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Nepal's Accession to WTO and Nepalese Legislation Required to Give Effect to WTO Covered Agreements

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GOLDEN GATE UNIVERSITY SCHOOL OF LAW

AN SJD DISSERTATION ON

**NEPAL'S ACCESSION TO WTO AND NEPALESE LEGISLATION
REQUIRED TO GIVE EFFECT TO WTO COVERED
AGREEMENTS**

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Submitted to

**Dean & Distinguished Professor Dr. Sompong Sucharitkul, Professor
Dr. Chris N. Okeke, and Professor Dr. Sophie Clavier**

**By
Ramesh Bikram Karky**

September 2005

“The future of Nepal lies in constitutional monarchy and multi-party democracy. Economically, it lies in openness and competition, and in joining the WTO.”

His Majesty King Gyanendra Bir Bikram Shah Dev

**This SJD Dissertation is dedicated to
His Majesty King Gyanendra Bir Bikram Shah Dev**

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INTRODUCTION

I.1 INTERLINKING NATIONAL ECONOMY INTO THE GLOBAL ECONOMY

Nepal's accession to the World Trade Organization is of great significance in many ways for the Nepalese people suffering from the extreme poverty. It is a hope not based on any theory but in reality. After the ending of the cold war, people of Africa and fourteen least-developed countries of Asia-Pacific region including Nepal who have been facing severe poverty are getting helping hand and poverty eradication agendas. The results of the Uruguay Round multilateral trade negotiations and the establishment of the World Trade Organization in 1995, the United Nations Millennium Declaration by one hundred forty seven Heads of State at the United Nations Millennium Summit in September 2000, WTO Doha Development Agenda of 2001, the International Conference on Financing for Development and its Monterrey Consensus of March 2002, and Highly Indebted Poor Countries (HIPC) Initiatives are example of important breakthrough in the search for economic development for all.

Poor countries have been facing many problems particularly of extreme poverty, highly foreign indebtedness, lack of technology & finance, no means of economic growth, etc. More than a billion people still struggle to survive on less than a dollar a day. One child out of five does not complete primary school. Half a million women die in pregnancy or childbirth each year. 42 million people are known to be infected by HIV/AIDS. The figures show that 54 countries

actually got poorer over the course of the 1990s.¹ The least-developed countries' share of world trade fell from 1.9 per cent in 1970 to some 0.4 per cent today.² The trend of foreign direct investment in African and poor countries is declining.⁴

In this connection, finding out practically possible & available ways and means of poverty eradication and of achieving economic growth is a challenging job. It is an well established fact that trade is an engine of economic development. The Monterrey Consensus states "that international trade is an engine for international development, and that a universal, rule-based, open, non-discriminatory and equitable multilateral trading system can substantially stimulate development world-wide benefiting countries at all stages of development."³ Global economy has been growing progressively and giving positive results.⁴ Global economy also known as economic globalization⁵ generally includes international trade, foreign investment, and flows of capital and technology transfer, etc. Globalization offers extensive opportunities. For the eradication of poverty and achieving economic growth in the poor countries, it is necessary of

¹. See Mark Malloch Brown, UNDP Administrator, *Renewing Commitment to the Millennium Development Goals: A Call to action to the Group of Eight*, News Bulletins, New York, 29 May 2003. Available at <http://www.undp.org/mdg/booklet/pdf> (visited 6/18/2005).

². See Marc Auboin, *The Trade, Debt and Finance Nexus: At the Cross-roads of Micro- and Macroeconomics*, World Trade Organization Discussion Paper No. 6, page 13.

³. See the Report of the International Conference on Financing for Development (Monterrey Consensus), Monterrey, Mexico, 18-22 March 2002, UN Doc. A/CONF.198/11 at para. 26.

⁴. See International Monetary Fund, *Globalization: Threat or Opportunity*, by IMF Staff, January 2002, page 11, available at <http://www.imf.org/external/np/exr/ib/2000/041200.htm> (visited on 6/21/2005).

⁵. It is hard to get single definition of Globalization. International Labour Organization defines globalization as a process of growing interdependence between all people of this planet. People are linked together economically and socially by trade, investments and governance. These links are spurred by market liberalization and information, communication and transportation technologies. In fact, global economy was in existence since the 16th century, based on the development of international trade, foreign direct investment and migration. See *Globalization and Workers' Rights*, International Labour Office, ILO, available at <http://www.ilo.org/actrav> (visited on 6/21/2005). International Monetary Fund states that Globalization offers extensive opportunities for truly worldwide development. Economic globalization is a historical process, the result of human innovation and technological progress. It refers to the increasing integration of economies around the world, particularly through trade and financial flows. The term sometimes also refers to the movement of people (labour) and knowledge (technology) across international borders. See *Globalization: Threat or Opportunity?* By IMF Staff, January 2002 available at <http://www.imf.org/external/np/exr/ib/2000/041200.htm> (visited 6/21/2005).

interlinking national economy of poor countries to the global economy. It gives an opportunity of market access into international market and attracts foreign direct investment. The foreign direct investment brings capital as well as technology which helps to promote economic activities inside the country, and promotes production standard and exportation of goods into international market. "Countries that have been able to integrate into the global economy are seeing faster growth and reduced poverty."⁶

When a poor economy enters into the global economy, in the beginning it will face many negative impacts, i. e., declination of fiscal revenue, domestic goods faces tough competition within the domestic market, etc. Solution to the negative impact of entering into the global economy can be an improvement of internal tax system, i. e., value added tax (VAT), reform of customs, trade facilitation including transportation facilities, etc. and other methods approved by the WTO Agreements, i. e., safeguards, transitional periods, etc. Besides it, the global economy is not without any weaknesses. So far, particularly rich countries and few advanced developing countries are able in harnessing the benefits of global economy.⁷ Poor countries are not able to get benefits of the global economy. As a result, "the gaps between rich and poor countries, and rich and poor people within countries, have grown. The richest quarter of the world's population saw its per capital GDP increase nearly six-fold during the century, while the poorest quarter experienced less than a three-fold increase. Income inequality has clearly increased."⁸ The weaknesses of the global economy also are not un-addressable. The gap between the rich countries and the poor countries should be fulfilled. For this, interlinking of poor economy into

⁶ . See International Monetary Fund, *Globalization: Threat or Opportunity*, supra, footnote 4, at p. 1.
⁷ . See International Monetary Fund, *Globalization: Threat or Opportunity*, supra, footnote 4, at p. 11.
⁸ . See International Monetary Fund, *Globalization: Threat or Opportunity*, supra, footnote 4, at p. 3.

the global economy and providing helping hand by rich countries to poor countries are necessary, and in fact it will be significantly effective for the uplifting of general conditions of poor countries. In this context, the world leaders expressed their commitment in the UN Millennium Summit that:

We believe that the central challenge we face today is to ensure that globalization becomes a positive force for all the world's people. For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed. We recognize that developing countries and countries with economies in transition face special difficulties in responding to this central challenge. Thus, only through broad and sustained efforts to create a shared future, based upon our common humanity in all its diversity, can globalization be made fully inclusive and equitable. These efforts must include policies and measures, at the global level, which correspond to the needs of developing countries and economies in transition and are formulated and implemented with their effective participation.⁹

The world leaders further set out in the UN Millennium Summit that, "We also undertake to address the special needs of the least developed countries. ... We call on the industrialized countries: to adopt a policy of duty- and quota-free access for essentially all exports from the least-developed countries; to implement the enhanced program of debt relief for the heavily indebted poor countries without delay; and to grant more generous development assistance."¹⁰ In fact, these are the core needs of poor countries and it will tremendously help for the reduction of

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¹⁰

See United Nations (2000) A/RES/55/2 United Nations Millennium Declaration at para. 5.
Ibid. at para.15.

poverty. The main focus of the UN Millennium Summit indicates clearly that the United Nations has put emphasis on the vital role of trade in development.

We should not think that only interlinking national economy of poor countries to the global economy is solution of all problems. For the effective positive results of interlinking national economy with the global economy, it should be supported by good and rational national policies. In this respect, the world leaders have clearly mentioned in the UN Millennium Declaration that, "Success in meeting these objectives (elimination of poverty) depends, *inter alia*, on good governance within each country."¹¹ It is important to mention here that national policies of poor countries also are equally responsible for the poverty. National policies, i. e., good governance, respect of human rights, rule of law, transparency, outward market economic policies based on competition, liberalizing trade, etc. are prerequisite for the economic development of a country.¹²

In this connection, it is important to mention here that democratic system is the best political system suitable to individuals' progress, prosperity, happiness and co-existence. Only democratic system allows freedom and liberties to individuals. Freedoms and liberties are the basis of human beings' progress and happiness. Without it, human beings will be a mere animal or a slave. Economic development is not possible without it. A political system, which restricts freedom and liberties, cannot be considered as civilized and such system is bound to bring poverty and absolute dictatorship. As such human rights including individuals' freedoms and liberties are not given by a state or government to individuals. They are inherent rights to individuals by birth. So, no state or government has any right to deprive any individual from his

¹¹ . Ibid at para. 13.

¹² . See International Monetary Fund, *Globalization: Threat or Opportunity*, supra, footnote 4, at p.11.

or her birthrights. The GATT/WTO system is based on the concept of free market economy. The free market economy also is an economic system that is a natural part of a democratic system and it supports individual freedoms as well as liberties. In the free market economy, individuals are main player and it is going to eradicate poverty in this planet in the future. It is an established as well as functioning economic system. However, currently terrorism has caused serious threat to the international trade and to the overall economic development of countries including Nepal. It has increased the cost of trade and hindered the smooth flow of goods, services and capital. In Nepal, the terrorism run by the so-called Nepalese Maoist is able to create dangerous fear in the mind of Nepali people. They have been killing and torturing innocent people, destroying basic infrastructure of economic development and distorting the smooth functioning of democracy in Nepal. However, such terrorism cannot win the heart of people and is bound to be defeated sooner or later. Because terrorists are not fighting for any principle, cause, justice and/or value. They are trying to turn the clock back by the means of terror and establish the age of barbaric. Hence, domestically a smooth functioning of a democratic political system and a free market economic system are essential for a successful interlinking of domestic economy into the global economy.

“Trade regimes in poor areas, which remain more restrictive than in other parts of the world are likely to be the among the biggest beneficiaries of further trade liberalization, particularly multilateral liberalization which combines the liberalization of a country’s own trade restrictions with the liberalization of those of its main trading partners.”¹³ “Developing (poor) countries must implement policies that address the root causes of poverty. But if poor countries are to win this

¹³ See Marc Auboin, *The Trade, Debt and Finance Nexus: at the Cross-roads of Micro- and Macroeconomics*, World Trade Organization Discussion Paper No. 6, page 14.

fight, it is vital that rich countries deliver on their own pledges to remove unfair trade barriers and provide more aid and meaningful debt relief.”¹⁴ “The studies revealed that, while most other developing countries had shared in the growth of world trade in the past thirty years, the poorest countries saw their share of world trade divided by four; the LDC’s share of world trade fell from 1.9 per cent in 1970 to some 0.4 per cent today. The studies pointed to the prevalence, in these countries’ main trading partners, of market access barriers on their exports of agricultural and labor-intensive manufactured products.”¹⁵ “These negative trends can be reversed through political will in the developing world and new financial commitments and trade policies in the wealthiest nations.”¹⁶ Furthermore, external debt is a major issue confronting poor countries and it has negative impact on their capacity to reap the benefits of their participation in the multilateral trading system. In this regard, the G8 Leaders have announced the US \$40 billion debt cancellation in June 2005 and they have expressed their commitment to continue such support. We consider it as a major breakthrough in respect of debt cancellation.

“Developed countries, and Quad countries¹⁷ in particular, display much lower bound and applied average tariffs than developing countries, although tariff peaks exist in selected industries – for example, food and footwear in the European Union and Japan; and textiles and clothing, footwear, glass and electricity parts in the United States and Canada. While tariff escalation also exists for these countries, it is a common feature among other WTO Members as well, including developing countries, in relatively similar categories of products. Therefore, contrary to

¹⁴ . See Mark Malloch Brown, UNDP Administrator. Available at <http://www.undp.org/mdg/booklet/pdf> (visited 6/18/2005).

¹⁵ . See Marc Auboin, *The Trade, Debt and Finance Nexus: at the Cross-roads of Micro- and Macroeconomics*, World Trade Organization Discussion Paper No. 6, page 13.

¹⁶ . See UNDP contention. Available at <http://www.undp.org/mdg/booklet/pdf> (visited 6/18/2005).

¹⁷ . Quad countries include the European Union, the United States, Japan and Canada.

common belief, there is ample scope for further liberalization in industrial products.”¹⁸ “Least-developed countries would gain most from agricultural liberalization in developed countries because of the greater relative importance of agriculture in their economies.”¹⁹ “For developed countries, the average bound and applied rates for agricultural products are four to nine times higher than that on industrial products.”²⁰ “... Experience since the Tokyo Round of multilateral trade negotiations shows that their integration cannot be achieved without better market access based on the principle of special and differential treatment on a non-reciprocal basis.”²¹

In this context, accession to the WTO is the main ways and means of interlinking national economy into the global economy. Accession to the WTO helps to liberalize domestic trade and gives access to international trade. In viewing the benefits of international trade, Nepal has decided to join the Multilateral Trading Systems and to interlink her economy into the global economy so that Nepal will be able to eradicate the existing poverty and to accelerate its economic activities. It is understood that Nepal will not only gain benefits but also may face some serious challenges joining the WTO. This thesis does not cover the whole aspects of poverty eradication or economic development through the means of interlinking national economy into the global economy, but only covers the area of Nepal’s accession to the WTO and Nepalese legislation required to give effect to the WTO covered Agreements. Conformity of domestic legislation with the WTO obligations is pre-requisite for trade liberalization as well as

¹⁸ . See Marc Auboin, *The Trade, Debt and Finance Nexus: at the Cross-roads of Micro- and Macroeconomics*, World Trade Organization Discussion Paper No. 6, page 17.

¹⁹ . Ibid.

²⁰ . Ibid.

²¹ . See Implementation of the Monterrey Consensus: a regional perspective, Note by the Secretary-General, 7 June 2005, UN Doc. A/59/826 at para 18.

for interlinking domestic trade into the international trade, and then finally interlinking national economy to the global economy.

I.2 ACCESSION TO THE WTO

Nepal had applied for accession to the General Agreement on Tariffs and Trade, predecessor of the World Trade Organization in May 1989.²² The Fifth Ministerial Conference of the World Trade Organization agreed to grant accession to Nepal in the World Trade Organization (hereinafter referred to as the "WTO") on 11 November 2003. After Nepal's ratification to the Protocol of Accession to the WTO, Nepal has become the 147th Member of the WTO on 23 April 2004.²³ Nepal also has become the first least-developed country to join the WTO through a full Working Party negotiation after the establishment of the WTO. The WTO Membership is a landmark in the history of Nepal. In fact, Nepal had applied for membership in 1989 following a trade embargo by India that had virtually crippled Nepalese trade and industry. Nepal, a landlocked country, had hoped to secure transit rights by virtue of its GATT membership.²⁴

The WTO Membership is highly valued in Nepal, and it is considered that it will facilitate Nepal's economic development. His Majesty King Gyanendra Bir Bikram Shah Dev has said, "The future of Nepal lies in constitutional monarchy and multi-party democracy. Economically,

²² . See WTO/Project Status Review, p. 1 (January 1997 to June 1999), Nepal's Accession to World Trade Organization (NEP/96/010), Babar Mahal, Kathmandu, Nepal.

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

²⁴ . See *Nepal's WTO-talks largely successful: WTO membership likely in September*, The Kathmandu Post (Nepal), July 20, 2003.

it lies in openness and competition, and in joining the WTO.”²⁵ Ralf Frank, US Ambassador to Nepal, says, “With peace, democracy, and good economic policies including WTO membership, Nepal’s future can be very bright indeed.”²⁶ He further states, “... as globalization agreements go into effect, Nepal is much better being on the inside of WTO than on the outside.”²⁷ WTO Membership has brought many opportunities and challenges to Nepal. Nepal has been seriously considering how to fulfill its obligations to Members under the Agreement Establishing the World Trade Organization (hereinafter referred to as the “WTO Agreement”).²⁸

No one can ignore the importance of accession to the WTO as it directly effects the whole range of trade in goods, service and intellectual property of acceding country. Under the WTO system there are two types of Members, viz., (i) Original Members, and (ii) Members by accession. The WTO Agreement lays down three requirements for a country to become an original Members of the WTO.²⁹ First, the applicant must have been a General Agreement on Tariffs and Trade (hereinafter referred to as the “GATT”) contracting party at the time the WTO Agreement entered into force. Second, the applicant must have accepted the WTO Agreement and the Multilateral Trade Agreements. Third, the applicant must have submitted a "Schedule of Concessions and Commitments" for both GATT 1994 and the GATS.³⁰

²⁵ . The Time Magazine had asked His Majesty the King of Nepal, “Where is Nepal heading?” It was the answer to the question by His Majesty the King. See Time Magazine, January 26, 2004.

²⁶ . See Ralf Frank, U. S. Ambassador to Nepal on Forward in WTO, GLOBALIZATION AND NEPAL, (Ananda P. Shrestha ed., May 2001) Nepal Foundation for Advanced Studies and United States Embassy, Kathmandu.

²⁷ . Ibid.

²⁸ . See Marrakesh Agreement Establishing the World Trade Organization, 33 I. L. M. 1144 (1994) [hereinafter WTO Agreement].

²⁹ . See WTO Agreement, *supra*, footnote 28, Article XI.

³⁰ . See RAJ BHALA ET AL., WORLD TRADE LAW 24 (1998).

A country interested in becoming WTO Member requires to acceding to the WTO under Article XII of the WTO Agreement. The 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 this Agreement and the Multilateral Trade Agreements on terms to be agreed between it and the WTO... ." ³¹ Thus a non-Member country may become member of the WTO by negotiating for accession. In accession negotiations, such acceding country has to make concessions and commitments with respect to tariffs and services so as to provide improved market access for other Members' goods and services. Besides it, such acceding country has to agree to take steps to bring its domestic legislation in conformity with the obligations of the WTO Agreements. ³² The WTO Agreement sets out that: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." ³³

This dissertation critically analyzes rules and procedures of accession to the WTO, and Nepalese legislation required to give effect to WTO Covered Agreements in the context of Nepal's accession to the WTO. As the issue of conformity of domestic legislation with the WTO Agreements is a new and serious subject matter affecting whole laws related to trade in goods, services and intellectual property, this study is relevant as well as timely, and Nepal will be benefited by it tremendously. ³⁴ Hence, before embarking on the exploration of Nepal's accession

³¹ . See WTO Agreement, *supra*, footnote 28, Article XII:1.

³² . See WTO Agreement, *supra*, footnote 28, Article XVI:4.

³³ . See WTO Agreement, *supra*, footnote 28, Article XVI:4.

³⁴ . As Nepalese Parliament was dissolved in 2002, no new laws were enacted in Nepal since Nepal's accession to the WTO in 2004. However, few Ordinances were promulgated by His Majesty the King. Hence, new Parliament as well as Nepal Government may be benefited by this research in the process of fulfilling Nepal's conformity obligation.

to the WTO and Nepalese legislation required to give effect to WTO Covered Agreements, it would appear relevant to mention a few words about the GATT, the WTO, and Nepal.

I.3 OVERVIEW OF GATT/WTO SYSTEM

I.3.A *The General Agreement on Tariffs and Trade*

In 1944, a comprehensive economic and financial plan for post-world War II reconstruction and development was proposed by the United States and the United Kingdom at Bretton Woods, New Hampshire, USA.³⁵ The Bretton Woods Conference was held in 1944 and it created the institutions of the International Monetary Fund and the World Bank. At the time of this Conference, it was recognized that an international organization for trade should be established. An initiative intended to bring a Charter of the International Trade Organization had started since 1945. The United Nations Conference on Trade and Employment was held at Havana, Cuba, from 21 November 1947 to 24 March 1948. At the conclusion of the Havana Conference the text of the Havana Charter for an International Trade Organization was published.³⁶ However, the Havana Charter never entered into force.

³⁵ See BHALA, *supra*, footnote 30, at 1.

³⁶ See WTO ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, vol. I, 6 (1995); See United Nations Conference on Trade and Employment held at Havana, Cuba, from 21 November 1947 to 24 March 1948: Final Act and Related Documents (UN Document E/CONF.2/78, dated April 1948). UN Sales No. 48. 11. D. 4. It includes the Havana Final Act, the Havana Charter and annexes, and Conference resolutions.

Meanwhile, the first round of General Agreement on Tariffs and Trade (GATT) multilateral tariff negotiations was conducted between members of the Preparatory Committee.³⁷ The tariff negotiations and the drafting of the General Agreement continued for two months afterward, principally in the Tariff Agreements Committee. The Final Act, including the 30 October 1947 text of the General Agreement, the Schedules of Tariff Concessions negotiated at Geneva in 1947 and the Protocol of Provisional Application, was published by the United Nations.³⁸

The General Agreement on Tariffs and Trade 1947 (GATT) also never entered into force. However, GATT was applied provisionally by the Contracting parties under Protocols of Provisional Application.³⁹ Provisional application of the General Agreement began as of 1 January 1948. GATT was not intended by its drafters to function on a permanent basis. GATT evolved over a period of time as a major treaty instrument for international trade.

Eight multilateral trade negotiation rounds have been held under GATT auspices. The first five GATT multilateral trade negotiation rounds had the goal of liberalizing trade by reducing tariffs and was focused on reduction of tariffs and the elimination of quantitative restrictions (quotas). Later rounds had goals of eliminating non-tariff barriers, broadening GATT's scope of coverage and clarifying existing trade rules. In addition to tariff reduction protocols, nine agreements and four understandings were negotiated in the Tokyo Round (1974-1979).⁴⁰

³⁷ . See WTO ANALYTICAL INDEX, *supra*, footnote 36, at p. 5; See UN Document EPCT/186, 10 September 1947.

³⁸ . See WTO ANALYTICAL INDEX, *supra*, footnote 36, at p. 5; UN Sales No. 1947.II/10.

³⁹ . See WTO ANALYTICAL INDEX, *supra*, footnote 36, at p. 6.

⁴⁰ . The non-tariffs barriers agreements concluded in the Tokyo Round included the Agreement on Implementation of Article VI (improved Anti-Dumping Agreement), the Interpretation and Application of Article VI, XVI and XXIII (Subsidies Code), the Agreement on Import Licensing, the Agreement on Civil Aircraft, the Agreement on Technical Barriers to Trade, the Agreement on Implementation of Article VII (Custom Valuation), the Government Procurement Code, the Bovine Meat Agreement and the Dairy Products Agreement. The four 'understandings' included Understanding on Differential and More Favorable Treatment, Reciprocity and Fuller

The GATT Uruguay Multilateral Trade Negotiation Round (1986-1994) integrated most of the Tokyo Round Codes, covered trade in services and intellectual property rights, and established a binding dispute settlement mechanism. The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations was signed in Marrakesh on April 15, 1994.⁴¹ Several Understandings and Multilateral Trade Agreements were concluded and made an integral part of the WTO Agreement.⁴²

1.3.B The World Trade Organization

We agree with Distinguished Professor Dr. Sompong Sucharitkul that, "Warnings have been given of shifting norms of international law. More important still is its inter-temporal character which permits international law to carry out with its evolution and the progressive development of its rules in various areas affecting our daily lives."⁴³ In the history of international trade rule,

Participation of Developing Countries, Understanding on Declaration on Trade Measures Taken for Balance-of-Payments Purpose, Understanding on Safeguard Action for Development Purposes and Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.

⁴¹ The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, 33 I. L. M. 1130 (1994)[hereinafter Final Act].

⁴² On 1 January 1995 when the WTO Agreement entered into force, the GATT 1947 and the WTO entered a brief period of coexistence as separate organizations with overlapping membership. The length of this period of coexistence was determined on 8 December 1994, when the Preparatory Committee of the World Trade Organization, and the Contracting Parties meeting in Special Session, each adopted a decision on "Transitional Coexistence of the GATT 1947 and the WTO Agreement." This decision provides, inter alia, that "The legal instruments through which the contracting parties apply the GATT 1947 are herewith terminated one year after the date of entry into force of the WTO Agreement. In the light of unforeseen circumstances, the Contracting Parties may decide to postpone the date of termination by no more than one year." With this termination, almost fifty years of provisional application of the General Agreement has come to an end.

⁴³ See Dean & Distinguished Professor Dr. Sompong Sucharitkul, D. C. L. (Oxon), *International Law at the Crossroads*, 13th Regional Meeting of the American Society of International Law at the Golden Gate University School of Law & 14th Annual Fulbright Symposium on Current Issues in International Law, at page 2, March 12, 2004, Golden Gate University School of Law in San Francisco.

the GATT has been remarkably successful over its five decades of history. Since 1947, GATT was the principal international multilateral treaty for trade. As the time passed, the GATT system was being challenged by the changing conditions of international economic activity, i. e., the greater interdependence of national economies, the growth in trade in services, provisions of Grandfather rights, defects in the dispute settlement procedure, lack of institutional provisions, etc. made GATT handicapped to play the needed role. These factors impelled toward making rules that would bind all participants in the world trading system.

The Uruguay Round was a new kind of trade negotiation, centered on rulemaking, in the history of GATT. The Ministerial Meeting at Punta del Este in September 1986 set forth the agenda for the Uruguay Round. The end of the eight-year Uruguay Round of trade negotiations in 1994 brought a profound change in the legal structure of the institutions for international trade. The Uruguay Round results created the World Trade Organization (WTO), a new international organization.

The WTO is a permanent international organization having legal personality.⁴⁴ The WTO is accorded privileges and immunities by each of its Member. The WTO is structured⁴⁵ into three tiers. The Ministerial Conference is the apex WTO body responsible for decision making. It meets every two years. The General Council is at the next tier which is responsible for the day to day work of the WTO. The General Council also meets as a Dispute Settlement Body when it considers complaints and takes necessary steps to settle disputes between member countries. It is also responsible for carrying out reviews of the trade policy of individual Member countries.

⁴⁴ . See WTO Agreement, *supra*, footnote 28, Art. VIII.

⁴⁵ . See WTO Agreement, *supra*, footnote 28, Art. IV.

Subsidiary Councils and Committees are at the bottom level which report to the General Council or the Ministerial Conference. There is WTO Secretariat Head-Quartered at Geneva, Switzerland, headed by a Director-General. With respect to the decision making process, the WTO Agreement stipulates that WTO shall continue the GATT practice of decision-making by consensus. When a consensus is not possible, a matter is decided by voting.⁴⁶

The constitutive document of the WTO, the WTO Agreement,⁴⁷ is confined to institutional measures and contains no substantive rules. The substantive rules are included in Annexes of the WTO Agreement. The Annex 1 of the WTO Agreement contains the bulk of the Uruguay Round results. These texts impose binding obligations on all members of the WTO. The said Annex 1 texts include Annex 1A which consists of the "Multilateral Agreements on Trade in Goods," Annex 1B which consists of the "General Agreement on Trade in Services" and Annex 1C which consists of the "Agreement on Trade-Related Aspects of Intellectual Property Rights." Annex 2 of the WTO Agreement has the dispute settlement rules, which are obligatory on all members. Annex 3 of the WTO Agreement establishes the Trade Policy Review Mechanism by which the WTO will review the overall trade policies of each member on a periodic and regular basis. Annex 4 of the WTO Agreement contains "Plurilateral Trade Agreements" which are optional.

GATT 1947 and GATT 1994 are legally distinct.⁴⁸ However, the WTO Agreement maintains continuity with the GATT 1947. Article XVI:1 of the WTO Agreement provides that "the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT

⁴⁶ . See WTO Agreement, *supra*, footnote 28, Article IX:1.

⁴⁷ . See WTO Agreement, *supra*, footnote 28.

⁴⁸ . See WTO Agreement, *supra*, footnote 28, Art. II:4

1947." In the event of conflict between a provision of the WTO Agreement and a provision of any of the Multilateral Trade Agreements, the provision of the WTO Agreement prevails.⁴⁹ In the event of a conflict between the Multilateral Trade Agreements and GATT 1994, the provision of the Multilateral Trade Agreements prevails.⁵⁰ Membership in the WTO requires accepting all the results of the Uruguay Round with the exception of Plurilateral Trade Agreements listed in Annex 4 which are optional. The "a la carte" (pick and choose) approach of the GATT 1947 is terminated.

I.4 NEPAL

I.4.A Introduction

Nepal is a sovereign Himalayan Kingdom situated between India and China in South Asia. The beautiful majestic Himalayas including the Mount Everest⁵¹ is situated in Nepal. Nepal is a least developed country, and ranks among the world's poorest countries with a per capita income of US \$220. Nepal's major economic resources are tourism, human resources, and hydroelectricity. Progress has been made in exploiting tourism. With respect to hydroelectricity, Nepal has potentiality of 83,000 MW⁵² whereas Nepal is able in harnessing only 300 MW so far. Nepal's population is 23 million. The total area of the country is 147,181 sq. km.. It is a unique country inhabited by multi-lingual people. There are 70 spoken languages and 40 ethnic groups.

⁴⁹ .

See WTO Agreement, *supra*, footnote 28, Art. XVI:3.

⁵⁰ .

See WTO Agreement, *supra*, footnote 28, General Interpretative Note to Annex 1A of the WTO

Agreement.

⁵¹ .

Mt. Everest is the top of the world.

⁵² .

Nepal's hydroelectricity potentiality is second largest in the world after Brazil.

Nepali,⁵³ derived from Sanskrit, is the official language. Hindu religion is a predominant religion followed by Buddhism. Nepal is the only Hindu nation in the world. The Constitution describes the country as a "Hindu Kingdom," although it does not establish Hinduism as the state religion.

Nepal has a long and glorious history and its civilization can be traced back to thousands of years. Ancient Nepal consisted of many small autonomous principalities. King Prithvi Narayan Shah, the ruler of the principality of Gorkha, integrated the autonomous principalities into modern Nepal. Politically, Rana's oligarchic rule started by Jung Bahadur Rana in 1846 and lasted for 104 years in which the post of prime minister was transferred from brother to brother. During the period of Rana rule, Nepal was kept in isolation throughout the long century of their power. The revolution of 1950 brought an end to oligarchic Rana regime. Democracy was established in Nepal under the multiparty system in 1950. Since 1960, Nepal was governed under the Partyless Panchayat system. A popular movement of 1990 reinstated the multi-party democratic system under constitutional monarchy. Since 1990, Nepal has been practicing multi-party democratic system. Economically, Nepal has adopted market economy based on openness and free competition.

The Constitution of the Kingdom of Nepal, 1991, is the fundamental law of Nepal and has provisions of legislative, executive and judicial branches. Legislative power is vested in the House of Representative (legislative branch). Members of the House of Representative are directly elected by people. Members of the House of Representative elect the Prime Minister,

⁵³ Nepali, a local usage, is Khas, a dialect of a northern Indic language whereas it is called Nepalese in English language.

head of Council of Minister (executive branch). The Council of Minister has executive power. His Majesty the King is the head of State and acts on the advice of the Council of Ministers. Supreme Court is the apex body of judiciary and it has power of judicial review.

1.4.B Nepal's Involvement with International and Regional Organizations

Since the end of oligarchic Rana regime in 1950, Nepal has become an active participant in international as well as regional organizations. Nepal was admitted to the United Nations on 14 December 1955. Prior to Nepal's admission to the United Nations, Nepal had become a member of several specialized agencies of the United Nations, i. e., the Food and Agriculture Organization in 1951; the United Nations Educational, Scientific, and Cultural Organization in 1952; the World Health Organization in 1953; and the Economic Council for Asia and the Far East in 1954. Nepal became a member of the World Bank and the International Monetary Fund in 1961. Nepal also was a member of the Universal Postal Union, the International Civil Aviation Organization. Nepal has become member of the World Customs Organization and the World Intellectual Property Organization (WIPO) as well.

Nepal participated in the Asian-African Conference in Bandung, Indonesia, in 1955. In all the non-aligned summits held since 1961, the Nepalese delegation has been actively participating. Nepal also was a member of the Group of 77. In 1977 Nepal motivated its major foreign aid donors to form an aid-Nepal consortium to improve Nepal's ability to coordinate aid projects. In February 1985, Nepal hosted the twenty-fourth session of the Asian-African Legal Consultative Committee. Nepal also participated in various other forums for least-developed nations. Nepal

was elected twice for a two-year term as a nonpermanent member of the UN Security Council. The Royal Nepal Army has contributed nearly 50,000 peacekeepers to a variety of UN sponsored peacekeeping missions in different countries since 1955.

Nepal has played an active role in the formation of the South Asian Association for Regional Cooperation (hereinafter referred to as the "SAARC"). The SAARC was established on December 8, 1985 by the seven original Member Countries, namely, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. The constitutive instrument of the SAARC is the Charter of the South Asian Association for Regional Cooperation, signed on December 8, 1985 by the Heads of State or Government of the seven South Asian Countries. In 1986, Kathmandu was chosen as the venue for the permanent secretariat of the SAARC.

The regional organization "SAARC" provides a platform for the peoples of this region to work together in a spirit of friendship, trust and understanding. It aims to accelerate the process of economic and social development in Member States.⁵⁴ Cooperation in SAARC is based on respect for the principles of sovereign equality, territorial integrity, political independence, non-interference in the internal affairs of the Member States, and mutual benefit.⁵⁵ SAARC has several functioning organs, namely, Summit, Council of Ministers, Standing Committee, Specialized Committees and a Secretariat headed by a Secretary-General.

Regional grouping is a stepping stone to create a single, integrated and universal world trading system. Regional trading by the development of closer integration among the economies of the

⁵⁴ . See Charter of the South Asian Association for Regional Cooperation, Article - I [hereinafter SAARC Charter].

⁵⁵ . See SAARC Charter, *supra*, footnote 54, Article - II.

Member countries through a custom union or a free trade area shall reduce trade barriers among the Member countries and facilitate the flow of trade.⁵⁶ Such regional arrangement finally helps to reduce trade barriers and to grow trade globally.

In December 1991, the Sixth SAARC Summit held in Colombo, Sri Lanka, approved the establishment of an Inter-Governmental Group (IGG) to formulate an agreement to establish a SAARC Preferential Trading Arrangement (hereinafter referred to as "SAPTA") by 1997. Given the consensus within SAARC, the framework Agreement on SAPTA was finalized in 1993, and formally came into operation in December 1995. The Arrangement reflected the desire of the SAARC countries to promote and sustain mutual trade and economic cooperation within the SAARC region through exchange of concessions. The preferential tariff concession has been granted to the number of products by the Member States. A SAARC Preferential Trading Arrangement has been established and negotiations are continuing on the reduction of tariffs and other impediments to a more free flow of trade within the region.

Following decisions at the Tenth SAARC Summit (Colombo, 1998), negotiations are also proceeding in a Committee of Experts to draft a Treaty for the establishment of a South Asian Free Trade Area. SAARC Preferential Trading Arrangement (SAPTA) was envisaged primarily as the first step towards the transition to a South Asian Free Trade Area (hereinafter referred to as "SAFTA") leading subsequently, towards a Customs Union, Common Market and Economic Union. Nepal was already a Member of the Agreement on SAARC Preferential Trading

⁵⁶ . See General Agreement on Tariffs and Trade 1994, Article XXIV:4, 5, and 8, (*Reprinted in GATT, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (1994) (incorporating by reference the General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U. N. T. S. 187, reprinted as amended in BISD 4th Supp. (1969) [hereinafter GATT 1994].

arrangement (SAPTA) and Nepal has recently signed an Agreement on South Asian free Trade Area (SAFTA) on 6 January 2004.⁵⁷

Hence, Nepal is already involved in the process of reduction of trade barriers through South Asian Preferential Trading Arrangement. The preferential tariff concession has been granted to the number of products by the SAARC Member States. This process of granting tariff concession will help Nepal to fulfill her WTO obligations.

Nepal also had applied for the membership of the Bangladesh, India, Myanmar, Sri Lanka and Thailand- Economic Cooperation (hereinafter referred to as "BIMST- EC") and Nepal had an observer status.⁵⁸ Now, Nepal has become full Member of the BIMST-EC in February 2004.⁵⁹ BIMST- EC's goal is towards creating a free trade zone. It will be an achievement for Nepal as finding another forum for economic cooperation. As Thailand and Myanmar are member of the Association of South-East Asian Nations (ASEAN), BIMST- EC is perceived as a bridge to ASEAN.

I.5 COVERAGE OF THE DISSERTATION

⁵⁷ . The SAFTA Agreement shall enter into force on 1st January 2006. This Agreement shall supersede the Agreement on SAARC Preferential Trading Arrangement (SAPTA). See <http://www.saarc-sec.org/summit12/saftaagreement.htm> (visited on 1/22/04).

⁵⁸ . See The Kathmandu Post, January 22, 2003 (http://www.kantipuronline.com/kpost_html/kp_editorial.htm).

⁵⁹ . Six members of the BIMST-EC, including Nepal, are agreed to sign a free trade agreement committing to throw open their markets by 2017 on 9 February 2004.

Nepal's obligation of bringing its national legislation in conformity with the WTO Covered Agreements is one of the greatest challenges faced by Nepal. Here, for the purpose of our study, the coverage of the WTO Covered Agreements includes the WTO Agreement particularly Article XVI:4, the Multilateral Agreements on Trade in Goods, General Agreement on Trade in Services and Agreement on Trade-Related Aspects of Intellectual Property Rights.⁶⁰ This dissertation will focus on Nepal's accession to the WTO and examine Nepalese laws to be revised, amended or enacted to give effect to WTO Covered Agreements. This dissertation is divided into four Chapters for the convenient presentation of the subject matter.

Chapter I of this dissertation aims to introduce the subject matter in general so that the readers will have basic idea about GATT, WTO, Nepal and the coverage of this dissertation paper. It will help to penetrate deeper into the main research in Chapter II and III. Chapter II of this dissertation will focus on the meaning of accession, and Rules and Procedures of accession to the WTO. Rules and Procedures of the WTO are vital because the acceding country makes negotiations, and terms and condition are fixed during the accession process. It also examines Procedure for accession to the GATT. GATT accession procedure helps to understand the WTO

⁶⁰ In accordance with article 1:1 and Appendix 1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, the WTO Covered Agreements include the following agreements: (A) Agreement Establishing the World Trade Organization; (B) Multilateral Trade Agreements; Annex 1B: Multilateral Agreements on Trade in Goods; Annex 1B: General Agreement on Trade in Services; Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights; Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes; (C) Plurilateral Trade Agreements; Annex 4: Agreement on Trade in Civil Aircraft; Agreement on Government Procurement. See Understanding on Rules and Procedures Governing the Settlement of Disputes, article 1:1 and Appendix 1, WTO Agreement, *supra*, footnote 3, Annex 2.

However, Nepal has not signed Plurilateral Trade Agreements. The Agreement Establishing the World Trade Organization has no substantive rules except very few, i. e., Article XVI:4. Understanding on Rules and Procedures Governing the Settlement of Disputes provides a common system of rules and procedures applicable to disputes arising under the WTO Agreements. As these agreements generally do not prescribe conformity obligation, in the context of Nepal's Membership and for the purpose and objective of this study we understand that the meaning of the WTO Covered Agreements include only i) Article XVI:4 of the WTO Agreement, ii) Multilateral Agreements on Trade in Goods, ii) General Agreement on Trade in Services, and iii) Agreement on Trade-Related Aspects of Intellectual Property Rights.

accession procedure because there is not any accession procedure prescribed by the WTO Agreements. Overall it discusses how a country becomes member of the WTO. As Nepal is a least-developed country, differential and more favorable treatment to the Least-Developed Countries (LDCs) and special procedure for accession of LDCs to the WTO are covered and discussed in detail in this Chapter. It also discusses about the terms and conditions of accession, particularly (i) commitment to schedules of concession (goods and services) and (ii) legislative enactment, regulation and administrative procedures in compliance with the WTO Agreement. Furthermore, it examines ratification process of the Protocol of Accession, and law making process in Nepal under the Nepalese Constitution, the Nepal Treaty Act, 1990 and other laws. This Chapter also discusses the relationship between the WTO Agreement and the domestic legislation of Nepal.

Chapter III is divided into three sub-chapters and each sub-chapter covers the Multilateral Agreements on Trade in Goods, General Agreements on Trade in Services and Agreement on Trade-Related Aspects of Intellectual Property Rights. The obligations prescribed by these Covered Agreements and the concerning GATT/WTO jurisprudence are studied in-depth, and examined provisions of related Nepalese legislation in each sub-chapter. This Chapter critically analysis Nepalese laws and provides suggestions with respect to Nepalese legislation to be revised, amended or enacted for the compliance with the WTO Covered Agreements. The WTO Covered Agreements have prescribed certain obligations to Member and requires to be fulfilled by each Member. Generally, WTO Member implements such obligations by enacting required legislation.

Under Chapter III, the meaning of conformity obligation under Article XVI:4 of the WTO Agreement, & international obligation under international law, GATT/WTO jurisprudence with respect to the conformity obligation and the concept of mandatory and discretionary provisions in the national legislation also are studied in-depth. Hence, in this Chapter, Nepalese legislation affecting trade in goods, services and intellectual property are critically examined and the obligations prescribed by the WTO Covered Agreements are studied in detail, and tried to figure out whether and if so to what extent Nepalese laws are to be amended or enacted to give effect to the WTO Covered Agreements. Finally, Chapter IV gives the conclusion of this dissertation.

I.6 CONCLUSION

For Nepal, integration to the global economy is a great opportunity to enhance her economic growth. Nepal will have many benefits of acceding to the WTO. Nepalese goods and services will get access to foreign markets. Right to transit, availability of rule-based system and dispute settlement mechanism, provisions of differential and more favorable treatment to LDCs, provisions of most-favored-nation & national treatment, and forum for multilateral trade agreements are the major attraction of benefits. However, Nepal is not without any obligation in this context. Nepal requires to fulfill her obligations prescribed by the WTO Agreement. In fact, all WTO Members are required to fulfill such obligation so that the barriers to trade do not exist and all Members' goods will have access to foreign markets.

Member's obligation to bringing domestic legislation in compliance with the WTO Covered Agreements is a major and challenging one. This dissertation critically analyzes in-depth the conformity obligation in the context of Nepal's accession to the WTO, and further gives suggestions to Nepal whether and if so what kinds of legislation need to be enacted or amended to give effect to the WTO Covered Agreements.

CHAPTER II

ACCESSION TO THE WTO

II.1 MEANING OF ACCESSION

Before embarking into the details of the WTO accession, it would be worthy to mention few words about the rules of accession related to other major international organizations and it will help us to seek the true meaning of accession as such. Here accession in general means accession to international organizations and in particular accession to the WTO. Accession may have other meaning in other context, i. e., accession of a country to another country. For example: the German Democratic Republic acceded to the Federal Republic of Germany in 1990 and the two German States have become one. In the context of a State, "secession" is just opposite to accession. "Two principal types of separatist societies are known to have emerged on the international scene: those which have a distinct history of separate administration from the Center, and those whose secession would split a nation into two."⁶¹ "Constitution law of states has been equally adverse to secession as a matter of international law. A very limited number of post-World War national constitutions have recognized a right of secession."⁶²

There are many inter-governmental international organizations as well as regional organizations working for different purposes. The constituent instrument of such organization provides the

⁶¹ See Professor Dr. Chris N. Okeke, *A Note on the Right of Secession as a Human Rights*, Annual Survey of International and Comparative Law, Vol. 3:1, 29 (1996).

⁶² See Professor Dr. Chris N. Okeke, *A Note on the Right of Secession as a Human Rights*, Annual Survey of International and Comparative Law, Vol. 3:1, 30 (1996).

"constitutional law" of the organization and it operates just as other treaties do, creating rules to bind states under international law.⁶³ These organizations have original members as well as members by accession. "Membership in international organizations is generally limited to states. In some cases other governmental entities have also been admitted to membership.

States become members by:

- (a) becoming parties to the constitutive treaty establishing the organization;
- (b) by admission through votes of one or more of the principal organs;
- (c) by succession in accordance with the rules of the organization."⁶⁴

There are generally accepted criteria in international law for determining what constitutes a State. Article 1 of the Montevideo Convention on Rights and Duties of States, 1933,⁶⁵ laid down the best known formulation of the basic criteria for statehood which states that:

"The State as a person of international law should possess the following qualifications:

- (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States."

Regarding the requirements of membership, some organizations are open to all states that accept the obligations of the constitution. Regional organizations limit membership to states within defined region. The constitution may impose other qualifications.⁶⁶

⁶³ . See FREDERIC L. KIRGIS, JR., INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING 137 (1993).

⁶⁴ . See LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 364 (1993).

⁶⁵ . The Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 3

Bevans 145, 165 L. N. T. S. 19.

⁶⁶ . See LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 364 (1993).

II.1.A Accession to the United Nations

The United Nations had 51 original Members and now it has 191 Members. New Members were admitted to the United Nations through the process of accession. In the early years of the United Nations (UN), admission to membership was a significant and time-consuming issue for the organization, the issue was partly legal and partly political.⁶⁷

Legal conditions for membership of the United Nations are set forth in article 4 of the United Nation's Charter.⁶⁸ Article 4 of the U. N. Charter states that:

- "1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council."

The requisite conditions for to be admitted to membership in the U. N. are five in number under paragraph 1 of Article 4 of the U. N. Charter: an applicant must (i) be a State; (ii) be peace-loving; (iii) accept the obligations of the Charter; (iv) be able to carry out these obligations; and (v) be willing to do so.⁶⁹ Demand of a new condition not prescribed in Art. 4 is incompatible

⁶⁷ . See FREDERIC L. KIRGIS, JR., *INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING* 138 (1993).

⁶⁸ . Charter of the United Nations set out at 59 Stat. 1031, T. S. 993, 3 Bevans 1153. Signed at San Francisco on June 26, 1945; entered into force on October 24, 1945.

⁶⁹ . See *Conditions of Admission of a State to Membership in the United Nations*, International Court of Justice, Advisory Opinion, 1948 [1948] I. C. J. 57.

with the letter and spirit of Art. 4 of the U. N. Charter.⁷⁰ The General Assembly has no power to admit a State to membership in the absence of a recommendation of the Security Council.⁷¹ "Observer status" does not appear in the U. N. Charter, but the General Assembly had theretofore granted it to some nonmember states and to regional intergovernmental organizations.⁷² Under the Covenant of the League of Nations,⁷³ new members were admitted by a two-thirds vote of the Assembly, without requiring a recommendation from the Council.

An advisory Opinion of the Permanent Court of International Justice in the case concerning the application for membership of the International Labor Organization by the Free City of Danzing in 1930 held that the Free City of Danzing could not participate as a Member in the work of the International Labor Organization.⁷⁴ It held that the Free City of Danzing's status was not compatible with the rights and duties of membership in the Organization as the Free City of Danzing was subject to certain restrictions in international relations. Non-state entities are also members of some international organizations. The Universal Postal Union, for example, includes postal administrations of territories that are not in themselves states.⁷⁵

⁷⁰ . See *Conditions of Admission of a State to Membership in the United Nations*, International Court of Justice, Advisory Opinion, 1948 [1948] I. C. J. 57

⁷¹ . See Advisory Opinion, I. C. J. 4. [1950].

⁷² . See FREDERIC L. KIRGIS, JR., *INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING* 167 (1993).

⁷³ . Article 1 of the Covenant of the League of Nations reads:

"1. The original Members of the League of Nations shall be those of the Signatories which are named in the Annex to this Covenant and also such of those other States named in the Annex as shall accede without reservation to this Covenant. Such accessions shall be effected by a declaration deposited with the Secretariat within two months of the coming into force of the Covenant. Notice thereof shall be sent to all other Members of the league.

2. Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments."

⁷⁴ . See P. C. I. J., Series B, No. 18.

⁷⁵ . See LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 365 (1993).

There are also other examples where non-nation State entities are also admitted to the international organization. In 1991, the European Economic Community (EEC) applied for Membership in the Food and Agriculture Organization (FAO). Under the FAO Constitution as it then existed, membership was limited to "nations." Since the EEC did not purport to be a "nation," an amendment to the FAO Constitution would be needed if it were to be admitted. Eventually the FAO Conference amended the FAO Constitution by adding few articles on admitting regional economic integration organizations to membership. The EEC, having duly submitted an instrument accepting the relevant obligations of the FAO Constitution and a declaration specifying the competence transferred to it by its member states, was admitted to membership later in the same session of the FAO Conference.⁷⁶

II.1.B Accession to the European Union

With respect to the European Union, all accessions of new Member States are governed by the principle of the *acquis communautaire*. This term means essentially that the intrinsic core of the Community (now the "Union") legal and political structure is a given ("acquis") which the new Member State must accept, not challenge or call into question.⁷⁷ Article 237⁷⁸ was introduced into the Treaty of Rome.⁷⁹ This Article governed the process involved in the first and second

⁷⁶ . See FAO Doc. C 91/REP/18, at 2 (1991). See FREDERIC L. KIRGIS, JR., INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING 164-165 (1993).

⁷⁷ . See Roger J. Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, FORDHAM INT'L L. J. 1141 (April, 1995).

⁷⁸ . Article 237 was amended by the Single European Act in 1987 to acquire the assent of parliament to the accession of a new state, but not otherwise modified.

⁷⁹ . Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U. N. T. S. 11, 1973 Gr. Brit. T. S. No.1 (cmd. 5179 - II).

enlargements (accessions) but was replaced by Article 'O' of the Maastricht Treaty. Article 'O' reads as follows:

“Any European State may apply to become a Member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.

The conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails shall be the subject of an agreement between the Member states and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.”

The only substantive difference between Article “O” and the prior article 237 is that an applicant now accedes to the European Union, rather than the Community. If any controversy should arise concerning the interpretation or application of Article “O,” Article L of the Maastricht Treaty enables the issue to be resolved by the European Court of Justice.⁸⁰

⁸⁰ Treaty on European Union, Feb. 7, 1992, O. J. C 224/1 (1992), [1992] 1 C. M. L. R. 719, 31 I.L.M. 247 [hereinafter TEU] (amending EEC Treaty). This treaty is sometimes called the TEU, but more often the Maastricht Treaty after its signature site. Signed on February 7, 1992, the Maastricht Treaty came into effect on November 1, 1993.

Regarding the terms and conditions of accession to the EU, the European Commission submitted a report to the European Council held in Lisbon in June of 1992.⁸¹ The Commission focused on the political, juridical and economic conditions which a candidate State should satisfy in order to become a member of the European Union, it stated that candidates should respect democratic principles, accept the juridical patrimony, and have an operating and competitive market economy, which included a legal framework and an adequate administrative body.⁸²

The Commission which met in Copenhagen in June of 1993, provided what conditions were needed for a candidate State to become a member of the European Union. The conditions stated include: (1) the stability of the institutions to guarantee democracy, the rule of law, human rights and the respect and protection of minorities; (2) the existence of a operational market economy, as well as the capacity to face competitive pressure and the market forces within the Union; and (3) the ability of the candidate to assume the obligations of accession, including the observance of the goals of the Political, Economic and Monetary Union.⁸³

Neither Article 237 of the EEC Treaty nor Article 'O' of the Treaty of European Union discuss the mode of negotiations with applicant states. Some of the stages of the procedure for the accession to the EU include application for membership by the applicant State to the Council. The Council requests the Commission for its opinion after the submission of the application. All Commission opinions on applications cover both political and economic factor. Upon the Commission's favorable opinion on application, the European Council authorizes the

⁸¹ . See *Europe and the Challenge of Enlargement*, Bulletin of the European Community, Supp. 3/92.
⁸² . See *Europe and the Challenge of Enlargement*, Bulletin of the European Community, Supp. 3/92,
at 11 – 12.
⁸³ . See Bulletin of the European Union, 6/1993, point 1.13.

start of the accession process and the Council itself carry out negotiations with the applicant states. Then the European Council takes the critical decisions of whether, when and how a prospective candidate State may be brought into the Union. This clearly falls within its sphere in setting the "general political guidelines" of the Union. After the Council decision, the European Parliament must give its consent, in this case by an affirmative vote of "an absolute majority of its component members."⁸⁴ Then finally the Council takes the final decision to accept the application. Then the applicant State accepts the terms and condition of accession and the applicant State accedes to the EU by ratification of the accession agreement.

It is worthy to mention here that EU has provision of resolving interpretation issues concerning accession by the European Court of Justice. Whereas there is no such provision of resolving interpretation issues concerning accession by the WTO Dispute Settlement System under the WTO Agreement.

II.1.C Accession to the North American Free Trade Agreement

The provisions of the North American Free Trade Agreement (NAFTA)⁸⁵ allows for the possibility of accession and it gives few concrete guidelines for the procedure to be followed.

The general procedure for accession to the NAFTA involves three steps: a formal invitation by the members of NAFTA to begin accession negotiations, negotiations between the applying

⁸⁴ . One of the important rights gained by the Parliament through the Single European Act's 1987 amendment of Article 237 (now Article "O") of the EEC Treaty is that of "assent" to any accession.

⁸⁵ . The Member of the North American Free Trade Agreement are the United States of America, Canada and Mexico.

country and representatives of the NAFTA members, and approval of the completed agreement by the three member countries and the acceding country. The first two steps are ad hoc in nature; the NAFTA members decide when and how to extend a formal invitation, after which they and the invitee agree on the logistics of the negotiations. The third step, however, must follow the changing of domestic laws of each state in accordance with NAFTA provisions. On December 12, 1994, the United States formally invited Chile to begin negotiations to join NAFTA⁸⁶ but little progress is made towards accession so far.

Regarding the accession, Article 2204 of the North American Free Trade Agreement (NAFTA) states:

"1. Any country or group of countries may accede to this Agreement subject to such terms and conditions as may be agreed between such country or countries and the Commission and following approval in accordance with the applicable legal procedures of each country. 2. This Agreement shall not apply as between any Party and any acceding country or group of countries if, at the time of accession, either does not consent to such application."⁸⁷

Interestingly NAFTA has provision of individual as well as bloc accession. Whereas there is no such provision of bloc accession to the WTO. Both NAFTA and EU have no provision of accession of custom territory whereas WTO has provision under which a custom territory may become a Member of the WTO. Particularly, the study of the provisions of accession of the NAFTA and EU are important with respect to the provision of WTO accession because these organizations are also basically involved with the rule of trade. NAFTA as a free trade area and

⁸⁶ . See Helene Cooper & Jose de Cordoba, *Chile is Invited to Join NAFTA as U. S. Pledges Free-Trade Zone for Americas*, Wall Street Journal, p. 3, (Dec.12, 1994).

⁸⁷ . See North America Free Trade Agreement, 32 I. L. M. 605, 702 (1993).

EU as a custom union are directly as well as indirectly related to the WTO particularly from most favor national treatment obligation prospects.⁸⁸

WTO also has a provision of accession. Those governments which wish to become WTO Members will generally be required to accede to the WTO under Article XII of the WTO Agreement.⁸⁹ Article XII:1 of the 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 this Agreement and the Multilateral Trade Agreements may accede to this Agreements, on terms to be agreed between it and the WTO"

II.1.D International Jurisprudence of an Accession

Article 2:1(b) of the Vienna Convention on the Law of Treaties, 1968,⁹⁰ defines the meaning of accession as "...the international act so named whereby a State establishes on the international plan its consent to be bound by a treaty." "Accession occurs when a state which did not sign a treaty, already signed by other states, formally accepts its provisions."⁹¹ "In practice, when a state has not signed a treaty it can only accede..., accession involves being party to the whole treaty by full and entire acceptance of all its provisions precluding reservations to any clause..., accession involves participation in the treaty with the same status as the original signatories...,

⁸⁸ . See General Agreement on Tariffs and Trade 1994, Article XXIV:8 (*Reprinted in GATT, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (1994) [hereinafter GATT 1994].

⁸⁹ . Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I. L. M. 1144 (1994) [hereinafter WTO Agreement].

⁹⁰ . See U. N. Doc. A/CONF. 39/27, (1969), 63 A.J.I.L. 875 (1969), 8 I.L.M. 679 (1969).

⁹¹ . See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 607 (1990).

states which have not signed a treaty can in theory accede only with the consent of all the states which are already parties to the instrument."⁹²

The International Court of Justice (ICJ) has propounded an international jurisprudence on the law of accession in an advisory opinion in "Conditions of Admission of a State to Membership in the United Nations."⁹³ The bottom line of the ICJ jurisprudence is that extra terms and conditions of accession to international organization which are beyond the provisions of the constituent instrument of the organization can not be given validity.⁹⁴

II.2 RULES AND PROCEDURE OF THE WTO ACCESSION

Generally each international organization has its rules and procedures of accession governed by its constitution and other legal documents. Sometimes, it is governed by its previous practice and/or customs as well. Basically the WTO Accession Procedures are based on GATT practice and it follows the norms and traditions of GATT accession. Article XVI:1 of the WTO Agreement states "1. Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established

⁹² . See J. G. STARK, INTRODUCTION TO INTERNATIONAL LAW 458 (10th ed. 1992).

⁹³ . See *Conditions of Admission of a State to Membership in the United Nations*, International Court of Justice, Advisory Opinion, [1948] I. C. J. 57.

⁹⁴ . See *Id.*. The International Court of Justice has said in an advisory opinion in "Conditions of Admission of a State to Membership in the United Nations" that a Member of the United Nations ... is not juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 Article 4 of the U. N. Charter; and that, in particular, a Member of the Organization can not, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that States.

in the framework of GATT 1947." We can infer from this provision & practice that the GATT accession practice has meaningful effect over the process of accession to the WTO. Hence, the study on GATT accession practice is pertinent and enlightening.

II.2.A Procedures for Accession to the GATT

GATT was not an international organization. Its participants were called Contracting Parties. There were three ways to becoming Contracting Party (Member) to the GATT under the provisions of the GATT 1947 which were as follows:

- (i) by signing the Protocol of Provisional Application as an original signatory;
- (ii) by "sponsorship" under GATT Art. XXVI:5(c)⁹⁵, and
- (iii) by accession under GATT Art. XXXIII.⁹⁶

Art. XXVI:5(c) of the GATT prescribes the participation to the GATT under sponsorship. Countries which had recently become independent may become GATT Contracting Party through sponsorship of the former parent country. The former parent country was required to be a GATT Contracting Party. The first country to accede under GATT Art. XXVI:5(c) was Indonesia. GATT also developed the practice of applying the GATT on a "de facto" basis to a

⁹⁵ Article XXVI:5(c) of the GATT 1947 states "If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party."

⁹⁶ Article XXXIII of GATT 1947 states "A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority. "

newly independent country, for a period of time, to allow that country to decide whether it wishes to become a GATT Contracting Party. A sponsored country need not negotiate a "ticket of admission," i. e., schedule of tariff commitment. Such Contracting Party was under an obligation to obey the terms and conditions previously accepted by the sponsoring Contracting Party. However, many newly independent States which were eligible to use the special procedure for accession to contracting party status under Article XXVI:5(c) have chosen accession under Article XXXIII of GATT. For example, in 1972 after independence, Bangladesh requested accession to GATT in accordance with the provisions of Article XXXIII of GATT.⁹⁷

Art. XXXIII of the GATT prescribes the normal procedure for GATT participation (membership). Under Art. XXXIII of the GATT, accession to the GATT required a decision of two-thirds majority to the existing Contracting Parties and terms "to be agreed between such government and the Contracting Parties." Under the GATT accession process, the acceding government or territory could make "reservations" in accession protocol.⁹⁸ GATT also had a provision and practice of "provisional accession." "Provisional accession" was a concept used during the 1955-1975 period. It was first implemented in the case of Switzerland.⁹⁹ There was no voting right under provisional accession. Provisional accession subsequently granted to other

⁹⁷ . See WTO ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, VOLUME 2, Geneva, 1995, World Trade Organization, P. 1025.

⁹⁸ . See WTO ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, VOLUME 2, Geneva, 1995, World Trade Organization, P. 1023. The Protocols of Accession of Poland, Romania, and Hungary each provide for a reservation with respect to Article XV:6 of GATT. Other Protocols of accession have provided for time-limited reservations for existing measures inconsistent with the GATT, such as certain internal taxes of the Philippines and Thailand, the Egyptian consolidation of economic development tax and import taxes and surcharges of Costa Rica, and quantitative restrictions maintained by Costa Rica.

⁹⁹ . See WTO ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, VOLUME 2, Geneva, 1995, World Trade Organization, P. 1024. Upon completion of the arrangements for provisional accession the CONTRACTING PARTIES adopted a Declaration on "Provisional Accession of the Swiss Confederation" (Declaration of 22 November 1958, 7S/19).

governments, pending their definitive accession, was not accompanied by tariff negotiations, i. e., Israel in 1959.¹⁰⁰ However, there have been no formal agreements for provisional accession since the date of the Declaration on Provisional Accession of Colombia in 1975.¹⁰¹ Besides it, the GATT accession process included "observer status," and "de facto application" of the GATT as well.

The Charter of the International Trade Organization (Havana Charter) also had a provision on accession to the International Trade Organization. Article 71¹⁰² of the Havana Charter is the

¹⁰⁰ . See WTO ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, VOLUME 2, Geneva, 1995, World Trade Organization, P. 1024.

¹⁰¹ . See WTO ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, VOLUME 2, Geneva, 1995, World Trade Organization, P. 1025.

¹⁰² . Article 71 of the Havana Charter of the International Trade Organization reads:

- "1. The original Members of the Organization shall be:
- (a) those States invited to the United Nations Conference on Trade and Employment whose governments accept this Charter, in accordance with the provisions of paragraph 1 of Article 103, by September 30, 1949 or, if the Charter shall not have entered into force by that date, those States whose governments agree to bring the Charter into force in accordance with the provisions of paragraph 2 (b) of Article 103;
 - (b) those separate customs territories invited to the United Nations Conference on Trade and Employment on whose behalf the competent Member accepts this Charter, in accordance with the provisions of Article 104, by September 30, 1949 or, if the Charter shall not have entered into force by that date, such separate customs territories which agree to bring the Charter into force in accordance with the provisions of paragraph 2 (b) of Article 103 and on whose behalf the competent Member accepts the Charter in accordance with the provisions of Article 104. If any of these customs territories shall have become fully responsible for the formal conduct of its diplomatic relations by the time it wishes to deposit an instrument of acceptance, it shall proceed in the manner set forth in subparagraph (a) of this paragraph.
2. Any other State whose membership has been approved by the Conference shall become a Member of the Organization upon its acceptance, in accordance with the provisions of paragraph 1 of Article 103 of the Charter, as amended up to the date of such acceptance.
3. Any separate customs territory not invited to the United Nations Conference on Trade and Employment, proposed by the competent Member having responsibility for the formal conduct of its diplomatic relations and which is autonomous in the conduct of its external commercial relations and of the other matters provided for in this Charter and whose admission is approved by the Conference, shall become a Member upon acceptance of the Charter on its behalf by the competent Member in accordance with the provisions of Article 104 or, in the case of a territory in respect of which the Charter has already

corresponding Article to GATT Article XXXIII. The full text of Article XXXIII of GATT 1947 reads as follows:

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

Under Article XXXIII of the GATT, the Contracting Parties were defined as "governments" and not as "states" or "nations" so that governments with less than complete sovereignty could be Contracting Parties to GATT. In GATT history, the first government to accede to the GATT under Article XXXIII was Chile,¹⁰³ which acceded under the Protocol for the Accession of Signatories to the Final Act of 30 October 1947.¹⁰⁴

been accepted under that Article, upon such approval by the Conference after it has acquired such autonomy.

4. The Conference shall determine, by a two-thirds majority of the Members present and voting, the conditions upon which, in each individual case, membership rights and obligations shall be extended to:

- (a) the Free Territory of Trieste;
- (b) any Trust Territory administered by the United Nations; and
- (c) any other special regime established by the United Nations.

5. The Conference, on application by the competent authorities, shall determine the conditions upon which rights and obligations under this Charter shall apply to such authorities in respect of territories under military occupation and shall determine the extent of such rights and obligations."

¹⁰³ See WTO ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, VOLUME 2, Geneva, 1995, World Trade Organization, P. 1017.

¹⁰⁴ Paragraph 4 of the Protocol of Provisional Application specified that the Protocol was open for signature by any government signatory to the Final Act, until 30 June 1948 at the latest. All of the governments signatory to the Final Act except for Chile signed the Protocol before 30 June 1948. On 7 September 1948 the Contracting Parties decided that "a government signatory of the Final Act of October 30, 1947 on behalf of which

The modalities of accession to the GATT were first considered in-depth in 1949. Procedures Governing Negotiations for Accession and a Model Protocol of Accession were agreed at that time, together with the Annecy Protocol of Terms of Accession.¹⁰⁵ The Procedures provided: "The secretariat, on receiving a communication from a government not party to the General Agreement which wishes to enter into negotiations with contracting parties with a view to acceding to the Agreement, would notify the contracting parties... ." Upon circulation of such a communication, the GATT Council establishes a working party to examine the application for accession to the General Agreement and to submit recommendations to the Council which may include a draft protocol of accession.¹⁰⁶ At its meeting on 27 October 1993, the GATT Council agreed that the following procedures should henceforth be followed in the organization and pursuit of negotiations on accession to the General Agreement, without prejudice to procedures currently applied:

- "1. Upon reception of a formal request for accession to the General Agreement and its approval by the Council or by the Contracting Parties, the Secretariat will address a communication to the acceding government in which it will outline the normal procedures followed by working parties on accession, and request that the acceding government submit a Memorandum on its Foreign Trade Regime that

the Protocol of Provisional Application was not signed by June 30, 1948 shall not be considered to be a 'party' within the meaning of Article XXXII of the General Agreement in its provisional application and consequently that any such government may accede to such Agreement pursuant to the accession provisions of Article XXXIII." (GATT/CP/1. P. 36.). See WTO ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, VOLUME 2, Geneva, 1995, World Trade Organization, P. 1017.

¹⁰⁵ See WTO ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, VOLUME 2, Geneva, 1995, World Trade Organization, P. 1017. The Annecy Protocol of Terms of Accession provided for the accession of Denmark, the Dominican Republic, Finland, Greece, Haiti, Italy, Liberia, Nicaragua, Sweden, and Uruguay.

¹⁰⁶ See WTO ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, VOLUME 2, Geneva, 1995, World Trade Organization, P. 1017.

covers but is not limited to the topics of the outline contained in the Annex (to document L/7317¹⁰⁷). This outline may be revised and amended as necessary in future, in the light of experience and of the results of the Uruguay Round.

