ETHIOPIA'S RELUCTANT MOVE TO JOIN THE WTO: A PRELIMINARY LOOK AT LEGAL AND INSTITUTIONAL IMPLICATIONS OF ACCESSION

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Introduction

The World Trade Organization (WTO) is the pre-eminent global body for the regulation of international trade in goods and services today. With a current membership of 152 countries and customs territories, and about 30 others negotiating their accession to it, the WTO can easily aspire to universal membership as a real possibility. Indeed, the 152 members alone already account for roughly about 95 percent of global merchandise trade.[1] Ongoing negotiations for the accession of Russia, Iran and Algeria – the only countries with significant share of international trade still outside the trading system – promise that virtually all international trade will take place within its framework of rules and enforcement mechanisms in the near future.[2]

Perhaps to the surprise of many, Ethiopia has yet to join the WTO. Given Ethiopia's tradition of enthusiastic participation in multilateral initiatives, this contribution attempts to ask some of the basic questions about why Ethiopia uncharacteristically stayed out of such an important endeavour for so long and why it wants to join now, and what the potential implications of the decision to join the system will be for the legal, institutional and economic policy landscape of the country both during the accession process as well as after achieving membership.

To do this, section II provides a brief historical account of how the multilateral trading system evolved over time. The purpose of this section is to situate Ethiopia's current

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[1] See WTO Secretariat, *International Trade Statistics 2007* (Geneva 2007).

[2] The reality is of course more complicated. A significant portion of international trade takes place within a web of bilateral and regional preferential trade arrangements, whether of a reciprocal (e.g. free trade areas and customs unions) or non-reciprocal (e.g. unilateral schemes based on the Generalised System of Preferences, GSP) nature. And yet, these preferential agreements are supposed to operate under a framework of rules set by the WTO system itself. As Dam put it in 1963, the GATT "has been charged with the duty to regulate the formation of customs unions and free trade areas." Kenneth W. Dam, "Regional Economic Arrangements and the GATT: The Legacy of a Misconception", 30 *University of Chicago Law Review* (1963), p. 615. Moreover, the fact that a country is not a member of the GATT/WTO system does not always mean that the rules of that system do not affect the international trade interests of that country; indeed, it is natural that the moment a country decides to trade with another, the rules and regulations in the latter inevitably dictate the actual conduct of such trade.

interest to join the WTO in its historical context, and the discussion on the evolution of the trading system itself is only secondary to this objective of assessing where Ethiopia stood throughout this historical process. The discussion in this section, and to a certain extent in others, is however incomplete in the sense that it is written only from an 'outside' perspective, i.e. based on the official records of the trading system itself rather than any archives of the Ethiopian Government on the subject.[3]

This is followed in Section III by a brief introduction to the accession process. There is ample literature on this subject and the sole purpose of this section is to provide a highlight of the process to make sure the article makes sense on its own. Section IV then asks the question of why Ethiopia wants to join the system now. We find indications of the Government's thinking from quite a few sources,[4] but a statement made by Ethiopia's representative to the WTO at the meeting of the General Council on 10 February 2003 that considered Ethiopia's accession application appears to have captured this well.[5] This section attempts to answer the "why?" and "why now?" questions using this official statement as a point of departure. Section V concludes that the Government is right to seek to join the WTO, and it needs to be supported. The accession process is a painful one for the country now, but it will be worth all the effort in the future. To maximise the benefits of the accession process, and of final membership, this article concludes with a proposal for an institutional response that relevant government departments, academic institutions and the business community might need to consider, and also outlines some areas for future research.

It is hoped that the article will make a modest contribution to the debate that must take place among all stakeholders in this area, encompassing all of us as citizens, farmers, business people, civil servants, academics, lawyers, economists, and the fledgling civil society. The article is written with such a wide readership in mind.

I. Brief Historical Note: Where was Ethiopia for So Long?

One of only four African members of the League of Nations (since 1923)[6], a founding member of virtually all major global inter-governmental organizations that cropped up in the aftermath of the second World War, including the United Nations, the World Bank and the International Monetary Fund, and a leading player in continental and regional initiatives within Africa, it is a mystery as to why Ethiopia appears to have

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[3] It is the hope of this writer that people with an 'inside' perspective will contribute to this journal and fill this gap in our understanding.

[4] The discussion in this article is based exclusively on publicly available information, which means that our sources are limited to the few official statements available out there, including: WTO, *Request for Observer Status: Communication from Ethiopia* (WT/L/229, 10 October 1997) and WTO, *Request for Extension of Observer Status: Communication from Ethiopia* (WT/L/445, 11 January 2002).

[5] See WTO doc. WT/GC/M/78, 7 March 2003.

[6] Liberia and South Africa were founding members of the League while Egypt joined in 1937.

never wanted to join the International Trade Organization (ITO) in the 1940s and the General Agreement on Tariffs and Trade (GATT) that effectively took over since 1948.[7]

It is not due to lack of awareness of what was going on at the time. The ITO Charter was negotiated under the auspices of the United Nations Economic and Social Council (ECOSOC), of which Ethiopia is a founding member. Nor would it be related to any ideological discomfort with the system, since the political and economic thinking of the Imperial Government of Ethiopia (1941-1974) was closer to the established West than the then emerging East.[8] The real reasons are difficult to determine, but a look at the history of the GATT/WTO system will provide the context within which government decisions were taken. To that end, it may be helpful to distinguish the establishment phase of the multilateral trading system (between 1945 and 1948), which would have allowed Ethiopia to become a founding member, from its later evolution during which Ethiopia could have acceded to it.

A. Ethiopia during the Establishment of the Trading System

The whole idea of establishing an international trade organization was conceived by the United States (US) Government, which saw a rules-based system of international trade relations as a key component of its mission to build a post-war world at peace with itself.[9] The US administration believed that in order to build world peace and stability, countries should adopt "a code of economic ethics and agree to live according to its rules".[10] Then US President Truman believed that the same principles of fair dealing that were being applied in politics by the United Nations also applied to economics and declared, "this is the way to peace".[11] The US Government thus took

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[7] On the history of the ITO negotiations, see Clair Wilcox, *A Charter for World Trade* (Macmillan, New York, 1949). See also John H. Jackson, *World Trade and the Law of GATT* (Bobbs-Merrill, Indianapolis 1969).

[8] Indeed, it is worth bearing in mind that a number of countries from the Eastern Bloc, such as Hungary, Poland and Romania, became GATT contracting parties in the late 1960s and early 1970s. For a list of the 128 countries that were contracting parties to the GATT on the eve of the WTO's establishment in January 1995 along with the date on which they signed the GATT, see http://www.wto.org/english/thewto_e/gattmem_e.htm. For a broad survey of the economic thinking of the Imperial regime, and particularly the close economic links with the US, see Shiferaw Bekele (ed.), *An Economic History of Ethiopia: The Imperial Era 1941 – 74* (Codesria, Senegal 1995).

[9] US Government official Harry Hawkins is quoted to have said: "We've seen that when a country gets starved out economically, its people are all too ready to follow the first dictator who may rise up and promise them all jobs. Trade conflict breeds non-cooperation, suspicion, bitterness. Nations which are economic enemies are not likely to remain political friends." Hawkins, as quoted in Jackson, *supra* n. 7, p. 38.

[10] US President Truman, as quoted in Wilcox (1949), *supra* n. 7, pp. 20-21.

[11] *Id.* P. 21.

the initiative and actively led the whole process that resulted in the conclusion of the Havana Charter for the establishment of the ITO in 1948.[12]

Already in 1945, the US Government had sent invitations to fifteen countries to participate in negotiations for the reduction of tariffs and other trade barriers.[13] The invitation was accepted by all except the USSR and talks commenced in December of the same year.[14] Ethiopia was not in that list. Given Ethiopia's cordial relations at the time with the US, this might indicate that the US determined the list on economic rather than political considerations. And when the UN ECOSOC, at its first meeting in London in February 1946, adopted a US-sponsored resolution for the calling of an International Conference on Trade and Employment, it appointed the US and the same 15 countries in the US list, plus another three (Chile, Lebanon and Norway), as the Preparatory Committee for the Conference.[15] It was this committee of 18 countries, i.e. except the USSR, that prepared the draft of the ITO Charter between October 1946 and August 1947. The draft later became the "basis for discussion" at the Havana Conference from 21 November 1947 to 24 March 1948.[16] The objective of the Havana Conference was to agree on a draft Charter that would establish a new specialized agency of the UN ECOSOC, the International Trade Organization.[17]

At the first session of the Preparatory Committee in London (15 October to 26 November 1946), the US "gave notice of its intention to enter into tariff negotiations with the members of the group"[18], thereby formally sowing the seeds of what later came to be known as the GATT. The Preparatory Committee completed the draft ITO Charter at the second session that commenced in Geneva on 10 April 1947 and concluded on 22 August 1947. But members of the Preparatory Committee were soon joined by five other countries (Burma (Mynamar), Ceylon (Sri Lanka), Pakistan, Southern Rhodesia (Zimbabwe), and Syria) to undertake the first tariff negotiations and adopt the GATT text, effectively the commercial policy chapter of the draft ITO charter, which was concluded on 30 October 1947. The GATT was applied provisionally through the Protocol of Provisional Application (PPA) on 1 January

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[12] See Interim Commission for the International Trade Organization, *Final Act and Related Documents of the Havana Conference* (UN doc. E/CONF. 2/78, April 1948).

