

# ROAD TO CANCUN

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## Acronyms

AAA	: Agriculture Adjustment Act
ADB	: Agriculture Development Bank
AGOA	: African Growth and Opportunity Act
AMS	: Aggregate Measurement of Support
AoA	: Agreement on Agriculture
APP	: Agricultural Perspective Plan
ASYCUDA	: Automated System for Customs Data and Management
ATC	: Agreement on Textile and Clothing
BIT	: Bilateral Investment Treaty
BoP	: Balance of Payment
CAP	: Common Agricultural Policy
CBD	: Convention on Biological Diversity
CTD	: Committee on Trade and Development
CV	: Customs Valuation
DSB	: Dispute Settlement Body
DSU	: Dispute Settlement Understanding
EBA	: Everything But Arms
EC	: European Commission
EU	: European Union
FAO	: Food and Agriculture Organisation of the United Nations
FDI	: Foreign Direct Investment
GATS	: General Agreement on Trade in Services
GATT	: General Agreement on Tariffs and Trade
GC	: General Council
GDP	: Gross Domestic Product
GMOs	: Genetically Modified Organisms
GPA	: Government Procurement Agreement
GSP	: Generalised System of Preferences
IF	: Integrated Framework
ILP	: Import Licensing Procedure
IP	: Intellectual Property
IPRs	: Intellectual Property Rights
IT	: Information Technology
ITO	: International Trade Organisation

JIT	: Just-In-Time
JWT	: Journal of World Trade
LDC/s	: Least Developed Country/Countries
LMO	: Living Modified Organisms
MFA	: Multifibre Arrangement
MFN	: Most Favoured Nation
MNCs	: Multinational Corporations
MoFSC	: Ministry of Forests and Soil Conservation
MTN	: Multilateral Trade Negotiation
MTO	: Multilateral Trade Organisation
NLSS	: Nepal Living Standard Survey
NTBs	: Non-tariff Barriers
OECD	: Organisation for Economic Cooperation and Development
QRs	: Quantitative Restrictions
RTA	: Regional Trading Agreement
S&DT	: Special and Differential Treatment
SAARC	: South Asian Association for Regional Cooperation
SMEs	: Small and Medium Enterprises
SPS	: Sanitary and Phytosanitary
TA	: Technical Assistance
TBT	: Technical Barriers to Trade
TK	: Traditional Knowledge
TNC	: Trade Negotiating Committee
TRIMs	: Trade Related Investment Measures
TRIPS	: Trade Related Aspects of Intellectual Property Rights
TRQs	: Tariff Rate Quotas
UK	: United Kingdom
UNCTAD	: United Nations Conference on Trade and Development
UNESCO	: United Nations Education, Scientific and Cultural Organisation
UPOV	: Union for the Protection of New Varieties of Plants
UR	: Uruguay Round
US\$	: United States Dollar
USA	: United States of America
WCO	: World Customs Organisation
WIPO	: World Intellectual Property Organisation
WTO	: World Trade Organisation

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## Preface

Nepal has finally completed all formalities for accession to the World Trade Organisation (WTO). On 15 August 2003, Working Party established for Nepal's accession to the WTO adopted its report, paving the way for its eventual accession during the fifth Ministerial Conference of the WTO to be held in Cancun, Mexico from 10 to 14 September 2003. After having secured observer status in the WTO in 1995, Nepal had been participating in the earlier Ministerial Conferences of the WTO as an observer. However, after the fifth Ministerial onwards Nepal will be participating in WTO Ministerial Conferences as a member.

In view of Nepal's impending membership in the WTO, SAWTEE and ActionAid Nepal organised a two-day national workshop titled *Road to Cancun* on 10-11 July 2003. The major objective of the workshop was to help the government prepare its position for the Ministerial.