3. It would be understood that the Secretariat will continue to make available to the government of the acceding country the necessary technical assistance facilities.
4. It would also be understood that in the course of its deliberations, the working party may request the Secretariat to prepare background documentation on specific issues or questions regarding the acceding government's trade policies which have arisen in the course of the examination by the working party."¹⁰⁸

In the beginning, there was no practice of asking questions by Contracting Parties and answering those questions by acceding government in the history of GATT. But in the last days of GATT accession practice, the CONTRACTING PARTIES invited questions from all contracting parties after submission of the memorandum on the foreign trade regime and then the applicant government provided written answers to those questions. The discussion in the working party was reflected in the report of the working party to the Council, to which were attached a draft Decision and Protocol of Accession. Accession tariff negotiations were held between the acceding government and those contracting parties to the GATT which wished to participate therein, in parallel with the working party. The accession schedule of concessions was annexed

¹⁰⁷ . See document (L/7317), 27 October 1993, the GATT Secretariat, Geneva, available at <http://www.wto.org>.

¹⁰⁸ . See WTO ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, VOLUME 2, Geneva, 1995, World Trade Organization, P. 1017.

to the draft Protocol of Accession. When the tariff negotiations had been concluded, the report of the accession working party together with the draft Decision and Protocol of Accession were submitted to the GATT Council for adoption of the report and approval of the texts of the draft Decision and Protocol of Accession. A decision on accession was taken, by a two-thirds majority of the contracting parties, and the Protocol then entered into effect thirty days after signature by the applicant government.

At the November 1994 Council meeting, the Chairman of the Council made following statement on management of accession negotiations:

"...After consultations with delegations, it has ... been possible to identify a certain number of points which may help to guide both the Secretariat and governments in handling the negotiations on accession. These points ... are of an indicative nature; their aim is to rationalize the manner of work on accession negotiations when an unusually large number of requests for accession must be dealt with. They are not intended in any way to substitute for the established procedures which are maintained.

"The points are as follows:

- "1. the management of accession negotiations in the GATT should ensure the wider acceptance and effective application of rules and disciplines under the GATT, thus contributing towards the reform processes in the applicant countries or territories, and towards the objective of further strengthening the multilateral trading system;
2. there shall be no lowering of present standards for terms of accession to GATT;

3. accession negotiations should be limited to issues related to GATT rights and obligations including market access to the applicant country or territory;
4. accession negotiations should be approached on a case-by-case basis, while respecting the established procedures for negotiations with all applicants;
5. adequate lead-time should be allowed in the preparatory stage of accession negotiations before meetings of the respective working parties are convened, in order to allow both the applicant government and members of the working party to better prepare themselves;
6. in line with 5 above, more than one round of questions and answers may be organized if necessary; subsequent rounds will be designed to select and clarify issues before an initial meeting of the working party;
7. adequate lead-time should be allowed for governments to examine documentation (i. e., three to four weeks); the conformity of such documentation with established procedures should be checked in advance by the Secretariat, which would inform contracting parties and the applicant governments of its views;
8. the Secretariat may be invited to examine the technical assistance requirements of the applicant government so as to elaborate its own plans for assistance and further coordinate them with those of individual governments;
9. the applicant government should be encouraged to undertake the necessary in-depth preparation for the accession negotiations before the working party meetings, *inter alia*, through informal consultations with contracting parties and the Secretariat;

10. applicant governments should also avail themselves, to the extent possible, of the training activities of GATT as part of their preparation for negotiations and to fully use their GATT observer status, in particular, to attend meetings of other accession working parties and of various committees."¹⁰⁹

Protocol of Accession was the key agreement between acceding government and GATT Contracting Parties. It was binding to the acceding country as well as existing Contracting Parties. Major "terms to be agreed between acceding government and the Contracting Parties" were included in the Protocol of Accession. In the GATT history, certain provisions have appeared in almost all protocols of accession since the Annecy Protocol.¹¹⁰

¹⁰⁹ See document (C/COM/4), the GATT Secretariat, Geneva, 16 November 1994, available at <http://www.wto.org>.

¹¹⁰ The following is text of GATT Protocol of Accession:
"The CONTRACTING PARTIES...

"Decide, in accordance with Article XXXIII of the General Agreement, that the Government of [...] may accede to the General Agreement on the terms set out in the Protocol of Accession.

"PROTOCOL OF ACCESSION OF [...]"

"The governments which are contracting parties to the General Agreement on Tariffs and Trade (hereinafter referred to as 'contracting parties' and the 'General Agreement,' respectively), the European Economic Community and the Government of [...] (hereinafter referred to as '[...]'), ...

"Have through their representatives agreed as follows:

PART I - GENERAL

"1. [...] shall, upon entry into force of this Protocol pursuant to paragraph 6, become a contracting party to the General Agreement, as defined in Article XXXII thereof, and shall apply to contracting parties provisionally and subject to this Protocol:

- (a) Parts I, III and IV of the General Agreement, and
- (b) Part II of the General Agreement to the fullest extent not inconsistent with the relevant legislation of [...] existing on the date of this Protocol.

The obligations incorporated in paragraph 1 of Article I by reference to Article III and those incorporated in paragraph 2(b) of Article II by reference to Article VI of the General Agreement shall be considered as falling within Part II for the purpose of this paragraph.

"2. (a) The provisions of the General Agreement to be applied to contracting parties by [...] shall, except as otherwise provided in this Protocol, be the provisions contained in the text annexed to the Final Act of the second session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as rectified, amended or otherwise modified by such instruments as may have become effective on the day on which [...] becomes a contracting party.

(b) In each case in which paragraph 6 of Article V, sub-paragraph 4(d) of Article VII, and sub-paragraph 3(c) of Article X of the General Agreement refer to the date of that Agreement, the applicable date in respect of the [...] shall be the date of this Protocol.

PART II - SCHEDULE

Accession to the GATT established rights, duties as well as relationship between acceding government/territory and the existing Contracting Parties. However, there was a provision of invocation of "opt-out" of a GATT relationship with any other Contracting Party under Article XXXV of the GATT.¹¹¹ It allowed non-application of General Agreement between particular Contracting Parties. "When GATT was negotiated, the original text required a unanimous decision to accept a new member. After the 1948 Havana Conference, however, this provision was changed to a two-thirds majority. Nevertheless, it was felt that no country should be forced

"3. The schedule in the Annex shall, upon the entry into force of this Protocol, become a schedule to the General Agreement relating to [...].

"4. (a) In each case in which paragraph 1 of Article II of the General Agreement refers to the date of the Agreement, the applicable date in respect of each product which is the subject of a concession provided for in the Schedule annexed to this Protocol shall be the date of this Protocol.

(b) For the purpose of the reference in paragraph 6(a) of Article II of the General Agreement to the date of that Agreement, the applicable date in respect of the Schedule annexed to this Protocol shall be the date of this Protocol.

PART III - FINAL PROVISIONS

"5. This Protocol shall be deposited with the Director-General to the CONTRACTING PARTIES. It shall be open for acceptance, by signature or otherwise, by [...] until [date].

"6. This Protocol shall enter into force on the thirtieth day following the day upon which it shall have been accepted by [...].

"7. [...] having become a contracting party to the General Agreement pursuant to paragraph 1 of this Protocol, may accede to the General Agreement upon the applicable terms of this Protocol by deposit of an instrument of accession with the Director-General. Such accession shall take effect on the day on which the General Agreement enters into force pursuant to Article XXVI or on the thirtieth day following the day of the deposit of the instrument of accession, whichever is the later. Accession to the General Agreement pursuant to this paragraph shall, for the purposes of paragraph 2 of Article XXXII of that Agreement, be regarded as acceptance of the Agreement pursuant to paragraph 4 of Article XXVI thereof.

"8. [...] may withdraw its provisional application of the General Agreement prior to its accession thereto pursuant to paragraph 7 and such withdrawal shall take effect on the sixtieth day following the day on which written notice thereof is received by the Director-General.

"9. The Director-General shall promptly furnish a certified copy of this Protocol and a notification of each acceptance thereof, pursuant to paragraph 6 to each contracting party, to the European Economic Community, and to [...].

"10. This Protocol shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

"Done at Geneva on [date] in a single copy, in the English, French and Spanish languages, except as otherwise specified with respect to the Schedule annexed hereto, each text being authentic."

¹¹¹. Art. XXXV of the GATT reads: "1. This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if: (a) the two contracting parties have not entered into tariff negotiations with each other, and (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application. 2. The CONTRACTING PARTIES may review the operation of this Article in particular cases at the request of any contracting party and make appropriate recommendations."

to accept a trade agreement with another country without its own decision to do so. Consequently, Article XXXV was added to the General Agreement, giving to each contracting party, and to an applicant for membership, a one time option (at the time the applicant becomes a contracting party) to "opt out" of a GATT relationship with any other contracting party."¹¹² When Japan entered GATT in the middle of the 1950's, the provisions of "opt out" were invoked by a number of countries against Japan. Subsequently, most of those countries withdrew their Article XXXV invocation, often after individual bilateral negotiations with the government of Japan. The United States has invoked Article XXXV in respect of several "communist" countries, partly due to legislative requirements.¹¹³

II.2.B Procedures for Accession to the WTO

Since the commencement of the WTO as an international organization, its participants are called "Members." GATT participating governments or customs territories were not called "Members" because the GATT was not an international organization. They were called "Contracting Parties." Governments/custom territories which were already participating parties to the GATT became the original Members of the WTO. The number of original WTO Members were 128. Governments/custom territories which had applied for accession to the GATT and had not completed accession process, and other countries/custom territories which are interested in joining

¹¹² . See JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS 306 (1995).

¹¹³ . See Id.

the WTO come under the scope of procedures for accession to the WTO. Here, first we survey the WTO provisions relevant to the accession and then we discuss WTO accession procedure.

II.2.B(1) WTO Accession Provisions

Paragraph 1 of Article XI of the WTO Agreement¹¹⁴ deals with original Membership of the WTO. The full text of this provision reads as follows:

"1. The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO."

There are few WTO provisions which are directly or indirectly related to the WTO accession. However, there are not any explicit provisions under the WTO Agreement that describe the procedures of accession to the WTO. The relevant provisions of the WTO Agreement with respect to the accession to the WTO are briefly mentioned here.

¹¹⁴ . See WTO Agreement, *supra*, footnote 89.

Article XII of the WTO Agreement deals with accession to the WTO. New Member States have acceded to the WTO under Article XII of the WTO Agreement. The full text of Article XII of the WTO Agreement reads as follows:

- "1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.
2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.
3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement."

Hence, a country becomes a member of the WTO by acceding to the WTO Agreement on terms agreed between it and the WTO. It is interesting to mention that neither Article XII of the WTO Agreement nor any other articles of the WTO Agreements give any guidance on the "terms to be agreed." Nor does it specify any procedures to be used for negotiating these terms. In fact, accession procedures have evolved separately in the due course of time which follow closely the corresponding Article XXXIII of GATT 1947.

Article XVI:4 of the WTO Agreement deals with the requirement of bringing national legislation in conformity with the rules of the multilateral Agreements. The full text of this provision reads as follows:

- "4. Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

Article XIII of the WTO Agreement deals with non-application of Multilateral Trade Agreements between particular Members. The full text of Article XIII of the WTO Agreement reads as follows:

- "1. This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application.
2. Paragraph 1 may be invoked between original Members of the WTO which were contracting parties to GATT 1947 only where Article XXXV of that Agreement had been invoked earlier and was effective as between those contracting parties at the time of entry into force for them of this Agreement.
3. Paragraph 1 shall apply between a Member and another Member which has acceded under Article XII only if the Member not consenting to the application

has so notified the Ministerial Conference before the approval of the agreement on the terms of accession by the Ministerial Conference.

4. The Ministerial Conference may review the operation of this Article in particular cases at the request of any Member and make appropriate recommendations.
5. Non-application of a Plurilateral Trade Agreement between parties to that Agreement shall be governed by the provisions of that Agreement."

Few other provisions of the WTO Agreement are also relevant to accession, for instance:

Article XVI:1 of the WTO Agreement lays down that "Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947." Article IV:2 of the WTO Agreement states that "In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council." Article IX of the WTO Agreement deals with decision-making.¹¹⁵ On 15 November 1995 the General Council agreed to procedures

¹¹⁵ Article IX of the WTO Agreement reads as follow:

1. The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.

2. The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.

3. In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths¹¹⁵ of the Members unless otherwise provided for in this paragraph.

regarding decision-making under Articles IX and XII of the WTO Agreement which clarified the relation between these two provisions.¹¹⁶ Article XVI:5 of the WTO Agreement deals with reservation with respect to the provisions of the WTO Agreement. It states that "no reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement."

II.2.B(2) WTO Accession Procedure

Article XII of the WTO Agreement is the main provision related to the WTO accession but it does not give guidance on the "terms to be agreed" between the acceding country and the WTO. Article XII of the WTO Agreement also does not lay down any procedures to be used for

(a) A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration pursuant to the practice of decision-making by consensus. The Ministerial Conference shall establish a time-period, which shall not exceed 90 days, to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three fourths⁴ of the Members.

(b) A request for a waiver concerning the Multilateral Trade Agreements in Annexes 1A or 1B or 1C and their annexes shall be submitted initially to the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, respectively, for consideration during a time-period which shall not exceed 90 days. At the end of the time-period, the relevant Council shall submit a report to the Ministerial Conference.

4. A decision by the Ministerial Conference granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate. Any waiver granted for a period of more than one year shall be reviewed by the Ministerial Conference not later than one year after it is granted, and thereafter annually until the waiver terminates. In each review, the Ministerial Conference shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. The Ministerial Conference, on the basis of the annual review, may extend, modify or terminate the waiver.

5. Decisions under a Plurilateral Trade Agreement, including any decisions on interpretations and waivers, shall be governed by the provisions of that Agreement."

¹¹⁶ See WTO document (WT/GC/M/8, page 6), the WTO Secretariat, Geneva, (1995), available at <http://www.wto.org>.

negotiating these terms and conditions. In fact, accession to the WTO is a process of negotiation which is quite different from the process of accession to other international organizations/entities. The procedure of accession to the WTO, like the procedure of accession to the GATT, is evolved in the course of time. The GATT accession history is relevant to the WTO accession because it clearly influences the interpretation of WTO provisions and the WTO practices. The meaning of the phrase "on terms to be agreed" of Article XII is obviously crucial, and the GATT procedures and practice have influence over it. The provisions of Article XXXIII of GATT -1947 are closely related to the provisions of Article XII of the WTO Agreement.¹¹⁷

Under the WTO Agreement, there is no provision of easy accession by sponsorship or provisional accession or de facto application of the Agreement as there were such provisions under the GATT -1947. However, some of the GATT accession concepts have been carried over into Article XII of the WTO Agreement, i. e., "ticket of admission," "independent customs territory" status, and non-application of the Agreement (opt-out provision).

As nothing is mentioned in Article XII regarding the procedure for the accession to the WTO, the WTO Secretariat has issued a Note on Procedures for Accession to the WTO.¹¹⁸ This Note sets out procedures for negotiations under Article XII to be followed in the organization and pursuit of accession negotiation. The WTO Secretariat consulted with interested WTO Members and took

¹¹⁷ . Article XXXIII of the GATT 1947 reads as "'A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority."

¹¹⁸ . See WTO document (WT/ACC/1), *Note by the Secretariat on Accession to the World Trade Organization, Procedures for Negotiations under Article XII*, the WTO Secretariat, Geneva, 24 March 1995, available at <http://www.wto.org>.

the views expressed into account before issuing the Accession Procedure Note. During these consultations an understanding was reached that this Note would not be submitted to the Ministerial Conference/General Council or to individual Working Parties for formal endorsement but that it would be prepared as a practical guide for delegations of both WTO Members and acceding Governments or separate customs territories and not a general policy statement on accession negotiations.¹¹⁹

The Note on Procedure for the Accession to the WTO were modeled on those followed by the Contracting Parties to GATT 1947, including the Complementary Procedures on Accession Negotiations agreed by the Council of GATT 1947 on 27 October 1993¹²⁰ and the statement by the Chairman of the Council of GATT 1947 on the Management of Accession Negotiations on 10 November 1994.¹²¹ This Accession Procedure Note is supplemented by four Technical Notes by the Secretariat: (i) information to be provided on domestic support and export subsidies in agriculture;¹²² (ii) information to be provided on policy measures affecting trade in services;¹²³

¹¹⁹ . See WTO document (WT/ACC/1, paragraph 2), *Note by the Secretariat on Accession to the World Trade Organization, Procedures for Negotiations under Article XII*, the WTO Secretariat, Geneva, 24 March 1995, available at <http://www.wto.org>.

¹²⁰ . See document (L/7317), 27 October 1993, the GATT Secretariat, Geneva, available at <http://www.wto.org>.

¹²¹ . See document (C/COM/4), the GATT Secretariat, Geneva, 10 November 1994, available at <http://www.wto.org>.

¹²² . See WTO document (WT/ACC/4), *Accession to the World Trade Organization: Information to be Provided on Domestic Support and Export Subsidies*, the WTO Secretariat, Geneva, 18 March 1996, available at <http://www.wto.org>.

¹²³ . See WTO document (WT/ACC/5), *Accession to the World Trade Organization: Information to be Provided on Policy Measures Affecting trade in Services*, the WTO Secretariat, Geneva, 31 October 1996, available at <http://www.wto.org>.

(iii) information to be provided on policy measures with respect to SPS and TBT issues,¹²⁴ (iv) information to be provided on implementation of the TRIPS Agreement.¹²⁵

The WTO Secretariat, in consultation with WTO Members, has also streamlined the accession process for least-developed and small island developing economies by reducing the number of Working Party meetings and ensuring that maximum progress is made between meetings without the acceding government concerned having to visit WTO Secretariat, Geneva. It is discussed latter in the following section.

Hence, the WTO accession procedure is based on consent, customary practice, and GATT accession history.¹²⁶ In accordance with the WTO Secretariat Note on Procedures for the Accession to the WTO,¹²⁷ the procedures for accession to the WTO under Article XII require the completion of the following five phases:

- (i) application for membership and establishment of working Party;
- (ii) the examination of the foreign trade regime of the acceding State or separate customs territory;

¹²⁴ See WTO document (WT/ACC/8), *Technical Note on the Accession Process: Checklist of SPS and TBT Illustrative Issues for Consideration in Accessions*, the WTO Secretariat, Geneva, 15 November 1999, available at <http://www.wto.org>.

¹²⁵ See WTO document (WT/ACC/9), *Technical Note on the Accession Process: Implementation of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, the WTO Agreement, Geneva, 15 November 1999, available at <http://www.wto.org>.

¹²⁶ Article XVI:1 of the WTO Agreement states that "Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947."

¹²⁷ See WTO document (WT/ACC/1, paragraph 3), *Note by the Secretariat on Accession to the World Trade Organization, Procedures for Negotiations under Article XII*, the WTO Secretariat, Geneva, 24 March 1995, available at <http://www.wto.org>.

- (iii) the negotiation and establishment of a schedule of concessions and commitments to GATT 1994 and a schedule of specific commitments to the General Agreement on Trade in Services (GATS) for such State or separate customs territory;
- (iv) agreement on the Report of the Working Party; and
- v) agreement on a Decision and a Protocol setting out the terms of Accession.

II.2.B(2)(i) Application for Membership to the WTO and Establishment of Working Party

First of all, an interested State or separate customs territory submits an application to the Director-General of the WTO and express its desire to accede to the WTO under Article XII of the WTO Agreement. Thus, the accession process commences with the submission of a formal written request for accession by the applicant government.¹²⁸ Then application is circulated to all WTO Members. The General Council of the WTO considers the application and establishes a Working Party. The terms of reference, in general, of Working Parties are "to examine the application for accession to the WTO under Article XII and to submit to the General Council/Ministerial Conference recommendations which may include a draft Protocol of Accession."¹²⁹ Membership in the Working Party is open to all interested WTO Members. The Chairperson of the Working Party is appointed following consultations conducted by the Chairperson of the General Council. The Applicant and Members of the Working Party are also involved in this process.

¹²⁸ In accordance with Art. XII of the WTO Agreement, "any state or customs territory having full autonomy in the conduct of its trade policies is eligible to accede to the WTO on terms agreed between it and WTO Members...." Hence, such state or customs territory are eligible to apply for membership of the WTO.

¹²⁹ See WTO document (WT/ACC/1, paragraph 5), *Note by the Secretariat on Accession to the World Trade Organization, Procedures for Negotiations under Article XII*, the WTO Secretariat, Geneva, 24 March 1995, available at <http://www.wto.org>.

After the establishment of the Working Party, the WTO Secretariat informs the Applicant of the procedures on accessions to the WTO, and the requirement that the Applicant submit a Memorandum on its Foreign Trade Regime. The WTO Secretariat and interested individual Members provide technical assistance to the applicant. The Applicant and members of the Working Party are allowed adequate time in the preparatory stage of accession negotiations before meetings of the Working Party.

II.2.B(2)(ii) The Examination of the Foreign Trade Regime of the Acceding Country

After the completion of the first stage, the acceding country submits a Memorandum describing in detail its foreign trade regime and providing relevant statistical data for circulation to all WTO Members. At the same time, copies of the Applicant's currently applicable tariff schedule in the harmonized system (HS) nomenclature; and other laws and regulations relevant to accession are made available to members of the Working Party.¹³⁰

The submitted Memorandum is to be circulated to all WTO Members. Then Members of the Working Party are invited to submit questions in writing with respect to the Applicant's foreign trade regime. The Applicant is given an opportunity to answer the questions asked to it by WTO Members. Generally, more than one round of questions and answers are organized before the first meeting of the Working Party. At the initial meeting of the Working Party, representatives from

¹³⁰ . The customary practice in this respect has been that the Applicant send a complete and comprehensive copy of the relevant laws and regulations to the Secretariat. The summary or the translated textual material also is circulated to members of the Working Party.

the acceding country and Members of the Working Party examine the Memorandum, and the questions and answers. Once the examination of the foreign trade regime is advanced, Members of the Working Party may initiate bilateral market access negotiations on trade in goods and trade in services, including on the other terms to be agreed. These two phases, fact-finding work on the foreign trade regime and the bilateral market access negotiation, can overlap and proceed in parallel.

II.2.B(2)(iii) The Bi-lateral Negotiation of a Schedule of Concessions and Commitments

In the accession process, bi-lateral market access negotiations start together with fact-finding work on the foreign trade regime. In the case of trade in goods, either interested Members submit requests and the Applicant then tables initial offers, or alternatively, the Applicant tables its draft Schedule of Concessions and Commitments to provide the basis for negotiations. Then bilateral market access negotiations proceed.

In the case of trade in services, interested Members submit requests and the Applicant then tables its draft Schedule of Specific Commitments, or alternatively the Applicant table a draft Schedule and provides a basis for negotiations. Then negotiations proceed bilaterally on the basis of draft Schedule. Following the conclusion of bilateral negotiations between interested Members and the Acceding country, the Schedule of Concessions and Commitments to GATT 1994, and the Schedule of Specific Commitments to the GATS are prepared, reviewed multilaterally and annexed to the draft Protocol of Accession as an integral part of it. Such bilateral negotiations will have multilateral effects.

II.2.B(2)(iv) Agreement on the Report of the Working Party

Finally the Working Party prepares the Draft Report of the Working Party containing a summary of proceedings and conditions of entry. Following the completion of the Working Party's Draft Report and Protocol of Accession, and the market access commitments in goods and services, the "accession package"¹³¹ is adopted at a final formal meeting of the Working Party. The Protocol of Accession contains the terms of accession agreed by the Applicant and Members of the Working Party and its provisions.

II.2.B(2)(v) Agreement on a Decision and a Protocol Setting out the Terms of Accession

After the conclusion of the negotiations on the schedules on goods and services, and the completion of the Working Party's mandate, the Working Party submits its Report along with the draft Decision and Protocol of Accession to the General Council or Ministerial Conference for adoption. After the General Council's or Ministerial Conference's approval, the accession package is redistributed as a non-restricted document. Finally two documents will be issued: (i) the decisions of the General Council, and (ii) the Protocol of Accession of the acceding country.¹³²

¹³¹ . The "accession package" consists of three documents which represent the results of both the multilateral and bilateral phases. These are: a Report of the Working Party containing a summary of proceedings and conditions of entry and a Protocol of Accession; Schedules of market access commitments in goods and services agreed between the acceding government and WTO Members.

¹³² . The following is the text of the Protocol of Accession to the WTO:
"The General Council,

Having regard to paragraph 2 of Article XII and paragraph 1 of Article IX of the Marrakesh Agreement Establishing the World Trade Organization, and the Decision-Making Procedures under Articles IX and XII of the Marrakesh Agreement Establishing the World Trade Organization agreed by the General Council (WT/L/93),

Taking note of the application of [name of country] for accession to the Marrakesh Agreement Establishing the World Trade Organization dated 7 December 1995,

Noting the results of the negotiations directed toward the establishment of the terms of accession of [name of country] to the Marrakesh Agreement Establishing the World Trade Organization and having prepared a Protocol on the Accession [name of country] (WT/ACC/.../...),

Decides as follows:

[name of country] may accede to the Marrakesh Agreement Establishing the World Trade Organization on the terms and conditions set out in the Protocol annexed to this Decision.]

“PROTOCOL OF ACCESSION OF [name of country]
TO THE AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION”

“The World Trade Organization (hereinafter referred to as the “WTO”), pursuant to the approval of the General Council of the WTO accorded under Article XII of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter referred to as “WTO Agreement”), and the Republic of ...[name of country]... (hereinafter referred to as “[short form of name]”),

Taking note of the Report of the Working Party on the Accession of ...[name of country]... to the WTO in document WT/ACC/[...] (hereinafter referred to as the “Working Party Report”),

Having regard to the results of the negotiations on the accession of ...[name of country]... to the WTO,
Agree as follows:

Part I – General

1. Upon entry into force of this Protocol, ...[name of country]... accedes to the WTO Agreement pursuant to Article XII of that Agreement and thereby becomes a Member of the WTO.
2. The WTO Agreement to which ...[name of country]... accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of entry into force of this Protocol. This Protocol, which shall comprise the commitments referred to in paragraph ...[list of relevant commitment paragraph numbers]... of the Working Party Report, shall be an integral part of the WTO Agreement.
3. Except as otherwise provided for in the paragraphs referred to in paragraph ...[list of relevant paragraphs numbers]... of the Working Party Report, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with the entry into force of that Agreement shall be implemented by ...[name of country]... as if it had accepted that Agreement on the date of its entry into force.

Part II – Schedules

4. The Schedules annexed to this Protocol shall become the Schedule of Concessions and Commitments annexed to the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as the “GATT 1994”) and the Schedule of Specific Commitments annexed to the General Agreement on Trade in Services (hereinafter referred to as “GATS”) relating to ...[name of country].... The staging of the concessions and commitments listed in the Schedules shall be implemented as specified in the relevant parts of the respective Schedules.
5. For the purpose of the reference in paragraph 6(a) of Article II of the GATT 1994 to the date of that Agreement, the applicable date in respect of the Schedules of Concessions and Commitments annexed to this Protocol shall be the date of entry into force of this Protocol.

Part III - Final Provisions

6. This Protocol shall be open for acceptance, by signature or otherwise, by ...[name of country]... until ...[date]...
7. This Protocol shall enter into force on the thirtieth day following the day of its acceptance.
8. This Protocol shall be deposited with the Director-General of the WTO. The Director-General of the WTO shall promptly furnish a certified copy of this Protocol and a notification of acceptance thereto pursuant to paragraph 7 to each Member of the WTO and to...[name of country]...
9. This Protocol shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

The WTO Agreement provides that new members may be admitted to the WTO by a two-thirds majority of the Ministerial Conference. However, in practice membership is conferred by consensus.¹³³

The Protocol of Accession annexed to the Report states that the Applicant country accedes to the WTO Agreement, defines the Schedules and outlines final provisions for timing of acceptance of the Protocol and full membership of the WTO. Hence, the Protocol of Accession is the main agreement equivalent to a treaty between the acceding country and the WTO. The Protocol of Accession contains the main terms and condition with respect to the accession and it shall be binding to acceding country, the existing Member States of the WTO and the WTO itself.¹³⁴

Once the General Council or Ministerial Conference adopt the Report of the Working Party and approve the draft Decision, the Applicant is then free to sign the Protocol of Accession. After the signature by the acceding country to the Protocol of Accession, normally three months time is given for the ratification by national parliament in the acceding country. Following the ratification of the Protocol of Accession by the national parliament, the acceding country notifies the WTO Secretariat that it has completed its ratification procedures. After 30 days of such notification the Applicant country becomes a full Member of the WTO.

Done at Geneva this ... day of ...[date]..., in a single copy in the English, French and Spanish languages each text being authentic, except that a Schedule annexed hereto may specify that it is authentic in only one or more of these languages."

Specific provisions

The following texts are contained only in some of the Protocols.

..... "

¹³³ . See Lawrence M. Reich, *Foreign Policy or Foreign Commerce?: WTO Accessions and the U. S. Separation of Powers*, 86 *Georgetown Law Journal* 751 (January, 1998).

¹³⁴ . See WTO document (WT/ACC/10, (Annex 2:)), *General Council Decisions and Protocols of Accession, Technical Note on the Accession Process*, the WTO Secretariat, Geneva, 21 December 2001, available at <http://www.wto.org>.

Once a country becomes Member to the WTO, it will have same rights and obligations under the WTO Agreement as other Members have. However, under certain situation, provisions of Multilateral Trade Agreements may not be applicable between particular Members. The WTO Agreement continues to have the provision of the "opt out." Art. XIII of the WTO Agreement has a provision in regard to the non-application of Multilateral Trade Agreements between particular members.¹³⁵

II.2.C *Least- Developed Countries (LDCs) & Procedure for Accession to the WTO*

There are no WTO definitions of "developed" or "developing" countries. Developing countries in the WTO are designated on the basis of self-selection. However, the WTO Agreement defines least-developed countries (hereinafter referred to as the "LDCs") as those countries which have been designated as such by the United Nations (hereinafter referred to as the "UN").¹³⁶ The least-developed countries are a group of fifty countries¹³⁷ that have been identified by the UN as

¹³⁵ . Art. XIII of the WTO Agreement sets out:

"1. This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application.

2. Paragraph 1 may be invoked between original Members of the WTO which were contracting parties to GATT 1947 only where Article XXXV of that Agreement had been invoked earlier and was effective as between those contracting parties at the time of entry into force for them of this Agreement.

3. Paragraph 1 shall apply between a Member and another Member which has acceded under Article XII only if the Member not consenting to the application has so notified the Ministerial Conference before the approval of the agreement on the terms of accession by the Ministerial Conference.

4. The Ministerial Conference may review the operation of this Article in particular cases at the request of any Member and make appropriate recommendations.

5. Non-application of a Plurilateral Trade Agreement between parties to that Agreement shall be governed by the provisions of that Agreement."

¹³⁶ . See WTO Agreement, *supra*, footnote 89, Article XI:2.

¹³⁷ . The name of fifty least developed countries are Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of

"least-developed" in terms of their low GDP per capita, their weak human assets and their high degree of economic vulnerability.¹³⁸ Nepal is one of the least-developed countries.

The list of UN least-developed countries is reviewed¹³⁹ every three years by the Economic and Social Council (ECOSOC), an organ of the UN. The total population of the fifty least developed countries are 630 million. Under the UN system, different thresholds are used for inclusion in, and graduation from, the list. A country qualifies to be added to the list of LDCs if it meets inclusion thresholds on all three criteria.¹⁴⁰ A country qualifies for graduation from the list if it meets graduation thresholds on two of the three criteria. For the low-income criterion, the threshold on which inclusion in the current list is based has been a GDP per capita of \$800.00; and the threshold for graduation has been a GDP per capita of \$900.00.¹⁴¹

Out of the fifty countries now classified by the United Nations as Least-Developed, thirty least-developed countries are original Members of the WTO. Eight least-developed countries Afghanistan, Bhutan, Cape Verde, Laos PDR, Samoa, Sudan, Vanuatu and Yemen are currently

Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea Bissau, Haiti, Kiribati, Lao People's Democratic Republic, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Sudan, Timor -Leste, Togo, Tuvalu, Uganda, United Republic of Tanzania, Vanuatu, Yemen and Zambia. See UNCTAD Press Release, UNCTAD/PRESS/PR/2004, dated 27/05/2004, available at <http://www.unctad.org>.

¹³⁸ See THE LEAST DEVELOPED COUNTRIES, 2002 REPORT, *Highlight*, UNCTAD. Available at <http://www.unctad.org>. [(<http://www.unctad.org/Templates/webflyer.asp?docid=2026&intItemID=1397&lang=1>) (visited on 6/18/2003)]

¹³⁹ The criteria underlying the current list of least developed countries are: (i) low national income, as measured by the gross domestic product (GDP) per capita (per capita GDP under \$ 900.00 for countries); (ii) weak human resources, as measured by a composite index (Augmented Physical Quality of Life Index) based on indicators of life expectancy at birth, per capita calorie intake, combined primary and secondary school enrolment, and adult literacy; (iii) a low level of economic diversification, as measured by a composite index (Economic Diversification Index) based on the share of manufacturing in GDP, the share of the labor force in industry, annual per capita commercial energy consumption, and UNCTAD's merchandise export concentration index. See *Statistical Profiles of LDCs*, 2001, UNCTAD. Available at www.unctad.org.

¹⁴⁰ *Id.*
¹⁴¹ See *Statistical Profiles of LDCs*, 2001, UNCTAD, available at <http://www.unctad.org>. [(<http://r0.unctad.org/en/pub/ldcprofiles2001.en.htm>) (Visited on 6/18/2003)]

in the process of accession to the WTO, while Ethiopia and Sao Tome and Principe, are observers. The Fifth WTO Ministerial Conference agreed to grant accession to Cambodia and Nepal, first least-developed countries to accede, on 11 September 2003. The remainder least-developed countries: Comoros, Equatorial Guinea, Eritrea, Kiribati, Liberia, Somalia and Tuvalu are currently not in the process of acceding to the WTO.¹⁴² So far, as of January 2005, least-developed countries Nepal and Cambodia have completed its accession to the WTO since the establishment of the WTO in 1995.

II.2.C(1) Differential and More Favorable Treatment of the Least-Developed Countries

The WTO Agreement and organs of the WTO have mentioned few differential and more favourable treatment provisions regarding the LDCs. Those are directly and/or indirectly concerned to the accession of the LDCs to the WTO. Because accession to the WTO is a negotiation between acceding country and the WTO including Member States. Such negotiation involves concession and commitment to schedule of goods and services; and conformity of domestic legislation with the WTO provisions. As Nepal is a least-developed country, the study on differential and more favourable treatment provisions of the GATT/WTO regarding the LDCs and the procedure for accession to the WTO with respect to the LDCs are also meaningful for Nepal. Hence, we survey the GATT/WTO provisions relevant to the differential and more favourable treatment of the LDCs and discuss the procedure for accession of the LDCs to the WTO.

¹⁴² See WTO document (WT/LDC/SWG/IF/11/Rev.2, paragraph 1), *Note by the Secretariat on Status of Least-Developed Countries Accession to the World Trade Organization*, the WTO Secretariat, Geneva, available at <http://www.wto.org>.

When Article XVIII of the GATT 1947 was revised, it was recognized for the first time at the Review Session (1954- 1955) that the developing countries are to be given additional flexibility with respect to the GATT obligations. The structural nature of their balance-of-payments problem was recognized, and the obligation of developing countries maintaining balance-of-payments restrictions to hold annual consultations was reduced to once in two years.¹⁴³ The requirement of prior approval was relaxed to some extent to deviate from GATT obligations for the promotion of a particular industry.¹⁴⁴ The concept of differential treatment of developing countries was introduced for the first time after these amendments to Article XVIII of GATT.

In 1965, the GATT added a special section of 'Trade and Development' in its Part IV,¹⁴⁵ and recognized the need for a rapid and sustained expansion of the export earnings of the less-developed countries. To this effect, developed countries are called upon to take a number of commitments. Thus, Part IV of GATT codified in the multilateral trading system the concept of non-reciprocity in trade negotiations between developed and developing countries.

Paragraph (8) of Article XXXVI of the GATT sets out: "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." Paragraph (8) of Article XXXVI of the GATT 1947 is further explained under paragraph (8) of Ad Article XXXVI, Annex I (Notes and Supplementary Provisions) of the GATT 1947. Under the said

¹⁴³ . See Article XVIII:B of GATT.

¹⁴⁴ . See Article XVIII:C of GATT.

¹⁴⁵ . See GATT, 13th SUPPLEMENT BASIC INSTRUMENTS AND SELECTED DOCUMENTS (BISD) 1-11(1965). This provision is also contained in GATT 1994. The text of the GATT now constitutes the main component of what is called the GATT 1994, which is also part of the WTO Agreement. In 1994, the WTO Agreement integrated the GATT.

Interpretery Note, paragraph (8) of Ad Article XXXVI reads "It is understood that the phrase "do not expect reciprocity" means, in accordance with the objectives set forth in this Article, that the less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments. This paragraph, would apply in the event of action under Article XXXIII, or any other procedure under this Agreement." It is already mentioned that GATT Article XXXIII is related to the accession to the GATT. This provision still exists under the GATT 1994 and influences the WTO accession procedure as well as accession negotiation. So it is obvious that the basic principles of reciprocity do not apply with respect to negotiations between an acceding least-developed country and WTO Members. The principles of reciprocity is the heart of the GATT/WTO system.

The Tokyo Round of the GATT further elaborated Part IV of the GATT in 1979 which has come to be known as the Enabling Clause.¹⁴⁶ The Enabling Clause consolidated the concept of "differential and more favorable treatment" for developing countries and the principle of non-reciprocity in trade negotiations. Under the Enabling Clause, Members are enabled to accord differential and more favorable treatment to developing countries and to depart from the most-favored nation (MFN) Clause. It stipulates that "Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favorable treatment to developing countries, without according such treatment to other contracting parties."¹⁴⁷

¹⁴⁶ . See GATT, 26th SUPPLEMENT BASIC INSTRUMENTS AND SELECTED DOCUMENTS (BISD) 203 (1980).

¹⁴⁷ . The following categories of treatment are listed under the Enabling clause:

At the time of the establishment of the WTO in Marrakesh, Ministers took a number of decisions in favor of the least-developed countries. In their "Decision on Measures in Favor of Least-Developed Countries," 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. They furthermore decided that MFN concessions on tariff and non-tariff measures agreed in the Uruguay Round on products of export interest to the least-developed countries may be implemented autonomously, in advance and without staging.

The chapeau of the WTO Agreement mentions that sustainable economic development is one of the objectives of the WTO. The chapeau of the WTO Agreement further specifies that international trade should benefit the economic development of developing and least-developed countries. Article XI:2 of the WTO Agreement reads: "2. The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities." Special provisions in favor of developing countries have also been included in the WTO multilateral trading system.¹⁴⁸

(a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences;

(b) Differential and more favorable treatment with respect to the provisions of the GATT concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under GATT (now WTO) auspices;

(c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the GATT Contracting Parties (now the WTO Ministerial Conference), for the mutual reduction or elimination of non-tariff measures, on products imported from one another;

(d) Special treatment of the least-developed among the developing countries in the context of any general or specific measures in favor of developing countries.

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Special provision in favor of developing countries include:
provisions aimed at increasing trade opportunities for developing countries;

The provisions for differential and more favorable treatment of developing country Members are all applicable to the least-developed country Members. Many provisions, however, contain additional benefits for least-developed country Members.¹⁴⁹ Furthermore, under Article IX:3 of the WTO Agreement, the General Council also have power to grant waivers from the WTO Rules in favor of developing countries.¹⁵⁰

In addition to the said provisions of the GATT/WTO, many attempts have been made for the facilitation of the LDCs by WTO authorities. At the first WTO Ministerial Conference in Singapore at the end of 1996, Ministers adopted the WTO Action Plan for Least-Developed Countries. This plan tried to improve the trading opportunities of the least-developed countries

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- provisions which require WTO Members to safeguard the interests of developing country Members when adopting protective trade measures;
 - provisions allowing flexibility to developing countries in the use of economic and commercial policy instruments;
 - provisions granting longer transitional periods for the implementation by developing countries of various commitments flowing from these agreements; and
 - the provision of technical assistance in the implementation of their commitments as well as in their efforts to reap full benefits from the results of the Uruguay Round.

¹⁴⁹ We can provide an illustrative list of such differential and more favorable treatment provisions (See available at <http://www.wto.org>): The Enabling Clause provides for special treatment of the least-developed countries in the context of any general or specific measures in favor of developing countries; In the provisions on non-reciprocity in trade negotiations in GATS as well as GATT 1994 greater emphasis is laid on not seeking contributions from the least-developed country Members. The Enabling Clause provides that the developed country Members shall exercise the utmost restraint in seeking any concessions and contributions from the least-developed country Members, and GATS provides that account shall be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments; The Agreement on Agriculture exempts the least-developed country Members from reduction commitments on domestic support and export subsidies, as well as market access; The Agreement on Subsidies and Countervailing Measures exempts the least-developed country Members (and developing country Members with per capita income of less than USD 1000 per annum) from the prohibition on export subsidies; In cases in which a transitional period has been allowed to developing country Members, in many cases the least-developed country Members have been given a longer time-frame.

¹⁵⁰ Recent examples of waivers include the EC/France Trading Arrangements with Morocco, the United States' Caribbean Basin Economic Recovery Act, the Canadian Tariff Treatment for Commonwealth Caribbean Countries, the United States' Andean Trade Preference Act, and the ACP-EC Partnership Agreement. The June 1999 General Council Decision on Waiver regarding Preferential Tariff Treatment for Least-Developed Countries allows developing country members to provide preferential tariff treatment to products of least developed countries.

and their integration into the multilateral trading system.¹⁵¹ In pursuance of the Plan of Action, a High Level Meeting on Integrated Initiatives for Least-Developed Countries was held at WTO in October 1997. The High Level Meeting endorsed the Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries. The framework seeks to enhance trading opportunities to least-developed countries by providing trade-related technical assistance. At the High Level Meeting, a number of WTO Members, both developed and developing, announced steps they would be taking on an autonomous basis to enhance market access for imports from the least-developed countries.

Two other recommendations emanating from the High Level Meeting relate directly to the work of the WTO: the development of efforts to assist least-developed countries in the process of accession; and accommodation on a priority basis of requests from least-developed countries for Trade Policy Reviews and assistance to them in preparing for such reviews. The Secretariat has been taking initiatives, with the cooperation of WTO Members, to streamline the accession process of acceding least-developed countries to the extent possible, and has been providing focused technical assistance to these countries from the earliest stages of the accession process. The Secretariat is increasingly assisting these countries in areas such as helping to draft WTO-related legislation and to establish the trade policy infrastructure necessary to pursue their trade interests in the WTO after accession.

¹⁵¹ . The WTO Action Plan focuses in particular on human and institutional capacity building and on market access for products of export interest to least-developed countries. It contains a number of calls for action, such as to explore possibilities of granting preferential duty-free access for the exports of least-developed countries. It envisages closer cooperation between the WTO and other multilateral agencies assisting least-developed countries.

Regarding the differential and most favorable treatment of LDCs, there are many issues involved with LDCs. Some of these issues are addressed and some are not. Many attempts are made to address these issues by proper authorities. Still serious grievances are expressed by LDCs and developing countries on these issues. A number of issues were highlighted at the UNCTAD Conference in Bangkok, Thailand in the year 2000.¹⁵²

WTO obligations are extensive and there are many difficulties for LDCs to reform or adopt new laws and administrative practices. Primary goods and low-wage services of the LDCs are not getting enough market access. Anti-dumping and countervailing duties imposed by developed countries, and unnecessary SPS standards hinder market access to exports of goods from LDCs. There is problem of fully implementing WTO special and differential treatment obligation.

II.2.C(2) Procedure for Accession of LDCs to the WTO

Leaders of many nations have made statements in various international forums on the issue of the accession of least-developed countries to the WTO.¹⁵³ In this connection, the Doha

¹⁵² . See paragraph 10 of the Bangkok Declaration: *Global Dialogue and Dynamic Engagement*, adopted at UNCTAD X, held in Bangkok Thailand, February 12-19,2000:

The Conference emphasizes commitment to a multilateral trading system that is fair, equitable and rules-based and that operates in a non-discriminatory and transparent manner and in a way that provides benefits for all countries, especially developing countries. This will involve, among other things, improving market access for goods and services of particular interest to developing countries, resolving issues relating to the implementation of World Trade Organization (WTO) agreements, fully implementing special and differential treatment, facilitating accession to the WTO, and providing technical assistance. The Conference reiterates that all countries and international organizations should do their utmost to ensure that the multilateral trading system fulfils its potential in terms of promoting the integration of all countries, in particular the least-developed countries, into the global economy... .

¹⁵³ . See the Statement made by Ministers in the Integrated WTO Plan of Action for the LDCs adopted at the Singapore Ministerial Conference on 13 December 1996; statement made by WTO Members at the High

Ministerial Conference in November 2001 sets out the agenda which included several mentions of the accession process.¹⁵⁴ Paragraph 9 of the Ministerial Declaration states that: "...In particular, we are committed to accelerating the accession of least-developed countries." Paragraph 42 of the Doha Ministerial Declaration, in the Section on Least-Developed Countries states that "42. ... Accession of Least-Developed Countries remains a priority for the Membership. We agree to work to facilitate and accelerate negotiations with acceding Least-Developed Countries. We instruct the Secretariat to reflect the priority we attach to Least-Developed Countries' accessions in the annual plans for technical assistance...."¹⁵⁵

The Committee of Trade and Development of the WTO has established the WTO Sub-Committee on Least-Developed Countries on 5 July 1995.¹⁵⁶ The commitment to accelerate the accession of Least-Developed Countries is being addressed in the Sub-Committee on Least-Developed Countries. In this respect, the Sub-Committee was mandated to report on the issue to the General Council by early 2003 with recommendations. The Director-General of the WTO submitted a status report to the Fifth Ministerial Conference on "Implementation of the

Level Meeting on Integrated Initiatives for LDCs' Trade Development on 27-28 October 1997; statement made by the Third United Nations Conference on Least-Developed Countries (LDC-III) in the Brussels Declaration and Programme of Action; and statement made by LDC Ministers in their Zanzibar Declaration of 24 July 2001 have contributed a lot to make an opinion in favor of least-developed countries' accession to the WTO. See WTO document (WT/COMTD/LDC/12), Draft Decision, Preamble, of the WTO Sub-Committee on Least-Developed Countries on *COMMUNICATION TO THE GENERAL COUNCIL, ACCESSION OF LEAST DEVELOPED COUNTRIES*, the WTO Secretariat, Geneva, 5 December 2002, available at <http://www.wto.org>.

¹⁵⁴ See WTO Document (WT/MIN (01)/DEC/1), 20 November 2001, the WTO Secretariat, Geneva, available at <http://www.wto.org>.

¹⁵⁵ See http://www.wto.org/english/thewto_e/acc_e/dda_accessions_e.htm (visited on 2/7/2003).

¹⁵⁶ Committee on Trade and Development established a Sub-Committee on Least-Developed Countries with the following terms of reference: (a) to give particular attention to the special and specific problems of least-developed countries; (b) to review periodically the operation of the special provisions in the Multilateral Trade Agreements and related Ministerial Decisions in favor of the least-developed country Members; (c) to consider specific measures to assist and facilitate the expansion of the least-developed countries' trade and investment opportunities, with a view to enabling them to achieve their development objectives; and, (d) to report to the Committee on Trade and Development for consideration and appropriate action." See WTO document (WT/COMTD/2), 18 July 1995, the WTO Secretariat, Geneva, available at <http://www.wto.org>.

Commitment by Ministers to Facilitate and Accelerate the Accession of Least-Developed Countries."¹⁵⁷

The WTO Sub-Committee on Least-Developed Countries, at its twenty-second Session in December 2000, as part of its contribution to the discussions at the Third UN Conference on Least-Developed Countries (LDC- III), requested the WTO Secretariat to prepare a factual note on the status of accession of Least-Developed Countries. Accordingly, the WTO Secretariat prepared a note on the "Status of Least-Developed Countries Accession to the WTO."¹⁵⁸ The WTO Secretariat Note "Status of Least-Developed Countries Accession to the WTO" outlines: a) the procedures laid down for accessions under Article XII; b) the terms, conditions and pace of the accession process, in particular the availability of special and differential treatment including transition periods; c) the provision and co-ordination of technical assistance to address the special needs and capacities of LDC applicants for accession; and d) the relationship between accessions and new trade negotiations.

Paragraph 3 of the WTO Secretariat Note on "Status of Least –Developed Countries" states: "the negotiation of accession to the WTO under Article XII, is a more complicated undertaking than accession to the GATT 1947, largely due to the increased scope and coverage of the WTO Agreement. It is also more structured and transparent. Paragraph 4 of the WTO Secretariat Note on "Status of Least-Developed Countries Accession to the World Trade Organization" reiterates

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See http://www.wto.org/english/thewto_e/acc_e/dda_accessions_e.htm.

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See WTO document (WT/LDC/SWG/IF/11/Rev.2), *Note by the Secretariat on Status of Least-Developed Countries Accession to the World Trade Organization*, the WTO Secretariat, Geneva, 19 April 2001, available at <http://www.wto.org>.

the same accession process for least-developed countries¹⁵⁹ and further states that no guidance is given in the text of Article XII on the "terms to be agreed" to accede.¹⁶⁰

It further states that the transition periods granted to original WTO Members have not automatically been made available to governments acceding under Article XII, regardless of their level of economic development. A few transition periods have been granted in limited areas and for short periods of time. Different views were expressed on the need for transition periods and special and differential treatment. Some Members said that all existing WTO provisions regarding special and differential treatment for LDCs should be extended automatically and without negotiation to all LDCs acceding to the WTO. However, some other Members noted that there was no provision for the automatic granting of transition periods to acceding governments. Others said that while they were not, a priori, opposed to transitional periods, they could be granted provided that there was a clear justification for them.¹⁶¹

¹⁵⁹ The WTO Secretariat Note on "Status of Least-Developed Countries Accession to the World Trade Organization" states that the accession process begins with a formal request to accede from the government to the Director-General. The General Council then considers the application to accede under WTO Article XII and the establishment of a Working Party. The Working Party first conducts a factual examination of the trade regime of the acceding government on the basis of a Memorandum presented by the acceding government and replies to questions from Members. At an appropriate moment, it moves on to negotiate the terms of accession, which relate to three main areas: adherence to WTO rules, and market access in goods and services. When agreed, the Report of the Working Party, including a draft Decision and Protocol of Accession, is forwarded to the General Council. The Protocol, which contains a single package of agreed commitments on rules; concessions and commitments on goods; and specific commitments on services, sets out the terms on which the applicant is invited to join WTO. Following the General Council's adoption of the Report and approval of the draft Decision, the acceding government becomes a Member of the WTO thirty days after it accepts its Protocol of Accession. Hence, it is understood from this statement of the WTO Secretariat that there is no separate accession procedure for least-developed countries. See WTO document (WT/LDC/SWG/IF/11/Rev.2, paragraph 5), *Note by the Secretariat on Status of Least-Developed Countries Accession to the World Trade Organization*, the WTO Secretariat, Geneva, 19 April 2001, available at <http://www.wto.org>.

¹⁶⁰ See WTO document (WT/LDC/SWG/IF/11/Rev.2, paragraph 4), *Note by the Secretariat on Status of Least-Developed Countries Accession to the World Trade Organization*, the WTO Secretariat, Geneva, 19 April 2001, available at <http://www.wto.org>.

¹⁶¹ See *Ibid.*, paragraph 10.

The Note mentions that Members have indicated that Article XII of the WTO, places no limits on the terms of accession to be agreed through negotiation with acceding countries. The accession of new Members will strengthen the system. The pace of the accession will depend on flexibility in negotiations and at the same time, the strengthening of domestic institutions to ensure WTO conformity.¹⁶² Delivery of timely and appropriate technical assistance facilitates the accession process, and strengthens human and institutional capacities in LDCs. The WTO Secretariat and Members have already managed to reduce to a minimum the number of Working Party meetings and to ensure that the meetings held are as productive as possible.¹⁶³ It is in the interest of the multilateral trading system that, as many acceding countries as possible, should participate in the new round of trade negotiations when launched.¹⁶⁴

In fact there is no separate procedure for the accession of LDCs to the WTO. This document proves that separate procedure is not applied for the accession of LDCs. Neither there are any special provisions under the WTO Agreement which guides the procedure for the accession of LDCs to the WTO. Article XII of the WTO agreement is the main article which deals with accession but it does not prescribe any procedure. Present procedure of accession to the WTO is evolved by consent and practice. Hence, it suggests that the WTO can evolve separate procedure for the accession of LDCs. So far LDCs and other countries stand at the same footing in the process of accession to the WTO. As it is mentioned earlier that accession includes negotiation between acceding country and the WTO including Member States, LDCs are compelled to make rather more concessions and commitments than they actually required to make. It suggests that

¹⁶² . See Ibid., paragraph 11.

¹⁶³ . See Ibid., paragraph 18.

¹⁶⁴ . See Ibid., paragraph 19.

so far the concept as well as provisions of differential and more favourable treatment of LDCs are not applied in the process of accession of LDCs to the WTO.

The WTO Secretariat Note "Status of Least-Developed Countries Accession to the WTO" emphasise on providing technical assistance to LDCs, particularly on legislative drafting. Although technical assistance may be helpful to the LDCs, main concern of the LDCs is to get an opportunity to use their rights to make concessions and commitments in accordance with their individual development, financial and trade needs, or their administrative and institutional capabilities.

The Sub-Committee on Least-Developed Countries prepared a text on "Accession of Least Developed Countries" on 2 December 2002,¹⁶⁵ and it forwarded to the General Council for adoption. The General Council adopted the text of "Accession of Least Developed Countries" on 10 Dec. 2003.¹⁶⁶ The text of "Accession of Least Developed Countries" contains guidelines to negotiation for accession of LDCs to the WTO.

It is very important to mention here, under the Market Access heading, the text of the Accession of LDCs states that WTO Members shall exercise restraint in seeking concessions and commitments on trade in goods and services from acceding LDCs, taking into account the levels of concessions and commitments undertaken by existing WTO LDCs' Members. It further states

¹⁶⁵ See WTO document (WT/COMTD/LDC/12), Draft Decision of the WTO Sub-Committee on Least-Developed Countries on *COMMUNICATION TO THE GENERAL COUNCIL, ACCESSION OF LEAST DEVELOPED COUNTRIES*, the WTO Secretariat, Geneva, 5 December 2002, available at <http://www.wto.org>.

¹⁶⁶ See WTO document (WT/L/508), *Accession of Least-Developed Countries*, the WTO Secretariat, Geneva, 20 January 2003, available at <http://www.wto.org>.

that acceding LDCs shall offer access through reasonable concessions and commitments on trade in goods and services commensurate with their individual development, financial and trade needs, in line with Article XXXVI.8 of GATT 1994, Article 15 of the Agreement on Agriculture, and Articles IV and XIX of the General Agreement on Trade in Services. It also mentions that technical assistance and capacity building shall be provided to assist acceding LDCs. Furthermore, under the WTO Rules heading, the text of Accession of LDCs states that:

- i) Special and Differential Treatment, as set out in the Multilateral Trade Agreements, Ministerial Decisions, and other relevant WTO legal instruments, shall be applicable to all acceding LDCs, from the date of entry into force of their respective Protocols of Accession;
- ii) transitional periods/transitional arrangements foreseen under specific WTO Agreements, to enable acceding LDCs to effectively implement commitments and obligations, shall be granted in accession negotiations taking into account individual development, financial and trade needs;
- iii) transitional periods/arrangements shall be accompanied by Action Plans for compliance with WTO rules. The implementation of the Action Plans shall be supported by Technical Assistance and Capacity Building measures for the acceding LDCs'. Upon the request of an acceding LDC, WTO Members may coordinate efforts to guide that LDC through the implementation process;

- iv) commitments to accede to any of the Plurilateral Trade Agreements or to participate in other optional sectoral market access initiatives shall not be a precondition for accession to the Multilateral Trade Agreements of the WTO.

We can easily infer from the said provisions of the text of the Accession of LDCs that the WTO General Council has taken a far reaching progressive decision. The General Council states on the same decision that WTO Members shall exercise restraint in seeking concessions and commitments on trade in goods and services from acceding LDCs, taking into account the levels of concessions and commitments undertaken by existing WTO LDCs' Members. There is no doubt that it is a major achievement to the LDCs. It is very sad to mention here that provisions of this decision is not implemented yet. However, it proves that there is enough realization within WTO Members that there should be separate procedure for the accession of LDCs, and differential and most favorable treatment should be provided at the time of accession negotiations.

It is obvious that on the one hand, the acceding country requires to undertake commitments and concessions in the process of negotiations for the accession. Such commitments and concessions will be binding obligation for acceding country upon accession. On the other hand, there are GATT/WTO provisions which states that LDCs 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. However, paragraph 8 of the Status of Least-Developed Countries Accession to the WTO, WTO Secretariat Note, clearly mentions

the requirement of the same process of accession to the WTO under Article XII of the WTO Agreement for LDCs as well as other countries. So far no LDC is treated differently in the process of negotiations for the accession. Hence, it is obvious that the provision "LDCs 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" is clearly ignored and not respected at the time of negotiations for accession. Here it seems relevant to mention Distinguished Professor Dr. Sompong Sucharitkul's remark, "Justice is an ideal that is still out of reach for most of us humankind" ¹⁶⁷

However, we can consider the realization of difficult situation of LDCs is a positive development within the WTO system. The WTO General Council has rightly stated at the "Accession of Least-Developed Countries" in January 2003 that WTO Member shall exercise restraint in seeking concessions and commitments on trade in goods and services from acceding Least-Developed Countries. Experience shows that such realization of the difficult situation of LDCs has been increasing within the WTO and its Member countries. Obviously such realization will facilitate for the implementation of differential and more favorable treatment of LDCs at the time of accession negotiation. It gives high hope that there are chances that WTO Member shall exercise restraint in seeking concessions and commitments from acceding LDCs at the time of accession negotiations in future.

¹⁶⁷ See Dean and Distinguished Professor Dr. Sompong Sucharitkul, *A Just and Peaceful World Under the Rule of Law*, p. 5, 15th Annual Fulbright Symposium on Current International Problems, Golden Gate University School of Law, April 8, 2005 in San Francisco.

II.3 NEPAL'S APPLICATION FOR THE ACCESSION TO THE WTO AND THE PROGRESS

II.3.A *Nepal's Application for the Accession to the WTO*

In May 16, 1989, Nepal applied for accession¹⁶⁸ to the General Agreement on Tariffs and Trade (GATT).¹⁶⁹ The historic special relation between India and Nepal was at impasse in this period of time in the history of Nepal-India relation. Nepal, as a land-locked country, was looking for smooth access to Sea or Ocean so that Nepalese goods could be sent to any other countries. Then Nepal government was attracted by the provision of 'freedom of transit' of the GATT.¹⁷⁰ Hence, Nepal government applied for the accession to the GATT so that Nepal shall have freedom of transit through the territory of GATT Contracting Parties including her neighbor India. It indicates that freedom of transit and market access of Nepalese goods to foreign countries were Nepal's foremost priority for seeking accession to the GATT. This perspective is still relevant. After the submission of an application for the accession to the GATT, a Working Party on the accession of Nepal was established on 21 June 1989.¹⁷¹ After the establishment of the WTO, the Working Party established for Nepal's accession to GATT was transformed into a Working Party on Accession to the WTO in 1995.¹⁷² H. E. Mr. R. Farrell designated as the Chairman of the Working Party. In December 1995, Nepal became observer to the WTO and

¹⁶⁸ . WTO/Project Status review (January 1997 to June 1999), Nepal's Accession to World Trade Organization, NEP/96/010, Babar Mahal, Kathmandu, Nepal, Page 1.

¹⁶⁹ . General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 55 U. N. T. S. 187 [hereinafter GATT].

¹⁷⁰ . Article V:2 of the GATT states that "there shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties..."

¹⁷¹ . See document Council-Minutes of the Meeting of 21-22 June 1993 (C/M/234), the GATT Secretariat, Geneva, available at <http://www.wto.org>.

¹⁷² . See WTO/Project Status review (January 1997 to June 1999, page 1), Nepal's Accession to World Trade Organization, NEP/96/010, Babar Mahal, Kathmandu, Nepal.

since then participated as an observer.¹⁷³ Nepal submitted memorandum on the foreign trade regime covering only trade in goods on 26 February 1990¹⁷⁴ and again submitted memorandum on the foreign trade regime covering all aspects of its trade and legal regime to the Working Party on 10 August 1998.¹⁷⁵ Nepal provided answers to questions asked by the Working Party and the Members of the WTO on 8 June 1999.¹⁷⁶ Nepal was again asked additional questions and Nepal provided to the Working Party answers to additional questions on 15 October 2001.¹⁷⁷

The first meeting of the Working Party took place in May 22, 2000 and market access negotiations commenced in September 2000. The second meeting of the Working Party was held on 12 September 2002. Nepal concluded all negotiations for WTO accession with India, United States, European Union, New Zealand, Australia, Canada, and Japan, among others.¹⁷⁸ Major issues of negotiations were the tariff binding, Other Duties and Charges (ODCs) and further opening up service sectors.¹⁷⁹ Negotiating countries agreed to provide Nepal with a transition period to comply with various WTO Agreements, including trade-related aspects of intellectual property rights, sanitary & phyto-sanitary measures, technical barriers to trade, and customs administration, among others.¹⁸⁰ Likewise, negotiating countries agreed to provide

¹⁷³ . See WTO/Project Status review (January 1997 to June 1999, page 1), Nepal's Accession to World Trade Organization, NEP/96/010, Babar Mahal, Kathmandu, Nepal.

¹⁷⁴ . See document (L/6637 (goods only)), 26 February 1990, the GATT Secretariat, Geneva, available at <http://www.wto.org>.

¹⁷⁵ . See WTO document (WT/ACC/NPL/2 and Add.1, Add. 2, Add. 3, Corr.1), *Memorandum on the Foreign trade Regime of Nepal*, 10 August 1998, available at <http://www.wto.org>.

¹⁷⁶ . See WTO document (WT/ACC/NPL/3 and Add. 1, Add.2, Add.3, Corr.1), *Questions and Replies of Nepal*, 8 June 1999, available <http://www.wto.org>.

¹⁷⁷ . See WTO document (WT/ACC/NPL/9), *Additional Questions and Replies of Nepal*, 15 October 2001, available at <http://www.wto.org>. The answers to additional questions were drafted by this writer.

¹⁷⁸ . See The Kathmandu Post, August 18, 2003.

¹⁷⁹ . See Professor Puskar Bajracharya, Central Department of Management of Tribhuvan University in Nepal, *Spotlight*, Vol. 23, No. 4, July 18- July 24, 2003.

¹⁸⁰ . See Dr. Posh Raj Pandey, Programme Manager of Nepal's Accession to the WTO Project, *The Kathmandu Post*, July 20, 2003.

Nepal with a two to ten year period for phasing out all "other duties and charges" (ODCs).¹⁸¹ After three formal meetings, the Working Party completed its work on 15 August 2003. In this process the remaining stage of accession was a final decision approving membership of Nepal by the Fifth Ministerial Conference.¹⁸² Hence, Nepal's membership negotiation ended on 15 August 2003 when the Working Party wrapped up its work. After the adoption of the accession package,¹⁸³ Mr. Dinesh Pyakural, Secretary of Ministry of Industry, Commerce and Chief Negotiator for Nepal, said that in the process of bilateral negotiations Nepal has bound the tariff rate at around 42 percent in agricultural products and around 24 percent in other products.¹⁸⁴

On 11 September 2003, the WTO Fifth Ministerial Conference in Cancun agreed by consensus on the text of the Protocol of Accession for Nepal's entry into the WTO.¹⁸⁵ Nepal was considered to become the second least-developed country to join the WTO, after Cambodia, through the full Working Party process since the WTO was set up in 1995. As Cambodia asked extra time for ratification, Nepal has become the first least-developed country member on 23 April 2004. On the occasion of the accession, the head of the Nepalese delegation, Hari Bahadur Basnet, Minister of Industry, Commerce and Supplies, said: "It is our conviction that joining this organization would not only enhance our effectiveness and efficiency in trading capacity but would also result in the expansion of trade, leading to a higher level of growth and enhancement of quality of life of our people."¹⁸⁶ In fact, after the Membership of the United Nations, the

¹⁸¹ . See *Id.*

¹⁸² . See http://www.wto.org/english/news_e/pres03_e/pr356_e.htm (visited on 9/15/2003).

¹⁸³ . The "accession package" consists of a Report of the Working Party containing a summary of proceedings and conditions of entry, a Protocol of Accession, and Schedules of market access commitments in goods and services agreed between the acceding government and WTO Members.

¹⁸⁴ . See http://www.wto.org/english/news_e/news03_e/acc_nepal_15aug_e.htm (visited on 8/21/2003).

¹⁸⁵ . See http://www.wto.org/english/news_e/pres03_e/pr356_e.htm (visited on 9/15/2003).

¹⁸⁶ . See *Id.*

Membership of the WTO is a landmark event in the history of Nepal. This shall enable Nepal to stand together with the civilized Nations of the world, which are working together for the betterment of all human being. Economically, Nepal's closer integration into the world economy is a powerful instrument to alleviate poverty and the main driving force for economic development.

The comment of the WTO Director-General Supachai Panitchpakdi on the approval of Nepal's accession seems very relevant. He said: "The completion of Nepal's accession negotiations is most welcome. Not only does it expand the number of total WTO members, it also increases the diversity and depth of the WTO community of members."¹⁸⁷ In fact this is the true spirit of Nepal's accession to the WTO.

II.3.B Ratification of the Protocol of Accession by Nepal

The Protocol of Accession was finally made ready by the Working Party and approved by the Fifth Ministerial Council on 11 September 2003. The remaining final stage of the accession was the ratification of the Protocol of Accession by Nepal. Sub-paragraph 1(a) of Art. 2 of the Vienna Convention on the Law of Treaties, 1968, 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

¹⁸⁷ . See *Id.*

law. In addition to the term "treaty," a number of other appellations are used to apply to international agreements."¹⁸⁸ Hence, the Protocol of Accession shall be a binding document as a treaty.

Clause (1) of Article 126 of the Constitution of the Kingdom of Nepal, 2049 (1990)¹⁸⁹ (hereinafter referred to as the "Constitution") states that the ratification of, accession to, acceptance of or approval of treaties or agreements to which the Kingdom of Nepal or His Majesty's 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 procedure aspects of ratification of or accession to treaties to which Nepal become 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;
- (a) defence and strategic alliance;

¹⁸⁸

See LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 416 (1993).

¹⁸⁹

The Constitution of the Kingdom of Nepal 2047 (1990), His Majesty's Government, Ministry of Law, Justice and Parliamentary Affairs, Law Books Management Board, Babar Mahal, Kathmandu, Nepal (hereinafter Constitution).

- (b) boundaries of the Kingdom of Nepal; and
- (c) 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.”

