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AN ISSUE OF INVOCABILITY OF PROVISIONS OF THE WTO COVERED AGREEMENTS BEFORE DOMESTIC COURTS

RAMESH KARKY*

I. INTRODUCTION AND BACKGROUND

Nepal had applied to join the General Agreement on Tariffs and Trade (GATT), predecessor of the World Trade Organization (WTO) in May 1989. After the successful completion of accession negotiations, on September 11, 2003 the Fifth Ministerial Conference of the WTO in Cancun, Mexico agreed by consensus on the text of the protocol for Nepal's entry into the WTO. After Nepal's ratification of the Protocol of Accession, Nepal has become the WTO's 147th member on April 23, 2004. Nepal also has become the first least-developed country¹ to join the WTO through a full working party negotiation. Nepal's entry into the WTO has brought many-fold legal issues which are required to be addressed sooner or later.

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1. Out of the forty-eight least-developed countries (LDCs), thirty were original Members of the WTO (previously GATT Contracting Parties). Now, thirty-one LDCs are members of the WTO and twelve others—Afghanistan, Bhutan, Comoros, Ethiopia, Equatorial Guinea, Laos PDR, Liberia, Samoa, Sao Tome and Principe, Sudan, Vanuatu and Yemen—are currently in the process of accession to the WTO. The remaining LDCs, Eritrea, Kiribati, Somalia and Tuvalu, are currently not in the process of acceding to the WTO. Understanding the WTO: Least-developed countries, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last visited Mar. 13, 2011).

The Agreement Establishing the World Trade Organization (hereinafter referred to as the "WTO Agreement")² provides that one of the principle functions of the WTO is the administration of the Understanding on Rules and Procedures Governing the Settlement of Disputes, which is set out in Annex 2 to the WTO Agreement. The Dispute Settlement Body (hereinafter referred to as the "DSB") administers the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU").³ The WTO General Council, in a specialized role under a separate chair, acts as the Dispute Settlement Body.⁴ The Dispute Settlement Understanding regulates dispute settlement under all covered WTO Agreements. "The DSB has the authority to establish panels, and to adopt panel and appellate body reports."⁵ The Dispute Settlement Understanding states that the dispute settlement system "is a central element in providing security and predictability to the multilateral trading system."⁶

The dispute settlement system of the WTO Agreement is available only to the Member states. However, many times the root cause of the dispute brought by a Member state to the DSB is the interest of an individual or a company.⁷

Historically, many nation-states have brought cases against other nation-states in the international plane on behalf of their citizens under the right of diplomatic protection. In theory an un-redressed wrong to an alien is considered as a wrongful act to his state and international responsibility arises in such a situation.⁸ The injured national may ask his government to espouse his claim. If the claim is espoused by a state, it becomes an international claim. The states concerned might elect to submit the claim to the International Court of Justice, to an ad hoc arbitral tribunal or to a special regime of arbitral tribunals established by the two states to hear

2. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement].

3. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter Dispute Settlement Understanding].

4. JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT, 258 (3rd ed. 2002).

5. Dispute Settlement Understanding, art. 2, ¶ 1.

6. *Id.* at art. 3, ¶ 2.

7. For example, a member state can impose safeguards (quotas or tariffs) under the Agreement on Safeguards to save its domestic industry from serious injury caused by high importation of certain goods and any concerned member state may bring a complaint against another member state at the DSB for such issues. It is important to note that in this context that the final beneficiary of the WTO system is often individuals or companies.

8. See LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS, 680 (third ed. 1993).

all outstanding claims by nationals of one against the other.⁹ Generally a state may not espouse a claim based on injury inflicted on its national by another state unless its national has first exhausted all administrative and judicial remedies available in the defendant state.¹⁰ The rationale for this prerequisite is to give the allegedly responsible state an opportunity to remedy the wrong under its own domestic institutions before the claim can be elevated to the international plane.

