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# NOTE ON CAMBODIA'S AND NEPAL'S ACCESSION TO THE WORLD TRADE ORGANIZATION: A LANDMARK DECISION

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Nepal had applied to join the General Agreement on Tariffs and Trade (GATT), predecessor of the WTO, in May 1989. Cambodia had applied to join the WTO in October 1994. After the successful completion of accession negotiations, on 11 September 2003 the Fifth Ministerial Conference of the WTO in Cancun, Mexico agreed by consensus on the text of the protocol for Cambodia's and Nepal's entry into the WTO. The Fifth Ministerial statement states: "At this meeting we have welcomed Cambodia and Nepal as the first least-developed countries to accede to the WTO since its establishment." Cambodia and Nepal ratified the Protocol of Accession and informed the WTO accordingly. Thirty days after the ratification, Nepal and Cambodia became the 147<sup>th</sup> and 148<sup>th</sup> members of the WTO on 23 April 2004 and 13 October 2004 respectively. Nepal and Cambodia also became the first and second Least-Developed Countries (LDCs)<sup>1</sup> to join the WTO through a full working party negotiation.

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Accession to the WTO is essentially a process of negotiation, which is quite different from the process of accession to other international organizations/entities. Those governments, which are not "original Members" and wish to become WTO Members, will generally be required to accede to the WTO under Article XII of the WTO Agreement.<sup>2</sup> Article XII of the WTO Agreement gives no guidance on the "terms to be agreed" nor does it specify any procedures to be used for negotiating these terms. However, the International Court of Justice has not given validity to extra terms and conditions of accession to international organization, which are beyond the provisions of the constituent instrument of the organization.<sup>3</sup> So far, no Least-Developed Country had completed its accession to the WTO under the provision of Art. XII of the WTO Agreement since the inception of the WTO in 1995.<sup>4</sup> Hence, the accession of Cambodia and Nepal to the WTO is considered a landmark decision in the history of the WTO.

Like Nepal in 1990, Cambodia has embarked on a process of fundamental political and economical reforms since the adoption of a new Constitution in 1993. Cambodia and Nepal have already started to liberalize their trade regime through the regional integration. Cambodia had joined the Association of South-East Asian Nations (ASEAN) in 1999 and is the member of the ASEAN Free Trade Area. Likewise, Nepal is a founding member of the South Asian Association for Regional Cooperation (SAARC). Nepal was a member of the Agreement on SAARC Preferential Trading Arrangement (SAPTA) and has recently

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1. Out of the forty-nine least-developed countries, thirty are original members of the WTO. Seven least-developed countries — Bhutan, Cape Verde, Laos PDR, Samoa, Sudan, Vanuatu and Yemen — are currently in the process of accession to the WTO, while Ethiopia and Sao Tome and Principe are observers. The remaining LDCs — Afghanistan, Comoros, Equatorial Guinea, Eritrea, Kiribati, Liberia, Somalia and Tuvalu — are currently not in the process of acceding to the WTO. See WTO Secretariat, *Note by the Secretariat on Status of Least-Developed Countries Accession to the World Trade Organization*, WT/LDC/SWG/IF/11/Rev.2, para. 1 (April 19, 2001), available at <http://www.wto.org>. The number of the least-developed countries is increasing, and none of the thirty original members of the WTO, which were also Contracting Parties to the GATT, has graduated from least-developed status.

2. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Art. XII (1), LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement] permits accession by "Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements . . . on terms to be agreed between it and the WTO." (emphasis added).

3. Advisory Opinion, Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948 I.C.J. 63 (May 28).

4. *Talks begin to include Nepal in WTO*, THE KATHMANDU POST, July 15, 2003 available at [www.kantipuronline.com/kpost\\_html/kp\\_business.htm](http://www.kantipuronline.com/kpost_html/kp_business.htm).

signed an Agreement on South Asian Free Trade Area (SAFTA)<sup>5</sup> on 6 January 2004. Nepal has become full member of Bangladesh, India, Myanmar, Sri Lanka and Thailand Economic Cooperation (BIMST-EC) from the year 2004. Six members of the BIMST-EC, including Nepal, agreed to sign a free trade agreement committing to throw open their markets by 2017 on 9 February 2004.

The incidence of accession of these two countries to the WTO has raised few issues regarding the accession negotiation. On the occasion of Cambodia's accession, the Cambodian Commerce Minister Cham Prasidh has made a statement to the WTO Ministers, which is in fact very meaningful. He said, "We believe that the package of concessions and commitments that we have to accept certainly goes far beyond what is commensurate with (Cambodia's) level of development . . . ." The referenced statement of the Cambodian Minister also has raised a serious question of whether WTO and its member countries are in compliance with the WTO provisions in connection to accession negotiations with these two least-developed countries.

