

Nepal's Accession to the World Trade Organization: Case Study of Issues Relevant to Least Developed Countries

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ABSTRACT

Nepal was the first Least Developed Country to negotiate its accession to the World Trade Organization. The negotiation process was demanding, yet it succeeded in securing a relatively well-balanced accession package. The purpose of this paper is to describe the contours of the negotiation process and to share lessons learned. The paper details the onerous process involved in the accession of LDCs to the WTO and describes the context of Nepal's negotiating positions. Some distinctive aspects of Nepal's approach to the process of accession are highlighted and compared with the situation of some other LDCs.

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Acronyms

ADB	Asian Development Bank
AfT	Aid for Trade
AoA	Agreement on Agriculture
ASYCUDA	Automated System for Customs Data
CSOs	Civil society organizations
CV	Custom Valuation
DFID	Department for International Development, United Kingdom
DSB	Dispute Settlement Body
DTIS	Diagnostic Trade Integration Study
EIF	Enhanced Integrated Framework
FAO	Food and Agriculture Organization of the United Nations
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GTZ	German Development Agency
HS	Harmonized System
IF	Integrated Framework
IFC	International Finance Corporation
ITA	Information Technology Agreement
ITC	International Trade Centre
LDCs	Least Developed Countries

MFN	Most Favoured Nation
MoCS	Ministry of Commerce and Supplies
MoF	Ministry of Finance
MoFTR	Memorandum on the Foreign Trade Regime
NGOs	Non-Governmental Organizations
NPC	National Planning Commission
NRB	Nepal Rastra Bank
NTC	Nepal Telecommunication Corporation
ODCs	Other duties and charges
SAARC	South Asian Association for Regional Cooperation
SPS	Sanitary and Phytosanitary Measures
SWAp	Sector-wide Approach
TBT	Technical Barriers to Trade
TPRM	Trade Policy Review Mechanism
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TRQs	Tariff rate quotas
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UPOV	International Union for the Protection of New Varieties of Plants
WP	Working Party
WTO	World Trade Organisation

Introduction

The negotiations to join the WTO have been highly demanding for Nepal. There are signs that the process is likely to become even more complex for other countries as the number of WTO members expands and the number of issues included in the WTO broadens. Because of the constructive ambiguity in the legal provisions dealing with accession in the Agreement establishing the WTO, incumbent members wield disproportionate power over aspiring members who are required to assume several more obligations than the founding members as a price for their entry into the multilateral trading system. Although there are no signs of any shift in the balance of power, a decision by the General Council in December 2002 to streamline the process of least developed countries' (LDCs) accession to the WTO has helped limit to some extent the possibility of imposing unfair conditions on LDCs.

As the first LDC to have acceded to the WTO by completing accession negotiations, Nepal has a number of lessons to share. Nepal's accession package is considered relatively well balanced in terms of both offering a credible signal to traders and foreign investors about its commitment to economic reform

and maintaining the policy space required to protect its development interests. This did not happen by accident. It was a result of a thoughtful negotiating approach taken by the country. It entailed, among other things, coordination across government agencies, mobilization of external support and diplomatic capital, and wide consultations with a range of stakeholders, including the private sector, civil society organizations (CSOs) and farmers' groups.

Although Nepal has not been able to take full advantage of its WTO accession because of several internal problems (such as political instability, supply-side constraints and inability to obtain technical assistance to overcome trade-related impediments), it has lessons to share with other LDCs that are in the process of WTO accession. These include enhanced use of the LDC platform to facilitate collective bargaining, pursuit of tailored technical assistance, preferably through a multilateral agency, establishment of a formal institutionalized mechanism for consultation, regular monitoring of the implementation of commitments made at the time of acceding to the WTO and a commitment to sustained trade reform.

1 The Process of Accession to the WTO

Affirmations to Facilitate LDC Accession

The transformation of the General Agreement on Tariffs and Trade (GATT) into the WTO fundamentally altered the mandate and the modalities of the institution, including the way new members accede to it. The jurisdiction of WTO rules is wider and more intrusive than those of the GATT. In addition to tariff bindings, members are required to make commitments on legal and institutional structures, domestic policies on subsidies, product standards, investment, regulations on trade in services, protection of intellectual property rights and transparency, among others. Acceding countries are obliged to accept rules as a “single undertaking”; that is, unlike in the GATT, members cannot choose which agreements to adopt and which not to adopt, but have to accept the WTO legal code as a complete package. WTO also permits an existing member to invoke the provision of non-application of WTO agreements against an acceding country. This gives rise to asymmetric power in the negotiation in favour of incumbent members who may use it as a negotiating lever to obtain concessions from the acceding country. As a result, the cost of accession has increased significantly and the process has become complicated and cumbersome (Basra 2007).

The direct benefits of joining WTO include non-discrimination, predictability and stability of the trading environment, increased market access and the opportunity to participate in multilateral trade rule-making and standard-setting. Indirectly, WTO membership may send credible signals about a country's commitment to globally-accepted economic norms, thereby attracting foreign investment (Delegn 2005, UNCTAD 1998). While many of the benefits are intangible and accrue over time, the costs of membership are real and immediate. This tradeoff implies that LDCs with limited trading potential need to try to secure benefits that transcend mercantilist gains and leverage WTO negotiations

to overcome structural impediments that will enable them to achieve long-term development objectives. They need to preserve the policy space to make the speed, nature and direction of the liberalization process compatible with their socio-economic imperatives.

WTO members have expressed their commitment to facilitate the speedy accession of LDCs to the WTO ever since the High Level Ministerial Conference of LDCs held in Geneva in 1997. In the run-up to the third WTO Ministerial Conference in Seattle in 1999, the European Union proposed providing “fast-track” accession to the LDCs; this would have required LDCs to bind industrial tariffs at 30 per cent and agricultural tariffs at 40 per cent, make services commitments in up to three sectors and to accept the automatic application of the transitional periods agreed in the Uruguay Round (WTO 1999a). This did not receive unanimous endorsement (Van-Grasstek 2001: 134). Acceding countries in general, and LDCs with their limited financial, legal and technical resources in particular, have therefore continued to complain of the onerous and one-sided nature of the accession process. These concerns were reflected in other international fora, such as the third conference of LDCs (and appeared in the Brussels Plan of Action 2001). The first LDC Trade Ministers Meeting, held in Zanzibar in 2001 in the run-up to the Doha WTO Ministerial Conference, also demanded that LDCs' accession be facilitated “with a more streamlined process of accession, under terms consistent with their development, financial and trade needs and commitments not higher than those undertaken by LDC WTO members, including transitional periods mandated by WTO Agreements starting from the date of accession” (WTO 2001, para 4).

Following this, the Fourth Ministerial Conference of the WTO held in Doha in 2001 made sweeping commitments on LDC accession in two paragraphs. The first stated: “we are committed to accelerating the accession of least developed countries” (paragraph 9, WTO 2001); the second read: “Accession of LDCs remains a priority for the Membership. We

agree to work to facilitate and accelerate negotiations with acceding LDCs” (paragraph 42). These efforts culminated in the preparation of the Guidelines on the Accession of LDCs by the WTO Sub-Committee on LDCs, which were subsequently approved by the General Council in December 2002. The resulting WTO Decision affirmed that the “negotiations for the accession of LDCs to the WTO be facilitated and accelerated through simplified and streamlined accession procedures, with a view to concluding these negotiations as quickly as possible”. It provided guidelines focusing on four areas, namely: (a) market access; (b) WTO rules; (c) process; and (d) trade-related technical assistance and capacity building. The Decision also suggested that the guidelines be reviewed regularly and discussed during the General Council meetings, as well as in Ministerial Conferences (WTO 2002).

However, in the three years between the adoption of the Guidelines and the Hong Kong Ministerial Conference in 2005, only two LDCs (Cambodia and Nepal) acceded to the WTO. At the Hong Kong Ministerial Conference, Ministers once again reaffirmed their commitment in paragraph 47 of the Declaration: “We agree to facilitate and accelerate negotiations with acceding LDCs based on the accession guidelines adopted by the General Council in December 2002. We commit to continue giving our attention and priority to concluding the ongoing accession proceedings as rapidly as possible” (WTO 2005a). Since the Hong Kong Ministerial Conference, only one LDC (Cape Verde) has acceded to the WTO, while 11 more remain in the process of accession.¹

Similarly, LDC Trade Ministers’ declarations, made in Dhaka (in 2003), Maseru (in 2008) and Dar Es Salam (in 2009), repeat the plea to WTO members to fully and faithfully adhere to the letter and spirit of the Guidelines for LDCs’ accession to the WTO adopted by the WTO General Council. Meanwhile,

the WTO Secretariat’s note on Accession of LDCs to the WTO (2009) has expressed general satisfaction with the way WTO members have attached significance to the accession of LDCs and their efforts to comply with the Guidelines. The note pleads ignorance on what transpires during the bilateral negotiations, which are by definition non-transparent and not open to public scrutiny.² However, this is where the most stringent conditions are attached (see, Grynberg and Joy 2000; Jones 2009). Even large countries such as China and Russia, which in theory have significant bargaining power, have had little room for maneuver when demands for concessions are imposed on them during bilateral negotiations (Jones 2009: 294).

Because of the slow progress in LDCs’ accession, there is considerable cynicism around the process. Grynberg and Joy (2000) argue that “(o)nly those who are extraordinarily naïve would believe that the system of accession will be reformed”. They advance two reasons. *First*, countries in the process of accession are, by definition, outside the WTO system and have no role to play in reforming the process. Knowing that engaging in general debate is unlikely to lead to an agreed result that would ease the burden on acceding countries, they have rather concentrated on negotiating specific terms with the incumbent members (Williams 2008: 50). *Second*, those inside the system are unlikely to be willing to expend scarce political capital in reforming the system because there is little for them to gain from such reform. A third reason can be added. Once the acceding countries enter the WTO, they are likely to seek to exercise their new-found power and demand concessions from other acceding countries. The major fault line therefore lies in the fact that the over-riding goal of trade negotiators is to extract concessions from their trading partners and they are not likely to abandon this by following the Guidelines of the General Council, which are nothing but a set of “best endeavour” clauses.

¹ These are Afghanistan, Bhutan, Comoros, Equatorial Guinea, Ethiopia, Lao People’s Democratic Republic, Samoa, Sao Tome and Principe, Sudan, Vanuatu and Yemen.

² Evenett and Braga (2006) suggest that stakeholders in applicant countries “should bear in mind that important steps in the WTO accession process remain confidential” (p 2).

For the reasons discussed above, the General Council Decision may not be considered a perfect document, and certainly not if its non-binding nature is considered. However, contrasting the accession package of Vanuatu, which was agreed in 2001, with those of Cambodia, Nepal and Cape Verde, there is reason to suggest that the General Council Decision has played a role, albeit minor, in constraining WTO members from imposing blatant “WTO-plus” conditions on LDCs. During their own bilateral negotiations, the Nepali negotiators frequently used the term “WTO-plus” to draw the attention of the *demandeurs* to the fact that the latter were crossing the lines established for them by the General Council Decision. Although some of the offers made by Nepal prior to the General Council Decision could not be altered, Nepali negotiators found that they were able to contain the damage to a significant extent in the aftermath of the Decision. Despite this, the commitments made by acceding LDCs are more stringent than those made by existing LDC members of the WTO and in some cases they are higher than those made by other developing country members (UNCTAD 2004; Baumüller et al. 2008).