However, the practice with the GATT and WTO with respect to the exhaustion of local remedies is different than the normal rule of general international law practice. The doctrine of exhaustion of local remedies by private parties does not apply under the GATT rule.¹¹ Although GATT and the WTO Agreements are state to state agreements, it is different than other international treaties. It involves products and services and not private parties as such. However, there are private party interests in the WTO obligations.¹² The International Law Commission's draft report on State Responsibility also supports this point of view.¹³

The WTO Agreements have some provisions which are directly applicable to private parties.¹⁴ “Arguably, a Member should not be able to complain that another is denying substantive rights if that other Member provides the required procedural channels for the enforcement and redress of those substantive rights and the relief afforded by these channels has not been utilized by those complaining of the substantive issue.”¹⁵

Hence, a system of invoking provisions of the WTO Agreements before domestic courts may be a good starting point to the DSB system because it will help to reduce the burden of certain types of cases on the international plane. A study on whether provisions of the WTO Agreements are invocable to the court of Member States under the WTO Agreements and national laws is valuable and contributes to the WTO system. In this context the writer has chosen Nepal and its laws for reference besides the laws of other countries are in the proper place. Nepal has become a member of the WTO. Hence, a serious question has already come to mind for many lawyers and judges in Nepal whether and

9. *Id.* at 691.

10. *Id.* at 693.

11. DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE, 35 (Cambridge Univ. Press 2004) (1999).

12. *See supra* note 11, at p. 35.

13. *See supra* note 11, at p. 35.

14. *See supra* note 11, at p. 30.

15. *See supra* note 11, at p. 35.

if so to what extent after Nepal's accession to the WTO, any citizen or company of Nepal or any foreigner will be able to invoke any provision of the Uruguay Round Agreements before the Courts of Nepal?

This paper examines and covers relevant provisions of the Uruguay Round Agreements and laws of Nepal, provides arguments favoring and opposing invocability and non-invocability, analyzes the constitutionality and validity of Nepal's accession to the WTO, the direct applicability of the Uruguay Round Agreements in Nepal's internal law, and the invocability of the provisions of the Uruguay Round Agreements before the courts of Nepal, and finally draws conclusion on the issue.

II. RELEVANT PROVISIONS OF NEPALESE LAWS AND THE WTO AGREEMENTS

Paragraph 1 of Article 1 of the Constitution of the Kingdom of Nepal, 1990,¹⁶ (hereinafter referred to as the "Constitution") states: "this Constitution is the fundamental law of Nepal and all laws inconsistent with it shall, to the extent of such inconsistency, be void." Paragraph 1 of Article 126 of the Constitution further states: "The ratification of, accession to, acceptance of or approval of treaties or agreements to which Nepal or the Government of Nepal is to become a party shall be as determined by law." Likewise, Paragraph 3 of Article 126 of the Constitution states: "after the commencement of this Constitution, unless a treaty or agreement is ratified, acceded to, accepted or approved in accordance with this Article, it shall not be binding on the Government of Nepal or Nepal."

Regarding the provisions of invocability of treaty before the courts of Nepal, there is not any explicit provision in the laws of Nepal. However, the Nepal Treaty Act, 1990 has a provision on applicability of treaty provision. Section 9 (1) of the Nepal Treaty Act, 1990 stipulates that "in case the provision of a treaty conflicts with the provisions of current laws, the latter shall be held invalid to the extent of such conflict for the purpose of that treaty, and the provisions of that treaty shall be applicable in that connection as Nepal laws."

16. See THE CONSTITUTION OF THE KINGDOM OF NEPAL 2047 (1990), HIS MAJESTY'S GOVERNMENT, MINISTRY OF LAW, JUSTICE & PARLIAMENTARY AFFAIRS, LAW BOOKS MANAGEMENT BOARD, BABAR MAHAL, KATHMANDU, NEPAL (hereinafter "CONSTITUTION"). Please note that this Constitution is no more valid and new Constitution has not been drafted finally yet. However, aforementioned provisions of this Constitution were valid during Nepal's accession process. Furthermore, these provisions are the basic provision of any Constitution and will have such provisions in the forthcoming Constitution of Nepal. Hence, still this provision has relevancy in analyzing the provision of invocability of WTO agreement before domestic courts.