Five papers were presented during the event based on national priority. The issue of agriculture is second to none because more than 80 percent of our population is dependant on agriculture for their livelihood. The global trade distortion created by agricultural protectionism in some developed countries is bound to have negative implications for the agriculture and economic development of the country. The Agreement on Agriculture (AoA) as expected has not been very helpful in curbing these distortions in international trade on agriculture. Therefore, AoA bears special significance for a least developed agrarian economy like Nepal.

Similarly, due to the potential implications of Trade Related Aspects of Intellectual Property Rights (TRIPS) on food security, biodiversity, farmers' rights and public health, among others, it was felt necessary to prepare a position on this agreement. Two issues, which are part of the Doha Declaration are going to form the basis for discussion during the Cancun Ministerial, namely Paragraph 19 of the Doha Declaration which mandates the TRIPS Council to discuss the linkage between TRIPS and Convention on Biological Diversity (CBD), among others; and the Declaration on TRIPS and Public Health in general and Paragraph 6 in particular.

Another important issue from the perspective of a least developed country (LDC) like Nepal was that of implementation. Despite the commitments made during the Doha Ministerial Conference, the deadlines proposed for resolving this issue had receded twice signalling the attitude of the developed countries to push this issue to the back burner. Implementation issues are expected to create a lot of heat at Cancun. Realising the need for Nepal to prepare a concrete strategy on how to protect its national interest and take advantage of the direction in which discussions on these issues would possibly head, this theme was also extensively discussed during the Workshop.

Likewise, special and differential treatment (S&DT) as contained in various agreements of the WTO have become at best inoperative due to their very nature. They cannot be considered anything better than “best endeavour” clauses inserted in these agreements simply to pacify the developing countries. Despite the fact that Paragraph 44 of the Doha Declaration talks of making them effective and operational, member countries have not been able to reach a consensus on how to move forward on this agenda. Considering the deadlock in Geneva and the possibility of its becoming a contentious issue once again at Cancun, it was felt that this is yet another area in which Nepal needs to adopt a position before the Ministerial.

Finally, Singapore issues are not yet part of the WTO proscenium, but efforts are being made by the *demandeurs* of these agreements to include the four issues, namely competition, investment, trade facilitation and transparency in government procurement in the WTO. The Doha Ministerial mentioned that these issues would be negotiated within the WTO after the fifth Ministerial Conference, subject to “explicit consensus” on the modalities of negotiation. These issues have become highly polarised, and a clear North-South divide has been created. They are likely to be contentious – with the Trade Commissioner of the European Union (EU), Pascal Lamy, making public statement that there would be no concession on agriculture unless and until Singapore issues are discussed at the WTO and developing countries taking increasingly hardened position, i.e., not to negotiate on Singapore issues unless and until implementation issues are fully and faithfully addressed.

We have included all five papers in this book, with skilful editing by Dr. Hiramani Ghimire. In preparing this book, Ms. Neelu

Thapa and Mr. Kshiteesh Vaskota provided necessary assistance to Dr. Ghimire. On behalf of the publishers, I would like to gratefully acknowledge their support and cooperation.

I would be failing in my duty if I did not thank Mr. Indra Shrestha, who prepared the cover design of the book and Mr. Krishna Subedi who prepared the text design and helped us bring this book in its present shape.

Finally, neither the organisation of the National Workshop nor this publication would have been possible without the financial support of ActionAid Nepal. I would like to thank them for providing us not only financial and moral supports but also intellectual inputs, as and when required.

Ratnakar Adhikari  
Executive Director, SAWTEE

2 September 2003  
Kathmandu

## Introduction

**Dr. Hiramani Ghimire\***

Nepal is set to become a member of the World Trade Organisation (WTO). It took five precious years to complete accession negotiations, including clarifications at different times on the country's policy contents governing trade and industry. Understanding of the WTO system will no more be the exclusive domain of 'experts'. The WTO has a very large group of stakeholders – farmers, traders, industrialists, craftspersons, and even poets and writers. Accordingly, the system will have to be demystified to the benefit of all of these groups. This means, firstly, that the legal text needs to be presented in a more accessible language. More importantly, this also means that sound social and economic interpretations of the implications of a host of WTO provisions should receive high attention. The WTO has come closer; we should be able to feel it. This book is a small attempt in this direction.