During the Uruguay Round, GATT members introduced the concept of a “single undertaking,” i.e., considering WTO agreements as a package. Neither the incumbent members nor prospective ones can opt out of the core disciplines of the WTO. Except for the two plurilateral agreements,³ which bind only the limited number of countries that have agreed to them, all agreements are equally binding on all members. The major difference is that, due to the very construct of Article XII, which provides the incumbent members with a *carte blanche* to dictate the terms and conditions of accession for newcomers, the conditions imposed on the latter are more demanding (Adhikari 2005).

Countries acceding to the WTO have to pursue three tracks of negotiations: (i) multilateral negotiations in the Working Party (WP), mainly focusing on

the acceding country’s economic system and trade regime; (ii) bilateral negotiations focusing on the acceding country’s concessions on tariffs and commitments on agricultural subsidies (market access in goods); and (iii) bilateral negotiations focusing on the acceding country’s commitments on trade in services. Negotiations on tariff concessions and market access conditions on services are conducted bilaterally on the basis of offers and requests. The procedures suggest that the negotiations may be initiated by either the applicant or the members. In practice, members tend to wait for the acceding country to submit an initial offer of proposed bound rates and initial commitments on services before requesting bilateral negotiations.

Although the procedure to be followed during accession looks fairly straightforward, acceding countries have often complained about the long, drawn-out process of accession (see table 1.1). However, the most common complaint from acceding countries is that the WP process is too inquisitorial and invasive. The fact-finding methods used are frequently repetitive and uncoordinated. Often the WP follows a set routine and asks standard questions without differentiating across countries, or it picks up issues that are hardly relevant or central to the accession process of the aspiring country (Bonapace 2003: 177). Some acceding countries have even gone so far as to criticize the accession process as being stacked in favour of developed incumbents who can baffle applicants with jargon and out-manoeuvre them by virtue of superior resources (Grynberg and Joy 2000: 289). The problem is further compounded by the lack of capacity and confidence among the negotiators from smaller acceding countries, in particular the LDCs.⁴

The time taken for the completion of the accession process varies. Among those countries that have acceded to the WTO, the shortest period between the presentation of the Memorandum on the Foreign Trade Regime (MoFTR) and accession was 34 months for Kyrgyzstan; the longest was 14 years and nine months for China. In the case of Nepal, the process took slightly less than five years (see table 1.2).

³ These are the Agreement on Government Procurement and the Agreement on Civil Aircraft.

⁴ This point is acknowledged by the WTO; see WTO (2009).

Table 1.1

WTO Accession Procedure

Step	Procedure	
1.	The applicant sends a communication to the Director-General of the WTO indicating its desire to accede to the WTO under Article XII.	
2.	The communication is circulated to all WTO Members.	
3.	A Working Party (WP) is established and a Chairperson is appointed.	
4.	The WTO Secretariat informs the applicant about the procedures to be followed.	
5.	The applicant submits a Memorandum on its Foreign Trade Regime for circulation to all WTO Members.	
6.	The WTO Secretariat checks the consistency of the Memorandum with the outline format (Annex I) and informs the applicant and the members of the WP of its views.	
7.	WP members submit questions on the Memorandum and the applicant answers. (Repeat if necessary).	Acceding country submits initial offers on industrial tariffs, agricultural tariffs, services offer, existing regime on agricultural subsidies (ACC 4), descriptions of its services regime (ACC 5) and provides checklists on Agreement on Sanitary and Phytosanitary (SPS) Measures, Technical Barriers to Trade (TBT) (ACC 8) and Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (ACC 9).
8.	The WP meets.	
9.	WP members submit and the applicant answers more questions on the Memorandum.	Bilateral negotiations between the applicant and interested WP members on concessions and commitments on market access for goods and services (as well as on the other specific terms of accession) are undertaken.
10.	The WP meets again.	
11.	Repeat steps 9 and 10 above, until 12.	
12.	The examination of the Memorandum is complete.	
13.	Terms and conditions (including commitments to observe WTO rules and disciplines upon accession and transitional periods required to make any legislative or structural changes necessary to implement these commitments) are agreed.	Concessions and commitments on market access for goods and services (as well as on the other specific terms of accession) are agreed.
14.	A WP Report is prepared.	The Schedule of Concessions and Commitments to GATT 1994 and the Schedule of Specific Commitments to the General Agreement on Trade in Services (GATS) is prepared.
15.	A draft Decision and a draft Protocol of Accession (containing commitments listed in the WP Report and the Schedule of Concessions and Commitments to GATT 1994 and the Schedule of Specific Commitments to the GATS) is prepared.	
16.	The WP adopts the 'accession package'.	
17.	The General Council/Ministerial Conference approves the accession package.	
18.	The applicant formally submits the instrument of ratification of the accession package.	
19.	The applicant notifies the WTO Secretariat of its formal acceptance.	
20.	30 days after step 19, the applicant becomes a Member of the WTO.	

Source: www.wto.org

It needs to be noted that a long time-frame for accession is not due solely to the lack of well defined criteria for membership. Michalopoulos (2002: 65-6) lists five possible reasons for the delays in the WTO accession process. First, there are delays due to weak follow up by the acceding countries in the submission of the MoFTR. In some instances, this has taken up to five years (as in the case of Uzbekistan). Second, in a few cases, political issues between an applicant and one or more influential members have caused delays (as in the cases of China and the

Former Yugoslav Republic of Macedonia). Third, due to the lack of human or material resources, some acceding countries face particular difficulty in preparing the MoFTR, causing delays. Fourth, the accession negotiation itself becomes lengthy because of the unwillingness on the part of applicants to make sufficiently liberal commitments and the dissatisfaction of some members with the level of commitments made by the applicant. Finally, the attitude of the incumbent members, notably a desire to extract as many concessions as possible, often exceeding

Table 1.2

Nepal's Accession Timeline

16 May 1989	Applied for membership under GATT
21–22 June 1989	Working Party under GATT established
26 February 1990	Submitted MoFTR
5 December 1995	Submitted written request showing Nepal's interest in joining the WTO
31 January 1996	Decided to continue the GATT Working Party for the accession of Nepal to the WTO; Nepal given observer status.
10 August 1998	Submitted the MoFTR
17 September 1998	Submitted supplementary documents on agriculture
8 June 1999	Submitted replies to the questions on the MoFTR
9 July 1999	Submitted documents on services
12 April 2000	Submitted documents on SPS measures, TBT and TRIPS
8-24 May 2000	First round of bilateral negotiations with 10 WTO members
22 May 2000	First formal meeting of the Working Party
21-27 Sept 2000	Second round of bilateral negotiations with 10 WTO members
21 May 2002	Submitted the Legislative Action Plan
July 2002	Submitted schedules on goods and services
9–13 September 2002	Third round of bilateral negotiations with seven WTO members
12 September 2002	Second formal meeting of the Working Party
20–23 May 2003	Fourth round of bilateral negotiations with seven WTO members
4–18 July 2003	Fifth round of bilateral negotiations with three WTO members
11–15 August 2003	Sixth round of bilateral negotiations with five WTO members
15 August 2003	Concluded Nepal's accession protocol by the third meeting of the Working Party
11 September 2003	Accession Package approved by the Fifth Ministerial Conference in Cancun, Mexico
24 March 2004	Nepal ratified the WTO treaty and its agreements
23 April 2004	Nepal became the 147th Member of the WTO

Source: Adhikari et al. (2008): 27

WTO requirements, coupled with their insensitivity regarding the stage of development and the capacity of the applicant country, can cause delay.

Viewed from a different perspective, VanGrasstek (2001) proposes a three dimensional framework to answer why WTO accession is becoming more complex, time consuming and demanding on incumbent members: a) height: the degree of protection from imports; b) breadth: the range of issues covered by the multilateral trading system; and c) width: the number of countries (or share of world trade represented in the system). He observes that height and width were the most important considerations in GATT accessions because GATT focused predominantly on border measures. However, the issue of breadth assumed greater salience in the accession negotiations after the establishment of the WTO because WTO covers wide-ranging “behind the border” issues. In addition, the built-in agendas mandated by the Uruguay Round have added new issues to the accession negotiations, including the liberalization of financial services, telecommunications services and the movement of natural persons.

During the GATT period, the targets of the incumbent members in terms of extracting concessions were not necessarily the smaller developing countries or the LDCs because their markets were insignificant. However, this changed in the WTO era. The developed countries started imposing stringent conditions for the accession of smaller countries so that they could set “precedence” for larger economies such as China, Taiwan Province of China, Russian Federation and Saudi Arabia, which collectively represented nearly 8 per cent of global trade in 1999.⁵ As VanGrasstek notes, “Even the smallest country is important when countries make fetish of precedence”. This is consistent with the analysis of Grynberg and Joy (2000:172) when they argue that the small country of Vanuatu suffered “collateral damage” in the so called rules-based system. With the

⁵ As of 2008, their combined share in global exports was 15 per cent and their share in global imports was 10 per cent (author calculation based on the Trade Profiles of the respective countries). See WTO (2009).

WTO approaching near universality, width is also becoming more important. The rule of thumb is, the larger the number of members, the longer the process is likely to be, as the acceding countries are subjected to diverse sets of demands from an increasing number of incumbent members. This is confirmed by a regression analysis conducted by Jones (2009), which finds that there is a link between cumulative accession and the increasing length of time until a country’s accession is complete. This is compounded by the fact that incumbent members have progressively learned to assert their bargaining power in each accession negotiation.

Whatever the reason, besides the direct costs of having to overstretch their negotiating capital and tax their national treasuries, long delays expose aspiring WTO member to hosts of indirect costs, such as the denial of a role to shape the future of trade negotiations and the postponement of the opportunity to gain predictable market access and lock-in policy reforms. Moreover, a protracted process may frustrate acceding countries, potentially causing them to divert their resources to pursue regional and bilateral trade agreements (Bonapace 2003: 177; Jones 2009: 285). The political economy of the terms and conditions for WTO accession has become more of a development than a trade issue.

2 Negotiation Issues in Nepal’s Accession

The Evolving Complexity and Prolonged Duration of the Accession Process

Nepal first applied for membership of the GATT in May 1989.⁶ Because of a momentous political change – reinstatement of democracy after 30 years—that

⁶ One motive for Nepal to submit its application for membership of GATT was to secure predictable transit rights via its southern neighbour, India, which had imposed a blockade on Nepal’s trade with third countries in early 1989. See Trade Promotion Centre (2003).