Article XVI: 4 of the WTO Agreement stipulates that “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the Annexed Agreements.” However, neither WTO law nor general international law requires countries to fully incorporate WTO law into their domestic laws and make precise and unconditional WTO rules directly applicable to domestic courts and citizens.¹⁷

The WTO Agreements include a large number of requirements in order to strengthen domestic judicial review and access to justice at the national level. Article X:1 of the GATT stipulates that “laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, ...shall be published promptly.” Likewise Article X:3 of the GATT stipulates that “(a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings...., (b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for... prompt review”

Article 13 of the Agreement on Implementation of Article VI of the GATT 1994 states that “Each Member ... shall maintain judicial, arbitral or administrative tribunals or procedures for ... the prompt review” Article 23 of the Agreement on Subsidies and Countervailing Measures also has same kind of provision: “Each Member ... shall maintain judicial, arbitral or administrative tribunals or procedures for ... the prompt review” Likewise Article 41:1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights stipulates that “Members shall ensure that enforcement procedures as specified in this part are available under their law....” and Article 42 of the same Agreement stipulates that “Members shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement....”

As the WTO Agreements include numerous precise and unconditional guarantees of private rights, such as the intellectual property rights protected in the TRIPS Agreement and the large number of guarantees of private access to domestic courts, these provisions obviously raise this question: if a Member State does not maintain these provisions in their laws, can anybody request the court of that Member State to invoke

17. ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* 244 – 245 (1997).

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one of these provisions of the WTO Agreements and decide the case accordingly?

III. ARGUMENT IN FAVOR OF INVOCABILITY OF PROVISIONS OF THE WTO AGREEMENTS

The WTO Agreement is made and signed by the Sovereign Member States: it is a kind of international law and thus is binding to its parties. International law asserts legal primacy over domestic law, as illustrated by Article 27 of the 1969 Vienna Convention on the Law of Treaties,¹⁸ and requires its performance in good faith.¹⁹ The European Union Law is also a treaty-made law which in many respects is directly applicable and invocable in the courts of Member States of the European Community. The example of European Union law shows the possibility of invocation of treaty law in the domestic court.

Besides the European Union law, there are other examples of invocation of international law before a national court, i.e., *Paquete Habana* case²⁰, *Filartiga* case.²¹ Countries like Germany and Switzerland recognize directly applicability and enforceability of the TRIPS Agreement in domestic courts.²² Furthermore, an individual may sue potential suppliers directly in national courts under the Agreement on Government Procurement.²³ By these precedents, the chances of the invocability of the provisions of the WTO Agreements before the domestic courts of Nepal appear high.

IV. ARGUMENT IN FAVOR OF NON-INVOCABILITY OF PROVISIONS OF THE WTO AGREEMENTS

Equality among States and consent of the State is the basis of international law. The WTO Agreements do not expressly state that the provisions of the WTO Agreements shall have statute like effect and be invocable before the court of Member State. Although WTO Agreements are created by Sovereign Member States, they do not have the nature of

18. See the Vienna Convention on the Law of Treaties, U. N. Doc. A/CONF. 39/27, (1969) [hereinafter Vienna Convention]. Art. 27 states: "party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

19. See *id.* art. 26. See PETERSMANN *supra* note 17 at p. 22.

20. See the *Paquete Habana Case*, Supreme Court of the United States, 1900, 175 U. S. 677, 20 S. Ct. 290, 44 L. Ed. 320;

21. See *Filartiga v. Pena-Irala*, United States Court of Appeals, Second Circuit, 1980, 630 F.2nd 876.

22. See PETERSMANN *supra* note 17, p. 21.

23. See Piet Eechout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 COMMON MKT. L. REV. 11 (1997).

supranational law like European Union law. Different treaties may have different implications.

There is a major distinction between treaty and statutory law. A treaty is a contract between states whereas a statute is enacted by a state legislature. Moreover, generally a statute shall be effective indefinitely until it is modified or repealed. The major distinction between a treaty and statute is that statutes intend to regulate society while treaties affect primarily international relationships.²⁴

“The essence of the legislative authority is to enact laws, in other words, to prescribe rules for the regulation of the society. The objects of treaties are contracts with foreign nations, which have the force of law, derived from the obligations of good faith. They are not rules prescribed by the Sovereign to the subject, but agreement between Sovereigns.”²⁵ Hence, a treaty cannot automatically give direct effect (statute-like) to the law of its parties. However, the parties of the treaty have responsibility to fulfill its obligations. A party to a treaty may fulfill its obligation in many ways. One such way is the ‘act of transformation’ of treaty provisions into domestic law. In this case, treaty provisions are incorporated into domestic law through amendment or enactment of law by a law-making body of the party State and are invocable before domestic court as a domestic law. Hence, no argument suggests direct applicability and invocability of the WTO Agreements before domestic law and domestic court.

