Bahir Dar University ,School of Law

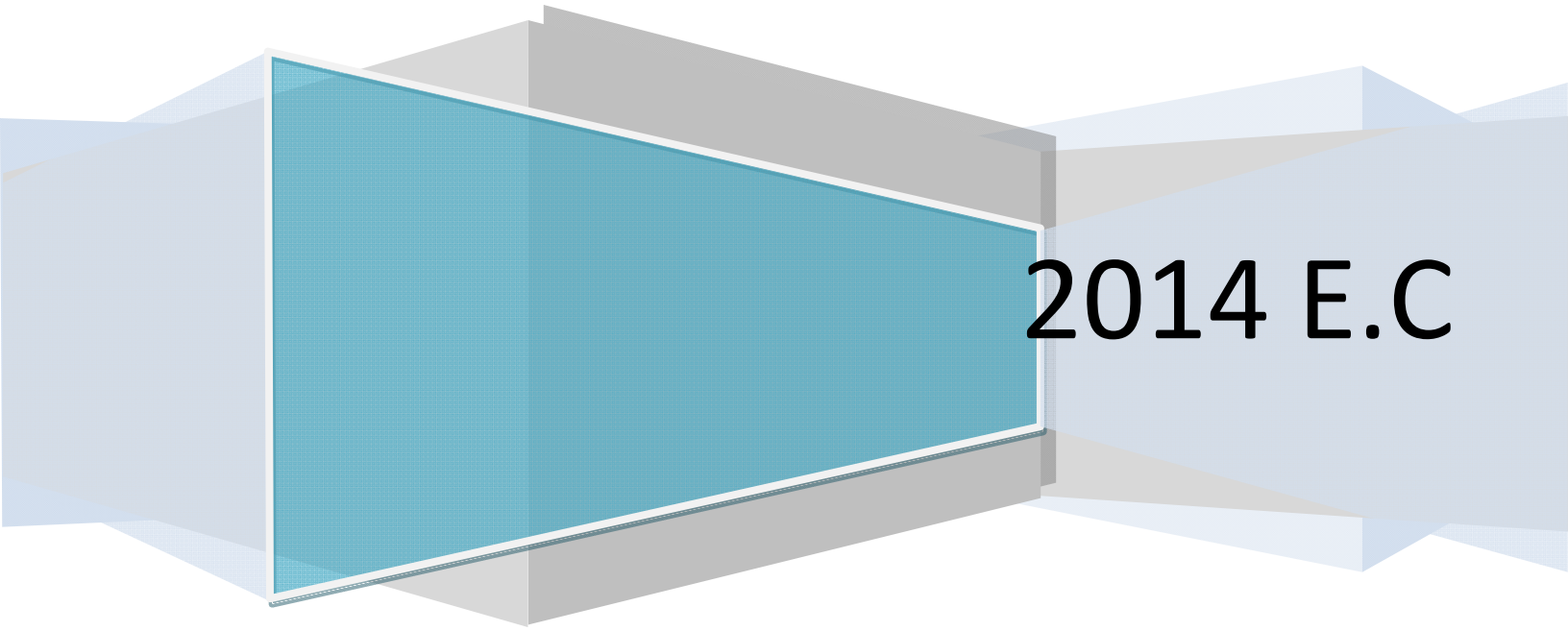
INTENATIONAL TRADE NOTE

By -KassawMar Assefa
Edited by –Ashenafi Fisha

2014 E.C

By -KassawMar Assefa

Edited by –Ashenafi Fisha



International Trade Note

UNIT ONE

INTERNATIONAL TRADE

- International trade law primarily focuses on states not individuals. But it does not mean that trade is not conducted by individuals. So we will talk about the behavior of states under this course. We are also going to talk about import and export.

Why states engaged in export?

- ✓ States export goods and services because they produce goods and services more than they consume.
- ✓ Individuals and firms have been able to sale goods and service to other countries at prices higher the prices they can obtain domestically.
- ✓ For developing countries, exports serve for the purpose of earning foreign currency.
- ✓ For developed countries, export sales helps to maintain high employment level.

Why states import goods and services?

- Goods or services those are essential to the economic evolving of the nation.
- Goods and services that are imported might be highly attractive to consumers but are not available in the domestic market.
- Those goods and services that satisfy domestic needs or wants can be produced more cheaply and efficiently by other countries and therefore sold at lower prices.

There are related concepts with international trade law

The first one is that, **international economic law**, which is regulates the international economic order or economic relations among nations. This might include; International trade law, Integration law, Private international law, International business regulations, International financial law, International private transaction law, International monetary law, International taxation law, International intellectual property law.