From 10-14 September 2003, the Mexican city of Cancun is hosting the WTO's fifth Ministerial Conference. The conference is expected to, among others, endorse Nepal's application for membership. This would be an event to cheer. While Nepal is looking forward to the Cancun approval of its membership, trade watchers around the globe have been expressing doubts over Cancun's success. Some are even talking of a repetition of Seattle. And, others (like *The Economist*) are happy that the "Doha Round is still breathing". What is Nepal cheering, then? This book presents Nepal's hopes and fears (which correspond to the hopes and fears of many other countries in the developing world) about the WTO and comes up with suggestions to make it more relevant for developing and least developed countries. Five experts examine here issues of cross-country interests. They focus their lens on Nepal's perspectives. Yet, they speak to a wide, international audience.

Liberalisation of agricultural trade is probably the trickiest question the Cancun Meeting will have to handle. And it is not a

new issue. Negotiations during the Uruguay Round (UR) itself were dominated by agriculture. The post-UR years have seen an ever-intensifying debate on agriculture. This could, therefore, make or break the Cancun negotiations. Failure to reach an agreement could sink the Doha Development Agenda much espoused for its renewed 'commitment' to address the concerns of developing and least-developed countries. *Hiramani Ghimire* looks at this issue closely in his paper on the Agreement on Agriculture (AoA). He concludes that, in breach of the spirit of the Agreement, some developed countries are reviving agricultural protectionism. At the Doha Ministerial, they did agree on liberalising farm trade, but reneged on it later. The United States (US) farm bill (enacted in August 2002) goes, for example, in the opposite direction by increasing federal farm subsidies. The bill also undoes the Freedom to Farm Act, 1996 that foresees phasing out of agricultural subsidies for most agricultural products. The European Union (EU) has been a major critic of the US farm bill. However, the EU countries themselves have not been able to reach an agreement on reforming their notorious 'common agricultural policy' (CAP). As a result, almost everyone loses. Taxpayers in developed countries are losing more than US\$ 300 billion doled out annually in subsidy payments, especially to big farmhouses. On the other hand, import restrictions and high tariffs have kept food prices high for consumers. At the same time, farmers in poor countries are being stripped of livelihood opportunities as they are losing out on international markets. The paradox is clear: some 1.2 billion people in the developing world live on less than one dollar a day whereas a day's subsidy for a European cow matches two dollars!

Interestingly, however, subsidies under CAP are becoming unsustainable even for the rich club. Given the need to reform, the EU has recently (June 2003) agreed on "decoupling" farm subsidies and production. However, farmers will still be receiving payments, which would be linked to other things such as rural development and environmental protection. On the other hand, the actual decoupling will begin in 2005, with countries having the option to delay it until 2007. And for some products (e.g., cereal and beef), decoupling will have only a partial coverage. The much-hyped "breakthrough" in addressing the problems of farm subsidies represents thus only a half-hearted attempt to reform the system. However, it does mark a new beginning in the thinking of European policymakers.

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In fact, both the United States of America (USA) and the EU are trying hard to avert a major crisis in Cancun. The joint US-EU proposal on agricultural trade (announced on 13 August 2003) is an example. The new “Blair House Accord” speaks of fundamental reform in agriculture and intends to put a ceiling on some trade-distorting subsidies. However, it falls far short of expectations of many other countries. The proposal may therefore fail to unite Cancun delegates around it.