V. DISCUSSION

The laws of each Member country produce different roles for treaties in its domestic legal system. Article XVI: 4 of the WTO Agreement states that each Member country shall ensure the conformity of its laws, regulation and administrative procedures with its obligations as provided in the Annexed Agreements. This gives rise to the question of whether any citizen or company of Nepal or any foreigner would be able to invoke any provisions of the WTO Agreements before the Courts of Nepal. To answer this question, we need to examine the following three sub-issues:

24. FLORENCE ELLINWOOD ALLEN, *THE TREATY AS AN INSTRUMENT OF LEGISLATION* 3 (1952).

25. *See id.* p. 5

A. CONSTITUTIONALITY AND VALIDITY OF NEPAL'S ACCESSION TO WTO

“Accession” means the international act, so named, whereby a state establishes on the international plane its consent to be bound by a treaty.”²⁶ “Accession occurs when a state which did not sign a treaty, already signed by other states, formally accepts its provision.”²⁷ Sub-paragraph 1(a) of Art. 2 of the Vienna Convention on the Law of Treaties defines treaty as “an international agreement concluded between States in written form and governed by international law....” “Treaties are a principal source of obligation in international law. The term ‘treaty’ is used generally to cover the binding agreements between subjects of international law that are governed by international law. In addition to the term ‘treaty,’ a number of other appellations are used to apply to international agreements.”²⁸ Hence, a Protocol of Accession to the WTO is a binding document as a treaty once an acceding country ratifies it. The power to accept the treaty is significant in determining whether a nation is bound by a treaty as a matter of international law.²⁹ A treaty that is valid and binding under international law may nevertheless be invalid under the constitutional law of the participants.³⁰ With respect to Nepal’s accession to the WTO, the Protocol of Accession is finally made ready by the Working Party and approved by the Fifth Ministerial Council on September 11, 2003. The remaining final stage of the accession, i.e., the ratification of the Protocol of Accession also is completed by Nepal. If the process of accession were to become invalid under international law or national law, there would not be any possibility of invoking the WTO Agreements before the courts of Nepal. Hence the question of constitutionality and validity of Nepal’s accession to the WTO is directly related to the question of the invocability of the WTO Agreements before the court of Nepal.

In accordance with the Nepal Treaty Act, 1990,³¹ the Nepal Government may issue full powers (letter of authority) empowering anyone to negotiate or accept or sign a treaty. In the case of any treaty relating to

26. See Vienna Convention, *supra* note 18, art. 2, para. 1(b).

27. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 607 (4th ed. 1990).

28. See HENKIN ET AL., *supra* note 8, at P. 416.

29. See JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 336 (2000).

30. See Vienna Convention, *supra* note 18, art. 46 stipulates that “A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.”

31. See The Nepal Treaty Act, section 2(b) and section 3 (1990) (Nepal).

the acquisition of membership to any such organization, or of any treaty that conflicts with any current law, Nepal or the Nepal Government may not become a party until a resolution is passed by the Parliament for ratification or accession.³²

Clause (1) of Article 126 of the Constitution³³ states that the ratification of, accession to, acceptance of or approval of treaties or agreements to which Nepal or the Nepal Government is to become a party shall be as determined by law. Accordingly, Nepal Treaty Act, 1990 has been enacted by Nepal. The important aspect of Clause (1) of Article 126 of the Constitution is that the law only can determine the procedural aspects of ratification of or accession to treaties to which Nepal becomes party. In other words, with respect to the treaty making, Parliament is not authorized by the Constitution to enact any such laws which will have substantive effect.

Clause (2) of the Constitution states:

“The laws to be made pursuant to clause (1) shall, inter alia, require that the ratification of, accession to, acceptance of or approval of treaties or agreements on the following subjects be done by a majority of two-thirds of the members present at a joint sitting of both Houses of Parliament:

- (a) peace and friendship;
- (b) defense and strategic alliance;
- (c) boundaries of Nepal; and
- (d) natural resources, and the distribution of their uses:

Provided that out of the treaties and agreements referred to in sub-clauses (a) and (b), if any treaty or agreement is of an ordinary nature, which does not affect the nation extensively, seriously or in the long term, the ratification of, accession to, acceptance of or approval of such treaty or agreement may be done at a meeting of the House of Representatives by a simple majority of the members present.”