Nepal and Cambodia are both least-developed countries. Cambodia has a population of 12 million and has a GDP per capita of US \$300.00. After two decades of holocaust, astonishing brutality and genocide, Cambodia is preparing for tomorrow. Nepal, a land-locked country, has a population of 23 million and a per capita income of US \$220.00. Agriculture is the main source of income and employment, and accounts for 41 percent of GDP and more than 80 percent of employment in Nepal. In the process of accession negotiations, Nepal has bound the tariff rate at around 42 percent in agricultural products and around 24 percent in industrial products. The majority of the import items fall in the customs duty range of 10-20 percent. A minimum tariff rate up to five percent applied for daily consumption items. Cambodia will be unable to levy duty on agriculture goods above 60 percent. Whereas the European Union farm tariffs range up to 252 percent, Canada 120 percent and other developed and developing countries also have high agricultural tariff rate. Nepal agreed to open up to 70 out of 160 service sectors, which cover the whole major service sectors. The statement addressed by the UN General-Secretary Kofi Annan to the WTO Fifth Ministerial Conference seems very relevant in this connection. He said,

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5. Agreement on South Asian Free Trade Area, Jan. 6, 2004 *available at* <http://www.sarc-sec.org/main.php>. This SAFTA Agreement shall enter into force on 1<sup>st</sup> January 2006 and shall supersede the Agreement on SAARC Preferential Trading Arrangement (SAPTA).

Those who press poor countries to open their markets may indeed have those countries' best interests at heart. But can we be surprised that poor countries are reluctant to take them seriously, when they find the markets of rich countries still closed to their products, and when they have to compete at home, and in the world market, against subsidized products from those same rich countries?<sup>6</sup>

At the time of the establishment of the WTO in Marrakesh, the ministers decided that least-developed countries 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. Article XI (2) of the WTO Agreement reads: "The least-developed countries . . . 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."

Likewise, paragraph 8 of Article XXXVI of the GATT reads: "The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties." In this connection, paragraph 8 of Article XXXVI, Annex I (Notes and Supplementary Provisions) of the GATT further states that the principle of no-reciprocity would apply in the event of accession as well.

The accession negotiations between the WTO and these two LDCs, Cambodia and Nepal, have indicated that LDCs and other countries stand at the same footing in the process of accession. LDCs are equally compelled to make concessions and commitments as others do, and sometimes more than others. So far the concept as well as provisions of differential and more favorable treatment to LDCs are not applied in the process of accession.

The WTO General Council has taken a far-reaching progressive decision adopting a text of "Accession of Least-Developed Countries."<sup>7</sup> However provisions of this decision are not implemented yet. This is a positive development of realization within the WTO system. WTO General

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6. UN Secretary-General Kofi Annan, Message to the Fifth Ministerial Conference of the World Trade Organization at Cancun, Mexico (Sept. 10, 2003).

7. See WTO Secretariat, *Accession of Least-Developed Countries*, WT/L/508 (Jan. 20, 2003), available at <http://www.wto.org>.

Council has rightly mentioned at “Accession of Least-Developed Countries” that WTO members shall exercise restraint in seeking concessions and commitments on trade in goods and services from acceding Least-Developed Countries.

Although technical assistance may be helpful to the LDCs, their main concerns are their rights to make concessions and commitments in accordance with their individual development, financial and trade needs, or their administrative and institutional capabilities.

In the accession negotiation, Cambodia and Nepal are granted a transitional period of time by the WTO and accordingly, Cambodia and Nepal need to apply the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)<sup>8</sup> fully by no later than 1 January 2007.<sup>9</sup> Article 66 (1) of the TRIPS Agreement has provided a ten-year transitional period to least-developed countries.<sup>10</sup> This ten-year

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8. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Annex 1C, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

9. See WTO Secretariat, *Report of the Working Party on the Accession of the Kingdom of Nepal to the World Trade Organization*, WT/ACC/NPL/16 para. 153, (Aug. 24 2003), available at <http://www.wto.org>; WTO Secretariat, *Report of the Working Party on the Accession of Cambodia to the World Trade Organization*, WT/ACC/KHM/21 para. 206, (Aug. 15, 2003), available at <http://www.wto.org>.