The WTO system has an explicit understanding that developing and least developed countries would be able to enjoy special and differential treatment (S&DT). This understanding is expressed in terms of more favourable transition periods and threshold levels for these countries. The idea is related to positive discrimination. In other words, developed countries vow not to seek reciprocity from poorer countries in the South. In addition, there are some non-binding offers of technical assistance for poorer countries. But these ‘special favours’ are designed adopting a technical approach to looking at the stage of a country’s development. By and large, they fail to reflect human and institutional capacities in any given country. *Posh Raj Pandey* picks up this issue for examination from a least developed country (LDC) perspective. He looks back at the genesis of S&DT and enumerates all efforts at enabling the participation of developing countries through its implementation. The WTO encompasses this spirit and has adopted as many as 145 provisions on S&DT. This spirit has not materialised. The WTO’s ‘single undertaking approach’ effectively requires developing countries to undertake commitments that stretch their capacity. Acceding countries like Nepal often face more severe obligations. The Doha mandate on this issue was a small relief. With missed deadlines and interpretation difficulties, however, the mandate is losing steam. It is expected that S&DT will feature prominently on the Cancun agenda. In his paper, *Pandey* presents a recipe for negotiations ahead. He wants to make the S&DT provisions more precise, effective, and operational. In this sense, he appears to be giving breath to the Para 44 of the Doha Declaration and Doha decision on implementation-related issues, most importantly paragraph 12 of the decision. It may be recalled that, of the 46 points included in the Ministerial Decision, 16 refer to the use of S&DT provisions in different WTO Agreements.

A separate Doha decision on implementation-related issues indicates that translating commitments into actions has become a

major problem in the WTO. There is a broad consensus that market access has not improved from the perspective of developing countries. In some cases, it has deteriorated. While explicit obligations remain unfulfilled, disguised forms of protection are emerging. Developed countries have not been very forthcoming in improving market access conditions for developing countries. Poor institutional capacity of developing countries, especially of the LDCs, to implement WTO Agreements is another problem. Enhancing their ability to participate in the WTO more meaningfully is itself an implementation problem. *Bhupendra Pant* takes a comprehensive view of these issues. Focusing on two areas – agriculture and textile – he “dissects” the Doha Ministerial Declaration to show how deadlines set for negotiations have been missed, one after another. An increased technical assistance coupled with widened market access for LDCs like Nepal could therefore be the priority agenda for Cancun.

Developing countries are keenly watching how the TRIPS debate moves ahead. The Doha Declaration on TRIPS and Public Health was very important in the sense that it recognised the primacy of public health over intellectual property rights (IPRs). When one reads the Doha text from a public health perspective, one gets the impression that TRIPS is being given a ‘human face’. However, the failure to meet commitments by developed countries belies all expectations and raises serious ethical questions. On the other hand, developed countries have taken no initiatives to share their technology even though the Agreement categorically mandates it. How should an LDC like Nepal respond to the TRIPS crisis? *Surendra Bhandari* comes up with definitive answers in his paper on the TRIPS Agreement. Beginning with a definition of IPR, the paper encompasses all its forms in its analysis of the TRIPS Agreement. Very importantly, TRIPS has been juxtaposed with the Convention on Biological Diversity (CBD) to which Nepal is a party. The inconsistencies between the two agreements are clear: while CBD promotes the concept of community rights, TRIPS advocates ‘company rights’. The farming community is thus a potential victim of TRIPS. Despite the Doha mandate, the TRIPS Council has not yet been able to decide on mechanisms that would ensure consistency between CBD and TRIPS. The WTO’s tacit recognition of International Union for the Protection of New Varieties of Plants (UPOV) as the only effective *sui generis* system for the protection of plant varieties creates further problems for developing countries. In

## Agreement on Agriculture: Nepal's Perspectives

Dr. Hiramani Ghimire

response to these challenges, Nepal and other LDCs could take a proactive approach in developing their human resource base, conducting research, and creating a favourable policy environment.