[13] These were Australia, Belgium, Brazil, Canada, China, Cuba, Czechoslovakia, France, India, Luxembourg, New Zealand, South Africa, the Netherlands, UK, and the Union of Soviet Socialist Republics (USSR). See Clair Wilcox, *supra* n. 7, p. 40.

[14] See http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

[15] See UN ECOSOC, *Resolution Regarding the Calling of an International Conference on Trade and Employment*, para. 6 (Annexure 1 to E/PC/T/33).

[16] See GATT, *Analytical Index: Guide to GATT Law and Practice, Updated 6th Edition* (Geneva, 1995), p. 5.

[17] See UN Information Center, *Press Release No. 36* (8 April 1947), para. 1.

[18] See Wilcox, *supra* n. 7, p. 43.

1948 among the eight countries listed in paragraph 1 of the PPA plus Cuba.[19] These nine countries and the 14 others that signed the PPA by the cut-off date of 30 June 1948 set under its paragraph 3 became GATT founding 'members' – its original Contracting Parties.[20]

Ethiopia was not involved in this process. Several other countries not members of the ITO Preparatory Committee sent observers to the first and second sessions of the Preparatory Committee as well as the Drafting Committee and, as we saw above, some even joined the tariff negotiation process and became original parties to the GATT. But we have not found any records of Ethiopia ever expressing interest in participating in this process. Indeed, once the draft ITO Charter was finalized by the Preparatory Committee, invitations were extended to all UN members to participate in the Conference that was scheduled to open in Havana on 21 November 1947. According to a report of the Chairman of the Preparatory Committee, as of 30 October 1947, 28 countries had accepted the invitation,[21] while eight others, including Ethiopia, had refused the invitations.[22] Ethiopia was thus absent when 53 countries signed the ITO Charter at Havana on 24 March 1948.[23] But the Charter never entered into force[24] and the resulting gap was essentially filled by the GATT.

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[19] These are Australia, Belgium, Canada, France, Luxembourg, the Netherlands, the United Kingdom (UK) and the US.

[20] Chile missed the 30 June 1948 deadline and became an 'original' contracting party only through a Special Protocol of September 1948. Note also that China, Lebanon and Syria later withdrew from the GATT. For more on this, see GATT, *Analytical Index: Guide to GATT Law and Practice, Updated 6th Edition* (Geneva, 1995), pp. 3-6; and WTO, *World Trade Report 2007* (hereafter WTR 2007).

[21] These are Australia, Brazil, Canada, China, Colombia, Costa Rica, Denmark, Haiti, Liberia, Luxemburg, Netherlands, New Zealand, Norway, Philippines, Turkey, United Kingdom, United States, Uruguay, Afghanistan, Sweden, Pakistan, Portugal, Switzerland, Trans-Jordan through Iraq, Indonesia, Burma, Ceylon, and Southern Rhodesia. See *United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment,* E/PC/T/PV.2/7, 30 October 1947, pp. 17.

[22] The seven others are Byelo Russia (Belarus), Saudi Arabia, Ukraine, USSR, Yugoslavia, Siam (Thailand), and Bulgaria. *Id.*

[23] Only four of the 53 countries were from Africa: Afghanistan, Australia, Austria, Belgium, Bolivia, Brazil, Burma, Canada, Ceylon, Chile, China, Colombia' Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, *Egypt*, El Salvador, France, Greece, Guatemala, Haiti, India, Indonesia, Iran, Iraq, Ireland, Italy, Lebanon, *Liberia*, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Peru, Philippines, Portugal, *South Africa, Southern Rhodesia*, Sweden, Switzerland, Syria, Transjordan, United Kingdom, United States of America, Uruguay, and Venezuela (African countries in italics).

[24] The reasons for this failure are many and varied. Many commentators now believe that the Charter was too ambitious to enter into force at the time. Among the specific reasons often mentioned include its treatment of agriculture (which some developed countries thought had gone too far – and note that the US secured a waiver from GATT's already weak agriculture provisions in 1955 – while mainly the developing countries thought it had not gone far enough), its approach to international commodity agreements, its ambitious investment and competition chapters, and so on. Indeed, it appears that by the time the Charter was submitted for ratification before national legislatures, the political tide appeared to have turned hostile towards economic liberalization. In the words of the WTO itself, ratification of the ITO Charter "proved impossible" in some national legislatures and "[t]he most serious opposition was

In sum, what stands out about Ethiopia at this time is not the fact that it was not invited by the United States or the UN ECOSOC to take part in the Preparatory Committee but its express refusal to do so when the invitation to participate in the Conference was finally made. This section has shown that Ethiopia actively rejected the trading system then, but we do not know why it chose to do so. But, whatever the reasons at the time, it is now clear with the benefit of hindsight, and an appreciation of the escalating "entry fee" to the WTO over the years, that this was an expensive mistake for the country, and the real cost of that mistake will become only clearer as the current accession negotiations progress.

B. Ethiopia and the GATT: from Active Rejection to Active Observation

From its modest beginnings as a provisional agreement among 23 largely rich countries, GATT membership grew sharply over the following decades. It is worth noting in this connection that GATT recognizes independent customs territories that may not satisfy the international law requirements of statehood as subjects of rights and obligations on the same basis as states.[25] For both states and independent customs territories, GATT allowed two routes for accession – a standard route under Article XXXIII,[26] and a special route under Article XXVI:5(c).[27]

The special route of Article XXVI:5(c) was intended to achieve two things: (1) regulate the application of the GATT to dependent territories for which GATT

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in the US Congress.... In 1950, the United States government announced that it would not seek Congressional ratification of the Havana Charter, and the ITO was effectively dead." See http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

[25] GATT Article XXIV:2 defines a customs territory as "any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories." Jackson has noted that GATT preparatory meetings had Southern Rhodesia, Burma, and Ceylon in mind as they "were deemed to have autonomy in external commercial relations when GATT was drafted in 1947" and were accepted as contracting parties to the GATT. See Jackson *supra* n. 7, p. 96. See also Melaku Geboye Desta, "EC-ACP Economic Partnership Agreements and WTO Compatibility: An Experiment in North-South Inter-Regional Agreements?", 43(5) *Common Market Law Review* (2006) pp. 1343-1379.

[26] The text of Art. XXXIII provides as follows: "A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority."

[27] GATT Art. XXVI:5(c) provides as follows: "If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party."

contracting parties had international responsibility,[28] and (2) facilitate participation in the GATT of newly-independent or semi-independent countries and customs territories.[29] Following the decolonisation of large parts of Africa and Asia in the 1950s and 1960s, a number of countries from these regions used this route to join the GATT.[30] Indeed, this route allowed newly-independent countries to become GATT contracting parties in some cases without having to undertake serious commitments of their own.[31] The accession-by-sponsorship option was of course *de jure* unavailable for Ethiopia as it was never colonized by any foreign power.[32] The only route for Ethiopia to accede to the GATT would thus be that in Article XXXIII.

Article XXXIII is notorious for its opacity, providing merely that any state or separate customs territory may accede to the GATT "on terms to be agreed between such government and the Contracting Parties." During its 47 years of life, GATT successfully processed the accession of scores of countries,[33] which was done mostly as part of its series of trade negotiation rounds.[34] Again, we could not find any records

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[28] This is a reference to countries or territories under colonial or other foreign rule in which the ruler is a party to the GATT and the colony or dependent territory does not yet have full autonomy over its own external commercial relations.

[29] The following statement made by the UK representative to the GATT in 1986 where the UK sponsored the accession of Hong Kong as a separate customs territory would be a good example of how it worked in practice. The UK declared that Hong Kong "possesses full autonomy in the conduct of its external commercial relations and of the other matters provided for in the Agreement. In accordance with the provisions of Article XXVI(5)(c) of the said Agreement and with the wishes of Hong Kong, Hong Kong will, with effect from the date of this communication, be deemed to be a contracting party to the Agreement. ... the United Kingdom will restore Hong Kong to the People's Republic of China with effect from 1 July 1997 and that the United Kingdom will continue to have international responsibility for Hong Kong until that date." GATT doc. L/5986, 24 April 1986.

[30] Indonesia became the first country to accede to the GATT under Art. XXVI:5(c) in 1950, which followed recognition by the Netherlands (27 December 1949) of Indonesia's unilateral declaration of independence on 17 August 1945. See *WTR 2007*, p. 213. Starting with the 1957 accession of Ghana, the first sub-Saharan African country to gain its independence in the same year, all sub-Saharan African countries currently members of the WTO, with the exception of the Democratic Republic of Congo, first became GATT contracting parties via the sponsorship route. See GATT Secretariat, "De Facto Status and Succession: Article XVI:5(c): Revision", GATT doc. MTN.GNG/NG7/W/40/Rev.1. See also *WTR 2007*, Appendix Table 10, pp. 253-56. For a legal analysis, see GATT, "De Facto Application of the General Agreement", GATT doc. C/130, 28 June 1984.