Table 2.1
Basic economic indicators during accession negotiations

	1990-95	1997/98	1998/99	1999/2000
Real GDP at market prices (annual percentage change)	5.2	3.0	4.4	6.5
Agriculture	1.5	1.2	2.7	4.8
Industry	9.3	1.9	7.4	8.9
Manufacturing	13.6	4.3	5.5	12.5
Services	7.4	5.8	5.8	3.3
Saving and Investment (percentage of GDP)				
Gross investment	21.1	24.8	20.5	24.3
National savings	14.1	22.0	21.0	24.8
External trade (annual percentage change)				
Export value	29.5	11.8	18.0	37.4
Import value	14.7	7.1	-2.0	27.6
Current account balance (percentage of GDP)	-	-2.8	0.5	0.5

Source: Ministry of Finance (MoF) (2002)

occurred in the country in 1990 and resumption of normal trading relations with India, the process was stalled for five years. Nepal revived its interest after the WTO was formally established and re-launched its bid in 1998 by submitting the Memorandum on Foreign Trade Regime (MoFTR) to the Working Party (WP).⁷ At the time, Nepal's average annual per capita income was one of the lowest in the world at around US\$220. The country had launched major economic reforms aimed at creating a dynamic open economy supported by stable macroeconomic conditions. These reforms of the 1990s were broad-based and covered monetary, fiscal, trade, price and foreign investment policies. Trade reforms in particular transformed an inward-looking regime into one of the most liberal in the region. Tariffs were reduced

and rationalized. Quantitative restrictions were abolished. The trade-to-GDP ratio reached a peak of 64 per cent in 1997. Foreign exchange was made convertible for current account transactions. Foreign investments were treated in a non-discriminatory manner. The reforms contributed to and coincided with high rates of economic growth, averaging 5 per cent per annum in real terms; investment and saving ratios increased; and exports grew at one of the highest rates ever seen. The economy underwent a transformation led by industry and services (see table 2.1).

On the other hand, 42 per cent of the population lived below the poverty line, approximately the same proportion as in 1984/85 (National Planning Commission (NPC) 1998). The growth of total food grain production had not kept pace with that of population and Nepal went from a net exporter to a net importer of grains. This aggravated poverty and food insecurity in rural areas (United Nations Development Programme (UNDP) 2001). Agriculture provided a livelihood to more than 80 per cent of the economically active population, but non-agriculture employment did not expand fast enough to absorb even a fraction of the new entrants into the labour

⁷ The WP provided a total of 364 questions from WTO members: 24 on economic policies and foreign trade; 178 on the framework for making and enforcing policies affecting trade in goods and services; 114 on trade-related intellectual property rights; and 48 on the services regime. The government of Nepal prepared replies to all the questions and submitted them to the Working Party on 8 June 1999. Nepal also received an additional 93 questions and clarifications and provided replies in July 2001.

market. People seeking employment abroad, and their remittances, went on to play a significant role in the Nepali economy in the 2000s.

Against this backdrop, Nepal's accession to the WTO was seen not as an end in itself but as a key element in the pursuit of national development objectives. It was imperative that the terms of accession agreed for WTO membership fell within the parameters of the defined development goals. Nepal also had to assess its institutional and infrastructural capacity to comply with WTO obligations.

Access for Foreign Goods into the Nepali Market

In the late 1990s, Nepal's average applied customs tariff was already low, at 15.2 per cent for agriculture products and 14.3 per cent for non-agriculture products. The rates ranged from 5 to 130 per cent, with intermediate tariffs rates of 10, 15, 25, 40 and 80 per cent. The highest tariffs were applied to automobiles and the lowest to agriculture and industrial raw materials and machines (WTO 2003).

Nepal was at an early stage of industrialization. It saw tariffs as one way of securing room for its nascent industries to grow and become more competitive. For a landlocked LDC, whose transit and transport costs account for more than one fourth of production costs, Nepal held that this would not be possible if tariffs were nil or near-zero for most of its industrial goods. Further, Nepal knew it had to make a thoughtful set of offers because, constrained by resources, it was not in a position to frequently revisit its safeguard measures, contest unfair trade practices, or renegotiate tariffs. It also could not ignore the fiscal consequences of tariff cuts (see box 2.1).

Market opening commitments in agriculture were particularly sensitive because the sector engaged over 80 per cent of the rural labour force and contributed nearly 40 per cent of the GDP. However, trapped in low productivity for a variety of reasons, from lack of irrigation to farm fragmentation, Nepal was unlikely to be globally competitive in agriculture. Nepal also could not initiate complementary policies to provide safety nets and facilitate adjustment in a WTO-compatible manner. This was evident from the declining

Box 2.1

Revenue consideration

In developing countries, tariffs continue to serve a dual purpose of protecting home industries and generating revenue. Theoretically, the impact of a tariff reduction on public finance is ambiguous. If the initial tariff rate is prohibitively high, the reduction of a tariff could increase revenue as imports increase and incentives to evade tariffs wither. The indirect effects of a tariff reduction also depend on the elasticity of substitution between imports and domestic substitutes and the shift in the composition of domestic production from non-tradables to tradables. Empirical studies have shown that any liberalization of trade in developing countries results in revenue losses unless the foregone revenue from trade is replaced by revenue from domestic sources (Bhagwati 1982; Rao 1999; Khattry and Rao 2002). However, Nepal faced institutional and policy challenges in mobilizing domestic resources to make up for lost revenue from trade taxes. There was low tax compliance, misuse of discretionary power, lack of infrastructure for efficient tax administration and low tax elasticity (NPC 2002).

The contribution of customs duties to total government revenue consistently exceeded 24 per cent from 1990 to 2000. On top of export and import duties, there were various fees and charges, ranging from 2.5 to 11.5 per cent on industrial goods and from 2.5 to 14.5 per cent on

agriculture products. They included the agriculture development fee, the local development fee and the cigarette and alcohol fee. These fees were collected at the border, not with the objective of providing protection to domestic industry in disguised form but because the collection procedure was cost-effective as it did not require any new administrative set-up. As none of these fees were levied on domestically produced goods, they could be defined as "other duties and charges" (ODCs), as defined in Article 2 of GATT 1994. The amounts collected amounted to about 7.6 per cent of total tax revenue in 2001/2002. Moreover, their utilization had a bearing on the provision of public services: the share of local development fees in the internal revenue of eligible local government bodies was 65.3 per cent in 2001/2002. Thus, the issue of abolishing the local development fee was politically sensitive. Similarly, the special fee contributed about 55 per cent of the additional cost of internal security and its abolition would have had an adverse impact on law and order.

Taking into account the role of customs duties in the country's fiscal system and the importance of fees collected at the border, it was imperative that there would not be an abrupt revenue loss as a result of tariff offers. Any commitment to phase out these sources of revenue would have to be gradual.

share of the agriculture sector in the total budget, from 15.9 per cent in the first part of the 1990s to 11.3 per cent in the second part (MoF 2002). In addition, Nepal was not in a position to assert the right to invoke special safeguard measures and tariff rate quotas (TRQs) as almost all tariff lines were already tariffed. Relatively high tariffs on agriculture goods were therefore the only remaining policy option.

Against this backdrop and in the light of the tariff commitments of existing WTO members, particularly the LDC members, Nepal went into the negotiations with what it thought was a reasonable ceiling binding of tariffs: the unweighted average bound rate of *initial* tariff offers was 55.2 per cent for industrial goods and 58.3 per cent for agricultural products. Nepal maintained peak tariffs for sensitive products such as cereals, processed foods, tobacco and alcoholic products, light manufactured products and automobiles, among others. The WTO members rejected Nepal's initial offer, stating that it was not commercially meaningful. They urged Nepal to participate in sectoral initiatives such as the Chemical Tariff Harmonization Agreement and the Information Technology Agreement. Thus began successive

rounds of bilateral negotiations to improve Nepal's offer. The interested WP members were Australia, Canada, China, the European Union, India, Japan, Malaysia, New Zealand and the United States.

The last WP meeting was held on 15 August 2003 when the terms and conditions of Nepal's accession to the WTO were finalized. In the final package, Nepal ended up binding 100 per cent of its tariff lines on agriculture products and 99.3 per cent of its tariff lines on non-agriculture products, except for a few tariff lines (such as petroleum products, cement, arms and ammunitions). In agriculture goods, Nepal's bound average tariff is 41.5 per cent (see table 2.2), with a tariff peak of 200 per cent in tobacco and a bound tariff above 25 per cent for more than 90 per cent of the tariff lines. Nepal bound its industrial tariff at an average at 23.7 per cent with the highest tariff binding of 80 per cent in automobiles. The major problem in the area of tariff binding faced by Nepal was that the applied tariffs for both agricultural and non-agricultural goods were low because of the prior unilateral trade liberalization undertaken as a result of the policy conditionality of the Bretton Woods institutions. Therefore, Nepal requested

Table 2.2

Major Commitments Made by Nepal during Accession

Measures	Initial Offer	Final Offer	Deadline
1 Agricultural tariffs	Average 51%	Average 42%	31/12/2006
2 Industrial tariffs	Average 39%	Average 24% *	31/12/2013
3 Liberalization of services sector			31/12/2009
4 Full implementation of TRIPS Agreement			31/12/2006
5 Full implementation of SPS Agreement			31/12/2006
6 Full implementation of TBT Agreement			31/12/2006
7 Full implementation of Customs Valuation Agreement			31/12/2006
8 Not to introduce export subsidy on agriculture			Accession date
9 Not to impose new Trade Related Investment Measures (TRIMS)			Accession date
10 Zero tariff on information technology products			31/12/2008
11 Complete phasing out of Other duties and charges (ODCs)			31/12/2013

* Includes categorical commitment to reduce tariff peak on motor vehicle from 130 per cent at present to 40 per cent at the end of implementation period, implying an annual reduction of 9 per cent. Source: WTO (2003).

credit for prior autonomous trade liberalization because it wanted to create policy space to protect the agricultural as well as industrial sector. However, developed member countries were opposed to such a proposal. Although the level of bound tariffs for Nepal provides better policy space and flexibilities than for some other newly acceded countries, it was more restrictive than the concessions offered to the original WTO members (see box 2.2), as well as the Guidelines for Accession of LDCs.

Access for Foreign Services into the Nepali Market

The share of services in Nepal's GDP nearly doubled to 51 per cent in 2000 from 26 per cent in 1985. It provided employment to 16.2 per cent of the total labour force. At the time of negotiation, Nepal's services regime was generally compliant with the standard most favoured nation (MFN) and transparency obligations of the General Agreement on Trade in Services (GATS). To promote cross-border trade, Indian currency was exchangeable for all current account transactions. Foreign-owned corporations generally enjoyed National Treatment. Foreign nationals were denied land ownership but foreign-owned companies could buy land. Services imports were regulated through foreign exchange controls, administered by the central bank. In a few sectors, such as insurance, education and medicine, the exchange control regime was moderated and foreign currencies were

made available on the recommendation of regulating ministries or professional associations. The rationale for foreign exchange controls was to prevent capital flight and maintain a reasonable stock of convertible currency reserves.

In banking and insurance, foreign-owned joint ventures were allowed but branch banking was prohibited. Regulators exercised discretion in permitting the entry of new financial institutions on the basis of 'economic need', as well as on 'prudential' grounds. In the telecommunications sector, the government-owned monopoly controlled the importation of services, at least within the range of its technological capacity. However, the government had announced a policy of liberalizing the telecommunications sector. This included privatization of the existing publicly-owned monopoly, Nepal Telecommunication Corporation (NTC); entry of a 'fixed line' competitor to NTC; entry of two mobile telephony operators; and liberalization of commercial presence for an unlimited number of 'value-added' providers. The target date for the implementation of the policy was 2004.