10. The TRIPS Agreement came into force on January 1, 1995. The TRIPS Agreement gives all WTO Member countries transitional periods within which WTO Member countries bring their national legislation and regulations in conformity with the provisions of the TRIPS Agreement. The transitional period is a grace period during which various members countries need not assume certain TRIPS obligations. The period of transition is determined by member country category. See L. Peter Farkas, ABA Sec. Int'l L. & Prac., *Trade-Related Aspects of Intellectual Property*, in *THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21<sup>ST</sup> CENTURY AND U.S. IMPLEMENTING LEGISLATION* 465 (Terence P. Stewart ed., 1996). The transitional period, which depends on the level of development of the country concerned, is contained in Articles 65 and 66 of the TRIPS Agreement. “No Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.” TRIPS Agreement, *supra* note 9 Art. 65 (1). Accordingly, all member countries have been given a transitional period of one year since January 1, 1995. Hence, all countries, particularly developed country members, have had to comply with all of the provisions of the TRIPS Agreement since January 1, 1996. This period has already expired. Moreover, all members, even those availing themselves of the longer transition period, have had to comply with the national and most-favoured-nation treatment obligations from the very beginning. TRIPS Agreement, *supra* note 8, Arts. 3, 4, & 65 (1).

However, for developing countries, besides the one-year grace period the general transition period is four years. A country whose economy is in transition, but which is not a developing country, could have nonetheless delayed application until the year 2000.

For least developed countries, the transitional period is ten years. If an original member, the country also will get a one-year grace period. The TRIPS Agreement provides a possibility to extend the transitional period upon a duly motivated request. All least developed member countries are under an obligation to apply most-favoured-nation and national treatment rules from January 1, 1996 onward. During the transitional period, developed and developing member countries are required not to take any measures that will result in a lower level of protection of intellectual property rights than the level already existing in their territories. See TRIPS Agreement, *supra* note 9, Art. 65 (5) (referred to as the “non-backsliding” or the “standstill” clause). However, there is no

transitional period is not given to these acceding countries. The transitional period provided to Cambodia and Nepal by the WTO is not counted from the date of these countries' entry into the WTO. There is no doubt that Cambodia and Nepal are least-developed countries. So Cambodia and Nepal deserve to get transitional period of ten years time. This transitional period of ten years is given to least-developed countries "in view of their special needs and requirements, economic, financial and administrative constraints, and their need for flexibility to create a viable technological base."<sup>11</sup>

In this connection, one should recall the general principle of international law that restrictions upon the sovereignty of independent states cannot be presumed. In other words, states can only be presumed to have given up their discretion to act if they have explicitly consented to such a restriction.<sup>12</sup> A restrictive interpretation of WTO law is recognized by the WTO Appellate Body, which states that: "We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation . . . ."<sup>13</sup> The WTO Appellate Body explained in a footnote:

The interpretative principle of *in dubio mitius*, widely recognized in international law as a "supplementary means of interpretation," has been expressed in the following terms:

The principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of States. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.<sup>14</sup>

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standstill clause with regard to the ten-year period of transition for least-developed member countries. See Farkas, *supra* note 11 at 467. The standstill provision is only located in Article 65 (relating to developed and developing countries) and applies to "[a] Member availing itself of a transitional period under paragraphs 1, 2, 3 or 4 . . . ." TRIPS Agreement, *supra* note 8, Art. 65.

11. TRIPS Agreement, *supra* note 8, Art. 66 (1).

12. See, e.g., *The Steamship Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 18).

13. Report of the WTO Appellate Body on EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, para. 165 (Jan. 16, 1998), available at <http://www.wto.org/wto/dispute/hormab.wp5>.

14. *Id.* at 63, n. 154.

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## ACCESSION TO THE WTO

From the WTO jurisprudence prospective as well, the TRIPS Agreement obligations are not required to fulfill during the transitional period. With respect to the transitional period of newly acceding least-developed country, Article 66 of the TRIPS Agreement also does not say that this transitional period of ten years time can not be available from the date of accession.

WTO obligations are extensive and there are many difficulties for LDCs to reform or adopt new laws and administrative practices and to build new institutions. The cost of implementation of the WTO obligations is beyond the economic abilities of a least-developed country. Besides, the past experiences of other original LDC members show that primary goods and low-wage services of LDCs are not getting enough market access. Anti-dumping and countervailing duties imposed by developed and developing countries and unnecessary Sanitary and Phytosanitary Measures (SPS) standards hinder market access and keep out LDCs' exports. Prevailing issues of environment, human rights and labor standards may lead to disguised protection. There is also no serious commitment to fully implementing WTO special and differential treatment in favor of LDC members.

However, experience shows that awareness of the difficult situation of LDCs has been increasing within the WTO and its member countries. This realization will facilitate the implementation of differential and more favorable treatment towards LDC members in the near future. We can conclude that Cambodia and Nepal might have paid a heavy price for the "ticket" but they have won by acceding to the WTO. Compared with bilateral negotiations with big economies, multilateral negotiations are always favorable to small countries. Closer integration into the world economy is a powerful instrument to alleviate poverty and provides the main driving force for economic development. Politically, after membership in the United Nations, membership in the WTO is a landmark event in the history of Cambodia and Nepal. This shall enable Cambodia and Nepal to stand together with the civilized nations of the world which are working together for the betterment of all human beings.