[31] A 1995 GATT Trade Policy Review of Cameroon noted, for example, that "Cameroon had no tariff bindings in the pre-Uruguay Round GATT". See http://www.wto.org/english/tratop_e/tpr_e/tp2_e.htm. After the conclusion of the Uruguay Round, Cameroon bound only three tariff lines, i.e. 0.1 percent of its total tariff lines. See WTO, *Market Access: Unfinished Business – Special Studies 6* (Geneva, 2001), pp. 7-8.

[32] Note also that this route is not available any more for accession to the WTO.

[33] GATT had a total of 128 contracting parties as at the end of 1994, i.e. on the eve of the creation of the WTO.

[34] As VanGrasstek observed, in "the great majority of GATT accessions, the applicant's 'entry fee' was negotiated concurrently with one of the eight rounds of multilateral trade negotiations conducted under the auspices of the GATT." See Craig VanGrasstek, "Why Demands on Acceding Countries Increase over Time: A three-dimensional analysis of multilateral trade diplomacy", in UNCTAD, *WTO*

showing if Ethiopia ever sought to join the system through the standard route of GATT Article XXXIII.

However, Ethiopia's attitude towards the trading system certainly changed over the years. Firstly, Ethiopia participated in the GATT on an ad hoc basis since its early days. To mention just a few examples, Ethiopia participated in the debate on the problem of commodities regulation in 1956.[35] It was also one of the countries that responded positively to a 1967 GATT invitation for non-member developing countries to take part in the work of the Trade Negotiations Committee of Developing Countries with a view to their participation in those negotiations.[36] Secondly, Ethiopia benefited from the training programmes of the GATT from as early as 1960.[37] Finally, Ethiopia participated in GATT activities as an observer since at least 1984.[38] Although there were no formal GATT rules on the role of observers, in practice, this meant that Ethiopia could attend meetings and participate in discussions but had no voting rights.[39] This established GATT practice has now been consolidated in detailed rules of procedure within the WTO, which expressly provides that an observer's right to speak "does not include the right to make proposals, unless a government is specifically invited to do so, nor to participate in decision-making."[40] The highest point of Ethiopia's GATT participation in this capacity was reached during the Uruguay Round

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Accession and Development Policies (Geneva, 2001, hereafter UNCTAD (2001)), p. 121. To mention an early example, the second GATT round of tariff negotiations at Annecy (France) in 1949 was entirely about tariff negotiations between the original Contracting Parties and 11 countries that just acceded to the GATT. See WTO, *WTR 2007*, p. 181. GATT sponsored eight such rounds: Geneva (1947), Annecy (1949), Torquay (1951), Geneva (1956), Dillon (1960-1961), Kennedy (1964-1967), Tokyo (1973-1979), and Uruguay (1986-1994). The ninth, or the WTO's first, round of trade negotiations is the ongoing Doha Development Agenda which was launched in November 2001.

[35] GATT Intersessional Committee, *Commodity Problems: Present Situation Regarding the Draft on Commodity Arrangements*, IC/W/51 10 September 1956.

[36] See GATT Trade Negotiations Committee of Developing Countries, *Participation of Non-GATT Countries: Note by the Secretariat*, TN(LDC)/6, 10 April 1968.

[37] GATT records show that an Ethiopian economist was one of nine young African economists that attended lectures in the Secretariat in February 1960. See GATT, *Fellowship Programme and Course for Officials of Governments Parties to the GATT or Members of the United Nations: Note by the Executive Secretary*, L/1327, 27 October 1960. Ethiopian officials continued to participate in GATT training programmes since the 1960s.

[38] See GATT, *Observer Status in GATT: Note by the Secretariat*, GATT doc. C/129, 27 June 1984. Although I was unable to verify this with the help of original GATT documents, Professor Jackson noted in his 1969 authoritative treatise that Ethiopia had an observer status in GATT already in 1968. See Jackson, *supra* n. 7, p. 901.

[39] At GATT Council meetings, for example, observers would traditionally be invited to speak on a particular point only after Council members have spoken. See GATT doc. C/129, *supra* n. 38, para. 11.

[40] WTO, *Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council*, WTO doc. WT/L/161, 25 July 1996, Annex 2, para. 10.

negotiations when it sounded nearly as committed to the principles and objectives of the trading system as any full-fledged member could be.[41]

Such increasingly warm and active participation could not of course alter the fact that, by the time the WTO was created, Ethiopia remained outside the GATT system. For Ethiopia and others still outside the system, the transition from GATT to the WTO also meant a transition to a more difficult and demanding system of accession with ever rising "entry fee".[42] As Gerald Curzon observed in 1965, accession to the GATT was "biased in favour of newcomers" and GATT contracting parties "do not normally try to drive too hard a bargain in payment of concessions which they made to third countries many years before."[43] Those 'good old days' have undoubtedly gone.[44]

C. Ethiopia and the WTO: Seeking Membership with Reluctance?

It was in 1997, two years after the establishment of the WTO, that the Ethiopian Government formally submitted an application for observership with a declaration of its "intention to apply for accession to the WTO Agreements in the near future".[45] Under the WTO rules of procedure, a government that requests such status is expected to initiate accession negotiations "within a maximum period of five years".[46] The WTO General Council accepted Ethiopia's application at its meeting of 22 October 1997 in which Ethiopia was represented at ministerial level, indicating the importance the

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[41] During the Uruguay Round negotiations, Ethiopian representative Gezahegne Tsegaye said that Ethiopia "follows the activities of the organization with keen interest, because not only do the activities of GATT directly or indirectly concern all countries, but also the objectives and principles of the organization merit the respect by all countries." Gezahegne went on to argue about the marginalization of the poor, endorsed statements made by the LDC Group in the Round and concluded: "while my delegation notes with satisfaction the progress made in the Uruguay Round of negotiations, it feels concerned that most of the substantive issues will have to be tackled within the remaining one year of the Round. Under the circumstances, the negotiations on the substantive issues will have to be accelerated further in order for the Round to reach a successful end." See GATT doc. SR.45/ST/33, 21 December 1989. As it turned out, the Uruguay Round negotiations continued for another four years.

[42] See Murray Gibbs, in UNCTAD (2001), p. xviii, noting that the process of WTO accession "has become more difficult than that of accession to the GATT 1947."

[43] Curzon, as quoted in Steve Charnovitz, "Mapping the Law of WTO Accession" , *WTO at Ten: Governance, Dispute Settlement and Developing Countries*, in Merit Janow, Victoria Donaldson and Alan Yanovichm (eds. Juris Publishing, forthcoming), p. 4, available at SSRN: http://ssrn.com/abstract=957651.

[44] Note however that this could be a matter of perspective. Peter Sutherland is certainly not alone when he says that those countries that undertook significant commitments as part of their accession benefited from their accession more than those that acceded with less rigorous commitments, as happened during the GATT days. See Peter Sutherland, "Transforming Nations: How the WTO Boosts Economies and Open Societies", in 87(2) *Foreign Affairs* (2008).

[45] WTO, *Ethiopia – Request for Observer Status: Communication from Ethiopia*, WT/L/229, 10 October 1997.

[46] See WTO Rules of Procedure *supra* n. 40, para. 4.

Government attached to the process.[47] However, domestic events soon overtook any intentions expressed in Geneva, and Ethiopia missed the five-year deadline within which to initiate the accession process. This meant that Ethiopia had to seek an extension for its observer status in 2002,[48] which was granted by the WTO General Council at its meeting of 13-14 May 2002.[49] This time, Ethiopia acted on its promises and submitted its request for accession in January 2003.[50] At its meeting of 10 February 2003, the General Council accepted the application and established an accession working party with standard terms of reference: "to examine the application of the Government of Ethiopia to accede to the WTO Agreement under Article XII, and to submit to the General Council recommendations which may include a draft Protocol of Accession."[51] As we shall see further below, however, Ethiopia submitted its Memorandum on Foreign Trade Régime (MFTR) only in 2007.

II. What Next for Ethiopia? Highlights of the Accession Process

The establishment of the working party is an important first step, but it is also the easiest part of the process. Almost every WTO member present at the General Council meeting appeared keen not to miss an opportunity to register a friendly statement about Ethiopia's decision to seek accession.[52] This friendly atmosphere inside the

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[47] See WTO doc. WT/GC/M/23, 28 November 1997.

[48] See WTO, *Ethiopia - Request for Extension of Observer Status: Communication from Ethiopia,* WTO doc. WT/L/445, 11 January 2002. Among the most eye-catching statements in the two brief documents submitted by the Government was the statement about a tariff overhaul in which the maximum rate was slashed from 230 per cent prior to the reform to 50 per cent by 1997, and to 40 percent by 2002. See Ethiopia's 1997 request, p. 3, and 2002 request, para. 22.

[49] See WTO doc. WT/GC/M/74, 1 July 2002.

[50] See WTO, *Technical Note on the Accession Process: Note by the Secretariat: State of Play and Information on Current Accessions: Revision*, WT/ACC/11/Rev.7, 18 May 2007.