Unless a treaty or agreement is ratified or acceded to, in accordance with Article 126, it shall not be binding on His Majesty's Government or the Kingdom of Nepal.¹⁹⁰ The Constitution has prohibited to conclude any treaty or agreement which is detrimental to the territorial integrity of the Kingdom of Nepal.¹⁹¹

Since the accession package was approved by the WTO, the Protocol of Accession was open for signature. Nepal accepts the protocol when it completes domestic ratification procedures. In Nepal, the ratification process is described by 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.¹⁹² 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. Nepal had got six months time, i. e., March 31, 2004 to ratify the Protocol.

¹⁹⁰ . See Constitution, *supra*, footnote 189, clause (3) of Article 126.

¹⁹¹ . See Constitution, *supra*, footnote 189, clause (4) of Article 126.

¹⁹² . See Nepal Treaty Act, 1990, Section 4.

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.

Nepal could request with the WTO for the extension of periods of time for ratification until the formation of next House of Representatives. The WTO General Council has power to extend such periods of time. But there was not certainty of formation of next House of Representatives within the extended period of time due to uncertain existing environment of violence caused by Maoist terrorism. 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, Government decided to amend the Nepal Treaties Act, 1990 to pave way for the ratification of the Protocol of Accession. The Cabinet (Council of Ministers) decided to add a new clause in Article 4 of the Nepal Treaties Act, 1990 through Royal Ordinance¹⁹³ that would 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.¹⁹⁴ After the issuance of Royal Ordinance by His Majesty's the King, the Government endorsed Nepal's membership to the

¹⁹³

See page 93 for the procedure of issuance of Royal Ordinance.

¹⁹⁴

See KANTIPUR ONLINE. 2004-03-13; See

<http://www.kantipuronline.com/php/kolnews.php?&nid=9035> (visited on 3/16/2004).

WTO.¹⁹⁵ The Nepalese Cabinet had forwarded the decision to ratify the WTO membership to His Majesty the King 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 provisions the King's approval mandate for the country to become the member of the multilateral organization when the Parliament is absent to do so.¹⁹⁶ The Nepalese domestic ratification process completed on 23 March 2004 after His Majesty the King granted Royal assent to the said Cabinet decision.¹⁹⁷ This has resolved the constitutional deadlock, which could have cost Nepal its hard won WTO membership.¹⁹⁸ A formal letter to this effect was issued to the Ministry of Industry, Commerce and Supplies. On March 25, 2004 the WTO accepted the submission of ratification by Nepal and announced "The Kingdom of 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."¹⁹⁹ Finally, again the WTO announces "The Kingdom of Nepal, on 23 April 2004, became the 147th Member of the World

¹⁹⁵ . 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).

¹⁹⁶ . March E-news letter on Globalization and WTO (2004) [SAWTEE FORUM], Vol. I, Issue 13, March 2004.

¹⁹⁷ . 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).

¹⁹⁸ . 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 organisations 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).

¹⁹⁹ . See http://www.wto.org/english/thewto_e/acc_e/al_nepal_e.htm (visited 3/25/2004).

Trade organization.²⁰⁰ This landmark decision of both, the WTO and Nepal, in connection to Nepal's accession, make all of us happy and proud on becoming a member of such a prestigious and truly international organization.

II.3.C Law Making Process in Nepal

Under the laws of Nepal, treaties are not self-executing.²⁰¹ It requires enacting laws for the implementation of a treaty signed by Nepal. After Nepal's accession to the WTO, Nepal may need to enact new laws to comply her laws with the provisions of the WTO Agreements.²⁰² In this connection, the study of Nepalese law making process is relevant in the context of Nepal's accession to the WTO.

The Nepalese Constitution entrusts the legislative power of Nepal to the Parliament. However, Article 1 of the Constitution of the Kingdom of Nepal states, "...all laws inconsistent with it (Constitution) shall, to the extent of such inconsistency, be void." Article 88(1) of the Constitution of the Kingdom of Nepal further states "...extraordinary power shall rest with the Supreme Court to declare that law as void either *ab initio* or from the date of its decision if it appears that the law in question is inconsistent with the Constitution." It is obvious that the Parliament does not have absolute and unlimited power to make laws. The Constitution of the

²⁰⁰ . See http://www.wto.org/english/news_e/news04_e/wto_147members_23apr04_e.htm (visited on 4/23/2004).

²⁰¹ . See *Kishan Lal Golchha v. His Majesty's Government of Nepal & Others*, decision No. 4351 of the Supreme Court of Nepal, Nepal Law Journal 2048, page 462; *Hulash Chandra Golchha v. His Majesty's Government of Nepal & Others*, Writ No. 1178 of the year 2046, decision of the Supreme Court of Nepal, Collection of Precedents by Nagendra Prashad Pathak, page 358.

²⁰² . WTO had asked Nepal to provide time frame for legislative action to comply with the WTO Agreements.

Kingdom of Nepal, the House of Representatives Regulation, 2054 and the National Assembly Regulation, 2055, govern Law making process of Nepal.

In accordance with the Constitution of the Kingdom of Nepal, Parliament comprises of His Majesty the King, the House of Representatives and the National Assembly.²⁰³ The House of Representatives comprises of two hundred and five members elected by popular votes of the people.²⁰⁴ National Assembly comprises of sixty members who are partly elected by the representatives of local bodies, and partly are nominated by His Majesty and other political parties which are elected in the House of Representatives.²⁰⁵

In Nepal, Bills are classified as the Government Bill or the Private Members Bill. A Bill may be presented in any House of the Parliament. The Speaker decides whether it is a Finance Bill or not. Finance Bill²⁰⁶ has to be presented as a Government Bill by the concerned Minister in the House of Representatives.²⁰⁷ Finance Bill has to be introduced in the House of Representatives. Member of the Parliament in any of the House may present other Ordinary Bills, known as private Member's Bill. Other Bills may be introduced in any House of the Parliament.²⁰⁸

203 . See Constitution, *supra*, footnote 189, Article 44.

204 . See Constitution, *supra*, footnote 189, clause (1) of Article 45.

205 . See Constitution, *supra*, footnote 189, clause (1) of Article 46.

206 . Besides other subject matters, imposition, collection, abolition, remission, alteration, or regulation of taxes come under the "Finance Bill" in accordance with Article 68(3) of the Constitution of the Kingdom of Nepal.

207 . See Constitution, *supra*, footnote 189, clause (1) of Article 68.

208 . See Constitution, *supra*, footnote 189, clause (1) of Article 68.

In general, a Bill has to go through various processes, i. e., a first reading (motion for leave to introduce a Bill),²⁰⁹ second reading (discussion on Bill and the motion moving the Bill)²¹⁰ and a third reading (motion that Bill be passed through the vote of the House).²¹¹ A Bill passed by one House is forwarded to the other House. The National Assembly does not have the right to propose amendments in respect to Finance Bills. However, it may propose for recommendations. If a Finance Bill is returned to the House of Representatives with recommendations from the National Assembly, the House of Representatives decides on the recommendations. Furthermore, if the National Assembly fails to return a Finance Bill within 15 days from the date of receipt, the House of Representatives may present the Bill to His Majesty for assent. With respect to other Bills, the National Assembly has to send back its decision within two months from the date of receipt. If the National Assembly does not return such a Bill within the specifies period, the House of Representatives may present the Bill to His Majesty for assent.

If any Bill passed by one House is rejected or passed with amendments by the other House, the Bill is transmitted back to the House where it originated. However, if the bill rejected or passed with amendments, had originated in the House of Representatives, it may pass the Bill again as it was or with amendments, by a majority of more than fifty percent of its sitting Members and

²⁰⁹ . Once the House approves the motion for leave to introduce the Bill, the Member proposing such a motion reads the objectives and the reasons of the Bill in the House. This process is called the "First Reading of a Bill."

²¹⁰ . The principles and different Sections of the Bill are discussed at this stage of the process. The Member moving the Bill answer the questions raised by other Members. Then the motion proposed is put to the vote of the House. If the House approves the motion, the general discussion comes to an end. This process is called the "Second Reading of a Bill."

²¹¹ . After general debate on a Bill, any Member may propose for amendments on it. It is a general practice that Bills are referred to one of the Committees to which that Bill is related. Decisions in the Committee are taken by consensus. The report of the Committee in respect to that Bill is presented to the House. Then the Member in charge of the Bill moves the motion that the Bill be passed and the decision is taken through the vote of the House. This process is called the "Third Reading of a Bill."

present the Bill to His Majesty for assent. However for Bills originating and passed by the National Assembly but rejected or returned with amendments (provided the National Assembly fails to pass with such amendments) by the House of Representatives is referred to a Joint Sitting of the two Houses. A Bill may be withdrawn at any time by the Member introducing such a Bill with the approval of the House.²¹²

Once both the Houses pass the Bill, the Bill then is presented to His Majesty for Royal assent and after Royal assent that Bill becomes an Act.²¹³ All kinds of Act are published in Nepal Gazette. The Constitution of the Kingdom of Nepal provides that "Except for a Finance Bill, if His Majesty is of the opinion that any Bill needs further deliberations, He may send back the Bill with His message to the House of the origin of the Bill within one month from the date of presentation of the Bill to Him."²¹⁴ After consideration in the Joint Sitting of the two Houses, the Bill again may be presented to His Majesty for Royal assent. In such situation, His Majesty has to give assent to the Bill within thirty days.²¹⁵

Besides it, there is a provision of promulgation of Ordinance. In accordance with the Constitution of the Kingdom of Nepal, His Majesty the King may promulgate an Ordinance under circumstances requiring immediate action when both Houses of Parliament are not in Session.²¹⁶ Such an Ordinance has to be tabled at the next Session of both the Houses of

212 . See Constitution, *supra*, footnote 189, Article 70.
213 . See Constitution, *supra*, footnote 189, clause (5) of Article 71.
214 . See Constitution, *supra*, footnote 189, clause (3) of Article 71.
215 . See Constitution, *supra*, footnote 189, clause (4) of Article 71.
216 . The Constitution of the Kingdom of Nepal, 1990, under Article 72, has made provision for the promulgation of an Ordinance.

Parliament. The Ordinance either has to be passed by both the Houses and be replaced by an Act or it ceases to be effective.

II.4 IMPACT ON NEPALESE FREEDOM OF ACTION

II.4.A Justification of Accession to the WTO

There are on going debates on advantages and disadvantages of joining the WTO. On one hand, it is usually said that the WTO dictates to Member governments to adopt or drop certain policies; the WTO is blindly for trade and commercial interest and ignores development, environment, health and safety; the WTO destroys jobs, worsens poverty; small economies are powerless in the WTO; the WTO is the tool of powerful lobbies; weaker countries are forced to join the WTO; the WTO is undemocratic; and others. On the other hand, there are arguments in favor of the WTO. It is usually said that the WTO system does contribute to international peace; the WTO system helps to resolve trade disputes peacefully and constructively. It is a system based on rules and not on power; liberalization and free trade cuts the cost of living; it provides consumers more choice, and a broader range of qualities to choose from; trade boosts incomes and stimulates economic growth and jobs; the WTO system helps governments to resist pressure from narrow interest lobbies; it reduces opportunities for corruption and encourage good government; non-discrimination, the basic principles of the WTO system, make life simpler for the enterprises directly involved in trade and for the producers of goods and services and others.

It seems that it is not easy to distinguish which argument is correct and which one is not. Some argument seems good in principle but in practice it may turn out differently, particularly from Least-Developed Countries' point of view. It seems that the benefits of joining the WTO largely depend on the acceding countries' internal economic situation and its capacity to compete other Member countries. In the history of GATT/WTO, no least-developed country Members are graduated from their LDCs status. It indicates the requirement of further support to LDCs and justification of special and differential treatment in favor of LDCs. It also demands the full implementation of special and differential provisions of the WTO Agreement in favor of LDC Members.

In fact the WTO system offers a range of benefits. The WTO has established a dispute settlement mechanism, the Dispute Settlement Body, and it helps to resolve trade disputes peacefully among member countries. Even poor countries have an equal right to challenge against any rich country in the Dispute Settlement Body. Besides it, smaller countries can enjoy some increased bargaining power within the WTO system. In the absence of multilateral regime, the more powerful countries would be freer to impose their will unilaterally on their smaller trading partners and smaller country would be less able to resist unwanted pressure.

The WTO's global system lowers trade barriers through negotiation and applies the non-discrimination principle. It helps to reduce costs of production and reduce prices of goods and services. It allows us more choice. Freer trade, the WTO's trading system, boosts economic growth and supports development. Least-Developed countries receive special treatment, i. e., more time to apply numerous provisions of the WTO Agreement, exemption from many

provisions, etc. The Agreement includes many important provisions that specifically take Least-Developed countries' interest into account.

II.4.B Potential Disadvantages for Nepal of WTO Accession

After accession to the WTO, nation-State that becomes member accepts limitation on its ability to use its international trade policy to protect its domestic market. Sovereignty is defined as "the power to do everything in a state without accountability, to make laws, to execute and to apply them, to impose and collect taxes and levy contributions."²¹⁷ By joining the WTO, Nepal becomes accountable to the WTO. Laws and its enforcement must conform to WTO standards. Nepal's ability to impose taxes on imports (tariffs) on her will would be limited. Thus, like other Member-States, Nepal would surrender a certain degree of freedom of increasing or decreasing the tariffs rate over the imported goods.

Acceding to the WTO demands the lowering of tariff rates and the abolition of import quotas. The legal structure and policy of sovereign states becomes the subject of the WTO Ministerial Conference, which will require certain concessions before allowing an applicant to accede. In addition, after becoming a member, a state may be required to further change its laws and policies in compliance with the WTO Agreements. Member state will be forced to accept the WTO panel's findings as an international obligation. This significantly hampers a country's freedom to choose whatever method of regulation of its own foreign trade that conflict with the WTO. However, it is a general rule and applies to all WTO Members. In fact, it helps to

²¹⁷ . See BLACK'S LAW DICTIONARY 1396 (1990).

facilitate international trade. So we can say that all WTO Members are benefited by such discipline.

However, one important trade related fiscal issue for Nepal is its high dependence on tariffs and other duties and charges (ODCs) for revenue (international trade taxes account for 33% of all tax revenues). WTO obligations for further tariff rationalization and the phasing out of ODCs can lead to revenue losses which can be said an immediate negative effect of Nepal's accession to the WTO. In this connection it is important to further rationalize the tax policy and administration so that more trade-neutral taxes can compensate for these revenue losses.²¹⁸ The biggest challenges for Nepal, upon the accession to the WTO, are the costs of accession stem from potential revenue loss and competitive challenges brought about by further tariff reductions and the need to strengthen institutional capacity.²¹⁹

II.4.C Potential Benefits for Nepal of WTO Accession

Membership in the WTO provides states with the advantages of more stable trade relations, greater access to foreign markets for its products, and greater opportunity to attract foreign investment. Besides it, Nepal will be able to get all benefits including differential and most favorable treatment provided by the WTO Agreements to the Least-Developed Countries.

²¹⁸ . See *Nepal Trade and Competitiveness Study*, DRAFT FOR CONSULTATION AND DISCUSSION, A Study conducted by the World Bank as part of the Integrated Framework for Trade-Related Technical Assistance, Page 7, June 6, 2003 (The world Bank carried out this study on behalf of the IF Working Group, which consists of six agencies (IMF, ITC, UNCTAD, UNDP, WTO and the World Bank), two donor representatives, an OECD-DAC observer and two LDC representatives).

²¹⁹ . See *Nepal Trade and Competitiveness Study*, *supra*, footnote 218, page iv.

Nepalese goods would be able to enter foreign markets on favorable terms. This would give Nepalese producers an opportunity to increase the number of sales. Under the WTO Agreements, all member-states require to extend MFN and National treatments to Nepalese goods. All member states would find themselves an obligation to apply their lowest tariff rate to imports from Nepal. As a consequence, the price of Nepalese goods would fall in foreign markets and would look attractive to consumers. Hence, Nepalese goods would enter world markets on equal footing as other member states in terms of tariffs. Nepalese goods would not be subject to more barriers to trade. Additionally, it would help Nepal to attract more foreign capital and create more jobs.

Hence, Nepal's entry into the WTO holds important benefits and challenges for Nepal. We can summarize threefold benefits: i) discipline of Nepalese policymakers and policy credibility resulting from WTO commitments; ii) discipline of trading partners to give Nepal access to their markets and trans-shipment rights; and iii) WTO-required institutional improvements.²²⁰

Politically, Nepal is a democratic country, and respects human rights. Economically, Nepal has embraced the idea of the free market economy. Nepal guarantees, through its Constitution, individuals the right to pursue their own economic interests. The Constitution guaranty freedom to practice any profession, or to carry on any occupation, industry or trade.²²¹ Right to property and constitutional remedy are also guaranteed by the Constitution.²²² Hence, membership of the WTO has integrated Nepalese economy into the global economy, and further provided an opportunity to grow foreign trade and enhance Nepalese economy.

²²⁰ . See Ibid.

²²¹ . See Constitution, *supra*, footnote 189, clause (2) of Article 12.

²²² . See Constitution, *supra*, footnote 189, Article 17.

II.5 RELATIONSHIP BETWEEN THE WTO AGREEMENT AND THE LAWS OF NEPAL

This sub-chapter examines the relationship between the WTO Agreement and the domestic laws of Nepal. It covers the relevant provisions of the WTO Agreement and laws of Nepal, and analyzes the constitutionality and validity of Nepal's accession to the WTO, the direct applicability of the WTO Agreements in Nepal's internal law, and the invocability of the provisions of the WTO Agreements before the courts of Nepal.

II.5.A Constitutionality and Validity of Nepal's Accession to WTO

Paragraph 1 of Article 1 of the Constitution of the Kingdom of Nepal, 1990,²²³ (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 the Kingdom of Nepal or His Majesty's Government 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 His Majesty's Government or the Kingdom of Nepal."

²²³ . See Constitution, *supra*, footnote 189.

"Accession" means the international act, so named, whereby a state establishes on the international plane its consent to be bound by a treaty.²²⁴ Accession occurs when a state which did not sign a treaty, already signed by other states, formally accepts its provision.²²⁵ 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."²²⁶ 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.²²⁷ A treaty that is valid and binding under international law may nevertheless be invalid under the constitutional law of the participants.²²⁸ 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 11 September 2003. The remaining final

²²⁴ See the Vienna Convention on the Law of Treaties, art. 2, para. 1(b), U. N. Doc. A/CONF. 39/27 (1969), [hereinafter Vienna Convention].

²²⁵ See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 607 (1990).

²²⁶ See LOUIS HENKIN ET AL, INTERNATIONAL LAW: CASES AND MATERIALS 416 (1993).

²²⁷ See JOHN H. JACKSON, THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS 336 (2000).

²²⁸ See Vienna Convention, *supra*, footnote 157, 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."

stage of the accession, i. e., the ratification of the Protocol of Accession also is completed by Nepal.

In accordance with the Nepal Treaty Act, 1990,²²⁹ His Majesty's Government of Nepal 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 the acquisition of membership to any such organization, or of any treaty that conflicts with any current law, the Kingdom of Nepal or His Majesty's government may not become a party until a resolution is passed by the House of Representatives (parliament) for ratification or accession.²³⁰

Clause (1) of Article 126 of the Constitution,²³¹ states that the ratification of, accession to, acceptance of or approval of treaties or agreements to which the Kingdom of Nepal or His Majesty's 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 procedure 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 Article 126 of the Constitution states:

²²⁹

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

²³⁰

See *id.*, para 4 of Section 4.

²³¹

See Constitution, *supra*, footnote 189.

“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) defence and strategic alliance;
- (c) boundaries of the Kingdom 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.”

It is obvious that unless a treaty or agreement is ratified or acceded to, in accordance with Article 126, it shall not be binding on His Majesty's Government or the Kingdom of Nepal.²³² The Constitution has prohibited to conclude any treaty or agreement which is detrimental to the territorial integrity of the Kingdom of Nepal.²³³ In Nepal, the ratification process is described by 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

²³² . See *Constitution, supra*, footnote 189, art. 126. cl. 3.

²³³ . See *Constitution, supra*, footnote 189, art. 126, cl. 4.

Representatives.²³⁴ 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. Nepal had 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 next House of Representatives. The WTO General Council has power to extend such periods of time.²³⁵ But there was not certainty of formation of next House of Representatives within the extended period of time due to uncertain existing violant 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, Government decided to amend the Nepal Treaties Act, 1990 to pave way for the ratification of the Protocol of Accession. The Cabinet (Council of Ministers) decided to add a new clause in Article 4 of the Nepal

²³⁴ . See Nepal Treaty Act, Section 4 (1990) (Nepal).

²³⁵ . 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).

Treaty Act, 1990 through Royal Ordinance²³⁶ 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.²³⁷ After the issuance of Royal Ordinance by His Majesty's the King, the Government endorsed Nepal's membership to the WTO.²³⁸ The Nepalese Cabinet had forwarded the decision to ratify the WTO membership to His Majesty the King 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 provisions the King's approval mandate for the country to become the member of the multilateral organization when the Parliament is absent to do so.²³⁹ The Nepalese domestic ratification process completed on 23 March 2004 after His Majesty the King granted Royal Assent to the said Cabinet decision.²⁴⁰ This has resolved the constitutional deadlock, which could have cost Nepal its hard won WTO membership.²⁴¹

²³⁶ . See Constitution, *supra*, footnote 189, 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.

²³⁷ . See KANTIPUR ONLINE. 2004-03-13;
see <http://www.kantipuronline.com/php/kolnews.php?&nid=9035> (visited on 3/16/2004).

²³⁸ . 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).

²³⁹ . See March E-news letter on Globalization and WTO (2004) [SAWTEE FORUM], Vol. I, Issue 13, March 2004.

²⁴⁰ . 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).

²⁴¹ . 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 organisations 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 / April 2004, <http://www.nepalitimes.com/issue189/economy.htm> (visited on 3/29/2004).

On March 25, 2004 the WTO accepted the submission of ratification by Nepal and announced "The Kingdom of Nepal will become the 147th Member of the WTO on 23 April 2004."²⁴² Finally, again the WTO announces "The Kingdom of Nepal, on 23 April 2004, became the 147th Member of the World Trade organization."²⁴³ Hence, we can infer from the above examination that the ratification of the Protocol of Accession to the WTO was in accordance with the provisions of existing laws and the Constitution of Nepal.

II.5.B Direct Applicability of The WTO Agreements in Nepal's Internal Law

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."

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

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²⁴³

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

See http://www.wto.org/english/news_e/news04_e/wto_147members_23apr04_e.htm (visited on 3/23/2004).

incorporate WTO law into their domestic laws and make precise and unconditional WTO rules directly applicable to domestic courts and citizens.²⁴⁴

"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 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."²⁴⁵

Traditionally, a "monist" State's legal system is considered to include international treaties to which the State is obliged. Thus, a citizen of other treaty parties can sue as an individual in the courts of that country. In the "dualist" State, international treaties are a part of a legal system separate from that of the domestic law. 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

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

²⁴⁵ . See JACKSON, *supra*, footnote 227, p. 332.

honor its obligation.²⁴⁶ 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, provides that in case the provisions to which the Kingdom of 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 laws. 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.²⁴⁷ 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.²⁴⁸ The Nepal Treaty Act, 1990, is not empowered to address more than procedural matters relating to how an accession process should be concluded. Hence, the provision setting out the invalidity of Nepalese law in case of conflict with a treaty and a provision of the treaty applicable in that connection under the Nepal Treaty Act, 1990 is ultra virus to the Constitution and is void under Article 1 of the Constitution.

The direct application of treaties is only one of a series of legal constitutional issues relating to treaties and national legal systems.²⁴⁹ The practice of various WTO Member States towards direct application of the WTO Agreements helps us to understand the true nature of the WTO

²⁴⁶ See JACKSON, *supra*, footnote 227, p. 334.
²⁴⁷ See Constitution, *supra*, footnote 189, art. 1.
²⁴⁸ See Constitution, *supra*, footnote 189, art. 126, cl. 1.
²⁴⁹ See JACKSON, *supra*, footnote 227, p. 335.

Agreements. The European Court of Justice has stated in the *Kupferberg case*²⁵⁰ that "...in order to reply to the question on the direct effect²⁵¹ 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*,²⁵² 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*,²⁵³ 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 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."

²⁵⁰ See *HAUPTZOLLAMT MAINZ v. C. A. KUPFERBERG & CIE.*, Case 104/81, [1982] ECR 5641, at 3665.

²⁵¹ 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.

²⁵² See *INTERNATIONAL FRUIT CO. v. PRODUKTSCHAP*, Cases 21-24/72, [1972] ECR 1219, 1227-1228.

²⁵³ See *PORTUGUESE REPUBLIC v. COUNCIL*, Case C-149/96, [1998] ECR I-7379, paras. 36-48.

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.²⁵⁴ 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.²⁵⁵ In the *Suramerica de Aleaciones case*,²⁵⁶ 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.

It should be noted that Switzerland led an initiative halfway through the Uruguay Round to require each GATT member to give the GATT direct effect, or some equivalent status, in its national law.²⁵⁷ The fact that this was not included in the final Uruguay Round Agreements seems to indicate, however, 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*,²⁵⁸ concluded that neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect.

²⁵⁴ . See JACKSON, *supra*, footnote 227, at p. 341.

²⁵⁵ . See JOHN H. JACKSON ET AL., INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 244 (2002).

²⁵⁶ . See *Suramerica de Aleaciones Laminadas, C. A. v. United States*, 966 F. 2nd 660, 667-668 (Fed. Cir. 1992).

²⁵⁷ . 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.

²⁵⁸ . 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 Constitution of the Kingdom of Nepal also does not provide for the direct applicability of such treaties in domestic law.

II.5.C Invocability of the Provisions of the WTO Agreements Before the Courts of Nepal

A study on whether provisions of the WTO Agreements are invocable before the court of Nepal under the WTO Agreements and national laws is valuable. 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 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 WTO Agreements before the Courts of 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."

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 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 Nepal does not maintain these provisions in their laws, can anybody request the court of Nepal to invoke one of these provisions of the WTO Agreements and decide the case accordingly?

There are arguments both in favor of invocability and in favor of non-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,²⁵⁹ and requires its performance in good faith.²⁶⁰ The European Union Law is 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 national court, i. e., *Paquete Habana case*²⁶¹, *Filartiga case*.²⁶² In few countries such as Germany and Switzerland, the official government statements on the national implementing legislation explicitly recognizes that the TRIPS Agreement rules may be directly applicable and enforceable in domestic courts.²⁶³ An individual may sue potential suppliers directly in national courts under the

²⁵⁹ . See Vienna Convention, *supra*, footnote 224, Art. 27 states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

²⁶⁰ . See Vienna Convention, *supra*, footnote 224, Art. 26. See PETERSMANN, *supra*, footnote 244, at p. 22.

²⁶¹ . See the *Paquete Habana Case*, Supreme Court of the United States, 1900, 175 U. S. 677, 20 S. Ct. 290, 44 L. Ed. 320;

²⁶² . See *Filartiga v. Pena-Irala*, United States Court of Appeals, Second Circuit, 1980, 630 F.2nd 876.

²⁶³ . See PETERSMANN, *supra*, footnote 244, at p. 21.

Agreement on Government Procurement.²⁶⁴ By these precedents the chances of the invocability of the provisions of the WTO Agreements before the domestic courts of Nepal appear high.

On the other side, 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 supranational law like European Union law. Different treaties may have different implications.

There is a major distinction between treaty and statute law. A treaty is a contract between states whereas a statute is enacted by the legislature of one single state. Moreover, unless it declares otherwise, a statute is meant to be effective indefinitely until modified or repealed. The controlling distinction, however, between treaty and statute is that statutes purport to regulate society, and generally speaking, they regulate internal and domestic affairs while treaties affect primarily international relationships.²⁶⁵

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.²⁶⁶ Hence, a treaty cannot automatically give direct effect (statute-like) to the law of its parties. However, the parties of the

²⁶⁴ . See Piet Eechout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 COMMON MKT. L. REV. 11 (1997).

²⁶⁵ . See FLORENCE ELLINWOOD ALLEN, *THE TREATY AS AN INSTRUMENT OF LEGISLATION* 3 (1952).

²⁶⁶ . See *id.*, at p. 5

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.

The laws of different countries produce different roles for treaties in their domestic legal system. 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.²⁶⁷ 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 purpose²⁶⁸ 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 under any Uruguay Round Agreement by virtue of Congressional approval thereof: 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, and no private party may rely on the results of an action brought by the federal government.²⁶⁹

In Japan, in the so-called *Necktie case*,²⁷⁰ the district court's decision to not allow invocation of a GATT provision was affirmed by the Japanese Supreme Court. The European Community, in the *International Fruit case*²⁷¹ & *Portuguese Republic case*,²⁷² has also not given effect of invocability (we call it direct effect in EU context) with respect to the WTO Agreements. 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.

267 . See JACKSON, *supra*, footnote 227, at p. 339.
268 . See Vienna Convention, *supra*, footnote 224, art 31, para.1.
269 . See The Uruguay Round Agreement Act, section 102 (c), (1994) (U. S. A.).
270 . See JACKSON, *supra*, footnote 227, at p. 358.
271 . See *supra*, footnote 252.
272 . See *supra*, footnote 253.

II.6 CONCLUSION

The chapeau of the WTO Agreement specifies that international trade should benefit the economic development of developing and least-developed countries. Many poor countries are interested in joining to the WTO with a hope that it will help to accelerate their economic development through the means of trade. Nepal also is one of them. Such countries interested in joining to the WTO are required to go through a process of accession which is both long and tough. In fact, accession to the WTO is a process of negotiation which is quite different from the process of accession to other international organizations. Accession to the WTO requires commitment to tariffs reduction, commitment to the service sector, non-discrimination, removal of quota and other non-tariffs barriers to trade, bringing the domestic legislation in conformity with the WTO Agreements, building institutions and others. These obligations are binding to acceding countries. So the nature of the WTO accession or membership is different than the accession to any other international organization. However, the WTO obligations have no supra-national characteristic like of the EU.

GATT/WTO system is based on reciprocity or give and take principles. Such reciprocity is exercised through the means of negotiations for concession commitments and others. Different Member countries have different economic strengthening. All Member countries are not required to make commitments on the same level. Level of the Commitment of concessions largely depends on the economic size of a Member country. If a Member country is able to take advantages from the commitments of other Member countries, then that Member country also is

bound to make same level of commitments to others. Likewise, if a country is poor and is capable only to take or receive a limited advantage from others' commitment, then that Member country is not bound to make commitments on the same level. That is why the idea of non-reciprocity, and special and differential treatment for least-developed countries was developed during the course of GATT Rounds. This concept also is included in the WTO Agreements.

The GATT, under Article XXXVI:8 says: "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." Furthermore, under the Enabling Clause, Members are enabled to accord differential and more favorable treatment to developing countries and to depart from the most-favored nation Clause. At the time of the establishment of the WTO in Marrakesh, Ministers decided in "Decision on Measures in Favor of Least-Developed Countries" 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. However, the accession of Vanuatu, a small island LDC, which was programmed to take place during the Fourth Ministerial Conference of the WTO, could not materialize.²⁷³ It is a harsh reality that countries applying for WTO Membership do not get what they deserve but what they negotiate.²⁷⁴

²⁷³ . Ratnakar Adhikari, *LDCs After Brussels and DOHA: Catching up or Falling Further Behind*, UNCTAD-Civil Society Dialogue on Selected Issues Being Addressed by the United Nations System, UNCTAD/ISS/Misc. 385, Geneva (10 December 2001), page 61.

²⁷⁴ . See Ibid.

The WTO Agreement, under Article XI: 2, sets out reads in the same spirit: "The least-developed countries ... 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." Special provisions in favour of developing countries have also been included in the multilateral trade agreements. Hence, we can conclude from the said provisions of the GATT and the WTO Agreement that the principles of non-reciprocity, and the differential and more favourable treatment to the least-developed countries are one of the fundamental rules of international trade. It will not be otherwise to say and count it as a peremptory norm of international trade rule. These provisions of the GATT and the WTO Agreement are based on justice, fairness and are balanced too. In this connection if we say that these provisions are not a special favour to poor Member countries, we will not be mistaken. Because a country that is economically very weak and is able to receive less is not required to pay more than what it has received.

Article XII of the WTO Agreement, main provision of the WTO accession, neither gives any guidance on the terms and conditions of accession nor lays down any procedures to be used for negotiating these terms and conditions. The WTO accession procedure is based on consent, customary practice, and GATT accession history. In accordance with the "WTO Secretariat Note on Procedures for the Accession to the WTO," interested country should submit an application for membership and then the General Council establishes Working Party to work on it. Applicant country submits memorandum of foreign trade regime including existing tariffs rate and relevant laws. Foreign trade regime of the acceding country will be examined and the process of negotiations for market access along with question and answer will start. After the conclusion of the negotiations

on the schedules on goods and services, and the completion of the Working Party's mandate, the Working Party submits its Report along with the draft Decision and Protocol of Accession to the General Council or Ministerial Conference for adoption. Once the General Council or Ministerial Conference adopts the Report of the Working Party and approve the draft Decision, the Applicant is then free to sign the Protocol of Accession to the WTO. After the signature and ratification by the acceding country to the Protocol of Accession, that country becomes a Member of the WTO. Nepal also went through the required negotiations, ratified the Protocol of Accession, and became a Member of the WTO.

In fact there is no separate procedure for the accession of LDCs to the WTO. So far LDCs and other countries stand at the same footing in the process of accession to the WTO. LDCs are compelled to make more concessions and commitments than required. It suggests that so far the principles of non-reciprocity as well as provisions of the differential and more favorable treatment of LDCs are not applied in the process of accession of LDCs to the WTO. Despite the fact that the WTO is a 'rule -based system,' it is a general understanding that these poor countries require to make commitments for WTO-plus conditions besides the WTO conditions.²⁷⁵ The general rule of international law does not permit extra terms and conditions in the accession to the inter-governmental organization which are beyond the provisions of the constituent instrument of the organization.

The WTO Secretariat Note "Status of Least-Developed Countries Accession to the WTO" emphasise on providing technical assistance to LDCs, particularly on legislative drafting. We

²⁷⁵ See Grynberg Roman and Roy Mickey Joy, *the Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System*, 34-6 the Journal of World Trade 159 (2000).

cannot deny that technical assistance will be helpful to the LDCs. However, the main concern of the LDCs is the rights to make concessions and commitments in accordance with their individual development, financial and trade needs, or their administrative and institutional capabilities. The WTO text of "Accession of Least Developed Countries," a guideline to negotiation for accession of LDCs to the WTO, states that WTO Members shall exercise restraint in seeking concessions and commitments on trade in goods and services from acceding LDCs, taking into account the levels of concessions and commitments undertaken by existing WTO LDCs' Members. It further states that acceding LDCs shall offer access through reasonable concessions and commitments on trade in goods and services commensurate with their individual development, financial and trade needs. Furthermore, it mentions that differential and more favourable treatment shall be applicable to all acceding LDCs, from the date of entry into force of their respective Protocols of Accession and transitional periods/transitional arrangements foreseen under specific WTO Agreements shall be granted in accession negotiations taking into account individual development, financial and trade needs.

We can easily infer from the said provisions of the text of the Accession of LDCs that the WTO General Council has taken a far-reaching progressive decision. There is no doubt that it is a major achievement to the LDCs. However, these provisions of the decision are not implemented yet. It proves that there is enough realization within WTO Members that there should be separate procedure for the accession of LDCs, and differential and most favourable treatment should be provided at the time of accession negotiations.

It is obvious that on one hand, the acceding country requires to undertake commitments and concessions in the process of negotiations for the accession. Such commitments and concessions will be binding obligation for acceding country upon accession. On the other hand, there are GATT/WTO provisions which states that LDCs 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. So far no least-developed country is treated differently in the process of negotiations for the accession. Hence, the provision "LDCs 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" is clearly ignored and not respected at the time of negotiations for accession.

We can consider the realization of difficult situation of LDCs is a positive development within the WTO system. The WTO General Council has rightly stated at the "Accession of Least-Developed Countries" in January 2003 that WTO Member shall exercise restraint in seeking concessions and commitments on trade in goods and services from acceding Least-Developed Countries. Such realization of difficult situation of LDCs has been increasing within the WTO and its Member countries. There is no doubt that such realization will facilitate for the implementation of differential and more favorable treatment of LDCs at the time of accession negotiation.

Besides it, after the accession to the WTO, the issue of the relationship between the WTO Agreements and the domestic legislation also arises. This issue is vital because it may bring many serious consequences to the acceding country's legal system. In this respect, on the basis

of the analysis of previous discussion, 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 arrangement but not on certain obligations like the European Union. It is not a supranational law or agreement. In this connection, the context, object and purpose of the WTO Agreements also 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 the *US-Section 301-310* case that the WTO Agreements will have no direct effect.

The Constitution of the Kingdom of Nepal is the fundamental law of Nepal and it has not allowed direct applicability of treaties in the law of Nepal. 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. But 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.

Finally, we can infer from the above discussion that the provisions of the GATT and the WTO Agreements related to the principles of non-reciprocity, and differential and more-favorable treatment to the least-developed countries are required to be implemented in good faith in the accession process for the larger interest of humankind, justice and fairness.

Chapter III

CONFORMITY OF NEPALESE LEGISLATION WITH THE WTO AGREEMENTS

III.1 INTRODUCTION

As Nepal became the 147th Member of the World Trade Organization (WTO) on 23 April 2004,²⁷⁶ Nepal requires fulfilling her obligations prescribed by the WTO Agreements. Article XVI:4 of the WTO Agreement²⁷⁷ requires the conformity of domestic laws with the WTO obligations. First sub-chapter of this chapter primarily focuses on trade in goods and Nepal's obligation towards conformity of domestic laws with the Multilateral Agreements on Trade in Goods.²⁷⁸ Nepal's conformity obligation with respect to services and intellectual property rights are addressed in sub-chapters II & III.²⁷⁹ Generally, these obligations are fulfilled by WTO

²⁷⁶ . Nepal is the first least-developed country to join the World Trade Organization through a full Working Party negotiation.

²⁷⁷ . Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I. L. M. 1144 (1994) [hereinafter WTO Agreement].

²⁷⁸ . The international trade rules on trade in goods are described under the title of 'Multilateral Agreements on Trade in Goods' in Annex 1A to the WTO Agreement. The Multilateral Agreements on Trade in Goods consist of: (a) General Agreement on Tariffs and Trade 1994, (b) Agreement on Agriculture, (c) Agreement on the Application of Sanitary and Phytosanitary Measures, (d) Agreement on Textiles and Clothing, (e) Agreement on Technical Barriers to Trade, (f) Agreement on Trade-Related Investment Measures, (g) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, (h) Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, (i) Agreement on Preshipment Inspection, (j) Agreement on Rules of Origin, (k) Agreement on Import Licensing Procedures, (l) Agreement on Subsidies and Countervailing Measures, and (m) Agreement on Safeguards. See ANNEX 1A of the WTO Agreement.

However, the other WTO Agreements on trade in goods contained in Annex 1A to the WTO Agreement always prevail over the General Agreement on Tariffs and Trade 1994 (*Reprinted in GATT, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (1994) (incorporating by reference the General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U. N. T. S. 187, reprinted as amended in BISD 4th Supp. (1969) [hereinafter GATT 1994]) in case of conflict. See General interpretative note to Annex 1A of the WTO Agreement.

²⁷⁹ . See Ramesh Bikram Karky, *Nepal's Accession to the World Trade Organization: Legislative Enactments in Compliance with the TRIPS Agreement*, 7 *The Journal of World Intellectual Property* 6, 891-918

Members by enacting or amending laws, and carrying out other activities including decisions in favor of these obligations. A comparative study between the obligations under the WTO Agreements and the provisions of Nepalese laws related to trade in goods, services and intellectual property shall provide a guidance on what kind of Nepalese legislation are to be required to give effect to the WTO Agreements in Nepal.

It is said that the GATT/WTO system is built on four legal principles or "pillars" that support the balance of the legal obligations undertaken by WTO Members. The four pillars of the GATT/WTO system are (i) the unconditional most-favored-nation obligation, (ii) tariff bindings, (iii) the national treatment obligation, and (iv) the elimination of quantitative restrictions.²⁸⁰

Besides these four obligations, in fact there are other obligations too under the GATT/WTO system, i. e., transparency, judicial/administrative review, etc..

With respect to the conformity obligation, Article XVI:4 of the WTO Agreement states, "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." Article 31 of the Vienna Convention on Law of Treaties provides that the words of a treaty are to be given their ordinary meaning in their context and in the light of the treaty's object and purpose. What are the objects and purpose of the WTO that are relevant to a construction of Article XVI:4 of the WTO Agreement? The most relevant objects and purpose of the WTO Agreement are those which relate to the creation of market conditions conducive to individual economic activity in national and global markets and

2004). This article has addressed the issue of Nepalese legislation in compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

²⁸⁰ See RAJ BHALA ET AL., WORLD TRADE LAW 59 (1998).

providing security and predictability to the multilateral trading system.²⁸¹ Thus, WTO inconsistent law may produce a situation of threat and legal uncertainty against other Members and undermines the security and predictability of the multilateral trading system.

We can infer from the wording of Art. XVI:4 of the WTO Agreement, i. e., "Each Member," that the conformity obligation begins when a country becomes Member of the WTO. However, the least-developed Members are provided an additional time frame under each WTO Agreement for the fulfillment of conformity obligation.

One of the significant characteristics of Art. XVI:4 of the WTO Agreement is that it does not require the conformity of Member's laws with the provisions of the WTO Agreements. It only requires conformity of laws with its obligations as provided in the annexed Agreements. In addition to it, Art. XVI:4 of the WTO Agreement does not say anything regarding the implementation and effectiveness of the conformity obligation. However, the WTO dispute settlement mechanism is an effective method to compliance with international obligations created by WTO Agreements.

In the context of the conformity obligation, the meaning of "compliance" is relevant and significant. Compliance generally refers to a state of conformity or identity between an actor's behavior and specified rule.²⁸² In the international context, compliance is often specified as "an

²⁸¹ . See *United States- Sections 301-310 of the Trade Act of 1974* (US-Section 301), Report of the WTO Panel, adopted 27 January 2000, WT/DS152/R, at para. 7.71.

²⁸² . Some compliance theorists argue that concepts of compliance vary given different theories of international law. See, e. g., Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 Mich. J. Int'l L. 345 (1998).

actor's behavior that conforms to a treaty's explicit rule."²⁸³ Compliance with an international obligation and the effectiveness of that obligation are not the same thing. Many international rules are not effective. Compliance may be very high and effectiveness may be very low.

International law is generally indifferent as to how states meet their international obligations, and as to the choice between the forms of legislation, common law, or administrative actions as the mode for giving effect to their international obligations.²⁸⁴ Faced with a claim that it has failed to adhere to its international obligations, a state cannot validly raise as a defense that it was unable to do so because of its domestic law.²⁸⁵ There also exists a presumption under international law that a state would perform its international obligations in good faith. Infringement of the international obligation is not to be presumed.²⁸⁶

"Comments were made at the Hague Conference of 1930 for the Codification of International Law to the effect that it is not the enactment of a law, but its application, that constitutes a breach of an international obligation."²⁸⁷ "Professor H. Lauterpacht's response to these comments was that: 'The matter is of some difficulty. Although prior to the application of the law no actual injury can, as a rule, be deemed to have occurred, the legislation can at least be regarded as a manifestation of intention to commit an international wrong and as such calling for a protest.

²⁸³ See RONALD B. MITCHELL, INTERNATIONAL OIL POLLUTION AT SEA: ENVIRONMENTAL POLICY AND TREATY COMPLIANCE 30 (1994). See ROGER FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW (1981); *A Symposium on Implementation, Compliance and Effectiveness*, 19 Mich. J. of Int'l L. 303 (1998); Beth A. Simmons, *Compliance with International Agreements*, 1 Ann. Rev. Pol. Sci. 75 (1998); Harold Hongju Koh, *Why do Nations Obey International Law?*, 106 Yale L. J. 2599 (1997).

²⁸⁴ See OPPENHEIM'S INTERNATIONAL LAW (Robert Jennings and Arthur Watts ed., 1992, Longman), Section 21 at 83.

²⁸⁵ See *Greek and Bulgarian Communities Case* (1930), PCIJ Series B, No. 17 at 32; Article 27 of the Vienna Convention of the Law of Treaties 1967.

²⁸⁶ See Kwan Kiat Sim, *Rethinking the mandatory/discretionary legislation distinction in WTO jurisprudence*, World Trade Review (2003), Vol. 2, Issue 1, page 59. See Article 26 of the Vienna Convention of the Law of Treaties 1969.

²⁸⁷ See *supra*, footnote 286, at page 58, cited at foot note number 160.

Moreover, it is possible that legislation as such may, because of resulting uncertainty, have injurious effects.²⁸⁸

There is an important GATT/WTO jurisprudence with respect to the conformity obligation. The main point of this jurisprudence is that the violation of a provision of GATT or WTO Agreements occur only after certain measures affecting trade have been taken in pursuance of the legislation, and the mere existence of a provision in a domestic legislation is not enough to violate a provision of GATT or WTO Agreements. Based on this interpretation, a distinction has been made between a mandatory provision in the legislation and a discretionary provision in the legislation. A mandatory provision can be explained as one kind of legislation in which the authorities are obliged to take certain measures and if taken such measures, it would violate some provision of the agreement. Whereas under the discretionary provision of a legislation, the authorities have the discretion to take such measures, but there is no mandatory obligation that they must take such measures.²⁸⁹ Hence, the final determinant factor is whether or not there is an absence of discretion in the legislation to take a measure which would violate the provisions of the agreement, and if there is an absence of discretion, there is violation of the agreement.²⁹⁰

In *US-Superfund Act*,²⁹¹ the GATT Panel stipulated that the legislation did not, by itself, constitute a violation of obligation. In *EEC-Parts and Components*,²⁹² the GATT Panel again

²⁸⁸ . See *Ibid.*; See H. Lauterpacht, 'Sovereignty Over Submarine Areas,' 27, BYIL, 376, 396 (fn 1) (1950).

²⁸⁹ . See BHAGIRATH LAL DAS, THE WORLD TRADE ORGANISATION: A GUIDE TO THE FRAMEWORK FOR INTERNATIONAL TRADE 48 (1999).

²⁹⁰ . See *Ibid.*

²⁹¹ . See *United States- Taxes on Petroleum and Certain Imported Substances*, Report of the GATT Panel, adopted on 17 June 1987, BISD 34S/136, 163-164, at para. 5.2.9.

²⁹² . See *EEC- Regulation of Import of Parts and Components*, Report of the GATT Panel, adopted on 16 May 1990, BISD 37S/132, 198-199, at para. 5.26.

stipulated that the mere existence of such legislation did not violate the obligations. In *Thai-Cigarettes*,²⁹³ the GATT Panel again concluded, on similar lines, that the possibility that legislation might be applied contrary to obligations was, by itself, not sufficient to make it inconsistent with the agreement. In *United States- Section 337*,²⁹⁴ the GATT panel's terms of reference encompassed both the law itself and its application in a particular instance but the complainant, the European Economic Community, withdrew that portion of its request.²⁹⁵

In *US- Tobacco*,²⁹⁶ the GATT Panel observed:

Panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge.

The WTO Agreement came into effect in January of 1995 and it provided that, "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."²⁹⁷ The GATT-1947, the predecessor of the WTO, had not contained such conformity provision and this conformity provision of the WTO Agreement was new in the scenario of international trade law. However, we may find the

²⁹³ . See *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, Report of the GATT Panel, adopted on 7 November 1990, BISD 37S/200, 227 at para. 84.

²⁹⁴ . See *United States --- Section 337 of the Tariff Act of 1930*, Report of the GATT Panel, adopted on 7 November 1989, BISD 36S/345.

²⁹⁵ . For a comment on this report, see David Palmeter, *Section 337 and the WTO Agreements: Still in Violation?*, 20 WORLD COMPETITION NO. 1, p. 27 (Sept. 1996).

²⁹⁶ . See *United States-- Measures Affecting the Importation, Internal Sale and Use of Tobacco*, Report of the GATT Panel, adopted on 4 October 1994, BISD 41S/131, at para. 118.

²⁹⁷ . See WTO Agreement, *supra*, footnote 277, art. XVI, para. 4.

elements of the conformity obligation in the provision of Article XXIII: 1 of the GATT 1947 and in the GATT jurisprudence. In this connection, views expressed by few scholars are worthy to mention here:

The Marrakesh Agreement Establishing the WTO changes the situation now. Article XVI:4 of this agreement lays down that each Member "shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." The annexed agreements include GATT 1994. This new obligation makes it necessary for Members to bring their laws into conformity with the WTO agreements. If a Member has any law or administrative procedure which is not in conformity with its obligations, it will be violating Article XVI:4 of the WTO Agreement. In such a situation, the consequences will follow as in any case of violation of the WTO agreements. Thus, now the mere existence of such laws, regulations and procedures is enough to make the Member liable for the consequences of violation of its obligations.²⁹⁸

The WTO Agreement provides that, "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed agreements." This is consistent with the conclusion of a GATT panel²⁹⁹ that "legislation mandatorily requiring the executive authority to impose a measure

²⁹⁸ . See DAS, *supra*, footnote 289, at 50.

²⁹⁹ . See DAVID PALMETER ET AL., DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION 24 (1999), cited *United States --- Denial of Most-Favored-Nation Treatment as to Non-rubber Footwear from Brazil*, Report of the GATT panel, adopted on 19 June 1992, BISD 39S/128 at Paragraph 6.13 citing *United States --- Taxes on Petroleum and Certain Imported Substances* (Superfund Taxes), Report of the GATT Panel, adopted on 17 June 1987, BISD 34S/136; and *European Economic Community --- Regulation on Imports of Parts and Components*, Report of the GATT Panel, adopted on 16 May 1990, BISD 37S/132.

inconsistent with that Agreement, as such, whether or not an occasion for the actual application of the legislation had arisen.”³⁰⁰

What has not been considered by WTO panels or the Appellate Body is the compatibility of this GATT case law with Article XVI:4 of the Marrakesh Agreement. . . . Article XVI:4, interpreted in light of the *pacta sunt servanda* principle encompassed in the Vienna Convention on the Law of Treaties, could lead to a reconsideration of the GATT law on this issue.³⁰¹

The WTO Panel and the Appellate Body also have considered this issue a couple of times in the course of dispute settlement.³⁰² In *US- Section 301*,³⁰³ the Panel remarked that it was incorrect to argue that under the classical test, discretionary legislation could never infringe WTO provisions. However, in *US-Exports Restraints*,³⁰⁴ the Panel acknowledges that the mandatory/discretionary distinction is a ‘classical test’ with ‘longstanding historical support.’ The Panel further says that the application of the ‘classical test’ still yields the conclusion that legislation as such cannot be inconsistent with WTO obligations unless it is mandatory.³⁰⁵ In the *US- Section 211*,³⁰⁶ the

³⁰⁰ . See PALMETER, *supra*, footnote 299, at 24.

³⁰¹ . See PALMETER, *supra*, footnote 299, at 25.

³⁰² . See *United States-Anti-dumping Act of 1916* (US-1916 Act), Report of the WTO Panel, adopted on 31 March 2000, WT/DS136/AB/R, Report of the WTO Appellate Body, adopted on 29 May 2000, WT/DS162/AB/R; *United States-Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or above from Korea* (US-DRAMS), Report of the WTO Panel, adopted on 19 March 1999, WT/DS99/R; *United States-Measures Treating Exports Restraints as Subsidies* (US-Exports Restraints), Report of the WTO Panel, adopted on 23 August 2001, WT/DS194/R; *United States- Sections 301-310 of the Trade Act of 1974* (US-Section 301), Report of the WTO Panel, adopted on 27 January 2000, WT/DS152/R; *United States-Measures Affecting the Importation, Internal Sale and Use of Tobacco* (US-Tobacco), Report of the GATT Panel, adopted on 4 October 1994, DS44/R; and others.

³⁰³ . See *United States- Sections 301-310 of the Trade Act of 1974*, Report of the WTO Panel, adopted on 27 January 2000, WT/DS152/R.

³⁰⁴ . See *United States- Measures Treating Exports Restraints as Subsidies*, Report of the WTO Panel, adopted on 23 August 2001, WT/DS194/R.

³⁰⁵ . See *supra*, footnote 304, at para. 8.13.

Appellate Body endorsed the concept of mandatory/discretionary distinction and remarked that 'where discretionary authority distinction is vested in the executive branch of a WTO member, it cannot be assumed that the WTO member will fail to implement its obligations under the WTO Agreement in good faith.'³⁰⁷ The Appellate Body further said that it could not be assumed the government branch would exercise its discretionary executive authority inconsistently with WTO obligations.³⁰⁸

With respect to conformity obligation, the idea behind this kind of consideration is also supported by the provision of Art. XXIII:1 of GATT, the concept of nullification or impairment of benefit. In fact this provision is the central element of the whole GATT/WTO system. Article 3:1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes explicitly expresses Members adherence to Article XXIII of GATT 1947 and it has been used as a main provision of dispute settlement. According to Article XXIII of GATT, failure of another Member to carry out its obligation under the agreement, or the application by another Member of any measure whether or not it conflicts with the provisions of this agreement is not enough to get remedy but additionally requires that any benefit accruing to any Member directly or indirectly under this agreement is being nullified or impaired. Hence, nullification or impediment of benefit accruing under agreement is the fundamental prerequisite for remedy under the WTO dispute settlement system and generally, actual action or application only creates nullification or impediment of benefit. Furthermore, Article XVI:1³⁰⁹ of the WTO Agreement gives validity to

³⁰⁶ See *United States-Section 211 Omnibus Appropriate Act of 1998*, Report of the WTO Appellate Body, adopted on 1 February 2002, WT/DS176/AB/R.

³⁰⁷ See *supra*, footnote 306, at para. 259.

³⁰⁸ See *Ibid.*

³⁰⁹ WTO Agreement, *supra*, footnote 277, art. XVI, para. 4. "... the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947."

the GATT jurisprudence which had primarily focused on actual action which causes impediment and violation of provisions of agreement.

The aforesaid concepts and provisions are vital when we examine the domestic laws in connection to the conformity obligation with WTO Agreements.

III.2 MULTILATERAL AGREEMENTS ON TRADE IN GOODS & RELATED NEPALESE LAWS

In this sub-chapter, the existing major obligations under the Multilateral Agreements on Trade in Goods are examined independently, summarized and discussed in the following sub-titles. The Reports of GATT/WTO Panels as well as Appellate Body also are examined and the principles propounded under the GATT/WTO jurisprudence are covered. In this connection, all related Nepalese laws are examined critically. Then we analyze existing provisions of Nepalese laws and obligations prescribed by the Multilateral Agreements on Trade in Goods comparatively, and find out whether and if so to what extent Nepalese laws are to be revised, amend or enact to bring Nepalese laws in compliance with the Multilateral Agreements on Trade in Goods.

III.2.A MAJOR OBLIGATIONS UNDER THE MULTILATERAL AGREEMENTS ON TRADE IN GOODS

III.2.A(1) NON-DISCRIMINATION

The obligation of non-discrimination, or in other words, the requirement not to treat less favorably all “like” products, irrespective of their origin or whether they are imported or domestic, is the cornerstone of the WTO multilateral trading system.³¹⁰ The non-discrimination obligation contributes to ensuring fair and predictable international trade relations.³¹¹ It involves two basic rules: i) most-favored-nation obligation, and ii) national treatment obligation.

III.2.A(1)(i) *The Most-Favored-Nation Obligation*

The most-favored-nation (hereinafter referred to as the “MFN”) obligation is one of the fundamental and central obligations undertaken by WTO Members.³¹² The concept embodied in the MFN obligation has been traced to the twelve century, although the phrase “most-favored-nation” did not appear until the end of the seventeenth century.³¹³ Today, the unconditional MFN

³¹⁰ See UNCTAD document (UNCTAD/EDM/Misc.232/Add.33), *The Course on Dispute Settlement in International Trade, Investment and Intellectual Property*, Module 3.5 GATT 1994, p. 13, United Nations, New York and Geneva, 2003. Available at www.unctad.org.

³¹¹ See *Ibid.*

³¹² The MFN treatment serves a central role in ensuring the multilateral nature of the trading system embodied in the GATT and the multilateral rule of law in this area. The requirement that any change be automatically applied to all WTO Members is an important element of stability and predictability in the system, guaranteeing that all will benefit from trade liberalization measures and making it more difficult to reverse such measures. See WTO document (WT/WGTC/W/114, p.11), *Background Note by the Secretariat on the Fundamental WTO Principles of National Treatment, Most-Favored-Nation Treatment and Transparency*, the WTO secretariat, Geneva, 14 April 1999, available at <http://www.wto.org>.

³¹³ See THE MOST-FAVORED-NATION PROVISION, EXECUTIVE BRANCH GATT STUDIES, NO. 9, 133 (1973); See JOHN H. JACKSON ET AL., *INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT*, 419 (2002). The emergence of the Most-Favored-Nation (hereinafter the “MFN”) provision is largely attributable to the growth of world commerce in the 15th and 16th centuries. For the history of the MFN principle, see EDMOND MCGOVERN, *INTERNATIONAL TRADE REGULATION*, section 8.3 (1996); Edward A. Laing, *Equal Access/Non-Discrimination and Legitimate Discrimination in International Economic Law*, 14 WIS. INT’L L. J. 246 (1996).

obligation³¹⁴ lies at the very heart of international trade law.³¹⁵ The Restatement (Third) Foreign Relations Law of the United States defines MFN treatment as “an obligation to treat that State, its nationals or goods, no less favorably than any other State, its nationals or goods.”³¹⁶ The International Law Commission defines “most-favored-nation treatment” as: treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favorable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.³¹⁷

The MFN obligation requires WTO Members not to discriminate between products originating in or destined for different countries. Article I: 1 of the GATT 1994³¹⁸ contains the core MFN obligation. In accordance with the GATT Article I:1, the MFN obligation applies to (i) customs duties and charges of any kind imposed on importation or exportation, (ii) the method of levying those duties and charges, (iii) all rules and formalities in connection with importation and exportation, and (iv) all matters referred to in paragraphs 2 and 4 of Article III concerning

³¹⁴ . There are differences in the meaning of conditional MFN and unconditional MFN commitment. The characteristic of conditional MFN commitment is reciprocity whereas unconditional MFN commitment is nondiscrimination. The MFN obligation under the GATT-WTO system is an unconditional MFN obligation.

³¹⁵ . For a discussion of the MFN commitment in GATT, see EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION, section 8.32 (1996); JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 249-72 (1969).

³¹⁶ . See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, Section 801 (1) (1987).

³¹⁷ . See the Report of the International Law Commission on the Work of its Thirtieth Session, [1978] 2 Y. B. Int'l L. Comm'n 5, U. N. Doc. A/33/192 (1978), reprinted in 17 INT'L LEGAL MATERIALS 1518 (1979).

³¹⁸ . GATT 1994, *supra*, footnote 278, art. I, para. 1. “With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [Members].”

national treatment in internal taxation and regulation.³¹⁹ In this context, Article I:1 of GATT or, in other words, the MFN clause further requires that any advantage, favor, privilege or immunity granted by any Member to any product originating in or destined for any other Member shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.³²⁰

If imports from two WTO Members are “like product,” then those imports are entitled to identical treatment regardless of their country of origin. In accordance with GATT Article I:1, discrimination between imported products is prohibited only if the products at issue are “like.” Hence, the MFN treatment obligation only applies to “like products.”³²¹ The concept of “like product”³²² is a crucial one for the MFN clause of Article I:1 and it is not defined anywhere in the

³¹⁹ . GATT Article I:1 covers those four areas of government activity. Out of those four, first three take place at the border and fourth deals with goods once they are entered the customs territory of a WTO Member.

³²⁰ . In *EC – Bananas III*, the European Communities maintained the so-called “activity function rules” which imposed requirements on importers of bananas from certain countries to qualify for tariff quotas that differed from those imposed on importers of bananas from other countries. The Appellate Body concluded that the European Communities had acted inconsistently with Article I:1 of the GATT 1994 through its “activity function rules” because they conferred an advantage upon bananas imported from a group of States (ACP States), and not upon bananas imported from other WTO Members, within the meaning of Article I:1. See *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III)*, Report of the WTO Appellate Body, adopted on 25 September 1997, WT/DS27/AB/R, DSR 1997:II, 591, at para. 206. In *Canada – Autos*, the Appellate Body states that: “Article I:1 requires that ‘any advantage, favor, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.’ The words of Article I:1 refer not to some advantages granted ‘with respect to ‘the subjects that fall within the defined scope of the Article, but to ‘any advantage;’ not to some products, but to ‘any product;’ and not to like products from some other Members, but to like products originating in or destined for ‘all other’ Members.” See *Canada – Certain Measures Affecting the Automotive Industry (Canada – Autos)*, Report of the WTO Appellate Body Report, adopted on 19 June 2000, WT/DS139/AB/R, WT/DS142/AB/R, para. 79.

³²¹ . In *Japan – Tariff on Imports of Spruce, Pine, Fir Dimension Lumber*, the GATT Panel concluded that Japan’s tariff classification scheme that gave duty-free treatment to certain softwood lumber products but imposed an 8-percent duty on the Canadian imports was not an MFN violation because the two imported products were not “like products.” See *Japan – Tariffs on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, Report of the GATT Panel, BISD, 36th Supp. 167, 197-98, paras. 5.7-5.10 (1989).

³²² . In addition to being found in Article I:1, the concept of “like product” is also found in other Articles of the GATT 1994, i. e., Article II:2(a), III:2, III:4, VI:1(a), IX:1, XI:2(c), XIII:1, XVI:4 and XIX:1. It is generally understood that the concept of “like product” has different meanings depending on the context in which it is found. The “like product” cases under Article III:2 and 4 have provided a rich source of cases resolving “like

GATT 1994. A number of GATT and WTO reports have examined the meaning of "like product." However, the expression "like products" could have different meanings in the different context in which it is used, and it was clear in the drafting of GATT.³²³ In *Japan – Alcoholic Beverages II*, the WTO Appellate Body compared the concept of "likeness" to an accordion.³²⁴ Decisions on the issue of "like products" are made on case by case basis and applied a variety of relevant criteria, including the product's end-uses in a particular market, consumer tastes and habits, and the product's characteristics.³²⁵ In this context, the use of tariff classifications and nomenclature is the accepted starting point in the "like product" analysis.³²⁶

In addition to Article I:1 of GATT, subject-specific MFN commitments are found in other provisions of GATT and the Uruguay Round Multilateral Trade Agreements (MTA). Other GATT MFN or nondiscrimination clauses include Article XIII (quota administration), Article XX (general exceptions), Article IV (b) (cinema films), Article III:7 (international mixing requirements), Article V:2, 5 & 6 (transit of goods), Article IX:1 (marks of origin), Article XVII:1 (state trading), and Article XVIII:20 (measures to assist economic development).³²⁷

product" inquiries. See, e. g., *United States - Standards for Reformulated and Conventional Gasoline*, Report of the WTO Panel, WT/DS2/R, 39, para. 6.9 (1996). See Rex J. Zedalis, *A Theory of the GATT "Like Product" Common Language Cases*, 27 VAND. J. TRANSNAT'L L. 33 (1994).

³²³ See WTO ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, vol. I, 35 (1995).

³²⁴ See *Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages II)*, Report of the WTO Appellate Body, adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 21.

³²⁵ See, e. g., Report of the GATT Working Party, Border Tax Adjustments, L/3463, BISD, 18th Supp. 97, 102, at para. 18 (1970); See *supra*, footnote 324, at p. 11 of Appellate Body report; See *Spain - Tariff treatment of Unroasted Coffee*, Report of the GATT Panel, adopted 11 June 1981, BISD 28S/102, para. 4.11.

³²⁶ See *supra*, footnote 324, at p. 22 of Appellate Body report.

³²⁷ GATT Article III:7 provides that "no internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply." GATT Article IV (b) relates to movies and provides that "screen time ... shall not be allocated formally or in effect among sources of supply." GATT Article V:5 and V:6 extends MFN treatment to traffic and products in transit through the territory of a WTO Member. In fact, historically this is the main point of attraction of land-locked Nepal's desire to accede to the WTO. GATT

Furthermore, we find MFN obligations under other Multilateral Trade Agreements dealing with trade in goods. For example: Article 2:3 of the Agreement on the Application of Sanitary and Phytosanitary Measures,³²⁸ Article 2:1 of the Agreement on Technical Barriers to Trade,³²⁹ Article 2:1 of the Agreement on Preshipment Inspection³³⁰ and Article 1:3 of the Agreement on Import Licensing Procedures.³³¹

However, the unconditional MFN obligation is not absolute. There are a number of important exceptions or qualifications to the application of the MFN obligation. These include the general exceptions and security exceptions.³³² There are few GATT provisions that authorize general nonobservance of Article I, most notably GATT Article XXIV (custom union and free trade area exception) and trade preferences in favor of and between developing countries (the Enabling

Article IX:1 concerns about marks of origin and provides for MFN treatment in connection with all marking requirements. GATT Article XIII:1 provides for the nondiscriminatory administration of quantitative restrictions. GATT Article XVII:1 requires to act on MFN basis in purchases and sales with respect to state trading enterprises. Article XVIII:20 states that developing country can not deviate from the MFN principle with respect to permitted subsidies to infant industries. Finally, the chapeau of GATT Article XX provides the observation of MFN principle while using the general provisions of exceptions.

³²⁸ See Agreement on the Application of Sanitary and Phytosanitary Measures, art. 2, para. 3, reprinted in GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (1994) [hereinafter SPS Agreement]. It provides that "Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail ..."

³²⁹ See Agreement on Technical Barriers to Trade, art. 2, para. 1, reprinted in GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (1994) [hereinafter TBT Agreement]. It provides that "Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded ... to like products originating in any other country."

³³⁰ See Agreement on Preshipment Inspection, art. 2, para 1. It provides that "user Members shall ensure that preshipment inspection activities are carried out in a non-discriminatory manner, and that the procedures and criteria employed in the conduct of these activities are objective and are applied on an equal basis to all exporters affected by such activities."

³³¹ See Agreement on Import Licensing Procedures, art. 1, para. 3. It provides that "the rules for import licensing shall be neutral in application and administered in a fair and equitable manner."

³³² See GATT, *supra*, footnote 278, art. XX & XXI.

Clause³³³). Besides it, in exceptional circumstances, the WTO Ministerial Conference can grant waivers of MFN or other WTO obligations.³³⁴

III.2.A(1)(ii) *The National Treatment Obligation*

Like the MFN obligation, national treatment obligation also is a non-discrimination obligation. The national treatment obligation, which complements the MFN obligation, requires that an imported products which has crossed the border after payment of customs duties and other charges should not receive treatment that is less favorable than that extended to the like product produced domestically.³³⁵

The national treatment obligation is set out in Article III of GATT 1994.³³⁶ Article III of the GATT 1994 is only concerned with internal measures and not border measures. Internal

³³³ . Decision on 28 November 1979 on "Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries," BISD 26S/203. The decision of the WTO General Council of 15 June 1999 allows developing countries to extend these exceptions to least-developed countries.