International trade law based on Traditional Principles of international economic law, which governs states when involve in international trade.

- Pacta sunt servanda which means the states are expected to fulfill their commitment.
- Freedom of nations is other principle.
- Sovereign equality is other principle.
- The other principle is reciprocity.
- Economic sovereignty is other principle.

Modern and evolving principles of international economic law.

- Duty to cooperate which imposes the states to cooperate.
- Permanent sovereignty of natural resource meaning, every nation has sovereignty over its natural resources found within its boundary.
- Preferential treatment to developing countries

As a final point, every law that relates to international economic relations among states are categorized under international economic law.

The second one is that, **International business law,** which is a body of legal rules that govern international commercial transaction. This law regulates the relation between individuals. If it is at policy level it is international economic law while if it is at transaction label, it is international commercial or business law.

The third one is international trade law.

THEORIES OF INTERNATIONAL TRADE LAW

- **Mercantilism or neo-mercantilism**, which is the economic system of the major trading nation from the sixteenth to eighteenth century throughout Europe. During this period, European nations believed that the wealth of the **world is limited** and **finite** as a result, they engaged in the possession and accumulation of gold and silver because under this theory, **the wealth of the country is measured in terms of how much gold and silvers that nation has**. In order to acquire surplus gold and silver, these states engaged in two kinds of approaches, they encouraged export as the same time, they discouraged import.
- **Neo-mercantilism** policies promote export industries. They also engaged in protectionism. During this century, states monopolized export in order to acquire surplus gold and silver which means the states strictly regulated export trade.

If all states encourage export and discourage import, it becomes 0 sum game meaning, there is not mutual benefit. Finally, this mercantilism approach towards international trade caused the following problems;

- They engaged in trade war which means to control trade, they fought each other. E.g. it causes Trans Atlantic trade war.
- It caused expanation of colonialism.
- It caused that raising food price and social arrest.

Adam smiz criticized mercantilism as follows;

- Mercantilism is **faulty understanding of wealth creation.**
- Mercantilism **primarily focuses on the interest of the producer** and neglected the interest of consumers.
- Mercantilism supports **monopolies**.

According to this reason, he proposed the theory called **absolute advantage.**

The purpose of this theory is to promote free trade among nations. The theory stated that, absolute advantage exists between nations where they differ in their ability to produce goods.

The third is **Comparative theory** that is proposed by David Ricardo, which answers what if a certain country has absolute advantage over the other country in the production of more than one goods and services. If one country has absolute advantage over the other country in the production of all goods and services, there is still a possibility of free trade through specialization. A country has a comparative advantage in a good if it has a lower opportunity costs to produce the good that another country produces in this case free trade is still possible.

FREE TRADE DEBATE

Free trade is an idea which is supported by western developed nation whereas fair trade comes mostly from the developing and least developed nations.

- When we talk about free trade, we are talking about reciprocal market access and non-discrimination. So free trade involves in activities to harmonize trading rules and the reduction of barriers to trade such as tariffs and quotas.

International Trade Note

- Free trade is about leveling the playing field and let's plays on it. The people who argued free trade is a fair trade raise the following;
- It minimizes conflicts. The people are free to buy what they want.
- People should leave and work when they choose. The Free trade should allow anyone to invest wherever they want.
- Free trade promotes innovation, competition, and offers consumers the most choices and opportunities including their standard of living.
- Free trade generates economic growth.
- Free trade disseminates democratic values and reduces corruption.
- Free trade fosters economic freedom.

On the contrary, people who **argued free trade is not a fair trade** raise the following;

- They raised infant industry argument by saying, how the infant industries compete with the giant industries. Meaning, our industry is not well-developed. The small and the less developed local industries would be swallowed by advancing foreign industries.
- Developing countries will always specialize in primary sector and industrialization is not likely to take place.
- The other argument is balance of payment argument. There is deficient balance of payment on developing country.
- The other argument is late comers argument which argued that, a country which has already achieved a dominant economic position tends to prefer free trade Imposing it all others to late comers Which means free trade serves for early comers.
- The other argument argued that, free trade facilitates the emergency of new income gap between developing and developed nations.
- It might cause for foreign economic gap.
- It also causes for environmental destructions.
- It also causes political and social instabilities.
- It might also cause for the loss of cultural identity.
- Liberalization without preparation entails the great risk.

The breatonwoods conference was held after ww ii to fix the reasons for the occurrence of the ww ii and to regulate the international monetary and financial order.