[51] See WTO doc. WT/GC/M/78, 7 March 2003, para. 31. Membership of the working party is open to all WTO members, and we will have indications of the numbers only after the first meeting of the working party takes place. In practice, the size of working parties "varies considerably". According to a WTO note, as of November 2005, Russia had the largest working party with 58 members, while Bhutan and Montenegro had the smallest number of members at nine each. See WTO Secretariat, *Technical Note on the Accession Process – Note by the Secretariat: Revision,* WT/ACC/10/Rev.3, 28 November 2005, p. 8. Note that in both cases then EC-25 was counted as one.

[52] See WTO doc. WT/GC/M/78, 7 March 2003, paras. 12-30, in which virtually every WTO member present "warmly welcomed Ethiopia's statement, and supported its request for accession and the establishment of a working party to examine it." The members that spoke, either for themselves or on behalf of groupings, include Morocco (on behalf of the Africa Group), Bangladesh (on behalf of the LDCs), the European Communities, India, Israel, Kenya, Pakistan, China, United States, Peru (on behalf of GRULAC, an informal grouping of Latin-American members of the WTO), Indonesia (on behalf of the ASEAN Members), Bahrain, Botswana, Canada, and Turkey, and Slovenia (on behalf of Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovak Republic).

meeting room will change soon, and there are almost no rules governing what goes on in that room.

A. The Process

The accession process is carried out on two parallel and often overlapping tracks – a multilateral track that aims to find out about the relevant laws, policies and practices of the acceding country and ensure they are brought into conformity with WTO rules, and a bilateral track that aims to extract as many specific commitments from the acceding country as is deemed reasonable by each member of the working party.

The multilateral and fact-finding track starts with the applicant country's submission of a Memorandum on its Foreign Trade Régime, a crucial document that is prepared according to a detailed outline format provided by the WTO Secretariat.[53] Once the MFTR is submitted, members of the working party start the questions and answers process in which they try to learn as much as they can about the applicant country's trade and legal regime and identify areas of possible inconsistency with WTO Agreements.[54] This multilateral process then moves on to negotiate "the terms of accession", which covers WTO rules on goods, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and systemic issues in the area of services.[55]

Parallel to the multilateral process, bilateral market access negotiations on goods and services take place between the acceding country and any interested WTO member.[56] A successful conclusion to the process comes in the form of a Report of the Working Party, including a draft Decision and Protocol of Accession, which is forwarded to the General Council. The Protocol "contains a single package of agreed commitments on rules, concessions and commitments on goods, and specific commitments on services" and "sets out the terms on which the Applicant is invited to join the WTO."[57]

As noted earlier, Ethiopia submitted its MFTR only in January 2007 and this has already triggered the bilateral questions and answers process, which has the potential to become a drawn-out exchange of papers between Ethiopia and any member of the working party. The first accession working party meeting took place in May 2008.

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[53] See WT/ACC/1, Attachment.

[54] See WT/ACC/10/Rev.3, 28 November 2005.

[55] See *Id.*, p. 5.

[56] See *Id.*

[57] See *Id.*

B. Inequities of the Accession Process

Given the tradition of consensus with which decisions are taken at the WTO, the slowest or most obstructive member of the working party normally dictates the pace of the entire process. As noted already, the whole accession process is subject to the same opaque language of GATT Article XXXIII, which has been reproduced almost verbatim in Article XII:1 of the Marrakesh Agreement establishing the WTO.[58] This is a provision that was written with deliberate vagueness and parsimony so as to guarantee existing members complete control over the identity of countries that may join and the speed and terms under which they may do so. As the WTO Secretariat observed,

> *Perhaps the most striking feature of WTO Article XII is its brevity. It gives no guidance on the 'terms to be agreed', these being left to negotiations between the WTO Members and the Applicant. Nor does it lay down any procedures to be used for negotiating these terms, the latter being left to individual Working Parties to agree. ... In this, it follows closely the corresponding Article XXXIII of GATT 1947.*[59]

There are a number of useful guidelines prepared by the WTO Secretariat and the United Nations Conference on Trade and Development (UNCTAD) about the accession process, but every country is different and it is impossible to say definitively what a specific acceding country can expect from this arduous process. The one-sided nature of the rule and the process has been used in practice to delay, and in some cases deny, the accession of countries for other than trade-related reasons,[60] and when accession is finally granted, to impose terms and conditions that go well beyond the commitments undertaken by existing members. We have seen from previous experience that newly-acceding countries could be "forced" to undertake obligations that exceeded those applying to existing WTO members (often called "WTO-plus

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[58] Article XII (1) and (2) of the Marrakesh Agreement provides as follows: "1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto. 2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO."

[59] WTO Secretariat, *Technical Note on the Accession Process – Note by the Secretariat: Revision* (WT/ACC/10/Rev.3, 28 November 2005), p. 3.

[60] A recent article on the *Financial Times* (London, 15 April 2008, p. 6) noted that Ukraine's then imminent accession to the WTO (as from 16 May 2008), has put the country in a position to block Russia's bid to join the WTO, "giving it significant leverage that it could use in natural gas supply talks or in retaliation over Moscow's opposition to plans by Ukraine and Georgia to join NATO." Likewise, it was widely reported in the media that Russia ratified the Kyoto Protocol in 2004 at least in part because the EU made support for Russia's WTO accession conditional on such move. See *The Independent* (London, 23 October 2004).

obligations") while they acquired less-than full rights within the system (often called "WTO-minus rights").[61] In a few cases, this process has been used by WTO members to effectively "modify" the rules of the WTO Agreement and its annexes that apply to newly-acceding countries.[62]

The inequities resulting from the opacity of Article XII of the WTO Agreement and the self-serving manner with which many developed countries apply it to the accession of developing countries has attracted criticism from observers and acceding countries themselves over the years. To cite only two examples, Craig VanGrasstek called it "almost a reverse form of special and differential (S&D) treatment for developing countries,"[63] while Grynberg and Joy described it as a process "akin to having a complainant at a panel act as the sole panellist" and an "abuse of power".[64]

C. The WTO Decision to Expedite the Accession of LDCs

It was in response to these and many other criticisms that the Doha Ministerial Declaration promised special procedures to accelerate the accession of LDCs.[65] This commitment was supplemented by a 2002 decision of the WTO General Council which aimed to set out "simplified and streamlined accession procedures" for LDCs.[66] The key points of the Decision include (1) an exhortation that WTO members must "exercise restraint" in seeking concessions and commitments on trade in goods and services from acceding LDCs; (2) a reaffirmation that acceding LDCs offer access through "reasonable concessions and commitments" on terms commensurate with their individual development, financial and trade needs; (3) a commitment to make existing special and differential treatment benefits immediately available to all acceding LDCs from the day of accession; (4) a commitment to make available the transitional periods and arrangements foreseen under specific WTO Agreements, which should be accompanied by action plans for implementation of commitments and supported by technical assistance and capacity building measures; (5) a commitment not to demand

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[61] For an insider analysis, see Marc Bacchetta and Zdenek Drabek, "Effects of WTO Accession on Policy – Making in Sovereign States: Preliminary lessons from the recent experience of transition countries", WTO Staff Working Paper DERD-2002-02 (April 2002). For a legal analysis of these concepts, see Charnovitz, *supra* n. 43.

[62] For analysis of how this process was used to alter the WTO rules that apply to China, see Julia Ya Qin, "'WTO-Plus' Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol", in 37(3) *Journal of World Trade* (2003), pp. 483-522.

[63] See VanGrasstek, *supra* n. 34, p. 115.

[64] See Roman Grynberg and Roy M. Joy, "The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System", in UNCTAD (2001), p. 36.

[65] See Doha Ministerial Declaration (WT/MIN(01)/DEC/1, 20 November 2001), para. 9. The Declaration further stated, in para. 42, 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."

[66] See WTO, *Accession of Least-Developed Countries: Decision of 10 December 2002*, WTO doc. WT/L/508, 20 January 2003.

membership of plurilateral agreements as a precondition for WTO accession; (6) a cautious suggestion for WTO members to be supportive of LDCs in their bilateral negotiations including the conduct of such negotiations "in the acceding LDC if so requested"; and (7) to give priority to acceding LDCs in the provision of "targeted and coordinated technical assistance and capacity building" including under the Integrated Framework (IF).[67]

The adoption of this Decision was soon followed by the successful accession of Cambodia and Nepal in 2003, the first and so far the only LDCs to join the WTO since its establishment in 1995.[68] No African country has acceded in accordance with Article XII of the WTO Agreement since 1995,[69] and indeed no sub-Saharan African country (hereinafter SSA) except the Democratic Republic of Congo has ever joined the GATT/WTO system through the standard accession route over the past six decades. Although this reflects the fact that most SSA countries took advantage of the sponsorship option described above, there are also quite a few African countries that have tried the full-fledged accession process that are still struggling to see it finalized.[70] Devising the right strategy with which to exploit the lamentable record of the WTO on LDCs in particular to their advantage is one of the challenges for the Ethiopian negotiators.

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[67] The IF was first established in 1997 by six multilateral institutions (IMF, ITC, UNCTAD, UNDP, World Bank and the WTO) to support LDCs in the multilateral trading system by helping them integrate trade into their national development plans and "to assist in the co-ordinated delivery of trade-related technical assistance in response to needs identified by the LDC." See http://www.integratedframework.org/about.htm. Among its most valuable contributions are the so-called Diagnostic Trade Integration Studies (DTIS), including one for Ethiopia. All these studies are freely available for download at: http://www.integratedframework.org/index.html.