For services other than finance and telecommunications, the Foreign Investment and Technology Transfer Act 1992 regulated foreign investment. The law opened up most services sectors to foreign investment with 100 per cent foreign equity participation. The sectors closed to foreign investment and covered by GATS were personal services business (hair cutting, beauty parlours, tailoring and driving training); real

Box 2.2

Tariff Bindings and Peak Rates for WTO Members

Binding tariffs on all agriculture products is a legal obligation of WTO members, but binding for industrial products is not. In industrial products, therefore, even developed countries have kept some tariff lines unbound. For example, the United States' tariff on crude petroleum, Japan's on fish and paper products and petroleum oils, and Canada's on petroleum oils and minerals are unbound. For selected developing countries, on a trade-weighted basis only 61 per cent of tariffs on industrial products are bound (Butkeviciene et al. 2001). The binding coverage in non-agriculture products for the original LDC members was tiny, e.g., Bangladesh bound only 2.6 per cent of its tariff lines and Tanzania only 0.2 per cent (WTO 2009). Similarly, the average bound rates for developing

countries in agriculture and non-agriculture were 53.9 and 19.1 per cent respectively and for LDCs in agriculture products was 94.1 per cent (Martin and Mattoo 2010). As for peak bound tariff rates on agriculture goods, LDC WTO members have bound rates as high as 550 per cent (Myanmar), other developing countries have bound rates as high as 3000 per cent (Egypt) and developed WTO members have bound rates as high as 350 per cent (United States). Similarly, in non agriculture goods, LDC WTO members have bound their tariffs as high as 550 per cent (Myanmar), other developing country WTO members have bound as high as 220 per cent and developed WTO members have bound their tariffs at rates that rise to a maximum level of 48 per cent (Australia) (UNCTAD 2004).

estate business (excluding construction industries); motion pictures (produced in native languages); retail business; travel agency; trekking agency; water rafting; pony trekking; horse riding; tourist lodging; internal courier; and consultancy services such as management, accounting, engineering and law. Employment of foreigners was allowed conditionally with the approval of the Department of Labour.

Most of the original members of the WTO did not commit to a major liberalization of their services sector upon adoption of GATS (see box 2.3). For its part, since its services regime was largely open, Nepal did not face difficulty in making commitments. To the contrary, there was strong pressure from the private sector to lock-in the liberal policies already in place. However, Nepal wanted to retain some policy flexibilities to protect sectors dominated by small, self-employed service providers, such as retail and personal tourism services (e.g., guides). Other concerns included retaining state support for the promotion of domestic services, preserving the rights of equity participation of domestic investors in joint ventures and protecting employment for domestic workers. Nepal was prepared to make commitments in sectors already open to foreigners and in sectors in which the Nepali private sector would not mount

domestic opposition. The negotiating goal, thus, was to use services commitments as a vehicle for attracting foreign direct investment and to leverage the more liberal opening up of services to retain policy flexibilities in merchandise trade.

In the services sector, Nepal was asked to undertake commitments on almost all sub-sectors, including audio-visual, distribution, retail and wholesale services. Nepal rejected the request to open sectors which could have an adverse impact on the socio-economic situation. However, it opened up 11 major sectors and 77 sub-sectors, constituting 48 per cent of all the sub-sectors in the WTO categorization. Further, for all the services sectors in which it made a commitment, Nepal was asked to allow up to 100 per cent equity participation by foreigners within a period of five years. In the final agreement, Nepal capped foreign investment in most sectors at 51 per cent, at 66-67 per cent in some and at 80 per cent in two sectors. Some of the other provisions it negotiated were: (a) to include a requirement that the majority of the board members of basic telecom providers should be Nepali nationals and, in the case of financial institutions, that the composition of the board should be proportionate to the shareholding pattern; (b) to allow foreign banks, which required a minimum 'B' rating by a credit rating agency, to establish branches only for wholesale banking (not retail banking); (c) to allow incentives and subsidies only to enterprises wholly owned by Nepali nationals; (d) to prohibit foreigners from purchasing or owning land; and (e) to limit the movement of natural persons to intra-corporate transfers at the executive, manager or specialist levels with a proviso that the number of such transfers should not exceed 15 per cent of the number of local employees in the firm.

Box 2.3

WTO Members' Obligations in GATS

GATS obligates members at two levels: general obligations of MFN treatment and transparency applicable across the board to measures affecting trade in services, and negotiated sectoral commitments for market access and national treatment. However, MFN exemptions can be scheduled for specific sectors and sectoral coverage is negotiated with limitations and qualifications on scheduled modes of supply.

Analyzing the commitments made by WTO members during the Uruguay Round, Hoekman (1996) concluded that, barring a few exceptions in basic telecommunications and financial services, the commitments inscribed in members' schedules remained essentially confined, in the best of cases, to binding existing regimes in a limited number of sectors. Evenett and Primo Braga (2006) observed that LDCs, developing, and developed founding members of the WTO, respectively, made commitments regarding, on average, 20, 44 and 108 sub-sectors (of the 160 sub-sectors identified in the GATS).

The Application of Special and Differential Treatment

With the exception of a few Plurilateral Agreements, the final outcomes of the Uruguay Round of negotiations, including GATT 1994, GATS and the Agreement on Trade-Related Intellectual Property Rights, are contained in a single legal instrument

which must be accepted by members in its entirety. This has the effect of establishing roughly the same set of obligations for all WTO members and linking all the rights and obligations to trade concessions (Ognivtsev et al. 2001). However, because of the special circumstances and difficulties faced by LDCs in implementing the Uruguay Round obligations, the WTO agreements provide special treatment on aspects of the implementation of all agreements. The Ministerial Decision on Measures in Favour of Least Developed Countries permits LDC members to apply only those commitments which are consistent with their development, financial and trade needs or their administrative and institutional capabilities (paragraph 1). Beyond the Ministerial Decision, specific provisions within the individual agreements allow LDCs more flexibility in implementing certain WTO rules and encourage other members to cooperate when LDC interests are involved. The special measures may be grouped under four headings as: (i) those recognizing the interests of LDCs in a general manner; (ii) those easing the rules or number of obligations to be met; (iii) those providing longer time frames for the implementation of certain obligations; and (iv) those providing for technical assistance.

In the first WP meeting, the Nepali delegation indicated its desire to utilize the special and differential treatment provision referred to in Article XI.2 of the Agreement Establishing the WTO (which states that ‘the least developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities’) and also in Article IV.3 of the GATS (which states that ‘particular account shall be taken of the serious difficulty of the least developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs’) (Ministry of Industry, Commerce and Supplies (MoICS) 2000). However, developed country members were of the view that all provisions of special and differential treatment were not automatic and had to be negotiated.

Other Negotiating Issues

Acceding countries are required to commit to bringing their laws, regulations, policies and other standards or practices into conformity with WTO agreements. Generally, these commitments should be straightforward and limited to the provisions related to implementing them. However, the experience of past accession processes shows that incumbent members often put pressure on aspiring members to accept obligations exceeding the requirements of WTO agreements. Such commitments include the non-application of transition periods, of subsidies, and of special safeguards for agriculture products; commitments on the pricing system and privatization; additional commitments to protect intellectual property rights; national treatment with respect to direct taxes; bindings of export tariffs; and participation in the plurilateral agreements and zero-for-zero tariff initiatives, among others. Following Butkeviciene *et al.* (2001), these conditions imposed on the acceding countries can be divided into two categories: WTO-minus (conditions that prevent acceding countries from making use of certain *rights* contained in the WTO Agreements) and WTO-plus (conditions which are either not required under the WTO or have not been undertaken by the existing members of the WTO and which therefore create new and additional *obligations*).⁸

The challenge for Nepal in the negotiations was to make the terms and conditions of accession compatible with its national development goals, taking into account the country’s desire for policy space and its institutional and infrastructure capacity. While it sought to minimize WTO-plus and WTO-minus obligations, the final package contains issues that can be judged to belong to both categories. This includes Nepal’s previously discussed final offers on tariff bindings and commitments on services, both of which are “WTO-plus”.

⁸ One caveat is that many of these conditions are based on a reading of the adopted WP reports on individual countries, with little or no understanding of the bilateral discussions and negotiations. This is because reports of such discussions are not available in the public domain because the negotiations are considered strictly confidential.

WTO-minus conditions

Other duties and charges (ODCs)

Article II, para 1(b), of GATT 1994 and the Understanding on the Interpretation of this Article reached during the Uruguay Round require ODCs to be recorded in the schedule of concessions against the bound tariff item to which they apply at the level applying on that date. Nevertheless, all acceding countries have been asked either to bind ODCs at zero or to phase them out over a short period of time (Adhikari 2003). The only two countries which have so far been allowed to maintain ODCs with an agreed timeline to phase them out are Bulgaria and Nepal. This is despite the fact that many original WTO members still maintain ODCs that have never been challenged by their trading partners (Adhikari 2003). Nepal made a commitment to phase out all ODCs over a period of 2 to 10 years. Based on this commitment, Nepal has started to reduce ODCs. The Special Fee has been completely abolished, the agriculture development fee was reduced from 10 per cent to 8 per cent in the fiscal year 2007/08 and the budget announcement for the fiscal year 2009/2010 scrapped the local development fee with effect from 16 July 2009 (MoF 2009).

Export subsidies

With regard to industrial subsidies, Article 27.3 of the Agreement on Subsidies and Countervailing Measures provides LDCs a transition period of eight years to abolish subsidies contingent upon local content requirements. Nepal made a commitment to administer its subsidy programme in full conformity with WTO agreements. This commitment ensures the right to provide export subsidies but rescinds the right to maintain subsidies to promote local value added for the maximum of eight years provided in Article 27.3.

With regard to export subsidies in agriculture, WTO agreements do not require their abolition (Article 9 of the Agreement on Agriculture (AoA)) but do require them to be bound and then reduced by prescribed percentages within a given period of time (Langhammer and Lucke 2000: 850). However,

Article 15 of the AoA excludes LDCs from all reduction commitments under the Agreement (Grynberg and Joy 2000:167). Despite this, the Cairns Group⁹ demanded that applicant countries commit themselves to abolishing agricultural export subsidies (VanGrassetek 2001; Langhammer and Lucke 2000: 850). Nepal, unlike other acceding countries, such as Jordan (paragraph 18), Moldova (paragraph 159) and Cambodia (paragraph 164), among others, did not bind export subsidies at zero but entered a “blank” in the Schedule of Concessions and Commitments on Goods. The schedule of agriculture export subsidies, together with Article 8 of AoA implies, in effect, that Nepal has withdrawn the right to subsidize agriculture exports.

Trade-related investment measures (TRIMs)

The Agreement on TRIMs prohibits measures that are inconsistent with Article III, which, among others, prohibits members from applying investment measures that have the effect of discriminating against foreign goods and Article XI, which, among others, prohibits restrictions on imports or exports. The illustrative list of such prohibited measures contained in the Annex to the TRIMs Agreement includes: (a) local content requirements; (b) trade balancing requirements; (c) foreign exchange balancing requirements; and (d) export restrictions (WTO 1999:146). However, in accession negotiations, some WTO members have requested commitments to eliminate or refrain from introducing export performance requirements even if they are not linked to import volume or value. Such measures restrict the right of acceding countries to use measures which are otherwise WTO-compatible.