³³⁴ . See WTO Agreement, *supra*, footnote 277, art. IX, para. 3 and the Understanding on Respect of Waivers of Obligations under the GATT 1994.

³³⁵ . See GATT 1994, *supra*, footnote 278, art. III. GATT Article III is closely related to a number of other GATT provisions, particularly GATT Articles I, II, XI, XVII, and XX. Tariff bindings under GATT/WTO system in respect of liberalizing international trade would be meaningless without GATT Article III. If higher internal tax is allowed for foreign goods, the result would be equivalent to the higher tariff and protecting domestic goods.

³³⁶ . The focus of the GATT 1947 as negotiated originally was on the control and liberalization of border measures restricting international trade. A key principle is that, as a general rule, any border measures to give a competitive advantage to domestic products should take the form of customs tariffs imposed at the border and that the level of such customs tariffs should be a matter for negotiation and binding in national schedules. Within this scheme of things, Article III on national treatment plays a critical role since, as its paragraph 1 makes clear, it is designed to ensure that all other measures, referred to as "internal" measures, are not applied to imported or domestic products so as to afford protection to domestic production. It thus serves the purpose of ensuring that internal measures are not used to nullify or impair the effect of tariff concession and other multilateral rules applicable to border measures. The essence of the principle of national treatment is to require that a WTO Member does not put the goods of other WTO Members at a competitive disadvantage *vis-a-vis* its own goods.

Measures include related internal tax and regulatory measures. In *Japan – Alcoholic Beverages II*, the WTO Appellate Body states that “... Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products.”³³⁷ In *Korea – Alcoholic Beverages*, the Appellate Body furthermore states that Article III aims at “... avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships.”³³⁸

Article III:1 of GATT 1994 establishes the general principle that internal taxes and regulations “should not be applied ... so as to afford protection to domestic production.” Article III:2 of GATT 1994 requires national treatment in respect of internal taxation, such as sales, excise or value added taxes, while paragraph 4 of Article III requires it in respect of regulations affecting the sale and use of goods generally. In accordance with GATT Article III:2, the national treatment (non-discrimination) obligation regarding internal taxation applies not only to “like products” (first sentence), but also to “directly competitive or substitutable products” (second sentence). However, the national treatment obligation regarding internal regulations in Article III:4 applies only to “like products.”

Several GATT Panels and the WTO Appellate Body have furthermore examined and interpreted the provisions of Article III of GATT 1994. The policy reasons, i. e., aim test, for imposing the

³³⁷ See *supra*, footnote 324, at p. 16 of Appellate Body report. See also *Korea – Taxes on Alcoholic Beverages*, Report of the WTO Appellate Body, adopted on 17 February 1999, WT/DS75/AB/R, WT/DS84/AB/R, para. 119; *Chile – Taxes on Alcoholic Beverages*, Report of the WTO Appellate Body, adopted on 12 January 2000, WT/DS87/AB/R, WT/DS110/AB/R, para. 67; *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the WTO Appellate Body, adopted on 5 April 2001, WT/DS135/AB/R, para. 97 and *Indonesia – Certain Measures Affecting the Automobile Industry*, Report of the WTO Panel, WT/DS54/R, WT/DS59/R, WT/DS64/R and Corr. 1, 2, 3, and 4, adopted 23 July 1998: DSR 1998: VI, 2201, para. 14.108.

³³⁸ See *Korea – Taxes on Alcoholic Beverages*, Report of the WTO Appellate Body, adopted on 17 February 1999, WT/DS75/AB/R, WT/DS84/AB/R, para. 120.

tax are irrelevant if they have a protectionist effect.³³⁹ A tax measure is inconsistent with Article III:2, first sentence, if the imported product is taxed in excess of the domestic like product. Evidence of protectionist intent need not be shown because such a discriminatory tax per se affords protection to domestic production.³⁴⁰ In this connection, the trade effects of a Member's internal taxes or regulations are equally irrelevant. Article III prohibition on discriminatory taxes and regulations is not conditioned on a "trade effect test,"³⁴¹ is not qualified by a *de minimis* exception,³⁴² and is not subject to an offsets rule where less favorable treatment on some imported products can be balanced against more favorable treatment for other imported products.³⁴³ The purpose of Article III is to protect the expectation that a competitive relationship will exist between imports and the domestic like product.³⁴⁴

"Article III:2, first sentence, concerns only "internal taxes and other charges of any kind" which are applied 'directly or indirectly' on products. Internal taxes on products such as value added taxes (VAT), sales taxes and excise duties are covered by Article III:2, first sentence. However,

³³⁹ See *Greece – Special Taxes*, Report of the GATT Panel, BISD, 1st Supp. 48, 49, para. 5 (1952); See *supra*, footnote 291, at para. 5.2.4.

³⁴⁰ See *supra*, footnote 324, at p. 18 of Appellate Body report. See *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, Report of the WTO Panel, adopted on 16 February 2001, WT/DS155/R and Corr.1, para. 11.137. The Panel in *Argentina – Hides and Leather* clarified that whenever imported products from one Member's territory are subject to taxes in excess of those applied to the like domestic products in the territory of another Member, this is deemed to "afford protection to domestic production" within the meaning of Article III:1

³⁴¹ See *supra*, footnote 324, at p. 23 of Appellate Body report.

³⁴² See *Ibid.*

³⁴³ See *United States – Section 337 of the Tariff Act of 1930*, Report of the GATT Panel, BISD, 36th Supp. 345, 387, at para. 5.1.4 (1989).

³⁴⁴ In *Japan – Taxes on Alcoholic Beverages*, the Appellate Body noted that "Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products. See *supra*, footnote 324, at p. 16 of Appellate Body report. See *United States – Taxes on Petroleum and Certain Imported Substances*, BISD, 34th Supp. at 158, para. 5.1.9 (1987); National treatment violation even though only one percent of domestic beer benefited from tax reduction: See *United States – Measures Affecting Alcoholic and Malt Beverages*, BISD, 39th Supp. 206, 270-71, at para. 5.6 (1992).

income taxes or import duties are not covered by Article III:2, first sentence, since they do not constitute internal taxes on products.”³⁴⁵

The national treatment obligation under Article III:2, first sentence, only applies to “like products.” The concept of “like products” is not defined in the GATT 1994. However, the concept of “like product” in Article III:2, first sentence, is defined by GATT Working Parties, GATT Panels, and the WTO Appellate body. In the 1970 Working Party Report on Border Tax Adjustments, the Working Party concluded that “the interpretation of the terms should be examined on a case by case basis. ... Some criteria were suggested for determining whether a product is “similar”: the product’s end-uses in a given market; consumer’s tastes and habits, which change from country to country; the product’s properties, nature and quality.”³⁴⁶ The GATT Panels have focused on product characteristics and end-uses, as well as tariff classifications.³⁴⁷ In *US – Standards for Reformulated Gasoline*, the WTO Panel found that since imported and domestic gasoline are chemically identical, have the same end-uses and tariff classification, and are perfectly substitutable, that they were like products for purpose of Article III:4.³⁴⁸ In *Japan – Taxes on Alcoholic Beverages*, the Appellate Body has reconfirmed the same concept of “likeness.”³⁴⁹ In *Canada – Certain Measures Concerning Periodicals*, the WTO Appellate Body stated that the proper test for making a “like product” determination is to construe Article III:2, first sentence, narrowly on a case-by case basis, examining factors that

³⁴⁵ . See UNCTAD/EDM/Misc.232/Add.33, *supra*, footnote 310, at p. 23.

³⁴⁶ . See *Report of the Working Party, Border Tax Adjustments*, L/3463, BISD, 18th Supp. 97, 102, para. 18 (1970).

³⁴⁷ . See *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, Report of the GATT Panel, BISD, 34th Supp. 83, 113-15 (1987).

³⁴⁸ . See *United States – Standards for Reformulated and Conventional Gasoline*, Report of WTO Panel, WT/DS2/R, at para. 6.9. (1996).

³⁴⁹ . See *supra*, footnote 324, at p. 21 of Appellate Body report.

include the product's end-uses in a given market; consumer tastes and habits; and the product's properties, nature, and quality.³⁵⁰

Article III:2, second sentence also concern "internal taxes or other internal charges." The national treatment obligation in Article III:2, second sentence, applies to "directly competitive or substitutable products," which is a broader category than "like products" in Article III:2, first sentence. "Unlike that of Article III:2, first sentence, ... three separate issues must be addressed to determine whether an internal tax measure is inconsistent with Article III:2, second sentence. These three issues are whether: (i) the imported products and the domestic products are 'directly competitive or substitutable products' which are in competition with each other; (ii) the directly competitive or substitutable imported and domestic products are 'not similarly taxed;' and (iii) the dissimilar taxation of the directly competitive or substitutable imported domestic products is 'applied ... so as to afford protection to domestic production.'³⁵¹

In the *Japan – Taxes on Alcoholic Beverages*, the WTO Panel concluded that although several imported and domestic alcoholic beverages were not like products, they were nevertheless directly competitive or substitutable.³⁵² The factors to be taken into account in establishing whether products are "directly competitive or substitutable," include, in addition to their physical characteristics, common end-use and tariff classifications, the nature of the compared products and the competitive conditions in the relevant market.³⁵³ Article III:2, second sentence, provides

³⁵⁰ . See *Canada – Certain Measures Concerning Periodicals*, Report of the WTO Appellate Body, AB-1997-2, WT/DS31/AB/R, Part V.A, at 21 (1997).

³⁵¹ . See *supra*, footnote 324, at p. 24 of Appellate Body report.

³⁵² . See *supra*, footnote 324, at p. 117, para. 5.7 of Appellate Body report.

³⁵³ . See *supra*, footnote 324, at p. 24 of Appellate Body report.

that the tax differential has to be more than *de minimis* in order to support a conclusion that the internal tax imposed on imported products is WTO-inconsistent.³⁵⁴

In *Japan – Alcoholic Beverages II*, the WTO Appellate Body said, the examination of whether the tax measures was applied “so as to afford protection to domestic production” does not require to examine the actual intent of the legislator or regulator to engage in some form of protectionism. It is the result of the application of a measure that matters under Article III:2, second sentence.³⁵⁵

Article III:4 of the GATT 1994 prohibits WTO Members to accord “less favorable treatment” to the like imported product than it accords to the group of like domestic products. In *US – Section 337*, the Panel interpreted “treatment no less favorable” to require “effective equality of competitive opportunities.”³⁵⁶ In *US – Gasoline*, Panel found that “the measure at issue accorded to imported gasoline less favorable treatment than to domestic gasoline on the basis that sellers of domestic gasoline were authorized to use an individual baseline, while sellers of imported gasoline had to use the more onerous statutory baseline.”³⁵⁷ In *Korea – Beef*, the Appellate Body observe that:

³⁵⁴ . See *supra*, footnote 324, at p. 26-27 of Appellate Body report.

³⁵⁵ . See *supra*, footnote 324, at p. 29-30 of Appellate Body report.

³⁵⁶ . Panels and the Appellate Body have consistently used this approach in later GATT/WTO reports.

See *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, Report of the GATT Panel, adopted 18 February 1992, BISD, 39 S/27, paras. 5.12-5.14 and 5.30-5.31; *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaint by the United States*, Report of the WTO Panel, adopted 25 September 1997, WT/DS27/R/USA, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR1997:II, 943, paras. 7.179-7.180; *Japan – Measures Affecting Consumer Photographic Film and Paper*, Report of the WTO Panel, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179, para. 10.379; See *supra*, footnote 348, at para.6.10 of WTO Panel report.

³⁵⁷ . See *supra*, footnote 348, at para.6.10 of WTO Panel report.

“... A measure that provides treatment to imported products that is different from that accorded to like domestic products is not necessarily inconsistent with Article III:4, as long as the treatment provided by the measure is “no less favorable”. According “treatment no less favorable” means according conditions of competition no less favorable to the imported product than to the like domestic product. Whether or not imported products are treated ‘less favorably’ than like domestic products should be assessed instead by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.³⁵⁸

Article III:4 of GATT 1994 deals specifically with internal laws and regulations. The national treatment obligation of Article III:4 is limited to regulations affecting like products, not directly competitive or substitutable products.³⁵⁹ The operative word in paragraph 4 is “affecting.” The use of the term “affecting” has been interpreted to mean that Article III:4 should cover not only laws and regulations which directly govern the conditions of sale or purchase but also any laws and regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal markets.³⁶⁰ Internal regulations that are *de facto* and *de jure* neutral may still violate Article III:4 if they adversely affect the competition opportunities of imports in the domestic market.³⁶¹ Paragraph 4 covers procedural as well as substantive laws, regulations and requirements.³⁶² A “requirement” within the meaning of

³⁵⁸ . See *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the WTO Appellate Body, adopted 10 January 2001, WT/DS161/AB/R, WT/DS169/AB/R, paras. 135-137.

³⁵⁹ . See *EEC – Measures on Animal Feed Proteins*, Report of the GATT Panel, BISD, 25th Supp. 49, 65-66, paras. 4.10,-4.12 (1978).

³⁶⁰ . See *Italian Discrimination Against Imported Agricultural Machinery*, Report of the GATT Panel, adopted 23 October 1958, BISD 7S/60, para. 12.

³⁶¹ . See *EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, Report of the GATT Panel, BISD, 37th Supp. 86, 124-25, para. 141 (1990).

³⁶² . See *supra*, footnote 294, at para.5.10 of GATT Panel report.

Article III:4 does not necessarily need to be imposed by government. Action by a private party can constitute a “requirement” under the purview of Article III:4, insofar as there is a nexus between that action and the action of a government such as that the government must be held responsible for that action.³⁶³

The non-discrimination obligation under Article III:4 applies only to “like product.” In *EC – Asbestos*,³⁶⁴ The WTO Appellate Body examined the meaning of the concept of “like products” in Article III:4. The Appellate Body further states in the same Report that the word “like” in Article III:4 is to be interpreted to apply to products that are in such a competitive relationship. Thus a discrimination of “likeness” under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products. The product scope of Article III:4, although broader than the first sentence of Article III:2, is certainly not broader than the combined product scope of the two sentences of Article III:2 of the GATT 1994.³⁶⁵ With respect to the criteria to be taken to account to determine whether products are “like” within the meaning of Article III:4, in *EC – Asbestos*, the Appellate Body adopted the criteria outlined in the Report of the Working Party on Border Tax Adjustments, and states that no one approach will be appropriate for all cases and it has to be made on a case-by-case basis. In *US – Gasoline*, the Panel found that chemically identical imported and domestic gasoline were “like products” because “chemically-imported and domestic gasoline by definition have exactly the same physical characteristics, end-uses, tariff classification and are perfectly

³⁶³ . See *Canada – Certain Measures Affecting the Automotive Industry*, Report of the WTO Appellate Body, adopted 19 June 2000, WT/DS139/AB/R, WT/DS142/AB/R, paras. 10.80 and 10.84.

³⁶⁴ . See *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the WTO Appellate Body, adopted 5 April 2001, WT/DS135/AB/R.

³⁶⁵ . See *supra*, footnote 364, at para. 97-100 of Appellate Body report.

substitutable.”³⁶⁶ The Panel did not examine the aim and effect of the regulatory distinction in determining “likeness.” In *US – Tuna/Dolphin*, the Panel found that differences in process and production methods of products are not relevant in determining “likeness.”³⁶⁷

GATT Article III: 8(a) and (b) provides the exception of national treatment obligation. Article III:8 (a) excepts government purchases of goods from the national treatment obligation. Article XX, XXI of GATT also provide provision of exception. Besides GATT, national treatment obligation is also incorporated in various other multilateral agreements on trade in goods, for example the Agreements on Technical Barriers to Trade and on the Application of Sanitary and Phytosanitary Measures.

III.2.A(2) TARIFF BINDINGS

Tariffs or customs duties are financial charges imposed on goods at the time of importation.³⁶⁸

Market access is conditional upon the payment of these customs duties. Tariffs or customs duties are one of the barriers to market access.³⁶⁹ However, it is not prohibited under the GATT

³⁶⁶ . See *United States – Standards for Reformulated and Conventional Gasoline*, Report of the WTO Panel, adopted 20 May 1996, WT/DS2/R, as modified by the WTO Appellate Body Report, WT/DS2/AB/R, DS1996:I, 29, para. 6.17.

³⁶⁷ . See *United States – Restrictions on Imports of Tuna*, Un-adopted Report of the GATT Panel, circulated 3 September 1991, BISD 39S/155, para. 5.15.

³⁶⁸ . There are different types of tariffs: ad valorem, specific, mixed, and tariff quota. Ad valorem is a tax set as a percentage of the value of the imported goods. A specific tariff is a flat charge per unit or quantity of goods. A mixed tariff combines these two concepts. Where as tariff quota provides a different tariff rate depending upon the amount already imported into a country. Ad valorem customs duties have become most common. See JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT* 339 (2002).

³⁶⁹ . Other market access barriers include quantitative restrictions including quotas, other duties and financial charges, and non-tariff barriers include customs procedures, technical regulations, and sanitary and phytosanitary measures, subsidies, state trading enterprises, and others.

1994.³⁷⁰ The basic purpose of the GATT 1947 was to cut tariffs significantly and to protect those cut from indirect evasion through discriminatory internal taxes or other measures.³⁷¹ Eight GATT Multilateral Trade Negotiation (MTN) 'Rounds' were successful to reduce tariffs rate significantly.³⁷² However, developing countries have taken the position in GATT Multilateral Trade Negotiation Rounds that non-reciprocity is their right, arguing that their economies do not permit the negotiation of reciprocal trade concessions.³⁷³ Developing countries including least-developed country Members, in the course of their trade negotiations, should not be expected to make tariff concessions inconsistent with their individual development, financial and trade needs.

Reduction of high tariffs rate on a reciprocal and mutually advantageous basis is one of the major obligations of a Member. Such tariff concessions are set out in each Member's "Schedule of Concessions on Goods." With respect to the original Members of the WTO, all tariffs concessions are set forth in schedules annexed to the Marrakesh Protocol and are an integral part of WTO Agreement. Where as all acceding Members must submit a Schedule of concessions that include substantial tariff reductions in line with those previously made by WTO Members.³⁷⁴

³⁷⁰ While tariffs are the most common import restraint, GATT prefers the tariff compare to other market access barriers. In comparison to other barriers, tariffs are more visible, do not require licensing to administer, do not require government funds in contrast to a subsidy, and give only a limited amount of protection. Tariff reduction is relatively easy to negotiate.

³⁷¹ See JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT* 343 (2002).

³⁷² The first five of these GATT Rounds (Geneva, Annecy, Torquay, Geneva, Dillon) from 1947 to 1961 were dedicated to the negotiation of tariff reduction. Where as the latter three GATT rounds (Kennedy, Tokyo and Uruguay) from 1963 to 1994 were focused on non-tariff issues. Although, there were significant negotiations on tariffs.

³⁷³ See Samuel Laird & Alexander Yeats, *Tariff-Cutting Formulas – and Complications*, in *THE URUGUAY ROUND: A HANDBOOK ON THE MULTILATERAL TRADE NEGOTIATIONS* 89 (J. Michael Finger & Andrzej Olechowski eds. 1987).

³⁷⁴ Submission of Schedule of Concessions with respect to the goods by the acceding applicant country is one of the major terms of conditions of WTO accession.

The framework for tariff negotiation is provided by GATT Article XXVIII *bis*, which stipulates that "... On a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation of even minimum quantities" ³⁷⁵

There is also a provision of modify or withdraw tariff concessions after negotiation under certain conditions which is commonly known as tariff renegotiations. ³⁷⁶

Article II of GATT, which requires Members to limit their tariffs on particular goods to a specified maximum. ³⁷⁷ The GATT obligation refers to goods "which are the products of territories of other contracting parties." If a Member charges a tariff in excess of the Schedule of Concessions, it is violating its GATT obligations, unless a GATT exception applies, such as Article VI (antidumping and countervailing duties) or Article XIX (the Escape Clause). ³⁷⁸

³⁷⁵ . See GATT, *supra*, footnote 278, art. XXVIII, para. 1*bis*.

³⁷⁶ . See GATT, *supra*, footnote 278, art. XXVIII.

³⁷⁷ . See JACKSON, *supra*, footnote 371, at 349.

³⁷⁸ . The GATT obligations relating to a tariff commitment can be divided into two groups. The first group consists of those obligations which relate specifically to a tariff binding and are triggered by the existence of that tariff binding on the GATT schedule. A second group of obligations consist of the more general GATT obligations (a sort of "code of good conduct for trade policy"), which relate not only to the treatment of goods that are listed on a schedule, but to all goods. These latter obligations (such as obligations on the use of quotas or national treatment obligations relating to internal taxation and regulations) have as one of their purposes the prevention of evasion of the GATT tariff binding. Since the objective of obtaining a binding is to gain market access and since non-tariff barriers inhibit such access, any non-tariff barriers is, to a certain extent, an evasion of the GATT tariff bindings. Thus, all GATT rules limiting non-tariff barriers serve to protect the Article II bindings." See JACKSON, *supra*, footnote 371, at 350; The group of obligations in the General Agreement which relate more directly to the tariff bindings and are generally limited to goods that are listed on the GATT tariff schedule, include the following: (1) The tariff maximum or ceiling, as expressed in the schedule (see Article II:1 which obligates treatment "no less favorable" than that specified in the schedule). (2) Other provisions of Article II designed to protect the value of the concession from encroachment by other governmental measures, such as "other charges," new methods of valuing goods, reclassification of goods (see Article II:3 &5) and currency revaluations (Article II:6). (3) Limits on the protection against imports of a particular product which can be afforded by the use of an import monopoly (Article II:4). (4) A GATT interpretation that new subsidies granted on products covered in a nation's schedule, after the schedule has been negotiated, shall be considered a "prima facie nullification" for purposes of complaints under Article XXIII. See JACKSON, *supra*, footnote 371, at 350.

Hence, WTO Members are under an obligation not to impose tariffs or other duties or charges which are in excess of those set forth in its Schedule of Concessions.³⁷⁹

Beyond the basic Article II obligation to respect tariff bindings when duties are assessed on imported goods, Article II:1(b) exempts bound items from all other duties or charges of any kind imposed on or in connection with importation. Although Article II does not define "other duties or charges," the term is recognized to include import surcharges, revenue duties, special import taxes, economic development taxes, and import or security deposits.³⁸⁰ The Uruguay Round Understanding on the Interpretation of Article II:1(b) of the GATT requires all such "other duties and charges," which are not included in Article VIII of the GATT 1994 on "fees and formalities," levied on imports in addition to the tariffs are to be recorded in the Schedule of Concessions.³⁸¹

Such tariffs or custom duties are permitted on imported goods with a condition that they be imposed on a most-favored-national (MFN) basis, which is a basic obligation of WTO Members.³⁸²

III.2.A(3) CUSTOMS VALUATION

³⁷⁹ . Article II: 1 (a) of the GATT 1994 states, "Each contracting party shall accord to the commerce of the other contracting parties treatment no less favorable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement." Article II:1 (b) of the GATT 1994 further states, "... the products of territories of other contracting parties shall, on the importation into the territory ..., be exempt from ordinary customs duties in excess of those set forth and provided for therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed ... by legislation in force in the importing territory on that date."

³⁸⁰ . See BHALA, *supra*, footnote 280, at 82.

³⁸¹ . See The Uruguay Round Understanding on the Interpretation of Article II:1(b) of the GATT 1994.

³⁸² . Article II:1(a) of GATT sets out, 'Each contracting party shall accord to the commerce of the other contracting parties treatment no less favorable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.'

The determination of value of goods is important while calculating the amount of tariff imposition. According to Article 1, 2, 3, 4 and 8 of the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994,³⁸³ the primary basis for customs value is "transaction value."³⁸⁴ Paragraph 2 of Article VII of GATT stipulates that the value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which the duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values. Articles 5 and 6 of the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 provide two bases for determining the customs value, i. e., deductive value and computed value as alternative formulas where it cannot be determined on the basis of the transaction value of the imported goods or of identical or similar imported goods.³⁸⁵

³⁸³ . A Customs Valuation Code was negotiated in the Tokyo Round. That was updated and included in the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994.

³⁸⁴ . Article 1 of the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 is to be read together with Article 8 of the same Agreement which provides, *inter alia*, for adjustments to the price actually paid or payable in cases where certain specific elements which are considered to form a part of the value for customs purposes are incurred by the buyer but are not included in the price actually paid or payable for the imported goods. Article 8 of the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 also provides for the inclusion in the transaction value of certain considerations which may pass from the buyer to the seller in the form of specified goods or services rather than in the form of money.

If the customs value cannot be determined under the provisions of Article 1 of the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, there should normally be a process of consultation between the customs administration and importer with a view to arriving at a basis of value under the provisions of Article 2 or 3 of the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994. It may occur, for example, that the importer has information about the customs value of identical or similar imported goods which is not immediately available to the customs administration in the port of importation. On the other hand, the customs administration may have information about the customs value of identical or similar imported goods which is not readily available to the importer. A process of consultation between the two parties will enable information to be exchanged, subject to the requirements of commercial confidentiality, with a view to determining a proper basis of value for customs purposes.

³⁸⁵ . Under paragraph 1 of Article 5 of the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, the customs value is determined on the basis of the price at which the goods are sold in the condition as imported to an unrelated buyer in the country of importation. The importer also has the right to have goods which are further processed after importation valued under the provisions of Article 5 if the importer so requests. Under Article 6 of the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, the customs value is determined on the basis of the computed value. Article 7 of the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 sets

Paragraph 3 of Article II of GATT obligates Member that it shall not alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule of tariffs concessions. The purpose of this obligation is to prevent the erosion of the benefit of tariff concession. Likewise, paragraph 4 of Article II of GATT 1994 restricts import monopolies from providing protection in excess of the amount of protection provided in the appropriate Schedule.

III.2.A(4) THE ELIMINATION OF QUANTITATIVE RESTRICTION

WTO Members are obliged to eliminate quantitative restrictions, which is also referred to as a quota,³⁸⁶ on imports and exports. It is an important obligation and is considered as a fourth pillar of the GATT-WTO system. Article XI of GATT sets out a general prohibition of quantitative restrictions on importation and exportation.³⁸⁷ Article XI:1 of GATT provides as follows:

out how to determine the customs value in cases where it cannot be determined under the provisions of any of the preceding Articles.

Article 20 of the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 provides for transitional period of 5 years to the developing countries not party to the 1979 Custom Valuation Code as a special and differential treatment with respect to the implementation of this Agreement. The same Article provides that the application of paragraph 2(b)(iii) of Article 1 and Article 6 for a period not exceeding three years.

³⁸⁶ A tariff quota and quantitative restriction may seem similar and are confusing. A tariff quota is not a quota and is not considered to be a quantitative restriction as it does not prohibit or restrict importation. A tariff quota only subject imports to varying duties and it is a quantity which can be imported at a certain duty/tariff. The Panel in *EC-Bananas* stated that a tariff quota is not per se a restriction, even if the over-quota tariff is prohibitively high. See *EEC – Import Regime for Bananas* (EC – Bananas II), Report of the GATT Panel, DS38/R, 1994 (unadopted).

³⁸⁷ GATT Article XI prohibits quantitative restrictions (quota) because it lacks transparency of customs duties and it, by creating an artificial short supply, prevents market forces from determining the price at which domestic and imported goods should be sold in the market.

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

The GATT Panel on *Semi-Conductors*³⁸⁸ noted that Article XI:1, unlike other GATT provisions, does not refer solely to laws or regulations, but rather more broadly to “measures.” Therefore, any measures maintained by a WTO Member that effectively restricts exports is prohibited under Article XI:1, regardless of the legally binding status of the measure. The Panel further noted that all types of government action falls into the purview of Article XI:1 if there are reasonable grounds to believe that sufficient incentives or disincentives exist for not-mandatory measures to take effect, and the operation of the measures to restrict exports below certain prices requires government action or intervention.³⁸⁹ With respect to the quantitative restrictions, it is irrelevant whether it has actual trade effect. The existence of quantitative restrictions, regardless of whether it actually impedes imports or exports, violates Article XI:1 because it affects the conditions of competition.³⁹⁰

Regarding GATT obligation with respect to exports, there is no GATT obligation against the use of export taxes or fees.³⁹¹ The general prohibition on quantitative restrictions prescribed by GATT Article XI:1 is subject to a number of exceptions. GATT Article XI:2 lists three

³⁸⁸ . See *Japan – Trade in Semi-Conductors*, Report of the GATT Panel, BISD, 35th Supp. 116, 155, para. 109 (1988).

³⁸⁹ . See *Id.*

³⁹⁰ . See *supra*, footnote 361, at 130, para. 150 of GATT Panel report.

³⁹¹ . See JACKSON, *supra*, footnote 371, at 396.

exceptions: (a) use of export restrictions to relieve critical shortages, (b) use of import and export restrictions necessary to apply certain commodity standards and (c) import restrictions to enforce certain government agricultural programs.³⁹² Likewise GATT Article XII and XVIII permit the use of quotas in the event of balance-of-payments problem.³⁹³ Another exception to it is safeguard action imposed as a remedy under GATT Article XIX.³⁹⁴ With these provisions of exception we can draw an inference that quantitative restrictions may be temporarily applied under certain conditions.

³⁹² The Agreement on Agriculture has brought the area of agriculture trade under GATT/WTO Rules. The Agreement on Agriculture forbids Members from applying non-tariff barriers to agriculture imports. Article 4:2 of the Agreement on Agriculture provides that "Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties," A footnote to this paragraph list the measures affected, including "quantitative import restrictions, variable import levies, minimum import prices. ...voluntary export restraints, ... but not measures maintained under balance-of-payments provisions or under other general, non-agricultural-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement."

Cotton, textiles and clothing were formally exempted from GATT rules, in particular the non-discrimination rule and the general prohibition of quantitative restrictions. However, it had its own regime, i. e., the Short-Term Arrangement Regarding International Trade in Textiles (Oct. 1961- Sep. 1962), the Long-Term Arrangement Regarding International Trade in Textiles (Oct. 1962 -1973). It was replaced by the Multifibre Arrangement in 1974 and the Multifibre Arrangement remained in effect until the WTO Agreement on Textiles and Clothing came into force in 1995. The WTO Agreement on Textiles and Clothing provides ten years transitional period for the gradual reintegration of textile and clothing products into the General Agreement, so that it will be subject of GATT rules in the future.

³⁹³ In accordance with GATT Article XII, a Member may restrict the quantity or value of imports to the extent necessary to prevent or forestall a serious decline in foreign exchange reserves or, when reserves are low, to achieve a reasonable increase in such reserves. GATT Article XVIII:B permits developing country Members import restrictions to ensure a level of reserves adequate for the implementation of its program of development. The paragraph 4 of the 1994 Understanding on the Balance-of-Payments provides that restrictive import measures taken for balance-of-payments purposes may only be applied to control the general level of imports and may not exceed what is necessary to address the balance-of-payments situation.

³⁹⁴ GATT Article XIX permits Members to raise trade barriers to safeguard a domestic industry seriously injured or threatened with serious injury by import competition. If the conditions for imposing escape clause relief are fulfilled, a Member may suspend a GATT obligation in whole or in part, or withdraw or modify a tariff concession, on a temporary basis. See Art. 7:1 of the Agreement on Safeguards. A Member imposing safeguard measures must not discriminate among sources of the imported product. See Art. 2:2 of the Agreement on Safeguards. Voluntary Restraint Agreement may be considered as a *de facto* exception to the obligation of quantitative restrictions under GATT Article XI and XIII. The Agreement on Safeguards requires Members to phase out voluntary restraint agreement over a five years period and thereafter making them illegal unless they are concluded in strict observance of the rules laid down in the Safeguard Agreement. See Art. 11:2 of the Safeguard Agreement.

In applying quantitative restrictions by Member States, GATT Article XIII:1 requires that it should be administered on a non-discriminatory basis. In other words, quantitative restrictions should apply to all trading partners equally when it is applied. The Appellate Body in *EC – Bananas III* stipulates the essence of the non-discrimination obligations and says that all like products be treated equally, irrespective of their origin.³⁹⁵ Many countries use a system of “automatic licensing”³⁹⁶ and “non-automatic licensing”³⁹⁷ to monitor and regulate imports. The Agreement on Importing Licensing Procedures prescribes the rules governing import licensing procedures by improving the transparency and predictability of such procedures.

III.2.A(5) OTHER DUTIES AND FINANCIAL CHARGES

GATT Article II:1 (b) obligates Member States that with regard to products on which there is a tariff concession, no other duties and financial charges may be imposed in excess of those imposed in 1948 or at any moment of accession to the GATT or WTO or provided for in mandatory legislation in force at either date. The Understanding on the Interpretation of Article II:1 (b) of GATT provides for an obligation to record all other duties and charges in the WTO Member’s Schedule. Article II:2(c) of GATT permits imposition of fees or other charges

³⁹⁵ See *European Communities –Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III)*, Report of the WTO Appellate Body, adopted on 25 September 1997, WT/DS27/AB/R, DSR 1997:II, at para.190.

³⁹⁶ An automatic licensing system is used to monitor the importation of goods. Article 2 of the Importing Licensing Agreement governs automatic licensing systems. In accordance with it, in order to qualify as an automatic licensing system, completed applications must be approved immediately and in no case more than 10 days after submission.

³⁹⁷ A non-automatic licensing system is used to administer quotas and tariff-rate quotas, and a limited number of licenses are issued under this system. Article 3 of the Importing Licensing Agreement governs non-automatic licensing systems. In accordance with it, government using them must publish licensing criteria in a manner that is understandable. Denials of applications must be accompanied by reasons and applicant must be provided an opportunity to appeal.

commensurate with the cost of services rendered. GATT Article VIII:1(a) requires that all fees and charges, other than tariffs, imposed on or in connection with import or export shall be limited to the approximate cost of services rendered.

III.2.A(6) TRANSPARENCY

Article X of GATT obligates Member State for the publication of all laws, regulations, judicial decisions and administrative rulings, measures adopted, etc. affecting trade or imports and exports.³⁹⁸ It also includes an obligation to publish relevant international agreements. In this respect, GATT Panels and the WTO Appellate Body have emphasized the duty of Member to provide information in a comprehensive and timely manner.³⁹⁹ Furthermore, such laws, regulations and measures may not be enforced before official publication. Member States further require to administer such laws, regulations, decisions and rulings in a uniform, impartial and reasonable manner. At this point it is worth to mention that trade laws and agreements include the regulation of sales, distribution, inspection and any other use of the products, and has been interpreted as covering administrative rulings in individual cases where such rulings establish or revise principles or criteria applicable in future cases.⁴⁰⁰ Regarding the requirement of uniform, impartial and reasonable administration of the law, GATT Panels have elaborated only on

³⁹⁸ GATT Contracting Parties reaffirmed their commitment to existing obligations under the GATT regarding publication and notification under paragraph 2 and 3 of the 1979 Tokyo Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance. See L/4907, BISD, 26th Supp. 210 (1979). In the Ministerial Decision on Notification Procedures (a partial successor arrangement to the 1979 Tokyo Round Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance) adopted on 15 April 1994, the Members reaffirm their commitment to notify and publish measures affecting the operation of GATT 1994.

³⁹⁹ See, *Japan - Trade in Semiconductors*, Report of the GATT Panel, adopted on 4 May 1988, BISD 35S/116, L/6309; *European Communities - Measures Affecting the Importation of Certain Poultry Products*, WTO Appellate Body Report, WT/DS69/AB/R.

⁴⁰⁰ See *Japan - Measures Affecting Consumer Photographic Film and Paper*, Report of the WTO Panel, adopted on 22 April 1998, Document WT/DS44/R.5 at para. 10.388.

uniformity and stipulated that the requirement is satisfied if rules are applied in a substantially uniform manner.⁴⁰¹ Besides these commitments, several of the WTO Agreements contain their own transparency provisions.⁴⁰²

The concept of transparency as reflected in WTO Agreements also obligates Member State the requirement of notification of various laws and regulations including various forms of governmental actions to the WTO.⁴⁰³ The WTO Trade Policy Review Mechanism encourages greater transparency in national trade policy.⁴⁰⁴ The Council for Trade in Goods is responsible for reviewing notification obligations and procedures under the Multilateral Trade Agreements.

The provisions of transparency, besides others, facilitate monitoring of compliance with obligations under the WTO Agreements. However, it is not without any exception. WTO Members are not required to disclose confidential information which would impede law

⁴⁰¹ See *Chile – Restrictions on Imports of Dessert Apples*, Report of the GATT Panel, complained by Chile L/3149 BISD Supp. 36 at 93-135 (1990).

⁴⁰² Article 2:9 of the Agreement on Technical Barriers to Trade obligates WTO Members to publish advance notice of any proposed product standard. Article 7 of the Agreement on the Application of Sanitary and Phytosanitary Measures requires WTO Members to notify changes in their sanitary and phytosanitary measures and provide information on such measures in accordance with the provisions of Annex B. Article 18:2-3 of the Agreement on Agriculture obligates WTO Members to submit notifications on the implementation of commitments made under the Agreement. Article 2:3 including other Articles of the Agreement on Textiles and Clothing require notification. Article 2 (g), and Article 3 (e) of the Agreement on Rules of Origin require WTO Members to publish their laws, regulations, judicial decisions and administrative rulings related to rules of origin. Article 5 of the Agreement on Import Licensing Procedure obligates WTO Members which instituting licensing procedures to notify the Committee on Import Licensing. Article 6:1 of the Agreement on Trade-Related Investment Measures requires WTO Members to publish related laws, regulations and decisions. Article 25 of the Agreement on Subsidies and Countervailing Measures and Article 12 of the Agreement on Safeguard obligate WTO Members a duty of notification.

⁴⁰³ A WTO Secretariat Note prepared for the Working Group on Notification Obligations and Procedures, established pursuant to a Decision taken by the Uruguay Round Trade Negotiations Committee, lists 165 different notification obligations and procedures in the trade in goods area. See G/NOP/W/2. See also G/L/223/Rev.1 of 27 January 1999, the most recent paper setting out information on compliance with these procedures.

⁴⁰⁴ Under the Trade Policy Review Mechanism, the first four trading entities including European Communities shall be subject to trade policy review every two years. The next 16 shall be reviewed every four years. Other WTO Members shall be reviewed every six years, except that a longer period may be fixed for least-developed country Members.

enforcement or otherwise be contrary to the public interest or which would prejudice legitimate commercial interests of particular enterprise, public or private.⁴⁰⁵

III.2.A(7) JUDICIAL/ADMINISTRATIVE REVIEW

Article X:3(b) of GATT requires Member States to maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters.⁴⁰⁶ Other WTO Agreements also obligate Member to maintain provisions of procedures and review of any administrative action/decision related to WTO subject matters in their domestic laws.⁴⁰⁷ Requirement of maintaining Judicial or administrative review is one of the fundamental obligations prescribed by the WTO Agreements. At the same time this obligation is going to bring far reaching results in favor of justice and fairness in international trade.

III.2.A(8) SANITARY & PHYTOSANITARY MEASURES

⁴⁰⁵ . See Article X:1 of GATT.

⁴⁰⁶ . No claim was ever made under Article X:3(b) before a GATT Panel. See *supra*, footnote 323, at 297-298.

⁴⁰⁷ . See Article 13 of the Agreement on Implementation of Article VI of the General Agreement on Tariff and Trade 1994 (Antidumping Code), Article 23 of the Agreement on Subsidies and Countervailing Measures, Article 2(j) and 3(h), Annex II (Article 3 (f)) of the Agreement on the Rule of Origin, Article 11 of the Agreement on Implementation of Article VII of the General Agreement on Tariff and Trade 1994, Article 4 of the Agreement on Pre-shipment Inspection. However, Agreement on Import Licensing Procedure and Agreement on the Application of Sanitary and Phytosanitary Measures do not have provision of judicial or administrative review obligation.

Sanitary and phytosanitary measures which impede trade were covered by Article XX (b) of the GATT 1947.⁴⁰⁸ Article XX (b) of the GATT permits the adoption and enforcement of measures to protect human, animal, or plant life or health. However, the Chapeau to Article XX of the GATT stipulates that “such measures are not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction to international trade”⁴⁰⁹ The Agreement on the Application of Sanitary and Phytosanitary Measures⁴¹⁰ (hereinafter referred to as the “SPS” Agreement) establishes a new, comprehensive set of norms for the adoption and maintenance of sanitary and phytosanitary measures.⁴¹¹

⁴⁰⁸ . See preamble of the Agreement on the Application of Sanitary and Phytosanitary Measures; Article XX (b) of the GATT 1947. As an exception to the GATT 1947, Article XX (b) of the GATT 1947 covers health measures that are discriminatory (GATT inconsistent) whereas the SPS Agreement covers all sanitary and phytosanitary measures whether they are discriminatory or non-discriminatory.

⁴⁰⁹ . With respect to the use of the GATT Article XX, GATT Panels and the WTO Appellate Body have adopted a “least trade restrictive” principle which is also known as the minimum derogation principle. In accordance with this principle, if there are alternative measures reasonably available, i. e., measures as effective as the one adopted but are less trade restrictive, Member should adopt the less trade restrictive measure. If the less restrictive trade measure is available and is not adopted, then the measures adopted does not qualify under the Article XX exception. See *United States – Standards for Reformulated and Conventional Gasoline*, Report of the WTO Appellate Body, 1996-AD-1, WT/DS2/AB/R, at 27 (1996); *United States – Restrictions on Imports of Tuna*, Report of the GATT Panel, circulated on 16 June 1994, reprinted in 33 INT’L LEGAL MATERIALS 839 (1994) (not adopted); *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, Report of the GATT Panel, adopted on 22 March 1988, BISD, 35th Supp. 98, 113-15, paras. 4.4-4.7 (1998); See *supra*, footnote 294, at 392-393, paras. 5.25-5.27 of GATT Panel report.

⁴¹⁰ . The SPS Agreement was negotiated in tandem with the Agreement on Agriculture, as negotiators wanted to ensure that the liberalization in the agricultural sector achieved by the Agreement on Agriculture would not be undermined by the misuse of health regulations for protectionist purposes.” Article 14 of the Agreement on Agriculture states that “Members agree to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures.”

⁴¹¹ . Traditionally, a sanitary measure addresses human and animal health while a phytosanitary measure addresses plant health. In accordance with Article 1 of ANNEX ‘A’ of the Agreement on the Application of Sanitary and Phytosanitary Measures, sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety. Here, “animal” includes fish and wild fauna; “plant” includes forests and wild flora; “pests” include weeds; and “contaminants” include pesticide and veterinary drug residues and extraneous matter.

The SPS Agreement covers both discriminatory as well as non-discriminatory SPS measures affecting international trade.⁴¹² The SPS Agreement confers upon WTO Members specific rights and obligations relating to sanitary and phytosanitary measures. The WTO Members are free to set whatever human, plant and animal health and food safety standards they deem appropriate provided that such measures are not inconsistent with the provisions of the SPS Agreement.⁴¹³ Hence, the right of Members to take SPS measures is not without limitation, and is subject to the disciplines set out in the SPS Agreement. Thus, in exercising this right Members' are obligated to ensure that the SPS measures are: scientifically justified; based on an assessment of risks and no more than necessary; not arbitrary or unjustifiable and, not constituting a disguised restriction on trade.⁴¹⁴

According to paragraph 2 of Article 2 of the SPS Agreement, Members require to ensure that their SPS measures are applied only to the extent necessary to protect human, animal or plant life or health. It further requires that SPS measures be based on scientific principles and not be maintained without sufficient scientific evidence. Paragraph 1 of Article 5 of the SPS Agreement further elaborates about scientific requirement and states that Members require to ensure their sanitary and phytosanitary measures be based on an assessment of the risks to human, animal or plant health or life.⁴¹⁵ However, paragraph 7 of Article 5 of the SPS

⁴¹² See Article 1:1 of the SPS Agreement; *Panel Report, EC Measures Concerning Meat and Meat Products (Hormones) (EC – Hormones(US))*, complaint by the United States, WT/DS26/R/USA, DSR 1998:III, 699, para. 8.38; *Panel Report, EC Measures Concerning Meat and Meat Products (Hormones) (“EC – Hormones (Canada)”)*, complaint by Canada, WT/DS48/R/CAN, DSR 1998: II, 235, para. 8.39.

⁴¹³ See SPS Agreement, *supra*, footnote 328, art.2, paragraph 1.

⁴¹⁴ See SPS Agreement, *supra*, footnote 328, art.2, paragraph 2 &3.

⁴¹⁵ See *EC Measures Concerning Meat and Meat Products (Hormones)*, Report of the WTO Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:I, para. 177; *Japan – Measures Affecting Agriculture Products*, Report of the WTO Appellate Body, WT/DS76/AB/R, adopted on 19 March 1999, at para. 73.

Agreement allows Members to adopt provisional SPS measures in cases where relevant scientific evidence is insufficient and certain other requirements are fulfilled.⁴¹⁶

According to paragraph 3 of Article 2 of the SPS Agreement, Members require to ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail.⁴¹⁷ It further requires that sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

Article 3 of the SPS Agreement aims to harmonize sanitary and phytosanitary measures to reduce the trade barriers caused by different standards. Hence, Members are under an obligation to “base” their sanitary and phytosanitary measures on international standards, guidelines or recommendations, where they exist,⁴¹⁸ or choose to establish an sanitary and phytosanitary measure which conforms to the relevant international standard;⁴¹⁹ or deviate from international standards and to choose their own level of sanitary and phytosanitary protection which result in a

⁴¹⁶ . See *Japan – Measures Affecting Agriculture Products*, Report of the WTO Appellate Body, WT/DS76/AB/R, adopted on 19 March 1999, at para. 80.

⁴¹⁷ . See *Australia – Measures Affecting Importation of Salmon*, Compliance Panel Report, Resourse to Article 21.5 of the DSU by Canada, WT/DS18/RW para. 7.111.

⁴¹⁸ . See SPS Agreement, *supra*, footnote 328, art. 3, paragraph 1. Annex A.3 of the SPS Agreement defines “international standards, guidelines and recommendations” as those set by: (1) the Codex Alimentarius Commission in the area of food safety; (2) the International Office of Epizootics in the area of animal health; (3) the International Plant Protection Convention in the area of plant health; and (4) other relevant international organizations open for membership to all WTO Members, as identified by the SPS Committee, for matters not covered by the three mentioned organizations.

⁴¹⁹ . See SPS Agreement, *supra*, footnote 328, art. 3, paragraph 2; See *EC Measures Concerning Meat and Meat Products (Hormones)*, Report of the WTO Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:I, para. 170.

higher level of protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations.⁴²⁰

Article 4 of the SPS Agreement obligates Members that they must accept the sanitary and phytosanitary measures of other WTO Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product.

Members are under an obligation to transparency and notification.⁴²¹ Each Member is required to publish any proposed regulation which is not based on international standard and which may have significant impact on trade. A Member must notify a change in its sanitary and phytosanitary measures related regulations. There must be delay between the publication of final regulation and its effective date, so that it enables all interested Members to become acquainted with them. Also Members are obligated to establish a national Enquiry Point so that it provides answers to all reasonable questions from other Members with respect to sanitary and phytosanitary measures.

The SPS Agreement does not contain special and differential treatment for developing countries in the nature of exceptions from the general obligation of Members.⁴²² It provides for technical assistance and gives developing countries additional time in which to fulfill some of the obligations under the Agreement. Article 10 of the SPS Agreement requires other Members that,

⁴²⁰ See SPS Agreement, *supra*, footnote 328, art. 3, paragraph 3; See *EC Measures Concerning Meat and Meat Products (Hormones)*, Report of the WTO Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:I, para. 172.

⁴²¹ See SPS Agreement, *supra*, footnote 328, art. 7, and Annex B.

⁴²² See Marsha A. Echols, *Sanitary and Phytosanitary Measures*, in ABA SEC. INT'L L. & PRAC., THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U. S. IMPLEMENTING LEGISLATION 205 (Terence P. Stewart ed., 1996).

in the preparation and application of sanitary and phytosanitary measures, they must take account of the special needs of developing country Members, especially the least developed Country Members. According to paragraph 3 of Article 10 of the SPS Agreement, the Committee on Sanitary and Phytosanitary Measures may permit importing developing Members time-limited exceptions in whole or in part taking into account their financial, trade and development needs. Article 14 of the SPS Agreement gives a least-developed Member benefit up to five years of delay in applying the Agreement to measures affecting importation and imported products.

III.2.A(9) TECHNICAL BARRIERS TO TRADE

The Agreement on Technical Barriers to Trade⁴²³ prescribes certain obligations to WTO Members. Members are obligated to provide most-favored-nation treatment and national treatment commitments in respect of technical regulations, standards and conformity assessment procedures⁴²⁴ and to ensure that technical regulations shall not be more trade restrictive than necessary to fulfill a legitimate objective,⁴²⁵ taking into account the risk non-fulfillment would

⁴²³ . The Agreement on Technical Barriers to Trade is the multilateral successor to the Standards Code, signed by 32 GATT contracting parties at the conclusion of the 1979 Tokyo Round of Trade Negotiations. The Agreement on Technical Barriers to Trade and the Agreement on the Application of Sanitary & Phytosanitary Measures are similar in a number of ways, however their substantive provisions are different.

The Agreement on Technical Barriers to Trade has not been interpreted to any significant degree by WTO Appellate Body or Panel. The Agreement on Technical Barriers to Trade deals with technical regulations and standards. It covers all products, including industrial and agricultural products. However, it does not cover measures subject to the Agreement on Application of Sanitary and Phytosanitary Measures. See TBT Agreement, *supra*, footnote 54, art. 1, paragraph 5.

Sanitary and Phytosanitary Measures may only be applied to the extent necessary to protect human, animal or plant life or health, based on scientific principles and not maintained without sufficient scientific evidence. Whereas measures related to the Agreement on Technical Barriers to Trade may be applied and maintained for other reasons, including national security or to prevent deceptive practices, etc. Both Agreements encourage Members to use international standards.

The Agreement on Technical Barriers to Trade was negotiated to ensure that technical regulations and standards including packing, marking and labeling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade.

“Technical regulation” is defined under paragraph 1 of Annex I of the Agreement on Technical Barriers to Trade and it says: “Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.” See *European Communities – Trade Description of Sardines*, Report of the WTO Appellate Body, WT/DS231/AB/R, adopted on 23 October 2002, paras. 189-195.

Paragraph 2 of Annex I of the Agreement on Technical Barriers to Trade defines “Standard” as a “Document approved by a recognized body, that provides for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory.”

Paragraph 3 of Annex I of the Technical Barriers to Trade defines “conformity assessment” procedure as “any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.”

“The Agreement on Technical Barriers to Trade establishes rules on distinguishing legitimate standards and conformity assessment procedures from protectionist measures and procedures in three areas: (i) the preparation and adoption of technical regulations and standards, (ii) conformity assessment procedures and mutual recognition of other countries assessments, and (iii) information and assistance about technical regulations, standards, and conformity assessment procedures. ... It establishes general procedural requirements to be observed when adopting or using such measures so that they do not create unnecessary obstacles to trade.” See BHALA, *supra*, footnote 5, at 126.

⁴²⁴ . See para 1 of Article 2 of the Agreement on Technical Barriers to Trade for technical regulations; see Article 5 (1) (1) of the Agreement on Technical Barriers to Trade for conformity assessment procedure and Annex 3 (D) of the Agreement on Technical Barriers to Trade for standards.

⁴²⁵ . See TBT Agreement, *supra*, footnote 329, art. 2, paragraph 2. Legitimate objectives for technical regulations are mentioned in para 2 of Article 2 of the Agreement on Technical Barriers to Trade and accordingly it

create. The technical regulation are to be prepared on the basis of available scientific information, related processing technology or intended end-uses of products and not with a view to or with the effect of creating unnecessary obstacles to international trade.⁴²⁶ The Members are required to use as far as possible international standards except where they are ineffective or inappropriate.⁴²⁷ Members are required to give positive consideration to accepting as equivalent regulation of other Members, even if they differ from their own, provided they are satisfied that these regulations adequately fulfill objectives of their own regulations.⁴²⁸ In case a new regulation is to differ from the international standard or an international standard does not exist notice is required to publish so that other Members become acquainted with the new regulation.⁴²⁹ The new regulation is to be notified to the WTO Secretariat along with its rationale.⁴³⁰ Members are required to ensure that an inquiry point exists which is able to answer all reasonable inquiries from other Members and interested parties and to provide relevant documents regarding technical regulations, standards, conformity standards and central, regional and local systems and arrangements.⁴³¹

Developing country Members including least-developed are entitled to prepare and apply technical regulations, taking into account their special development, financial and trade needs and in the operation of institutional needs.⁴³² Such country Members can adopt certain technical regulations, standards or conformity regulations aimed at preserving indigenous technology, and

includes: national security, the prevention of deceptive practices, the protection of human health or safety, animal or plant life or health, or the environment.

⁴²⁶ . See TBT Agreement, *supra*, footnote 329, art. 2, paragraph 2.

⁴²⁷ . See TBT Agreement, *supra*, footnote 329, art. 2, paragraph 4.

⁴²⁸ . See TBT Agreement, *supra*, footnote 329, art. 2, paragraph 7.

⁴²⁹ . See TBT Agreement, *supra*, footnote 329, art. 2, paragraph 9.

⁴³⁰ . See *Id.*

⁴³¹ . See TBT Agreement, *supra*, footnote 329, art. 10, paragraph 1.

⁴³² . See TBT Agreement, *supra*, footnote 329, art. 12, paragraph 2 & 3.

production methods and processes compatible with their development needs.⁴³³ The Agreement on Technical Barriers to Trade further says that such Members shall be provided with necessary technical assistance.

III.2.A(10) IMPORT LICENSING, ANTIDUMPING, COUNTERVAILING AND SAFEGUARDS

The Agreement on Import Licensing Procedures regulates about import licensing⁴³⁴ and ensures that import licensing procedures are not constituting trade barriers in themselves.⁴³⁵ Generally a licensing system is used to determine who has the right to import under the quota, when quotas are imposed. the Agreement on Import Licensing Procedures does not mandate how quotas are to be allocated among individual suppliers.⁴³⁶

According to the Agreement on Import Licensing Procedures, Members require to implement import licensing in a transparent and predictable manner.⁴³⁷ It further requires that the rule for import licensing procedures is to be “neutral in application and administered in a fair and

⁴³³ . See TBT Agreement, *supra*, footnote 329, art. 12. paragraph 4.

⁴³⁴ . Import licensing is defined as administrative procedures used for the operation of import licensing regimes requiring the submission of an application, or other documentation, to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member. See para 1 of Article 1 of the Agreement on Import Licensing Procedures.

⁴³⁵ . See preamble of the Agreement on Import Licensing Procedures. See *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/R, adopted on 12 March 1998, WT/DS69/AB/R, adopted 13 July 1999.

⁴³⁶ . Nepal has laws related to import licensing procedures.

⁴³⁷ . See Preamble of the Agreement on Import Licensing Procedures.

equitable manner.”⁴³⁸ Likewise, Members are under an obligation to publish information about relevant rules and changes to them and the products to which they apply.⁴³⁹

Licensing procedures are automatic⁴⁴⁰ and non-automatic.⁴⁴¹ Automatic licenses do not normally present any problem as they are a trade monitoring device.⁴⁴² The Agreement on Import Licensing Procedures requires that: “(a) automatic licensing procedures shall not be administered in such a manner as to have restricting effects on imports subject to automatic licensing. Automatic licensing shall be deemed to have trade restricting effects unless, *inter alia*:

- (i) any person, firm or institution which fulfils the legal requirements of the importing Member for engaging in import operations involving products subject to automatic licensing is equally eligible to apply for and obtain import licensing;
- (ii) applications for licensing may be submitted on any working day prior to customs clearance of the goods;
- ii. applications for licensing when submitted in appropriate and complete form are approved immediately on receipt, to the extent administratively feasible, but within a maximum of ten working days;”⁴⁴³

⁴³⁸ . See Article 1:3 of the Agreement on Import Licensing Procedures.

⁴³⁹ . See Article 1:4(a) of the Agreement on Import Licensing Procedures.

⁴⁴⁰ . Automatic import licensing is defined as import licensing where approval of the application is granted in all cases. See para 1 of Article 2 of the Agreement on Import Licensing Procedures.

⁴⁴¹ . Non-automatic import licensing procedures are defined as import licensing not falling within the definition contained in paragraph 1 of Article 2. See para 1 of Article 3 of the Agreement on Import Licensing Procedures.

⁴⁴² . See UNCTAD document (UNCTAD/EDM/Misc.232/Add.32), *The Course on Dispute Settlement in International Trade, Investment and Intellectual Property*, WORLD TRADE ORGANIZATION, Module 3.15 Agriculture, p.60, United Nations, New York and Geneva (2003). Available at www.unctad.org. See foot note 4 of Article 2 of the Agreement on Import Licensing Procedures.

⁴⁴³ . See Article 2:2(a) of the Agreement on Import Licensing Procedures.

The Agreement on Import Licensing Procedures particularly focuses on Members' compliance obligation.⁴⁴⁴ With respect to non-automatic licenses, the Agreement on Import Licensing Procedures prescribes obligation to Members that it should not have trade-restrictive or trade-distortive effects on imports additional to those caused by the imposition of the restriction.⁴⁴⁵

In addition to it, GATT 1994 has a number of provisions on safeguards intended to protect domestic industries against increased imports causing balance of payment problems, damage to industry. GATT 1994 provides possibilities for adjustment of tariffs, imposition of anti-dumping or countervailing duties, quantitative restrictions on discriminatory or non-discriminatory basis.⁴⁴⁶

Members whose national legislation contains provisions on safeguards, antidumping and countervailing are under an obligation to maintain judicial, arbitral or administrative tribunals or procedures for the purpose of prompt review of administrative actions relating to final determination or reviews. Protection of domestic industry under the Agreement on Safeguards, Antidumping, and Subsidies and Countervailing Measures can be initiated if the injury to domestic industry is being caused. For it, the imports must be taking place in increased

⁴⁴⁴ . Article 8:2 of the Agreement on Import Licensing Procedures stipulates that: "(a) Each Member shall ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement. (b) Each Member shall inform the Committee of any changes and regulations relevant to this Agreement and in the administration of such laws and regulations."

⁴⁴⁵ . See Para 2 of Article 3 of the Agreement on Import Licensing Procedures.

⁴⁴⁶ . A number of multilateral agreements, i. e., Agreement on Import Licensing Procedures, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping), Agreement on Subsidies and Countervailing Measures, Agreement on Safeguards have been developed and refined over years to ensure a uniform application of safeguard measures. These Agreements interpret relevant provisions of GATT 1994, particularly Articles VI, XVI, and XIX. As Nepal has no anti-dumping, countervailing, and safeguard legislations, Member's obligations prescribed by the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping), Agreement on Subsidies and Countervailing Measures, Agreement on Safeguards are not discussed here in detail.

quantities or are being dumped or subsidized. Antidumping measures are permissible if dumped products are causing material retardation of the establishment of domestic industry. These safeguards can be initiated at the request of the domestic industry.

III.2.B NEPALESE LEGAL REGIME AFFECTING FOREIGN TRADE IN GOODS

Pursuant to Article 35 and 41 of the Constitution of the Kingdom of Nepal, 1990,⁴⁴⁷ and the His Majesty's Government (Allocation of Business) Regulation 2000, the Ministry of Industry, Commerce and Supplies is primarily responsible for making and enforcing the policies affecting foreign trade. As one of the Departments of the Ministry of Industry, Commerce and Supplies, the Department of Commerce is responsible for registration of trade firms, and issuing licenses for goods to be imported or exported. The Ministry of Finance is responsible for the revenue policy and planning, revenue administration, and collection of customs duties and taxes. The Department of Customs is primarily responsible for the administration of customs. The Trade Promotion Center as a governmental entity works for the promotion of foreign trade, particularly overseas trade. The Commercial Council coordinates activities of all agencies involved in the export activities. Many other governmental departments & offices are also involved in the course of foreign trade in goods in Nepal. Nepal has many laws & regulations affecting foreign trade in goods. Major provisions of such laws & regulations affecting foreign trade in goods are discussed in the following sub-titles.

⁴⁴⁷ . *The Constitution of the Kingdom of Nepal, 1990 (2047)*, His Majesty's Government, Ministry of Law, Justice and Parliamentary Affairs, Law Books Management Board, Babar Mahal, Kathmandu, Nepal.

III.2.B (1) IMPORT REGULATION

III.2.B (1)(i) *Registration of Firm or Company*

It is necessary to obtain the registration of entity to engage in business in Nepal. It covers activities related to export and import. However, Individuals for personal purpose, not for trading or business, can import without any registration requirements. The Department of Commerce is a concerning department for firms related to commerce. Likewise, the Department of Industry is a concerning department for firms related to industry. According to the Foreign Investment and Technology Transfer Act, 1992, foreign owned companies, or joint companies with foreign participation, are required to make an application to the Department of Industry for obtaining permission to engage in industrial business in Nepal.

Agencies, sole proprietor undertakings and partnership business for trading are required to register at the Department of Commerce. Business firms for commerce or trade in goods register at the Department of Commerce in accordance with the Private Firm Registration Act, 1956.⁴⁴⁸ The Private Firm Registration Act, 1956 governs the rule of registration of a private firm⁴⁴⁹ engaged in business with respect to importation or exportation of goods. Any individual desiring to register a private firm must submit the form prescribed by the Private Firm Registration Regulation, 1978 along with the prescribed application fees.⁴⁵⁰ If the Department finds the

⁴⁴⁸ . With respect to the registration of entity related to trade in services, Nepal Agency Act, 1958 and Partnership Act, 1964 prescribes the basic rules and procedures.

⁴⁴⁹ . Pursuant to Section 2 (a) of the Private Firm Registration Act, 1956, a private firm is defined as any firm, a company or a concern set up by any person to engage in the business of export or import.

⁴⁵⁰ . See Private Firm Registration Regulation, Rule 3 and Schedule-I (1978) (Nepal).

statement of the application true and feels reasonable to register, it will register the private firm, and accordingly issue a certificate of registration. The Private Firm Registration Act, 2056 prohibits to run a private firm without registration.⁴⁵¹

Provisions of incorporation of a company in Nepal are prescribed by the Company Act, 1997. Foreigner, with a license to run activities for profit, may also incorporate a company in Nepal.⁴⁵²

Any one who wants to register a company in Nepal must submit an application with a Memorandum of Association and the Articles of Association of the company along with application fee to the Office of the Company Registrar.⁴⁵³ The Company Registrar, with

necessary inquiries, registers the company and issues a certificate of incorporation within 15 days.⁴⁵⁴ However, the Company Registrar has the authority of rejecting registration of a

company if the proposed name of the company is already registered, or the proposed name is against public moral, etc. or the object of the company is contradictory to the existing laws, or the conditions required to incorporate the company under the Company Act are not fulfilled.⁴⁵⁵

In case the Company Registrar rejects to register a company, he or she gives due notice and reasoning of rejection to the concerning applicant.⁴⁵⁶

III.2.B (1)(ii) *Customs Tariffs*

⁴⁵¹ . *See Private Firm Registration Act, Section 3 (1956) (Nepal).*
⁴⁵² . *See Company Act, Section 3(2) (1997) (Nepal).*
⁴⁵³ . *See Ibid., Section 4.*
⁴⁵⁴ . *See Ibid., Section 5.*
⁴⁵⁵ . *See Ibid., Section 6.*
⁴⁵⁶ . *See Ibid., Section 7.*

Nepal imposes customs tariffs on imported goods pursuant to Section 2 (c) and Section 6 of Customs Act, 1962 and Annual Fiscal Act.⁴⁵⁷ Each year the Government of Nepal imposes the tariffs rate on imported goods in accordance with the rate fixed under the Schedule of Fiscal Act. Nepal is a Member of World Customs Organization. The Harmonized System of Commodity Classification (HS) was adopted in Nepal since the fiscal year 1992/1993. The 2002 version of the HS Nomenclature had been put into effect. As a general rule, *ad valorem* duties are applied in Nepal. A limited number of products are subject to specific duties.⁴⁵⁸ However, regional free trade agreement or preferential trade agreement, i. e., Agreement on SAARC Preferential Trading Arrangement (SAPTA) of 1993,⁴⁵⁹ bio-lateral agreements like the Indo-Nepal Treaty of Trade, 2002⁴⁶⁰ have prescribed different tariffs rate.

Nepal has shifted from a highly regulated high tariff import regime to liberal one. Since the early 1990's there has been a downward revision in tariff rates. The unweighted average tariff rate fell from nearly 40% to 14%. Most rates now fall at 5 – 25% while more than 70% of rates exceeded 25% in 1990.⁴⁶¹ The prevailing basic customs tariff rate are 5%, 10%, 15%, 25%,

⁴⁵⁷ . Each year the Finance Minister of His Majesty's Government of Nepal presents an annual budget to the Parliament of Nepal. In this connection, the Parliament of Nepal enacts the Fiscal Act annually and the Fiscal Act fixes the rate of customs duties for importing goods. Obviously such annual fixation respects the Schedule of Concession on goods submitted to the WTO.

⁴⁵⁸ . Products like motor fuels, kerosene oils, gas and fuel oils, cement clinkers and some cements, liquor, tobacco and tobacco products are subject of specific duties.

⁴⁵⁹ . Agreement on SAARC Preferential Trading Arrangement (SAPTA), 1993 provides preferential trading arrangement among Members of the South-Asian Association for Regional Cooperation (SAARC) and Nepal also is a member of the SAPTA. It aims to reduce and provide different tariff rate among Members.

⁴⁶⁰ . Treaty of Trade Between the Government of India and His Majesty's Government of Nepal is signed on 6th December 1991 and currently it is in force from 6th March 2002 to 5th March 2007. In accordance with Article XII(a) of Indo-Nepal Treaty of Trade, this Treaty shall be automatically extended for the periods of five years at a time. Customs duty is exempted on primary products in trade between India and Nepal under Article IV of the Indo-Nepal Treaty of Trade, 2002, and exemption or preferential customs duty is available on other products between India and Nepal under Article V and VI of the Indo-Nepal Treaty of Trade, 2002.

⁴⁶¹ . See *Nepal: Trade and Competitiveness Study*, Draft for Consultation and Discussion, A Study Conducted as part of the Integrated Framework (IF) for Trade-Related Technical Assistance by the World Bank on behalf of the Integrated Framework (IF) Working Group, which consists of six agencies (IMF, ITC, UNCTAD, UNDP, WTO and the World Bank), p. 19 (June 6, 2003).

