at http://www.oxfam.org/sites/www.oxfam.org/files/bp79_extortion_history_0.pdf.

³⁵⁶*Ibid*

³⁵⁷*Ibid*

³⁵⁸The Pacific Institute of Public Policy (PiPP) (2011), *Joining World's Economic Parliament, Vanuatu's WTO Accession Package Explained*, Port Vila, p. 6, Available at <http://dangay.files.wordpress.com/2011/07/van-wto-pipp-130711.pdf>

service sectors.³⁵⁹

The totality of these commitments goes well beyond that of virtually any other existing WTO member, including the richest nations. It is believed that accession with service commitments intact would expose Vanuatu to the worst kind of corporate cream skimming risk. It would also deprive Vanuatu of essential policy options in many critical areas of its economy.³⁶⁰

Under the terms of the Working Party Report, Vanuatu is committed to full liberalization of telephone and email services after 2012, including full national treatment for foreign companies. In making this commitment, Vanuatu has probably relinquished its power to regulate for cross-subsidization, even though that is very likely to be the sole means available for the country to provide urgently needed telephone services to rural areas (universal coverage).³⁶¹

It is widely recognized that the regulation of the telecommunications sector to provide some kind of universal coverage is extremely important to a nation's interests. The right to do so is expressly recognized within GATS, the aspect of GATS that deals with telecommunications includes a 'reference paper',³⁶² on telecommunications that contains the following provision:

Universal Service: any Member has the right to define the kind of universal service obligation it wishes to maintain such obligations will not be regarded as anti-competitive *per se*, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.³⁶³ It is this right that Vanuatu surrendered due to a strong demand from incumbent members.

Nevertheless, while it might seem that this provision would allow a country to regulate for universal service, this is by no means assured. In April 2004, as discussed in the *Telmex* case, the United States won a ruling from the WTO Disputes Panel against Mexico for attempting to use this provision to regulate for cross-subsidization.³⁶⁴

³⁵⁹ *Ibid*

³⁶⁰ Oxfam Briefing Paper (2005), *Supra* note 355, p. 3

³⁶¹ *Id.*, p. 16

³⁶² WTO (2001), *Draft Report of the Working Party on the Accession of Vanuatu*, WT/ACC/VUT/13/Add.2

³⁶³ Reference Paper, par 3

³⁶⁴ *Telmex*

4.3.3. Nepal

Nepal had applied for the membership of the GATT, 1947, the predecessor institution of WTO in 1989. Because of a momentous political change, the process was stalled for five years. In 1997, Nepal converted its application for accession to the GATT to an application for membership to the WTO. It acceded to the WTO in April 2004..³⁶⁵

Nepal has commitment in 11 sectors and 70 sub-sectors on services including telecommunications services with conditions of;

- 1) Incorporation of company in Nepal in accordance with Nepalese law is required and foreign equity participation ceiling is up to 80 per cent through joint venture.
- 2) Intra corporate transferee is allowed up to 15% of total local employees as manager/executive/ specialist, maximum up to 10 years staying in Nepal;
- 3) Membership of relevant professional organization is needed to serve in such professional service in Nepal etc.

Nepal had already opened up telecom sector for private and foreign investment before becoming member of WTO. After being member of WTO and scheduling the telecommunications service as specific commitment in its protocol of accession, the subject became a multilateral agreement and global issue. Obviously, Nepal has agreed to abide by its obligation through the agreement. It also agreed to adopt the Telecommunications Reference Paper in addition to the specific commitments. Now Nepal is obliged to create an environment for the development of institutional arrangements as stipulated in the Reference Paper..³⁶⁶

While Nepal submitted its application to the WTO there was a list of a few sectors for opening up. After the working party and bilateral meetings, due to intense pressure exerted on it from incumbent members, the list of services for opening up was increased. Many member states advised to open telecommunications services too. Hence, Nepal made necessary changes and