32. See *id.* section 4, para 4.

33. See CONSTITUTION, *supra* note 16.

Unless a treaty or agreement is ratified or acceded to, in accordance with Article 126, it shall not be binding on the Nepal Government or Nepal.³⁴ The Constitution prohibits the conclusion of any treaty or agreement which is detrimental to the territorial integrity of Nepal.³⁵

In Nepal, the ratification process is described by the Nepal Treaty Act, 1990. In accordance with the Nepal Treaty Act, 1990, Nepal government should table a resolution for ratification at the House of Representatives. The resolution concerning the accession must be passed by a majority of the Members present in the House of Representatives.³⁶ Hence, as a rule, Nepal had to ratify the Protocol of Accession from the House of Representatives (Parliament) and informed the WTO. Thirty days after the ratification, Nepal would become a member of the WTO. Instead of thirty days, Nepal got six months time, i.e., March 31, 2004 to ratify the Protocol.

The House of Representatives was dissolved by the last elected Prime Minister in Nepal in 2002 and the date for election was not scheduled yet. In such circumstances, Nepal had only two options, either to request with the WTO for the extension of ratification periods of time or to ratify the Protocol of Accession in accordance with the existing legal and constitutional framework. In the absence of the House of Representatives, the legislative power including the treaty making power still exists with Nepal as a sovereign nation, and Nepal can ratify this Protocol of Accession accordingly.

Nepal could request with the WTO for the extension of periods of time for ratification until the formation of the next House of Representatives. The WTO General Council has power to extend such periods of time.³⁷ But there was not certainty of formation of next House of Representatives within the extended period of time due to the uncertain existing political environment. Hence, this option was not logical. Finally, the Government of Nepal decided to ratify the protocol of accession in accordance with the existing legal and constitutional framework. Accordingly, the Government decided to amend the Nepal Treaties Act, 1990 to pave the way for the ratification of the Protocol of Accession. The Cabinet (Council of Ministers) decided to add a new

34. See CONSTITUTION, *supra* note 16, art. 126, cl. 3.

35. See CONSTITUTION, *supra* note 16, art. 126, cl. 4.

36. See Nepal Treaty Act, section 4 (1990) (Nepal).

37. The WTO General Council has already exercised this power in the case of Cambodia's accession on 11 February 2004 and it agreed to give another six months to ratify its membership agreement. See http://www.wto.org/English/news_e/news04_e/gc_Cambodia_11feb04_e.htm (visited 2/17/2004).

clause in Article 4 of the Nepal Treaty Act, 1990 through Royal Ordinance³⁸ that will delegate the Government the authority to ratify international agreements. The clause has also made a provision for the present arrangement to be automatically annulled once there is an elected parliament.³⁹ After the issuance of Ordinance, the Government endorsed Nepal's membership to the WTO.⁴⁰ The Nepalese Cabinet forwarded the decision to ratify the WTO membership to the Head of the State on the third week of March, 2004 as per the Nepalese Treaties Ordinance, a law drawn into effect for the purpose. The newly added clause in the erstwhile Nepal Treaty Act, 1990 provides for the King's approval mandate for the country to become the member of the multilateral organization when the Parliament is absent to do so.⁴¹ The Nepalese domestic ratification process completed on March 23, 2004 after the King granted Royal Assent to the said Cabinet decision.⁴² This has resolved the constitutional deadlock, which could have cost Nepal its hard won WTO membership.⁴³

On March 25, 2004 the WTO accepted the submission of ratification by Nepal and announced "Nepal will become the 147th Member of the WTO on 23 April 2004. Nepal will be the first least-developed country to join the WTO through the full working party negotiation process."⁴⁴ Finally,

38. See CONSTITUTION, art. 72(1). It provides that His Majesty's shall have a power to issue Royal Ordinance when the House of Representatives is not setting/working.

39. See KANTIPUR ONLINE. 2004-03-13; see <http://www.kantipuronline.com/php/kolnews.php?&nid=9035> (visited on 3/16/2004).