40%, 80% and 130%. There are a significant number of tariff lines with zero duty. The majority of the imports items fall in the customs duty range of 10 – 20 per cent. A minimum tariff rate up to 5% applied for daily consumption items.⁴⁶² Since Nepal became member of the WTO, Nepal is bound to apply customs tariffs not more than the rate specified in the Nepal's Schedule of Concessions on Goods.

III.2.B (1)(iii) Tariff Rate Quotas, Tariff Exemptions

There are no tariff quotas for imports in effect in Nepal. Section 9 of the Customs Act, 1962 provides for certain tariff exemptions and tariff reductions, in order to facilitate the import of specific goods on provisional basis. These measures are taken by the government⁴⁶³ and published in the Nepal Gazette.

III.2.B (1)(iv) Other Duties and Charges (ODCs)

Besides MFN tariff rates, Nepal imposes 'additional duties' as well on imported goods. Additional duties and taxes include: (i) a development levy of 2-9%, an agricultural development levy of up to 10%, and a security levy, amounting to 0.5% for all imports and exports; (ii) local

⁴⁶² See WTO document (WT/ACC/NPL/16, para 37), *Report of the Working Party on the Accession of the Kingdom of Nepal to the World Trade Organization*, the WTO Secretariat, Geneva, p. 13, 28 August 2003, available at <http://www.wto.org>.

⁴⁶³ Import duty exemptions are given for the following goods: books; equipment and vehicles for trolley bus services; medical equipment for public health projects; cold storage equipment for the preservation of agricultural products including fish and fruits; alternative power development equipment; high quality printed materials imported for the promotion and publicity of the tourism in Nepal; threshing machines and husk-machines; raw jute; and crates for keeping eggs.

development fee of 1.5%; and (iii) special fees on: items where the duties levied are less than 2.5%, the fee equals 0% on value; items where the duties levied are 2.5-5%, the fee equals 1% on value; items where the duties levied are more than 5%, the fee equals 3% on value; P.O.L. products/per liter (Rs. 1.00/liter); and items on which the MFN tariff is expressed as a specific duty of 3%.⁴⁶⁴

III.2.B (1)(v) Charges for Services Rendered

There are no duties and charges applied on import for customs processing in Nepal. However, the Customs Act of 1962 and the Customs Regulations of 1969 authorize the Customs Office to charge for the services rendered. There is a charge of 1 per cent of the value of the goods to be imported as an import license fee.⁴⁶⁵

III.2.B (1)(vi) Quantitative Import Restriction including Prohibitions

There is no provision of quotas and Nepal does not apply import quotas. All items are free for import. As an exception Nepal imports some goods on a quota basis from India under Indo-Nepal Treaty of Trade.⁴⁶⁶ Following products are banned for import including domestic

⁴⁶⁴ . See *Nepal: Trade and Competitiveness Study, supra*, footnote 461, at page 20. See the Fiscal Act, 2003.

⁴⁶⁵ . See Nepal Gazette, vol. 42, No. 33, Nov. 30, 1992. See Export-Import Regulation, Rule 8 (4) (1975) (Nepal).

⁴⁶⁶ . Under Indo-Nepal Treaty of Trade, 2002, the quota system operates only for those goods that are restricted for exports, or subjected to price controls, in one of the Parties to the trade agreement. The list of products that Nepal import from India on a quota basis varies depending on the agreement reached every year. Generally it includes: milk powder, baby food, waste cotton, cotton, cotton yarn, rutil, sugar.

production and sale: (i) Narcotic drugs like opium and morphine; (ii) Liquor containing more than 60 per cent alcohol; (iii) Beef and beef products.⁴⁶⁷ The following products are restricted for import and domestic production: (i) Materials used in the production of arms and ammunition; (ii) Guns and cartridges; (iii) Caps without paper; (iv) Arms and ammunition, and other explosives; (v) Wireless, walkie talkie and similar other audio communication equipments; (vi) Valuable metals and precious stones.⁴⁶⁸ Nepal does not restrict importation of jewellery made of valuable metals but there is restriction on the importation of gold, silver and other valuable metals and precious stones.⁴⁶⁹ The restricted products can be imported under import license of His Majesty's Government.

III.2.B (1)(vii)

Licensing Procedures

The Export Import (Control) Act, 1957 gives His Majesty's Government an authority to impose prohibition on export or import of any goods if the Government thinks that it is appropriate.⁴⁷⁰ It generally happens in the case of balance-of-payment problems and in specific cases of governmental assistance to economic development. However, His Majesty's Government has not imposed any prohibition in this respect except on very few items. Importer does not need to submit any other administrative or other documentation for importation except as prescribed by the Import Export (Control) Act, 1957 and Import Export Regulation 1978.

⁴⁶⁷ . See Notification by His Majesty's Government under the 1956 Export-Import (Control) Act, Schedule II, Nepal Gazette, vol. 42, No. 33, November 30, 1992.

⁴⁶⁸ . See Id.

⁴⁶⁹ . 10 K.G. gold and 150 K. G. silver are allowed to import paying customs duties under personal baggage.

⁴⁷⁰ . See Export Import (Control) Act, Section 3 (1957) (Nepal).

His Majesty's Government has restricted seventeen items for importation, for example: (i) Materials used in the production of arms and ammunition; (ii) Guns and cartridges; (iii) Caps without paper; (iv) Arms and ammunition, and other explosives; (v) Wireless, walkie talkie and similar other audio communication equipments; (vi) Valuable metals and precious stones; etc.⁴⁷¹

The restricted products can be imported under import license of His Majesty's Government. Hence, import license is only required for the importation of restricted goods into Nepal. Import license is not required for the import of any other goods. However, the parties need to present the letter of credit opened for import, and no fee has to be paid in these cases. If a letter of credit opened for imports or exports is presented with customs documentation, no import or export license is required except for goods listed as restricted. The purpose of requiring the presentation of a letter of credit for import is to get information about goods and to ensure that importer is genuine one.

The Export Import Regulation, 1978 has prescribed the rules in detail about the authority of granting export import license, process of application, format and fees of application and license, grounds of cancellation of license, etc. The laws and all other information concerning procedures for the submission of applications for import licenses are to be published in Nepal Gazette. Such publication takes place before it comes into effect.

The concerning person should apply to the Director-General of the Department of Commerce for import license and the application should be in the format prescribed in Schedule-B of the Export

⁴⁷¹ . See *supra*, footnote 192. Such items include HS number: 85.28, 85.28, 85.29, 85.25, 85.25, 85.17, 85.29, 85.28, 85.17, 85.17, 85.17, 85.17, 85.28, 85.28, 93.05, 93.01-93.04, 93.06, 93.07.

Import Regulation of 1978.⁴⁷² The necessary documents and information are to be given as required and prescribed by the application form. The applicant should pay application fee and license fee.⁴⁷³ The Department of Commerce issues license on the basis of the recommendation of the concerned ministries, e. g., Ministry of Information recommends for telecommunication related equipment, Home Ministry recommends for arms ammunition and explosives related items. The import license may be issued for different purposes, e. g., for government office purpose, government construction project purpose, commercial purpose, social institution purpose, private use purpose, professional firm/company like tourism industry purpose and specimen purpose.⁴⁷⁴ The import license for commercial purpose shall be issued to the registered firm or company or government corporation only.⁴⁷⁵ The format of application for different purposes are prescribed in Schedule-B of the Export Import Regulation of 1978. The period of validity of import license is normally up to six months and it is one year in special situation. The goods for importation should be shipped within the period of validity of the license. In case an importer could not import goods within six months of the issuance of the license due to external factors beyond his control, the authority shall examine the case based on the nature of goods and the prevailing situation, and may extend license up to another six months at a time.

If a license is refused by the authority the applicant is advised of the reasons and he may appeal to the Ministry of Industry, Commerce and Supplies within 35 days of the notice issued to him of such refusal. The applicant should mention the subject-matter to complaint, claims and reasons

472 . See Export Import Regulation, Rule 4(1) (1978) (Nepal).
473 . See Ibid., Rule 8.
474 . See Ibid., Rule 6.
475 . See Ibid., Rule 7.

of claims in his appeal. The applicant must submit copies of all relevant documents along with the appeal and a copy of the appeal should be sent to the licensing authority. In addition to it, There is also a provision of penalty in case any person commits any offenses under the Export Import (Control) Act, 1957.⁴⁷⁶ The original jurisdiction in respect to such cases is vested in the concerned Customs Officer and appeal against such decision may be filed with the Revenue Tribunal within 35 Days.⁴⁷⁷ The Export Import (Control) Act, 1957, Export Import Regulation, 1978 and all related notices are published in Nepal Gazette.

III.2.B (1)(viii) *Customs Valuation*

The rules for assessment of customs duty is crucial in international trade. In Nepal, the methods of customs valuation is governed by the Customs Act of 1962, as amended in 1997, and Customs Regulation of 1969. The rules for assessment of customs duty are laid out under the Customs Act, 1962 which is as follows:

- “(1) Customs duty on goods which are to be imported shall be assessed on the basis of their transaction price.
- (2) The owner of the goods which are to be imported must submit to the Customs Office such bills, invoices or documents showing their price as are demanded by the Customs Officer for the purpose of verifying their transaction price.
- (3) The onus of proving the authenticity of the bills, invoices or documents submitted under Sub-section (2) shall be on the owner of the concerned goods.

⁴⁷⁶ . See Export Import (Control) Act, Section 5 (1957) (Nepal).
⁴⁷⁷ . See Ibid., Section 6.

- (4) While assessing customs duty on the basis of the transaction price of any goods which are being imported, in case it is found that the transaction price quoted by the owner of the goods does not conform to the procedure of fixing the actual transaction price, the Chief Customs Authority, or a Customs Officer designated by him, shall fix the price of the concerned goods on the basis of the recorded price, price-list, or the prices of goods of the same nature, and assess customs duty accordingly.
- (5) In case customs duty cannot be assessed because of the failure of the owner of the concerned goods to present the transaction price of the goods under Sub-Section (4), the Chief Customs Authority, or a Customs Officer designated by him, may fix the price thereof on the basis of the price-list or the recorded price, or the prices of other goods of the same nature.
- (6) While fixing the price of goods for the purpose of assessing customs duty, the Chief Customs Authority, or a Customs Officer designated by him, may do so on the basis of the recorded price or the price-list submitted by the manufacturer or distributor, or the available data or information, or the suggestions of an expert or of the concerned agency or organization.
- (7) While fixing the price of goods for the purpose of customs duty, His Majesty's Government may ordinarily do so on the basis of all or any of the following: the bills or invoices submitted by the owner, the official price-list of the manufacturer or distributor, the international market price, or the opinion of an expert on the concerned goods or any agency or individual connected with the concerned industry, commerce and trade.

- (8) Gifts bought or received as specimen from abroad by the importer, or if the transaction price is not assessable due to any reasons, the owner of such goods must submit application mentioning all about it to the concerning Customs Officer.
- (9) Upon the inquiries made on the application submitted under Subsection (8), if the transaction price is proved as not assessable the Chief Customs Authority, or a Customs Officer designated by him, shall fix the price of the concerned goods according to the Subsection (5).
- (10) Upon the inquiries made on the application submitted under Subsection (8), if the transaction price is proved as not assessable the Chief Customs Authority, or a Customs Office designated by him, shall fix the price of the concerned goods according to the Subsection (5).
- (11) No demurrage shall be charged on imported goods until they are 'valued' for the purpose of assessing customs duty.⁴⁷⁸

With respect to the determination of customs value, the importer has the right to appeal to the Revenue Tribunal against the decisions of customs officials.⁴⁷⁹

III.2.B (1)(ix) *Other Customs Formalities*

If the invoice value is not questioned by Customs authority the importer does not need to present any other documentation to substantiate the goods' declared value.

⁴⁷⁸ . See Customs Act, Section 13 (1962) (Nepal).

⁴⁷⁹ . See Ibid., Section 37.

III.2.B (1)(x)

Application of Internal Taxes

Nepal enacted the Value Added Tax Act in 1996 and adopted the Value Added Tax (VAT) since the fiscal year 1997/1998 replacing the sales tax and all the existing taxes on services and goods. VAT is imposed to domestically produced goods and imported goods on equal basis. Every person including firm, etc. desirous to be involved in any commercial transaction is required to register in the tax office before beginning to engage in such transactions. There is also provision of exemption from registration to small vendors whose commercial transaction value is less than Nepalese Rupees 2 million (approximately) during the last twelve months. Further-more Value Added Tax Act, 1996 exempts a number of goods and services from the application of VAT. All exemptions of the VAT is equally available for both imported and domestic products under Section 5 of the Value Added Tax Act, 1996.

The Excise Tax is another internal tax in Nepal. The excise tax is levied to the products specified in the Finance Act and it is not levied to imported goods. However, imported goods are subject to the "equalizing duty" levied at the rate of excise tax applicable to the products listed in the Financial Act.

Nepal government has eliminated the octroi tax⁴⁸⁰ and has adopted a system of levying "Local Development Fee" as the alternative measures to replace the revenue loss.⁴⁸¹ This Local

⁴⁸⁰ . The octroi tax is a local (municipal) transit tax which is abolished by the Local Self Government Act, 1998.

⁴⁸¹ . See Nepal Gazette, dated 30 May 2000.

Development Fee is levied on the imported goods, fixed by His Majesty's Government by a notice published in Nepal Gazette. The amount collected by this system will be distributed to the Municipalities for their development works.

III.2.B (1)(xi) *Rules of Origin*

Nepal has no legal regime on rules of origin. However, Nepal has been applying the rules of origin under the Agreement on SAARC Preferential Trading Arrangement (SAPTA) of 1993 and Indo-Nepal Treaty of Trade in order to establish whether preferences should be applied on imported goods. These requirements are mentioned in the respective agreements and are not governed by domestic laws.

III.2.B (1)(xii) *Pre-shipment Inspection*

Nepal has no system of pre-shipment inspection or any legal regime in that effect.

III.2.B (1)(xiii) *Anti-dumping, Countervailing Duties and Safeguard Regimes*

There is no system of anti-dumping duty, countervailing duties and safeguard or any legislation in that effect in Nepal. However, Nepal government is authorized to restrict imports by issuing an order in accordance with Section 3 of the Export Import (Control) Act, 1957. Nepal government can use this authority in the context of safeguard, i. e., to prevent or remedy serious

injury to a domestic industry, and/or for the balance-of-payments. But Nepal government has liberalized import regime under Section 3 of the Export Import (Control) Act, 1957 at present and has not imposed any quantity restriction on imports.

III.2.B (2) EXPORT REGULATION

III.2.B (2)(i) Registration Requirement for Engaging in Exporting

It is necessary to obtain the registration of entity to engage in business in Nepal. Hence, whoever wants to export goods from Nepal has to be registered as an entity, i. e. companies, joint venture agencies, business undertakings for industrial ventures, etc. However, individuals for personal purpose, not for trading or business, can export without any registration requirements. The same registration requirements are used for imports and exports.⁴⁸²

III.2.B (2)(ii) Customs Tariff Nomenclature and Export Duties

Nepal uses the tariff nomenclature harmonized system as approved by the World Customs Organization for exports and imports. As a general rule, exports are free from duties. However, Nepal government has levied export duties on 16 items, which include among from forest product, pulses, ricebran, and oil cakes. It is levied on yearly basis. The export duties are levied in accordance with the Finance Act of each year. Nepal also levies an export service fee of 0.5

⁴⁸² . See the subtitle "Registration of Firm or Company" in the context of the importation at page 171 for the details of registration.

per cent *ad valorem* to all exports from Nepal except those subject to export duties. The service charge is levied to cover the costs of services rendered to exporters by the customs authorities.

The value of goods mentioned in the bill or invoice submitted by the exporter is regarded as the value of such goods for custom valuation purpose. In case the Customs Officer is not satisfied with the bill or invoice, he may determine the value of such goods on the basis of previous records.

III.2.B (2)(iii) Quantitative Export Restrictions, including Prohibition, Quotas, and Licensing Systems

The export licensing system is been introduced for statistical purposes. Nepal government may restrict the export or quantity of exports by issuing an order pursuant to Section 3 of the Export Import (Control) Act, 1957. However, in general, Nepal government has not imposed any restrictions on exports. As an exception, Nepal has imposed banned from exportation of certain goods. The banned items are (i) raw hides, and skin (including dry salted); (ii) raw wool; (iii) all imported raw materials, parts and capital goods (here parts and capital goods come within the scope of raw materials as their part); (iv) Mamira; and (v) logs and timber.⁴⁸³ In addition to it, the Forest Act, 1992 does not allow to issue any export license to certain products based on wild animals and forest, banned by the Convention on International Trade in Endangered Species of Flora and Fauna (CITES).

⁴⁸³ . See Schedule-I of the Export Import Controls (1992) Order, issued by Nepal government pursuant to Section 3 of the Export Import (Control) Act, 1056, Nepal Gazette, Vol. 42, No. 33, November 30, 1992,

III.2.B(2)(iv) Export Licensing Procedure

The interested entity submits an application for the export license to the Director-General of the Department of Commerce in accordance with the prescribed form indicated in Schedule-2 of the Export Import Regulation, 1978. The details of required documentations and information are listed in the application form. The Director-General of the Department of Commerce issues certificate of export license in accordance with the format prescribed in Schedule-4 of the Export Import Regulation, 1978. The export licenses are granted for different purposes, e. g. commercial purpose, private use purpose for specimen purpose, government office use purpose, maintenance purpose. The commercial purpose export license is granted only to the registered entity. The application fee for export license is Nepalese currency (NRs) 10.00 and applicants do not need to pay any fee for export license.

III.2.B (2)(v) Other Measures, e. g., Minimum Export Prices, Voluntary Export Restrictions, and Orderly Marketing Arrangements

There is no system of export minimum price list, voluntary export restrictions and orderly marketing arrangements nor any legal provision in that effect in Nepal.

III.2.B (2)(vi) Export Financing, Subsidy and Promotion

Income tax is exempted for income from exports in Nepal. Foreign exchange for the purpose of current account transaction of the balance of payments has been made convertible. The current international payment regime consists of different provisions for the payments made through convertible currency and non-convertible currency. Trade with India is settled through non-convertible Indian Rupees whereas for other countries including China payment is made through convertible currency US Dollar. Some selected commodities could be imported from India through Dollar payments. There is no payment restriction on current transaction. Furthermore, Nepal is a Member of the Asian Clearing Union (ACU). The commercial transactions among ACU Members are cleared through Asian Currency Unit. However, the balance needs to be settled through US Dollar.

The Ban on Investments in Foreign Countries Act, 1964 prohibits any form of investment including purchase of property, bank deposit, investment in share and bonds by Nepalese citizens in foreign countries. However, the repatriation of capital movements by foreigners is free under the Foreign Investment and Technology Transfer Act, 1992.

Pursuant to the Development Board Act, 1956 as amended in 1995, Nepal government has established the Trade Promotion Centre in 1971 to promote Nepal's foreign trade. However, the Trade Promotion Centre does not provide any type of financial assistance. Likewise, a Commercial Council has been formed to coordinate activities of all agencies involved in the export activities. Private sector is also incorporated in the Commercial Council.

III.2.B (2)(vii)

Import Duty Drawback Schemes

Section 15 of the Industrial Enterprises Act, 1992 governs the duty drawback system of Nepal. It provides refunding the customs duties if any, Value Added Tax, and excise duty levied upon raw materials used by any industry in connection with its product for export. Industries producing intermediate goods that are utilized in the production of exportable goods are also entitled to the reimbursement of duties and taxes levied on raw materials. Such reimbursement shall be made within sixty days from the date of an application to that effect. If the application is not submitted to that effect within one year from the date of export, the said reimbursement can not be available for export.

III.2.B (3) INTERNAL REGULATIONS AFFECTING FOREIGN TRADE IN GOODS

III.2.B (3)(i)

Technical Regulations and Standards

The Nepal Standards (Certification Mark) Act, 1980, and the Standard Weights and Measures Act, 1968 (fourth amendment in 1988) are the main statute governing the technical regulations and standards in Nepal. Nepal is corresponding Member of the International Organization for Standardization⁴⁸⁴ (ISO) and has followed the national standards prescribed by the ISO, standards of the British Standard Institute, the International Electrical Committee, the Indian Standards,

⁴⁸⁴ . The International Organization for Standardization (ISO) is a national standards institute of 148 countries with a central Secretariat in Geneva, Switzerland.

and if required on Codex Alimentarius Commission (CODEX).⁴⁸⁵ The Nepal Standards (Certification Mark) Act, 1980 has prescribed the provision of laboratory for the purpose of determination of standards or tests.

The Nepal Standards (Certification Mark) Act, 1980 establishes the Nepal Standard Council⁴⁸⁶ and Nepal Bureau of Standards⁴⁸⁷ and empowers them to determine and recognize standards prescribed by local and foreign institutions and issue licenses,⁴⁸⁸ and to grant recognition to any governmental or non-governmental laboratory for the purpose of determination of standards or tests.⁴⁸⁹ In case of goods or processes other than pharmaceuticals and foodstuffs covered by the relevant Acts, the government has the power under this Act to enforce standards in the interest of public health and public security.⁴⁹⁰ The government for the promotion of international trade may publish notification in Nepal Gazette that such goods shall conform to the standard prescribed by the Council.⁴⁹¹ The Standard Weights and Measures Act, 1968 as amended time and again, covers detailed standards for weights and measures, unit of time, unit of electricity, measure of temperature, unit of light, mole. In case of penalties for the violation of certain provision of these Acts by the decision of the Authority, there is provision of appeal as well.⁴⁹² Nepal has already established the "Enquiry Point" as a single contact point for information.⁴⁹³

485 . See WTO Doc. WT/ACC/NPL/16, *supra*, footnote 462, at para 93.

486 . See Nepal Standards (Certification Mark) Act, Section 3 (1980) (Nepal).

487 . See *Ibid.*, Section 5.

488 . See *Ibid.*, Section 4(b).

489 . See *Ibid.*, Section 4(c).

490 . See *Ibid.*, Section 10.

491 . See *Ibid.*, Section 11(2).

492 . See *Ibid.*, Section 17; Standard Weights and Measures Act, Section 29 (1968) (Nepal).

493 . The "Enquiry Point" is established at the Nepal Bureau of Standards and Metrology (NBSM), P. O. Box 985, Balaju, Kathmandu, Kingdom of Nepal.

III.2.B (3)(ii) Sanitary and Phytosanitary Measures

Nepal is a member of the International Office of Epizootics (OIE) since 12th March 1998, Codex Alimentarius Commission for last two decades, and Asia Pacific Plant Protection Commission⁴⁹⁴ since August 5, 1965. Nepal has a number of Acts to provide institutional and regulatory framework for protection of human, animal and plant life & health. These are Food Act 1967 as amended in March 24, 1974; May 30, 1991; June 4, 1991; October 22, 1992, & Food Rules 1970; Animal Feed Act, 1976; Animal Concentrates Act, 1976; Plant Protection Act, 1972 & Plant Protection Rules, 1974; Nepal Seed Act, 1988; Pesticides Act, 1991 & Pesticides Regulation, 1994; Drug Act, 1978, Drugs Registration Regulation, 1979 & Drugs Examination, Inspection Regulation, 1980; Contagious/Infectious Disease Act, 1964; Animal Health and Livestock Services Act, 1998; Slaughter House and Meat Inspection Act, 1998; Veterinary Council Act, 1998 and others. The regime provided through these Acts is detailed below.

The Contagious/Infectious Disease Act, 1964, authorizes the government to intercept any person, animal, animal products, and feeds suspected of carrying an infectious disease or agent at entry points.⁴⁹⁵ Such a person and animal may be hospitalized or isolated for examination and control.⁴⁹⁶ Animal Health and Livestock Services Act, 1998 regulates the animal quarantine.

The Food Act 1966 as amended, enacts "legal provisions for checking undesirable adulteration of foodstuffs, or preventing any one from lowering or removing any natural quality inherent in or

⁴⁹⁴ . Asian Pacific Plant Protection Commission (APPC) is a regional organization adhering to the International Plant Protection Convention (IPPC) (executed and administered by the FAO) for harmonizing the implementation of phytosanitary measures as per the Agreement on the Application of Sanitary and Phytosanitary Measures. Its Secretariat is in Bangkok, Thailand.

⁴⁹⁵ . See Contagious/Infectious Disease Act, Section 2(1) (1964) (Nepal).

⁴⁹⁶ . See *Ibid.*, Section 2(3).

the utility of foodstuffs, and ensuring the maintenance of proper standards of foodstuffs, in order to maintain the health and comfort of the public.”⁴⁹⁷ The Food Act, 1966 prohibits production, sale or distribution of contaminated or substandard foodstuffs, prohibits sale of foodstuffs by cheating, licensing for production, sale, supply, storage and processing of foodstuffs.⁴⁹⁸ The Food Act, 1966 empowers the government to prescribe the quality, standard or volume of any ingredient of any foodstuff. Foodstuffs are tested in the prescribed laboratory which submits a report authenticated by the prescribed officer. Such orders related to quality, standard or volume of any ingredient of any foodstuff have to be published in the Nepal Gazette.⁴⁹⁹ The decision of the Chief District Officer with respect to the preliminary action can be appealed in the Appellate Court.⁵⁰⁰

Food Rules under the Food Act were first promulgated on 31st August, 1970 and have been subsequently amended in June, 1973, September, 1975, July 1991, and March 1998. Food Rules, 1970 provide for working procedure for Food Research Division, appointment of Public Analyst, Food Inspectors and their powers and functions. A high level Board has been established to prescribe the limit within which the quality and quantity of foodstuffs should be made and to advise the government on measures to ensure the quality and quantity of foodstuffs.

Food Rules, 1970 provide for labeling requirements such as clear description, indication of the name and address of the trader packing foodstuffs, the name, quantity, volume and weight of the ingredients, colors and preservatives as mentioned in the schedules to the Rules, indication of

⁴⁹⁷ . See Preamble of the Food Act (1966) (Nepal).
⁴⁹⁸ . See Food Act, Section 3 (1966) (Nepal).
⁴⁹⁹ . See *Ibid.*, Section 7 & 8.
⁵⁰⁰ . See *Ibid.*, Section 12.

minerals, vitamins and other nutritious matters, dates of production, and terminal dates for consumption. These restrictions do not apply to fruits and vegetables, milk other than condensed, whole eggs, fish and meat other than canned, meals prepared by hotels (except indication of oil used in preparation of meals). Food Rules, 1970 prohibit sale of contaminated food, foodstuffs mixed with brominated vegetable oil (BVO) or "khesari," fruits artificially ripened through carbide gas (acetylene), foodstuffs prepared from dead birds or animals. Food Rules, 1970 also provide for conditions regarding storage or containers. Foodstuffs kept in rusted utensils, worn out enameled utensils, utensils of iron and bronze utensils not coated with tin, and utensils of aluminum mixed with lead are prohibited.

The Animal Feed Act, 1976 prohibits sale, supply, export, import, or storage of defective animal feed⁵⁰¹ and requires licensing of production, sale, and supply of prescribed animal feed.⁵⁰² The Animal Feed Act, 1976 empowers the government to prescribe standards or content of any component of any animal feed by notification in the Nepal Gazette.⁵⁰³ Tests shall be conducted at the prescribed laboratory to determine whether or not any animal feed is defective.⁵⁰⁴ The original jurisdiction vests in the Chief District Officer and an appeal can be filed with the Appellate Court.⁵⁰⁵ The Pesticides Act, 1991 and Pesticides Rules, 1994 regulates the export and import of pesticides and authorizes the government to ban or restrict pesticides that are potentially hazardous to health.

⁵⁰¹ . See Animal Feed Act, Section 3 (1976) (Nepal).

⁵⁰² . See Ibid., Section 7.

⁵⁰³ . See Ibid., Section 10.

⁵⁰⁴ . See Ibid., Section 11.

⁵⁰⁵ . See Ibid., Section 16.

Plant Protection Act, 1972 empowers government to impose prohibitions/restrictions in the import of plant or plant products by notification in the Nepal Gazette.⁵⁰⁶ Quarantine officers are appointed to seize plants that do not meet the prescribed requirements. Appeal against decision by the plant quarantine officer lies with the Director General, Department of Agriculture and appeal against his decision with the Government or an officer specified by the Government.⁵⁰⁷ Prohibitions and restrictions regarding the conditions for import of maize, tobacco, sugarcane, citrus fruit, tea, cotton, potato, banana plants, paddy, sweet potato, tomato, ground nut, fruit and vegetables, sunflowers, lettuce, soil and rooted plants, wheat, and snails have been notified on the basis of internationally recognized diseases affecting the relevant plants.⁵⁰⁸

Nepal Seed Act, 1988 establishes a National Seed Board to advise the Government on production, distribution of seeds, investment in seed industry, regularize new varieties of seed, approve local and foreign standardized quality seed.⁵⁰⁹ The necessary infrastructure for certification is prepared by Seed Certification Office for approval by the Board. Seed certification has to be notified in the Nepal Gazette.⁵¹⁰ The Government can, on the recommendation of the National Seed Board, recognize any foreigner or international institution for the purpose of seed testing and certification by notification in the Nepal Gazette. Nepal government could establish a Central Seed Testing Laboratory to carryout the functions and duties of Seed testing.⁵¹¹

⁵⁰⁶ . See Plant Protection Act, Section 3 (1972) (Nepal).

⁵⁰⁷ . See Ibid., Section 7.

⁵⁰⁸ . Nepal government has prohibited the imports of the said Plants or Plant products by issuing an order with notification in Nepal Gazette on 7th April 1975.

⁵⁰⁹ . See Nepal Seed Act, Section 3, 4, & 5 (1988) (Nepal).

⁵¹⁰ . See Ibid., Section 7.

⁵¹¹ . See Ibid., Section 9.

III.2.C EXAMINATION OF NEPALESE LAWS IN COMPLIANCE WITH THE MULTILATERAL AGREEMENTS ON TRADE IN GOODS

Most-favored-nation obligation

The most-favored-nation obligation particularly requires if a member country grants to another country any tariff or benefit to any products, it must immediately and unconditionally extend it to the like products of other member countries.⁵¹² Nepal has adopted Harmonized System of Commodity Classification and has used it for export and import on equal basis. Nepal has submitted Schedules of Concession, under which Nepal is bound to provide same tariff rates to all Member countries. Additional duties and taxes are imposed on imported goods on equal basis. The service charge imposed by the Customs Office also is imposed on equal basis. Granting export import license, process of application, fees of application, etc. are administered on equal basis. The method of customs valuations also is administered on equal basis. Value Added Tax is imposed to domestically produced goods and imported goods on equal basis. In the light of above discussion, we can infer that Nepal does not maintain any laws, regulations or administrative procedures, which are discriminatory among the products of different countries.

However, we find few exceptions to the most-favor-nation treatment obligation in the practice of Nepal's trade. The Indo-Nepal Treaty of Trade provides differential treatment, i. e., lower tariffs rate than with other countries, between India and Nepal.⁵¹³ Such kind of preferential treatment is allowed under the General Enabling Clause.⁵¹⁴ In addition to it, Nepal is a Member of the

⁵¹² . See GATT 1994, *supra*, footnote 278, art. I.

⁵¹³ . See Indo-Nepal Treaty of Trade, *supra*, footnote 460, art. IV, V & VI.

⁵¹⁴ . The General Enabling Clause was adopted in the Tokyo Round in 1979. In this connection, once Indian Commerce Minister had stated that the preferential treatment between India and Nepal was allowed by Article XXIV of GATT as it was considered a free trade zone. However, Nepal has claimed it as an exception provided by the General Enabling Clause in the answer to questions asked by WTO Members to Nepal.

Agreement on SAARC Preferential Trading Arrangement (SAPTA), 1993. The SAPTA provides preferential treatment, i. e., lower rate of tariffs, among the Member countries trade. Although it is against the most-favor-nation treatment obligation, the lower or duty-free rates applicable to trade among Members of regional arrangements are allowed under Article XXIV of GATT.

National Treatment Obligation

The national treatment obligation complements the most-favor-nation treatment obligation. It obligates Member to provide equality of competitive conditions for imported goods vis-à-vis domestic like products. The national treatment obligation starts once an imported products crossed the border after payment of custom duties and other charges. In Nepal, domestic goods are subject to the Value Added Tax and Excise tax on specified goods. Nepal imposes Value Added Tax to imported goods above the custom tariff. Since the enactment of the Value Added Tax in 1996, it is imposed to domestically produced goods and imported goods on equal basis. Exemption of the Value Added Tax, 1996 is equally available to imported as well as domestic goods.⁵¹⁵ Imported goods are subject to equalizing duty, which is levied at the rate of excise tax applicable to domestic goods. Equalizing duty covers only those goods which are covered by the excise tax and the rate is same. Incomes from export earnings are exempted from income tax. However, income taxes or export duties are not covered by Article III:2, first sentence, since they do not constitute internal taxes on products.⁵¹⁶ Existing Nepalese tax laws do not have any provision to discrimination between the imported and domestic like products or directly competitive or substitutable products. Neither it has any provision of tax imposition in excess of the domestic like product.

⁵¹⁵ . See Value Added Tax, Section 5 (1996) (Nepal).

⁵¹⁶ . See UNCTAD Doc. UNCTAD/EDM/Misc.232/Add.33, *supra*, footnote 310, at p. 23.

We do not find any provision violating national treatment obligation in the Nepal Standards (Certification Mark) Act, 1980, Standard Weight and Measures Act, 1968, Food Act, 1967, Animal Food Act, 1976, Animal Concentration Act, 1976, Plant Protection Act, 1972, Nepal Seed Act, 1988, Pesticides Act, 1991, Drug Act, 1978, etc. Hence, regarding regulation affecting the sale and use of goods, once foreign goods enter Nepalese market legally, it gets the same treatment as to the domestically produced goods.

Tariff Bindings

Another central obligation requires Member to limit its tariffs on particular goods to a specified maximum. Such tariffs rates are set out in Member's Schedule of Concessions on Goods. Nepal has also submitted Schedule of Concessions on Goods to the WTO and it is obliged not to impose tariff in excess of those set forth in its Schedule of Concessions. Hence, Nepal meets the tariff binding obligation. However, Nepal has been imposing other duties and charges (ODCs), i. e., local development fee, the special fee, the agriculture development fee, the cigarettes and alcohol fee and the alcohol control service fee.⁵¹⁷ In the accession negotiation, Nepal has made commitment for the elimination of ODCs for all tariff lines over a period of time between two and ten years and after that date all ODCs would be bound at zero.⁵¹⁸

Customs Valuation

⁵¹⁷ . See WTO Doc. WT/ACC/NPL/16, *supra*, footnote 462, at para 40.

⁵¹⁸ . See WTO Doc. WT/ACC/NPL/16, *supra*, footnote 462, at para 41.

Member's obligation with respect to the customs valuation is valuable. In accordance with the Customs Valuation Agreement, the primary basis for customs value is transaction value.⁵¹⁹ Alternatively, deductive value and computed value method can be used in case it can not be determined on the basis of the transaction value of the imported goods.⁵²⁰ In Nepal, the Custom Act, 1962⁵²¹ also has adopted the method of assessment of customs duties on the basis of transaction value. As such Nepal's laws, regulations and administrative procedures are in conformity with the conformity obligation prescribed by the provisions of the Agreement in terms of Article 22 of the Agreement on Customs Valuation.

However, besides transaction valuation method, alternative valuation methods, i. e., imputed or computed valuation, is not available and the Customs Regulation 1969 does not provide for detailed regulations for implementing the transaction value. The Customs Department as such is left without sufficient guidance. There is also widespread impression among the business community this leaves them without sufficient protection. As a result of this gap between the Customs Act and the Customs Regulations an "effective and wider application" of the Customs Valuation Agreement cannot be fully assured. Hence, provisions of imputed valuation,⁵²² computed valuation,⁵²³ and transaction valuation particularly related to price actually paid or payable for the imported goods⁵²⁴ of the Customs Valuation Agreement should be written into

⁵¹⁹ . See Article 1, 2, 3, 4 and 8 of the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994.

⁵²⁰ . See *Ibid.*, art. 5 and 6.

⁵²¹ . See Custom Act, Section 13(1) (1962) (Nepal).

⁵²² . Article 5 of the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 covers the subject of imputed valuation.

⁵²³ . Article 6 of the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 covers the subject of computed valuation.

⁵²⁴ . Article 8 of the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 covers the area of transaction valuation particularly related to price actually paid or payable for the imported goods.

the Customs Regulations so that there is no room for ambiguity and any legislative gap that might exist is removed.

There is already a provision of right to appeal to the Revenue Tribunal against the decision of Customs Official in respect of the determination of customs value under Section 37 of the Customs Act, 1962. However, Nepal has made a commitment in the accession negotiation for the establishment of an independent administrative tribunal to review the decisions of the Customs authority regarding customs valuation.⁵²⁵ All related legislation, regulations and administrative decisions are published in Nepal Gazette. Nepal has got transitional period of 1 January 2007 for the full implementation of the obligations of the Agreement on Customs Valuation.⁵²⁶

The Elimination of Quantitative Restrictions (Quota)

WTO Member is obliged to eliminate quantitative restrictions (quota) on imports and exports. In Nepal, Government has not, in general, imposed any restrictions on import or export and all items are free to import or export. However, quota system exists on certain items under the Indo-Nepal Treaty of Trade. Generally, it includes milk power, baby food, etc. that are restricted for exports, or subject to price control, in one of the parties to the trade agreement. Likewise certain items like narcotic drugs, beef, etc are banned for importation and also are banned for domestic production. Materials used in the production of arms and ammunition, guns, etc. are restricted for importation and domestic production. These restricted items can be imported under import license of the Government. Nepal has imposed banned on the exportation of raw wool,

⁵²⁵ . See WTO Doc. WT/ACC/NPL/16, *supra*, footnote 462, at para 53.

⁵²⁶ . See WTO Doc. WT/ACC/NPL/16, *supra*, footnote 462, at para 55.

all import raw materials, parts and capital goods, logs and timber, etc.. Under the Forest Act, 1992, certain products based on wild animals and forest are not allowed for exportation. Nepal can defend such restriction under Article XI:2 of GATT,⁵²⁷ Article XII & XVIII of GATT,⁵²⁸ Article XIX,⁵²⁹ Article XX & Article XXI of GATT. However, Nepal needs to lift the ban on the export of imported raw materials, parts and capital goods.

Nepal may impose restriction on quantity of imports by issuing an order in accordance with Section 3 of the Export Import (Control) Act, 1957. However, the power granted to Government under Section 3 of the Export Import (Control) Act, 1957 is to be exercised in line of Article XI:1 of GATT. It would be better if Government prescribes the ground or basis when Government may restrict the quantity of imports.

Transparency

Transparency is one of the major obligations of the WTO Member. It facilitates monitoring of compliance with obligation under the WTO Agreements. It requires Member to publish all laws, regulations, judicial decisions, and administrative rulings affecting trade. However, the method of publication is for the Member to choose. All that is required by this obligation is that other Members and traders should have an opportunity to know about these materials. Nepal's internal law requires that all acts, rules, and regulations are to be published in the Nepal Gazette and in

⁵²⁷ . Article XI:2 of GATT lists three exceptions to the general prohibition on quantitative restrictions: i) use of export restrictions to relieve critical shortage, ii) use of import and export restrictions necessary to apply certain commodity standards, and iii) import restrictions to enforce certain government agricultural programs.

⁵²⁸ . Article XII and Article XVIII of GATT permit the use of quotas in the event of balance-of-payment problem.

⁵²⁹ . Article XIX of GATT allows Member to raise trade barriers to safeguard a domestic industry seriously injured or threatened with serious injury by import competition.

practice Nepal has been publishing all acts, rules, regulations and treaties in the Nepal Gazette.⁵³⁰ Generally, laws enter into force from the day of its publication. Judgments of the Supreme Court of Nepal are published regularly in the Nepal Law Journal. Any concerning party may ask for copy of any concerning documents with government or court or tribunal or administrative bodies.⁵³¹

In addition to the requirement of publication by general law, individual laws also require publication of concerning law. For example: Section 3 and 2(c) of the Export Import (Control) act, 1957 requires to publish all related notices in Nepal Gazette; Likewise Section 10 and 11 of the Nepal Standards (Certification Mark) Act, 1980; Section 14, 15(2), 21, and 24 of the Standard Weight and Measures Act, 1968; Section 10 of the Animal Feed Act, 1976; Section 7 of the Food Act, 1966; Section 7, 11, 18 of Nepal Seed Act, 1988; Section 3 of the Plant Protection Act, 2029; Section 2(1), 3, 4, 10, 16 and 31 of the Animal Health and Animal Service Act, 2055; etc. require to notification in the Nepal Gazette.

Nepal has already made commitment that Nepal would submit all initial notifications required by any WTO Agreements and also Nepal conforms to notify any regulation subsequently enacted to implement WTO Agreements.⁵³²

Judicial or Administrative Tribunals or Procedure

⁵³⁰ . See Statute of Interpretation Act, Section 3 (1953) (Nepal); See His Majesty's Government (allocation of Business) Regulation, 2000, & Nepal Gazette of August 1955.

⁵³¹ . See Mulki Ain (Civil Code), Adalati Bondobasta Number 110 (1963) (Nepal).

⁵³² . See WTO Doc. WT/ACC/NPL/16, supra, footnote 462, at para. 148.

Member's requirement to maintaining judicial or administrative tribunals or procedure for the purpose of prompt review of administrative action or decision related to the subject matters of the Multilateral Agreement on Trade in Goods is one of the fundamental obligations of the WTO Agreements.⁵³³ In general, Nepal has maintained appeal system over any decision or final order of any administrative body under Section 8(1) of the Justice Administrative Act, 1991. Pursuant to Section 37 of the Customs Act, 1962, there is a right to appeal to the Revenue Tribunal against the decision of the Customs Official in respect to the determination of customs value. Any decisions given by Customs Officer in respect to export or import offenses are subject to appeal pursuant to Section 6 of the Export Import (Control) Act, 1957. With respect to the refusal of license by the authority, the applicant may appeal against such decision to the Ministry of Industry, Commerce and Supplies pursuant to Rule 16 of the Export Import Regulation, 1978. The Nepal Standards (Certification Mark) Act, 1980 and the Standard Weights and Measures Act, 1968 also have provisions of appeal in case of penalties for the violation of certain provision of these Acts.⁵³⁴

We find that Nepalese legislation provides the right to appeal to the concerning party against any decisions of the authorities on matters related to the Multilateral Agreement on Trade in Goods including import licensing, Sanitary and Phytosanitary Measures. However, Agreement on

⁵³³ Article X:3(b) of GATT obligates Member to maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action. See Article 13 of the Agreement on Implementation of Article VI of the General Agreement on Tariff and Trade 1994 (Antidumping Code), Article 23 of the Agreement on Subsidies and Countervailing Measures, Article 2(j) and 3(h), Annex II (Article 3 (f)) of the Agreement on the Rule of Origin, Article 11 of the Agreement on Implementation of Article VII of the General Agreement on Tariff and Trade 1994, Article 4 of the Agreement on Pre-shipment Inspection.

⁵³⁴ See Nepal Standards (Certification Mark) Act, Section 17 (1980) (Nepal); Standard Weights and Measures Act, Section 29 (1968) (Nepal).

Import Licensing Procedure and Agreement on the Application of Sanitary and Phytosanitary Measures do not have provision of judicial or administrative review obligation.

There are few laws in Nepal, which do not allow appeal against the decision of the authority, i. e., Privatization Act, 1996, Foreign Investment and Technology Transfer Act, 1992. However, the area covered by these acts do not come under the scope of the WTO Agreements and hence, maintaining appeal or administrative tribunal or procedures for the prompt review under these acts are not considered as WTO obligation.

Technical Barriers to Trade

The Agreement on Technical Barriers to Trade encourages WTO Member to use international standards as a basis for domestic technical regulations and standards,⁵³⁵ and asks Member to ensure that technical regulations shall not be more trade restrictive than necessary to fulfill a legitimate objective.⁵³⁶ It further requires that technical regulation are to be prepared on the basis of available scientific information and it should not create unnecessary obstacles to international trade.⁵³⁷ Nepal is a Member of ISO and has followed the national standards prescribed by the ISO.⁵³⁸ The Nepal Standards (Certification Mark) Act, 1980 has provision of laboratory for the purpose of determination of standards or tests.⁵³⁹

Nepal's Standards (Certification Mark) Act, 1980 establishes the Nepal Standard Council and Nepal Bureau of Standards and empowers them to determine and recognize standards prescribed

⁵³⁵ . See TBT Agreement, *supra*, footnote 329, art. 2, paragraph 4.

⁵³⁶ . See TBT Agreement, *supra*, footnote 329, art. 2, paragraph 2.

⁵³⁷ . See *Id.*

⁵³⁸ . See WTO Doc. WT/ACC/NPL/16, *supra*, footnote 462, at para 93.

⁵³⁹ . See Nepal Standards (Certification Mark) Act, Section 4(1)(a) (1980) (Nepal).

by local and foreign institutions and issue licenses. The Standards Weights and Measures Act, 1968 covers detailed standards for weights and measures, unit of time, unit of electricity, measure of temperature, unit of light, mole. In all these cases international standards have been followed. Supplementary standards for weights and measures are also to follow internationally prescribed standards. There are provisions of publication of regulations and standards in Nepal Gazette and provisions of appeal against any decision of the concern authorities. Obviously, Nepal will notify new regulations and standards to the WTO Secretariat. The Nepal Bureau of Standards and Metrology acts as the Enquiry Point for information and it is already in operation.

Furthermore, least-developed Member is entitled to prepare and apply technical regulations, taking into account her special development, financial and trade needs and in the operation of institutional needs.⁵⁴⁰ A least-developed Member may adopt certain technical regulations, standards or conformity regulations aimed at preserving indigenous technology, and production methods and processes compatible with her development needs.⁵⁴¹ Nepal needs to consider these benefits provided by the Agreement on Technical Barriers to Trade and should seek necessary technical assistance as well.

Sanitary and Phytosanitary Measures

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) provides right to set human, plant and animal health and food safety standards as it deems appropriate provided that such measures are not inconsistent with the provisions of the SPS

⁵⁴⁰ . See TBT Agreement, *supra*, footnote 329, art. 12, paragraph 2 & 3.

⁵⁴¹ . See TBT Agreement, *supra*, footnote 329, art. 12, paragraph 4.

Agreement.⁵⁴² It requires that SPS measures be based on scientific principles, international standards and not be arbitrarily or unjustifiably discriminate between Members, and such measures should not be applied in a manner which would constitute a disguised restriction on international trade. The SPS Agreement further requires transparency and notification obligations and to establish an Enquiry Point so that it provides answers to questions from other Members. In this respect, Nepal has enacted a number of Acts to provide institutional and regulatory framework for protection of human, animal and plant life & health.⁵⁴³ Nepal is a member of International Office of Epizootics (OIE), Codex Alimentarius Commission and Asia Pacific Plant Protection Commission. Nepal has established an Enquiry Point to provide information to other Members in this respect.

We have found in our previous discussion that Nepal's sanitary and phytosanitary regime provides for transparency, scientific standards requirements stipulated in the Agreement on Sanitary and Phytosanitary Measures. Appeal procedures are available to the persons not satisfied with any decisions with respect to the relevant measures. There are provisions of publication of relevant measures and regulations. The Nepalese regime, therefore, meets the requirements of transparency and judicial reviews. The regulations generally follow the accepted international standards. In fact, changes in the basic laws and procedures are not required. However, Nepal may think to improve these laws, scientific laboratories and standards for the better protection of human, animal and plant health and life in line to the SPS Agreement. In this connection, Nepal may seek WTO technical assistance.

⁵⁴² . See SPS Agreement, *supra*, footnote 328, art. 2, paragraph 1.

⁵⁴³ . See page 190, Nepalese laws related to institutional and regulatory framework for protection of human, animal and plant life are described in detail on Sanitary and Phytosanitary Measures, Internal Regulations Affecting Foreign Trade in Goods, Legislative Enactment in Compliance with WTO Agreements, Chapter III.

The SPS Agreement does not provide special and differential treatment for developing country Member as an exception from the general obligation of a Member. It requires other Members to take account of the special needs of developing country Member, particularly least-developed country Member while in the preparation and application of sanitary and phytosanitary measures.⁵⁴⁴ It further allows a transitional period of five years to least-developed Member.⁵⁴⁵ Whereas, Nepal is given time to implement the SPS Agreement by 31 December 2006.⁵⁴⁶

Antidumping, Countervailing, Safeguards & Import Licensing

Nepal does not have antidumping or countervailing or safeguards legal regime as such. So the question of conformity of these laws does not arise in this stage. In case Nepal enacts any antidumping or countervailing laws in future, Nepal is under an obligation to implement appropriate laws in conformity with the provisions of the Agreements on the Implementation of Article VI and Subsidies and Countervailing Measures, and to notify it before Nepal apply any anti-dumping or countervailing duty measures under such new laws. However, Nepal is not obligated to enact such laws under these Agreements.

With respect to the safeguards, there is Section 3 of the Export and Import Act, 1956, which states, "Power of His Majesty's Government to Prohibit or Control Exports and Imports: In case it is considered essential to prohibit or control the export or import of any commodity or commodities throughout the Kingdom of Nepal or any part thereof, His Majesty's Government

⁵⁴⁴ . See SPS Agreement, *supra*, footnote 328, art. 10.

⁵⁴⁵ . See SPS Agreement, *supra*, footnote 328, at art. 14.

⁵⁴⁶ . See WTO Doc. WT/ACC/NPL/16, *supra*, footnote 462, at para. 105.

may do so through a notified order to be enforced with effect from the date mentioned therein.”

Nepal has liberalized import regime and at present there is not import quantity restriction on imports as such. However, Nepal has privilege to introduce trade restrictions for balance of payment and to prevent or remedy serious injury to a domestic industry purposes under Article XVIII and XIX of GATT. If Nepal enacts any new Safeguards laws in future, Nepal is under an obligation to enact such laws in conformity with the provisions of the Agreement on Safeguards and to notify Safeguard laws before Nepal apply any safeguard measures. Here too, it is important to mention that Nepal is not obligated to enact safeguard law by the Agreement on Safeguards.

Nepal is entitled, under Article XVIII of GATT 1994, to take measures to implement programs and policies of economic development designed to raise the general standard of living of her people, to take protective or other measures affecting imports, if such measures are justified in so far as they facilitate the attainment of the objectives of GATT. Contracting parties engaged in progressive development of their economies enjoy additional facilities to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the protection of a particular industry and (b) to apply quantitative restrictions for balance of payment purposes in a manner which take full account of the continued high level of demand for imports likely to be generated by their programs of economic development.

Nepal is no doubt entitled to maintain an import regime indicated in Article XVIII of GATT 1994. Nepal's Export and Import Act, 1957 has to be seen in this light. The Act empowers His Majesty's Government to prohibit or control exports and imports, issue licenses subject to

policies determined from time to time. These policies are determined as part of the annual budget, and Fiscal Act of each year. Import licenses are issued accordingly. These are issued automatically, and immediately. As such the licensing procedures meet the requirement of Article 2 of the Agreement on Import Licensing Procedures. There is no exemption in the Agreement on Import Licensing Procedures for the least-developed countries. Nepal's import regime does not require import licensing except in few products where a system of automatic licensing is followed.

While Article XVIII provides the legal cover for a developing or least-developed country to maintain an import regime commensurate with its economic development needs. The other WTO Agreements provide for safeguards to protect a particular product, from all sources or a particular source, through quantitative restrictions or through additional duties (antidumping or countervailing). Protection of domestic industry under the Agreement on Safeguards, Antidumping, and Subsidies and Countervailing Measures can be triggered if the injury to domestic industry is being caused.

As we mentioned earlier, these Agreements do not mandate domestic legislation. Above all these Agreements mandate that these measures be used sparingly and in specified circumstances.

Where domestic legislation already exists it should be brought into conformity with the relevant Agreements. The use of these measures is not obligatory. Members whose national legislation contains provisions on safeguards, antidumping and countervailing are required to maintain judicial, arbitral or administrative tribunals or procedures for the purpose of prompt review of administrative actions relating to final determination or reviews.

In fact, there is no need for domestic legislation for countries, which do not require their use in view of the flexibility allowed to them under Article XVIII of GATT. From this point of view, Nepal is not required to have in place domestic legislation on these measures. However, if Nepal wishes to use these measures the relevant provisions of these Agreements could be transformed by amendments in Customs Act, 1962 (for antidumping and countervailing), and Export and Import (Control) Act, 1956 (for safeguards).⁵⁴⁷

Others

Nepal has no domestic laws related to the Agreement on Pre-Shipment Inspection and the Agreement on Rules of Origin. So, Nepal may enact new laws covering the obligations prescribed by the Agreement on Pre-Shipment Inspection and the Agreement on Rules of Origin. However, the Agreement on Pre-Shipment Inspection and the Agreement on Rules of Origin do not obligate Members to enact laws if there are no contrary practices.

In accordance with the Agreement on Agriculture, Members are required to make specific agricultural commitments. Least-developed countries are required to bind all agricultural tariffs, but not to make any tariff reductions.⁵⁴⁸ Furthermore, least-developed Members are not required to undertake any export subsidy reduction commitments. Nepal has submitted the Schedule of Concessions on goods in the due course of accession negotiation and it covers specific agriculture commitments.

⁵⁴⁷ . Most of the European countries had followed this practice in 1950s and 1960s. These countries had antidumping procedures contained in their Customs Acts.

⁵⁴⁸ . Developed country Members are required to reduce their tariff on agricultural products by 36 percent on average over a six year period. Likewise developing country Members are required to reduce their tariff on agricultural products by 24 percent on average over ten years.

GATT Article XVII applies to State enterprises and enterprises to which a Member has granted exclusive or special privileges.⁵⁴⁹ GATT Article XVII:1(a) requires that if Member States maintain a state trading enterprise, it should act in a manner consistent with GATT's general principles of nondiscriminatory treatment. GATT Article XVII:4(a) requires notification of State trading enterprises. In Nepal, many governmental corporations are privatized and few are still in operation. However, they are not been granted any special or exclusive privileges except to the Nepal Oil Corporation.

III.2.D CONCLUSION

A study conducted by the World Bank on Nepal's trade and competitiveness says that, "Nepal is among South Asia's most open and trade-dependent economies," and "Nepal has the most liberalized trade policy in South Asia - comparable to those of the most liberalized developing countries."⁵⁵⁰ In this study also we do not find any provisions violating most-favored-nation obligation and national treatment obligation in Nepalese laws affecting on foreign trade in goods. Nepal has reduced tariffs rate significantly and is committed to limit maximum tariffs rate as are set out in Schedule of Concessions on Goods. However, Nepal has been imposing some other

⁵⁴⁹ . The 1994 Understanding on Article XVII of GATT adopts the working definition of State trading enterprises as "Government and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports." Paragraph 5 of the Understanding on the Interpretation of Article XVII of GATT has authorized to adopt an illustrative list and accordingly the WTO Goods Council on October 15, 1999 adopted a list of relationships between Governments and State trading enterprises and the kinds of activities engaged in by these enterprises.

⁵⁵⁰ . See *Nepal: Trade and Competitiveness Study*, *supra*, footnote 461, at page i & iii.

duties and charges (ODCs) on imported goods besides custom duties. Nepal needs to eliminate these ODCs over a period of time as agreed in the accession negotiation.

Nepal's primary basis for customs valuation is transaction valuation. However, alternative valuation methods, i. e., imputed or computed valuation, is not available in the Custom Acts, 1962. The Customs Regulation, 1969 does not provide for detailed regulations for implementing the transaction value. Hence, provisions of imputed valuation, computed valuation, and transaction valuation particularly related to price actually paid or payable for the imported goods of the Customs Valuation Agreement should be included into the Customs Regulations.

Nepal's Export and Import Act, 1957 has to be seen in the light of article XVIII of GATT. The Act empowers His Majesty's Government to prohibit or control exports and imports, issue licenses subject to policies determined from time to time. Article XVIII of GATT provides the legal cover for a least-developed country to maintain an import regime commensurate with its economic development needs. If Nepal prescribes the ground or basis to invoke the Section 3 of the Export Import (Control) Act, 1957, it would be more predictable and accurate.

The WTO Agreements provide for safeguards to protect a particular product, from all sources or a particular source, through quantitative restrictions or through additional duties, i. e., antidumping or countervailing. If Nepal wishes to use these measures the relevant provisions of these Agreements could be transformed by amendments in Customs Act, 1962 (for antidumping and countervailing), and Export and Import (Control) Act, 1956 (for safeguards).

Regarding the transparency obligation, Nepal's internal laws require that all acts, rules, and regulations are to be published and in practice Nepal has been publishing all acts, rules, regulations and treaties in the Nepal Gazette. Generally, laws enter into force from the day of its publication. Judgments of the Supreme Court of Nepal are published regularly in the Nepal Law Journal.

In general, Nepal has maintained appeal system over any decision or final order of any administrative body, court or tribunal. As Nepal has made a commitment in the accession negotiation for the establishment of an independent administrative tribunal to review the decisions of the Customs Authority regarding customs valuation, Nepal is required to establish an independent administrative tribunal and to amend Customs Act, 1962 accordingly.

With respect to the foreign investment, there are no laws which require domestic content requirements in Nepal. Subject of income tax also does not fall under the WTO Agreements. Nepal should be able to avoid commitments which are not required by the WTO Agreements, particularly in the area of investment.

With Respect to the technical barriers to trade, Nepal is a Member of the ISO and has followed the national standards prescribed by the ISO. The Nepal Standards (Certification Mark) Act, 1980 has provision of laboratory for the purpose of determination of standards or tests. There are provisions of publication of regulations and standards in Nepal Gazette and provisions of appeal against any decision of the concern authorities. The Enquiry Point is already established and is in operation. In this respect, Nepal needs to consider the benefits provided for the least-developed Member by the Agreement on Technical Barriers to Trade. A least-developed

Member is entitled to prepare and apply technical regulations, taking into account her special development, financial and trade needs and in the operation of institutional needs. A least-developed Member may adopt certain technical regulations, standards or conformity regulations aimed at preserving indigenous technology, and production methods and processes compatible with her development needs. Also Nepal needs to seek necessary technical assistance from WTO and other developed countries in this respect.

With respect to the Sanitary and Phytosanitary measures, Nepal is a member of International Office of Epizootics (OIE), Codex Alimentarius Commission and Asia Pacific Plant Protection Commission. Nepal has established an Enquiry Point to provide information to other Members in this respect. Nepal's sanitary and phytosanitary regime provides for transparency, scientific standards requirements stipulated in the SPS Agreement. Appeal procedures are available to the persons not satisfied with any decisions with respect to the relevant measures. There are provisions of publication of relevant measures and regulations. The regulations generally follow the accepted international standards. However, Nepal may think to improve these laws, scientific laboratories and standards for the better protection of human, animal and plant health and life in line to the SPS Agreement. In this connection, Nepal may request to other Members to take into account the special needs of least-developed Nepal and seek technical assistance with the WTO and other developed Members.

Hence, despite the provisions of Article XXXVI:8 GATT, "the developed Members 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 Members," and the provision of Article

XI:2 of the WTO Agreement, "the least-developed Members 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," Nepal has low tariffs rate and major provisions of Nepalese laws are in compliance with the WTO Multilateral Agreements on Trade in Goods. Furthermore, we can recommend that Nepal may make few adjustments on her laws which are as following:

- i. Nepal may enact new laws covering the obligations prescribed by the Agreement on Pre-shipment Inspection, the Agreement on Rules of Origin, and the Agreements on the Implementation of Article VI, Subsidies, Countervailing and Safeguard Measures. Or, the relevant provisions of these Agreements could be transformed by amendments in Customs Act, 1962 (for antidumping and countervailing), and Export and Import (Control) Act, 1956 (for safeguards). However, it is important to mention here that Nepal is not obligated to amend or enact such laws by these Agreements.
- ii. Alternative customs valuation methods, i. e., imputed or computed valuation, should be included into the Customs Regulations. Nepal is required to establish an independent administrative tribunal to review the decisions of the Customs Authority regarding customs valuation, and to amend Customs Act, 1962 accordingly.
- iii. Nepal should prescribe the ground or basis of invoking the Section 3 of the Export Import (Control) Act, 1957.

- iv. Nepal needs to lift the ban on the exportation of all imported raw materials, parts and capital goods.
- v. Nepal needs to eliminate other duties and charges (ODCs) imposed on imported goods over a period of time as agreed in the accession negotiation.

We can conclude from the above discussion that Nepalese legislations affecting foreign trade in goods are very much in compliance with the WTO Multilateral Agreements on Trade in Goods. Furthermore, it is suggested to Nepal that Nepal should fulfill her obligations prescribed by the WTO Multilateral Agreements on Trade in Goods in good faith and at the same time, Nepal should be able to reject WTO plus obligations in future. In addition to it, Nepal should seek to be benefited from the differential & preferential treatment provided for least-developed Members by the WTO Agreements. In future negotiations, Nepal needs to remember that, “the developed Members 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 Members,” and, “the least-developed Members will only be required to undertake commitments and concessions to the extend consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.”

III.3 GENERAL AGREEMENT ON TRADE IN SERVICES & AGREEMENT ON TRADE RELATED INVESTMENT MEASURES

III.3.A GENERAL AGREEMENT ON TRADE IN SERVICES

III.3.A(1) INTRODUCTION

General Agreement on Trade in Services (GATS)⁵⁵¹ is one of the agreements listed under the WTO Agreement⁵⁵² and it is a new agreement in the arena of international trade. Prior to the GATS, trade in service was not subject to any international discipline. However, some efforts were made to discipline trade in services under the Treaty of Rome, OECD, U. S. -Canada Free Trade Agreement, and NAFTA.⁵⁵³ Trade in Services is a growing area of international trade. The World Investment Report 2004 of the UNCTAD states:

“The structure of FDI has shifted towards services. In the early 1970s, this sector accounted for only one-quarter of the world FDI stock; in 1990 this share was less than one-half; and by 2002, it had risen to about 60% or an estimated \$4 trillion. Over the same period, the share of the primary sector in world FDI stock declined, from 9% to 6%, and that of manufacturing fell even more, from 42% to 34%.”⁵⁵⁴

The basic principles of GATS are influenced by GATT. The GATS covers only government measures affecting trade in services and actions by private service providers are not subject of the disciplines of the GATS. As provisions of the GATS are not much interpreted by the WTO Panels and the Appellate Body, there is very little WTO jurisprudence on GATS.

⁵⁵¹ . See , General Agreement on Trade in Services, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND, 33 I. L. M. 1168, 1994 [hereafter GATS].

⁵⁵² . See Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 33 I. L. M. 1144, 1994 [hereinafter WTO Agreement].

⁵⁵³ . See JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS 853 (2002).

⁵⁵⁴ . See UNCTAD document (UNCTAD/WIR/2004 (Overview)), *World Investment Report 2004: The Shift Towards Services*, p. 15, United Nations, New York and Geneva, 2004. Available at www.unctad.org.

The GATS defines services as to include any services in any sector except those supplied in the exercise of governmental functions.⁵⁵⁵ The scope of application of the GATS cover any measures affecting trade in services.⁵⁵⁶ Here measures include any measure by a Member in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form.⁵⁵⁷

III.3.A(2) FOUR MODES OF DELIVERY

Article I:2 of the GATS states, "For the purposes of this Agreement, trade in services is defined as the supply of a service:

- (a) from the territory of one Member into the territory of another Member,⁵⁵⁸
- (b) in the territory of one Member to the service consumer of any other Member,⁵⁵⁹
- (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;⁵⁶⁰

⁵⁵⁵ . See GATS, *supra*, footnote 551, Article I (3) (b).

⁵⁵⁶ . See GATS, *supra*, footnote 551, Article I (1). See Article XXVIII of the GATS for the definition of measures affecting trade in services. See *Canada – Certain Measures Affecting the Automotive Industry*, Report of the WTO Appellate Body, adopted on 19 June 2000, WT/DS139/AB/R, WT/DS142/AB/R, at para. 152.

⁵⁵⁷ . See GATS, *supra*, footnote 551, Article XXVIII (a).

⁵⁵⁸ . It is called "Mode 1" which also is known as the "cross-border" mode of supply. It is the supply of a service from one Member into another Member. Its example includes international transportation services, supply of service through telecommunication or mail, transfer of funds from a bank in one Member to a financial institution in another Member country, etc. It does not require the physical movement of supplier or consumer.

⁵⁵⁹ . It is called "Mode 2" which also is known as the "consumption abroad" mode of supply. Example includes tourism services or a medical services in a hospital of another country. It requires a movement of the consumer to the location of the supplier.

⁵⁶⁰ . This "Mode 3" is called "commercial presence." It involves supply of a service by a service supplier of one country through commercial presence (having an establishment) in another country. It may involve the presence of corporation, joint ventures, etc. For example, a banking service may be provided by having a branch or a subsidiary of a foreign bank. Another example may be legal services provided by lawyers establishing an office in the territory of another Member.

(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.”⁵⁶¹

Hence, GATS provides the four “modes of delivery” in which services are provided. The four modes of supply is fundamental to understanding the scope and operation of the GATS. The right to provide services under any of the modes is not an automatic one but must be in accordance with the schedule of commitment pursuant to Article XVI or Article XVII of the GATS.

Out of four modes of delivery, the “commercial presence” is very meaningful and important. Article XXVIII (d) of the GATS defines “commercial presence” as any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service. The mode of service delivery under the “commercial presence” is also considered as a provision of foreign investment. Because of the existence of the provision of “commercial presence,” GATS is an agreement which also governs directly or indirectly foreign investment. In this connection, it will not be considered otherwise to study the Agreement on Trade-Related Investment Measures (TRIMPs) and the Agreement on Trade in Services (GATS) together.

⁵⁶¹ . This “Mode 4” is called “movement of natural persons.” For example a doctor or a consultant traveling to the territory of another Member to provide his or her services. It involves actual movement of persons across the border.

III.3.A(3) GAENERAL OBLIGATIONS

General obligations of GATS include the most-favored-nation treatment and transparency. It is applicable to all sectors, irrespective of the fact whether or not specific commitments have been made in that sector. Thus a WTO Member is required to apply most-favored-nation treatment by not discriminating between services products and services providers of different countries.⁵⁶² Under the transparency obligation, a Member is required to publish all relevant laws and regulations, and further required to establish an enquiry point.⁵⁶³

III.3.A(4) SPECIFIC OBLIGATIONS

Specific commitments or obligations are contained in each Member's Schedule of specific commitments and it includes specific service sectors which are listed in the Schedule of specific commitments of a Member. The Schedule of specific commitments is binding to the concerning Member and it is one of the required terms of condition for accession to the WTO.⁵⁶⁴ The Schedule of specific commitments are annexed to the GATS and are considered as an integral part of the GATS.⁵⁶⁵ We can say that the real GATS obligations and commitments are contained in the Schedule of Commitments. If a certain service sector is not included in the Schedule, specific obligations can not be arisen. In each of the selected sectors, a Member is obligated to (i) market access, (ii) national treatment, and (iii) additional commitments.