³⁶⁵ <http://www.wto.org>

³⁶⁶ WTO (2003), *Report of the Working Party on The Accession of The Kingdom of Nepal*, WT/ACC/NPL/16/Add.2

submitted its telecommunication services commitment in a more liberal way.³⁶⁷

Its schedule of specific commitments categorizes telecommunication services into basic, mobile, and value-added.³⁶⁸ There are no limitations on market access in Modes 1 and 2. There are foreign participation and equity limitations on commercial presence, and a provision that provides for two mobile operators to be licensed by 2004. Limitations on the number of service providers in basic and mobile telecommunications will end as of January 2009. No national treatment limitations are applied to Modes 1, 2, and 3, except Mode 3 basic telecommunication services, where the majority of the Board of Directors of a joint venture should be Nepalese nationals. Market access and national treatment measures in Mode 4 remain unbound and subject to limitations stated in Nepal's horizontal commitments, although market access under basic telecommunications services allows consultants not available in Nepal to enter to work for 90 days or less.³⁶⁹ Nepal also subscribes to the Reference Paper.³⁷⁰

4.3.4. Lessons Drawn

The accession of the countries discussed may be unique, for both political and economic reasons, and lessons from them have to be drawn with care. Each accession case involves a different negotiation with different dynamics. However, the fact that these countries are LDCs and have struggling economy make them similar to Ethiopia and that is why the researcher decided to see their experience to help him draw lessons for the latter.

Several lessons have emerged out of the analysis of the three countries accession process in general and the telecom commitments in particular. Among these lessons few are:

First, the accession for WTO membership, as discussed throughout this paper, was strenuous and time-consuming. Despite a stated commitment by WTO Members to simplify and

³⁶⁷ Kailash Prasad Neupane (2009), *Nepal's Telecom Sector Challenges under the WTO Rules*, I-Ways Journal of E-Government Policy and Regulation 32, IOS Press, p. 209 Available at <http://iospress.metapress.com/content/h607m47634613575/>

³⁶⁸ Basic services include; local telephone, domestic telephone, international telephone, telex, and domestic and international telegraph. Value-added services include internet (including email); email, voice mail, video text, fax mail, VSAT, audio conference, pay phone, pre-paid calling cards; radio paging, trunk mobile, and local, long distance and international data communications. See *Supra* note 355

³⁶⁹ *Supra* note 366

³⁷⁰ Dr Dinesh Kumar Sharma, *Nepal's Commitment on Telecommunication Services in the WTO*, presentation at Symposium on Telecommunications to Commemorate the 10th Anniversary of the Fourth Protocol to the GATS, 20-21 February 2008, Geneva, Switzerland.

streamline the negotiating process for LDCs, Cambodia, Vanuatu and Nepal had to complete the same complex steps as non-LDCs. The countries faced difficulty especially during bilateral negotiations as Members usually made stringent demands during these negotiations.³⁷¹ These demands include a request for liberalization of sensitive trade areas, like telecom sectors, in which the acceding countries have no intent to take commitments.

Second, despite an assurance by the WTO membership to exercise restraint in seeking concessions and commitments on trade in goods and services from acceding LDCs, Cambodia, Vanuatu and Nepal's commitments are more stringent than incumbent LDC Members and even some developing country Members. They were asked to make commitments that are not commensurate with their level of economic development, capacity and trade needs.³⁷² This is evidenced in their telecom commitment.

Third, because it is the private sector, which decides how its best interests can be pursued and despite the fact that it is the government that takes on the contractual responsibilities of WTO membership, the model countries has ensured before, and during, the accession process that a national consensus be secured among all concerned parties, particularly the private sector. They have developed one of the most open engagement approaches to policy dialogue consultations. Active public awareness campaigns about the WTO, its agreements, the accession and the implications of membership were launched. In general, effective public-private sector partnerships were an essential factor for a smooth accession process.³⁷³

Fourth, it is clear that difficulties existed, and delays occurred, during accession process of these countries. Delays can occur on both sides of the negotiating table. Insufficient knowledge, inadequate experience, limited resources and shallow analytical capacities required for accession negotiations were recurrent sources of delay and procrastination and were complained about often by the respective countries' negotiating teams. WTO members, for their part, were also the cause of delays. WTO members have yet to agree on a common approach to the terms of accession, and often express different views on this matter. To illustrate, the demand by

³⁷¹ Heike Baumuller (2008), *Making WTO Membership Work for Least-developed Countries: Lessons from Nepal and Cambodia*, International Institute for Sustainable Development (iisd), Winnipeg, p. 9.

³⁷² Adhikari *et al.*, *Supra* note 94, p. 4

³⁷³ Sok Siphana, *Cambodia enters the WTO: Lessons learned for Least Developed Countries*, ADBI Research Policy Brief No. 16, p. 10. Available on <http://www.adbi.org/research-policy-brief/2005/10/11/1430.cambodia.wto.lessons/>

some members required from the acceding countries is a higher level of commitment than that made by the original WTO members in the Uruguay Round.³⁷⁴ While, on the other hand, the model countries insist on protecting their sensitive national interest areas, like the telecom sector. However, at the end of the day, owing to strong pressure from incumbent Member these countries gave up and took stringent commitments.