The WTO appears to be willing to widen its mandate. The Singapore issues (i.e., investment, competition, transparency in government procurement, and trade facilitation) are a case in point. They could feature prominently at Cancun. At Doha, it was decided that negotiations on these issues would take place after the Cancun Meeting and on the basis of “explicit consensus”. Semantics aside, there is an apprehension about what the developed countries are up to. Technically, decisionmaking at the WTO is based on consensus. However, past experiences show that ‘smart’ participants tend to push things in without giving others much time for examining the issues at stake. Another typical approach to setting agenda consists of proposing a “study” first and then grooming it into an agreement. How should Nepal then deal with the Singapore issues? *Ratnakar Adhikari* delves into the relevant literature for an appropriate answer. His analysis is based primarily on the political economy of issues on the agenda. Accordingly, he concludes that the demand for the inclusion of Singapore issues in WTO negotiations comes from countries that saw their position on agriculture compromised during the UR. They are therefore seeking a trade-off. Secondly, the attempt to take the new issues on board is consistent with the approach of industrialised countries to push for an agenda in which they are better placed than others. Even so, *Adhikari* is not too defensive in terms of dealing with these issues. He suggests an unbundling of these issues in order to be able to see their strengths and weaknesses more clearly. The conclusion is: while LDCs like Nepal are still in a premature state to handle internationally agreed competition and investment decisions, they have an opportunity in the areas of trade facilitation and transparency in government procurement provided the agreements in question have an incentive scheme for poorer countries.

### Agricultural liberalisation under the WTO

The Agreement on Agriculture (AoA) under the World Trade Organisation (WTO) sets out a programme for progressive liberalisation of trade in agriculture. The UR (Uruguay Round) saw agricultural protectionism as a factor for trade distortion and included agriculture in the agenda for negotiation. The purpose was to bring “more discipline and predictability to world agricultural trade”.<sup>1</sup> In fact, agriculture was never excluded in the old General Agreement on Tariffs and Trade (GATT). However, rules on it were weak. They allowed, for instance, quantitative restrictions (QRs) and export subsidies. Dispute settlement required consensus. Trade in agriculture has always been a politically sensitive issue. This may be seen in a number of disputes over agricultural trade. Although the share of agriculture in world trade sank from one-half to one-tenth over the 40 years from 1948, agricultural trade continued to account for about half of all disputes brought to GATT/WTO.<sup>2</sup>

### The three pillars

The AoA requires WTO member countries to undertake a number of measures towards liberalising agricultural trade. There are three major areas of commitment, namely market access, domestic support, and export competition. Key elements of the market access commitments are “tariffication” (calculating tariff equivalents of non-tariff import barriers and adding them to fixed tariffs), tariff reduction, and binding of tariffs. During the negotiations, it was realised that tariffication alone would not lead to better market access opportunities. Many countries at that time were imposing QRs to limit the volume of import of particular commodity groups. These were included in each country’s tariff rate quotas (TRQs), which would allow low tariff imports up to a certain amount. The emphasis of the domestic support provisions is on limiting the effects of trade-distorting measures. Domestic subsidies may distort

trade. However, not all subsidies do so. Therefore, the Agreement divides subsidies into three groups: 'green box' (freely granted), 'blue box' (granted, but actionable), and 'amber box' (such as set aside payments). The Agreement establishes a ceiling on the total domestic support, commonly referred to as "Aggregate Measurement of Support" (AMS). The green and blue box subsidies are exempt from inclusion in AMS. Export subsidies are considered as trade-distorting. The Agreement bans their use unless they qualify under some exceptions. Many developing countries can hardly pay export subsidies. This is affordable only for the developed countries. In fact, only 25 WTO Members have agricultural export subsidy entitlements in their Schedules. They cover a total of 428 product groups.

The Agreement has also *de minimis* provisions, which exempt supports that are less than five percent (10 percent for developing countries) of the production value from reduction commitments. Similarly, the Agreement contains a "peace clause" that shields some of the domestic support policies and export subsidies from remedial actions by other countries.