Nepal did not have any TRIMs at the time of accession, but was asked to make a commitment not to introduce any such measures in the future. However, the Hong Kong Ministerial Conference agreed to allow LDCs “to introduce new measures that deviate from their obligations under the TRIMs

⁹ The Cairns Group is a diverse coalition of 19 developed and developing agricultural exporting countries from Latin America, Africa and the Asia-Pacific region.

Agreement” (WTO 2005a) for a period of five years at a time and until 2020 so that Nepal can introduce any such measure, if it deems it to be in its interest.

Import licensing procedures and balance of payments safeguards

The Agreement on Import Licensing Procedures of 12 April 1979 provides that a developing country member which was not party to the Agreement may, upon notification to the Committee, delay the application of some clauses of Article 2 dealing with automatic import licensing. However, Nepal was not allowed to have recourse to the transition period and was made to commit to implement the Agreement and also to eliminate (or not to introduce or reintroduce) measures having equivalent effects to import licensing from the date of accession (WTO 2003d, para. 50). In addition, Nepal’s commitments dilute the flexibilities provided by Article 13 to countries at an early stage of development to deviate temporarily from the provisions of GATT 1994 in order to safeguard their balance of payments.

Transition period

Prior to the negotiations, Nepal had legislation regarding sanitary and phyto-sanitary measures, technical standards, customs valuation and the protection of intellectual property rights, but these pieces of legislation were not compatible with WTO agreements. In the case of customs valuation, for example, enquiry points were not envisaged when the relevant legislation was adopted; Nepal’s Customs Act incorporated transaction value, but there were no detailed regulations to enforce it and it did not have any provisions for deductive (Article 5) and computed value (Article 6); and there was no independent administrative tribunal to review the decisions of the customs authority. In the case of intellectual property rights, Nepal’s laws required amendment to broaden the scope of intellectual property to include patentable subjects, geographical indications, layout designs and undisclosed information. In addition, the existing legislation lacked provisions on compulsory license, process patents, repression of unfair competition, right to priority, seizure on importation and prohibition

on importation, effective legal remedies, provisional measures and instituting criminal procedure.

It was essential for Nepal to ask for transition periods for the full implementation of the agreements relating to customs valuation, technical standards, sanitary and phyto-sanitary measures and intellectual property rights, as envisaged in the agreements, i.e., five year transition periods for the implementation of the Agreements on Customs Valuation, on Technical Barriers to Trade and on the Application of Sanitary and Phyto-Sanitary Measures and 11 years for the Agreement on Trade Related Aspects of Intellectual Property Rights.

WTO members argued that transition periods could not be allowed automatically and asked Nepal for justification for transition periods. In each case, Nepal was required to provide information on the current status of legislative work and a detailed action plan for completing implementation within the timeframe of the transition period.¹⁰ Nepal was allowed a transition period of only two years and nine months to fully implement the Agreement on Customs Valuation and the TRIPS Agreement compared to transition periods of 5 and 11 years respectively for these Agreements enjoyed by the original LDC members.

WTO-plus conditions

Incumbent members of the WTO attempted to incorporate several WTO-plus requirements during Nepal’s accession process. Nepal withstood the pressure to some extent, but felt compelled to concede in the following areas:

¹⁰ Nepal also had to commit to not introduce any changes in its laws, regulations and practice made during the transition period that would result in a lesser degree of consistency with the provisions of WTO Agreements than existed on the date of accession, and that the scope of application of existing inconsistencies with WTO provisions in these areas would not be allowed to increase (Working Party Report, para 56, para 97, para 106 and para 136). Despite these action plans and commitments, a transition period for the implementation of various agreements was not granted to Nepal as enjoyed by the original LDCs.

Judicial review

WTO agreements, such as GATT 1994 (Article X), GATS (Article VI) and TRIPS (Article 41), require that members establish independent mechanisms to review administrative decisions. These provisions oblige members to provide the opportunity for objective and impartial review of relevant administrative actions by a judicial, arbitral or administrative tribunal. Such tribunals or procedures must be independent of the agencies entrusted with administrative enforcement to ensure the review is objective and impartial. A member, however, is not obligated to institute a review mechanism if it would be inconsistent with its constitutional structure or the nature of its legal system (Qin 2003).

Paragraph 31 of the Working Party Report of Nepal dealing with judicial review not only confirms but also elaborates the existing provisions of WTO. In the process of elaboration, the report appended an additional requirement for a tribunal or procedures as not having 'any substantial interest in the outcome of the matter' in addition to being 'impartial and independent of the agency entrusted with administrative enforcement'. This may, in effect, preclude the possibility of constituting administrative tribunals for review of administrative decision, as has been practiced to date in Nepal. In addition, the requirements for 'impartial review' under GATT 1994, GATS and TRIPS and the scope of such tribunals are different, but the commitments made by Nepal are clubbed together and made applicable for goods, services and intellectual property.¹¹

Policies regarding internal taxes and tariffs

Article I of GATT 1994 obligates WTO members to extend MFN treatment with respect to customs

¹¹ GATT Article X.3.b provides that a central administration may take steps to review the matter if there is a good cause to believe that a decision is inconsistent with established principles of law or the actual facts. Similarly, Article VI.6.2.a of GATS relaxes the requirements of the tribunal's independence of the agency entrusted with the administrative decision concerned provided an objective and impartial review is ensured. However, TRIPS does not provide such flexibilities.

duties and charges of any kind imposed on or in connection with importation and exportation while Article III obliges members to accord national treatment to imported products on matters of internal taxes or other internal charges and other regulations and requirements. GATT 1994 does not obligate any member to have parity in internal taxes or customs duties among and between products or group of products. However, paragraph 64 of the Working Party Report requires Nepal to maintain an equal rate of excise duty for *chhyang*, a fermented local beverage, and beer from the date of accession. Similarly, the schedule of tariff concessions states that Nepal is required to maintain its applied rate, including other duties and charges, for rape or colza (canola) seeds (Harmonized System (HS) line 1205) at a level no higher than that of soya beans (HS 1201), for flours and meals of rape or colza (canola) seeds (HS 1208.90) at a level no higher than that of flour and meals of soya beans (HS 1208.10), for rape or colza (canola) oils and its fractions (HS 1514) at a level no higher than that of soya-bean oil and fractions (HS 1507) and for oil cake and other solid residues (HS 2306 41/49) at a level no higher than that of oil cake and other solid residues (HS 2304).

Commitment on information technology

During negotiations, Nepal was requested to join not only the plurilateral Agreement on Government Procurement, but also such 'zero-for-zero' initiatives as the Chemical Tariff Harmonization Agreement and the Information Technology Agreement (ITA) launched by a group of WTO members during and after the Uruguay Round. It did not join any. However, it agreed to eliminate tariffs on most information technology products with effect from 2008, without joining the ITA. The rationale was that this would spare Nepal from binding tariffs at zero for future information technology products that have not yet been invented, marketed or traded.

Membership of the International Union for the Protection of New Varieties of Plants (UPOV)

One of the most controversial issues during Nepal's accession process was that it was asked to join UPOV.

Agreeing to this could have led Nepali farmers to compromise their traditional right to save, exchange, replant and sell seeds. Owing to pressure from Nepali Non-Governmental Organizations (NGOs) and the tactfulness with which the negotiators handled the issue during the final WP Meeting in Geneva in August 2003, the WTO members finally agreed to a “minimalist” text.¹² Although the language contained in the text is non-binding, the very inclusion of the text concerning UPOV is a WTO-plus condition.

Transparency

Article III of GATS requires members to publish all relevant measures of general application at the latest by the time of their entry into force. However, Article 63 of TRIPS and Article X of the GATT 1994 oblige members to publish laws, regulations, judicial decisions and administrative rulings of general application promptly; the purpose of such publication is ‘to enable governments and traders to become acquainted with them’ (para 1). Similarly, only measures effecting the rate of duty, or other charges on imports or administrative requirement, restriction or prohibition on imports, or on the transfer of payments are required to be published before enforcement (para 2).

The commitments made by Nepal on transparency go beyond the requirements of the WTO agreements. They club together the subjects of trade in goods, services and TRIPS and do not distinguish the differential requirements of transparency in different agreements. The commitments specifically provide that any laws, regulation or measures of general application will not enter into force before

their publication. The requirement to publish laws, regulations and other measures, along with the products and services affected by the particular measures, identified for customs purpose by appropriate tariff lines and classification, is also a WTO-plus commitment (WTO 2003d, para. 147).

Technical assistance

Regarding technical assistance, the General Council Decision states:

“Effective and broad-based technical cooperation and capacity building measures shall be provided, on a priority basis, to cover all stages of the accession process, i.e. from the preparation of documentation to the setting up of the legislative infrastructure and enforcement mechanisms, considering the high costs involved and in order to enable the acceding LDC to benefit from and comply with WTO rights and obligations” (WTO 2002).

The need for technical assistance runs through the paragraphs of the WP Reports related to implementation issues and one of the justifications for the transition period has been to allow acceding countries to obtain and utilize technical assistance in the fulfillment of the treaty obligations. Nepal’s negotiations on the issue of technical assistance were unique. First, Nepal made a presentation in the WP meeting on the specific areas and projects related to customs valuation, technical and sanitary and phytosanitary standards and intellectual property rights where technical assistance was required. Second, the Report of the WP on the Accession of Nepal incorporated a separate subsection on technical assistance. Third, the WP report recognized the serious difficulties faced by Nepal in the implementation of WTO agreements due to its limited resources, infrastructure and institutional and technical capabilities and the critical role of individual WTO members, bilateral donors and international agencies in helping Nepal fulfill WTO commitments (WTO 2003d, para 152).

In 2002, during the accession negotiations, the Government of Nepal requested the Integrated

¹² Paragraph 122 of the Working Party report (WTO 2003d) states: “...Nepal would also look at other World Intellectual Property Organization (WIPO) and intellectual property-related Conventions, e.g., Geneva Phonograms Convention, UPOV 91, WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, *in terms of national interest* and explore the possibility of joining them in the future, as appropriate” (emphasis added). See Adhikari (2003) for an account of how Nepal fended off pressure from the United States to join UPOV.