40. See the Kathmandu Post, March 24, 2004; see http://www.nepalnews.com.np/archive/2004/mar/arc_mar04_27.htm#3 (visited on 3/24/2004).

41. See March E-news letter on Globalization and WTO (2004) [SAWTEE FORUM], Vol. I, Issue 13, March 2004.

42. See the Kathmandu Post, March 24, 2004; see http://www.nepalnews.com.np/archive/2004/mar/arc_mar04_27.htm#3 (visited on 3/24/2004).

43. In connection to the constitutionality of the ratification, Prachand Man Shrestha, Head of the WTO Cell at the Ministry of Industry and Commerce, says "Our constitution has a provision for making laws in absence of the House of Representatives and we have done so in the past 14 years. In case of WTO, if we are required to join it within a certain deadline, we can bring the ordinance accordingly. But we have been cautious enough not to hamper the democratic system. If the House of Representatives, after it comes into being, finds that the WTO package was not the right deal, it can still take action. The ratification had to be done through the amendment because we have the 31 March deadline. If we fail to do so, we will be putting our country's credibility at stake." "Despite the provision in the Treaty Act, we could not get the ratification done through the House of Representatives because it is not there right now. But we are running out of time for ratification. After intensive discussion with legal professionals, we decided to make the amendment in the Treaty Act through ordinance so that ratification is possible. The additional clause in the Act will be applicable only in case international organizations join, which have to be multilateral and that means only the WTO. The amendment also has a mandatory provision that we notify the House of Representatives within seven days of its formation about the changes made. If dates for elections are announced, this provision will be null and void. That is how we have tried to maintain the spirit of the Act and the Constitution." See NEPALI TIMES, #189, 26 March – 1 April 2004, <http://www.nepalitimes.com/issue189/economy.htm> (visited on 3/29/2004).

44. See http://www.wto.org/english/thewto_e/acc_e/al_nepal_e.htm (visited 3/25/2004).

again the WTO announces “Nepal, on 23 April 2004, became the 147th Member of the World Trade organization.”⁴⁵ This landmark decision of both the WTO and Nepal in connection to Nepal’s accession makes all Nepalese proud to become a member of such a prestigious and truly international organization. So the answer to the question regarding the constitutionality and validity of Nepal’s accession to the WTO allows us to consider other proposed sub-issues.

B. DIRECT APPLICABILITY OF THE WTO AGREEMENTS IN NEPAL’S INTERNAL LAW

“Direct application” means that the international treaty instrument has a “direct” statute-like role in the domestic legal system. “Direct application” is very similar to “self-executing.” There is distinction between “direct application” and “invocability.” There will be no possibility of invoking a treaty provision before the domestic court when there is no provision of direct applicability of the treaty provision. Invocability is possible only if there is provision of direct applicability in the domestic law. When an international treaty is not directly applicable in the domestic law system, it requires an “act of transformation,” that is, a government action by that state incorporating the treaty norm into its domestic law. Sometimes this may be called implementation of a treaty norm. Even if a treaty norm does not prevail as a matter of domestic law, it will likely still be “in force” as a matter of international legal obligation. Furthermore, it can have certain “internal effects” other than “statute-like direct application.”⁴⁶

Traditionally, a “monist” State’s legal system is considered to include international treaties as a domestic law. Consequently, a citizen of other treaty parties can sue as an individual in the courts of that country. In contrast, in the “dualist” state, international treaties are considered as a separate legal system. Therefore, a treaty is not part of the domestic law and hence an alien only has recourse to persuade his own government to use diplomatic means to encourage another State to honor its obligation.⁴⁷ Keeping these systems and concepts in mind, we need to examine the Nepalese Constitution and law to determine the nature of its system.

There is no explicit provision of monist or dualist system under the laws of Nepal. Paragraph 1 of Section 9 of the Nepal Treaty Act, 1990,

45. See http://www.wto.org/english/news_e/news04_e/wto_147members_23apr04_e.htm (visited on 4/23/2004).

46. See JACKSON, *supra* note 29, p. 332.

47. See *id.* at p. 334

provides that in case the provisions to which Nepal has become a party following its accession conflict with the provisions of current laws, the latter shall be held invalid to the extent of such conflict for the purpose of that treaty, and the provision of the treaty shall be applicable in that connection as Nepal law. This provision of law is not enough to conclude that Nepal is a monist state. The Constitution is the fundamental law of Nepal and all laws inconsistent with it are deemed void.⁴⁸ However, the Constitution says nothing about the direct applicability of a treaty and has a provision stating that the accession to treaties to which Nepal is to become a party shall be as determined by law.⁴⁹ The Nepal Treaty Act, 1990, is not empowered to address more than procedural matters relating to how an accession process should be concluded.