International Trade Note

The ww ii had caused by many different reasons;

- There are countries which had not trading block.
- Protectionism was at high at that time.
- Difficulty in settlement of payment system. There was a bank called Bank of Settlement but that bank was served only UK.

Unite 2

Once the allied power defeated the Nazi, they gathered at new hamshayer. UK and US agree to restructure the world economic and financial system. UK would like to emphasize on reconstruction and development of its own industries while USA emphasize free trade and new financial order. As well as UK and USA agreed the US dolar as reserve currency. The dollar backed by gold until 1971, due to the Vietnam and cold war. Then automatically gold backed currency changed to fiat money. WB is established at that time which focused on reconstruction and development. IMF was established as well. ITO was established to govern the international trade.

ITO has broad elements. Many countries agreed to this charter. But until 1950, the US senate did not ratified and any international organization to which America is not a member cannot be established according to this reason, ITO failed to be established. As a result, there was a parallel negotiation among 23 developed states to reduce tariff and protection. So in 1947, they established an organization called GATT (general agreement on trade and tariff). Therefore, GAT was established to reduce tariff among member states.

The origins of WTO were GAT. GATT was established for provisional period but it served until 1994 in which WTO was established. Factors pushed GATT members to a new effort to new areas; i. goods and services are increased. ii. Dispute settlement mechanism of the institution was weak. iii. Organizational structure was also weak additionally; it was not addressing developing states. WTO is the most effective multilateral organization.

The best description given to the WTO is the negotiating form. WTO tries to establish a rule based international trading system. It has the most effective dispute settlement system in the world.

PRINCIPLES OF WTO

Transparency or predictability. So WTO has required governments to adopt transparent laws, regulations, and practices regarding to its international trade. To effect this principle, there is trade policy review mechanism.

The other principle is non-discrimination.

The third principle is progressive liberalization of trade. When we say liberalization of trade, we mean that, reducing barriers of trade and open the market.

The fourth principle is promoting fair competition.

The fifth principle is special and preferential treatment to developing countries.

Legal framework of the WTO

Annex one is about goods. Annex 1(a) is mainly talks about GATT. GATT is the primary legal framework for trade in goods in so far as it does not contradict with the WTO agreement. In annex 1 (a) contains 14 agreements.

Annex 1(b) addresses the general agreement on trading services.

Annex 1(c) addresses trade related aspects of intellectual property rights.

Annex two addresses dispute settlement mechanism.

Annex three addresses policy review mechanism.

Annex 4 is trilateral agreements which are voluntary.

Annex 4 (a) talks about agreements on civil air craft.

Annex 4 (b) talks about agreement on government procurement.

Annex 4 (c) discussed regarding international diary agreements.

Annex 4 (d) discussed international bovine meet agreement.

Schedules of commitment. Each member has its own specific schedules of commitment which means every member of the WTO has to negotiate upon all goods and services with every other member country. Then, bound tariff is decided this means the highest level of tariff that a country levies when goods and services are imported to its boarder. Applied tariff is a tariff that country applies for importing goods. Applied tariff cannot be beyond tariff bound. When WTO was established, GAT members automatically became members of the WTO without negotiating further negotiation.

OBJECTIVES OF WTO

The increase of standard of living

The attainment of full employment

The growth of income and effect of demand

The expansion of production of goods and services

FUNCTION OF WTO

The negotiation of new agreements

The settlement of disputes

Trade policy review

Cooperation with other organization

Technical assistance to developing countries

CHAPTER THREE - Fundamental four principles

The principle of Non-discrimination

Non-discrimination is a fundamental principle of the multilateral trading system and is recognized in the Preamble to of the WTO Agreement as a key instrument to achieve the objectives of the WTO. In the Preamble, WTO members express their desire to eliminate discriminatory treatment in international trade relations. Non discrimination in the WTO is

embodied by two principles, the most favored nation (MFN) treatment obligation and the national treatment obligation. The MFN principle applies to trade in goods, trade in services, and trade related aspects of intellectual property.

I. Most favors nation principle that prohibits the state discrimination between trading partners in providing trade advantage. If a state provides a certain trade advantage to one member, it must provide to all members of the WTO immediately and unconditionally. Requirements are; a. there must be advantage or favor or privilege Granted to one member during the process of importation or exportation of goods. B. it has to be like products meaning, the trade advantage given to the product of one member country shall be given to the like product of the other member country. To say like products there are four standards; physical characteristics of the product, end use of the product, principal preparation, the classification of the product in members tariff laws. C. it must be immediate and unconditional.

ii. National treatment principle dictated that, each trading partners shall treat imports not less favorably than the treat like domestic produced goods. Requirements; I. it should be like products. ii. The imported products are taxed more than in excess of the domestic products. The national treatment obligation applies to internal measures. Specific exception for national treatment: government procurement, subsidy to domestic products, cinematographic films.