Framework (IF) Working Group, consisting of the International Monetary Fund, International Trade Centre (ITC), UNCTAD, UNDP, WTO and the World Bank, to conduct a Diagnostic Trade Integration Study (DTIS). The purpose of the study was to identify policy, infrastructure and technical assistance requirements to make the Nepali economy more competitive, including in a number of areas where Nepal's WTO commitments would require it to make institutional improvements. The resulting DTIS included an Action Matrix outlining the technical assistance requirements of the country in the area of trade. It recommended practical, time-bound policy initiatives for domestic policy reform to be carried out by the government itself and areas for technical assistance to be provided by development partners in four areas: (a) the development of institutional capacity and the regulatory framework and the creation of an improved investment climate; (b) the development of a WTO-compatible legal and institutional framework; (c) initiatives for reducing transaction costs through trade facilitation and transport and transit logistics; and (d) specific initiatives in key sectors and those with export potential, such as garments and carpets, tea, agriculture, tourism and hydro power (Government of Nepal 2004). The Government of Nepal approved the DTIS report and its proposals for implementing policy measures and mobilizing investment and technical assistance, as identified in its 'Action Matrix'

Post-accession, the technical assistance promised during negotiations has not been forthcoming because of Nepal's internal political problems, as well as donor myopia. In particular, the implementation of DTIS has not been encouraging due to a lack of ownership. Neither the periodic development plans nor the medium-term expenditure framework of the government have fully embraced the activities identified in the DTIS. In addition, the country assistance programmes of development partners have been indifferent towards the recommendations of the report (Pandey 2009). Instead of managing trade-related technical assistance in a coordinated manner, the government approached donors on a project-by-project basis.

Nevertheless, Nepal has continued to receive considerable external support to the trade sector since the adoption of the DTIS report. UNDP continues to assist Nepal in the fulfillment of some of the obligations of WTO membership through its projects. The Ministry of Commerce is implementing an Enhanced Integrated Framework (EIF) Trust Fund Tier I project with the aim of strengthening the capacity of institutional mechanisms for the implementation of EIF, including the capacity of the Steering Committee, the national implementation unit and other stakeholders. The European Commission-supported "WTO Technical Assistance Project" helps with WTO compliance in TBT and SPS. The Asian Development Bank (ADB) and the German Development Agency (GTZ) have programmes on private sector development, the International Finance Corporation (IFC) has launched a Public-Private Dialogue through the Nepal Business Forum, UNCTAD is strengthening the utilization of the Automated System for Customs Data (ASYCUDA) and ITC is providing support for export potential analysis. The United Kingdom Department for International Development (DFID), the Food and Agriculture Organization (FAO) and the Finnish Cooperation Agency have also lent some assistance on trade.

Overview of Nepal's objectives for the negotiations and the results achieved

Overall, Nepal's development concerns served as its guide through the entire process of accession. This is reflected in its ability to maintain policy space while making a commitment to bind tariffs, liberalize services and follow the WTO discipline on intellectual property rights and subsidies. For example, the final average tariff bound by Nepal at the WTO is 26 per cent, with agricultural tariffs bound at an average of 42 per cent and industrial tariffs at 24 per cent. These rates provide sufficient "water" (or overhang) to accord the country a good degree of policy space. Similarly, Nepal was able to liberalize services while keeping its development priorities at the forefront. The Schedule of specific commitments submitted by

Nepal liberalized 11 services sectors and 77 sub-sectors which, at face value, appears high for an LDC. However, the objective was to liberalize only those services sectors in which: (a) the Nepali private sector is unlikely to ever get involved, given the huge sunk costs and high gestation period (e.g., pipeline transportation); (b) the Nepali private sector is already competitive and is confident that it would be able to outperform foreign service suppliers, even if the sector is liberalized (e.g., banking services); and (c) sectors where the employment potential for locals is high (e.g., computer and related services) (Adhikari 2004). Despite the concessions called for by WTO members, the results achieved were consistent with the country's development priorities.

3 Notable Aspects of Nepal's Preparations for Negotiations, Accession and Membership

The substantive negotiations for Nepal's accession to the WTO occurred between 1998 and 2003, culminating in its successful admission by the WTO Ministerial Conference in Cancun in September 2003. The Government ratified the accession agreement on 24 March 2004, and Nepal became the 147th member of the WTO soon after. Overall, in comparison with the terms of "peer" acceding countries, Nepal's accession package is deemed well-balanced. This has to do with both the goodwill shown by a number of trading partners towards Nepal, following the adoption of the General Council decision in 2002 to expedite the accession of the LDCs, and the qualitatively different approach that Nepal followed in preparing for its accession. Some of these factors are highlighted below.

External support

The WTO accession process and negotiations are complex and highly technical. The commitments to comply with the rules and discipline of WTO Agreements have long-term implications for national trade and development. The process also demands preparation

of various technical documents and high-level coordination within the Ministry of Commerce and other ministries involved with accession, and between the government and the other stakeholders. However, the ability of the Nepal government to carry out multinational trade negotiations was constrained by: (a) the low level of knowledge among government officials, the private sector and other national institutions on issues related to multilateral trade agreements; (b) the lack of experience of government officials in multilateral negotiations; (c) insufficient integration of trade policy into overall national development policies; (d) the absence of a legal framework in Nepal compatible with WTO rules; (e) insufficient knowledge about the trade opportunities that accession to the WTO would provide to Nepal; and (f) lack of coordination between the government and the private sector (UNDP and UNCTAD 1999).

These shortcomings pointed towards the need for comprehensive technical assistance in the negotiations. However, Nepal was hesitant to approach any bilateral donor for fear of conflict of interest as it was likely that it would have to negotiate commercial terms in Geneva with some of the same countries providing technical support in Kathmandu. Therefore, Nepal chose a neutral partner, UNDP, to support its bid for accession through a project entitled "Nepal's Accession to WTO", launched in 1998. The project, implemented by UNCTAD, focused on four areas: (a) assisting the government in the preparation of technical documents, such as the memorandum on the foreign trade regime, replies to questions raised on the memorandum, tariff offers, the initial commitment on the services sector, checklists on customs valuations, technical barriers to trade, sanitary and phyto-sanitary measures, trade-related aspects of intellectual property rights, the schedule of the aggregate measure of support, etc.; (b) capacity building through training, workshops, seminars, research, and the diffusion of information; (c) providing a forum for government and private sector consultation and interaction; and (d) backstopping the negotiating team in bilateral and multilateral negotiations. Since the project was completed before the conclusion of the accession process, UNDP launched another programme entitled

'Multilateral Trade Integration and Human Development' to continue the remaining tasks of accession. Nepal also regularly engaged with UNCTAD and sought expert advice on technical aspects of the negotiations during the accession period. Additionally, Nepal received support from the WTO Secretariat itself in the form of training and workshops on WTO issues and agreements.

Mobilization of diplomatic capital

Acceding to the WTO is not only a matter of economic and legal understanding, but also an exercise in diplomacy. Nepal utilized various diplomatic platforms to garner support for its WTO membership. Nepal intensified meetings with the capital-based diplomatic missions of major trading nations. It kept Commerce Ministers of the South Asian Association for Regional Cooperation (SAARC) informed about the progress on WTO accession. In collaboration and coordination with other acceding LDCs, Nepal put forward the issue of accession in LDC Trade Ministers' meetings. LDCs' Trade Ministers, in adopting a common position on a LDC agenda prior to the 4th WTO Ministerial Conference, underscored the difficulties faced by the LDCs in WTO accession and demanded that clear, simplified and fast-track procedures for accession be established. They also asked for automatic eligibility of all acceding LDCs for all provisions on special and differential treatment, including unconditional access to transitional periods (WTO 2001).

Nepal's success on the diplomatic front is reflected in the Working Party report. Some members of the Working Party expressed their reservation on the demand to provide assurance to Nepal on the application of the substantive provisions of the TRIPS agreement during the transition period and noted that such commitments would create implementation difficulties for Nepal during the transition period (WTO 2003, para 135). Brazil stated, at the meeting of Working Party held on 15 August 2003, in association with India and Malaysia, that the commitment by Nepal to implement the TRIPS agreement would in no way affect the rights of Nepal with respect to

the provision of the Doha Declaration on the TRIPS Agreement and Public health (WTO 2003).

While consolidating its diplomatic outreach, Nepal also paced its negotiations strategically. Despite its desire to accede within a reasonable period of time, the Nepal government did not let its trading partners know that it was in a hurry. Examples of the accession of Kyrgyzstan and the suspended process of Vanuatu were fresh in the mind of Nepali negotiators. Kyrgyzstan, which completed its accession negotiations in a record period of 34 months, was made to assume several "WTO-plus" conditions.¹³ Similarly, Vanuatu was asked to liberalize wholesale and retail services because of pressure from a major WTO member, as well as the WTO Secretariat. The latter, in particular, wanted to ensure that Vanuatu became the first LDC to accede to the WTO during the Doha Ministerial Conference, which was going to be branded a "development round" (Hayashi 2003). However, the domestic political backlash made this impossible (Gay 2005; Hayashi 2003).

National consultations

The then Ministry of Industry, Commerce and Supplies (MoICS), the nodal ministry responsible for WTO accession, not only sought to develop a mechanism for inter-ministerial/inter-agency coordination by involving other ministries and various other agencies of the government in the process of accession, but also conducted extensive consultations with a range of stakeholders during the process of accession. The expectation was that such a process would help the country identify its national interest and make it easier for the government to sell the WTO agreement to its domestic constituency. MoICS formed a high level committee on WTO accession, chaired by the Secretary of the Ministry. The members comprised the secretaries of the Ministries of Finance, Agriculture and Health and the National Planning Commission

¹³ Although Mogilevskii (2004) argues that Kyrgyzstan had nothing to lose by making these commitments because it had the most liberal economy in Central Asia, he feels that the country was not able to derive the benefits it had hoped for through WTO membership.

and the Governor of the Central Bank, among others. The Ministry also established a Technical Committee chaired by the Joint Secretary of the WTO Division of the MoICS. Finally, the Ministry established a formal channel of communication between the Ministry and the Geneva Mission of Nepal to the WTO (Pandey 2009). Each trade negotiation team to the Working Party and the bilateral negotiations comprised, besides officials and experts from the MoICS, representatives from the Ministry of Finance (including the Department of Customs), Ministry of Agriculture, and Ministry of Law and Justice, as well as regulators such as the Central Bank (Nepal Rastra Bank) and the NTC.

MoICS conducted several workshops at the sub-national level with a view to raising the awareness of the local private sector of the potential outcomes of the negotiations (see Bhandari *et al.* 2005). Consultation with the private sector helped the government identify areas requiring protection, as well as gauge their level of confidence in case any particular sector needed to be opened up. One such example is that, during the process of consultation with the Nepal Bankers Association, it was found that the bankers did not have any objection to opening up their sector to foreign competition (with an adequate transition period). As a result, Nepal made a commitment to liberalize banking by allowing foreign banks to establish branches with effect from 1 January 2010.¹⁴

Similarly, the government consulted with NGOs and farmers' groups, to the extent possible, although it was constrained by the fact that NGOs did not have a nationally recognized apex body with sufficient expertise on trade issues which could be invited for regular consultation. Each of the international and national NGOs that was involved in WTO issues focused on a narrow agenda, such as intellectual property rights, especially farmers' rights to genetic resources for food and agriculture, and food security and livelihood issues (Adhikari *et al.* 2008). They conducted

research on specific issues and shared the findings with grassroots organizations, government agencies and the private sector. The outcomes of these public consultations carried out by the NGOs were shared with the government in a timely manner and some key recommendations were helpful to the government in formulating its negotiating position. Realizing the importance of NGOs, the government included their representatives in its WTO delegation during the Fifth Ministerial Conference (Bhandari *et al.* 2005; Rajkarnikar 2005). The government continued this practice during the Sixth as well as the Seventh Ministerial Conferences of the WTO.