The direct application of treaties is only one of a series of legal constitutional issues relating to treaties and national legal systems.⁵⁰ The practice of various WTO Member States towards direct application of the Uruguay Round Agreements helps us to understand the true nature of the Uruguay Round Agreements.

The European Court of Justice has stated in the *Kupferberg* case⁵¹ that “...in order to reply to the question on the direct effect⁵² of the first paragraph of Article 21 of the Agreement between the Community and Portugal it is necessary to analyze the provision in light of both the object and purpose of the Agreement and its context. The purpose of the Agreement is to create a system of free trade As such, this provision may be applied by a court and thus produce direct effects throughout the Community.” But in the *International Fruit* case,⁵³ the European Court of Justice concluded that GATT Article XI did not have direct effect because of various loopholes in GATT. In the *Portuguese Republic* case,⁵⁴ the European Court of Justice has stated:

“... The agreement establishing the WTO, including the annexes, is still founded, like GATT, on the principle of negotiations with a view to ‘entering into reciprocal and mutually advantageous

48. See CONSTITUTION, *supra* note 16, art. 1.

49. See CONSTITUTION, *supra* note 16, art. 126, cl. 1.

50. See JACKSON, *supra* note 29, p. 335.

51. See HAUPTZOLLAMT MAINZ v. C. A. KUPFERBERG & CIE., Case 104/81, [1982] ECR 3641, at 3665.

52. In the European Law context, direct effect is understood as a provision of a treaty that can be invoked before the Courts of Member States.

53. See INTERNATIONAL FRUIT CO. v. PRODUKTSCHAP, Cases 21-24/72, [1972] ECR 1219, 1227-1228.

54. See PORTUGUESE REPUBLIC v. COUNCIL, Case C-149/96, [1998] ECR I-7379, paras. 36-48.

arrangements' and is thus distinguished, from the viewpoint of the Community and non-member countries which introduce a certain asymmetry of obligations, or create special relations of integration with the Community... some of the contracting parties have concluded from the subject-matter and purpose of the WTO Agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law... having regard to their nature and structure, the WTO Agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.”

Under United States jurisprudence, some treaties can be found to be self-executing, in which case they will be directly applied. United States courts have ruled that a directly applied treaty has the same status as federal laws (statutes, etc.) and that the latest in time therefore prevails. Thus, for internal law purposes, a later United States statute will prevail over the international agreement.⁵⁵ “Regarding the Uruguay Round Agreements, it is not self-executing and thus has no direct “statute-like” effect in United States law, although the agreements can and should have an indirect effect on United States courts and offices when they interpret provisions of United States law.”⁵⁶ In the *Suramerica de Aleaciones* case,⁵⁷ the Court concluded that if there is a direct conflict between a United States statute and the GATT, the statute controls and the GATT does not trump domestic legislation.

During the Uruguay Round negotiation, Switzerland initiated to require each GATT member to give the GATT direct effect, or some equivalent status, in its national law.⁵⁸ This initiation was not included in the final Uruguay Round Agreements and it indicates that the GATT members as a whole still do not desire direct effect for the GATT. In fact, the WTO Dispute Settlement Panel, in the *US-Section 301-310 of the Trade Act 1974* case,⁵⁹ concluded that neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect.

55. See JACKSON, *supra* note 29, at p. 341.

56. See JACKSON ET AL., *supra* note 4, at p. 244.

57. See *Suramerica de Aleaciones Laminadas, C. A. v. United States*, 966 F. 2nd 660, 667-668 (Fed. Cir. 1992).

58. See Kuijper, *The New WTO Dispute Settlement System – The Impact on the European Community*, 29 *Journal of World Trade* 49 (No. 6), 1995 at 65.

59. See UNITED STATES-SECTION 301-310 OF THE TRADE ACT OF 1974, WT/DS152/R, Panel Report adopted by the DSB on January 27, 2000.