Principle related to market access

As you certainly imagine, there are many possible impediments to market access for goods, services and intellectual property. The two main categories of barriers to market access for goods are (1) tariff and (2) non tariff barriers. The WTO does not prohibit the use of tariffs, however, there is the recognition that they often constitute obstacles to trade; hence there is the obligation on members to negotiate on tariffs. Article XXVIII of the GATT 1947 contains the original mandate on tariff negotiations.

- Tariff is determined by negotiation and reciprocity. Then, reducing tariff step by step. Renegotiation of tariff is possible either temporarily or permanently.

- Tariff negotiations are based on (1) reciprocity and mutual advantage, and (2) the most favored nation (MFN) treatment obligation.

Renegotiation of concessions is governed by the rules and provisions in GATT Article XXVIII and GATT Article XXVIII, GATT 1994 Understanding on the interpretation of Article XXVIII as well as the Note Ad Article XXVIII. If a Member wishes to withdraw its previous commitment and impose a higher customs duty than the bound rate in its Schedule, two alternatives are available under GATT Article XXVIII: 1. the level of the tariff concession can be TEMPORARILY "waived" - where the Member has, under exceptional circumstances, received specific authorization from all the other Members; 2. the level of the tariff concession can be PERMANENTLY changed (decreased or increased). The renegotiation of any tariff concession requires compensating the exporting Members.

There are also non-tariff barriers such as quantitative restriction like quotas and other barriers such as lack of transparency, unfair and arbitrary application of trade regulations, other custom formalities, and technical barriers to trade.

There is no explicit definition of the term "quantitative restriction" in the WTO. An implicit definition is provided by GATT Article XI:1, which proscribes any prohibition or restriction other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures.

In addition to customs duties and other charges, as well as quantitative restrictions, trade in goods is also impeded by other non-tariff barriers that restrict market access. Lack of transparency, unfair and arbitrary application of trade measures, customs formalities and procedures, and other measures or actions such as pre-shipment inspection, marks of origin, and measures relating to transit shipments, as well as other forms of inaction (failure to inform about applicable trade laws, regulations, procedures and practices, timely and accurately) may constitute a barrier to trade.

Exceptions to restriction of quota; I. to prevent critical shortage of food staff or other essential products. ii. Remove temporary surplus of low a domestic like product. iii. Uphold import restriction or agriculture and fishery products.

EXCEPTIONS FOR THE FOUR OBLIGATIONS (PRINCIPLES)

The first exception is general exception which is addressed under art. xx of the gat. The provision stated conditions from A. to g. there are two tests for the application of this general exception: 1. Necessity test. 2. Chapel of art. 20. The general exception should not applicable by discriminating the member states.

The second exception is security. This security measure may be related to the material from which they are derived: traffic in arms: ammunition…

The third exception is economic exception.

The fourth exception is waver which means the WTO member may be authorized by another memberstate to derogate for a specific time and under certain condition for any provision contained in the WTO.

The fifth exception is regional integration since the very purpose of WTO is to liveralize market. Therefore, regional integration is allowed to facilitate that liveralization market.

The sixth exception is special and differential treatment for developing countries which is exception to the principle of non-discrimination.

The reason for the adoption of WTO is ineffectiveness and problem of dispute settlement mechanism enshrined under GAT. Eg, there was no any panel and appellate body which adjudicate the dispute arising within international trade under GAT. also there was no time framework for each step taken to solve disputes. The decision making process during GAT was based up on consensus which means all member states of the GAT must agree eg, to adopt report The WTO however, re-inverse that process which means consensus is needed when not to adopt report.

The four areas whereby dispute settlement understanding is considered as the most effective dispute settlement mechanisms;

The first dispute settlement method under DSU is consultation which is referred by DSB (dispute settlement body) to the conflicting parties to solve their disputes through negotiation [consultation] within 60 days.

The second method is adjudication if consultation fails to resolve the dispute. There are panel and appellate bodies under adjudication method.