The tariffication package of the Agreement, which may lead to very high tariff equivalents of non-tariff barriers (NTBs), requires countries to maintain existing access opportunities. For products with no existing market, minimum access commitments are offered. However, countries may take special safeguard actions under specified conditions in order to appropriately respond to sudden increases in imports. The obligation of tariffication may be waived for developing countries in case of balance of payment (BOP) difficulties. Similarly, they were given the flexibility to bind their tariffs at ceiling rates, which could be higher than their applied rates.

Countries agreed to reduce tariffs and subsidies by fixed percentages during the UR. Developing and least-developed countries (LDCs) enjoy preferential status in terms of tariff reduction. Industrial countries must reduce tariffs by 36 percent over six years, while developing countries have to do so by 24 percent over 10 years. LDCs do not need to cut their tariffs. Similarly, aggregate producer subsidies are to be cut by 20 percent by industrialised countries over six years and by 13.3 percent by developing countries over 10 years. LDCs are exempt from this commitment, too. On export subsidies, developed countries must

reduce by 36 percent the *value* of their direct export subsidies and by 21 percent the *quantity* of subsidised exports over six years. The cuts for developing countries are set at two-thirds this level over 10 years. No cuts need to be made by LDCs.

The Agreement on Sanitary and Phytosanitary Measures (SPS), closely linked to AoA, allows countries to restrict trade in order to protect human, animal, or plant life. However, this should not be a disguised restriction on trade. The Agreement covers all measures to protect animal and plant health from pests and diseases, and to protect human and animal health from risks in foodstuffs as well as to protect humans from animal-carried diseases. All actions against such risks must be based on scientific evidence.

The Agreement also covers some non-trade concerns such as food security and environmental protection.

### Poor performance

Despite the euphoria of initial years of the WTO in respect of its benefits, most analysts now consider that income and trade gains have been much smaller than expected. One of the major reasons for the high expectations was the assumption that WTO Members would implement their commitments not only in letter but also in spirit.<sup>3</sup> In agriculture, like in many other sectors, there has been much hesitation in the implementation of commitments.

Despite all good intentions contained in the Agreement, agricultural protection has remained prohibitively high in developed countries. In some cases, the level of protection has even increased. Protection and subsidies for agriculture in Organisation for Economic Cooperation and Development (OECD) countries amounted to US\$ 311 billion in 2001, compared to US\$ 302 billion in 1986-88.<sup>4</sup> Subsidies and other supports to agriculture in high-income countries is about US\$ one billion a day (which is more than six times the sum of all official development assistance). In fact, the total transfer to agriculture has increased. For example, OECD farmers have enjoyed higher domestic support in the last five years although their governments utilised less than 50 percent of agreed AMS. Besides, reduction in AMS has been accompanied by an increase in green and blue box supports. The Agreement allows such manipulation of farm supports, requiring governments only to

notify new or modified subsidies announced as green.

Market access for developing country products has become more difficult in some cases due to “dirty tariffication” (over-estimated calculation of tariff equivalents of NTBs). For instance, the EU (European Union) has bound tariffs on average at about 61 percent above the actual tariff equivalents, and the US at about 44 percent. Canada and Japan are the two other major economies with a very high degree of dirty tariffication. For example, the average tariff for butter is computed at 360 percent in Canada. Similarly, tariffs for cheese and eggs are computed at 289 percent and 236 percent respectively. In Japan, tariffication for wheat stands at 353 percent. In the USA, there is a 244 percent tariff on sugar, 174 percent on peanuts.<sup>5</sup>

Despite the incidence of dirty tariffication in some products, average tariff levels of many countries have come down as a result of tariff reforms after the conclusion of the UR. However, for some products, particularly for those of export interests to developing countries, they still remain very high. This phenomenon of tariff peaks has been eroding the opportunities for developing countries in the international market, especially in the developed countries. Most affected are dairy products, sugar, groundnuts, and cereals.