[68] The two candidates were formally welcomed into the club at the WTO's Cancun Ministerial Conference in September 2003, which may not be remembered for much else. See WTO, *Ministerial Conference: Fifth Session – Cancún, Ministerial Statement: Adopted on 14 September 2003*, WT/MIN(03)/20, 23 September 2003, para. 2.

[69] A qualification must be added here: Cape Verde, an African country that graduated out of the LDC category in 2007, got its accession package approved by the WTO General Council on 18 December 2007, but the country has yet to ratify the deal in order to complete its accession. Cape Verde can do this until 30 June 2008, pending which it remains an observer at the WTO. See WTO Press Release, "Lamy welcomes Cape Verde's accession as another sign of confidence in the WTO", Press/503, 18 December 2007.

[70] African countries currently negotiating accession, apart from Ethiopia and Cape Verde, are Algeria (since June 1987), Comoros (since October 2007), Equatorial Guinea (since February 2008), Liberia (since December 2007), Libya (since July 2004), Sao Tomé and Principe (since May 2005), Seychelles (since July 1995), and Sudan (since October 1994). The dates in parentheses indicate when their accession applications were accepted and accession working parties established.

III. Why Join the WTO, and Why Now?

To start with the question of timing, the Government's decision to join the WTO now must be seen in the light of the economic reform programme it has been pursuing since 1991/92. The reform programme aimed to replace the command economy of the previous regime with a market economy by, *inter alia*, "lifting restrictions on the private sector, instituting markets for factors of production, macro-economic and trade liberalization."[71] This economic programme has been developed into an overall economic development strategy that has come to be known as Agricultural Development-Led Industrialization (ADLI).[72] A key feature of the reform programme has been the unilateral economic liberalization process that, in trade terms, led to a reduction of the maximum import tariff levels in the country from as high as 240 percent prior to 1991 to 80 percent in 1995 and 35 percent in 2002.[73] WTO accession thus appears to be the logical extension of this reform programme.

In preparation for its WTO accession negotiations, the Government has established a WTO Affairs Department within the Ministry of Trade and Industry (MOTI), the ministry responsible for trade negotiations. While the minister of MOTI is the chief negotiator, a national Steering Committee made up of about 12 ministers and the heads of about ten autonomous governmental agencies has been set up to provide overall guidance for the negotiations and submit legislative proposals to the Council of Ministers for final decision. Furthermore, a national Technical Committee has been established to provide technical support to the negotiation effort.[74]

This does not of course answer the critical question of why Ethiopia wants to join the WTO at all. A few governmental documents and speeches by relevant officials provide indications of the overall objectives of the Government in seeking accession, but the statement made by Ethiopia's representative at the meeting of the WTO General Council on 10 February 2003 that considered Ethiopia's accession application appears to have captured well the Government's thinking in this respect and this section attempts to answer the "why" question using that official statement as a point of departure.

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[71] See WTO, *Trade-Related Technical Assistance Needs-Assessment Presented By Ethiopia*, WT/COMTD/IF/19, 26 February 1998, p. 8.

[72] ADLI's objectives are "to create adequate markets so as to sustain the growth of the agricultural sector; [to] generate foreign exchange necessary for the overall economic development; and [to] ensure the promotion of an internationally competitive industry." See WT/L/445, *supra* n. 4. A recent World Bank report strongly endorses this approach saying "the growth strategy of agriculture-based economies for many years to come has to be anchored in improving agricultural productivity." *World Development Report 2008: Agriculture for Development* (2007) p. 7.

[73] See Diagnostic Trade Integration Study (DTIS) of *Ethiopia: Trade and Transformation – Summary and Recommendations* (July 2004), Vol. 1, p. 20.

[74] See Ministry of Trade and Industry, *Directive 1/1999*, November 2007, Amharic version on file with author.

A. Reasons Given by the Government

At that General Council meeting, the representative of Ethiopia outlined "some of the reasons which had led his Government to decide to start the WTO accession process and to be part of the multilateral trading system" as follows:

> *[the Government] was fully convinced that the best way to accelerate economic growth and development was to integrate its economy into the multilateral trading system. To be a Member of the WTO was to be part of the rules-based multilateral trading system, and this would create confidence for investors and serve as an instrument to attract foreign direct investment for diversifying the production base and expanding the supply capacity of the country. It would also help to secure predictable and transparent market access. The effective participation of the least-developed countries in the decision-making process of the multilateral trading system would encourage them that the speed, nature and direction of globalization would be compatible with their developmental needs.*[75]

This statement makes it clear that the Government has identified at least four broad and interrelated objectives for its WTO accession: (1) to accelerate economic growth and development, (2) to attract foreign investment, (3) to secure predictable and transparent market access, and (4) to influence the speed, nature and direction of globalization. The first three objectives in particular are conventional explanations often invoked as reasons for WTO accession. However, we will argue below that the direct role of WTO accession for the attainment of these otherwise worthy goals may be limited. But, if the Government handles the accession process carefully and carries out its membership obligations in good faith, WTO accession is likely to help achievement of these goals, albeit indirectly.

1. WTO Accession and Economic Development

To start with the first and overriding objective, the relationship between trade liberalization – the one thing we can surely expect to come out of the WTO accession process – and economic growth is a complex and controversial one.[76] While there is strong evidence that suggests that "freer trade tends to lead to greater growth", no one seriously claims that freer trade necessarily leads to this. Leading trade economist and ardent champion of the multilateral trading system Jagdish Bhagwati wrote that "those who assert that free trade will also lead necessarily to greater growth *either* are ignorant of the finer nuances of theory and the vast literature to the contrary on the subject at hand *or* are nonetheless basing their argument on a different premise: that is,

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[75] See WTO doc. WT/GC/M/78, 7 March 2003.

[76] For an excellent analysis of the relationship between trade and economic development, and accessible to the non-economist, see WTO, *World Trade Report 2003* (Geneva 2003), pp. 78-113.

that the preponderant evidence on the issue (in the postwar period) suggests that freer trade tends to lead to greater growth after all."[77] Another influential group of scholars argued more recently that development comes primarily from inside, that "outsiders can play only a limited role" and that national "history and economic and political institutions have trumped other factors in determining economic success."[78] The World Bank also agrees that "[m]ost of the gains from trade liberalization result from a country's own reforms."[79] Peter Sutherland, the first Director General of the WTO (and the GATT's last), sees a more significant role in "outsiders", but even he does not present WTO membership as the primary determinant of economic success; he considers the trading system only as "a catalyst" for outside support once the internal commitment to reform is firmly in place – i.e., when "political leaders understand that fundamental change is necessary, or unavoidable, and that it cannot be achieved without [such] support from the outside."[80]

Even if we were to assume that freer trade leads to greater growth, it does not necessarily follow that a country has to be a WTO member to liberalize its trade policies.[81] Unilateral liberalization is always an option and, while WTO membership can facilitate the liberalization process, membership comes with a package of its own, and parts of that package can impose additional costs. As Ismail noted, "[t]here is increasing recognition that WTO rules may have gone too far in reducing the discretion available to many developing countries to use some trade policy instruments to enhance their economic development".[82] Indeed, it has been almost an article of faith among developing countries that the very design of the GATT/WTO system has been skewed against their interests since its inception. A summary of India's reaction to US proposals for the ITO in 1946, recounted by then US negotiator Clair Wilcox, captured well the discontent of developing countries at the time:

> *In India, as in other underdeveloped countries, the original American Proposals were regarded with suspicion. They were designed exclusively, it was said, to serve the present needs of the industrial powers. They offered no hope of reducing disparities in living standards between the nations of the world. They afforded no positive program for the development of backward areas. Their approach was wholly negative; they would deny to undeveloped nations freedom to*

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[77] Jagdish Bhagwati, *Free Trade Today* (Princeton, 2002), p. 42.

[78] See Nancy Birdsall, Dani Rodrik, and Arvind Subramanian, "How to Help Poor Countries", 84(4) *Foreign Affairs* (July/August 2005), pp. 136-152.

[79] World Bank, *Global Economic Prospects 2004*, p. 206.

[80] Sutherland, *supra* n. 44.

[81] However, for an argument that WTO accession helped its new members to accelerate their economic development, see Sutherland, *supra* n. 44.