⁵⁶² . See GATS, *supra*, footnote 551, Article II.

⁵⁶³ . See GATS, *supra*, footnote 551, Article III.

⁵⁶⁴ . See WTO Agreement, *supra*, footnote 552, Article XII:1.

⁵⁶⁵ . See GATS, *supra*, footnote 551, Article XX.

III.3.A(4)(i) Market Access

Market access is not defined as such in the GATS. Market access commitments are limited in application to the service sectors listed in a Member's Schedule. However, generally, market access can be defined in the context of any limits on the quantity of services that are provided from foreign owned services suppliers. A Member is obligated not to impose limits on number of service providers or conditions of economic need test. Numerical limits, measures restricting the type of legal entity or joint venture, requirement to such as foreign partner's share are prohibited.⁵⁶⁶ However, Members generally prefer to make reservation in this area in practice.

III.3.A(4)(ii) National Treatment

National treatment obligation requires a Member to accord treatment to foreign services and service suppliers no less favorable treatment than that accorded to like domestic services and service suppliers.⁵⁶⁷ However, it applies only to the service sectors which are listed in the Schedule of a Member.

III.3.A(4)(iii) Additional Commitments.

Commitments made under Article XVIII of GATS reflect obligations as strictly laid out in the "additional commitments." If additional commitments are not spelled out, no obligations are assumed. It is not subject to Schedule under Articles XVI and XVII of GATS.

⁵⁶⁶ . See GATS, *supra*, footnote 551, Article XVI.

⁵⁶⁷ . See GATS, *supra*, footnote 551, Article XVII:1.

We can infer from the above discussion that the method of scheduling commitments is critical to rights and obligations a Member assume under the GATS.⁵⁶⁸ First of all, no service sector is bound by market access or national treatment unless it is listed in the schedule of specific commitments. Secondly, once a sector is listed in the Schedule of specific commitments, it assumes all the obligations specified in the market access and national treatment unless they list reservation accordingly. Hence, GATS obligation is applied to laws covering these sectors. Article VI of the GATS which covers domestic legislation provides that:

- (i) In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.
- (ii) Judicial and other tribunals shall be maintained for objective and impartial review.
- (iii) The procedures for applications shall be transparent.
- (iv) Measures relating to qualification requirements and procedures, technical standards, and licensing do not constitute unnecessary barriers to trade in services.
- (v) Members shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner not expected at the time commitments were undertaken.

III.3.A(5) CONFORMITY OF NEPALESE LAWS AFFECTING TRADE IN SERVICES

Trade in service is vital for Nepal. Since large number of Nepalese have gone abroad for jobs, it has changed the overall income pattern in Nepal. The share of farm income in total income has

⁵⁶⁸ . See GATS, *supra*, footnote 551, Article XX.

declined from 61 percent to 48 percent while that of non-farm income increased from 22 to 28 percent and other sources including remittances increased from 16 to 25 percent.⁵⁶⁹ The number of people below the poverty line in Nepal has dropped by 11 percent in less than a decade. The report by the World Bank and Nepal's Central Bureau of Statistics says that the drop is because of money sent home by overseas workers.⁵⁷⁰ It proves that services provided by Nepalese workers in foreign countries is vital for the economic development of Nepal. However, such kind of services is not covered by the GATS or by any other WTO Agreements. It is governed by bi-lateral agreements between Nepal and service receiving countries in some cases, or it is explored by concerning service provider in their own.

Nepal also has made a commitment on Schedule of Specific Commitments⁵⁷¹ with respect to the service sectors during the accession negotiation. At the first working party meeting, Nepal made limited commitments in three sectors: i) telecommunications, ii) hotel (large only), and iii) hospital services. WTO Members then asked for commitments in more sectors, and Nepal offered them in 12 sectors at the second working party meeting (in September 2002); however, then the Working Party reportedly wanted commitments in 22 sectors and sub-sectors.⁵⁷² Finally, Nepal agreed to open 70 sectors out of 160 sectors.

⁵⁶⁹ . See *Sustaining is the Challenge*, Spotlight Weekly, Vol. 24, No. 30, Feb. 18 – Feb. 24, 2005.

⁵⁷⁰ . See *Sharp decline in Nepal poverty*, BBC NEWS, http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/south_asia/4516271.... (printed 5/5/2005).

⁵⁷¹ . See WTO doc. WT/ACC/NPL/16/Add.2, *Report of the Working Party on the Accession of the Kingdom of Nepal, Addendum*, (the Schedule of Specific Commitments on Services), 28 August 2003, available at www.wto.org.

⁵⁷² . See *Nepal: Trade and Competitiveness Study*, Draft for Consultation and Discussion, A Study Conducted as part of the Integrated Framework (IF) for Trade-Related Technical Assistance by the World Bank on behalf of the Integrated Framework (IF) Working Group, which consists of six agencies (IMF, ITC, UNCTAD, UNDP, WTO and the World Bank), p. 33 (June 6, 2003).

Nepal has opened all most all areas of importance, i. e., financial services which include banking, insurance, etc., telecommunication, accounting, legal, research and development, engineering, architecture, marketing, construction, air transport, computer related services, etc. It is surprising that even country like India has not open financial service, legal service sector yet.⁵⁷³ India is an original Contracting Party of GATT –1947 and many folds bigger economy than Nepal. Article IV:3 of the GATS stipulates that in negotiations, particular account shall be taken of the serious difficulty of least-developed Members in accepting “negotiated specific commitments in view of their specific economic situation and their development, trade and financial needs.”

Hence, Nepal is bound to provide national treatment and market access to those service sectors which are listed in the Schedule. It is obvious that Nepal will not be compelled to open other service sector and have any obligations to those service sectors which are not listed in the Schedule of Commitments. Nepal shall be compelled to fulfill her obligations with respect to the service sector and modes of delivery which Nepal has listed in the Schedule of Commitments.

Nepalese legislation relating to telecommunication and banking already provided for foreign participation and fulfill the requirement of most-favored-nation treatment. The Government of Nepal has decided to completely open the telecommunications services and to convert Nepal Telecommunications Corporation (State enterprise) into a company.⁵⁷⁴ Company Act, 1996, provides that any foreigner may incorporate a company in Nepal. Foreigner may hold 100% equity. This applies to all including banks as well as telecommunication companies.

⁵⁷³ See The Financial Express, available at http://financialexpress.com/print.php?content_id=84634 (dated 3/24/2005)

⁵⁷⁴ See the Kathmandu Post, 9 March 2004. See *Nepal to Open Telecom Sector*, March E-newsletter on Globalization and WTO, Vol. 1, Issue 13, March 2004.

Commercial Bank Act, 1964 has a similar provision. There is no restriction on branches of banks. Central Bank may allow branches to be opened. In addition to it, other Nepalese legislation affecting trade in services meets the requirements prescribed by the GATS.⁵⁷⁵ In Nepal, the authorities' decision affecting trade in services are subject to judicial review under the provisions of each law governing each service sector. In addition to it, there is also a provision of appeal on such cases under the Justice Administration Act, 1991. The Justice Administration Act, 1991, provides provision of an appeal against the decision of any authority in respect of disputes between parties. Generally appeal lies to the Court of Appeal which is an independent judicial body. Generally, each laws and regulations are to be published in Nepal Gazette. The necessary obligations, i. e., national treatment, most-favored nation, judicial review, transparency, etc. are already in existence in Nepal. Nepal has made a commitment to establish an "enquiry point" in the accession negotiation.⁵⁷⁶ Hence, Nepal needs to establish "enquiry point" to fulfill her obligation prescribed by the GATS. Thus Nepalese laws are in conformity with the obligations prescribed by the GATS.

III.3.A(6) CONCLUSION

⁵⁷⁵ . See the Telecommunications Act, 1996 and the Telecommunication Regulation, 1997; the Insurance Act, 1992; the Tourism Act, 1978; the Nepal Bar Council Act, 1993; the Nepal Medical Council Act, 1997; Commercial Bank Act, 1974; the Central Bank Act, 1955; the Development Act, 1996; the Finance Companies Act, 1985; the Education Act, 1971 and the Education Regulation, 1992; the Nepal Agency Act, 1958; the Nepal Chartered Accountants Act, 1997; the Insurance Act, 1992; and others.

⁵⁷⁶ . See WTO document WT/ACC/NPL/16, para 143, *Report of the Working Party on the Accession of the Kingdom of Nepal to the World Trade Organization*, the WTO Secretariat, Geneva, 28 August 2003, available at <http://www.wto.org>.

The Telecommunications Act, 1996 and the Telecommunication Regulation, 1997; the Insurance Act, 1992; the Tourism Act, 1978; the Nepal Bar Council Act, 1993; the Nepal Medical Council Act, 1997; Commercial Bank Act, 1974; the Central Bank Act, 1955; the Development Act, 1996; the Finance Companies Act, 1985; the Education Act, 1971 and the Education Regulation, 1992; the Nepal Agency Act, 1958; the Nepal Chartered Accountants Act, 1997; the Insurance Act, 1992; and others deal with in these area in Nepal. However, Foreign Investment and Technology Transfer Act, 1992 prohibits foreigners to make an investment on consultancy services such as Management, Accounting, Engineering and Legal Services, and other areas too.⁵⁷⁷ This provision can not be considered as otherwise because the Foreign Investment and Technology Transfer Act, 1992 is compatible to the TRIMs. Generally, if such consultancy services are considered only subject to the GATS and Nepal includes it under the Schedule, Nepal is bound to provide national treatment and market access to foreigners on these sectors in accordance with the Schedule of commitments. The issue whether a certain sector is related to foreign investment or to the service sector is vital as it creates confusion and hence, the question of conformity of laws also remains disputed. Except the areas covered by such confusion, we can conclude that the Nepalese laws related to the service sectors are in compliance with the GATS.

III.3.B AGREEMENT ON TRADE RELATED INVESTMENT MEASURES

III.3.B(1) INTRODUCTION

⁵⁷⁷ . See Section 3(4) of the Foreign Investment and Technology Transfer Act, 1992 (Nepal).

Foreign Direct Investment (hereinafter referred to as the "FDI") is valuable and increasing in international economic transactions. The FDI is considered as one of the important parts of economic development of poor countries. Today, FDI is widely recognized as a major potential contributor to growth and development. It can bring not only capital to the host country, but also technology, management know-how and access to new markets. In comparison with other forms of capital flows it is also more stable, with a longer-term commitment to the host economy.⁵⁷⁸ So far there is no single document or agreement which would regulate FDI in international arena. Historically, foreign investment law has emerged as a development of the public international law concept of protection of aliens and of state responsibility for injuries inflicted on foreign citizens.⁵⁷⁹ Well settled general principle of international law states that when an alien established himself in the foreign state, he has to accept the conditions and liabilities which nationals of that state have; and no state is expected to relinquish its jurisdiction over that alien within her territory.⁵⁸⁰ Therefore, a foreign investor owes high extent of obedience to the host state in exchange for protection of his property and for permission to act at the internal market of that country.⁵⁸¹

⁵⁷⁸ . See Jorg Weber, *Existing Proposals on Bilateral and Multilateral Investment Agreements and Practices Towards Codes of Conduct on TNCs and Government With Respect to FDI*, UNCTAD-Civil Society Dialogue on Selected Development Issues Being Addressed by the United Nations System, UNCTAD/ISS/Misc. 385, (Geneva, 10 December 2001), page 31.

⁵⁷⁹ . M. SORNARAJAH, *THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* 8 (1994).

⁵⁸⁰ . Michael P. Avramovich, *The Protection of International Investment at the Start of the Twenty-First Century: Will Anachronistic Notions of Business Render Irrelevant the OECD's Multilateral Agreement in Investment?* 31 J. MARSHALL L. REV. 1252 (1998).

⁵⁸¹ . See Id.

Prior to the World War II, foreign investment was not afforded any degree of sufficient legal protection on the international level.⁵⁸² Military force remained as the main means of protection of the property of nationals abroad . Shortly after the World War II, an attempt to regulate FDI was made for the first time in the Charter of the International Trade Organization.⁵⁸³ It provided that each state had the sole right and jurisdiction to implement rules and impose restrictions relating to the FDI regulation in its territory. The Charter of the International Organization never came into force.

The General Agreement on Tariffs and Trade (GATT -1947) had not any provision on foreign investment. Initially, the GATT did not address the issue of trade-related measure, i. e., investment, services and intellectual property, as they were not considered tariffs or custom duties.⁵⁸⁴ The lack of multilateral agreement regulating foreign direct investment looked increasingly inadequate in the light of success of the GATT. However, tremendous bilateral investment treaties were concluded between capital exporting and capital importing countries.⁵⁸⁵ Bilateral investment treaties were concluded with the main purpose of protection against expropriation and setting forth standards for compensation to investors. Bilateral investment treaties provided for national treatment and most favored national treatment to foreign investors, protection against expropriation, free repatriation of profits, dispute settlement, etc.⁵⁸⁶ Bilateral investment treaties have still remained the dominant vehicle through which foreign direct

⁵⁸² . See SORNARAJAH, *supra*, footnote 579, at 29.

⁵⁸³ . See Charter of the International Trade Organization, Final Act and Related Documents, U. N. Conference on Trade and Employment, Mar. 24, 1948, U. N. Doc. ICITO/1/4 (1948).

⁵⁸⁴ . See Eric M. Burt, *Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization*, 12 AM. U. J. INT'L L. & POL'Y 1015, 1033 (1997).

⁵⁸⁵ . See Kenneth J. Vandeveld, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L. J. 469 (2000).

⁵⁸⁶ . See Todd Shenkin, *Trade Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, 55 U. PITT. L. REV. 541, 543 (1994).

investment is governed in the international plane.⁵⁸⁷ Moreover, many countries entered into regional multilateral trade arrangement under which we find investment provisions.⁵⁸⁸

In 1955, the GATT Conference adopted Resolution on International Investment.⁵⁸⁹ It recognized that increased investment flows to developing countries help development efforts by injecting capital and advanced technology and it called to GATT Contracting Parties to create FDI friendly environment. In 1982, the first investment dispute arose under the GATT. The United States brought the matter before GATT against Canada under Article XXIII (2) of the GATT.⁵⁹⁰ The Foreign Investment Review Act had provision, besides other, that foreign investors require to purchase from Canadian sources. The United States challenged the Foreign Investment Review Act of Canada as violating Article III:4 of the GATT and alleged nullification and impairment of its benefits under Article III:4, III:5, XI and XVII (1)(c). The GATT Panel found nullification and impairment of Article III:4 (national treatment obligation) by imposing local content requirement, Canada indirectly discriminated against those countries that would like to export goods to the investor. Moreover, the panel agreed that while the local content requirement is nullification or impairment of the expected benefits in the relations between two developed countries. However, it would not necessarily have the same result in the dispute involving developing countries. The decision was extremely important for developing TRIMs jurisprudence and it was eventually embodied in the Agreement on Trade-Related Investment

⁵⁸⁷ . See Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 640 (1998).

⁵⁸⁸ . Chapter 11 of North America Free Trade Area (NAFTA) deals with foreign investment. Likewise, European Union under Amsterdam Treaty provides for general liberalization of capital movement and freedom of establishment. MERCOSUR, APEC and ASEAN also have provisions on investment within their regional basis.

⁵⁸⁹ . See Resolution on International Investment for Economic Development, Mar. 4, 1955, GATT B. I. S. D. (3rd Supp.) at 49-50 (1955).

⁵⁹⁰ . See GATT Report Panel Report, *Canada - Administration of the Foreign Investment Review Act*, adopted on 7 February 1984 (L/5504 - 30S/140) (*Canada - Administration of the Foreign Investment Review Act*, GATT B. I. S. D.)30th Supp. At 140 (1984).

Measures (TRIMs).⁵⁹¹ The Agreement on Trade-Related Investment Measures (hereinafter referred to as "TRIMs") is one of the agreements listed under Annex 1A of the WTO Agreement. The TRIMs Agreement is a product of consensus between two opposite camps of developed and developing countries, which sought to attain opposite goals.

III.3.B(2) GATS & ITS RELATION TO THE TRIMs AGREEMENT

Foreign investment in the services sector is governed by the General Agreement on Trade in Services (GATS). The GATS permits market access for service suppliers through four modes of supply, one of which is clearly investment-related: the commercial presence of a service supplier.⁵⁹² The term "commercial presence" is defined as "any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service."⁵⁹³ The TRIMs Agreement also contains many important obligations including most favored nation (MFN) and national treatment. However, while the GATS requires to accord MFN treatment immediately and unconditionally, national treatment provision is subject to special limitations. According to Article XVII, national treatment of foreign service suppliers is limited to sectors and modes of supply specifically reserved by the Member state in its Schedule of Commitments. Thus, in many ways, the GATS is the WTO's real investment agreement. The provisions of the GATS

⁵⁹¹ . See Robert H. Edwards & Simon N. Lester, *Towards a More Comprehensive World Trade Organization Agreement on Trade Related Investment Measures*, 33 STAN. J. INT'L L. 186 (1997).

⁵⁹² . See GATS, *supra*, footnote 551, Article I:2.

⁵⁹³ . See GATS, *supra*, footnote 551, Article XXVIII (d).

also do not compel Nepal to open certain service sector for foreign investment if Nepal does not make any commitment through Schedule of Commitment.

III.3.B(3) PROVISIONS OF THE TRIMs AGREEMENT

The TRIMs Agreement sets forth measures that are inconsistent with the national treatment principle of Article III:4⁵⁹⁴ of GATT or the prohibition on quantitative restrictions of Article XI:1⁵⁹⁵ of GATT. The scope of the TRIMs Agreement is defined in Article 1 of the TRIMs Agreement, which states that the Agreement applies to investment measures related to trade in goods only. Thus, the TRIMs Agreement does not apply to services. Article 2 provides that no Member may apply any TRIMs that is inconsistent with the provisions of Article III (national treatment of imported products) or XI (prohibition of quantitative restrictions on imports or exports) of GATT 1994. The term "trade-related investment measures" is not defined in the Agreement. However, the Agreement contains in an Annex an Illustrative List of measures that are inconsistent with GATT Article III:4 or XI:1 of GATT 1994. Paragraph 1 of the Annex lists TRIMs that are inconsistent with the national treatment obligation contained in paragraph 4 of GATT Article III.⁵⁹⁶ Paragraph 2 lists those that are inconsistent with the obligation of general

⁵⁹⁴ . Article III:4 states in relevant part: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use...."

⁵⁹⁵ . Article XI:1 states: "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

⁵⁹⁶ . The TRIMs Agreement include those which "require:" "(a) purchase or use by an enterprise of products of domestic origin or from any domestic source...[i. e., domestic content requirements]; or (b) that an

elimination of quantitative restrictions provided for in paragraph 1 of GATT Article XI.⁵⁹⁷ The chapeau to the paragraphs 1 and 2 of the Annex of the TRIMs Agreement provides that GATT - inconsistent TRIMs "include those which are mandatory or enforceable under domestic law or under administrative rulings or compliance with which is necessary to obtain an advantage...."

All exceptions under GATT 1994 shall apply under the TRIMs Agreement.⁵⁹⁸ In addition, developing countries are permitted to deviate from Article 2 obligations for balance of payments reasons.⁵⁹⁹ Members of the WTO are required to notify the Council for Trade in Goods of any TRIMs that are not in conformity with the Agreement. Countries are given two, five or seven years to eliminate all notified TRIMs depending on whether they are a developed, developing, or least-developed country Member, respectively.⁶⁰⁰ Developing and Least-developed country Members may qualify for extension.⁶⁰¹ Members are required to ensure transparency with respect to the application of TRIMs. Members need to notify to the WTO Secretariat of lists of

enterprise's purchase or use of imported products be limited to an amount related to the volume or value of local products that it exports [i.e., trade balancing requirements]."

⁵⁹⁷ . The TRIMs Agreement include those which "restrict:" "(a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports; (b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or (c) the exportation or sale for export by an enterprise of products...."

⁵⁹⁸ . See Agreement on Trade Related Investment Measures, Art. 3 [hereinafter TRIMs Agreement]. Regarding GATT exceptions, there is provision of waiver of obligations under Article XXV of the GATT which authorizes the Contracting Parties in exceptional circumstances to waive their Agreement obligations. Likewise, balance-of-payments exception is available under GATT Article XII which allows the Member state to introduce quotas in order to safeguard its external financial position and its balance of payments. Article XXIV of the GATT provides that custom union and free trade area can deviate from their most favored nation obligations under Article I of the GATT. The Escape Clause under Article XIX (1) (a) and (b) of GATT is a safeguard designed against imports. It allows the Member to suspend its obligations under the GATT if as a result of unforeseen development and of the effect of a certain GATT obligation, any product is being imported in such quantities and in such conditions that it causes or threatens serious injury to domestic producers or directly competitive products. GATT Article XX set forth a list of general exceptions, i. e., protection of human health, animal or plant life, etc., compelling circumstances that are deemed to override the interests and benefits of unrestrained international trade. GATT Article XXI provides that the GATT shall not apply in case of compelling interests of national security.

⁵⁹⁹ . See TRIMs Agreement, *supra*, footnote 598, Article 4.

⁶⁰⁰ . See TRIMs Agreement, *supra*, footnote 598, Article 5.

⁶⁰¹ . *Id.*

publications in which TRIMs may be found.⁶⁰² Committee on Trade-Related Investment Measures is established as a forum to examine the implementation operation of the Agreement.⁶⁰³

III.3.B(4) PROVISIONS OF NEPALESE LEGISLATION AFFECTING FOREIGN INVESTMENT

The Constitution of the Kingdom of Nepal (hereinafter referred to as the "Constitution")⁶⁰⁴ states in one of its directive principles that the state shall take the policy of attracting foreign capital and technology while at the same time promoting indigenous investment for the purpose of national development. This is the very first constitutional mention of state's foreign investment policy in the history of Nepal. Following the restoration of democracy in 1990, His Majesty's Government of Nepal had adopted several policies including Industrial Policy of 1992 and Foreign Investment Policy of 1992. Consequently, Nepal enacted Industrial Enterprise Act, 1992, and Foreign Investment and Technology Transfer Act, 1992.

The Industrial Policy of 1992 identifies foreign investment promotion as an important strategy in achieving the objectives of increasing industrial production to meet the basic needs of the people, create maximum employment opportunities and pave the way for the improvement in the balance of payments. The Foreign Investment and Technology Transfer Act, 1992 has been enacted for attracting of foreign investment and technology transfer in Nepal. The Foreign Investment and

⁶⁰² . See TRIMs Agreement, *supra*, footnote 598, Art. 6. Notifications received under this provision are listed in document G/TRIMS/N/2/Rev.2.

⁶⁰³ . See TRIMs Agreement, *supra*, footnote 598, Article 7.

⁶⁰⁴ . See *The Constitution of the Kingdom of Nepal*, 1990, Article 26 (12). However, the directive principles of the Constitution are not binding.

Technology Transfer Act, 1992, as amended in 1996, lays down the legal regime governing foreign investment in Nepal. The Foreign Investment and Technology Transfer Act, 1992 regulates mainly private sector investment.

The Foreign Investment and Technology Transfer Act, 1992 has defined the concept of foreign investment, technology transfer, foreign investor etc.. According to section 2(b) of the Act, "foreign investment" means the investment in share, reinvestment of the earnings derived from the investment and investment made in the form of loan or loan facilities. Similarly the Act has defined the concept "technology transfer" as well. According to section 2(c) of the Act "technology transfer" means any transfer of technology to be made under an agreement between an industry and a foreign investor on the following matters:-

- a) Use of any technological right, specialization formula, process, patent or technical know-how of foreign origin.
- b) Use of any trademark of foreign ownership.
- c) Acquiring any foreign technical consultancy management and marketing services.

Hence, foreign investment is welcome in the form of share (equity) in Nepal⁶⁰⁵. Reinvestment⁶⁰⁶ of earnings derived from foreign investment also constitutes foreign investment. In addition to this, investment made in the form of loan or loan facilities⁶⁰⁷ also constitutes foreign investment.

Under the Foreign Investment and Technology Transfer Act, 1992, government approval or

⁶⁰⁵ · See Foreign Investment and Technology Transfer Act, 1992, Section 2 (b) (1).
⁶⁰⁶ · See Foreign Investment and Technology Transfer Act, 1992, Section 2 (b) (2).
⁶⁰⁷ · See Foreign Investment and Technology Transfer Act, 1992, Section 2 (b) (3).

permission is essential for the foreign investment or technology transfer.⁶⁰⁸ Foreign companies/investors have to fill up a prescribed form to the Department of Industries of His Majesty's Government of Nepal for approval. "Industrial promotion Board" established under section 12 of the Industrial Enterprise Act, 1992, will decide approving foreign investments under the Foreign Investment and Technology Transfer Act, 1992. If an application is made by a foreign company, enterprise or individual in the prescribed format to the Department of Industries, the Board will give the permission within 30 days of the application filed. The Board shall not give approval in certain restricted areas of industries as mentioned in Section 3 (4) of the Foreign Investment and Technology Transfer Act, 1992.

The Foreign Investment and Technology Transfer Act, 1992, has given certain facilities to attract foreign investors in the country. In addition to facilities provided by Industrial Enterprises Act, 1992, the Foreign Investment and Technology Transfer Act, 1992 also has provided certain facilities and concessions for foreign investment. Non tourist visa will be issued for up to six months to a foreigner who is undertaking any study or carrying out any research for the purpose of making investment. Business visa will be provided to a foreign investor or dependent family or authorized representative of such a foreign investor. Residential visa will be issued to the foreign investor who makes investment amounting not less than one hundred thousand US dollar or in convertible foreign currency equivalent. A foreign investor shall be levied income tax at the rate of fifteen percent only. Nationalization of industries is prohibited.⁶⁰⁹ Pursuant to Sec. 5(2) of the Foreign Investment and Technology Transfer Act, 1992, a foreign investor who

⁶⁰⁸ . See Foreign Investment and Technology Transfer Act, 1992, Section 3 (a).

⁶⁰⁹ . See the Industrial Enterprise Act, 1992, Section 21.

makes an investment in foreign currency shall be entitled to repatriate the following amounts outside the country:

- a) The amount received by sale of the whole or any part of share investment;
- b) The amount received as profit or dividend in lieu of the foreign investment;
- c) The amount received as repayment of the principal and payment of interest on the loan;
- d) The amount received under an agreement for the transfer of technology;
- e) The amount received as compensation for the acquisition of any property;
- f) Foreign experts working in Nepalese industries are permitted to repatriate in convertible currency up to 75 percent of the amount received by them as salaries, allowances etc.

III.3.B(4)(i) *Areas Restricted for Foreign Investment*

The broad areas open for foreign investment include manufacturing industries, energy based industries, tourism industries, mineral resource based industries, agro-based industries and

service industries. However, foreign investment is not allowed in the following industries in Nepal⁶¹⁰:

1. Cottage Industries.
2. Personal Service Business (Business such as Hair Cutting, Beauty Parlour, Tailoring, Driving Training, etc.).
3. Arms & Ammunition Industries.
4. Explosives, Gunpowder.
5. Industries related to Radio-Active Materials.
6. Real Estate Business (excluding Construction Industries).
7. Motion Pictures Business (Produced in national languages and the language of the nation).
8. Security Printing.
9. Currencies & Coinage Business.
10. Retail Business.
11. Travel Agency.
12. Trekking Agency.
13. Water Rafting.
14. Pony Trekking.
15. Horse Riding.
16. Cigarette, Bidi (Tobacco), Alcohol (excluding those exporting more than 90%).
17. Internal Courier Service.
18. Atomic Energy.
19. Tourist Lodging.
20. Poultry Farming.
21. Fisheries.
22. Bee-keeping.
23. Consultancy Services such as Management, Accounting, Engineering and Legal Services.

However, the above mentioned restrictions don't apply in the area of technology transfer.⁶¹¹

⁶¹⁰ . See Foreign Investment and Technology Transfer Act, 1992, Section 3 (4), Annex Part (A) & (B).

⁶¹¹ . See Foreign Investment and Technology Transfer Act, 1992, Section 3 (4).

3.B(4)(ii) Dispute Settlement Mechanism

Section 7 of the Foreign Investment and Technology Transfer Act, 1992 provides that any dispute that arises between a foreign investor, national investor or the concerned industry, the concerned parties shall be required to settle the dispute by mutual consultations in the presence of the Department of Industry. If in such way dispute could not settled through conciliation, it shall be finally settled through arbitration. The arbitration shall be held in accordance with existing arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). The arbitration shall be held in Kathmandu. The laws of Nepal will be applicable in arbitration. The parties of the agreement are free to fix the procedure, laws and venue of the dispute settlement.⁶¹² In addition to it, Nepal is a Member of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID) under which investment dispute between foreign investor and Nepal Government can be settled if both Parties agreed.

III.3.B(5) CONFORMITY OF NEPALESE LAWS WITH THE TRIMs AGREEMENT

The Agreement on Trade-Related Investment Measures (TRIMs) is one of the trade agreements. It does not contain substantive rules for the protection of investment except as derived from protection accorded to trade in goods. The TRIMs Agreement does not address the issue of the

⁶¹² See Foreign Investment and Technology Transfer Act, 1992, Section 7(4).

protection of foreign investors in the host Member. It fails to cover the following important areas:

- a) non-trade-related TRIMs (they are covered in part by GATS);
- b) other type of TRIMs except local content requirements and performance requirements (such as equity requirements,⁶¹³ or other remittance restrictions);
- c) political risks, such as, expropriation, nationalization, requisition;
- d) repatriation of profits.

Hence, the TRIMs Agreement does not require Members to provide any other protection measures for foreign direct investment, and it only prescribes obligations to Members to protect from local content requirement and quantitative restriction on goods to be used in investment. Nepalese laws do not have any provision of local content requirement and do not impose measure of quantitative restriction with respect to foreign investment. It has selected certain sectors of industries which are not allowed for foreign investment. This provision of laws is not contrary to the provisions of TRIMs. On the top of it, Nepalese laws have provided enough protection to foreign investment in Nepal, i. e., repatriation, no nationalization except for public purpose and with compensation only, equal treatment, provision of dispute settlement, etc. Hence, it is obvious that Nepalese laws on foreign investment are in compliance with the TRIMs provision. But Nepal needs to notify its measures related to foreign investment to the Council of

⁶¹³ Covered in part by GATS Article XVI, unless otherwise specified in the schedule of Commitments. Article XVI, Market Access: "2. [...] the measures which a Member shall not maintain or adopt, [...] are defined as:

[...]

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment."

Goods of the WTO. Nepal meets transparency requirement because every laws, regulations, bylaws, etc. are published in Gazette in Nepal.

III.3.B(6) CONCLUSION

In Nepal, 100 percent of foreign investment is permitted; in large as well as medium scale industries, foreign investment is allowed; full remittance of profits, dividends and repatriation of capital are permitted; transfer of technology in cottage and small industries has been allowed; security of foreign investment is guaranteed; facilities provided; local content requirement is not required; and quick and efficient services to foreign investor through one door system is provided under the existing laws of Nepal. Hence, we can conclude from the discussion that Nepalese law provides broader protection to foreign investment in Nepal than what the TRIMs Agreement requires.

III. 4 AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS AND RELATED NEPALESE LAWS

III. 4.A INTRODUCTION

Nepal became the first least-developed country to join the World Trade Organization (hereinafter referred to as the "WTO") through a full Working Party negotiation in the history of the WTO.⁶¹⁴ WTO Membership has brought many-fold opportunities and challenges to Nepal. On the one hand, Nepal has been working on how to explore opportunity for further export of Nepalese goods and services into the international markets, and on other hand, Nepal is seriously considering how to fulfill her obligations provided by the Agreement Establishing the World Trade Organization⁶¹⁵ (hereinafter referred to as the "WTO Agreement") to Members. The Agreement on Trade-related Aspects of Intellectual Property Rights⁶¹⁶ (hereinafter referred to as the "TRIPS Agreement") is one of the annexed agreements of the WTO Agreement. The TRIPS Agreement reiterates the principles of international intellectual property protection. The TRIPS Agreement includes the prescription of minimum levels of substantive intellectual property rights protection for all WTO Member countries, a requirement of providing adequate enforcement mechanisms (including judicial processes), and the potential for authorization of trade sanctions against a Member that fails to implement the requirements.⁶¹⁷ The TRIPS Agreement gives binding effect to the WTO Member countries and has a provision of dispute settlement mechanism. Hence, the TRIPS Agreement lays down minimum standards for the protection of intellectual property rights as well as the procedures and remedies for their enforcement. The structure of the TRIPS Agreement is built on the existing international conventions dealing with intellectual property rights.

⁶¹⁴ . Nepal has become the 147th Member of the World Trade Organization on 23 April 2004.

⁶¹⁵ . See Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. III, para. 3, 33 INT'L LEGAL MATERIALS 1144 (1994) [hereinafter WTO Agreement].

⁶¹⁶ . See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Annex 1C, 33 I. L. M. 1197 (1994) [hereinafter TRIPS Agreement].

⁶¹⁷ . See 1 FREDERICK ABBOTT ET AL., THE INTELLECTUAL PROPERTY SYSTEM: COMMENTARY AND MATERIALS 2 (1999).

The WTO Agreement sets out, "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."⁶¹⁸ Accordingly, in addition to the provisions of other annexes, each Member of the WTO are under obligation to ensure the conformity of its laws, regulations and administrative procedures as provided in the TRIPS Agreement, annex 1C of the WTO Agreement. The TRIPS Agreement further states, "Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, ... Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."⁶¹⁹ In *India-Patents (U. S.)*, the WTO Appellate Body further reconfirms this provision and explains, "Members are free to determine how best to meet their obligations under the TRIPS Agreement within the context of their own legal system. And, as a Member, India is 'free to determine the appropriate method of implementing' its obligations under the TRIPS Agreement within the context of its own legal system."⁶²⁰ The TRIPS Agreement is the first WTO Agreement requiring Members to establish a relatively detailed set of substantive norms within their national legal systems, as well as requiring them to establish enforcement measures and procedures meeting minimum standards.⁶²¹

In addition to the conformity obligation, Article 63 of the TRIPS Agreement establishes transparency requirements, which include obligations to publish or otherwise make available

⁶¹⁸ . See WTO Agreement, *supra*, footnote 615, Art. XVI, para 4.

⁶¹⁹ . See TRIPS Agreement, *supra*, footnote 616, Art. 1 (1).

⁶²⁰ . See Report of the WTO Appellate Body, *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted on 16 January 1998, AB-1997-5, WT/DS50/AB/R, at para.59.

⁶²¹ . See UNCTAD document (UNCTAD/EDM/Misc.232/Add.18), *Course on Dispute Settlement*, WTO, 3.14 TRIPS, New York & Geneva, 2003, page ii.

legal texts such as laws and judicial decisions. This Article establishes an obligation to notify laws and regulations to the TRIPS Council.⁶²²

Under the WTO system, a Council for TRIPS is established to deal with the TRIPS Agreement. The duties of the Council for TRIPS are set out in Article 68 of the TRIPS Agreement, to monitor the operation of the Agreement, especially Member States' compliance with obligations, to give Member States the opportunity to consult on trade-related aspects of intellectual property and, as well as other responsibilities, to provide assistance requested by them in relation to dispute settlement procedures.

It is worth to mention here that Nepal has become member of the World Intellectual Property Organization (WIPO)⁶²³ since 4 February 1997 and the Paris Convention⁶²⁴ since 22 June 2001. In the WTO accession negotiation, Nepal has expressed her commitment to join the Berne Convention,⁶²⁵ by December 2005, and join the Rome Convention⁶²⁶ and the Treaty on Intellectual Property in respect of Integrated Circuits⁶²⁷ by 2006.⁶²⁸ As the WTO Ministerial Conference agreed to grant Membership to Nepal on 11 September 2003 and Nepal ratified the accession protocol, Nepal needs to ensure her intellectual property rights laws, regulations and

⁶²² . This obligation was discussed in the *India-Patents (US)* by the WTO Appellate Body. See Report of the WTO Appellate Body, *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted on 16 January 1998, AB-1997-5, WT/DS50/AB/R, at para.59.

⁶²³ . The World Intellectual Property Organization (WIPO) is the international body chiefly responsible for administering some twenty International Intellectual Property Treaties and Conventions. But it has no enforcement powers; established in 1967 as a U. N. agency.

⁶²⁴ . It refers to the Paris Convention for the Protection of Industrial Property.

⁶²⁵ . It refers to the Berne Convention for the Protection of Literary and Artistic Works.

⁶²⁶ . It refers to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted at Rome on 26 Oct. 1961.

⁶²⁷ . It refers to the Treaty on Intellectual Property in respect of Integrated Circuits, adopted at Washington on 26 May 1989.

⁶²⁸ . See WTO document (WT/ACC/NPL/16, para 122), *Report of the Working Party on the Accession of the Kingdom of Nepal to the World Trade Organization*, the WTO Secretariat, Geneva, 28 August 2003, available at <http://www.wto.org>.

procedures compatible to the provisions of the TRIPS Agreement⁶²⁹ by the transitional period of time provided to Nepal by the WTO.

The Patent, Design and Trademark Act, 1965; the Copyright Act, 2002 and the Copyright Regulation, 1989 are the main statutes in respect of intellectual property rights in Nepal. The Patent, Design and Trademark Act, 1965 provides statutory regimes for patent, design and trademark; and the Copyright Act, 2002 provides statutory regimes for copyright. It should be noted that Nepalese intellectual property rights laws do not cover all the rights included in the above WIPO or TRIPS list.

In this sub-title, Nepalese copyright, patent, design and trademark laws are being studied, and compared it with the minimum standards prescribed by the TRIPS Agreement. It has examined the conformity of Nepalese intellectual property rights laws with the provisions of the TRIPS Agreement. It focuses on Nepal's conformity obligation in the context of Nepal's accession to the WTO. Finally this study suggests what kind of intellectual property rights laws are to be enacted or amended to give effect to the TRIPS Agreement in Nepal.

III. 4.A(1) *The Notion and Scope of Intellectual Property Right*

It would be helpful to overview the basic idea of intellectual property before we enter into the legal regime of intellectual property of Nepal and provisions of the TRIPS Agreement. The

⁶²⁹ . See WTO Agreement, *supra*, footnote 615, Art. XVI, para. 4. "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

rights of creators of innovative or artistic works are known as intellectual property rights. Intellectual Property protects applications of ideas and information that are of commercial value. Intellectual property is an intangible concept that is not easily described. The law creates the property by defining what will be protected from others. Intellectual property is created and protected based upon policy considerations as to what types of intellectual activities should be encouraged. As with all types of property, intellectual property may be sold, transferred, or otherwise disposed of.⁶³⁰

Generally, Intellectual Property Rights include copyrights (which protects the rights of authors of books and other artistic creations), patents (which protect the rights of inventors) and industrial designs (which protect rights to ornamental designs). They also cover trademarks and other signs that traders use to distinguish their products from those of others and thus build consumer loyalty and goodwill for their marks or brand names. This is a branch of law which protects some of the finer manifestations of human achievement.

Intellectual property may be intangible but it can be very valuable.⁶³¹ Like other kinds of property intellectual property can be passed on to someone else, by gift, sale or bequest. It may be transferred permanently or temporarily. Intellectual property is usually worth money and most of the law of intellectual property is concerned with protecting the right of the owner to make money out of his property. Thus intellectual property rights are primarily economic rights and in many cases the right owner can get pecuniary compensation for breach of his rights, though he

⁶³⁰

See DONALD A. GREGORY ET AL, INTRODUCTION TO INTELLECTUAL PROPERTY LAW 1 (1994).

⁶³¹

See RAJ BHALA ET AL., WORLD TRADE LAW 1081 (1998).

will also want to stop anyone else from cashing in on these rights and making money which should lawfully be his.

Intellectual Property Rights are territorial in scope.⁶³² Despite the existence of a number of international treaties and conventions on the protection of intellectual property, more effective protection is currently found in national laws and practices. The Court of Justice of the European Community states in the *Ihi International Heiztechnik Gmbh and another v. Ideal-standard Gmbh and another*⁶³³ that national trademark rights are first of all territorial. This principle of territoriality, which is recognized under international treaty practice, means that it is the law of the country where protection of a trademark is sought which determines the conditions of that protection. Moreover, national law can only provide relief in respect of acts performed within the national territory in question.⁶³⁴

The objects of intellectual property are the creations of the human mind, the human intellect, thus the designation 'intellectual property'. Intellectual property has direct effect on economic development of a country. Foreign investment and technology transfer are relevant to the intellectual property rights. "In general, licensing provides a firm with intellectual property with a means for increasing the returns yielded by that property by permitting someone else to exploit it. In the international context, this capability is particularly useful: a U. S. concern with little or

⁶³² . See *Id.* at 1083.

⁶³³ . Case C-9/93, *IHI International Heiztechnik Gmbh. v. Ideal-standard Gmbh.*, 3 C.M.L.R. 147 (1994).

⁶³⁴ . See 1 ABBOTT, *supra*, footnote 617, at 151.

no experience in Nepal can contract with someone with such experience to exploit the Nepalese market.”⁶³⁵

Traditionally, the term "intellectual property" was used to refer to the rights conferred by the grant of a copyright in literary, artistic and musical works. In more recent times, however, it has been used to refer to a wide range of disparate rights, including a number more often known as "industrial property", such as patents, designs and trademarks. The Convention Establishing the World Intellectual Property Organization (WIPO)⁶³⁶ defines "intellectual property" as including the rights relating to:

- literary, artistic and scientific works;
- performances of performing artists, phonograms and broadcasts;
- inventions in all fields of human endeavor
- scientific discoveries;
- industrial designs, trade marks, services marks and commercial names and designations;
- protection against unfair competition; and
- all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.⁶³⁷

In accordance with the TRIPS Agreement, the word "intellectual property rights" refers to the rights related to:

- Copyright and Related Rights

⁶³⁵ See RICHARD SCHAFFER ET AL, INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT 585 (3rd ed. 1997).

⁶³⁶ Convention Establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967, amended on September 28, 1979, WIPO Publication No. 250 (E), (1993) [hereinafter WIPO Convention]. The full text of the Convention is available from the WIPO website at <http://www.wipo.org/eng/ipler/inedix.htm>. International Intellectual Property Treaties and Conventions are collected in INTERNATIONAL TREATIES OF INTELLECTUAL PROPERTY (Marshall A. Leaffer, ed. 1990).

⁶³⁷ See WIPO Convention, *supra*, footnote 636, Art. 2 (viii).

- Trademarks
- Geographical Indications
- Industrial Designs
- Patents
- Layout-Designs (Topographies) of Integrated Circuits
- Protection of Undisclosed Information.⁶³⁸

III. 4.A(2) Background of the TRIPS Agreement

It is important to go a little bit through the historical background of the TRIPS Agreement before entering into its provisions. It will facilitate to understand the TRIPS Agreement properly. Before the Uruguay Round, there were no specific agreement relating to intellectual property rights in the framework of the GATT multilateral trading system. However, the principles contained in the GATT relating to measures affecting importation or exportation of goods and to the treatment of imported goods could apply, *inter alia*, to measures taken in connection with intellectual property rights, to the extent that they fell within their scope. Article XX (d) of GATT⁶³⁹ specifically referred to intellectual property rights, providing a general exception permitting measures which would otherwise be inconsistent with the General Agreement to be taken to secure compliance with laws or regulations relating, *inter alia*, to intellectual property rights, subject to certain conditions. In addition to this GATT Article dealing with intellectual property rights, two GATT Panels have dealt with intellectual property rights and concluded that

⁶³⁸ . See TRIPS Agreement, *supra*, footnote 616, part II, Sections 1 to 7.

⁶³⁹ . Now Article XX (d) of GATT 1994.

national patent laws are internal regulations that are subject of GATT Article III's national treatment obligation.⁶⁴⁰

Proposals that action should be taken in GATT to control the trade in counterfeit and pirated goods were made by developed countries as early as the Tokyo Rounds of negotiations. When the Uruguay Round was being launched, these countries proposed that the negotiations should not only cover trade in counterfeit goods but also aim at developing minimum standards of protection for adoption by member countries. While developing countries were in general not opposed to the proposals for action on counterfeit goods, they initially resisted discussion on minimum standards. These views, however, did not prevail and pressures from developed countries ultimately resulted in the negotiations focusing to a greater extent on the establishment of substantive and uniform standards providing a higher level of protection for intellectual property rights. In this context, the attitude of both developed and developing countries evolved as the negotiations proceeded. It was thus possible to reach a consensus on the Agreement on TRIPS which, *inter alia*, lays down minimum standards for the protection of all the main categories of intellectual property rights.

The general goals of the TRIPS Agreement are contained in the Preamble of the TRIPS Agreement. It includes the reduction of distortions and impediments to international trade, promotion of effective and adequate protection of intellectual property rights, and ensuring that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. Article 8 of the TRIPS Agreement under title "principles" recognises

⁶⁴⁰ See Report of the GATT Panel, *United States-Section 337 of the Tariff Act of 1930*, BISD, 36th Supp. 402 (1989); Report of the GATT Panel, *United States- Imports of Certain Automotive Spring Assemblies*, BISD, 30th Supp. 107 (1984).

the rights of members to adopt measures for public health and other public interest reasons and to prevent the abuse of intellectual property rights, provided that such measures are consistent with the provisions of the TRIPS Agreement.

For the purpose of the TRIPS Agreement, the term "intellectual property" refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of the TRIPS Agreement. The areas of intellectual property that it covers are: copyright and related rights, trademarks including service marks, geographical indications, industrial designs, patents including the protection of new varieties of plants, layout-designs of integrated circuits and protection of undisclosed information including trade secrets and test data.⁶⁴¹

Nepalese Intellectual Property Rights legal regime does not cover: (i) Geographical Indication, (ii) Layout-Design (Topographies) of Integrated Circuits, and (iii) Protection of Undisclosed Information. It is obvious that the said uncovered areas of Intellectual Property Rights are to be incorporated into the existing Nepalese Intellectual Property laws and such laws need to provide protection to those areas as prescribed by the TRIPS Agreement before the expiration of transitional period given to Nepal.

III.4.B PROVISIONS OF THE TRIPS AGREEMENT AND THE RELATED NEPALESE LAWS

With respect to Nepal's obligation to bringing her laws in conformity with the TRIPS Agreement, the provisions of Nepalese laws are examined and analyzed with the obligations of

⁶⁴¹ . See TRIPS Agreement, *supra*, footnote 616, part II, Sections 1 to 7.

the TRIPS Agreement. Understanding the provisions of the TRIPS Agreement and the relevant Nepalese laws are required to achieve this objective.

In short, Part I (Article 1 through Article 8) of the TRIPS Agreement contains the basic principles and general obligations of the TRIPS Agreement. Part II (Article 9 through 40) of the TRIPS Agreement sets out the minimum standards of protection to be provided by each member of the WTO in respect of each of the main areas of intellectual property rights covered by the TRIPS Agreement. Section 1 (Article 9 to 14) of the TRIPS Agreement contains provisions on copyright and its protection. Section 2 (Article 15 to 21) of the TRIPS Agreement contains the provisions of the trademark and its protection. The provisions of geographic indications and its protections are contained in Section 3 (Article 22 to 24) of the TRIPS Agreement. The provisions of industrial design are contained in Section 4 (Article 25 to 26) of the TRIPS Agreement. The provisions of patent and its protection are contained under Section 5 (Article 27 to 34) of the TRIPS Agreement. The provisions of layout-designs are contained under Section 6 (Article 35 to 38) of the TRIPS Agreement. Likewise, the provisions of protection of undisclosed information and control of anti-competitive practices in contractual licenses are contained under Section 7 (Article 39) and Section 8 (Article 40) of the TRIPS Agreement respectively.

Part III (Article 41 to 61) of the TRIPS Agreement contains the provisions of domestic procedures and remedies for the enforcement of intellectual property rights. Part VI (Article 65 to 67) of the TRIPS Agreement contains the provisions of transitional arrangements for the implementation of the rules at the national level.

In Nepal, the Patent, Design and Trademark Act, 1965, provides the provisions relating to patent, design and trademark. Likewise, the Copyright Act, 2002, provides the provisions relating to copyright. Geographical Indication,⁶⁴² Layout-Design (Topographies) of Integrated Circuits,⁶⁴³ and Protection of Undisclosed Information⁶⁴⁴ are not covered by the intellectual property rights legal regime of Nepal. These areas of intellectual property rights are not discussed in this paper and it is recognized that these areas of intellectual property rights are to be incorporated into the existing laws of Nepal before the expiration of transitional period provided to Nepal.

With respect to Nepal's obligation to bringing her laws in conformity with the TRIPS Agreement, here several important Sections of Patent, Design and Trademark Act, 1965 and the Copyright Act, 2002, are analyzed, with reference to the corresponding provisions of the TRIPS Agreement under the following sub-title:

⁶⁴² . See TRIPS Agreement, *supra*, footnote 616, Art. 22:1: Geographical indications are defined, for the purposes of the Agreement, as indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

⁶⁴³ . See TRIPS Agreement, *supra*, footnote 616, Art. 35 requires Member countries to protect the layout-designs of integrated circuits in accordance with the provisions of the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC Treaty), negotiated under the auspices of WIPO in 1989. These provisions deal with, *inter alia*, the definitions of "integrated circuit" and "layout-design (topography)", requirements for protection, exclusive rights, and limitations.

An "integrated circuit" means a product, in its final form or an intermediate form, in which the elements, at least one of which is an active element, and some or all of the interconnections are integrally formed in and/or on a piece of material and which is intended to perform an electronic function. A "layout-design (topography)" is defined as the three-dimensional disposition, however expressed, of the elements, at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture.

⁶⁴⁴ . See TRIPS Agreement, *supra*, footnote 616, Art. 37 contains provisions of protection of undisclosed information. The TRIPS Agreement requires undisclosed information - trade secrets or know how - to benefit from protection. According to Article 39.2 of the TRIPS Agreement, the protection must apply to information that is secret, that has commercial value because it is secret and that has been subject to reasonable steps to keep it secret.

1. Basic principles and general obligations.
2. Minimum standards of protection covering:
 - i) Copyrights
 - ii) Trademarks
 - iii) Designs, and
 - iv) Patents
3. Anti-competitive practices in contractual licenses
4. Domestic procedures and remedies for the enforcement of intellectual property rights
5. Transitional arrangements for the implementation of the rules at the national level.

III.4.B (1) Basic Principles and General Obligations of the TRIPS Agreement

National Treatment and Most-Favored-Nation (MFN) Treatment:

The TRIPS Agreement reaffirms the basic principle of national treatment and most-favored-national treatment embodied in the various intellectual property right conventions. Art. 3, 4 and 5 of the TRIPS Agreement include the fundamental rules on national and most-favored-nation (MFN) treatment of foreign nationals, which are common to all categories of intellectual property covered by the TRIPS Agreement. These obligations cover not only the substantive standards of protection but also matters affecting the availability, acquisition, scope maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in the TRIPS Agreement.

The TRIPS Agreement states that each member shall accord to the nationals of other members treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property.⁶⁴⁵ It further states that with regard to the protection of intellectual property, any advantage, favor, privilege or immunity granted by a member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other members.⁶⁴⁶ Hence, the national treatment clause forbids discrimination between a member's own nationals and the nationals of other members where as the most-favored-nation treatment clause forbids discrimination between the nationals of other members. In *Indonesia-Auto*, the Panel of the WTO has, with respect to the claim relating to the acquisition of trademarks, rejected the United States' claim that Indonesian law was according less favorable treatment to foreign nationals than to Indonesian nations.⁶⁴⁷

Foreign and national Intellectual Property are equally protected in Nepal. Although the amount is very nominal, the provision of double fee⁶⁴⁸ for the registration and renew of foreign Intellectual Property under the Patent, Design and Trademark Act, 1965 is contradictory to Article 3 of the TRIPS Agreement. Hence, this provision of double fee for foreign Intellectual Property is to be removed from the existing law. Accordingly, Nepal has already made commitment for the removal of this provision of double fee upon Nepal's accession to the WTO in the accession negotiation.⁶⁴⁹ When we examine the whole provisions of the Patent, Design

⁶⁴⁵ . See TRIPS Agreement, *supra*, footnote 616, Art. 3.

⁶⁴⁶ . See TRIPS Agreement, *supra*, footnote 616, Art. 4.

⁶⁴⁷ . See Report of the WTO Panel, *Indonesia-Certain Measures Affecting the Automobile Industry*, adopted on 23 July 1998, WT/DS54/R, at para 14.268.

⁶⁴⁸ . See Patent, Design and Trademark Act, Section 23 (1965) (Nepal).

⁶⁴⁹ . See WTO document (WT/ACC/NPL/16, para 123), *Report of the Working Party on the Accession of the Kingdom of Nepal to the World Trade Organization*, the WTO Secretariat, Geneva, 28 August 2003, available at <http://www.wto.org>.

and Trademark Act, 1965 and the Copyright Act, 2002, we do not find discriminatory provisions between foreigners, nor between national and foreigners with respect to the registration, protection and enforcement of intellectual property rights in Nepal. Hence, we can draw a conclusion from the above mentioned discussion that the legal regime of intellectual property rights in Nepal meets the requirement of most-favored-nation and national treatment obligations prescribed by the TRIPS Agreement.

III.4.B (2) *Minimum Standards of Protection*

Here we discuss the existing relevant Nepalese laws and the protection provided by it to the Intellectual Property. The existing Nepalese Intellectual Property laws cover patent, trademark, design and copyright. Each areas are discussed and compared with the provisions of the TRIPS Agreement which sets out the minimum standards of protection to be provided by each Member of the WTO. Standards concerning the availability, scope, and use of each of the main areas of intellectual property rights covered by the Nepalese Intellectual Property laws and the TRIPS Agreement are examined under the following sub-title:

- a. Copyrights
- b. Trademarks
- c. Designs, and
- d. Patents

III.4.B(2)(i) Copyright

III.4.B(2)(i)(a) Introduction

Copyright is a kind of intellectual property. The importance of copyright has increased enormously in recent times due to the rapid technological development in the field of printing, music, communication, entertainment and computer industries. Copyright is a property right. It is a piece of intangible personal property. Like any other piece of personal property it may be transferred to a new owner by sale, gift or bequest, and the rights may be licensed for another person to use.

In general copyright means the exclusive right to do or authorise others to do certain acts in relation to (i) literary, scientific and artistic works, (ii) cinematograph film and (iii) sound recordings. The nature of the acts varies according to the subject matter. Basically copyright is the right to copy or reproduce the work in which copyright subsists. The exclusive right for doing the respective acts extends not only to the whole of the work but to any substantial part thereof or to any translation or adaptation thereof, where applicable. There is no copyright in ideas. Copyright subsists only in the material form in which the ideas are expressed.

Copyright subsists only in original work. It does not mean that the work must be the expression of original or inventive thought. The originality which is required, relates to the expression of the thought but the expression need not be in an original or novel form, but that the work must not be copied from another work. Copyright must be distinguished from other intellectual property rights, i.e., patents and designs. Essentially copyright is the right to prevent others copying one's

work by reproducing it in any one of the ways outlined in the copyright law whereas patents and designs are monopoly rights.

Historically, British Common Law has always conceived of copyright in purely economic terms. On the other hand, Continental jurisdictions have traditionally viewed copyright as having another dimension of moral rights. The economic right and the moral right are concerned with the author's personal relationship to his work. The moral right is seen as an emanation of his personality and thus subsequent unauthorized alterations to it or dealings with it are not to be permitted if they are prejudice to the author's honor or reputation. The two most important moral rights are the "right of paternity", that is, the right to claim authorship of a work and the "right of integrity", that is, the right to prevent distortions or mutilations of the work. In some jurisdictions, further rights are included, for instance, the right to publish or not to publish a work, the right to prevent excessive or vexatious criticism and the right to withdraw a work from sale. Such rights normally subsist independently of any economic rights (rights in relation to the commercial exploitation of the work) which an author has in his work. Thus, he can invoke them even after he has parted completely with ownership of the economic rights.

Copyright is essentially a right to prevent the copying of works or other subject matter. We can put it in another way that it is a right to prevent the unauthorized reproduction by a third party of the tangible form in which a person has chosen to express his ideas, for example, in a book, a musical composition, a painting or a cinematograph film. The tangible manifestations of a person's creative thought which copyright law protects are many and varied. Hence, the law does not permit one to appropriate to himself what has been produced by the labor, skill and capital of another.

Various countries have joined to form conventions for the protection of copyright owned by its nationals in other countries. The Berne Convention⁶⁵⁰ and Universal Copyright Convention⁶⁵¹ are the result of such joint efforts. Nepal is not signatory of any international conventions which provide for reciprocal protection of Nepalese works in other countries which are members of the convention and vice versa. Nepal has made commitment to join the Berne Convention by December 2005 in the accession negotiation with the WTO.⁶⁵²

III.4.B(2)(i)(b) Historical Development of Copyright Laws

There seems to have been no great concern about the copying or reproduction of written or artistic works before the invention of the printing press. The advent of printing press in the last part of the 15th century really marks the start of concern about the copying of works. At this time, printing had existed in Holland, Flanders and Germany for some years before it was introduced into England. The first copyright statute was enacted in the United Kingdom as long ago as 1709. Much of the history of copyright has been concerned with the gradual extension of protection to new types of subject matter. This process has accelerated enormously with the rapid explosion of technology which has occurred in the last 100 years.

⁶⁵⁰ . Berne International Union for the Protection of Literary and Artistic Works, done Sept. 9, 1886, as last revised at Paris, July 4, 1971, 828 U. N. T. S. 221.

⁶⁵¹ . The Universal Copyright Convention was signed at Geneva on 6 September 1952 and was revised at Paris on 24 July 1971, the text is available at http://www.unesco.org/culture/laws/copyright/html_eng/page1.shtml

⁶⁵² . See WTO document (WT/ACC/NPL/16, para 122), *Report of the Working Party on the Accession of the Kingdom of Nepal to the World Trade Organization*, the WTO Secretariat, Geneva, 28 August 2003, available at <http://www.wto.org>.

The statutory provision of the copyright started in Nepal with the commencement of the Copyright Act, in 1965. The Copyright Act, 1965 was first amended in 1998 and this amendment had added the provisions of boarder measures and imprisonment in case of infringement of copyright. The 1965 Copyright Act has been repealed in 2002 and the Copyright Act, 2002 has come into existence. Nepalese copyright law is governed by the Copyright Act, 2002 and the Copyright Regulation, 1989. The new Act has been enacted to provide better protection to copyright. The Right to privacy of the document is inviolable as a fundamental right under the Constitution of the Kingdom of Nepal.⁶⁵³

The object of copyright law is to encourage authors, composers, artists and designers to create original works by rewarding them with the exclusive right for a limited period to exploit the work for monetary gain. The economic exploitation is done by licensing such exclusive right to entrepreneurs like, publishers, film producers and record manufacturers for a monetary consideration.

III.4.B(2)(i)(c) Copyright Related Provisions under the TRIPS Agreement

Articles 9 to 14 of the TRIPS Agreement contain provisions on copyright and its protection. The TRIPS Agreement substantive provisions on copyright primarily involve incorporated

⁶⁵³ . See *The Constitution of the Kingdom of Nepal 2047* (1990), Art. 22, His Majesty's Government, Ministry of Law, Justice & Parliamentary Affairs, Law Books Management Board, Babar Mahal, Kathmandu, Nepal (hereinafter "Constitution").

provisions of the Berne Convention (Articles 1 through 21, and the Appendix).⁶⁵⁴ In *US-Section 110 (5) Copyright Act*, the WTO Panel held, "Article 9.1 of the TRIPS Agreement obliges WTO Members to comply with Articles 1-21 of the Berne Convention (1971) (with the exception of Article 6bis on moral rights and the rights derived therefrom) and the Appendix thereto. ..." ⁶⁵⁵

The subject matter of copyright protection includes works in the literary, scientific and artistic domain, whatever the mode or form of expression is. For a work to enjoy copyright protection, it must be an original creation. The idea in the work does not need to be new but the form, be it literary, artistic or scientific, in which it is expressed must be the original creation of the author.

Owners of copyright in a protected work have a right to exclude others from using it without their authorization. The rights of copyright owners are therefore often described as exclusive rights to authorize others to use the protected work. Authorization from copyright owners is usually required in the following situations:

- Reproduction rights: copying and reproducing the work;
- Performing rights: performing the work in public (e. g. play or concert);
- Recording rights: making a sound recording of the work (e. g. phonograms or sound recordings in the technical language of copyright law);
- Motion picture rights: making a motion picture (often called cinematographic work in technical language);
- Broadcasting rights: broadcasting the work by radio or television;
- Translation and adaptation rights: translating and adapting the work.

⁶⁵⁴ . See UNCTAD document (UNCTAD/EDM/Misc.232/Add.18), *Course on Dispute Settlement*, WTO, 3.14 TRIPS, New York & Geneva, 2003, page 12.; See TRIPS Agreement, *supra* note 3, Art. 9 (1).

⁶⁵⁵ . See Report of the WTO Panel, *United States-Section 110 (5) of the US Copyright Act*, adopted on 27 July 2000, WT/DS160/R, at paras 6.17-6.18.

In addition to these exclusive rights of an economic character, Article 6bis of the Berne Convention provides original author's moral rights. These rights enable authors, even after they have transferred their economic rights, to claim authorship of the work and to object to any distortion or other derogatory action in relation to the work which would be prejudicial to their reputation or honor. However, the TRIPS Agreement does not cover moral rights or of the rights derived therefrom.⁶⁵⁶

The TRIPS Agreement has provisions on related rights. Literary and artistic works are created in order to be disseminated among the people. This cannot be done by the authors themselves always, for it often requires intermediaries who use their professional skills to give the works appropriate forms of presentation to make them accessible to a wide public.

Besides protecting the rights of authors of works, it is therefore also necessary to protect the rights of:

- Performing artists in relation to their performance;
- Producers of phonograms in relation to their phonograms; and
- Broadcasting organizations in relation to their radio and television programs.

These related rights are also called neighboring rights because they have developed in parallel to copyright and the exercise of these rights is often linked with the exercise of copyright.

Copyright laws frequently deal also with neighboring rights.

⁶⁵⁶ See TRIPS Agreement, *supra*, footnote 616, Art. 9 (1)

The provisions of the TRIPS Agreement contain Computer programmes and databases; Rental rights to computer programmes, sound recordings and films; Rights of performers and producers of phonograms; and Rights of broadcasting organisations. The TRIPS Agreement provides that computer programmes should be considered literary works and protected under national copyright laws of the members.⁶⁵⁷ The Agreement requires member countries to provide authors of computer programmes, sound recordings and cinematographic films "the right to authorize or to prohibit the commercial rental" of their copyright works. A member country "shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works.... materially impairing the exclusive right of reproduction conferred on ... author."⁶⁵⁸

The TRIPS Agreement provides that performers shall have, "in respect of a fixation of their performance on a phonogram", the right to prevent the reproduction of such fixation.⁶⁵⁹ They shall also have a right to prevent "broadcasting by wireless means and the communication to the public of their live performance" without their authorization.⁶⁶⁰ Phonogram producers shall have the right to authorize or prohibit the direct or indirect reproduction of their phonograms. Broadcasting organizations shall have the right to prohibit the following acts from being carried out without their authorization: i) Fixation; ii) Reproduction of fixations; and iii) Rebroadcasting by wireless or communication on television of their broadcasts.⁶⁶¹

⁶⁵⁷ . See TRIPS Agreement, *supra*, footnote 616, Art. 10.

⁶⁵⁸ . See TRIPS Agreement, *supra*, footnote 616, Art. 11.

⁶⁵⁹ . See TRIPS Agreement, *supra*, footnote 616, Art. 14.

⁶⁶⁰ . See TRIPS Agreement, *supra*, footnote 616, Art. 14.

⁶⁶¹ . See TRIPS Agreement, *supra*, footnote 616, Art. 14.

Regarding the term of protection under the TRIPS Agreement, Copyrights are protected for life of the author and 50 years.⁶⁶² Cinematographic works are protected for 50 years after the work has been made available to the public or, if not made available, after the making of such work.⁶⁶³ Photographic work or works of applied art are protected for 25 years after the making of the work. The right of the Performers and producers of phonograms are protected for 50 years from the end of the calendar year in which the fixation (phonogram) was made or the performance took place. The rights related to broadcasting are protected for 20 years from the end of the calendar year in which the broadcast took place.⁶⁶⁴

The WTO Panel in *US-Section 110 (5) Copyright Act* interpreted Art. 13 of the TRIPS Agreement⁶⁶⁵ and specified the conditions for limitations or exceptions to exclusive rights and found that these conditions apply cumulatively. The Panel said, "Article 13 of the TRIPS Agreement requires that limitations and exceptions to exclusive rights (i) be confined to certain special cases, (2) do not conflict with a normal exploitation of the work, and (3) do not unreasonably prejudice the legitimate interests of the right holder..."⁶⁶⁶

The Copyright holders lose their rights when the said duration of protection expires. From then on copyright can be exploited by any member of the public without having to obtain authorization from the right holder.

⁶⁶² . See TRIPS Agreement, *supra*, footnote 616, Art. 12.

⁶⁶³ . See TRIPS Agreement, *supra*, footnote 616, Art. 12.

⁶⁶⁴ . See TRIPS Agreement, *supra*, footnote 616, Art. 14 (5).

⁶⁶⁵ . See TRIPS Agreement, Art. 13: "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

⁶⁶⁶ . See Report of the WTO Panel, *United States-Section 110 (5) of the US Copyright Act*, adopted on 27 July 2000, WT/DS160/R, at paras 6.97.

Here we discuss the provisions of copyright protection provided by the laws of Nepal. The Copyright Act, 2002 is the main Act, which deals with the copyright in Nepal. In accordance with the Copyright Act, 2002, "works" are the subject matter of copyright protection.⁶⁶⁷ The Copyright Act, 2002 has defined "work," which means "any originally and intellectually presented work in the literary, artistic, scientific, and other fields."⁶⁶⁸ The term "work" includes the following works:

- i. Books, pamphlets, articles, and research-papers.
- ii. Dramas, musical-dramas, dumb shows, and other works prepared for the stage in similar ways.
- iii. Musical works with or without words.
- iv. Audio-visual works.
- v. Architectural designs.
- vi. Drawings, paintings, sculpture, woodcuts, lithography, and other works relating to architecture.
- vii. Photo-based works.
- viii. Works of applied art.
- ix. Quotations, maps, plans, three-dimensional works relating to geography, topography and scientific articles and works.

⁶⁶⁷ . See Copyright Act, Section 3 (1) (2002) (Nepal).