On the other hand, the average tariff cut could in effect be less than one/sixth as an average, as the system allows unweighted cut with the requirement to reduce each tariff item by only 15 percent. Countries have often taken recourse to this provision, limiting the positive outcomes of the Agreement. Besides, this allows governments to set peak tariffs for their sensitive products. Since recently, the “multifunctionality” argument has been eroding the importance of liberalisation in agricultural trade. As a result, agricultural tariffs remain very high at 62 percent on average (compared to 5-10 percent manufacturing tariffs), with tariff peaks of over 500 percent.<sup>6</sup> On the other hand, rich countries are applying NTBs such as food safety standards, which go beyond internationally agreed levels. The levels of protection are in some cases equivalent to tariffs of more than 100 percent.<sup>7</sup>

The Agreement foresees TRQs to guarantee minimum access (where there had been no significant imports) or maintain current access opportunities for exporters. Thirty-seven of the 146 member countries are using TRQs, which are concentrated in particular

product groups. Fruits and vegetables alone account for some 25 percent of all TRQs. Four other major product groups are meat, cereals, dairy products, and oilseeds. However, the ‘fill rate’ of TRQs has remained low. For example, only two-thirds of all TRQs were filled in OECD countries between 1995 and 2000. And the trend is declining. Changing competitiveness in importing countries and the administration of the quota system often lead to the underutilisation of TRQs.<sup>8</sup>

Agricultural commodities receive an annual export subsidy of approximately US\$ seven billion (calculated for 25 exporting countries). The EU doles out large amounts of export subsidies. They account for 90 percent of the total subsidies. The dairy sector gets the lion’s share (33 percent). It is followed by beef (20 percent), sugar (11 percent), coarse grains (eight percent), and wheat and wheat products (five percent). The remaining 23 percent is distributed over a large number of other products.<sup>9</sup>

### **Impact on farming communities**

The implications of AoA for farming communities could be grouped into two categories: trade-related issues and non-trade concerns.

#### ***Trade-related issues***

The revival of protectionist influence in agricultural trade has continued at the expense of farming communities in poor countries, who provide more than 60 percent of the world’s value added in agriculture. Poor people in most developing and least developed countries depend upon agriculture for livelihood. More than 70 percent of the populations live in rural areas, with more than 95 percent of them engaged in agriculture. Agricultural exports are the largest source of employment, revenue, and foreign exchange in these countries. Besides, any additional incomes generated through agricultural trade become the source of non-agricultural incomes for local enterprises. Increased opportunities for agriculture mean therefore benefits for the whole of rural economy. The AoA has not been able to realise these benefits. Development priorities were neglected in its ‘implementation’. In fact, an honest implementation of the AoA would benefit not only the poor countries but also the rich ones. It has been estimated that the USA would benefit most getting 24 percent of the consumer purchasing power increased through the elimination of protectionist measures (estimated at US\$

56 billion). The EU would have enjoyed the second place with 19 percent.<sup>10</sup> On the other hand, a recent OECD study indicates that farm subsidies are ineffective in achieving income gains, with only about 25 percent of total subsidies ending up as extra income for farmers.<sup>11</sup>

In the case of LDCs like Nepal, the EU has announced the EBA (everything but arms) initiative, which grants duty- and quota-free access for all goods except armaments. For three products, namely bananas, rice, and sugar, duty-free access will be granted in a phased manner (i.e., until 2008). It is important to mention here that Nepal is already exporting sugar to the EU under a recently agreed EBA scheme.<sup>12</sup> However, even this initiative provides mechanisms to avoid any “unfavourable” influence in the EU market. In other words, safeguard options will be available.<sup>13</sup>

### ***Non-trade concerns***

Among the non-trade concerns raised by the Agreement are food security and environmental protection in poorer countries the most important. The Food and Agriculture Organisation (FAO) definition of food security emphasises three major parts that are essential for achieving food security. They are availability, access, and affordability. These demand-side factors will be influenced by supply-side issues of food policy of the government, cropping pattern, and the level of food production. In fact, the need to ensure some degree of security in the supply of basic foodstuffs can be seen as a public good.