[82] Faizel Ismail, "How Can Least-Developed Countries and Other Small, Weak and Vulnerable Economies Also Gain from the Doha Development Agenda on the Road to Hong Kong?", 40(1) *Journal of World Trade* (2006), p. 58.

use the very devices by which the industrial powers had established their pre-eminence.[83]

This developing country view was later found to have merit by a high profile study commissioned by the GATT itself in 1958, which concluded, *inter alia*, that "there is some substance in the feeling of disquiet among primary producing countries that the present rules and conventions about commercial policies are relatively unfavourable to them."[84]

The result was that the history of developing countries in the GATT/WTO system became a history of relentless struggles to modify the system in their favour, which traditionally meant an effort to water down the extent of obligations applying to them in the form of what is now generally known as special and differential treatment.[85] Among the notable multilateral responses that took a legal form over the lifetime of the GATT/WTO system are the amendment of GATT Article XVIII by the 1954-55 GATT Review Session to relax the conditions under which developing countries could take measures for infant industry protection as well as for balance-of-payments purposes, the 1964 addition of Part IV to GATT on trade and development, the introduction of the Generalized System of Preferences in 1971 on the basis of a temporary waiver from the MFN principle which was later put on a permanent legal foundation as the Enabling Clause, as part of the Tokyo Round agreements in 1979, and the insertion of special and differential treatment provisions in virtually every agreement that has been concluded as part of the Uruguay Round whether in the form of exemption from specific obligations, longer transition periods to implement certain commitments or the institution of special procedures in dispute settlement cases involving developing countries.[86] It is depressing to realize that most of the development issues at the top of the agenda today are almost exactly the same as they were during the formative years of the trading system.[87]

The conclusion for us here would be straightforward: WTO membership is neither a necessary nor a sufficient condition for economic growth and development. However, we can go a step further and argue that parts of the WTO package have the potential to

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[83] Wilcox, *supra* n. 7, p. 31.

[84] GATT, *Trends in International Trade: Report by a Panel of Experts* (presided by Gottfried Haberler, Geneva 1958), para. 62.

[85] As Keck and Low put it, the issue of special and differential treatment has been "a defining feature of the multilateral trading system for most of the post-war period." A. Keck and P. Low, *Special and Differential Treatment in the WTO: Why, When and How?* (WTO Staff Working Paper 2004), p. 3.

[86] For more on this, see WTO Secretariat, "Non-Reciprocal Preferences and the Multilateral Trading System" in WTO, *World Trade Report 2004* ((hereafter *WTR 2004*), pp. 26-44) and Dos Santos, et al, "Generalized System of Preferences in General Agreement on Tariffs and Trade/World Trade Organization: History and Current Issues", 39(4) *Journal of World Trade* (2005) pp. 637-670.

[87] For more on the trade and development debate, see Robert Hudec, *Developing Countries in the GATT Legal System* (Gower Publishing, Aldershot, Hampshire 1987).

directly undermine the development objectives of countries such as Ethiopia. The main threat comes from the TRIPS Agreement, which was brought into the WTO primarily to protect the interests of developed countries over developing countries.[88] Developing countries agreed to TRIPS in exchange for developed country commitments to liberalize agriculture and textiles,[89] but the result is an intellectual property regime that, in the words of Lord Templeman, will help to "keep developing countries in a state of economic subjection which is no better than the colonial exploitation of the last century."[90] None other than Bhagwati argued that the WTO approach to intellectual property, such as its 20-year protection for patents, amounts to "a transfer [of resources] from most of the poor countries to the rich ones" and dismisses TRIPS as "an item that does not belong to the WTO."[91] The utility of the TRIPS Agreement for poor countries like ours is next to non-existent,[92] and the Agreement itself recognizes this and provides for flexibilities designed to respond to the particular challenges of LDCs.[93] But, empirical evidence suggests that those flexibilities are rarely used by these countries.[94]

From the perspective of an acceding country, therefore, the accession process is effectively about finding the right point of balance between what is supportive of development in the WTO against that which could be damaging to development.

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[88] As Finger put it, intellectual property came into the Uruguay Round agenda "at the insistence of developed country industries. … [F]ew delegates or analysts (such as this reviewer) appreciated the size of the liability TRIPS would create for intellectual property users." See Michael Finger, "Review essay" in 6(1) *World Trade Review* (2007), p. 139. For an extensive treatment of the TRIPS Agreement, see UNCTAD-ICTSD, *Resource Handbook on TRIPS and Development* (Cambridge 2005).

[89] Donald Mcrae, "Developing Countries and 'The Future of the WTO'", 8(3) *Journal of International Economic Law* (2005), p. 603.

[90] Lord Sydney Templeman, "Intellectual Property" in 1(1) *Journal of International Economic Law* (1998), p. 605.

[91] Bhagwati, *supra* n. 77, p. 75. Likewise, Birdsall *et al* argue that "[c]urrently, the developed world uses international trade agreements to impose costly and onerous obligations on poor countries. The most egregious example has been the [TRIPS Agreement]. TRIPS will make the prices of essential medicines significantly greater, and this at a time when poor countries are being ravaged by one of the worst health epidemics ever known—HIV/AIDS. The price increase means that money from the citizens of poor countries will be transferred directly to wealthy pharmaceutical companies. … An international community that presides over TRIPS and similar agreements forfeits any claim to being development-friendly." Birdsall *et al*, *supra* n. 78, pp. 144.

[92] For a rare story of potential success by an LDC pursuing the route of intellectual property protection, see "Coffee in Ethiopia: Direct from the source", *The Economist*, April 17th 2008. It tells the story of how the Ethiopian Government successfully trademarked its three top coffee varieties, Harar, Yirgacheffe, and Sidamo and licensed the brands to about 70 suppliers worldwide, which has created the hope that this will establish the varieties as brand names and "enable farmers to demand higher prices."

[93] See, e.g. TRIPS Art. 66.

[94] For a recent review of the role of the TRIPS Agreement on technology transfer and development, see UNCTAD, *The Least Developed Countries Report 2007: Knowledge, Technological Learning and Innovation for Development* (Geneva 2007), available at http://www.unctad.org/Templates/Page.asp?intItemID=3073.

While it seems fairly clear that WTO membership can play a significant role in facilitating economic development, it is only secondary to a national commitment to economic, legal and overall policy reform. It is this internal commitment to reform that seems to have played the decisive role in the economic development of many countries that have acceded hitherto. The lesson from that experience appears to be that, for governments that have taken the firm commitment to reform, the WTO provides them with a framework within which to implement it, a catalyst with which to speed it up, and a reason to remain loyal to it even in the face of politically more expedient short term options.[95]

2. WTO Accession and Foreign Direct Investment

The role of WTO membership and consequent trade liberalization on the flow of foreign direct investment is at best unclear, and at worst counterproductive. There is plenty of empirical evidence that suggests that one of the main reasons companies invest in a foreign country is to avoid the import barriers of that country by producing their goods from inside the border. As a WTO Secretariat report noted, "[b]ypassing protectionist measures by establishing production facilities in the protecting country is perhaps the oldest explanation for FDI".[96] This theory would naturally lead to the conclusion that, other things being the same, higher import restrictions are more attractive to FDI than lower ones. In fact, the conclusion reached by economists who studied the subject is much more nuanced than that: "both high and low trade barriers can attract FDI, but of different types. … FDI attracted to protected markets tends to take the form of stand-alone production units geared to the domestic market. In contrast, low trade barriers, especially on intermediate goods, are conducive to vertical FDI attracted by the fundamental advantages of the host country, such as low labour costs, natural resources and generally favourable economic conditions. Judging from the cross-country regressions on inflows of FDI to developing countries, countries with an 'open' trade regime seem on average to attract more FDI than countries with a 'closed' trade regime."[97]

What this means for our purposes is that not much can be expected in terms of FDI flows from WTO membership per se.[98] Government policy seems to play the decisive

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[95] This is also what comes out from Sutherland's analysis: "The fundamental value of WTO membership – and the negotiations that precede it – is an opportunity to establish an agenda and identify priorities for the candidate countries. Government ministers and officials and businesspeople in these countries have to consider issues of WTO compliance whenever they are tempted to slip back into the old ways. Broadly, the restraints imposed by the WTO push countries toward better governance. Above all, the global trade rules provide a cover for reformers." Sutherland, *supra* n.44.

[96] See WTO, *The Relationship between Trade and Foreign Direct Investment: Note by the Secretariat*, WT/WGTI/W/7, 18 September 1997, para. 62.

[97] WT/WGTI/W/7, 18 September 1997, para. 73.

[98] Unlike participation in multilateral trade agreements, there is a clearer link between the conclusion of bilateral investment treaties (BITs) and the flow of FDI. A recent study in the US found that: "After reviewing both the literature, which makes note of the potential impact of BITs with strong investor

role once more. This can be illustrated by what is happening in those sectors that are already attractive to foreign investors, such as telecoms and finance. Foreign investment is not happening today in these sectors mainly because of government policy to keep the sectors closed to foreigners[99] rather than the country's non-membership of the WTO. If the accession process forces the Government to change such policies, we will probably see a quick flow of foreign investment into these sectors, but the same could very well happen much earlier if the Government were to make the policy change prior to accession.

3. WTO Accession and Secure Market Access

The third objective identified by the Government, i.e. to secure predictable and transparent market access, is much more plausible and directly relevant than the others. There is no doubt that WTO membership provides Ethiopian producers more predictable access to foreign markets. A question can be raised even here, though. As an LDC, Ethiopia already has duty- and quota-free access to some of the most lucrative markets for virtually anything that we are able to produce and supply. The generous everything-but-arms initiative of the EU[100] and the Africa Growth and Opportunity Act (AGOA) of the US[101] easily come to mind here. A typical counterargument here is that these are unilateral measures, introduced with the laudable object of helping the poorest countries in the world, but they are often time-limited and can be withdrawn unilaterally at the whims of those countries; hence they are also too unpredictable for any businessperson to base their decisions on. On the other hand, a commitment within the WTO framework is legally binding, and hence stable and predictable, and its breach will have legal consequences.