These illustrations make clear that a provision of the WTO Agreements cannot be applied directly as domestic law in Nepal. This is because the WTO Agreements have no nature of direct applicability in domestic law and there are no practices of direct applicability in domestic law among various major states. The laws of Nepal also do not provide for the direct applicability of such treaties in domestic law.

C. INVOCABILITY OF THE PROVISIONS OF THE WTO AGREEMENTS BEFORE THE COURTS OF NEPAL

Paragraph (1) of Section 9 of the Nepal Treaty Act, 1990, states: "... in case the provisions of a treaty conflict the provision of current laws, the latter shall be held invalid to the extent of such conflict for the purpose of that treaty, and the provisions of the treaty shall be applicable in that connection as Nepal laws." As discussed above, Paragraph (1) of Section 9 of the Treaty Act, 1990, is not compatible with clause (1) of Article 126 of the Constitution and is subject to being voided under Article 1 of the Constitution if any body challenges this law before court. Hence, we cannot state only on the basis of the said provision of the Nepal Treaty Act, 1990, that there is provision of direct applicability in the laws of Nepal. There will be no possibility of invoking a treaty provision in the domestic court when there is no provision of direct applicability of treaty provision. Invocability is possible only if there is provision of direct applicability. Besides this, the said provision of the Nepal Treaty Act, 1990, does not state that a treaty provision will be invocable before the courts of Nepal. Even on the basis of Nepal Treaty Act, 1990, we can say that a provision of a treaty is not invocable before the courts of Nepal. Concerning direct application, the treaty must be valid both internationally and domestically, it must be applied directly, and it must be invocable.⁶⁰ Hence, we can say that provisions of the WTO Agreements are not invocable before the courts of Nepal under prevailing laws.

The context, object and purpose⁶¹ of the WTO Agreements also do not give the meaning of direct application in national law and invocability before a domestic court, because they do not create absolutely binding obligations, but reciprocity and mutually advantageous arrangements.

Other major countries' practices also help us to understand the issue of the invocability of the WTO Agreements. In the United States, no person (except the United States itself) has a cause of action or defense

60. See JACKSON, *supra* note 29, at p. 339.

61. See Vienna Convention, *supra* note 18, art 31, para. 1.

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under any Uruguay Round Agreement and no person may challenge a federal, state or local law or action or inaction on the grounds that it is inconsistent with the Uruguay Round Agreements.⁶²

In Japan, in the so-called *Necktie* case,⁶³ the district court's decision to not allow invocation of a GATT provision was affirmed by the Japanese Supreme Court. The European Community has also not given effect of invocability (we call it direct effect in EU context) with respect to the WTO Agreements.⁶⁴ Hence, other major WTO Member countries' practices, the nature of the Agreement, and laws of Nepal support the view that provisions of the WTO Agreements cannot be invoked before the courts of Nepal.

VI. CONCLUSION

On the basis of the analysis of the above-mentioned sub-issues, we can draw an opinion that the very nature of the WTO Agreements is founded on the principle of negotiations with a view to entering into reciprocal and mutually advantageous arrangements but not on certain obligations like the European Union. It is not a supranational law or agreement.

The context, object and purpose of the WTO Agreements do not hint at direct applicability in domestic law and invocability before the court of Member States. Other major member countries also have not given direct applicability of the WTO Agreements to their domestic laws and accordingly not allowed the invocation of provisions of the WTO Agreements before their domestic courts. Even a Panel of the Dispute Settlement of the WTO (adopted by the Dispute Settlement Body) has stated in a case⁶⁵ that the WTO Agreements will have no direct effect (no invocability).

The Nepal Treaty Act, 1990, also does not provide for the invocability of treaty provision before the courts of Nepal. Therefore, no person, company, or any foreigner can invoke any provision of the WTO Agreements before the courts of Nepal. However, in the future, if the House of Representatives (Parliament of Nepal) passes an implementing law that provides for the invocability of WTO Agreements before the courts of Nepal, the WTO Agreements may be invoked before the courts of Nepal.

62. See The Uruguay Round Agreement Act, section 102(c), (1994) (U. S. A.).

63. See JACKSON, *supra* note 29 at p. 358.

64. See *supra* note 53 & 54.

65. See *supra* note 59.