Consultation with NGOs and farmers' groups helped the government to identify sectors that needed to be protected in the interest of food and livelihood security and to avoid joining UPOV. NGOs in particular, working closely with consumer groups, requested the government to make a commitment to enact competition legislation without giving in to opposition from select groups within the private sector that had thrived on anti-competitive business practices (Rajkarnikar 2005).

Post-accession implementation of commitments

Despite the negotiated transition periods, the Government of Nepal has found it difficult to meet its implementation commitments, primarily due to lack of resources and expertise. While the government received enough support from donors in the form of "software" (such as conducting studies, organizing/participating in training and even preparing draft laws), the major areas where assistance was lacking involved "hardware", such as upgrading laboratories to undertake the testing required to meet sanitary and phyto-sanitary requirements for agricultural products, or to test the compatibility of technical specifications required by the Agreement on TBT.¹⁵ Other commitments also ran into problems of a kind perhaps unique to Nepal. Since it did not have a functioning

¹⁴ Nepal Rastra Bank (NRB) has since made an announcement opening up the banking sector to foreign banks by allowing them to establish branches. Prior to this, NRB only allowed foreign banks to establish their commercial presence in Nepal through joint ventures.

¹⁵ Funding from the European Union was received after the deadline for implementing Nepal's commitment under these two agreements expired.

Parliament between 2002 and April 2006, there was a division among stakeholders on whether or not to enact the required legislation through Ordinance, with the expectation that the Parliament would eventually ratify it. Those who opposed the enactment of laws through Ordinance were of the view that it would be “undemocratic” to short-circuit the process and would be wise to wait for a legitimate parliament to form. On the other hand, those who were in favour of enacting the legislation through Ordinance argued that there could not be an indefinite wait because the country’s credibility would suffer. However, even when the parliament was reinstated in April 2006, it could not devote sufficient time to focus on implementing the WTO commitments because it was preoccupied with resolving political issues (Adhikari *et al.* 2008; Adhikari 2010).

A review of the status of implementation of the 42 commitments made in the Legislative Action Plan submitted by Nepal revealed that, as of December 2009, four pieces of legislation that were required to be enacted or amended were in force prior to Nepal’s accession to the WTO, three inquiry points (for SPS, TBT and GATS) had been designated by the Government,¹⁶ fourteen pieces of legislation or sets of regulations, including the instrument for the ratification of the WTO Agreement, that were required to be enacted or amended had been either enacted or amended while twenty required pieces of legislation and sets of regulations were in various stages of enactment or amendment (Ojha *et al.* 2010: 24-28).

4 Nepal’s Commitments in a Comparative Perspective

This section compares the outcomes of the negotiations of three recently acceding LDC members of the WTO – Nepal, Cambodia and Cape Verde. It also

compares their commitments regarding tariffs with those of three original LDC members – Bangladesh, Tanzania and the Solomon Islands – and examines the differing services commitments of Bangladesh, Cambodia and Nepal.

Bound level of tariffs

The three selected original LDC members were successful in keeping significant “water” in their tariff bindings during the Uruguay Round. Bangladesh and Tanzania bound their average agriculture tariffs at more than ten times their applied rates and Solomon Islands at more than five times. The gap between applied and bound tariffs in the non-agriculture sector is also high for Tanzania and Solomon Islands but lower for Bangladesh. However, binding coverage for Bangladesh is low (15.5 per cent) and high for Solomon Islands (100 per cent), indicating a trade-off between the level of bound tariff and the binding coverage (see table 4.1).

Unlike the original LDCs, the levels of bound tariffs for acceding countries are significantly lower because of the unilateral trade liberalization in the recent past and pressure from WTO members to match bound with applied tariff rates during the negotiation. Compared to other acceding LDCs, Nepal was successful in keeping bound tariffs both for agriculture and non-agriculture products at relatively high rates and maintained policy space through substantial “water” in its tariffs. However, it had to bind almost all tariff lines (99.4 per cent). Cambodia and Cape Verde also bound almost all tariff lines but their unweighted average bound rates were significantly lower - 28.1 per cent and 19.3 per cent respectively for agriculture products and at 17.7 per cent and 15.2 per cent for non-agriculture products

With regard to the distribution of bound tariffs, Nepal bound more than 90 per cent of agriculture tariff lines at *above* 25 percent, whereas Cape Verde bound about 85 per cent and Cambodia more than 40 per cent of agricultural tariff lines at *less than* 25 percent. For non-agriculture products, 3.1 per cent, 5.5 per cent and 1.1 per cent of tariff lines are bound

¹⁶ The inquiry points are as follows: a) For GATS, Ministry of Industry, Commerce and Supplies (now Ministry of Commerce and Supplies); b) for SPS, Department of Food Technology and Quality Control; and c) For TBT, Nepal Bureau of Standards and Metrology.

Table 4.1

Bound and Applied Tariffs

	Agriculture Simple average bound rates (%)	Agriculture Simple average MFN rates (%)	Agriculture Binding coverage (% of tariff lines)	Non- Agriculture Simple average bound rates (%)	Non- Agriculture Simple average MFN rates (%)	Non- Agriculture Binding coverage (% of tariff lines)
Bangladesh	192	17.6	100	34.4	14.3	2.6
Solomon Islands	72.7	14.8	100	79.4	9.2	100
Tanzania	120	19.9	100	120	11.5	0.2
Cape Verde	19.3	12.1	100	15.2	10.2	100
Cambodia	28.1	18.1	100	17.7	13.6	100
Nepal	41.5	14.8	100	23.7	12.4	100

Source: WTO (2009)

at zero for Nepal, Cape Verde and Cambodia, respectively. Nepal has bound only 12.4 per cent of tariff lines at less than 15 per cent whereas Cambodia has bound 59.7 per cent and Cape Verde 58.6 per cent of tariff lines below this level (WTO 2009). None of the countries participated in either of the plurilateral zero-for-zero tariff reduction initiatives, namely the ITA and the Chemical Harmonization Agreement. However, they agreed to reduce tariffs and sometimes eliminate them in some products covered by these initiatives. Using the ratio of bound to applied tariff rates as a measure of the scope that a country has to protect domestic industries, Nepal has retained the highest level of policy space for both agriculture (280 per cent) and non-agriculture products (191 per cent) among the newly acceded LDCs.

Services commitments

Cambodia made higher degrees of commitment than Nepal in market access, national treatment and sectoral regulations other than education, health and recreation services. However, the overall level of commitment of Nepal is ten times higher than that of Bangladesh. The latter made commitments only in communication and tourism (see table 4.2).

The commitments under GATS by the original LDCs in general and Bangladesh, Tanzania and

Solomon Islands in particular were shallow and less than the preservation of status quo policies. Bangladesh made commitments only in telecommunications and five-star hotels and lodging services (WTO 2003a) and Tanzania only in hotels of four-stars and above (WTO 2003b). The schedule of commitments of Solomon Islands was broader, covering legal, accounting, architectural, engineering, construction, financial and hotel and restaurant services (WTO 1996). Moreover, the depth of commitments in the scheduled sectors was high, meaning that the commitments have incorporated fewer limitations and conditions. In the schedule, Bangladesh retained the right to restrict employment of foreign natural persons and to limit government subsidies and tax benefits to domestic service providers. Tanzania and Solomon Islands did not incorporate such restrictions in their schedules.

The commitments of Nepal, Cambodia and Cape Verde in the area of services generally show a tendency towards liberalization and are characterized by wide-ranging commitments both in terms of the mode of supply and sectoral coverage. The only limitations are those intended to guide foreign investment to generate development impacts. The sectoral coverage and depth of commitments in these countries' schedules of commitments reflect their desire to utilize service commitments for overall economic

Table 4.2
GATS Commitment Index

Sectors	Nepal	Cambodia	Bangladesh
Overall Index	33.34	49.08	3.36
Market Access	29.19	43.68	2.24
National Treatment	37.49	54.48	4.47
Business Services	30.32	31.58	0.00
Communication services	15.68	47.35	26.68
Construction/engineering services	14.73	50.00	0.00
Distribution services	54.45	66.09	0.00
Educational services	40.76	32.61	0.00
Environmental services	68.75	75.00	0.00
Financial services	47.58	64.29	0.00
Health/social services	25.53	23.40	0.00
Tourism/ travel services	66.73	69.12	33.09
Recreational/ cultural services	28.65	0.00	0.00
Transport services	13.25	25.29	0.00
Other Services	0.00	0.00	0.00

Source: World Bank (2009)

development and trade promotion. Their commitments are in sectors that could contribute to improving the quality and efficiency of the services required by business, such as accounting, banking, insurance, management consulting, telecommunications and transport services. In addition, the commitments include sectors which contribute to developing skills required for a modern, knowledge economy (such as education, computer and related services) and also sectors which help improve health and environment conditions.

All three countries have restrictions on the ownership of land by foreigners but that allow leasing. They have crafted commitments to protect employment in the services sector for their own nationals and the employment of foreign nationals is limited to specific categories of intra-corporate transferees such as executives, managers and specialists. In addition, Nepal has an upper ceiling on the number of foreign employees that can be employed in joint venture entities.

However, in terms of the breadth and depth of the commitments, Nepal has lower sub-sectoral coverage than Cambodia and Cape Verde and does not have full commitments in any of the subsectors; rather, the commitments are partial, with transition periods in some sectors. Nepal has not allowed 100 per cent foreign equity participation in any service sectors, but foreign investors are allowed to retain majority stakes. It means the participation of Nepali nationals and domestic investors is a precondition for the commercial presence of foreign service-providers in Nepal. Cambodia has unbound subsidies whereas Nepal has restricted subsidies and tax benefits to wholly nationally-owned enterprises in order to provide some policy space to promote national service providers (WTO 2003e). Cape Verde has committed to provide subsidies to domestic jurisdiction persons, including foreign-owned enterprises (WTO 2007b). Nepal's schedule provides specific importance to the protection of the environment and obliges foreign investment to meet environmental standards (WTO 2003e).

Transition period

In view of the Guidelines established by the General Council (WTO 2002) and the special and differential treatment that WTO legislation provides to LDCs, Nepal, Cambodia and Cape Verde made clear their need for transitional periods for the implementation of WTO agreements and provided detailed Action Plans with the status of their institutional infrastructures and the specific steps needed to bring their countries into full conformity with the agreements for which transition periods were being sought (WTO 2003c, WTO 2003d and WTO 2007b). Nepal and Cambodia sought transitional periods for the implementation of the agreements on Customs Valuation (CV), SPS Measures, TBT and TRIPS. Cape Verde did not ask for a transition period for the implementation of the TBT agreement, but requested a transition period for the other three agreements.

The transition periods granted for the implementation of various agreements for the acceding countries vary depending on the status of the institutional capacity to implement the agreements, the plan to overcome the institutional deficits and the negotiating capacity of the country concerned. Cape Verde got transitional periods of 2 years and 6 months, 1 year and 6 months and 4 years 6 months respectively for the implementation of the agreements on CV, SPS and TRIPS. Cambodia was granted transition periods of 2 years and 3 months for the delayed implementation of agreements on TRIPS and TBT and 3 years and 3 months and 4 years and 3 months respectively for the implementation of the agreements on SPS and CV. Nepal negotiated transition periods of 2 years and 9 months to fully implement agreements on CV, SPS and TRIPS but only 1 year and 9 months for the implementation of TBT.