From a strictly legal angle, this is certainly the case. Breach of a commitment within the WTO will not be as easy as withdrawing a privilege granted unilaterally, not least because there is the threat of resort to the dispute settlement mechanism. In reality, however, this is a threat that exists only on paper for many developing countries. The

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protections, and our own econometric study on the promotional effects of a U.S. BIT, we find strong evidence that BITs have, to a significant extent, attained their stated goal of promoting investment." Jeswald W. Salacuse and Nicholas P. Sullivan, "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain", 46(1) *Harvard International Law Journal* (2005), p. 11.

[99] For the reasons why the Government is keeping telecoms in monopoly ownership, see "Interview: Meles Zanawi, Ethiopian prime minister", *Financial Times,* 6 February, 2007.

[100] See Council Regulation (EC) No. 416/2001 (28 Feb. 2001) O.J. 2001, L 60/43, later replaced by Council Regulation (EC) No 980/2005, *OJ L* 169/1, 30.6.2005, usually called the everything-but-arms (EBA) initiative. This is a unilateral EC instrument which applies equally to all LDCs in the world. For the current UN list of LDCs, see www.un.org/special-rep/ohrlls/ldc/list.htm.

[101] See Raj Bhala, "Global Interdependence and International Commercial Law: Generosity and America's Trade Relations with Sub-Saharan Africa", 18 *Pace International Law Review* (2006), pp. 133-225.

dispute settlement process is often too costly for a poor country to make use of,[102] and even the final benefits of a 'victory' before a panel and/or the Appellate Body could easily be illusory.[103] That is why LDC participation in WTO dispute settlement has been practically nonexistent over the past 12 years. According to the WTO's own analysis, one reason small countries do not participate in the dispute settlement process is because they "lack the necessary retaliatory power to enforce rulings in their favour. Anticipating the futility of their endeavours to coerce economically powerful countries into compliance, small countries abstain from engaging in costly litigation procedures in the first place or right away opt for other options to protect their interests".[104]

It follows that while WTO accession will enhance the predictability and transparency of market access opportunities for Ethiopia's products, it is important that we approach the accession process with a realistic view of what we can get out of it. Equally, the developed countries that offer unilateral market access privileges are unlikely to withdraw them arbitrarily despite the fact that there is no legal reason to stop them from doing so. It was not for legal reasons that they introduced such preferential access opportunities to poor countries in the first place. All the GATT/WTO system did was "authorise" these countries, with a waiver from the Most-Favoured Nation principle, to introduce, if they so wished, more favourable terms of trade for defined groups of poor countries without having to extend the same treatment to all members; but, it did not require them to do so. The political, moral and possibly economic arguments that persuaded them to introduce such schemes in the first place are likely

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[102] Shaffer and Nordstrom found that "it can take up to three years to litigate a [WTO] dispute, cost more than half a million dollars in legal fees, and require a significant time commitment from government officials who may already be severely under-resourced. Moreover, all this could be for naught, since there is no assurance that a ruling will be affirmative or that the respondent will comply in a manner that leads to market access." They concluded that "Notionally equal litigation rules provide unequal opportunities for WTO Members. Small trading nations are effectively constrained from being able to use the legal system to the full extent, constituting, in practice, a form of in-built discrimination." Shaffer, Gregory C. and Nordstrom, Hakan, "Access to Justice in the World Trade Organization: The Case for a Small Claims Procedure?" (May 2007), available at SSRN: http://ssrn.com/abstract=983586.

[103] There is extensive literature on the problems with the remedies system of the WTO particularly for developing countries, but for an excellent summary of the debate and a proposed solution, see Marco Bronckers and Naboth van den Broek 'Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement', 8(1) *Journal of International Economic Law* (2005) 101-126. The authors argue that the WTO dispute settlement system envisages two types of remedies: compensation (in the form of reduction of trade restrictions in sectors where the winning party in the dispute has a particular interest) or retaliation (in the form of withdrawal by the winning party of proportionate trade concessions in sectors of particular interest to the offending party). However, while compensation is only theoretical (because it is dependent on the agreement of the offending party), retaliation is often counterproductive to the interest of the winning party and almost impossible to use especially by developing countries. In their own words, trade retaliation "is not available to [developing country] Members, with the possible exception of the largest amongst them. The cost of imposing these measures is simply too high, and developing countries feel – often rightly so – that given the small size of their markets, retaliation will never put sufficient pressure on larger, more developed Members." Shaffer and Nordstrom, *Id.*, p. 102.

[104] *WTR 2007,* p. 278.

to remain nearly as effective a guarantee as the WTO dispute settlement system can be for a poor country like ours. The real challenge on Ethiopia's export trade for now and the foreseeable future remains our poor production and supply capacity rather than the traditional trade barriers in the developed countries.[105]

4. WTO Accession and Globalization

Finally, the fourth objective of the Government, i.e. to use participation in WTO decision-making processes to influence the speed, nature and direction of globalization is again plausible, if slightly overstated. If Ethiopia plays its cards well, its membership can further strengthen the groups within the WTO that have been fighting for a more development-friendly trading system, whatever that is. This can however be only a long-term ambition. The sheer breadth and technical complexity of the WTO system means that our focus for the short- to the medium-term will remain on how to best master the technical details of the system and use the knowledge to negotiate a reasonable accession package that preserves some policy space and still forces us to critically examine our laws, institutions and practices and take appropriate reform measures. Whether we like it or not, the globalization process is shaped by forces totally beyond the control of any single nation, and the best we can do is follow at a reasonable distance rather than lead from the front.

In conclusion, it appears that the objectives set by the Government for its WTO accession, while certainly plausible, probably paint too rosy a picture of WTO membership. This is not however to suggest that Ethiopia should not join the WTO; it is only to argue that the said reasons are based on an exaggerated view of the trading system and its potential role for the development of the country. Otherwise, it is the view of this author that Ethiopia's accession to the WTO is long overdue and the sooner we join, the better. The reasons are neither original nor exhaustive, and include the following.

B. Additional Reasons

The WTO Secretariat's comprehensive *World Trade Report 2007* mentions two "popular propositions" often used to make the case for accession to the WTO, i.e. accession as an "external anchor" and accession as a "signalling device", but they dismiss them both as having not yet been formalized and difficult to assess exactly how they operate.[106] I suggest that both propositions have some relevance for Ethiopia's accession. Importantly, I see three potential benefits from the process of accession as well as final membership of the WTO.

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[105] I use the term "traditional trade barriers" advisedly to refer to tariffs and quantitative restrictions as opposed to the health, technical and other standards that still are significant barriers particularly to our agricultural exports.

[106] See *WTR 2007*, p. 60.

Firstly, for a country like Ethiopia, with laws largely unknown outside a narrow circle, and often irrelevant to day-to-day administrative and business practice, the accession process gives us an opportunity to systematically collect our laws and evaluate the extent to which the laws in the books are observed in the daily life of the nation. It is not difficult to demonstrate that a wide gap exists between the laws in the *Negarit Gazetas* and the 'laws' in action. The accession process will force us to critically examine our own system, learn our own laws and practices and revise them to fit in with an externally-imposed system of rules and principles.[107] This is where "external anchorage" and "lock-in" become relevant. Not only do we need to understand and reform our laws, we will also need to defend them in front of a powerful club of nations that are prepared to challenge us.

Secondly, the transparency requirements of the WTO, i.e. reporting obligations contained in virtually all WTO instruments[108] on all trade-related legislative and administrative developments in the country as well as the periodic national trade policy reviews conducted by the WTO mean that the law review and reform process is a continuing one. It is an expensive and time-consuming process, but it will ultimately be more than offset by the resulting benefits. If carried out properly, the effect can be clearer, more business-friendly and enforceable laws that are administered professionally and transparently and with accountability embedded in them. Put differently, the process of accession as well as the resulting membership obligations could enhance rule of law and the quality of institutions in the country. The quality of institutions is "an important component of a well-functioning market" and "[t]he state of institutions will ... likely affect the amount of trade and welfare generated by trade liberalization."[109] As Carothers put it, "[b]asic elements of a modern market economy such as property rights and contracts are founded on the law and require competent third-party enforcement. Without the rule of law, major economic institutions such as corporations, banks, and labor unions would not function, and the government's many involvements in the economy — regulatory mechanisms, tax systems, customs structures, monetary policy, and the like — would be unfair, inefficient, and opaque."[110] Both the process of accession as well as final membership can be used to consolidate rule of law and speed up the process of institution building in the country.

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[107] As Murray Gibbs observed, acceding countries "often lack the capacity to clearly identify the conflicts between their existing laws, regulations and administrative practices and the obligations of the WTO Agreements." UNCTAD (2001), p. 163.

[108] Just to mention a few examples, see GATT Art. X, GATS Art. III, TRIPS Art. 63 and so on.

[109] See *WTR 2004*, p. xxiv. The term institution is used in a broad sense to mean "formal and informal rules of behaviour, ways and means of enforcing these rules, procedures for the mediation of conflicts, sanctions in the case of a breach of the rules, and organizations supporting market transactions." *Id.* See also E-U Petersmann, "How to Promote the International Rule of Law: Contributions by the World Trade Organization Appellate Review System" 1 *Journal of International Economic Law* (1998), pp. 25-48, at 26.