The last and concluding lesson is that the process of accession represents a great opportunity for local capacity building. These countries made active use of technical assistance and consultancies from international organizations, in particular through the Integrated Framework for Trade-related Technical Assistance for Least Developed Countries (IF). This supported the preparation of the required documentation, as well as local human resource development. Local beneficiaries encompassed both public and private sector decision-makers and civil society stakeholders.³⁷⁵

4.4. Analysis of the Ethiopian Case: Can Ethiopia Accede without Liberalizing its Telecom Sector?

In chapter two, the researcher has intensively discussed the current position of Ethiopian government regarding telecommunication liberalization. In doing so, the researcher came into conclusion that the country has no intention, at least for the time being, to open the telecommunication market. There are various justifications forwarded in support of this stance by the government. Universal access and revenue generation for cross subsidization of other developmental projects are, *inter alia*, the prominent reasons for this obstinate position of the government though the country's private sector found this argument as untenable. In this section, expectations of WTO Members concerning liberalization of the sector as well as the implication that the policy positions of the government has on the pace of the country's accession process are addressed.

³⁷⁴ *Ibid*

³⁷⁵ *Ibid*

Ethiopia expects to join the World Trade Organization in 2015³⁷⁶ without heeding to demands that it liberalizes its state-run banking and telecoms sectors. The pressure on the government has been growing from various directions. On its website, Reuters reported that, U.S. trade officials have publicly asked the country to liberalize both sectors. They stated that Ethiopia should liberalize its banking and telecom sector as a step towards full membership to the WTO. One of these officials, Peter Allgeier, the U.S. representative to the WTO, said, "For a country like Ethiopia, this is extremely important in establishing the competitiveness of its economy". He added, "Our expectation would be there are some movements in these areas."³⁷⁷

Similarly, in an interview with Bloomberg News, Chiedu Osakwe, director of the WTO's accessions division, said Ethiopia is at "mid-point" in its bid to join the global trade body. "We have certainly not turned the corner to drive it toward an end-game status," he said. "There is considerable work to be done to change gears and begin to turn this accession machine around."³⁷⁸ From the wording of Mr. Osakwe, one can infer that the resistance of the country not to liberalize telecommunication and the like sectors would result in its prolonged accession. He also added that, there will have to be "degrees of opening" equivalent with changes made by other recently acceded poor nations such as Cambodia and Cape Verde.³⁷⁹ His statement makes it clear that Ethiopia has to make commitments in telecommunication sector, which is correspondent to the commitments undertaken, by acceded LDCs, like Cambodia. As it can be recalled from the discussion in this chapter under the section entitled '*Accession Experience of Some Selected LDCs*', the researcher described that after initial resistance, Cambodia's government decided to "fully open" its telecommunications market during negotiations with the WTO due to the intense pressure from the incumbent Members.³⁸⁰ Hence, from the statement of Mr. Osakwe '*...degrees of opening equivalent with Cambodia and Cape Verde ...*' one can

³⁷⁶ A Foreign Ministry statement, quoting Lesaneworku Zerfu, head of the Trade Ministry's multilateral trade relations department available at <http://www.reuters.com/article/2013/07/10/us-ethiopia-trade-idUSBRE9690BJ20130710>

³⁷⁷ Aaron Maasho, *Ethiopia expected to join WTO in 2015*, Available at <http://www.reuters.com/article/2013/07/10/us-ethiopia-trade-idUSBRE9690BJ20130710>

³⁷⁸ William Davison, *Ethiopia Plans to Make WTO Offer on Services by September*, available at <http://www.bloomberg.com/news/2013-07-14/ethiopian-government-to-make-wto-offer-on-services-by-september.html>

³⁷⁹ *Ibid*

³⁸⁰ Siphana (2005), *Supra* note 349, p. 1

conclude that Ethiopia should open its telecommunication sector in order to be acceded to the WTO.