⁶⁶⁸ . See *Id.*, at Section 2 (a).

x. Computer programs.⁶⁶⁹

In addition to these works, every translation, adaptation, serial adaptation, collection of works or compositions, data or data-base compiled in such a manner that it can be read with or without an apparatus, proverb, folk-tale, folk-song or any other derivative work based on folk expressions which comes under the folk expression discipline, which has been presented in an original form from the viewpoint of performance, compilation or expression, shall be entitled to copyright protection as in the case of an original work without prejudice to the copyright of the main work.⁶⁷⁰

In general, no formalities like registration are required to acquire copyright in Nepal.⁶⁷¹

Copyright in a work automatically subsists as soon as the work comes into existence.⁶⁷²

However, in case any person wishes to register any work, sound recording, performance or broadcast voluntarily, he may have the same registered by applying to the Registrar.⁶⁷³ The registration system has the advantage of certainty.

There are exceptions to the copyright protection. "No (copyright) protection shall be available under this Act to any expression, description, or interpretation, or any inclusion in any work, of any ideology, religion, news, working procedure, concept, principle, court verdict, administrative decision, folk-song, folk-tale, proverb, general data, etc."⁶⁷⁴

⁶⁶⁹ . See *Id*, at Section 2 (a).

⁶⁷⁰ . See *Id*, at Section 3 (2) (2002).

⁶⁷¹ . See *Id*, at Section 3 (1).

⁶⁷² . See *Id*, at Section 5 (1).

⁶⁷³ . See *Id*, at Section 5 (2).

⁶⁷⁴ . See *Id*, at Section 4.

Copyright owner is the author in case economic rights are vested in the author of any work, or, in case such rights are vested mainly in any other person or institution other than the author, such person or institution.⁶⁷⁵ Section 2 (b) of the Copyright Act, 2002 has defined author. According to it, author means the person who has created a work mentioned (defined) in Clause (a) of Section 2 of the Copyright Act, 2002.

In the following circumstances, copyright ownership shall not vest in the author: in case economic rights are vested mainly in any other person or institution other than the author, and, in case ownership of such rights has been transferred to any person or institution.⁶⁷⁶

Economic rights are the rights, vested in a copyright owner of a work, to re-produce the work; to translate the work; to improve or amend the work; to adopt and otherwise make alterations in the work; to sell, supply or hire out to the public the original and duplicate copies of the work; to transfer or hire out the rights vested in him in respect to any audio-visual work, work with a sound recording, computer program, or musical work based on data or in a graphical form; to import copies of the work; to publicly exhibit the original work or copies thereof; to perform the work; to broadcast the work and to communicate the work to the public.⁶⁷⁷

The first owner of the economic rights of a work shall be its author.⁶⁷⁸ However, in certain circumstances, the economic rights of a work shall be vested in the following persons or

⁶⁷⁵ . See *Id.*, at Section 2 (h).

⁶⁷⁶ . See *Id.*, at Section 2 (h).

⁶⁷⁷ . See *Id.*, at Section 7.

⁶⁷⁸ . See *Id.*, at Section 6 (1).

institutions: i) joint authors, in the case of a joint work; ii) the person or institution under whose initiative or direction the work has been prepared; iii) the person paying the remuneration in case remuneration is paid to prepare any work; iv) publisher of a work, in the case of an anonymous work, until any person is proved to be its author; v) producer in the case of an audio-visual work.⁶⁷⁹

Besides economic rights, every author shall have the moral rights over his work, irrespective of whether or not his economic rights are inherent in such work.⁶⁸⁰ Moral rights over the work cover the rights: i) to have his name mentioned in the copies of his work, or in case his work is used publicly; ii) in case the author has used a pseudonym instead of his actual name in his work, to have the pseudonym mentioned while using such work publicly; iii) to prevent such acts as presenting his work in a distorted or mutilated form and undermining the honor or reputation gained by him, and iv) to effect necessary changes or improvements in his work.⁶⁸¹

The Copyright Act, 2002 has described in detail the performer's right,⁶⁸² rights of producers of sound-recordings,⁶⁸³ rights of broadcasting organizations,⁶⁸⁴ and the Act has given protection to these rights.⁶⁸⁵ The owner of a copyright of any work may transfer all or any of his economic rights to any other person through an agreement in writing or authorize to use it with or without

⁶⁷⁹ . See *Id.*, at Section 6 (2).

⁶⁸⁰ . See *Id.*, at Section 8 (1).

⁶⁸¹ . See *Id.*, at Section 8 (1).

⁶⁸² . See *Id.*, at Section 9.

⁶⁸³ . See *Id.*, at Section 10.

⁶⁸⁴ . See *Id.*, at Section 12.

⁶⁸⁵ . See *Id.*, at Section 13.

specifying any conditions.⁶⁸⁶ Likewise, moral rights may be transferred to anyone through an agreement in writing and such transfer comes into effect after his death.⁶⁸⁷

In Nepal, the copyright of any work, i. e., economic and moral rights, of an author under the Copyright Act, 2002 shall, subject to other provisions of this Act, remain protected through out his life, and shall continue for fifty years after his death.⁶⁸⁸ In the case of a join authors of a work, the economic and moral rights of a work shall be protected for a period of fifty years after the death of the person who ever dies last among them.⁶⁸⁹ The economic and moral rights of a work which has been prepared on initiative or direction, or has paid remuneration to any other person to prepare work, shall remain protected for 50 years from the years of its first publication, or from the year of its first presentation before the public, whichever is earlier.⁶⁹⁰ In the case of an anonymous work, the copyright shall remain protected for a period of fifty years beginning from the first date of the publication of the work or from the year of its first presentation before the public, whichever is earlier.⁶⁹¹ The economic and moral rights of a work relating to applied art and a photo-based work shall remain protected for 25 years from the year of its creation.⁶⁹² In the case of any work which is published after the death of its author, the copyright shall be valid for a period of fifty years from the date of the publication of such work.⁶⁹³ The rights vested, under the Copyright Act, 2002, to performers and producers of phonograms shall remain valid for 50 years.⁶⁹⁴

⁶⁸⁶ . See *Id.*, at Section 24 (1).
⁶⁸⁷ . See *Id.*, at Section 24 (2).
⁶⁸⁸ . See *Id.*, at Section 14 (1).
⁶⁸⁹ . See *Id.*, at Section 14 (2).
⁶⁹⁰ . See *Id.*, at Section 14 (3).
⁶⁹¹ . See *Id.*, at Section 14 (4).
⁶⁹² . See *Id.*, at Section 14 (5).
⁶⁹³ . See *Id.*, at Section 15.
⁶⁹⁴ . See *Id.*, at Section 9 (5), 10 (2).

There is no provision of compulsory licensing of copyright under the Copyright Act, 2002. However, it has provisions of limitations and exceptions to exclusive rights. Accordingly, under certain circumstances, copyright materials may be used without permission, i. e., (i) for reproducing some parts of a published work for personal use,⁶⁹⁵ some portions of a published work may be quoted for bona fide purposes (the source & the name of the author must be mentioned),⁶⁹⁶ reproducing small portions of any published work for the purposes of study and teaching (without prejudicing to the economic rights of the author or copyright owner);⁶⁹⁷ public library or archive may reproduce a single copy of any of the works;⁶⁹⁸ a single copy of any computer program may be reproduced in case the objective for which it has been acquired is not achieved;⁶⁹⁹ a single copy of any work may be imported for personal use;⁷⁰⁰ and in case any person wished to exhibit publicly any work or a copy thereof, he may do so.⁷⁰¹

The copyright holder has certain rights to do certain acts in respect of the work. If any body does any of these acts without obtaining the authority or license from the copyright holder/owner, he will be committing an infringement of the copyright in the work.⁷⁰² It is also considered an infringement of copyright if any person sells, supplies or hires out any copy of a work or sound recording knowing or having adequate reasons to believe that they have been published in

⁶⁹⁵ . See *Id*, at Section 16 (1).
⁶⁹⁶ . See *Id*, at Section 17.
⁶⁹⁷ . See *Id*, at Section 18.
⁶⁹⁸ . See *Id*, at Section 19.
⁶⁹⁹ . See *Id*, at Section 21.
⁷⁰⁰ . See *Id*, at Section 22.
⁷⁰¹ . See *Id*, at Section 23.
⁷⁰² . See *Id*, at Section 25 (1).

violation of this Act.⁷⁰³ The Copyright Act, 2002 also has banned on importing unauthorized copies of any work or sound recording.⁷⁰⁴

Penalties in the event of infringement of protected rights (copyrights) shall be a fine ranging between Nepalese Rupees (Rs.) 10,000.00 and Rs.100,000.00 or imprisonment for a term not exceeding six months, or both, depending on the degree of his offense. In case he repeats the offense, the punishment will be double. The materials so published, reproduced, distributed or used for reproduction shall be seized.⁷⁰⁵ The violator shall pay compensation to the copyright owner for the losses suffered by the copyright owner.⁷⁰⁶

Penalties for importing unauthorized copies shall be a fine ranging between Rs10,000.00 and Rs100,000.00, such copies shall be seized and the violator/importer needs to pay compensation to the copyright owner for the losses suffered by the copyright owner as a result of such imports.⁷⁰⁷ Violation of any other provision of this Act shall be punished with a fine ranging between Rs.5,000. and Rs.50,000.⁷⁰⁸

In case there is reason to believe that an infringed work or sound recording is going to be published or reproduced, the concerned police employee shall prevent the sale and supply of copies of such works or sound recordings; and the machinery and other materials used for this

⁷⁰³ . See *Id*, at Section 26.

⁷⁰⁴ . See *Id*, at Section 26.

⁷⁰⁵ . See *Id*, at Section 27 (1).

⁷⁰⁶ . See *Id*, at Section 27 (2).

⁷⁰⁷ . See *Id*, at Section 28.

⁷⁰⁸ . See *Id*, at Section 29.

purpose may also be seized.⁷⁰⁹ Such seized copies of works or sound recording must be destroyed after the final verdict of the court.⁷¹⁰

The power to hear and dispose of cases punishable under the Copyright Act, 2002 is vested in District Court;⁷¹¹ and, in the course of hearing and disposing of a complaint, the District Court may issue a prohibitory order.⁷¹² In case a copyright is infringed complaints in respect thereto may be filed within 35 days from the date of learning the same.⁷¹³ His Majesty's Government of Nepal shall be the plaintiff in such punishable cases.⁷¹⁴

The Appellate Court have powers to hear appeals against the judgment or final orders of any District Court or any authorities under the Justice Administration Act, 1991. An appeal may lie in the Supreme Court against the judgments or final orders made by the Appellate Courts in cases tried and settled by the Appellate Court under original jurisdiction; and in cases in which there is a material difference between the judgment made by the original court, body or authority and the judgment of the Appellate Court made on appeal against such judgment.

There is a provision of boarder measure under the Copyright Act, 2002. An application may be loadzed to the Custom Officer if any person is importing unauthorized copies of any work. The Custom Officer, after necessary enquiries, may ban the import of the concerned material.⁷¹⁵

⁷⁰⁹ . *See Id*, at Section 32.

⁷¹⁰ . *See Id*, at Section 33.

⁷¹¹ . *See Id*, at Section 35 (1).

⁷¹² . *See Id*, at Section 36.

⁷¹³ . *See Id*, at Section 39.

⁷¹⁴ . *See Id*, at Section 37.

⁷¹⁵ . *See Id*, at Section 34.

There is a provision of Registrar who will supervise and control royalty collection society. The Registrar may hear complaints with respect to the royalty fixed by a royalty collection society. The order issued or decision made by the Registrar in this context may be appeal to the Appellate Court.⁷¹⁶

After over-viewing the provisions of the Copyright Act, 2002, we have come to know that the scope of subject matter of copyright protection prescribed by the TRIPS Agreement is covered by the Copyright Act, 2002. There is no requirement of registration to acquire copyright in Nepal. The Copyright Act, 2002 has given exclusive rights of an economic character and moral rights to copyright author and/or owner. It also has protected related rights (neighboring rights). The term of protection of copyright provided by the Copyright Act, 2002 is very much similar to the term of protection provided by the TRIPS Agreement. The provision of exception to the copyright protection is justified by the "fair use" provision of the TRIPS Agreement. There is no provision of compulsory license of copyright under the Copyright Act, 2002. There is provision of boarder measure as well. In case of copyright infringement, there is mechanism to file complaint before the Court/Authority and the decision of such Court/Authority is subject to appeal before Appellate Court. There is provision of fine and imprisonment for copyright infringement.

However, in the accession negotiation, a WTO Member noted that Section 13 of the Nepal Copyright Act, 2002 fails to provide protection for foreign copyright works, sound recordings or

⁷¹⁶ . See *Id.*, at Section 30.

performers.⁷¹⁷ If we read the whole Sections of the Copyright Act, 2002, we shall find the provisions of protection provided to foreign copyright works, sound recordings or performers.⁷¹⁸

It is not required to mention foreign in each section of the Copyright Act, 2002 if the protection is provided among national and foreign copyright on equal basis. As a WTO Member, Nepal has the right to implement the TRIPS Agreement in the manner it consider appropriate.⁷¹⁹ Hence, the Copyright Act, 2002 is able to provide minimum standard of protection for copyright prescribed by the TRIPS Agreement.

III.4.B(2)(ii) Trademark

III.4.B(2)(ii)(a) A General Introduction to Trademark

Trademark is vital to the promotion of trade and the protection of consumer interest. The norms of trademark protection prescribed in the TRIPS Agreement are internationally recognized as standard. Trademark is defined as "any word, name, symbol or any combination thereof used by a manufacturer or retailer of a product, in connection with that product, to help consumers identify that product and distinguish that product from the products of competitors."⁷²⁰ The trademark is a device used by a business enterprise to identify its products and distinguish them from those made or carried by other companies. It may consist of fancy and descriptive words, of pictures, figures, letters, dress labels, business equipment and the like, and a combination of

⁷¹⁷ . See WTO document (WT/ACC/NPL/16, para 123), *Report of the Working Party on the Accession of the Kingdom of Nepal to the World Trade Organization*, the WTO Secretariat, Geneva, 28 August 2003, available at <http://www.wto.org>.

⁷¹⁸ . See Copyright Act, Section 3, 9, 10, 12 (2002) (Nepal).

⁷¹⁹ . See TRIPS Agreement, *supra*, footnote 616, Art. 1 (1).

⁷²⁰ . See MICHAEL A. EPSTEIN, *MODERN INTELLECTUAL PROPERTY* 7-4.1 (3D ED. 1998).

all of these. It may be a business mark, a merchandise mark, or a service mark. Where a trademark is used in connection with services, it is sometimes specifically called a "service mark."⁷²¹ Trade names and other symbols such as the appearance of goods are like trademarks if they can be registered as such.

The Supreme Court of the United States, in the *Qualitex Company v. Jacobson Products Company*,⁷²² goes far beyond the ordinary definition of trademark in stating that a color may sometimes meet the basic legal requirements for use as a trademark and hence the U. S. Lanham Trademark Act of 1946 permits the registration of colors alone as a trademark. Some jurisprudence has considered colors to have a generic nature and have reasoned that they need to be combined with other elements in order to achieve the necessary distinctiveness. The notion and scope of trademark may vary, in the details, from country to country.⁷²³

The owner of a trademark may exclude others from using a similar trademark on similar goods or services.⁷²⁴ Trademark laws confer on the proprietor the exclusive right to prevent all third parties not having the consent of the owner from using in the course of trade any sign which is identical with the trademark or any sign whose similarity to the trademark is such that there exists a likelihood of confusion on the part of the public between the sign and the trademark.⁷²⁵ Such a right acquired by use is recognized as a form of property in the trademark, and protected under common law. Such an unregistered trade mark can be kept alive and protected for as long as it continues to be used provided the owner of the mark takes appropriate action against

⁷²¹ See 1 ABBOTT, *supra*, footnote 617 at 128.

⁷²² See *Qualitex Co. v. Jacobson Products Co.*, 514 U. S. 159; 115 S. Ct. 1300 (1995).

⁷²³ See 1 ABBOTT, *supra*, footnote 617, at 144.

⁷²⁴ See RICHARD STIM, *INTELLECTUAL PROPERTY* 10 (1994).

⁷²⁵ See 1 ABBOTT, *supra*, footnote 617, at 129.

infringers. A person can also acquire a similar right over a trademark, not so far used but only proposed to be used, by registering it. In the United States, trademark protection is a common law concept that exists independent of any statute.⁷²⁶

In general, it may be said that trademarks traditionally perform four main functions. These functions relate to the distinguishing of marked goods and services, their origin, their quality and their promotion in the market place.⁷²⁷ Another essential function consists in assuring that all the goods bearing the mark have been produced under the control of a single undertaking which is accountable for their quality.⁷²⁸ Both traders and consumers alike should have an equal interest in ensuring that other traders do not use the same or misleading or deceptive marks in relation to their goods. The underlying principle of trademark law is to protect consumers against confusion.⁷²⁹ A trademark can only be registered if it is distinctive or capable of becoming distinctive and it becomes liable to removal if it loses this distinctiveness or becomes generic.

Patents and copyrights are based on the creative efforts of the mind of man. A trademark, on the other hand, is not based on any such thing. Trademark is merely a convenient way of identifying goods and a service mark is a convenient way of identifying services. The right to use the mark is not granted by the government and registration of a mark does not in itself create any exclusive rights. Rights in a mark are acquired by use and use must continue if the rights are to continue. Registration is simply recognition by the government of the right of the owner to use the mark in commerce to distinguish his goods or services. The rights in relation to a registered

⁷²⁶ See SHELDON W. HALPERN ET AL., FUNDAMENTALS OF UNITED STATES INTELLECTUAL PROPERTY LAW 275 (1999).

⁷²⁷ See 1 ABBOTT, *supra*, footnote 617, at 144.

⁷²⁸ See *Id.*, at 146.

⁷²⁹ See STIM, *supra*, footnote 724, at 10.

mark, unlike a patent or a copyright, may be forfeited or lost during the term for which the registration was granted.

There is a theory of trademark that adoption and use acquire the ownership of a trademark, registration under the statute merely affects procedural rights. Registration is merely declaratory of title to the mark and therefore does not affect or perfect the trademark rights. Trademark rights are derived from the common law, a system of legal rules derived from the precedent and principles established by court decision.⁷³⁰ Hence, a trademark identifies the product and its origin, guarantees its quality, advertises the product, and creates an image for the product.

III.4.B(2)(ii)(b) Historical Development of Trademark Laws

The origins of trademarks and commercial identification trace back into antiquity well prior to recorded history. The identifying marks of the makers frequently have been found on prehistoric implements, weapons, pottery and other articles of commerce.⁷³¹ Since then, it has been the custom of traders in most countries to mark their wares so as to distinguish them from those of other traders. The word "trade mark" has traditionally been used to refer to a name, word, symbol or device which is used in relation to goods so as to indicate their origin.

Trademark jurisprudence has developed over centuries of time. The use of a mark to identify the source of a product actually began at least 3500 years ago when potters made scratchings on the

⁷³⁰

See Id.

⁷³¹

See BEVERLY W. PATTISHALL ET AL, TRADEMARKS AND UNFAIR COMPETITION 1 (1994).

bottoms of their creations to identify the sources. The first juridical recognition of trademark in a common law system did not come, however, until 1584 in what is known as *Sanforth's Case*.⁷³² It soon became a well-accepted judicial notion in England that as a mark, indicates source or origin of goods, it deserves common law protection.

Statutory protection of marks, however, was much slower in developing, and followed the path of the common law and equitable protection which was extended by the courts in the early 19th century. The modern law of trademarks is an extension from the common law of passing off which developed in the early 19th century. The first United States trademarks were primarily proprietary marks and used for such purposes as branding cattle and serving as distributor's marks such as those that appeared on dairy bottles. The earliest trademark case on state record in the United States was decided in Massachusetts in 1837.⁷³³

As far as Nepal is concerned, the legal protection of trademark started in the beginning of the twentieth century with the commencement of the Patent, Design and Trademark Act of 1936. The Patent, Design and Trademark Act of 1936 was repealed in 1965. The Patent, Design and Trademark Act of 1965 came into force, with all of its provisions and provided a code of trademark law applicable to all trademarks in Nepal.

⁷³² See HALPERN, *supra*, footnote 726, at 276.

⁷³³ See FRANK H. FOSTER ET AL., PATENTS, COPYRIGHTS, AND TRADEMARKS 22 (2D ED.

With regards to international arrangements, besides the TRIPS Agreement, the Paris Convention for the Protection of Industrial Property of 1883⁷³⁴ includes trademarks among the forms of industrial property within its scope. Well-known trademarks are protected under Article 6bis of the Paris Convention. Further protection arose from the Madrid Agreement on the International Registration of Marks 1891,⁷³⁵ which was a special arrangement within the Paris Convention. There are the Madrid Protocol, 1989⁷³⁶ and the Trademark Law Treaty, 1994,⁷³⁷ which were signed by few countries. Nepal is not a signatory of the Paris Convention. Nepal became a member of the World Intellectual Property Organization (WIPO) in 1997. Being a Member of the WTO, Nepal needs to ensure that its intellectual property rights laws, regulations and procedures are compatible with the provisions of the TRIPS Accord.⁷³⁸

III.4.B(2)(ii)(c) Trademark Related Provisions Under the TRIPS Agreement

Section 2 (Article 15 to 21) of the TRIPS Agreement contains the major provision of the trademark and its protection. The general provisions of the TRIPS agreement follow those of the

⁷³⁴ . Paris Convention for the Protection of Industrial Property of March 20, 1883 as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, and as amended on September 28, 1979 (here after the "Paris Convention").

⁷³⁵ . Madrid Agreement on the International Regulation of Marks of April 14, 1891 as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Nice on June 15, 1957, and at Stockholm on July 14, 1967, and as amended on September 28, 1979. See *Industrial Property Laws and Treaties*, MULTILATERAL TREATIES - 3-005. (WIPO Publication No. 204 (E), Source: International Bureau of WIPO).

⁷³⁶ . Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, as signed at Madrid on June 28, 1989.

⁷³⁷ . Trademark Law Treaty adopted at Geneva on October 27, 1994.

⁷³⁸ . See WTO Agreement, *supra*, footnote 615, Art. XVI, para. 4. "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

Paris, Berne, and Rome Conventions providing for national treatment and most favored national treatment.⁷³⁹ The TRIPS Agreement states that any sign, or any combination of signs, capable of distinguishing the goods and services of one undertaking from those of other undertakings is eligible for registration as a trademark, provided that it is visually perceptible.⁷⁴⁰ The TRIPS Agreement requires service marks to be protected in the same way as marks distinguishing goods.

The TRIPS Agreement requires Member States to ensure that the owner of a registered trademark is granted the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion.⁷⁴¹ The TRIPS Agreement contains certain provisions on well-known marks, it obliges Members to refuse or to cancel the registration, and to prohibit the use of marks whose appearance conflicts with that of a mark which is already well known.

The TRIPS Agreement further states that the initial registration and each renewal of the registration of a trademark shall be for a term of no less than seven years. The registration of a trademark shall be renewable indefinitely.⁷⁴² Cancellation of a mark on the grounds of non-use cannot take place before three years of uninterrupted non-use. Use of a trademark by another person, when subject to the control of its owner, must be recognized as use of the trademark for

⁷³⁹ See TRIPS Agreement, *supra*, footnote 616, Art. 3 & 4.

⁷⁴⁰ See TRIPS Agreement, *supra*, footnote 616, Art. 15

⁷⁴¹ See TRIPS Agreement, *supra*, footnote 616, Art. 16:1

⁷⁴² See TRIPS Agreement, *supra*, footnote 616, Art. 18.

the purpose of maintaining the registration.⁷⁴³ Use of the trademark in the course of trade shall not be unjustifiably encumbered by special requirements⁷⁴⁴ and the compulsory licensing of trademarks shall not be permitted.⁷⁴⁵ Other substantive and procedural aspects prescribe by the TRIPS Agreement are discussed hereinafter with the provisions of Nepalese trademark laws.

III.4.B(2)(ii)(d) **Legal Regime of Trademark in Nepal**

Any person may acquire title to a trademark after having it registered in the Department of Industry⁷⁴⁶ under the Patent, Design and Trademark Act, 1965 in Nepal. No person shall use a trademark registered in the name of any other person without the written permission of the latter, or operate such trademark by imitating it in such a manner as to deceive the general public.⁷⁴⁷

The Patent, Design and Trademark Act, 1965 contains provision for the general exclusion from registrability. In case it is felt by the Department of Industry that such trademark may hurt the prestige of any individual or institution, or adversely affect public conduct or morality, or undermine the national interest or the reputation of the trademark of any other person, or in case such trademark is found to have already been registered in the name of another person, it shall not be registered.⁷⁴⁸ Likewise, the name, emblem or official seal of an international organization or government, such as a national flag, is not registrable as a trademark.

⁷⁴³ . See TRIPS Agreement, *supra*, footnote 616, Art. 19.

⁷⁴⁴ . See TRIPS Agreement, *supra*, footnote 616, Art. 20.

⁷⁴⁵ . See TRIPS Agreement, *supra*, footnote 616, Art. 21.

⁷⁴⁶ . See Patent, Design and Trademark Act, Section 16 (1) (1965) (Nepal).

⁷⁴⁷ . See *Id.* at Section 16 (2).

⁷⁴⁸ . See *Id.* at section 18 (1), para. 1 (the Restrictive Clause of Sub-section).

The Department of Industry may cancel the registration of any trademark if it is satisfied the existence of above mentioned ground of general exclusion from registrability. The Department of Industry shall, before canceling the registration of any trademark in this manner, provide a reasonable opportunity to the holder of the trademark to show cause, if any, why his trademark should not be cancelled.⁷⁴⁹ In case a trademark registered at the Department of Industry is not brought into use within one year from the date of registration thereof, the Department of Industry shall conduct necessary inquiries and cancel such registration.⁷⁵⁰

The title of the person in whose name a trademark has been registered shall remain valid for a period of seven years from the date of registration thereof, except when it is renewed.⁷⁵¹ A trademark may be renewed any number of times for a period of seven years at a time.⁷⁵²

If any one wishes to allow others to make use of a trademark registered in his name, both parties must submit a joint application and the Department of Industry may grant permission in this respect but the ownership of the trademark will be transferred into the name of the user.⁷⁵³

The title to any trademark registered in a foreign country shall not be valid in Nepal unless it is registered in Nepal by the concerned person.⁷⁵⁴ The Department of Industry may register trademarks registered in foreign countries without conducting any enquiries if an application is filed along with a certificate of their registration in foreign countries.⁷⁵⁵

⁷⁴⁹. See Patent, Deign and Trademark Act, Section 18 (3) (1965) (Nepal).
⁷⁵⁰. See *Id.* at Section 18C.
⁷⁵¹. See *Id.* at Section 18D.
⁷⁵². See *Id.* at Section 23B.
⁷⁵³. See *Id.* at Section 21D.
⁷⁵⁴. See *Id.* at Section 21B.
⁷⁵⁵. See *Id.* at Section 21C.

If a person uses a trademark registered in the name of any other person under the Patent, Design and Trademark Act, 1965, without the written permission of the latter, or operates such trademark by imitating it in such a manner as to deceive the general public, or brings into use a trademark which has been cancelled under the Patent, Design and Trademark Act, 1965, or uses a trademark as a registered trademark without registering it at the Department of Industry, he may be punished with a fine, as well as the confiscation of all articles and goods connected with such offense, on the orders of the Department of Industry.⁷⁵⁶

If a registered trademark proprietor actually suffers any losses as a result of any other person contravening the provisions of this Act in respect to such trademark, the Department of Industry may have the appropriate amount of such losses recovered from such offender in the form of compensation.⁷⁵⁷ Any person who is not satisfied with the decision issued by the Department of Industry may file an appeal with the Appellate Court⁷⁵⁸ under the Patent, Design and Trademark Act, 1965. Furthermore, the Appellate Court has power to issue an injunction order under the Justice Administration Act, 1991 with respect to the protection of trademark.

We can infer from the study that the elements of definition, capable to distinguish, prescribed by the TRIPS Agreement⁷⁵⁹ are covered in the definition of trademark under the Patent, Design and Trademark Act, 1965.⁷⁶⁰ Article 16:1 of the TRIPS Agreement provides that the owner of a registered trademark shall have the right to prevent unauthorized persons from using identical or

⁷⁵⁶ See *Id.* at Section 19.

⁷⁵⁷ See *Id.* at Section 25.

⁷⁵⁸ See *Id.* at Section 27.

⁷⁵⁹ See TRIPS Agreement, *supra*, footnote 616, Art. 15 (1).

⁷⁶⁰ See Patent, Design and Trademark Act, Section 2 (C) (1965) (Nepal).

similar signs for identical or similar goods or services as those covered by the registration, where such use would result in a likelihood of confusion. The Patent, Design and Trademark Act, 1965 also has provided this right to the owner of a registered trademark.⁷⁶¹ Hence, Nepalese laws meet this important requirement.

The notion of parallel importation is one of the main issues of trademark which is highly in debate in those days. In the *Mattel Canada case*,⁷⁶² an injunction was granted to an exclusive registered user against a parallel importer. In *Mattel*, the trademark registration was treated as a territorial right. With respect to this issue, a case is pending before the Appellate Court of Nepal.⁷⁶³ The Appellate Court has granted an injunction order against parallel importation in this case. In fact, it is important with respect to the protection of trademark. European Union (EU) allows parallel importation within the EU countries. However, the situation of the EU is different because border does not exist within the European Union.

Article 15 (3) of the TRIPS Agreement provides that registrability may depend on use, but actual use shall not be a condition for filing an application. Provisions of the Patent, Design and Trademark Act, 1965 do not require actual use as a condition for filing an application for registration. The TRIPS Agreement requires the Parties to apply the provisions of well-known marks of Article 6bis of the Paris Convention to services.⁷⁶⁴ The Patent, Design and Trademark Act, 1965 requires that the trademark should be his own trademark for the application of the

⁷⁶¹. See Patent, Design and Trademark Act, Section 16 (2) (1965) (Nepal), which reads: "No person shall use a trademark registered in the name of other person without the written permission of the latter, or operate such trademark by imitating it in such a manner as to deceive the general public."

⁷⁶². See *Mattel Canada Inc. v. GTS Acquisitions Ltd.*, (1990) 27 C.P.R. (3d) 385 (Fed. Ct., Trial Div.) (Can.).

⁷⁶³. *Hindustan Lever Ltd. v. Departmental Store*, Appellate Court, Nepal (2001). The author had argued the case before the Supreme Court of Nepal and the Appellate Court representing Hindustan Lever Ltd.

⁷⁶⁴. See TRIPS Agreement, *supra*, footnote 616, Art. 16(2).

registration of the trademark.⁷⁶⁵ Hence, this provision excludes the registration of others well-known trademarks.

The text of the TRIPS Agreement provides, in Article 18, that the initial term, and each renewal term of a registration shall be for not less than seven years. Also, under the TRIPS Agreement, a registration may be cancelled for non-use only after an uninterrupted period of at least three years of non-use. The TRIPS Agreement states that circumstances beyond the control of the owner of the registration are to be recognized as valid reasons for non-use, especially circumstances such as import restrictions on, or other government requirements for, goods and services identified by the trademark. The Patent, Design and Trademark Act, 1965 provides a period of seven years for initial registration⁷⁶⁶ and each renewal term shall be for seven years.⁷⁶⁷ Hence, it meets the basic requirement of the TRIPS Agreement. But it has a provision of cancellation of registration of trademark in case of a non-use period of one year⁷⁶⁸ which is to be changed and extended to at least three years. It also should include a provision for valid reasons for non-use.

The TRIPS Agreement provides that a Member may determine conditions on the licensing and assignment of trademarks, but compulsory licensing of trademarks is not permitted.⁷⁶⁹ In addition, it is stated that the owner of a registered trademark shall have the right to assign its trademark with or without the transfer of the business to which the trademark belongs.⁷⁷⁰

⁷⁶⁵ See Patent, Design and Trademark Act, Section 17 (1) and 17 (2) (1965) (Nepal).

⁷⁶⁶ See *Id.* at Section 18D.

⁷⁶⁷ See *Id.* at Section 23B.

⁷⁶⁸ See *Id.* at Section 18C.

⁷⁶⁹ See TRIPS Agreement, *supra*, footnote 616, Art. 21.

⁷⁷⁰ See TRIPS Agreement, *supra*, footnote 616, Art. 21.

Compulsory licensing is not permitted under the Patent, Design and Trademark Act, 1965. The owner of the registered trademark has a right to assign its trademark with or without the transfer of the business to which its trademark belongs. But if the parties go to the Department of Industry for this purpose, the Department of Industry may transfer the owner's name into the name of the license user.⁷⁷¹ Hence, parties prefer to make private contracts (franchise agreement) and give to others for their use. As it is against the basic rights of trademark, this right of the Department of Industry of transferring owner's name needs to be removed from the said Act.

III.4.B(2)(iii) Design

III.4.B(2)(iii)(a) Introduction

Historically, in the United Kingdom, design registration dates back more than a century and a half, to the Design Act, 1839, though textile designs were protected from infringement as early as 1787. As we talked about other industrial property rights of Nepal, the Nepalese design law also begins in the beginning of twentieth century with the commencement of the Patent, Design and Trademark Act, 1936. The existing Patent, Design and Trademark Act, 1965 repealed the said Act of 1936 and came into force, with all its provisions, on August 30, 1965, and provides a code of design law applicable to all designs including foreign designs applied for from that date. The designs registered prior to the commencement of this Act under the Patent, Design and

⁷⁷¹. See Patent, Design and Trademark Act, Section 21D (3) (1965) (Nepal).

Trademark law enacted in 1936, shall be deemed to have been registered under this Act, with effect from the date of its commencement.⁷⁷²

Design means only the features of shape configuration, pattern or ornament applied to any article by any industrial process or means, which in the finished article appeal to and are judged solely by the eye and which is not a mere mechanical device. A design in order to be registrable must be new or original not previously published.

A Design may be the shape of a motor car, wash basin, a locomotive engine or any material objective, it may be the shape embodied in a sculptured or a plastic figure, which is to serve as a model for commercial production, or it may be a drawing in the flat or a complex pattern to be used for the manufacture of things such as linoleum or wallpaper. Although a design need not possess any artistic merit, it must have individuality of appearance which makes it noticeable. The TRIPS Agreement defines industrial design by reference to “independent” creation and ‘new or original’ character, but allows for exclusion if such designs are essentially dictated by technical or functional considerations.⁷⁷³

Design protection only operates to protect the appearance of articles, not the way they are made or in which they operate. The protection given for design under the Patent, Design and Trademark Act, 1965 is not copyright protection. Although there is an area of overlap between the Copyright Act, 2002 and the Patent, Design and Trade Mark Act, 1965 in respect of designs

⁷⁷² . See *Id.* at Section 26.

⁷⁷³ . See TRIPS Agreement, *supra*, footnote 616, Art. 25.

the two statutes do not give coterminous protection as regards subject matter. There is no provision of compulsory licensing of design under the Patent, Design and Trademark Act, 1965.

Apart from other subject matter such as patents, trademarks and the like, the Paris Convention applies to industrial designs which must be protected by each country of the Union.⁷⁷⁴ The basic principle underlying the Paris Convention is that of national treatment that each Union country is to accord to nationals or persons domiciled in other Union countries the same protection that it accords to its own nationals, as well as any other rights which are specially provided for the Convention.⁷⁷⁵ The Paris Convention allows persons who have applied for protection of an industrial design in one Union country a right of priority for the making of corresponding applications for protection in other Union countries. The Hague Agreement concerning the International Deposit of Industrial Designs⁷⁷⁶ is made for the recognition of an international application for designs protection as being the equivalent of a national application. Nepal is not a member of the Hague Agreement.

The object of design registration is to see that the originator of a profitable design is not deprived of his reward by others applying it to their goods without his permission. The principal object of the registered designs system is to give protection, through the grant of a monopoly right, to the visual form of articles which are commercially produced. It has been seen that good design is an integral part of the manufacture and marketing of all kinds of useful articles.

⁷⁷⁴ . Paris Convention for the Protection of Industrial Property (1967) mentioned in the TRIPS Agreement, Art. 5quinquies.

⁷⁷⁵ . Paris Convention for the Protection of Industrial Property (1967) mentioned in the TRIPS Agreement, Art. 2 (1), 3.

⁷⁷⁶ . The Hague Agreement Concerning the International Deposite of Industrial Designs of November 6, 1925 is available at <http://www.wipo.org/treaties/registration/hague/index.html>.

III.4.B(2)(iii)(a)

Design Related provisions of the TRIPS Agreement

The TRIPS Agreement obliges Members to provide for the protection of independent created industrial designs that are new or original.⁷⁷⁷ The TRIPS Agreement requires Members to grant the owner of a protected industrial design the right to prevent third parties not having the owner's consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, or the protected design, when such acts are undertaken for commercial purposes.⁷⁷⁸ The TRIPS Agreement allows Members to provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties.⁷⁷⁹ Regarding the term of protection, the duration of protection available shall amount to at least 10 years.⁷⁸⁰ The wording "amount to" allows the term to be divided into, for example, two periods of five years.

III.4.B(2)(iii)(c)

Legal Regime of Design in Nepal

Section 2 (b) of the Patent, Design and Trademark Act, 1965 has define Design as the form or shape of any material manufactured in any manner. Design means only the features of shape configuration, pattern or ornament applied to any article by any industrial process or means,

⁷⁷⁷ . See TRIPS Agreement, *supra*, footnote 616, Art. 25 (1).

⁷⁷⁸ . See TRIPS Agreement, *supra*, footnote 616, Art. 26 (1).

⁷⁷⁹ . See TRIPS Agreement, *supra*, footnote 616, Art. 26 (2).

⁷⁸⁰ . See TRIPS Agreement, *supra*, footnote 616, Art. 26 (3).

which in the finished article appeal to and are judged solely by the eye and which is not a mere mechanical device. A design in order to be registrable must be new or original not previously published. Designs which are functional are not registrable.

Any person may acquire under the Patent, Design and Trademark Act, 1965 title to the design of any article manufactured or caused to be manufactured by him after getting it registered under the Patent, design and Trademark Act, 1965.⁷⁸¹ No person shall manufacture any article by using the design registered in the name of any person under the Patent, design and Trademark Act, 1965 without the latter's written permission, or by imitating such design so as to deceive the general public.⁷⁸²

The Restrictive Clause of Sub-section (1) of Section 14 of the Patent, Design and Trademark Act, 1965 contains the general exclusion from registrability. In case it is felt by the Department of Industry that such design may hurt the prestige of any individual or institution or adversely affects the public conduct or morality, or undermines the national interest, or in case such design has already been registered in the name of any other person, it shall not be registered.

Any person desirous of having the design of any article manufactured or caused to be manufactured by him registered under the Patent, Design and Trademark Act, 1965 shall submit to the Department of Industry an application, together with four copies of such design and maps, and drawings and particulars thereof.⁷⁸³ On receipt of the application for the registration of

⁷⁸¹ . See Patent, Design and Trademark Act, Section 12 (1965) (Nepal).

⁷⁸² . See *Id.* at Section 12 (2).

⁷⁸³ . See *Id.* at Section 13 (1).

design filed by any person, the Department of Industry shall register the design in the name of the applicant.⁷⁸⁴

In case the Department of Industry felt that such design hurts the prestige of any individual or institution or adversely affects the public conduct or morality, or undermines the national interest, or in case such design has already been registered in the name of any other person, it shall not register such design.⁷⁸⁵ In case the Department of Industry is satisfied that there exists any circumstance as mentioned above, it may cancel the registration of any design.⁷⁸⁶ The Department of Industry shall, before canceling the registration of such design, provide reasonable opportunity to the design-holder to show cause, if any, why the registration of his design should not be cancelled.⁷⁸⁷ The Department of Industry shall publish the designs registered under the Patent, Design and trademark Act, 1965 as well as particulars of their renewal or cancellation, for the information of the public.⁷⁸⁸ Any one who has any objection to the particulars published may file a complaint to the Department of Industry within a period of 35 days from the date of publication of such particulars. The Department of Industry shall take necessary actions after holding inquiries into such complaints.⁷⁸⁹

The title of the person in whose name a design has been registered under the Patent, Design and Trademark Act, 1965 shall remain valid for a period of five years from the date of registration

⁷⁸⁴ . See *Id.* at Section 14 (1).

⁷⁸⁵ . See *Id.* at Section 14 (1), para. 1 (Restrictive Clause of Sub-section).

⁷⁸⁶ . See *Id.* at Section 14 (3).

⁷⁸⁷ . See *Id.* at Section 14 (3), para. 3 (Restrictive Clause of Sub-section).

⁷⁸⁸ . See *Id.* at Section 21A (1).

⁷⁸⁹ . See *Id.* at Section 21A (2).

thereof.⁷⁹⁰ A design may be renewed not more than two times for a period of five years at a time.⁷⁹¹

In case any one wishes to allow others to make use of a design registered in his name, the Department of Industry may grant approval for the use of such design by the other person. In case the Department of Industry grants permission for the use of design, the title to the concerned design shall be transferred to the person who has been permitted to make use of such design.⁷⁹²

The title to any design registered in a foreign country shall not be valid in Nepal unless it is registered in Nepal by the concerned person.⁷⁹³ The Department of Industry may register designs registered in foreign countries without conducting any enquiries if an application is filed for their registration along with certificate of their registration in foreign countries.⁷⁹⁴ With regards to the registration of foreigner's design (registered in foreign countries)⁷⁹⁵ and renewing the registration of such design,⁷⁹⁶ a double amount of the said fee shall be charged in convertible foreign currency determined on the basis of the current rate of exchange.

It is not permitted to manufacture any article by using the design registered in the name of any person under the Patent, Design and Trademark Act, 1965 without the written permission of the design holder or by imitating such design so as to deceive the general public.⁷⁹⁷ The violation of this provision is an infringement of design under the Patent, design and Trademark Act, 1965. In

⁷⁹⁰ . See *Id.* at Section 14A.
⁷⁹¹ . See *Id.* at Section 23B (3).
⁷⁹² . See *Id.* at Section 21D.
⁷⁹³ . See *Id.* at Section 21B.
⁷⁹⁴ . See *Id.* at Section 21C.
⁷⁹⁵ . See *Id.* at Section 23 (1).
⁷⁹⁶ . See *Id.* at Section 23 (2).
⁷⁹⁷ . See *Id.* at Section 12 (2).

the case of infringement of design, the design holder can file a lawsuit before the Department of Industry against the infringer, and can claim compensation. The Department of Industry may punish with a fine not exceeding Rs. 800.00 as well as confiscation all articles or goods connected with such offence.⁷⁹⁸ Likewise the Department of Industry may recover the appropriate amount of losses from the offender in the form of compensation.⁷⁹⁹

The Patent, Design and Trademark Act, 1965 has not given power to the Department of Industry for the issuance of injunction order for restraining the defendant from using the offending design pending the trial of the suit. The Appellate Court have powers to issue orders of injunction for the enforcement of legal rights of any person infringed by any body or authority under the Justice Administration Act, 1991. Hence, besides filing lawsuit before the Department of Industry, the proprietor of the design may file an application before the Appellate Court for issuance of injunction order prohibiting the defendant from using the offending design until the finality of the suit pending at the Department of Industry. If the matter is urgent and serious, an *ex parte* injunction for a short period may be obtained from the Appellate Court. Any person who is not satisfied with the order issued by the Department of Industry under the Patent, Design and Trademark Act, 1965 may file an appeal with the Appellate Court within 35 days.⁸⁰⁰

From the perspective of Nepal's obligation to bringing her laws in compliance with the TRIPS Agreement, we can evaluate Nepalese design law with the provisions of the TRIPS Agreement. Accordingly, we find in Nepalese laws that there are provisions for the registration of domestic as well as foreign design. Only registered designs are protected under the Patent, Design and

⁷⁹⁸ . See *Id.* at Section 1D.
⁷⁹⁹ . See *Id.* at Section 25.
⁸⁰⁰ . See *Id.* at Section 27.

Trademark Act, 1965. Newness or originality of design are not expressly mentioned as a required prerequisite of the registration. However, newness or originality are implied prerequisite for the registration of design.⁸⁰¹ The Patent, Design and Trademark Act, 1965 has, in case of infringement, provided the design owner the right to prevent third parties. The TRIPS Agreement also allows Members to provide limited exceptions to the protection of designs. It justifies, under certain conditions, the provision of exclusion from registrability of the Patent, Design and Trademark Act, 1965. In Nepal, the title of the registered design shall remain valid for a period of five years and it may be renewed two times for a period of five years at a time. There is no provision of discrimination between foreigners, and between national and foreigners. The only provision of double fee for registration and renew for foreign design is against of national treatment provision of the TRIPS Agreement. Hence, this provision is subject of removable from the existing law. Nepal has already made commitment to remove this double fee provision related to foreigner in the accession negotiation upon Nepal's accession to the WTO.⁸⁰² The aforesaid discussion indicates that the basic requirements prescribed by the TRIPS Agreement with respect to the design protection are available under the existing laws of Nepal.

III.4.B(2)(iv) Patent

III.4.B(2)(iv)(a) Introduction and Background

⁸⁰¹ See *Id.* at Section 12.

⁸⁰² See WTO document (WT/ACC/NPL/16, para 136), *Report of the Working Party on the Accession of the Kingdom of Nepal to the World Trade Organization*, the WTO Secretariat, Geneva, 28 August 2003, available at <http://www.wto.org>.

Patents are about protecting inventions. It is difficult to define what amounts to an invention. A patent is a form of intellectual property. Patents are perhaps the oldest and most widely-recognized form of intellectual property.⁸⁰³ The owner of the patent can sell this property or he/she can grant licenses to others to exploit it. A patent is a monopoly right granted by the state to the proprietor (patentee) who has invented a new and useful article or an improvement of an existing article or a new process of making an article. The proprietor has the exclusive right to exploit the patented invention. This right consists of an exclusive right to manufacture the new article invented or manufacture an article according to the invented process for a limited period. Once the term of a patent expires, the patent cannot be renewed, and the invention enters the public domain. Anybody can make use of the invention after the expiry of the duration of patent.⁸⁰⁴

The concept of patent and its essential ingredients, i. e., the invention must be new, must involve an inventive step, lack of obviousness and must be capable of industrial application are the same since it was conceived four hundred years ago. A patent is not granted for an idea or abstract principle as such, but the result accomplished by the application of an idea is patentable. A patent will not be issued for the discovery of a phenomenon of nature.

A computer programme is protectable in Nepal under the Copyright Act, 2002, as a literary work⁸⁰⁵ and it is not considered a patentable invention. Modern technology has produced high-yielding varieties of agricultural seeds, creation of plants by tissue culture and micro-organisms and new products based on them which have been found beneficial in industry, medicine and

⁸⁰³ . See BHALA, *supra*, footnote 631, at 1084.

⁸⁰⁴ . See *Id.* at p. 1085.

⁸⁰⁵ . See Copyright Act, Section 2 (a) (10) (2002) (Nepal).

food production. The question of patenting such processes and products is a highly controversial subject even in developed countries.

The objective of granting a patent is to encourage and develop new technology and industry. The opportunity of acquiring exclusive rights in an invention encourages research and invention, induces an inventor to disclose his discoveries, offers a reward for the expenses of developing inventions to the stage at which they are commercially practicable, and provides an inducement to invest capital in new lines of production.

International organizations are being attempting from time to time for the protection of industrial property to introduce more and more uniformity and harmonization among national patent systems. The International Convention for the Protection of Industrial Property (Paris Convention)⁸⁰⁶ deals patent along with other industrial property. In a sense patents have assumed an international character. The increasing number of applications for patents from foreigners received in many countries is recognition of this fact. The TRIPS Agreement ensures with the member countries of the WTO that they bring, *inter alia*, their patent laws, regulations and administrative procedures in compliance to the provisions of TRIPS. Hence the basic rule of the patent system is accepted and harmonized all over the world.

III.4.B(2)(iv)(b) Historical Development of Patent Laws

⁸⁰⁶ . International Convention for the Protection of Industrial Property (Stockholm text), done July 14, 1967, 982 U. N. T. S. 369, 21 U. S. T. 1583, 24 U. S. T. 2140, T. I. A. S. 6923, 7727. The text is available from WIPO's website at <http://www.wipo.org>.

The development of patent system first took place in the United Kingdom and it has a long history. A concept of intellectual property in inventions are seen as dating from the Statute of Monopolies of 1624 but it was the industrial revolution, from the late eighteenth century, which gave the major impetus to patents. Patents were granted in the English colonies of North America, and after the formation and independence of the United States the first patent law soon followed. Patent laws were enacted as early as 1790 in the United States. The original laws of 1790 were subsequently revised a number of times. The laws of the United States will determine owner's right to a patent and once this right has been acquired, no state can limit it except in the exercise of its 'police powers'. In France the revolution brought forth a patent law in 1791. Prussia had a patent law in 1815. The law on patents were introduced for Germany in about 1870s.

The Nepalese patent law begins in the beginning of twentieth century with the commencement of the Patent, Design and Trademark Act, 1936. The Patent, Design and Trademark Act, 1965 replaced the said Act of 1936 and came into force, with all its provisions, on August 30, 1965, and provides a code of patent law applicable to all patents including foreign applied for from that date.

The Patent, Design and Trademark Act, 1965 serves a dual purpose in this respect. It is deigned to protect the inventor of "any useful invention relating to a new method or process of manufacture, operation or publicity or any material or a combination of materials, or that made on the basis of a new theory or formula".⁸⁰⁷ This patent is a grant of certain rights and privileges made by the government to an inventor in return for which he must disclose his invention to the

⁸⁰⁷ . See Patent, Design and Trademark Act, Section 2 (a) (1965) (Nepal).

public. The inventor is granted a "monopoly" for a specific term of years during which time he has the right to exclude all the world from making, using or selling the invention without his authority.

III.4.B(2)(iv)(c) Patent Related Provisions Under the TRIPS Agreement

The provisions of patent are contained under Section 5, from article 27 to 34, of the TRIPS Agreement. The TRIPS Agreement requires Member countries to make patents available for inventions, whether products or processes, in all fields of technology without discrimination, subject to the normal tests of novelty, inventiveness (non-obvious) and industrial applicability (useful). It is also required that patents be available and patent rights enjoyable without discrimination as to the place of invention and whether products are imported or locally produced.⁸⁰⁸ In *Canada – Pharmaceutical Patents*, in explaining its understanding of the term “without discrimination” in Article 27, the WTO Panel advised:

"The primary TRIPS provisions that deal with discrimination, such as the national treatment and most-favored-nation provisions of Articles 3 and 4, do not use the term 'discrimination'. They speak in more precise terms. The ordinary meaning of the word 'discriminate' is potentially broader than these more specific definitions. ... Discrimination may arise from explicitly different treatment, sometimes called 'de jure discrimination', but it may also arise from ostensibly identical treatment which, due to differences in circumstances, produces differentially disadvantageous effects, sometimes

⁸⁰⁸ See TRIPS Agreement, *supra*, footnote 616, Art. 27 (1).

called 'de facto discrimination'. ... 'Discrimination' is a term to be avoided whenever more precise standards are available, and when employed, it is a term to be interpreted with caution, and with care to add no more precision than the concept contains.⁸⁰⁹

In accordance with the TRIPS Agreement, there are three permissible exceptions to the basic rule on patentability:

(i) Ordre public or morality: The first ground to exclude from patentability is inventions contrary to *ordre public* or morality; this explicitly includes inventions dangerous to human, animal or plant life or health or seriously prejudicial to the environment. This is subject to the condition that the commercial exploitation of the invention must also be prevented and that this prevention must be necessary for the protection of *ordre public* or morality.⁸¹⁰

(ii) Diagnostic, therapeutic and surgical methods: The second exception is that Members may exclude from patentability diagnostic, therapeutic and surgical methods for the treatment of humans or animals.⁸¹¹

(iii) Plants and animal other than micro-organisms...: The third exception is that Members may exclude plants and animals other than micro-organisms and essentially biological processes for the production of plants or animal other than non-biological and microbiological processes. However, any Member country excluding plant varieties from patent protection must provide an effective *sui generis* system of protection.⁸¹²

⁸⁰⁹ . See Report of the WTO Panel, *Canada – Patent Protection for Pharmaceutical Products*, adopted on 7 April 2000, WT/DS114/R, at para. 7.94.

⁸¹⁰ . See TRIPS Agreement, *supra*, footnote 616, Art. 27 (2).

⁸¹¹ . See TRIPS Agreement, *supra*, footnote 616, Art. 27 (3) (a).

⁸¹² . See TRIPS Agreement, *supra*, footnote 616, Art. 27 (3) (b).

The TRIPS Agreement confers certain exclusive rights to the owner of the patent. Where the subject-matter of a patent is a product, the exclusive rights conferred will prevent others from the acts of: making, using, offering for sale, selling, or importing for these purposes that product. Where the subject-matter of a patent is a process, the exclusive rights conferred will prevent others from the act of using the process, and from the acts of: using, offering for sale, selling or importing for these purposes at least the product obtained directly by that process. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.⁸¹³ Members of the WTO may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interest of the patent owner, taking account of the legitimate interests of third parties.⁸¹⁴ In *Canada – Pharmaceutical Patents*, the WTO Panel addressed the basic structure of Article 30 of the TRIPS Agreement, outlined the conditions for its application and then found that these conditions apply cumulatively:

“Article 30 established three criteria that must be met in order to qualify for an exception: (1) the exception must be 'limited'; (2) the exception must not 'unreasonably conflict with normal exploitation of the patent'; (3) the exception must not 'unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties'. The three conditions are cumulative, each being a separate and independent requirement that must be

⁸¹³ . See TRIPS Agreement, *supra*, footnote 616, Art. 28.

⁸¹⁴ . See TRIPS Agreement, *supra*, footnote 616, Art. 30.

satisfied. Failure to comply with any one of the three conditions results in the Article 30 exception being disallowed."⁸¹⁵

The term of protection, in accordance with the TRIPS Agreement, available shall not end before the expiration of a period of 20 years from the filing date.⁸¹⁶ Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the applicant.⁸¹⁷ In respect to the burden of proof if the subject-matter of a patent is a process for obtaining a product, the judicial authorities shall have the authority to order the defendant to prove that the process to obtain an identical product is different from the patented process, where certain conditions indicating a likelihood that the protected process was used are met.⁸¹⁸

There are special provisions on compulsory licensing of patent under the TRIPS Agreement. Compulsory licensing and government use without the authorization of the right holder are allowed, but are made subject to conditions aimed at protecting the legitimate interests of the right holder.⁸¹⁹

⁸¹⁵ . See Report of the WTO Panel, *Canada –Patent Protection for Pharmaceutical Products*, adopted on 7 April 2000, WT/DS114/R, at para. 7.26.

⁸¹⁶ . See TRIPS Agreement, *supra*, footnote 616, Art. 33.

⁸¹⁷ . See TRIPS Agreement, *supra*, footnote 616, Art. 29 (1).

⁸¹⁸ . See TRIPS Agreement, *supra*, footnote 616, Art. 34.

⁸¹⁹ . See TRIPS Agreement, *supra*, footnote 616, Art. 31.

III.4.B(2)(iv)(d) Legal Regime of Patent in Nepal

The Patent, Design and Trademark Act, 1965 is the sole governing law of patent in Nepal. Any person desirous of obtaining right over any patent shall have such patent registered in his name under the Patent, Design and Trademark Act, 1965.⁸²⁰ An invention which is both new and useful is patentable. Ingenuity and originality are the determining factors. If an inventor's efforts resulted merely in some modification or improvement of an already existing invention or process, he would be denied a patent. The Patent, Design and Trademark Act, 1965 states "any useful invention relating to a new method or process of manufacture, operation or publicity or any material or a combination of materials, or that made on the basis of a new theory or formula" are patentable.⁸²¹

A number of things are excluded from patentability. The Department of Industry (Patent authority) shall not register any patent under the Patent, Design and Trade Mark Act, 1965 in the following circumstances:

- a. In case the patent is already registered in the name of any other person, or
- b. In case the applicant himself is not the inventor of the patent sought to be registered by him, nor has he acquired rights over it from the original inventor, or
- c. In case the patent sought to be registered is likely to adversely affect the public health, conduct or morality or the national interest, or
- d. In case the registration of the patent will constitute a contravention of existing Nepal law."⁸²²

⁸²⁰ . See Patent, Design and Trademark Act, Section 3 (1) (1965) (Nepal).

⁸²¹ . See *Id.* at Section 2 (a).

⁸²² . See *Id.*, at Section 6.

The patent registered in the name of any person under this Act shall not be copied by any other person or operated or used in his name, during the period of seven years and two times of a period of seven years at a time by renew, without the written permission of the patentee.⁸²³

The patent registered in the name of any person under this Act may be transferred by him in any manner in any other person like movable property.⁸²⁴ In simple terms this means that patentee's rights are protected for seven years first and then fourteen years more by renew (in total twenty-one years) during which period patentee is free to do as he pleases with his invention. Patentee may do nothing if he so desires or he may assign or sell or license some or all of his patent rights in return for royalties. After twenty-one years (if renewed timely), however, his rights expire and the public may use and practice his invention without obligation to him.

There is no provision, under the Patent, Design and Trade Mark Act, 1965, of granting compulsory licenses to use a patented invention in certain circumstances, i. e., if the right holder is not fully exploiting the patent. The parallel imports are not allowed and the concept of exhaustion of rights are not adopted within the meaning and scope of the Patent, Design and Trade mark Act, 1965.

A person desirous of having any patent registered in his name should submit to the Department of Industry an application, containing the particulars mentioned below, along with all available evidence in his possession:

“a. Name, address and occupation of the person inventing the patent.

⁸²³ . See *Id.*, at Section 3 (2).

⁸²⁴ . See *Id.*, at Section 3 (3).

- b. If the applicant himself is not the inventor, how and in what manner he acquired title thereto from the inventor.
- c. Process of manufacturing, operating or using the patent.
- d. The theory or formula if any on which the patent is based.

Along with the application for the patent registration, the applicant should also submit maps and drawings, along with particulars, of the patent, as well as the application fee.”⁸²⁵

However, the Patent, Design and Trademark Act, 1965 does not force the inventor to file his patent application within certain time limit of the date of his invention. The Department of Industry may cancel the registration of any patent which had been registered in the circumstances in which patent cannot be registered as mentioned above.⁸²⁶ But the Department of Industry shall, before canceling the registration of any patent, provide opportunity to the patentee to show cause, if any, why the registration of this patent should not be cancelled.⁸²⁷

Patents registered under the Patent, Design and Trade Mark Act, 1965, other than those which must be kept secret in the national interest, shall be published by the Department of Industry in the Nepal Gazette for the information of the public.⁸²⁸ In case anyone has any objection to such a patent, he may file a complaint with the Department of Industry within a period of 35 days from the date of seeing or copying the patent.⁸²⁹ In case any complaint is received to such a patent, the Department of Industry shall take necessary action after conducting inquiries.

⁸²⁵ . *See Id.*, at Section 4.

⁸²⁶ . *See Id.*, at Section 6 (2).

⁸²⁷ . *See Id.*, at Section 6 (2).

⁸²⁸ . *See Id.*, at Section 7A.

⁸²⁹ . *See Id.*, at Section 7A (3).

The title of the patentee to the patent shall be valid for a period of seven years from the date of registration.⁸³⁰ A patent may be renewed two times for a period of seven years at a time.⁸³¹ Upon the expiration of patent's term, the patent becomes part of the public domain.

The title to any patent registered in a foreign country shall not be valid in Nepal unless it is registered in Nepal by the concerned person.⁸³² The Department of Industry may register patents registered in foreign countries without conducting any inquiries if an application is filed for their registration along with certificate of their registration in foreign countries.⁸³³ With regards to the foreigner's patent (registered in foreign countries), a double amount of the registration fee shall be charged in convertible foreign currency determined on the basis of the current rate of exchange.⁸³⁴

Infringement of patents is not expressly defined in the Patent, Design and Trade Mark Act, 1965. Obviously infringement of a patent is the violation of the monopoly rights conferred by the statute. The rights conferred by the patent is the exclusive right to make, use, exercise, sell or distribute the invention in Nepal. Infringement consists in the violation of any of these rights. Hence a patent is infringed by making a patented product or using a patented process, also by selling or importing the product.

⁸³⁰ . *See Id.*, at Section 8 (1).
⁸³¹ . *See Id.*, at Section 8 (2), 23B (3).
⁸³² . *See Id.*, at Section 21B.
⁸³³ . *See Id.*, at Section 21C.
⁸³⁴ . *See Id.*, at Section 23.

The patent registered in the name of any person under the Patent, Design and Trademark Act, 1965 shall not be copied by any other person or operated or used in his name during the period mentioned in section 8 (seven years and two times of a period of seven years at a time by renew) without the written permission of the patentee.⁸³⁵ The violation of this provision is an infringement under the Patent, Design and Trademark Act, 1965.

In case of infringement of patent, the patentee can file a lawsuit before the Department of Industry against the infringer, and can claim compensation. The Department of Industry may punish with a fine not exceeding Rs. 2000.00 as well as confiscation all articles or goods connected with such offence.⁸³⁶ Likewise the Department of Industry may recover the appropriate amount of losses from the offender in the form of compensation.⁸³⁷

The Patent, Design and Trademark Act, 1965 has not given power to the Department of Industry for the issuance of injunction order for restraining the defendant from using the offending patent pending the trial of the suit. The Appellate Court have powers to issue orders of injunction for the enforcement of legal rights of any person infringed by any body or authority under the Justice Administration Act, 1991.⁸³⁸ Hence, besides filing lawsuit with the Department of Industry, the patentee may file an application with the Appellate Court for issuance of injunction order prohibiting the defendant from using the offending patent until the finality of the suit pending at the Department of Industry. If the matter is urgent and serious, an *ex parte* injunction for a short period may be obtained from the Appellate Court.

⁸³⁵ . See *Id.*, at Section 3 (2).

⁸³⁶ . See *Id.*, at Section 11.

⁸³⁷ . See *Id.*, at Section 25.

⁸³⁸ . See Administration of Justice Act, Section 8 (2) (1991) (Nepal).

Any person who is not satisfied with the order issued by the Department of Industry under the Patent, Design and Trademark Act, 1965 may file an appeal with the Appellate Court within 35 days.⁸³⁹ The patentee or any concerned person may appoint an agent or legal practitioner for the purpose of taking any action which he is required to take under the Patent, Design and Trade Mark Act, 1965, and all actions taken by such agent or legal practitioner shall be deemed to have been taken by him personally.⁸⁴⁰

Hence, when we compare the provisions of the TRIPS Agreement prescribing minimum standard of patent protection with the provisions of patent protection under the Nepalese laws, we find that the Nepalese law provides minimum standard of patent protection. The elements of definition of a patent, an invention with usefulness and newness, prescribed by TRIPS Agreement⁸⁴¹ are covered in the definition of patent under the Patent, Design and Trademark Act, 1965.⁸⁴² There are provisions of registration of national as well as foreign patent and both are protected on equal basis. There is no provision of discrimination between national and foreign patents, and between foreigners.

The TRIPS Agreement confers certain exclusive rights to the owner of the patent, i. e., preventing others from the acts of making, using, selling or importing.⁸⁴³ The Patent, Design and Trademark Act, 1965, has provided this exclusive right to the owner of a registered patent.⁸⁴⁴ Right to assign, or transfer the patent and to conclude licensing contracts are provided to the

⁸³⁹ . See Patent, Design and Trademark Act, Section 27 (1965) (Nepal).

⁸⁴⁰ . See *Id.*, at Section 20.

⁸⁴¹ . See TRIPS Agreement, *supra*, footnote 616, Art. 27 (1)

⁸⁴² . See Patent, Design and Trademark Act, Section 2 (a) (1965) (Nepal).

⁸⁴³ . See TRIPS Agreement, *supra*, footnote 616, Art. 28.

⁸⁴⁴ . See Patent, Design and Trademark Act, Section 3 (2) (1965) (Nepal).

patent owner by the Patent, Design and Trademark Act, 1965.⁸⁴⁵ The grounds of exclusion⁸⁴⁶ from patentability under the Patent, Design and Trademark Act, 1965 are justified under the TRIPS agreement.⁸⁴⁷ The title of patent is valid for a period of seven years and may be renewed two times for a period of seven years at a time.⁸⁴⁸ This provision indicates that if a patent owner wants to get protection of patent for a period of 20 years, he can get this protection in Nepal. It meets the requirement of the term of protection of a period of 20 years provided by the TRIPS Agreement.⁸⁴⁹

There is no provision of compulsory licensing of patent under the Patent, Design and Trademark Act, 1965. It is a better protection on behalf of the patent owner. The TRIPS Agreement allows compulsory licensing of patent under certain conditions.⁸⁵⁰ It is not an obligation of a member country to make provision of compulsory licensing because it deteriorates the rights of patent owner. However, Nepal needs to incorporate this provision of compulsory licensing of patent under certain conditions.

III.4.B(3) *Anti-Competitive Practices in Contractual Licenses.*

The TRIPS Agreement recognizes that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and

⁸⁴⁵ . *See Id.*, at Section 3 (3).

⁸⁴⁶ . *See Id.*, at Section 6.

⁸⁴⁷ . *See* TRIPS Agreement, *supra*, footnote 616, Art.30.

⁸⁴⁸ . *See* Patent, Design and Trademark Act, Section 8 (1) (2) (1965) (Nepal).

⁸⁴⁹ . *See* TRIPS Agreement, *supra*, footnote 616, Art.30.

⁸⁵⁰ . *See* TRIPS Agreement, *supra*, footnote 616, Art.31.

may impede the transfer and dissemination of technology.⁸⁵¹ The TRIPS Agreement allows Member countries to adopt, consistently with other provisions of the Agreement, appropriate measures to prevent or control practices in the licensing of intellectual property rights which are abusive and anti-competitive.⁸⁵² Neither the Copyright Act, 2002 nor the Patent, Design and Trademark Act, 1965 have provided provisions on competition rule with respect to the licensing of intellectual property rights in Nepal. Hence, a provision on competition rule in this respect should be enacted and be incorporated into the existing laws. It should prohibit licensing practices which restricts competition in the market.

III.4.B(4) *Domestic Procedures and Remedies for the Enforcement of Intellectual Property Rights*

The TRIPS Agreement contains detailed provisions concerning domestic procedures and remedies relating to enforcement of all intellectual property rights covered by the TRIPS Agreement. The provisions on enforcement of intellectual property rights are contained in Part III of the TRIPS Agreement. It prescribes the institutional mechanism, procedures and remedies that Member countries should adopt. It's objectives are to ensure that effective means of enforcement are available to right holders and that enforcement procedures are applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide safeguards against their abuse. The provisions of enforcement of intellectual property rights under the TRIPS Agreement and the Nepalese legal regime are discussed below under the following subtitle:

i) General Obligation

⁸⁵¹ . See TRIPS Agreement, *supra*, footnote 616, Art. 40.