[110] Thomas Carothers, "The Rule of Law Revival", 77(2) *Foreign Affairs* (March/April 1998) p. 97.

Finally and related to the above two, a number of WTO provisions require the establishment of an independent system for the objective and impartial judicial review of administrative action.[111] The transparency requirements and the periodic surveillance process described above, coupled with the fact that there is now an explicit requirement on the Government to ensure availability of a well-functioning independent judicial review mechanism, can have significant positive implications for the evolution of the country's administrative and judicial systems.

The reasons briefly outlined above are worthy goals in themselves, but they are also critical means for the achievement of other goals, including those of economic growth and attraction of foreign investment identified by the Government. For these and several other reasons, the decision of the Government to accede to the WTO is the right one.

Concluding Remarks and Areas for Future Research

The WTO is virtually about everything the government of a nation is – whatever is within the scope of government activities could potentially be brought within the scope of the WTO. This ranges from the type of industrial, agricultural and even social development policies adopted, to the way imports and exports are treated, to the manner government agencies purchase stationery for office use, to the content and manner of administration of almost any laws of the country. Not only are governments required to enact, and live by, laws that comply with WTO requirements, they are also often required to be seen to be doing so – transparency is a vital principle of the WTO system.

The Ethiopian Government is right to seek accession to the WTO, and it must be supported. The reasons given by the Government for its decision to seek accession – facilitation of economic growth, attraction of foreign investment, securing predictable and transparent market access, and influencing the direction of globalization – are broadly in line with the conventional explanations about the benefits of WTO accession. As we attempted to show in section IV above, however, the direct role of WTO accession for the attainment of these otherwise worthy goals may be limited. But, if the accession process is handled carefully and final membership obligations carried out in good faith, WTO accession is likely to help achievement of the goals articulated by the Government, *albeit* indirectly. WTO accession will require review and reform of laws and policies and the establishment of administrative procedures and implementing institutions that are objective, impartial and effective. The attributes of rule of law, administrative transparency and accountability, and impartial judicial review of administrative action are some of the most vital prerequisites for a

[111] See, e.g. GATT Art. X:3(b), GATS Art. VI:2(a), and TRIPS Art. 41:4.

functioning domestic market that is attractive to domestic and foreign investment and supportive of economic growth and development.

In order to make the best out of the accession process, however, relevant government departments, academic and training institutions and the business community must carefully consider how they can work together to come up with the best possible institutional response. The priority must be to establish research and training institutions, made up of economists, lawyers and international relations experts, dedicated to international economic relations. Ethiopia's position as the seat of international, continental and regional economic institutions means that there is potentially a large pool of expertise within Addis that can be tapped into without undue difficulty. A number of multilateral and bilateral initiatives have been launched to support particularly the LDCs, and the Integrated Framework (IF) is perhaps the most prominent multilateral effort so far. A project proposal prepared jointly by the Government, the business community and universities for the establishment of a dedicated research and training institution is likely to win the financial and other backing of some of these funding arrangements. The Government and the business community must also encourage and support the establishment of independent think tanks and non-governmental organizations that are vital for the huge task of information dissemination, public education, and critical analysis and debate that is badly needed in the course of this process.

New research and analysis in this area should be able to help us appreciate that, apart from the poor production and supply capacity mentioned above, the main hurdles against our export trade relate to a combination of bad geography and poor infrastructure rather than tariff-based protectionism in our potential markets.[112] However much we may love our rugged terrain and enjoy the breathtaking landscape, we know that those same topographical features, together with distance from the nearest sea port, mean high cost of infrastructure and high overall transaction costs for our import-export trade, often making our exports unprofitable and our imports unaffordable. This is particularly the case for the two sectors in which we have the potential to compete on the global marketplace, i.e. agriculture and mining, which are characterised by the production of goods with a "low value-to-weight ratio."[113] A policy to enhance Ethiopia's exports must thus primarily focus on how best to address the infrastructure problems.

As if our rugged terrain, distance from the sea and poor infrastructure are not hurdles enough, Ethiopia's landlockedness since 1993 has added an even larger problem to the

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[112] The impact of tariffs on the export competitiveness of our goods can be significantly smaller than the effect of transport costs. According to a WTO study, "for the majority of Sub-Saharan African countries, transport cost incidence for exports (the share of international shipping costs in the value of trade) is five times higher than tariff cost incidence (the trade weighted *ad valorem* duty actually paid)." *WTR 2004*, p. 114.

[113] See *WTR 2004*, p. 115.

mix. Infrastructural challenges can be overcome by a determined effort from within; problems of transit and access to the sea, on the other hand, require the consent and cooperation of other sovereign states within the province of international law. This leaves our vital national interests in the hands of sometimes unfriendly, often unpredictable, and possibly unstable, regimes in the region.[114] This is where regional economic integration arrangements could play an important role, including in building regional political stability and a cooperative spirit.[115] Regrettably, however, Ethiopia once again appears to be a reluctant player even here, which can be seen from its non-membership of the COMESA Free Trade Area, the lack of progress in the economic integration objectives of the Intergovernmental Authority on Development (IGAD) and the absence of any other serious bilateral or regional integration initiatives to which Ethiopia is a party.[116] Whatever one's view of the proliferation of regional trade agreements (RTAs) over the past decade or so, a geographically disadvantaged country such as Ethiopia is likely to benefit from closer regional economic integration. The research and training institutions proposed above should help us clarify the role of these and other factors on our export trade opportunities and assist policymakers to get a clearer sense of priorities. Such research should inform not just our trade negotiation policy but the type of products we specialize in must also reflect these geographical, political and infrastructural realities.

Finally, and by way of caution, while the Government's decision to seek accession is the right one, it is not clear if it is truly committed to a speedy conclusion of the accession process. It is already 11 years since Ethiopia formally became an observer to the WTO with the declared intention to apply for accession "in the near future",[117] and five years since its accession application was accepted by a meeting of the General Council where the Ethiopian representative expressed his Government's "commitment

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[114] Note that, even under normal circumstances, landlocked countries face "on average, 50 per cent higher transport costs than otherwise equivalent coastal economies." *WTR 2004,* p. 115.

[115] RTAs can serve several objectives, an important one of which is regional political stability. It is widely recognized that creating linkages between economies through RTAs "can make conflicts more costly and favour cross-border collaboration". *WTR 2003,* p. 50.

[116] Note that there are a few intra-IGAD arrangements of a bilateral nature. For example, Ethiopia and Sudan have a bilateral agreement which aims to promote trade and broader economic relations between the two countries. The parties to this agreement however agreed to grant only Most-Favoured-Nations (MFN) treatment to each others' goods. (See *Trade Agreement between the Government of the Republic of Sudan and the Government of the Federal Democratic Republic of Ethiopia*, signed at Khartoum on 6th March 2000, on file with author.) Likewise, Ethiopia and Kenya also have a bilateral trade agreement with effectively the same objectives as the Ethio-Sudan agreement except that the former has a broader scope. (See *Trade Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Kenya*, signed at Addis Ababa on 23rd July 1997, on file with author.) In both cases, the key trade commitment only requires of the parties MFN treatment for each other's trade in goods and services. Given that all three countries are members of COMESA, which naturally aims to deliver preferential terms of access that are more favourable than MFN, it is difficult to find a trade rationale behind such agreements, let alone the seed of any free trade agreement.

[117] WTO doc. WT/L/229, 10 October 1997.

to speed up the accession process."[118] This needs to change. Given the technical complexity of the process and our institutional deficiencies, only a sense of utmost urgency can bring this process to completion within a reasonable period.

At the same time, we know that the process may drag on even under the best of intentions and commitments on our part. This is where a careful management of our diplomatic relations will be needed. As anywhere in life, friends in high places are vital, and the friendly relations that prevail between Ethiopia and a number of influential WTO members and groupings will be critical. The Africa Group and the LDCs Group within the WTO are a natural ally that should be skilfully utilized to expedite the process. A number of developed members of the WTO, including the influential US and EU, might also like to see Ethiopia inside the WTO. Indeed, the Organization itself will be keen to support a determined African LDC to complete the process expeditiously not least because its reputation and legitimacy will benefit from it. However, ultimately, Mosoti was right when he said that the ability to carry through the accession process successfully depends on "the tenacity and expertise of the acceding country's negotiators and political will and support from home."[119]

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[118] See WTO doc. WT/GC/M/78, 7 March 2003, para. 11.

[119] Victor Mosoti, "The Legal Implications of Sudan's Accession to the World Trade Organization", *African Affairs* (2004), 269–282, pp. 273-74. As the WTO Secretariat likes to stress, "much depends on the readiness of the applicant country to meet not only the rules and obligations of the WTO's market-economy principles, and its policies of pro-competition and non-discrimination, but also the market-access conditions for goods and services which the applicant country grants to other WTO Members." See WTO, "WTO successfully concludes negotiations on China's entry", *Press/243*, 17 September 2001, http://www.wto.org/english/news_e/pres01_e/pr243_e.htm.