Furthermore, in another interview with Bloomberg News on February 10, 2011 at Addis Ababa, Mr. Chiedu Osakwe recognizes the nonexistence of total liberalization. "There's hardly ever total liberalization," he said. "The acceding government undertakes commitments, with restrictions on market access." However, he stressed that "All 25 countries that have recently acceded have made offers on energy, telecoms, banking and financial services. What does not work is total closure."³⁸¹ Here, he is conveying a message to Ethiopia that in one way or another, the country has to make commitments on telecom sector along others. Such commitment does not actually need to be full liberalization of the sector as the country can restrict market access on its schedule of commitments while making offers. However, the issue that often arises relating to market access restriction is that, Members do not accept the offer that states restriction of market access on essential transactions that is profitable, like for instance basic telecommunications.

Beside international pressure from the WTO Members and its Officials, domestic private sectors, as discussed in Chapter 2 of this paper, are also making demands for liberalization of the sector. In a their position paper on '*WTO Accession of Ethiopia: Regulation and Openness of Ethiopia's Service Sectors*' prepared by Ethiopian Chamber of Commerce and Sectoral Association (ECCSA), the private sectors insisted the sector be liberalized so that quality and efficient telecommunication services can be provided.³⁸²

However, despite the pressures, Ethiopia kept on resisting by claiming that the telecommunication and financial service sectors are "sensitive areas" whose liberalization may harm national interests.³⁸³ In an interview with Bloomberg Geremew Ayalew, head of the trade relation and negotiation directorate at the Trade Ministry, said that the decision on whether to liberalize service industries will be based on government policy and through negotiations with WTO member nations. He further stated that the opening of vital industries would not occur until

³⁸¹ William Davison, *Ethiopia Probably Won't Need to Fully Liberalize Economy to Join WTO*, available at <http://www.bloomberg.com/news/2011-02-10/ethiopia-probably-won-t-need-to-fully-liberalize-economy-to-join-wto.html>

³⁸² ECCSA (2013), *Supra* note 13

³⁸³ Maasho, *Supra* note 377

the government is effectively able to regulate them and domestic businesses can compete with foreign companies.³⁸⁴

In interview with the researcher, Mr Geremew Ayalew stated that unlike other WTO documents, there is a room for flexibility in the GATS in undertaking service commitments. A country can restrict market access even after taking commitment to open a given sector. For instance, assume that a country decided to open the telecom sector. In its schedule of commitments, that country can restrict market access in the telecommunication sector only to certain transactions or may limit the number of telecom operators allowed. He also stated that there are no WTO rules that require a country to change its policy in order to accede to the organization. A country can accede to the organization while retaining its policy. What matters is the bilateral negotiation in which the Members can ask questions on the sectors they need to be liberalized. He further assured the researcher that Member countries like US, EU and Canada have asked Ethiopia to liberalize the telecom and other sectors. However, the country responded to the question by stating that the question should be asked at bilateral stage after the country submit its initial service offer.³⁸⁵

Mr. Lisanework Gorfu, in interview with the researcher, also shares the idea of Mr. Geremew. He stated that there are various GATS provisions that support the position of the country. GATS preamble and Articles IV and XIX are the core provisions he raised that Ethiopia could raise to defend its stance. He, however, admitted that the recently acceded LDCs has made onerous commitments in telecom sector and that Ethiopia could inevitably face enormous challenge in the bilateral negotiations with respect to its current policy.³⁸⁶

Ethiopia is invoking the WTO rules that can help it evade making commitments in service sectors it considers sensitive. These rules are Article XIX the GATS and Guidelines for Accession of LDCs, which allow acceding LDC to progressively open fewer sectors, liberalize fewer types of transaction. The government expects to accede to the WTO as a Least Developed Country, while retaining control of industries considered strategic, Getachew Reda, spokesperson for Prime Minister Hailemariam Desalegn, said in an interview on July 12, 2013

³⁸⁴ Davison, *Supra* note 378

³⁸⁵ Ayalew, *Supra* note 151

³⁸⁶ Interview with Mr. Lisanework Gorfu, Trade Relation and Negotiation Directorate, Head of Multilateral Trade Relations Department, Ministry of Trade (Mot), on January 15, 2014.

with Bloomberg News. “There will be some wiggle room for LDC countries to retain policy autonomy in a number of areas, which of course will include the sectors we’ve so far not liberalized,” he said. “There definitely will be a compromise, but the compromise will not affect our control over the strategic sectors. The WTO said last year³⁸⁷ that the world’s poorest countries will not be forced into making commitments on market access to services sectors that “do not correspond to their individual development, financial and trade needs.”³⁸⁸