The third method is Arbitration under art. (25) of DSU. The parties to the arbitration must be defined the procedure and they are also bound by the award of the arbitration. The substantive aspects of decision of the arbitration must be based up on the covered agreement.

the fourth method is Good offices. If disputant parties are allowed, the DSB may use its good offices (expertise) to facilitate the conciliation. there are expertise within every agreements.

INSTITUTIONS ESTABLISHED BY DSU.

The first one is Dispute settlement body. as it is stated under DSU, the DSB shall have the authority to establish panel, adopt panel and appellate body reports, maintain surveillance of the implementation of reports and recommendations and authorize suspension of concessions and other obligations. The decision making processes of the DSB are consensus and re-inverse consensus. Adoption of panel and appellate bodies reports, authorization of implimentations, establishment of panel, retaliation, compensation, are decided by re-inverse consensus whereas Other functions of the DSB are decided based on consensus. The member of the WTO will become automatically the member of the DSB.

The second one is panels. If negotiation fails, At the request of the complaining party, the DSB will establish a panel to hear and decide on the dispute. Panels are not permanent.

the party who dissatisfied by the decision of the panel, can brought to appellate body which is a permanent institution. It is composed of seven persons refered to as members of the appellate body.

other bodies eg, under the SCM agreement, there is textile monitoring body.

TIME FRAMEWORK OF PROCEEDING.

DSB refered the case back to the conflicting parties to solve their disputes through consultation within 60 days.

If consultation fails, At the request of the complaining party, the DSB will establish a panel within 20 days. Then, The panel hass to submit its report to the DSB within six monthes since its establishment.

the permanent members of The appellate body shall review the case within 30 days. Then, the report is returned to the DSB.

The report is distributed to all members within nine monthes since the establishment of the panel. Then, the report is adopted within 60 days whether it is from the panel or from the appellate body.

Remedies for failure of implementing the recommendation with reasonable time.

If the loosing country agrees, compensation is one remedy.

If there is no agreement, the DSB is authorized the victim country to retaliate against the loosing country. During the authorization, The DSB has taken into consideration the following: i. if possible, the retaliation must be on the same sector within the same agreement. ii. If the retaliation on the same sector within the same agreement is failed, the DSB is authorized the victim state to retaliate against the losing state on the other sector in the same agreement. iii. if the retaliation on the other sector in the same agreement is failed, the DSB is authorized to retaliate on the other agreement or in other speaking, on cross sector and cross agreement.

SPM (sanitary and phyto-sanitary measures)

The purpose of sanitary and phyto-sanitary agreement is on one hand, to insure human, animal, plant health which is legitimate interest On the other hand, to protect these measures not to be taken as a disguised form of restrictive trade. So whenever we are talking about SPM, we are talking about balancing two interests. There are three tests to measure whether that measures are in allying to the agreements or not:

1. Risk assessment. The country must undertake a rigorous assessment of risks whether there is risk to the health of humans, animals, plants or not.

2. Harmonization. The country must conform to international standards with regard to risk assessment although it must undertake a rigorous assessment of risks. These agreements encourage states to recognize and apply common SPM. But by no means, that measure must be justified scientifically.

3. Transparency. The member state has to publicize through the WTO channel about any SPS measure and change treaty.

but no matter what happens, when a country takes special measures, it should follow atleast two principles such as non-discriminaition which contains two principles, and the principle of scientific justification.

TBT (Technical barriers to trade)

Technical barriers are defined as covers technical regulation, standards and conformity assessment procedures other than SPS measures. This TBT agreements cover products and services. Examples of this TBT measures are labeling of food,drink and drugs, grading and quality requirements for food, packaging requirements, regulation of electrical appliances, textile and garmenting labeling vehicles and accessories, shipment and other. So this technical barriers may be conducted by the states either directly or indirectly. Eg, when we say directly, they may prohibit not to import such products and services. And also when we say indirectly, they may increase their production cost. The objective of TBT is protection of life (health of plant, animal, human), national security, the environment, and deceptive marketing practice.

When states impose technical barrier, they should take into consideration:

It should be non-discriminatory.

They should have legitimate purpose.

They should encourage national standard to conform to international standards.

International Trade Note

Trade in Service

Annex 1(b) addresses the general agreement on trade in services. This agreement tries to reconcile two interests on one hand; it allows states to take policy measures with regard to the service investor. On the other hand, the member states must step by step liberalize the service sector.

Objective of this agreement is:

1. Expanation of trade in services.
2. Progressive liberalization of trade in services.
3. Insuring transparency and Predictability of relevant truth and regulation.
4. Increasing participation of developing states.