⁸⁵² . See *Id.*

- ii) Civil and Administrative Procedures and Remedies
- iii) Provisional Measures
- iv) Criminal Procedures
- v) Enforcement of Intellectual Property Rights at the Border

III.4.B(4)(i) General Obligations

The general obligations of Members relating to enforcement requires that domestic enforcement procedures are available under their law so as to permit effective action against any act of infringement of intellectual property rights, and that the remedies available must be expeditious in order to prevent infringements and must constitute a deterrent to further infringements.⁸⁵³

Such enforcement procedures are to be “fair & equitable,” and “not unnecessarily complicated or costly, or entail unreasonable time limits on unwarranted delays.” In Nepal, under the Copyright Act, 2002 and the Patent, Design and Trademark Act, 1965, there are provisions of authorities and procedures to enforce intellectual property rights. We will discuss about the authorities and the procedures relating to the enforcement of the intellectual property rights later in the following sub-titles.

The general principles relating to enforcement aim to guarantee due process.⁸⁵⁴ The TRIPS Agreement sets out that parties to a proceeding shall have an opportunity for review by judicial authority of final administrative decisions.⁸⁵⁵ In fact this is one of the major obligations to be

⁸⁵³ . See TRIPS Agreement, *supra*, footnote 616, Art. 41.

⁸⁵⁴ . See *Id.*

⁸⁵⁵ . See TRIPS Agreement, *supra*, footnote 616, Art. 41 (4).

fulfilled by WTO Member countries. In Nepal, any person who is not satisfied with the order issued by the Department of Industry under the Patent, Design and Trademark Act, 1965 may file an appeal before the Appellate Court within 35 days.⁸⁵⁶ Likewise, any party who is not satisfied with the order issued by the Registrar or District Court under the Copyright Act, 2002 may file an appeal before the Appellate Court within 35 days.⁸⁵⁷

Besides the provisions of appeal of the Patent, Design and Trademark Act, 1965, and the Copyright Act, 2002, the Appellate Court also have powers to hear appeals against the judgment or final orders by any other bodies or authorities including the Department of Industry, the Registrar or the District Court under the Justice Administration Act, 1991.⁸⁵⁸

With regards to patent, design and trademark, the provision of appeal may be invoked by the concerning person in any of the following situations:

- (i) In case the Department of Industry feels that a patent, design or trademark should not be registered, the applicant may file an appeal before the Appellate Court.
- (ii) If the Department of Industry cancels the registration of a patent, design or trademark which had been registered, the owner may file an appeal before the Appellate Court for the nullification of the order of the Department of Industry.
- (iii) With regards to the decision of the Department of Industry in connection to the objection to a patent, design or trademark registration, concerning party may file an appeal before the Appellate Court.

⁸⁵⁶ . See Patent, Design and Trademark Act, Section 27 (1965) (Nepal).

⁸⁵⁷ . See Copyright Act, Section 31 (2002) (Nepal).

⁸⁵⁸ . See Administration of Justice Act, Section 8 (1) (1991) (Nepal).

- (iv) Likewise an appeal may lie with the Appellate Court against the decision of the Department of Industry with respect to the punishment given for violation (infringement) of patent rights, design rights or trademark rights and/or losses recovered in the form of compensation.
- (v) In addition to those mentioned above, an appeal lies with the Appellate Court against any decision of the Department of Industry.

An appeal may lie in the Supreme Court against the judgements or final orders made by the Appellate Courts in cases tried and settled by the Appellate Court under original jurisdiction.⁸⁵⁹

Hence, an appeal lies in the Supreme Court against the judgements made by the Appellate Court in injunction cases. But the decisions of the Appellate Court with regards to patent, design, trademark and copyright cases are not always subject to appeal in the Supreme Court. The only ground under which an appeal lies in the Supreme Court against the judgements or final orders made by the Appellate Courts in patent, design, trademark and copyright cases is if there is a material difference between the judgement made by the Department of Industry/District Court and the judgement of the Appellate Court.

III.4.B(4)(ii) Civil and Administrative Procedures and Remedies

Article 42 through 49 of the TRIPS Agreement establish basic principles for the conduct of civil proceedings to enforce intellectual property rights. The provisions reflect the basic elements of many systems of justice, such as timely and detailed written notice to defendants, the right to

⁸⁵⁹ . See *Id.* at Section 9.

independent counsel, and the right to present relevant evidence.⁸⁶⁰ The provisions also include the right to discovery, interlocutory or final orders in the event of refusal of a Party to provide access to evidence within that Party's control, injunctions, damages, costs, and damages against a Party at whose request enforcement measures were taken and who has abused the enforcement procedures in order to provide compensation for the loss suffered by any Party wrongfully enjoined.⁸⁶¹ In *India – Patents (EC)*, the WTO Panel has interpreted the words “[the judicial authorities] shall have the authority [to order ...]” of Articles 42 – 48 of the TRIPS Agreement and said that “the function of the words ‘shall have the authority’ is to address the issue of judicial discretion, not that of general availability.”⁸⁶² In addition to these familiar remedies, the TRIPS agreement contains provisions intended to deter infringement. These include, orders requiring disposition of infringing goods or of the tools from which they were made, outside normal trade channels, or destruction of such goods or tools.⁸⁶³ Simple removal of the trademark unlawfully affixed to counterfeit goods will not normally be sufficient to permit release of the goods into trade channels.⁸⁶⁴

In Nepal, the Patent, Design and Trademark Act, 1965⁸⁶⁵ and other provisions of existing laws, i. e., the Administration of Justice Act, 2048; the Evidence Act, 2032; the Civil Rights Act, 2012; Civil Code, 2021; and the Constitution of the Kingdom of Nepal, 1990 (2047), provide the requirements of written notice to the defendant, the right to independent council, the right to present relevant evidence, interlocutory and final orders, disposition of infringing goods,

⁸⁶⁰ See TRIPS Agreement, *supra*, footnote 616, Art. 42.

⁸⁶¹ See TRIPS Agreement, *supra*, footnote 616, Art. 43 (1),(2); 44(1); 45 (1); 45 (2) and 48 (1).

⁸⁶² See Report of the WTO Panel, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted on 22 September 1998, WT/DS79/R, at para. 7.66.

⁸⁶³ See TRIPS Agreement, *supra*, footnote 616, Art. 46.

⁸⁶⁴ See TRIPS Agreement, *supra*, footnote 616, Art. 46.

⁸⁶⁵ See Patent, Design and Trademark Act, Section 11, 15, 19, 20, 25 (1965) (Nepal).

compensation, etc. It would be better if these provisions were written in the Patent, Design and Trademark Act, 1965 and the Copyright Act, 2002.

III.4.B(4)(iii) Provisional Measures

The TRIPS Agreement provides for interlocutory or interim measures to prevent infringement and in particular to prevent the entry into channels of commerce of allegedly infringing goods, including measures intended to prevent the destruction of evidence.⁸⁶⁶ Any person applying for such relief may be required to prove that the applicant is the right holder; that the applicant's right is being infringed soon or that such an infringement is imminent, that any delay in the granting of the requested relief is likely to cause irreparable harm to the right holder, or that there is a real risk that evidence might be destroyed.⁸⁶⁷ The rights of defendants are protected by provisions which require revocation of provisional orders in the event proceedings leading to a decision on the merits are not initiated in a timely manner.⁸⁶⁸ In addition, defendants who are damaged by reason of improper application of provisional measures, e.g. if it turns out there was no infringement or threat of infringement, will be compensated for any injury caused by the measures.⁸⁶⁹

In Nepal, these interlocutory measures are used by the Appellate Court through the injunction order under the Civil Rights Act, 2012. Hence, provisions relating to the provisional measures

⁸⁶⁶ See TRIPS Agreement, *supra*, footnote 616, Art. 50 (1).

⁸⁶⁷ See TRIPS Agreement, *supra*, footnote 616, Art. 50(3).

⁸⁶⁸ See TRIPS Agreement, *supra*, footnote 616, Art. 50(6).

⁸⁶⁹ See TRIPS Agreement, *supra*, footnote 616, Art. 50(7).

should be incorporated in the same law which governs intellectual property rights. Under the Copyright Act, 2002, the District Court may issue a prohibitory order to the concerned person. However, there is no provision of compensation to the defendant in case of improper application of injunction. Hence, it is required to include a provision of compensation to the defendant in case of improper application of injunction to meet the requirement of the TRIPS Agreement.

III.4.B(4)(iv) Criminal Procedures and Penalties

Each Member is required under the TRIPS Agreement to provide criminal procedures and penalties at least in respect to willful trademark counterfeiting and copyright piracy on a commercial scale including fines or imprisonment, or both.⁸⁷⁰ In addition, provisions are made for seizure, forfeiture and destruction of infringing goods and materials used in the commission of the offence.⁸⁷¹

There are provisions of fines, seizure, forfeiture in such situations under the Patent, Design and Trademark Act, 1965⁸⁷² and the Copyright Act, 2002.⁸⁷³ The Copyright Act, 2002 has provision of imprisonment for copyright piracy⁸⁷⁴ but there is no provision of imprisonment for wilful trademark counterfeiting under the Patent, Design and Trademark, Act, 1965. Regarding the provision of imprisonment with respect to the trademark counterfeting, the TRIPS Agreement has proposed this proposition but has not made it compulsory.

⁸⁷⁰ . See TRIPS Agreement, *supra*, footnote 616, Art. 61.

⁸⁷¹ . See *Id.*

⁸⁷² . See Patent, Design and Trademark Act, Section 11, 15, 19, 25 (1965) (Nepal).

⁸⁷³ . See Copyright Act, Section 27, 28, 29 (2002) (Nepal).

⁸⁷⁴ . See *Id.* at Section 27.

III.4.B(4)(v) Enforcement of Intellectual Property Rights at the Border

The TRIPS Agreement requires each Member to adopt procedures to enable a right holder who has valid grounds for suspecting that importation of counterfeit trademark or pirated copyright goods may take place, to apply for suspension by the customs administration of the release of such goods into free circulation.⁸⁷⁵ Such authorities also have the right to order the destruction or disposal of infringing goods. The TRIPS Agreement leaves flexibility to WTO Member governments on whether to include imports of goods which involve other infringement of intellectual property rights.⁸⁷⁶

In Nepal, the Copyright Act, 2002, has provided a provision of border measures.⁸⁷⁷ Where as the Patent, Design and Trademark Act, 1965 has not provided such provision of enforcement at the border. Hence, with respect to the importation of counterfeit trademark, this provision should be included in the Patent, Design and Trademark Act, 1965 as well in Nepal.

III.4.B(5) *Transitional Arrangements for the Implementation of the Rules at the National Level.*

The TRIPS Agreement has come into force since January 1, 1995. The TRIPS Agreement gives all WTO Member countries transitional periods within which WTO Member countries bring

⁸⁷⁵ . See TRIPS Agreement, *supra*, footnote 616, Art. 51.

⁸⁷⁶ . See TRIPS Agreement, *supra*, footnote 616, Art. 51.

⁸⁷⁷ . See Copyright Act, Section 34 (2002) (Nepal).

their national legislation and regulations in conformity with the provisions of the TRIPS Agreement. The transitional period is a period of "grace," during which various members countries need not assume certain TRIPS obligations. The period of transitions is determined by member country category.⁸⁷⁸ The transitional periods, which depend on the level of development of the country concerned, are 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."⁸⁷⁹ Accordingly all member countries have been given transitional period of one year since January 1, 1995.⁸⁸⁰ Hence, all countries, it means particularly developed country Members have had to comply with all of the provisions of the TRIPS Agreement by January 1, 1996. This period has already expired. Moreover, all Members, even those availing themselves of the longer transition periods, have had to comply with the national and most-favored-nation treatment obligations from the very beginning.⁸⁸¹

However, for developing countries, besides one year's grace period, the general transition period is four years.⁸⁸² A country whose economy is in transition, but which is not a developing country, may nonetheless delay application until the year 2000.⁸⁸³

For least developed countries, the transitional period is ten years.⁸⁸⁴ If it is an original member, it will get one year's grace period as well. The TRIPS Agreement provides a possibility to

⁸⁷⁸ . See L. Peter Farkas, *Trade-Related Aspects of Intellectual Property*, in ABA SEC. INT'L L. & PRAC., THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U. S. IMPLEMENTING LEGISLATION 465 (Terence P. Stewart ed., 1996).

⁸⁷⁹ . See TRIPS Agreement, *supra*, footnote 616, Art. 65 (1)

⁸⁸⁰ . See *Id.*

⁸⁸¹ . See TRIPS Agreement, *supra*, footnote 616, Art. 3, 4, & 65 (1).

⁸⁸² . See TRIPS Agreement, *supra*, footnote 616, Art. 65 (2).

⁸⁸³ . See TRIPS Agreement, *supra*, footnote 616, Art. 65 (3).

⁸⁸⁴ . See TRIPS Agreement, *supra*, footnote 616, Art. 66 (1).

extend the transitional period upon duly motivated request.⁸⁸⁵ All least developed member countries are under an obligation to apply most-favored-nation and national treatment rules from January 1, 1996. During the transitional periods, developed and developing member countries are required not to take any measures that will result in a lower level of protection to intellectual property rights than that already existing in their territories.⁸⁸⁶ However, there is no "standstill" clause with regard to this 10 years period of transition for least-developed member countries.⁸⁸⁷ The "standstill" provision is only located in Article 65 (related to developed & developing countries) and applies to "[a] Member availing itself of a transitional period under paragraphs 1, 2, 3 or 4 [of Article 65]"

In the accession negotiation, Nepal has made commitment to establish most-favored-nation and national treatment in all areas covered by the TRIPS Agreement, in particular in the protection of foreign copyright works, and the elimination of discrimination in fees charged to the foreign applicants, upon Nepal's accession to the WTO.⁸⁸⁸ Nepal is granted a transitional period of time by the WTO and accordingly, Nepal needs to apply the TRIPS Agreement fully by no later than 1 January 2007.⁸⁸⁹ The transitional period provided to Nepal by the WTO is not counted from the date of Nepal's entry into the WTO, but from the date of the establishment of the WTO.

⁸⁸⁵ . See *Id.*

⁸⁸⁶ . See TRIPS Agreement, *supra*, footnote 616, Art. 65 (5). This is referred to as the "non-backsliding" or the "stand-still" clause.

⁸⁸⁷ . See L. Peter Farkas, *Trade-Related Aspects of Intellectual Property*, in ABA SEC. INT'L L. & PRAC., THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U. S. IMPLEMENTING LEGISLATION 467 (Terence P. Stewart ed., 1996).

⁸⁸⁸ . See WTO document (WT/ACC/NPL/16, para 137), *Report of the Working Party on the Accession of the Kingdom of Nepal to the World Trade Organization*, the WTO Secretariat, Geneva, 28 August 2003, available at <http://www.wto.org>.

⁸⁸⁹ . See WTO document (WT/ACC/NPL/16, para 153), *Report of the Working Party on the Accession of the Kingdom of Nepal to the World Trade Organization*, the WTO Secretariat, Geneva, 28 August 2003, available at <http://www.wto.org>.

There is no doubt that Nepal is a least-developed as well as land-locked country. So Nepal deserves to get transitional period of 10 years time. Nepal has become member of the WTO on 23 April 2004. Nepal's duty to fulfill her TRIPS obligations starts from the date of membership, i. e., 23 April 2004, not from 1 January 1995. In the same manner, Nepal may claim her rights under the TRIPS Agreement from the date of membership. No logic or reasoning allows to say that the transitional period of 10 years of least-developed country Nepal starts from 1 January, 1995 because Nepal was not member at that time. Likewise, no WTO member has any right to deprive other member from any right given by the WTO Agreements. Hence, with respect to the transitional period of 10 years time, it should begin from the date when Nepal became member. This transitional period of 10 years time is given to least-developed countries keeping "in view of their special needs and requirements, economic, financial and administrative constraints, and their need for flexibility to create a viable technological base."⁸⁹⁰

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 restriction.⁸⁹¹ 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."⁸⁹² The WTO Appellate Body explained in a footnote:

⁸⁹⁰ . See TRIPS Agreement, *supra*, footnote 616, Art. 66 (1).

⁸⁹¹ . See, e.g., Permanent Court of International Justice (PCIJ), *Lotus (France v. Turkey)*, 1927 PCIJ (ser. A), No. 9, 7 September, 18.

⁸⁹² . See Report of the WTO Appellate Body, *European Communities-Measures Concerning Meat and Meat Products (Hormones)*, adopted on 13 February 1998, WT/DS26/AB/R-WT/DS48/AB/R, at para. 165.

“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.’”⁸⁹³

In *Canada – Patent Term*, the WTO Appellate Body stated that: “The provisions in part VI (transitional arrangement, Art. 65 - 67) establish when obligations of the TRIPS Agreement are to be applied by a WTO Member”⁸⁹⁴ The Appellate Body in *India – Patents (US)* further explained:

“Article 65 provides for transitional periods for developing countries: in general five years from the entry into force of the WTO Agreement, i. e., 1 January 2000, and an additional five years to provide for product patents in areas of technology not so patentable as of 1 January 2000. Thus, in such areas of technology, developing countries are not required to provide product patent protection until 1 January 2005.”⁸⁹⁵

⁸⁹³ . See Report of the WTO Appellate Body, *European Communities-Measures Concerning Meat and Meat Products (Hormones)*, adopted on 13 February 1998, WT/DS26/AB/R-WT/DS48/AB/R, at footnote, para. 165.

⁸⁹⁴ . See Report of the WTO Appellate Body, *Canada–Term of Protection for Patents*, adopted on 12 October 2000, WT/DS170/AB/R at para. 100.

⁸⁹⁵ . See Report of the WTO Panel, *India–Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted on 16 January 1998, WT/DS50/AB/R at para. 7.27.

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 10 years time can not be available from the date of accession.

III.4.C CRITICAL ANALYSIS ON CONFORMITY OF NEPALESE LAWS WITH THE PROVISIONS OF THE TRIPS AGREEMENT

The TRIPS Agreement is the first WTO Agreement requiring Members to establish a relatively detailed set of substantive norms within their national legal systems, as well as requiring them to establish enforcement measures and procedures meeting minimum standards.⁸⁹⁶ In this context, several important Sections of the Copyright Act, 2002, and the Patent, Design and Trademark Act, 1965, are discussed and analysed, with reference to the corresponding provisions of the TRIPS Agreement.

Article XVI (4) of the WTO Agreement sets out that each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements. Accordingly, Article 1 (1) of the TRIPS Agreement further reaffirms, "Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, ... Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice." The WTO Appellate Body, in

⁸⁹⁶ See UNCTAD document (UNCTAD/EDM/Misc.232/Add.18), *Course on Dispute Settlement*, WTO, 3.14 TRIPS, New York & Geneva, 2003, page ii.

India-Patents (U. S.), further reconfirms this provision and explains that Members are free to determine how best to meet their obligations under the TRIPS Agreement within the context of their own legal system. Hence, each Member are under an obligation to provide minimum standard of intellectual property rights protection as prescribed by the TRIPS Agreement but the concerning Member determines the appropriate method of implementing it's obligations.

There are both negative and positive views regarding the situation of Nepalese intellectual property rights protection. The Government officials and local business community plead that the existing legal regime of intellectual property rights is able to give protection to patent, design, trademark and copyright in Nepal. They argue that the provisions of registration and protection of patent, design and trademark under the Patent, Design and Trademark Act, 1996, are not discriminatory between foreigners, nor between nationals and foreigners. Accordingly, Nepal maintains the national treatment obligation and most-favored-national treatment obligation requirements. It does not allow parallel importation, which would weaken the protection of intellectual property rights. There is no provision of compulsory licensing with respect to the patent, design, trademark and copyright. Regarding the term of protection, trademark may be registered for seven years and it may be renewed time and again. Patent may be registered for seven years and it may be renewed two times for seven years each time. Design may be registered for five years and may be renewed two times for five years each time. Copyright is not required to be registered in Nepal and it is protected for the period of time as prescribed by the TRIPS Agreement.

It is argued that there is an authority, i. e., the Department of Industry, to settle disputes relating to patents, designs and trademarks. Regarding the copyright, the District Court shall settle disputes relating to the copyright. The Department of Industry may punish the infringer and can award compensation to the proprietor of the patent, design and trademark in case of violation of those rights. The District Court may punish by fine and/or imprisonment the infringer and may award compensation to the owner of the copyright. Any concerned party may appeal the decision of the Department of Industry or the District Court. There is provision of immediate remedy as well. The Appellate Court may grant an injunction order in respect of protection of those intellectual property rights. Regarding the provision of criminality, even the provision of the TRIPS Agreement has not said that it should be obligatory. However, there is provision of imprisonment under the Copyright Act, 2002. Further necessary measurements may be enhanced in law by court's interpretation. Hence, the Nepalese laws (the Patent, Design and Trademark Act, 1996, and the Copyright Act, 2002) are able to provide protection to the proprietors of available intellectual property rights and in fact, has been providing such protection.

There is other view, which is not satisfied with the standard of protection provided to intellectual property rights in Nepal. This group argues that the proprietors of intellectual property rights, particularly trademarks with significant reputations among consumers have grievances related to the infringement of their trademark rights in Nepal. Many foreign trademark proprietors are surprised to learn that their trademarks have been registered by others before they have applied for their own registration in Nepal. These groups of proprietors of trademark argue that the institution governing intellectual property rights is not fully equipped to provide protection and

there is a lack of trained personnel. The law has no systematic and full provisions of intellectual property rights protection. Furthermore, the existing laws are not fully implemented and not well interpreted by the courts.

This group further argues that, under the existing laws, the punishment to the infringer is minimum and there is no provision of imprisonment and the law is inadequate to deter the infringement of another's intellectual property rights. This group suggests, in order to better protection, there should be provisions of imprisonment for counterfeiting goods. The law should be well drafted and cover all provisions in simple language. The institution and enforcement mechanism should be further developed and better equipped for the protection of intellectual property rights.

From the perspective of Nepal's obligation to bringing her laws in compliance with the TRIPS Agreement, we can evaluate Nepalese intellectual property laws with the provisions of the TRIPS Agreement. As we studied different provisions of the TRIPS Agreement and the Nepalese intellectual property rights laws above, now we are able to draw some substantive conclusion with respect to the situation of Nepalese intellectual property laws and Nepal's duty to fulfil its conformity obligation. Accordingly, the principle of non-discrimination is the foundation of all intellectual property conventions, and in accordance with Article 3 and 4 of the TRIPS Agreement, it is an essential component of the TRIPS Agreement as well. In Nepal, there are not discriminatory provisions between foreigners, nor between national and foreigners with respect to the registration, protection and enforcement of intellectual property, i. e., patent, design, trademark and copyright, under the Patent, Design and Trademark Act, 1965 and the

Copyright Act, 2002. Foreign and national intellectual property are equally protected in Nepal. Although the amount is very nominal, the provision of double fee for the registration and renew of foreign intellectual property under the Patent, Design and Trademark Act, 1965 is contradictory to Article 3 of the TRIPS Agreement. Hence, this provision of double fee for foreign Intellectual Property is to be removed from the existing law.

While over-viewing the provisions of the Copyright Act, 2002, we have come to know that the scope of subject matter of copyright protection prescribed by the TRIPS Agreement is covered by the Copyright Act, 2002. There is no requirement of registration to acquire copyright in Nepal. The Copyright Act, 2002 has given exclusive rights of an economic character and moral rights to copyright author and/or owner. It also has protected related rights (neighboring rights). The term of protection of copyright provided by the Copyright Act, 2002 is very much similar to the term of protection provided by the TRIPS Agreement. The provision of exception to the copyright protection is justified by the "fair use" provision of the TRIPS Agreement. There is no provision of compulsory license of copyright under the Copyright Act, 2002. There is provision of boarder measure as well. There is provision of fine and imprisonment for copyright infringement. Hence, the Copyright Act, 2002 is able to provide minimum standard of protection for copyright prescribed by the TRIPS Agreement.

Regarding the situation of trademark protection in Nepal, we can deduce from the above study that the elements of definition, capable to distinguish, prescribed by the TRIPS Agreement are covered in the definition of trademark under the Patent, Design and Trademark Act, 1965. Article 16 (1) of the TRIPS Agreement provides that the owner of a registered trademark shall

have the right to prevent unauthorized persons from using identical or similar signs for identical or similar goods or services as those covered by the registration, where such use would result in a likelihood of confusion. The Patent, Design and Trademark Act, 1965 also has provided this right to the owner of a registered trademark. With respect to the issue of parallel importation, a case is pending at the Appellate Court of Nepal. The Appellate Court has already granted an injunction order against parallel importation in the pending case. In fact, it is important with respect to the protection of trademark.

Article 15 (3) of the TRIPS agreement provides that trademark registrability may depend on use, but actual use shall not be a condition for filing an application. Provisions of the Patent, Design and Trademark Act, 1965 do not require actual use as a condition for filing an application for registration. The TRIPS agreement requires the Parties to apply the provisions of well-known marks of Article 6bis of the Paris Convention to services. The Patent, Design and Trademark Act, 1965 requires that the trademark should be his own for a submission of the trademark registration application. Hence, this provision excludes the registration of others well-known trademarks.

In accordance with the TRIPS Agreement, a trademark registration may be cancelled for non-use only after an uninterrupted period of at least three years of non-use. The TRIPS agreement states that circumstances beyond the control of the owner of the registration are to be recognized as valid reasons for non-use, especially circumstances such as import restrictions on, or other government requirements for, goods and services identified by the trademark. The Patent, Design and Trademark Act, 1965 has a provision of cancellation of registration of trademark in

case of a non-use period of one year which is to be changed and extended to at least three years. It also should include a provision for valid reasons for non-use.

The TRIPS Agreement further provides that a Member may determine conditions on the licensing and assignment of trademarks, but compulsory licensing of trademarks is not permitted. In addition, it is stated that the owner of a registered trademark shall have the right to assign its trademark with or without the transfer of the business to which the trademark belongs. Compulsory licensing of trademark is not permitted under the Patent, Design and Trademark Act, 1965. The owner of the registered trademark has a right to assign its trademark with or without the transfer of the business to which its trademark belongs. But if the parties go to the Department of Industry for this purpose, the Department of Industry may transfer the owner's name into the name of the license user. As it is against the basic rights of trademark, this right of the Department of Industry of transferring owner's name needs to be removed from the said Act.

Regarding the situation of the Nepalese design protection, we find in Nepalese laws that there are provisions for the registration of domestic as well as foreign design. Only registered designs are protected under the Patent, Design and Trademark Act, 1965. Newness or originality of design are not expressly mentioned as a required prerequisite of the registration. However, newness or originality are implied prerequisite for the registration of design. The Patent, Design and Trademark Act, 1965 has, in case of infringement, provided the design owner the right to prevent third parties. The TRIPS Agreement also allows Members to provide limited exceptions to the protection of designs. It justifies, under certain conditions, the provision of exclusion from registrability of the Patent, Design and Trademark Act, 1965. In Nepal, the title of the registered

design shall remain valid for a period of five years and it may be renewed two times for a period of five years at a time.

The provision of double fee for registration and renew for foreign design is against of national treatment provision of the TRIPS Agreement. Hence, this provision is subject of removable from the existing law. Nepal has already made commitment to remove this double fee provision related to foreigner in the accession negotiation. The aforesaid discussion indicates that the basic requirements prescribed by the TRIPS Agreement with respect to the design protection are available, except the provision of double fee for registration and renew, under the existing laws of Nepal.

When we compare the provisions of patent protection under the Nepalese laws with the provisions of the TRIPS Agreement prescribing minimum standard of patent protection, we find that the Nepalese law provides minimum standard of patent protection. The elements of definition of a patent, an invention with usefulness and newness, prescribed by TRIPS Agreement are covered in the definition of patent under the Patent, Design and Trademark Act, 1965. There are provisions of registration of national as well as foreign patents and both are protected on equal basis.

The TRIPS Agreement confers certain exclusive rights to the owner of the patent, i. e., preventing others from the acts of making, using, selling or importing. The Patent, Design and Trademark Act, 1965, has provided this exclusive right to the owner of a registered patent. Right to assign, or transfer the patent and to conclude licensing contracts (franchise agreement) are

provided to the patent owner by the Patent, Design and Trademark Act, 1965. The grounds of exclusion from patentability under the Patent, Design and Trademark Act, 1965 are justifiable under the TRIPS Agreement.

There is no provision of compulsory licensing of patent under the Patent, Design and Trademark Act, 1965. It is a better protection on behalf of the patent owner. The TRIPS Agreement allows compulsory licensing of patent under certain conditions. It is not an obligation of a member country to make provision of compulsory licensing because it deteriorates the rights of patent owner. However, for the benefit of the larger interest of society, Nepal needs to incorporate this provision of compulsory licensing of patent under certain conditions without depriving economic interest of patent owner. The patent right is provided to the owner by the State for the final benefit of the society at large.

In addition to those provisions, the TRIPS Agreement obliges Member countries to adopt appropriate measures to prevent or control practices in the licensing of intellectual property rights which are abusive and anti-competitive. Neither the Copyright Act, 2002 nor the Patent, Design and Trademark Act, 1965 have provided provisions on competition rule with respect to the licensing of intellectual property rights in Nepal. Hence, a provision on competition rule in this respect should be incorporated into the existing laws. Such new provision of law should prohibit intellectual property licensing practices which restricts competition in the market; and may have adverse effects on trade, and may impede the transfer and dissemination of technology.

Furthermore the TRIPS Agreement contains detailed provisions concerning procedures and remedies relating to enforcement of all intellectual property rights at domestic level. In Nepal, under the Copyright Act, 2002 and the Patent, Design and Trademark Act, 1965, there are provisions of authorities and procedures to enforce intellectual property rights. We have already discussed above about the authorities and the procedures relating to the enforcement of the intellectual property rights.

In Nepal, the Department of Industry is the authority for administration and dispute settlement with respect to patents, designs and trademarks whereas the District Court is the body to settle dispute regarding copyrights. There is also provision of Registrar under the Copyright Act, 2002. The Patent, Design and Trademark Act, 1965 and other provisions of existing laws, i. e., the Administration of Justice Act, 2048; the Evidence Act, 2032; the Civil Rights Act, 2012; Civil Code, 2021; and the Constitution of the Kingdom of Nepal, 1990 (2047), provide the requirements of written notice to the defendant, the right to independent council, the right to present relevant evidence, interlocutory and final orders, disposition of infringing goods, compensation, etc.

The interlocutory measures are used by the Appellate Court through the injunction order under the Civil Rights Act, 2012. Hence, provisions relating to the provisional measures should be incorporated in the same law, i. e., the Patent, Design and Trademark Act, 1965, which governs intellectual property rights. Under the Copyright Act, 2002, the District Court may issue a prohibitory order to the concerned person. However, there is no provision of compensation to the defendant in case of improper application of injunction. Hence, it is required to include a

provision of compensation to the defendant in case of improper application of injunction to meet the requirement of the TRIPS Agreement.

There are provisions of fines, seizure, forfeiture in such situations under the Patent, Design and Trademark Act, 1965 and the Copyright Act, 2002. The Copyright Act, 2002 has provision of imprisonment for copyright piracy but there is no provision of imprisonment for wilful trademark counterfeiting under the Patent, Design and Trademark, Act, 1965. Regarding the provision of imprisonment with respect to the trademark counterfeiting, the TRIPS Agreement has proposed this proposition but has not made it compulsory.

In Nepal, the Copyright Act, 2002, has provided a provision of border measures in case of importation of pirated copyright goods. Where as the Patent, Design and Trademark Act, 1965 has not provided such provision of enforcement at the border. Hence, with respect to the importation of counterfeit trademark, this provision of border measures should be included in the Patent, Design and Trademark Act, 1965 as well in Nepal.

In Nepal, any person who is not satisfied with the order issued by the Department of Industry under the Patent, Design and Trademark Act, 1965 may file an appeal with the Appellate Court within 35 days. Likewise, any party who is not satisfied with the order issued by the Registrar or District Court under the Copyright Act, 2002, may file an appeal with the Appellate Court within 35 days.

The above mentioned discussion infers that the existing laws of Nepal have all required provisions with respect to the domestic enforcement of the intellectual property rights. However, Nepal needs to enact a provision of border measure with respect to the importation of counterfeit trademark.

Regarding the transitional periods provided by the TRIPS Agreement, the transitional period for all least-developed countries is ten years. If it is an original member, it will get one year's grace period too. All least developed member countries are under an obligation to apply most-favored-nation and national treatment rules from January 1, 1996 or from the date of accession to the WTO. However, there is no "standstill" clause with regard to this 10 years period of transition for least-developed member countries.

In the accession negotiation, Nepal has made commitment to establish most-favored-nation and national treatment in all areas covered by the TRIPS Agreement. Also Nepal has made a commitment in the accession negotiation that Nepal meets the conformity obligation prescribed by the TRIPS Agreement fully by no later than 1 January 2007. In this connection, in the accession negotiation, the transitional period provided to Nepal by the WTO is not counted from the date of Nepal's entry into the WTO. It should begin from the date when Nepal became member. This transitional period of 10 years time is given to least-developed countries by Article 66 of the TRIPS Agreement keeping in view of their special needs and requirements, economic, financial and administrative constraints, and their need for flexibility to create a viable technological base.

The Patent, Design and Trademark Act, 1965 and the Copyright Act, 2002 do not contain the provision of exhaustion. In fact the provision of exhaustion will weaken the protection of intellectual property rights in any country. The TRIPS Agreement does not prescribe the international exhaustion of intellectual property rights. The TRIPS Agreement apparently has left discretion to the individual members. Whatever their choice, it can not be challenged in disputes before the WTO dispute settlement body.

In addition to the conformity obligation, Article 63 of the TRIPS Agreement establishes transparency requirements, which include obligations to publish or otherwise make available legal texts such as laws and judicial decisions. This Article establishes an obligation to notify laws and regulations to the TRIPS Council. This obligation was discussed in the *India-Patents (US)* case by the WTO Appellate Body. It has been Nepal's practice to publish relevant acts, rules and regulations in the Nepal Gazette pursuant to Section 3 of the Statute of Interpretation Act, 1953. Judgment of the Supreme Court of Nepal are published regularly in the Nepal Law Journal by the Supreme Court. Nepal has already made commitment that within 12 Months, at the latest, upon entry into force of the Protocol of Accession, Nepal would submit all initial notifications required by any Agreement constituting part of the WTO Agreement.

III.4.D CONCLUSION

We need to consider the law and practice with respect to the protection of intellectual property rights. Sometimes there may be a perfect law but its implementation may be very poor. Nepal is

a least developed country and the concept of intellectual property is new. For an efficient enforcement mechanism, a nation needs both sincerity and economic strength. It costs a lot of money to maintain office, well-trained officers and other physical materials. So it is a serious problem for Nepal how to maintain effective enforcement mechanism. In this respect, Nepal may introduce higher rate of registration fee than the existing one to big companies for the protection of intellectual property rights, which also is suggested by other WTO member countries in the accession negotiation.⁸⁹⁷

The increase of global trade and frequent violations of patent, design, trademark, copyright and other have created a complex situation. As regards law, Nepal already has basic provisions with respect to the protection of copyright, patent, design and trademark rights. As we have come to know by comparison with international standards prescribed by the TRIPS Agreement, the Copyright Act, 2002 has all required provisions for the protection of copyright; whereas the Patent, Design and trademark Act, 1965, is required to be amended and improved for the better protection of patent, design and trademark in the present situation and the inclusion of the uncovered areas of intellectual property rights. Hence, the following recommendation is to be adjusted in Nepalese laws:

- In Nepal, the Patent, Design and Trademark Act, 1965, provides the provisions relating to patent, design and trademark. Likewise, the Copyright Act, 2002, provides the provisions relating to copyright. Geographical Indication, Layout-Design (Topographies) of Integrated Circuits, and Protection of Undisclosed Information are not covered by the intellectual property rights legal regime of

⁸⁹⁷ . See WTO document (WT/ACC/NPL/16), *Report of the Working Party on the Accession of the Kingdom of Nepal to the World Trade Organization*, the WTO Secretariat, Geneva, 28 August 2003, available at <http://www.wto.org>.

Nepal. These areas of intellectual property rights are to be incorporated into the existing laws of Nepal before the expiration of transitional period provided to Nepal.

Discriminatory provision, i. e., double fees for registration and renew for foreign patent, design and trademark should be abolished upon Nepal's accession to the WTO.

- The Department of Industry should not transfer the owner's name on design and trademark to the user in case of use by other with the consent of owner. It is a serious violation of design and trademark rights. So this provision should be abolished from the Patent, Design and Trademark Act, 1965.
- The provision of cancellation of a registered trademark in the case of non-use should be set at three years minimum instead of its current one-year time frame and the law should include provisions for valid reasons for non-use.
- Measures of enforcement of trademark rights at the border mentioned in the TRIPS agreement ought to be included in the law.
- Instead of maintaining different provisions in different laws, it would be better if the provisions related to the "specific enforcement procedures" and "provisional measures," provided in the TRIPS agreement, are written in one law.
- Law should increase monetary punishment, higher than the existing one, so that it deters the infringement of trademark rights.
- With respect to patent, law should include a provision of compulsory licensing under certain conditions as prescribed by the TRIPS Agreement without depriving economic interest of patent owner.

- There should be a provision of competition rule with respect to licensing of intellectual property rights that are abusive and anticompetitive.
- Law should include a provision of compensation to the defendant in case of improper application of injunction.
- Nepal needs to seek full transitional period of time, technical assistance and introduce higher rate of registration fee for the protection of intellectual property to big companies so that it helps maintain cost of enforcement mechanism.

Chapter IV

CONCLUSION

Trade is an engine of economic development and accession to the WTO is a process of interlinking national economy into the global economy. The global economy is successful to achieve overall economic development. However, poor countries are not able to harness the benefits of the global economy. The WTO Agreement specifies that international trade should benefit the economic development of developing and least-developed countries.⁸⁹⁸ Many countries are interested in joining the WTO with a hope that it will help to accelerate their economic development. Nepal also is one of them. Nepal has become the 147th Member of the WTO on 23 April 2004. For Nepal, integration to the global economy is a great opportunity to accelerate her economic growth. Foreign market access, right to transit, availability of dispute settlement mechanism & rule-based system, provisions of differential & more favorable treatment to LDCs, provisions of most-favored-nation & national treatment, and forum for multilateral trade agreements are the major attractions of joining the WTO.

Accession to the WTO requires commitment to tariffs reduction and opening up service sectors, non-discrimination, removal of quota and other non-tariffs barriers to trade, bringing the domestic legislation in conformity with the WTO Agreements, building institutions and others. It is a process of trade liberalization. In fact, all WTO Members are required to fulfill these obligations so that the trade barriers do not exist and all Members' goods and services will have smooth

⁸⁹⁸ . See WTO Agreement, *supra*, footnote 615, Chapeau.

access to other Members' markets. In this connection, Member's obligation to bringing domestic legislation in compliance with the WTO Covered Agreements is a major and challenging obligation. The WTO conformity obligation helps to liberalize internal trade and facilitates domestic economy to interlink into the global economy. However, the WTO Agreement does not say anything about the implementation and effectiveness of the conformity obligation. Generally, international law is indifferent as to how states meet their international obligations.

WTO Accession Process

Article XII of the WTO Agreement, main provision related to the WTO accession, neither gives any guidance on the terms and conditions of accession nor lays down any procedures. The WTO accession procedure is based on consent, customary practice, and GATT accession history. In accordance with the current practices, an interested country should submit an application for membership to the Director-General of the WTO and then the General Council establishes Working Party to work on it. Applicant country submits memorandum of foreign trade regime including existing tariffs rates and relevant laws. Foreign trade regime of the acceding country will be examined and the process of negotiations for market access along with question and answer will start. After the conclusion of the negotiations on the schedules on goods and services, and the completion of the Working Party's mandate, the Working Party submits its Report along with the draft Decision and Protocol of Accession to the General Council or Ministerial Conference for adoption. Once the General Council or Ministerial Conference adopts the Report of the Working Party and approves the draft Decision, the Applicant is then free to sign the Protocol of Accession to the WTO. After the signature and ratification by the acceding country to the Protocol of Accession,

that country becomes a Member of the WTO. Nepal also went through this process and made negotiations, ratified the Protocol of Accession, and became a Member of the WTO.

In fact there is no separate procedure for the accession of LDCs to the WTO. So far LDCs and other countries stand at the same footing in the process of accession to the WTO. This study suggests that so far the principles of non-reciprocity as well as provisions of the differential and more favorable treatment of LDCs are not applied in the accession negotiations. Despite the fact that the WTO is a 'rule-based system,' it is a general understanding that these poor countries require to make commitments for WTO-plus conditions besides the WTO conditions. The general rule of international law does not permit extra terms and conditions in the accession to the inter-governmental organization which are beyond the provisions of the constituent instrument of the organization.

The WTO Secretariat Note "Status of Least-Developed Countries Accession to the WTO" emphasise on providing technical assistance to LDCs, particularly on legislative drafting. It cannot be denied that technical assistance will be helpful to the LDCs. However, the main concern of the LDCs is the right to make concessions and commitments in accordance with their individual development, financial and trade needs, or their administrative and institutional capabilities. The WTO text of "Accession of Least Developed Countries," a guideline to negotiation for accession of LDCs to the WTO, states that WTO Members shall exercise restraint in seeking concessions and commitments on trade in goods and services from acceding LDCs. Furthermore, it mentions that differential and more favourable treatment shall be applicable to all acceding LDCs.

We infer from the said provisions of the text of the Accession of LDCs that the WTO General Council has taken a far-reaching progressive decision. Despite the fact that the provisions of this decision are not implemented yet, there is no doubt that it is a major achievement to the LDCs. It proves that there is realization within WTO Members that there should be a separate procedure for the accession of LDCs, and differential and most favorable treatment should be provided at the time of accession negotiations too. The realization of difficult situation of LDCs is a positive development within the WTO system.

Differential and More Favorable Treatment as a Peremptory Norm of International Trade Rule

The GATT/WTO system is based on the principle of reciprocity. Such reciprocity is exercised through the means of negotiations for concession commitments and others. Different Member countries have different economic strengthening. All Member countries are not required to make commitments on the same level. Level of the Commitment of concessions largely depends on the economic strength of the concerning Member country. Small economies receive less and should not be obliged to pay more or to make higher commitments than what they receive. That is why the principle of non-reciprocity, and differential and more favorable treatment for least-developed countries were developed during the course of GATT Rounds. The principle of non-reciprocity, and differential and more favorable treatment for least-developed countries also are included in the WTO Agreements.

Article XXXVI: 8 of the GATT says: "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." Furthermore, under the Enabling Clause, Members are enabled to accord differential and more favorable treatment to developing countries and to depart from the most-favored nation Clause. At the time of the establishment of the WTO in Marrakesh, Ministers decided in "Decision on Measures in Favor of Least-Developed Countries" 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.

The WTO Agreement, under Article XI: 2, sets out: "The least-developed countries .. 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." Special provisions in favor of developing countries have also been included in the multilateral trade agreements. Hence, we can conclude from the said provisions of the GATT and the WTO Agreement that the principles of non-reciprocity, and the differential and more favourable treatment to the least-developed countries are one of the fundamental rules of international trade. In fact, it will not be otherwise to accept it as a peremptory norm of international trade rule. These provisions of the GATT and the WTO Agreement are balanced and based on justice and fairness. They are hope for poor countries to eliminate poverty and to grow their economy. However, we should not forget that they are not a gift by big economies to poor economies. These principles are just an expression of reality that you do not need to pay more than what you have received.

Relationship Between the WTO Agreement & the Domestic Legislation

The issue of the relationship between the WTO Agreement and the domestic legislation also arises after the accession to the WTO. This issue is vital because it may bring many serious consequences to the acceding country's legal system, i. e., direct effect in national law, invocability before domestic courts, etc. In this respect, on the basis of the analysis, we can draw an opinion that the very nature of the WTO Agreement is founded on the principle of reciprocity and mutually advantageous arrangement but not like on certain obligations prescribed by the European Union. It is not a supranational law or agreement. In this connection, the context, object and purpose of the WTO Agreement also 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 Agreement to their domestic laws and accordingly not allowed the invocation of provisions of the WTO Agreement before their domestic courts. Even a Panel of the Dispute Settlement of the WTO (adopted by the Dispute Settlement Body) has stated in the *US-Section 301-310* case that the WTO Agreement will have no direct effect. In Nepal, the Constitution of the Kingdom of Nepal has not allowed direct applicability of treaties in the law of Nepal. 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 Agreement before the courts of Nepal.

Trade in Goods

A study conducted by the World Bank on Nepal's trade and competitiveness says that, "Nepal is among South Asia's most open and trade-dependent economies,"⁸⁹⁹ and "Nepal has the most liberalized trade policy in South Asia - comparable to those of the most liberalized developing countries."⁹⁰⁰ In this study also we do not find any provisions violating most-favored-nation obligation and national treatment obligation in Nepalese laws affecting on foreign trade in goods. Nepal has reduced tariff rates significantly and is committed to bound by the maximum tariffs rates as are set out in Schedule of Concessions on Goods. However, Nepal has been imposing some other duties and charges (ODCs) on imported goods besides custom duties. Nepal needs to eliminate these ODCs over a period of time as agreed in the accession negotiation.

Nepal's primary basis for customs valuation is transaction valuation. However, an alternative valuation method, i. e., imputed or computed valuation, is not available in the Custom Acts, 1962. The Customs Regulation, 1969 does not provide for detailed regulations for implementing the transaction value. Hence, provisions of imputed valuation, computed valuation, and transaction valuation particularly related to price actually paid or payable for the imported goods of the Customs Valuation Agreement should be included into the Customs Regulations.

The Nepal's Export and Import Act, 1957, empowers His Majesty's Government to prohibit or control exports and imports, issue licenses subject to policies determined from time to time. The Nepal's Export and Import Act, 1957 has to be seen in the light of article XVIII of GATT. Article XVIII of GATT provides the legal cover for a least-developed country to maintain an

⁸⁹⁹ . See *Nepal: Trade and Competitiveness Study*, *supra*, footnote 186, at page i.
⁹⁰⁰ . See *id.*, at page iii.

import regime commensurate with its economic development needs. However, Nepal needs to prescribe the ground or basis to invoke the Section 3 of the Export Import (Control) Act, 1957, so that it would be more predictable and accurate.

So far Nepal has not enacted anti-dumping and countervailing laws. The WTO Agreements provide for safeguards to protect a particular product, from all sources or a particular source, through quantitative restrictions or through additional duties, i. e., antidumping or countervailing. If Nepal wishes to use these measures the relevant provisions of these Agreements could be transformed by amendments in Customs Act, 1962 (for antidumping and countervailing), and Export and Import (Control) Act, 1956 (for safeguards).

With Respect to the technical barriers to trade, Nepal is a correspondent Member of the International Organization for Standardization (Iso) and has followed the national standards prescribed by the ISO. The Nepal Standards (Certification Mark) Act, 1980 has provision of laboratory for the purpose of determination of standards or tests. There are provisions of publication of regulations and standards in Nepal Gazette and provisions of appeal against any decision of the concern authorities. The Enquiry Point is already established and is in operation. In this respect, Nepal needs to consider the benefits provided for the least-developed Member by the Agreement on Technical Barriers to Trade. A least-developed Member is entitled to prepare and apply technical regulations, taking into account her special development, financial and trade needs and in the operation of institutional needs. A least-developed Member may adopt certain technical regulations, standards or conformity regulations aimed at preserving indigenous technology, and production methods and processes compatible with her development needs.

Also Nepal needs to seek necessary technical assistance from WTO and other developed countries in this respect.

With respect to the Sanitary and Phytosanitary measures, Nepal is a member of International Office of Epizootics (OIE), Codex Alimentarius Commission and Asia Pacific Plant Protection Commission. Nepal has established an Enquiry Point to provide information to other Members in this respect. Nepal's sanitary and phytosanitary regime provides for transparency, scientific standards requirements stipulated in the SPS Agreement. Appeal procedures are available to the persons not satisfied with any decisions with respect to the relevant measures. The regulations generally follow the accepted international standards. However, Nepal may think to improve these laws, scientific laboratories and standards for the better protection of human, animal and plant health and life in line to the SPS Agreement.

Despite the fact that Nepal has low tariffs rates and major provisions of Nepalese laws are in compliance with the WTO Multilateral Agreements on Trade in Goods, we can recommend that Nepal may make few adjustments on her laws which are as following:

- i. Nepal may enact new laws covering the obligations prescribed by the Agreement on Pre-Shipment Inspection, the Agreement on Rules of Origin, and the Agreements on the Implementation of Article VI, Subsidies, Countervailing and Safeguard Measures. Or, the relevant provisions of these Agreements could be transformed by amendments in Customs Act, 1962 (for antidumping and countervailing), and Export and Import (Control) Act, 1956 (for safeguards). However, it is important to mention here that Nepal is not obligated to amend or enact such laws by these Agreements.

- ii. Alternative customs valuation methods, i. e., imputed or computed valuation, should be included into the Customs Regulations. Nepal is required to establish an independent administrative tribunal to review the decisions of the Customs Authority regarding customs valuation.
- iii. Nepal should prescribe the ground or basis of invoking the Section 3 of the Export Import (Control) Act, 1957.
- iv. Nepal needs to lift the ban on the exportation of all imported raw materials, parts and capital goods.
- i. Nepal needs to eliminate other duties and charges (ODCs) imposed on imported goods over a period of time as agreed in the accession negotiation.

We conclude from the above discussion that in general Nepalese legislations affecting foreign trade in goods are in compliance with the WTO Multilateral Agreements on Trade in Goods. Furthermore, it is suggested to Nepal that Nepal should fulfill her obligations prescribed by the WTO Multilateral Agreements on Trade in Goods in good faith. In addition to it, Nepal should seek all opportunities to be benefited from the differential & more favorable treatment provided for least-developed Members by the WTO Agreements in future negotiations.

Transparency

Regarding the transparency obligation, Nepal's internal laws require that all acts, rules, and regulations are to be published and in practice Nepal has been publishing all acts, rules, regulations and treaties in the Nepal Gazette. Generally, laws enter into force from the day of its

publication. Judgments of the Supreme Court of Nepal are published regularly in the Nepal Law Journal.

Administrative Review and Appeal System

In general, Nepal has maintained appeal system over any decision or final order of any administrative body, court or tribunal. Besides it, Nepal has already made a commitment in the accession negotiation for the establishment of an independent administrative tribunal to review the decisions of the Customs Authority regarding customs valuation.

Service Sectors

There are two kinds of obligations under the General Agreement on Trade in Services (GATS): general and specific. Most-favored nation treatment is considered as a general obligation. There are no provisions under Nepalese laws that hinder most-favored nation treatment with respect to service sector. Specific obligations include market access, national treatment, transparency, appeal and others. Member country is required to fulfill these specific obligations to the service sectors that are listed in the Schedule of Specific commitments. So, Nepal is bound to provide national treatment and market access to foreigners on those sectors that are listed in the Schedule of commitments. Nepal has made a specific commitment in the Schedule of service sectors during the accession negotiations. Related Nepalese laws have provisions of appeal, transparency and national treatment. So, we can conclude that the Nepalese laws related to the service sectors are in compliance with the GATS.

Foreign Investment

Nepalese laws do not have any provision of local content requirement and do not impose measure of quantitative restriction with respect to foreign investment. On the top of it, Nepalese laws have provided enough protection to foreign investment in Nepal, i. e., repatriation, no nationalization except for public purpose and with compensation only, equal treatment, provision of dispute settlement, etc. Hence, it is obvious that Nepalese laws on foreign investment are in compliance with the TRIMs provision. But Nepal needs to notify its measures related to foreign investment to the Council of Goods of the WTO. Nepal meets transparency requirement because every laws, regulations, bylaws, etc. are published in Gazette in Nepal. Hence, we can conclude from the discussion that Nepalese laws have provided much broader protection to foreign investment in Nepal than what the TRIMs Agreement requires.

The Protection of Intellectual Property Rights

In Nepal, there are neither discriminatory provisions between foreigners, nor between nationals and foreigners with respect to the registration, protection and enforcement of intellectual property, i. e., patent, design, trademark and copyright, under the Patent, Design and Trademark Act, 1965 and the Copyright Act, 2002. Foreign and national intellectual property are equally protected in Nepal. Although the amount is very nominal, the provision of double fee for the registration and renew of foreign intellectual property under the Patent, Design and Trademark Act, 1965 is contradictory to Article 3 of the TRIPS Agreement. Hence, this provision of double fee for foreign Intellectual Property is to be removed from the existing law.

While over-viewing the provisions of the Copyright Act, 2002, we have come to know that the Copyright Act, 2002 covers the scope of subject matter of copyright protection prescribed by the TRIPS Agreement. There is no requirement of registration to acquire copyright in Nepal. The Copyright Act, 2002 has given exclusive rights of an economic character and moral rights to copyright author and/or owner. It also has protected related rights (neighboring rights). The term of protection of copyright provided by the Copyright Act, 2002 is very much similar to the term of protection provided by the TRIPS Agreement. The provision of exception to the copyright protection is justified by the "fair use" provision of the TRIPS Agreement. There is no provision of compulsory license of copyright under the Copyright Act, 2002. There is provision of boarder measure as well. There is provision of fine and imprisonment for copyright infringement. Hence, the Copyright Act, 2002 is able to provide minimum standard of protection for copyright prescribed by the TRIPS Agreement.

Regarding the situation of trademark protection in Nepal, the Patent, Design and Trademark Act, 1965, provides that the owner of a registered trademark shall have the right to prevent unauthorized persons from using identical or similar signs for identical or similar goods or services. Provisions of the Patent, Design and Trademark Act, 1965 do not require actual use as a condition for filing an application for registration. It requires that the trademark should be his own for a submission of the trademark registration application. Hence, this provision excludes the registration of others well-known trademarks. The Patent, Design and Trademark Act, 1965 has a provision of cancellation of registration of trademark in case of a non-use period of one

year, which is to be changed and extended to at least three years. It also should include a provision for valid reasons for non-use.

Compulsory licensing of trademark is not permitted under the Patent, Design and Trademark Act, 1965. The owner of the registered trademark has a right to assign its trademark with or without the transfer of the business to which its trademark belongs. But if the parties go to the Department of Industry for this purpose, the Department of Industry may transfer the owner's name into the name of the license user. As it is against the basic rights of trademark, this right of the Department of Industry of transferring owner's name needs to be removed from the said Act.

Regarding the situation of the Nepalese design protection, we find in Nepalese laws that there are provisions for the registration of domestic as well as foreign design. Only registered designs are protected under the Patent, Design and Trademark Act, 1965. Newness or originality of design is not expressly mentioned as a required prerequisite of the registration. However, newness or originality is implied prerequisite for the registration of design. The Patent, Design and Trademark Act, 1965 has, in case of infringement, provided the design owner the right to prevent third parties. In Nepal, the title of the registered design shall remain valid for a period of five years and it may be renewed two times for a period of five years at a time.

The provision of double fee for registration and renew for foreign design is against the national treatment provision of the TRIPS Agreement. Hence, this provision is subject to remove from the existing law. The aforesaid discussion indicates that the basic requirements prescribed by the

TRIPS Agreement with respect to the design protection are available, except the provision of double fee for registration and renew, under the existing laws of Nepal.

The elements of definition of a patent, an invention with usefulness and newness, prescribed by TRIPS Agreement are covered in the definition of patent under the Patent, Design and Trademark Act, 1965. There are provisions of registration of national as well as foreign patents and both are protected on equal basis. The TRIPS Agreement confers certain exclusive rights to the owner of the patent, i. e., preventing others from the acts of making, using, selling or importing. The Patent, Design and Trademark Act, 1965, has provided this exclusive right to the owner of a registered patent. Right to assign, or transfer the patent and to conclude licensing contracts (franchise agreement) are provided to the patent owner by the Patent, Design and Trademark Act, 1965. The grounds of exclusion from patentability under the Patent, Design and Trademark Act, 1965 are justifiable under the TRIPS Agreement.

There is no provision of compulsory licensing of patent under the Patent, Design and Trademark Act, 1965. It is a better protection on behalf of the patent owner. The TRIPS Agreement allows compulsory licensing of patent under certain conditions. It is not an obligation of a member country to make provision of compulsory licensing because it deteriorates the rights of patent owner. However, for the benefit of the larger interest of society, Nepal needs to incorporate this provision of compulsory licensing of patent under certain conditions without depriving economic interest of patent owner. The patent right is provided to the owner by the State for the final benefit of the society at large.

With respect to the competition rule in the licensing of intellectual property rights, neither the Copyright Act, 2002 nor the Patent, Design and Trademark Act, 1965 have provided provisions on competition rule in Nepal. Hence, a provision on competition rule in this respect should be incorporated into the existing laws. Such new provision of law should prohibit intellectual property licensing practices, which restricts competition in the market; and may have adverse effects on trade, and may impede the transfer and dissemination of technology.

Furthermore the TRIPS Agreement contains detailed provisions concerning procedures and remedies relating to enforcement of all intellectual property rights at domestic level. In Nepal, under the Copyright Act, 2002 and the Patent, Design and Trademark Act, 1965, there are provisions of authorities and procedures to enforce intellectual property rights. In Nepal, the Department of Industry is the authority for administration and dispute settlement with respect to patents, designs and trademarks whereas the District Court is the body to settle dispute related to copyrights. There is also provision of Registrar under the Copyright Act, 2002. The Patent, Design and Trademark Act, 1965 and other provisions of existing laws, i. e., the Administration of Justice Act, 2048; the Evidence Act, 2032; the Civil Rights Act, 2012; Civil Code, 2021; and the Constitution of the Kingdom of Nepal, 1990 (2047), provide the requirements of written notice to the defendant, the right to independent council, the right to present relevant evidence, interlocutory and final orders, disposition of infringing goods, compensation, etc.

However, there is no provision of compensation to the defendant in case of improper application of injunction. Hence, it is required to include a provision of compensation to the defendant in case of improper application of injunction to meet the requirement of the TRIPS Agreement.

There are provisions of fines, seizure, forfeiture in such situations under the Patent, Design and Trademark Act, 1965 and the Copyright Act, 2002. The Copyright Act, 2002 has provision of imprisonment for copyright piracy but there is no provision of imprisonment for wilful trademark counterfeiting under the Patent, Design and Trademark, Act, 1965. Regarding the provision of imprisonment with respect to the trademark counterfeiting, the TRIPS Agreement has proposed this proposition but has not made it compulsory.

In Nepal, the Copyright Act, 2002, has provided a provision of border measures in case of importation of pirated copyright goods. Where as the Patent, Design and Trademark Act, 1965 has not provided such provision of enforcement at the border. Hence, with respect to the importation of counterfeit trademark, this provision of border measures should be included in the Patent, Design and Trademark Act, 1965.

In Nepal, any person who is not satisfied with the order issued by the Department of Industry under the Patent, Design and Trademark Act, 1965 may file an appeal with the Appellate Court within 35 days. Likewise, any party who is not satisfied with the order issued by the Registrar or District Court under the Copyright Act, 2002, may file an appeal with the Appellate Court within 35 days.

The above-mentioned discussion infers that the existing laws of Nepal have all required provisions with respect to the domestic enforcement of the intellectual property rights. However, Nepal needs to enact a provision of border measure with respect to the importation of counterfeit trademark.

Regarding the transitional periods provided by the TRIPS Agreement, the transitional period for all least-developed countries is ten years. If it is an original member, it will get one year's grace period too. All least developed member countries are under an obligation to apply most-favored-nation and national treatment rules from January 1, 1996 or from the date of accession to the WTO. However, there is no "standstill" clause with regard to this 10 years period of transition for least-developed member countries.

In the accession negotiation, Nepal has made commitment to establish most-favored-nation and national treatment in all areas covered by the TRIPS Agreement upon Nepal's accession to the WTO. Nepal needs to meet the conformity obligation prescribed by the TRIPS Agreement fully by no later than 1 January 2007. The transitional period provided to Nepal by the WTO does not start from the date of Nepal's entry into the WTO. It should begin from the date when Nepal became member. This transitional period of 10 years time is given to least-developed countries by Article 66 of the TRIPS Agreement keeping in view of their special needs and requirements, economic, financial and administrative constraints, and their need for flexibility to create a viable technological base.

In addition to the conformity obligation, Article 63 of the TRIPS Agreement establishes transparency requirements. It has been Nepal's practice to publish relevant acts, rules and regulations in the Nepal Gazette pursuant to Section 3 of the Statute of Interpretation Act, 1953. The Supreme Court publishes judgments of the Supreme Court of Nepal regularly in the Nepal Law Journal. Nepal has already made commitment that within 12 Months, at the latest, upon

entry into force of the Protocol of Accession, Nepal would submit all initial notifications required by any Agreement constituting part of the WTO Agreement.

We can infer that Nepal already has basic provisions with respect to the protection of copyright, patent, design and trademark rights. The Copyright Act, 2002 has all required provisions for the protection of copyright; whereas the Patent, Design and trademark Act, 1965, is required to be amended and improved for the better protection of patent, design and trademark in the present situation and the inclusion of the uncovered areas of intellectual property rights. Hence, the following recommendation is to be adjusted in Nepalese intellectual property rights laws:

- In Nepal, the Patent, Design and Trademark Act, 1965, provides the provisions relating to patent, design and trademark. Likewise, the Copyright Act, 2002, provides the provisions relating to copyright. Geographical Indication, Layout-Design (Topographies) of Integrated Circuits, and Protection of Undisclosed Information are not covered by the intellectual property rights legal regime of Nepal. These areas of intellectual property rights are to be incorporated into the existing laws of Nepal before the expiration of transitional period provided to Nepal.
- Discriminatory provision, i. e., double fees for registration and renew for foreign patent, design and trademark should be abolished upon Nepal's accession to the WTO.
- The Department of Industry should not transfer the owner's name on design and trademark to the user in case of use by other with the consent of owner. It is a serious violation of design and trademark rights. So this provision should be abolished from the Patent, Design and Trademark Act, 1965.

- The provision of cancellation of a registered trademark in the case of non-use should be set at three years minimum instead of its current one-year time frame and the law should include provisions for valid reasons for non-use.
- Measures of enforcement of trademark rights at the border mentioned in the TRIPS agreement ought to be included in the law.
- Instead of maintaining different provisions in different laws, it would be better if the provisions related to the "specific enforcement procedures" and "provisional measures," provided in the TRIPS agreement, are written in one law.
- Law should increase monetary punishment, higher than the existing one, so that it deters the infringement of trademark rights.
- With respect to patent, law should include a provision of compulsory licensing under certain conditions as prescribed by the TRIPS Agreement without depriving economic interest of patent owner.
- There should be a provision of competition rule with respect to licensing of intellectual property rights that are abusive and anticompetitive.
- Law should include a provision of compensation to the defendant in case of improper application of injunction.
- Nepal needs to seek full transitional period of time, technical assistance and introduce higher rate of registration fee for the protection of intellectual property to big companies so that it helps to maintain cost of enforcement mechanism.

In the light of the above findings concerning Nepal's accession to the WTO, Customs Act, 1962, Export and Import (Control) Act, 1956, Patent, Design and Trademark Act, 1965, and along with others are to be amended and if Nepal prefers, Nepal may enact new laws related to pre-shipment inspection, rules of origin, anti-dumping and countervailing duties. In addition to it, implementation of the WTO Agreements is a costly responsibility to Nepal. We can fairly say that cost of implementation of the WTO Agreements to any least-developed country including Nepal is beyond their economic strength.⁹⁰¹ Transitional period provided to the LDCs by the WTO Agreements should be counted from the date of accession to the WTO.

It is strongly recommended in this study that the principles of non-reciprocity, and differential and most-favored treatment to the least-developed countries are required to be implemented fully in good faith in accession negotiations as well as afterwards too. In its absence, the object, purpose and aim of acceding to the WTO will be defeated. Poor countries cannot eradicate poverty and achieve economic development just joining the WTO or global economy. The number of poor countries is increasing and in the last fifty years, even the least-developed Members of the GATT/WTO system are not able to graduate from the least-developed status. So it is urgently required to implement the principles of non-reciprocity, and differential and most-

⁹⁰¹ . See *Nepal: Trade and Competitiveness Study*, *supra*, footnote 186, at page 38. The study predicts that the cost of expanding current Intellectual Property Rights Offices in Nepal could cost from US\$4 to US\$32 million. It mentions in footnote 53 that the World Bank loaned Mexico US\$32 million in the early 1990s to support the creation of a new patent office as part of a larger industrial innovation program. In addition to the intellectual property rights, TBT & SPS areas also are equally costly. The maintenance of Ant-dumping and Countervailing investigation commissions require a lot of money.

avored treatment in favor of poor countries so that the interlinking poor economies to the global economy be able to give positive results.

In the current scenario of the world, economic development of a country is effected by internal as well as external factors. In this respect, good governance, human rights, rule of law, outward oriented liberal economy are internally responsible factors whereas duty-free market access to the products of poor countries, debt relief and Official Development Assistance (ODA) by big economies are externally responsible factors. Nepal has already adopted a democratic multiparty system and the Constitution of Nepal guarantees the protection of human rights. Nepal has adopted a free market economy based on competition. Hence, Nepal meets the basic requirement internally. However, the terrorism run by Nepalese Maoist has disturbed the whole system and life of ordinary people. The Government of Nepal has been working hard to control the situation and it is believed that Nepal Government will be successful in this respect soon. Nepal is already a Member of the WTO which is a great achievement with respect to interlinking Nepalese economy into the global economy. Nepal needs technical assistance, training, and financial help to implement the WTO obligations particularly in the area of TBT, SPS, and TRIPS.

As Nepal is a land-locked country and far way from Ocean, Nepal should focus on trade facilitation and improvement of transportation system. Nepal also needs to improve her internal tax system and reform customs system so that Nepal can recover the revenue. In addition to it, Nepal also requires debt cancellation and Official Development Assistance for the economic growth of Nepal. Nepal should seek differential and more favorable treatment from developed

and developing countries. The trade policy of Nepal's neighboring countries, i. e., China & India, toward Nepal is vital for the economic development of Nepal. As ninety percent population of Nepal is based on agriculture and the agriculture sector is very much backward, Nepalese agricultural products are facing sever competition from Indian products and as a result it is not getting market even in Nepal, and whole population has been suffering. In fact, agriculture in Nepal is a tradition, culture, way of life, and a means of survival, not a trade. It is hard to distinguished between agriculture and a life of a Nepalese citizen. So Nepal government requires to protect agriculture sector from trade so long as it remains as non-trade area. From China as well, the flow of cheap goods has compelled to close down Nepalese industries. Hence, for the overall economic development of Nepal, this problem has to be addressed and it is only possible when China and India agree to make a just trade policy towards Nepal. Furthermore, Nepal needs to make special arrangement, i. e., bilateral agreement for the duty/quota free access of Nepalese goods to the markets of developed countries and developing countries. It is important to mention here that Nepal should fulfill her WTO obligations in good faith. Nepal should be aware of WTO obligations and reject WTO plus obligations. Nepal should seek special and differential treatment from developed and developing countries, and be benefited by these provisions.

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