Likewise, Yakob Yala, the Ethiopian Minister of Trade, on workshop organized by U.S. Agency for International Development on February 10, 2011 at Addis Ababa, affirmed that Ethiopia will push to retain control of “sensitive” areas. In support of his position he stated the application of a 2002 ruling by the WTO (the Guidelines for Accessions of LDCs), which called on members to “exercise restraint in seeking concessions and commitments on trade” when the poorest countries try to join.³⁸⁹

Given the strategic importance of the telecom sector the best Ethiopia can do is to raise every justifications possible to hold on its position of not liberalizing the sector. On the other hand, the researcher believes WTO members will not give up and accept the proposal of Ethiopia. Needless to repeat, despite existence of the rules that favor acceding LDCs to retain policy autonomy, the practice of accession so far shows that LDCs have been obliged to make commitments in the sectors they consider essential. The accession guidelines Ethiopia is invoking have their own limitations. As it can be recalled from the discussion of chapter three, as regards service commitment of LDCs, the guidelines fall short of establishing measurable and clearly enforceable benchmark.³⁹⁰ Admitting the ambiguity of these guidelines, Mr. Geremew, however, is of opinion that the statement ‘*open fewer sector, liberalize fewer types of transaction*’ under the guidelines state that acceding LDCs are to take service commitments that are fewer than commitments of any Member country, whether developed, developing and LDCs themselves.³⁹¹

³⁸⁷ Given the time when the interviews were conducted, when Mr. Getachew says ‘*last year*’, the researcher presumes that he is referring to 2012 Guidelines for Acceding LDCs, which demand Member to restrain from demanding market access from LDCs if it is to affect their development.

³⁸⁸ Davison, *Supra* note 378

³⁸⁹ Davison, *Supra* note 381

³⁹⁰ Ghishu (2013), *Supra* note 128, p. 5

³⁹¹ Ayalew, *Supra* note 151

Though the researcher give due respect to the interpretation given by Mr. Geremew on the guidelines with respect to setting a benchmark for acceding LDCs on service commitment, he doubts the practical application of this interpretation. Hence, as to the researcher, the Members are in a better position to use this gap and coerce Ethiopia, so that it offers commitments on the telecom sector. As many recently acceded LDCs did, Ethiopia can through everything it has in order to retain the policy autonomy in this sector, though it very difficult to presume it will succeed. It needs a miracle to change the deep-rooted practice of the organization given Ethiopia's weak bargaining position, as almost all recently acceded LDCs gave up at the last minute and took commitments in areas they once called sensitive. Though it is not the right time to judge whether the country will succeed to retain its policy autonomy since bilateral negotiations are not commenced yet, a glance at the tradition of the WTO accession process make things easy to make a sound prediction. Thus, cognizance of the facts concerning difficulties encountered by model LDCs recently acceded to the WTO in their accession process, which only resulted in extended accession but to the terms of the incumbent Members, what Ethiopia awaits seems the same.

Hence, it is reasonable to conclude that it is hardly possible to be accepted to the organization while at the same time holding on to the policy position of retaining the telecom sector, *i.e.*, not liberalizing it.

4.5. Conclusion

Though multilateral negotiation on telecommunication started in 1986, the participants did not reach upon decisions regarding telecom commitments at the time of incorporation of the WTO, 1994. The reason for this is the failure of the participants to address issues of basic telecommunication service. It is in 1997 that an agreement was reached between the participants on these commitments. Fifty-five schedules of telecom commitment were attached to a brief document, which became the Fourth Protocol to the GATS. In addition to specific commitments made in the schedules of the countries and the general rules of the GATS, GATS Annex on Telecommunication and the WTO Reference Paper are the rules that regulate the sector. The general rules of GATS are the likes of application obligations of MFN treatment, domestic regulations and conditions of transparency. The Annex on Telecommunication attached to GATS

is based on the recognition that telecommunications are essential tools for other economic activities and is concerned with access and use of public telecommunications transport and services. Whereas, the Reference Paper often called telecom additional commitments on regulatory principles, represents the regulatory component of the telecommunications agreement. It sets common guidelines for a regulatory framework that countries should follow to support the transition of the telecommunication sector to a competitive market place. The nature of principles of the Reference Paper, *i.e.*, competitive safeguard, interconnection, universal service, licensing, independence of the regulator and allocation of resource, are somehow similar to the principles laid down by the Ethiopian telecom regulations with slight differences.