Cape Verde got an additional transition period for the implementation of sections 5 and 7 of part II of the TRIPS Agreement (relating to patents and the protection of undisclosed information, respectively) until December 2016 in accordance with paragraph 7 of the Doha Declaration on the TRIPS Agreement and Public Health. Nepal and Cambodia also asserted

their right to the flexibilities provided in the Doha Declaration on the TRIPS Agreement and Public Health.

During the transition period, these countries made commitments to implement the agreements progressively and also to ensure that any changes made in their laws, regulations and practices would not result in a lesser degree of consistency with the provisions of relevant agreements. For the TRIPS agreement, they pledged to observe the provisions of national treatment and most favoured nation treatment in the protection of intellectual property rights. In addition, Cambodia committed not to grant patents, trademarks, copyrights, or marketing approvals for pharmaceuticals or agricultural chemicals inconsistent with the provisions of the TRIPS Agreement and to protect against unfair commercial use of undisclosed test or other data submitted in support of applications for marketing approval of pharmaceutical or agricultural chemical products during the transition period (WTO 2003c, para 209).

Technical assistance

During their accession negotiations, Nepal, Cambodia and Cape Verde attempted to link the implementation plan of the agreements with the requirement for technical assistance and cooperation. However, implementation was not conditioned upon the availability of such assistance and it has been normal practice for incumbent WTO members to reject outright any proposal to link implementation of commitments made by acceding countries with technical assistance.¹⁷

In contrast with these other acceding countries, Nepal secured an implicit pledge of technical assistance to implement its commitments. However, , because

¹⁷ See, for example, Charveriat and Kirkbirde (2003) in the case of Cambodia and Report of the Working Party on the Accession of Cape Verde to the World Trade Organization (document WT/ACC/CPV/30, dated 6 December 2007). Of particular note is the content of para 170, the relevant part of which reads: “Noting Cape Verde’s requests for technical assistance, some Members stressed that Cape Verde *should not* make implementation of the TBT Agreement contingent on the provision of future technical assistance” (p. 36) (emphasis added).

of the lack of ownership of the DTIS and inadequate follow-up by both the Government of Nepal and donors, technical assistance has not been mobilized to the desired extent. In contrast, Cambodia has been able to mobilize substantial technical assistance in support of trade reform, such as through a Sector Wide Approach (SWAp) for Trade.¹⁸

5 Lessons for LDCs

The discussions in preceding sections suggest that the level of commitments of the newly acceded LDCs to the WTO is broader and deeper than those of the original LDC members. They mark a considerable deviation from the letter and spirit of the General Council Guidelines on the accession of LDCs. However, despite the fact that there were many WTO-plus and WTO-minus commitments, it can be argued that Nepal obtained a more satisfactory accession package than others in terms of the policy space that it retained and the transition period for implementation. Based on the experience of Nepal in its accession negotiations, the following lessons could be drawn for other acceding LDCs.

Enhanced Collective Bargaining Through the LDC Platform

Given the fact that a sizeable number of LDCs are still in the process of accession and those that have acceded so far faced difficulty during the process of accession, the issue has caught the attention of the international community. Moreover, the fact that an LDC like Vanuatu had to suspend its accession bid due to stringent conditions and the fear of political backlash at home points to serious “birth defects” in the accession process.¹⁹ Therefore, a number of observers have pointed to the need to make the accession process of LDCs simpler, more transparent and manageable (see, for example, Charveriat and Kirkbride 2003; Adhikari 2005; Baumuller et al. 2008).

¹⁸ See ODI (2009) for further details.

¹⁹ See Grynberg and Joy (2000). See also Gay (2005) and Hayashi (2003) for a detailed account of the reasons for Vanuatu to suspend its accession bid.

Nepal made use of the LDC platform by constantly voicing its concerns over the onerous demands that WTO members attempted to impose, as well as the time taken. Together with other LDCs, Nepal made use of every possible international forum to ensure that the imperatives of facilitating the speedy accession of LDCs were included prominently in their declarations. It must be reemphasized that the continued push from LDCs contributed significantly to the adoption of the General Council Decision on the Accession of LDCs in 2002. Although the Decision has not been implemented in its true spirit so far, it did result in the demands being placed on acceding LDCs being less than those on other countries that have acceded to the WTO.²⁰ What is equally plausible, but difficult to establish, is that the political backlash resulting from Vanuatu's suspension of accession after the adoption of its Working Party report eased somewhat the burden on LDCs that were applying for WTO membership.

Continued use of the LDC platform to ensure meaningful implementation of the General Council Decision is essential to build momentum to simplify the WTO accession process for the LDCs which are currently applying for membership. Some concrete reforms in this regard could include the following: first, in order to reduce the delays in the negotiations, it should be mandatory to hold the first Working Party (WP) meeting within one year of the submission of the MoFTR; second, the overall number of WP meetings should be limited; third, bilateral negotiations should be held in the acceding country's capital; and fourth, better use should be made of information technology and “virtual” bilateral negotiation.

Pursuit of Tailored Technical Assistance

Nepal was unique among acceding countries in securing an implicit pledge of external technical support in assisting it to implement the commitments that it had assumed during the negotiations. Following accession, however, the promised assistance has not been fully forthcoming because of Nepal's

²⁰ See WTO (2009) for a detailed account of the commitments made by the countries that have acceded to the WTO.

internal political problems, as well as donor myopia. This has had a direct bearing on Nepal's ability to fulfil some of the commitments it entered into under the Protocol of Accession. Cambodia, on the other hand, without any implicit pledge of technical assistance during negotiations, has secured significant amounts of trade-related technical support since 2004. Acceding countries could learn from Nepal and Cambodia on ways to manage technical assistance both in word and deed.

Institutionalized Mechanisms for Consultations

Inter-ministerial and inter-agency coordination, as well as consultation with a wide range of stakeholders, helped Nepal to achieve two key objectives. First, it ensured that its membership of the WTO would contribute to the country's overall development objectives. Secondly, it enabled the country to secure relatively better terms of accession than other LDCs, particularly when viewed from the overall development perspective. Therefore, the merit of such consultation cannot be overemphasized.

However, there was never a formal and institutionalized mechanism for consultation with various stakeholders on trade issues in Nepal, and whatever consultation took place during the accession process was due to the personal preference of trade negotiators at the time (Adhikari et al. 2008; Baumuller et al. 2008). These weaknesses have been exposed in the aftermath of WTO accession with a conspicuous slackening of verve on the part of the government to engage civil society organizations CSOs.²¹ Nepal's experience shows

that, while ad hoc processes of consultation can yield results, there ought to be a formal, institutionalized mechanism in place, with a clear demarcation of the rights and obligations of participants.

Monitoring the Implementation of Commitments

Since members are expected to fulfill all commitments made by them during the process of accession to the WTO, according to the deadlines mentioned in the Protocol of Accession, it is assumed that the countries generally comply with them. However, there has not been any serious monitoring of the implementation of Nepal's accession commitments, neither within the country nor from the WTO. The only two mechanisms that exist to monitor the compliance/non-compliance with these commitments are the Trade Policy Review Mechanism (TPRM) and Dispute Settlement Body (DSB). Since Nepal's Trade Policy Review was due only in 2010, and none of the WTO members have brought a complaint in the DSB, Nepal's non-compliance with its accession commitments was not exposed to the international community.

The government has informally divided the implementation of its WTO commitments into binding and non-binding categories (Bhandari et al. 2005). It has complied with the binding/mandatory commitments, such as the reduction of tariffs per schedule (e.g., the peak tariff on motor vehicles has been reduced), the phasing out of ODCs and the establishment of enquiry points, within the prescribed deadline. However, laws that the government feels are non-binding, such as on access and benefit sharing, anti-dumping and plant variety protection, have not been enacted. Belatedly, it enacted legislation on competition. However, the law was a non-starter for a number of reasons, notably the absence of an independent competition commission; the low level

²¹ Three examples show how the consultation process has weakened in Nepal since accession. *First*, an IF Steering Committee was created in the aftermath of the WTO accession and representation of various government agencies and private sector was ensured, but civil society organizations were kept outside the process. *Second*, the Ministry of Commerce and Supplies (MoCS) is in the process of updating its DTIS as a part of the Enhanced Integrated Framework (EIF) initiative, and the preparation of a report titled Nepal Trade Integration Study has already been initiated. However, the Ministry of Agriculture, one of the crucial ministries for the national economy with tremendous potential to contribute towards trade development,

has not been involved in the process. Similarly, consultation with other stakeholders, including CSOs, is not even on the agenda of the Ministry. *Third*, the Board of Trade, formed as part of the new Trade Policy 2009 to assist the government in formulating policies and monitoring the implementation of the policy itself, does not include any representatives from the CSOs (MoCS 2009).

of penalties proposed (which weakens deterrence); the cumbersome process to initiate cases; and a lack of clarity on the role of the competition authority (Adhikari 2007). Similarly, a lack of technical assistance has prevented the government from upgrading the standards testing infrastructure required to comply with the implementation of the SPS and TBT agreements, among others. At the same time, some developments since accession have reduced the urgency of implementation. For example, the decision of the WTO Council for TRIPS dated 29 November 2005, which extended the deadline for LDCs to comply fully with the TRIPS Agreement to 1 July 2013 (WTO 2005b), has resulted in the government holding back its decision to implement some of the legislation, such as the draft Industrial Property Bill and the Plant Variety Protection Bill.

The lesson for other LDCs is that, since the implementation of the accession commitments also has a bearing on the credibility of the domestic policy regime, there should be some form of monitoring in the country to implement the commitments made at the WTO. When the deadline for the implementation of a certain commitment expires, a new deadline should be set (Baumuller et al. 2008).

Commitment to Sustained Trade Reforms

For all its slow progress in implementation, Nepal's commitment to trade policy reform is evident from several unilateral measures undertaken even prior to its accession to WTO. What it tried to do through WTO accession, among other things, was to bind these reforms. For the past 15 years, Nepal's simple average of applied tariffs for both agriculture and non-agriculture has been below 15 per cent. Its continued commitment to trade reform is reflected in several policy documents announced in the aftermath of Nepal's accession to WTO. Two such documents are the Three Year Interim Plan 2007-10 and Trade Policy 2009. One of the policies outlined by the Three Year Plan is "to make foreign trade regime, liberal, competitive, and market-oriented in accordance with the global trade regime..." (NPC

2007: 231). It projected a budget estimate of Rs. 1.74 billion for implementing the plans envisaged under the trade sector. The Plan document also made a commitment to prepare and implement a new trade policy. Accordingly, the Ministry of Commerce and Supplies prepared the new Trade Policy 2009.

Given that WTO accession provides an anchor for trade policy reform, the lesson for other LDCs is that continued commitment to trade reform is necessary in the post-accession period. The reform agenda should be forsaken only if it transpires that it compromises development objectives (such as industrial development and protection of food security and livelihood).

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