MODES OF SUPPLY OF SERVICE

A. Cross border supply which means the service crosses the border of a given country. Eg, an architect in the Ethiopia sending plans to a client in America. So in the given example, the service crosses the border of the recipient country that is America.

B. Consumption abroad. E.g., American tourist taking a vacation in Bahirdar, Or British citizen coming to Ethiopia for health care.

C. Commercial presence. E.g., the branch of an Ethiopian bank open the office and start to work in south Africa.

D. Presence of natural person. Eg the representative of an American software company spending a month in France installing the firm's product on a French company's computer. So there is a real presence of natural person.

Exceptions which are not covered under this agreement are:

1. Services supplied In the exercise of government authority on a non-commercial bases.

2. Services related to air transport.

OBLIGATIONS UNDER THIS AGREEMENT

The obligation of the GATT applied to measures by members affecting trade in services. Measures by members means measures taken by central, regional and local governments And by non-governmental bodies in the exercise of powers delegated by the central or regional governments. So obligations that are enshrined within GATT are applied to measures taken by governments.

General obligations which are automatically applicable and includes to all services and to all members

- The first obligation is MFN Treatment that prohibits the state discrimination between trading partners in providing trade advantage. As per art. 1 (1) of GATT, If a state provides a certain trade advantage to one member, it must provide to all members of the WTO immediately and unconditionally.
- The second obligation is transparency. Art. 3 of the GATT requires the member states to publish promptly or at least annually, all relevant measures of general application which pertain to or affect the operation of the GATT. As well as member states are required to promptly to respond to any question asked by any member state with regard to any issues like laws, regulations, administrative guidelines… issued by that member state.

SHEDULES OF SPECIFIC COMMITMENTS

Under this, there are market access, national treatment principle and additional commitments.

These kinds of obligations apply only to the extent that a member has inscribed specific commitment with respect specific sectors and schedule of specific commitment. This means the outcome of market access and national treatment principle is determined by negotiation. Art. 16 of the GATT have provided as to market access. E.g., if the branch of an American

bank opens in Ethiopia, Ethiopia can treat her banks better than that of branch of American bank if she does not agree not to do so. But any discrimination shall not exceed ten years.

Additional commitments may include but are not limited to undertakings with respect to qualifications, technical standards, licensing requirements of procedures and other domestic regulations.

EXCEPTIONS:

Under GATT, there is general exception that is mutant mutandis.

Other exceptions are:

- Economic integration.
- Public policy objective.
- Difficulty of balance of payment.
- Security interests.

Accession to WTO

The first is observer status. Art. 12 of the WTO agreement states that, accession to the WTO would be on terms to be agreed between the acceding government and the WTO. So from this, we can understand that, accession to the WTO is based on negotiation Since the WTO is primarily the form of negotiation. Not only states but also any separate customs territory can be a member of WTO. So there are two points here those are, the agreement must be between state or separate customs territory and members of the WTO. Therefore, if any country or separate customs territory would like to join the WTO, that state or separate customs territory must come up with terms based on negotiation with each member of the WTO. Thus, joining WTO late has its own disadvantage e.g., it increases the costs of negotiation: increases the costs of joining the WTO: increases the obligations of specific commitment that would member state assume.

If a country would like to join WTO, WTO allows that would be member state to have an observer status. Which means that would be member state observes the functions of the WTO. Or it can participate in the meeting of the WTO members as an observer even if it is

not required to make any decisions. It can also learn what is required from that country. And also that would be a member state is expected to be ready for the next stage.

Accession Process

There are steps:

- Submission of Application to the WTO. When the state wishes to join the WTO, it communicates its submission to the WTO general council. Then, this request is sent to all members raised in the general council meetings.
- Establishment of working party. The members of this working party are Any WTO members who are interested to negotiate with that would be member state. This is a formal group established to review each new application. Then, the working party established a memorandum on its foreign trade regime of the working member states.
- Fact finding. In this stage, mainly, it is question and answer. Any member state can ask any question that would be member state. This stage requires a significant amount of information.
- Negotiation. It is the process of offer and request negotiation. The offer is made by the prospective member while request is made by the existing member. The would be member negotiates agreements with all other members under three broad categories: Market access for goods. Market access for services. Agricultural supports.
- After negotiation is over, it comes drafting stage. If the state joins the WTO, this draft becomes the main schedule of commitment of that country.

Finally, the working party gives this draft protocol of accession gives to general council for accession. Two third of majority is needed to join the new state to the WTO. The remaining countries can block the effectiveness of the accession of that member state up on itself.

The End

Thank you