Accession experience of most recently acceded LDCs, such as Cambodia, Vanuatu and Nepal, shows that these countries gone through very extended and laborious accession processes. Regardless of their resistance on avoiding taking commitments in the service areas they deem essential to their development, they ended up liberalizing them, even by taking more onerous commitment than those of the Members. The WTO rules require simplified and accelerated accession negotiations for LDCs. In doing so, they demand Members to restrain themselves from demanding market access from LDCs that is detrimental the development of the latter. These rules state that LDCs has the right to progressively open fewer sector, liberalize fewer transaction. However, applications of these rules are debatable as LDCs continued to be frustrated while acceding to the organization.

Though bilateral negotiation is not started yet, Members have started pressuring Ethiopia to liberalize sensitive service sector areas like telecommunication. Ethiopia has been resisting these demands by claiming that the WTO regime provides a room for acceding LDC to retain its policy autonomy. The researcher, however, believes that, despite existence of these rules that Ethiopia is invoking, it is not an easy task to convince the Members given the experience recently acceded countries and the country's weak bargaining position.

Chapter 5

5. Conclusion and Recommendations

5.1. Conclusion

The Ethiopian government has plain and simple stand that the telecommunication sector is not the type of business in which liberalization is allowed. The sector is amongst the most sensitive transactions to which a great national interest is attached. The government defends its stance by arguing that universal access, cross subsidization and security are, *inter alia*, the major reasons why it retains the ownership of the sector and does not allow competition. Nevertheless, the private sectors of the country dismisses such argument by proving that the country is losing the benefits it could have got had it liberalize the sector. They did so by analyzing telecom sectors of the neighboring countries who have allowed liberalization.

Ethiopia is currently on the WTO accession process and hope that it will accede to the organization while retaining its policy position on the telecom sector. Though the country has not entered bilateral negotiation stage yet, several WTO Members are demanding Ethiopia to liberalize its telecom sector along other service sectors that it deems sensitive. The country, nonetheless, is clinging on its position by raising a set WTO rules that in one way or another provide a room for the country to accede to the organization while at the same time keeping its policy autonomy. These rules are the preamble, Article IV and XIX of the GATS as well as the Guidelines for Accession for LDCs. The provisions of GATS stated require LDCs to open fewer sectors, liberalize fewer types of transactions and progressively extending market access in line with their development situation. They take into account the serious difficulty of the LDCs in view of their special economic situation and their development, trade and financial needs. The guidelines mentioned is also based on this framework but specifically require the Members to restrain from demanding unreasonable market concession from LDCs, so that the accession negotiations of LDCs can be simplified and streamlined.

Many recently acceded LDCs, such as Cambodia, Vanuatu and Nepal, went through complex and prolonged accession processes. Despite these countries' appeal for application of these rules, which Ethiopia is now invoking, in the course of their accession process, they ended up taking more onerous commitments in the area they once regard as sensitive, including the telecom

sector. Hence, the applications of these rules are questionable when it comes to the reality on the ground. Since the nature of WTO accession process is one sided, it is difficult for the one who is on the other side of the negotiating table to convince the Members to come its terms. This situation got worse when the acceding country is LDC that lacks the human resources and technical capabilities required by the process. One can conclude, therefore, that the accession process is inherently power based and the very opposite of the WTO's principles.

It is too early to judge whether Ethiopia will succeed in its attempt to accede to the WTO while retaining its policy autonomy with respect to the telecom sector since bilateral negotiations are not commenced. However, given the deep-rooted practice of the WTO and the accession experience of recently acceded countries, the researcher has every reason to believe that it will not be an easy task for LDCs like Ethiopia to convince the Members. Hence, one can reasonably conclude that it is hardly possible to be accepted to the WTO without making, at least, slight reforms to once policy positions. Lessons drawn from recently acceded LDCs show that the only thing these countries got in return for resisting in order to retain their policy autonomy is further extended and complicated accession process period. The researcher, in effect, fear that the current slow pace of accession process of Ethiopia will be extremely slowed if the country is to enter into the bilateral negotiation phase without reconsidering its policy stance on the telecom sector.

5.2. Recommendations

Based on the findings of the research and the conclusions drawn above, the researcher recommends the following points that he deems will contribute in directing Ethiopia so that it will be successful in the coming bilateral negotiations and expedite its accession process. Since delays of the WTO accession process are attributable to both sides of the negotiating table, the researcher forwards some recommendations for the WTO too. If the developed country members of the WTO really want to accelerate and simplify the accession process of the LDCs they need to move beyond rhetoric. This will happen only when the following recommendations are seriously pursued by these countries at the WTO fora.

5.2.1. Recommendations for Ethiopia

1. Ethiopia should reconsider its policy stance relating to the telecom sector. The country should make commitments for liberalization of the sector in gradual and closely restricted manner. This will provide the government reasonable time for improving the competency and institutional capacity of its operator. The reform have to take into account the country's development strategies and implementing instruments, economic and social goals, and legislative reforms, which are all necessary if Ethiopia is to be in compliance with the multitude of WTO rules and disciplines. An important consideration for any acceding country is that there is a certain amount of competition for the serious attention of WTO members. As experience of the recently acceded countries show, members have refused to negotiate seriously with acceding countries whose offers are clearly shy of reasonable expectations for accession. Thus, Ethiopia should calibrate its initial offer with care, demonstrating its serious intent toward acceptable thresholds while retaining enough flexibility to improve its offer at later stages where it believes it is possible to do so. In effect, having drawn lessons from model countries, the researcher specifically recommends the following:
 - 1.2. Ethiopia should fully liberalize value added telecom services. These services, of course, are already open to the domestic investors. Full liberalization of such service to foreign investors does not have substantial adverse effect on the country;
 - 1.3. Since there is an assumption that foreign companies rely on already existing network and, thus, have little interest in building infrastructures, Ethio telecom should remain the single provider of fixed-line services and exclusive network provider. Such action will also ease the fear of the government on security issues;
 - 1.4. Limited number of foreign mobile operators, two or three, with some foreign equity restrictions should be allowed with gradual full liberalization plan. This will create competition to Ethio telecom. Above provision of cheap and quality services, it shows the WTO Members seriousness of Ethiopia in taking commitment; and
 - 1.5. Ethiopia should fully adopts the Reference Paper.

2. The legal and regulatory framework for provisions of telecom services sector that takes issues of universal access into account has to be developed.
3. Development of strong regulatory and institutional capacities supported by a more transparent policy framework is essential to make the liberalization of telecom work. Thus, adjustments have to be made to establish more transparent and independent telecommunication regulatory body, in terms of structure, budget and decision making power, in conformity with the principles of the Reference Paper.
4. As a precondition to taking commitments listed under the Recommendation 1 above, Ethiopia should demand technical assistance to build the capacity of its telecom regulator so that it regulates a competitive telecommunications environment to the benefit of consumers and service providers. Since there is no WTO rules that covers provision of technical assistance to address issues of capacity building at domestic level like capacitating telecom regulators, negotiators can use this precondition as a bargaining chip in order to force Member countries provide assistances needed in this respect.
5. The country should fully use the assistances at its disposal in efficient and effective manner. To do so, necessary institutions like the WTO Reference office of the Ministry of Trade (MoT) should be capacitated, so that they can fully and wisely utilize technical assistances donated to them.
6. In addition to resistance of making reforms to their policy positions, insufficient knowledge, inadequate experience, limited resources, and limited analytical capacities required for accession negotiations have been recurrent sources of delays that led to frequent complaints by the recently acceded LDCs' negotiating team. Thus, before starting the bilateral negotiations, Ethiopia should build its capacity on these matters by demanding technical assistance from the WTO and using other means necessary to help it speed up its accession process.

To this end, Ethiopia may speed up its accession to the WTO by avoiding delays that is attributable to its current stubborn policy position.

5.2.2. Recommendations for the WTO

1. Article XII of the WTO should be interpreted with clear-cut guidelines detailing transparent criteria for accession of a country or a separate custom territory. The WTO should incorporate a specific provision for the accession of LDCs, where the LDCs, seeking accession, will not require bilateral negotiation on market access.
2. Accession Guidelines for LDCs should be mandatory and legally binding rules. The legislature of the WTO, WTO General Assembly, must issue such laws while the WTO Secretariat as well as Committee on Trade and Development and its subcommittee on LDCs should follow and supervise implementations of these rules.
3. All the provisions of the Technical Assistance and Capacity Building should be legally binding. The coverage of Technical Assistance and Capacity Building should also comprise provisions that address issues of capacity building at domestic level.
4. Special and differential treatments must be made mandatory and legally binding and subject to dispute settlement system of the WTO (including inclusion of these commitments in the country schedules).

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