Generally speaking, trade contributes to food security. However, increased trade does not necessarily mean better food security. While aggregate trends of food security are positive, one could see the situation deteriorating in specific cases. In the LDCs, for instance, the food bill (measured by food imports as a percentage of total exports) remains still very high at 20 percent (which was the case of many developing countries in the 1960s).<sup>14</sup> In fact, trade alone cannot contribute substantially towards resolving the problems of food insecurity in a majority of developing countries. Most of world's poor are rural-based and rely on farm and non-farm employment and incomes, which are again dependent on agriculture. For them, economic improvements are assured only if they produce the food themselves. Increased agricultural production, and not only trade, should therefore be the focus of attention.<sup>15</sup>

Price instability in agricultural commodities is a major risk for farming communities. If the export base is narrow, the impact of price fluctuations is more visible. Families that spend a large part of their income on food often face a survival problem when prices go up unexpectedly. In the same way, they are critically affected when prices for agricultural commodities fall. The AoA can be a factor for both of these situations.

With the requirement to reduce domestic support under the AoA, the cost of official food aid will be higher than under previous farm policy regimes. In this context, it can only be expected that domestic political pressure will be exercised in the developed countries to reduce food aid. This will lead to an increase in food prices, creating food security problems in developing countries. Further, technical assistance for improving agricultural productivity is declining. In fact, international research institutions and aid agencies themselves have been suffering from the scarcity of funds.

Another major issue is that of cropping pattern. The Agreement promotes commercialisation, and therefore, specialisation in agriculture. This may invite dangers of monocropping. Moreover, production of cash crop is likely to get prominence over other food products under the liberalised trade regime. This tendency may erode national capacity to ensure food security in the long term. On the other hand, it may come at the cost of biodiversity and environmental conservation.

### **Agriculture in the Doha Development Agenda**

The ‘work programme’ adopted at the Doha Ministerial allocates two paragraphs to agriculture. It commits Members to “substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support”. Modalities for further commitments should have been established by 31 March 2003. This deadline has been missed. Doha gave thus a new context to negotiations, which started in March 2000 as a part of the “continuation of the reform process” foreseen in the Agreement. During the first phase of negotiations (March 2000-March 2001), more than 40 proposals were put forward by 121 countries and were then reviewed. In the second phase, which lasted until February 2001, the initial proposals and some new ones were examined in greater depth.

The prospects for a successful outcome of these negotiations are difficult to predict. The continued – or, rather increased protection to agriculture in some developed countries speaks a different language from that of the Doha text.

### **Doha agenda resisted**

The USA and the EU worked together at the Doha Ministerial to secure a higher degree of agricultural liberalisation. However, the farm bill of the USA (enacted in August 2002) goes in the opposite direction by increasing federal farm subsidies by about 80 percent (which means an additional subsidy of US\$ 82 billion over the next 10 years). The US House Committee on Agriculture even observed, “We should not depend on the Third World for a safe and adequate supply of food and fibre”. The bill also undoes the Freedom to Farm Act, 1996 which foresees phasing out of agricultural subsidies for most agricultural products. The bill, which would provide a ‘safety net for American farmers’, is politically very important. Basically, it has been exchanged for ‘trade promotion authority’, which the President needs to establish his credibility in international trade negotiations. With this, US subsidies per farm will soon reach almost four times the EU levels. Three-fourths of the cash bill will go to big farmers.<sup>16</sup> The EU has been a major critic of the US farm bill. It is also being seen as a problem in getting the EU to reform its common agricultural policy (CAP). In fact, the EU wants to grasp any opportunity to put off the CAP reforms so that their politically powerful farmers are not hurt. The Franco-German alliance against reform in the CAP<sup>17</sup> is a fresh reminder of this fact.

Interestingly, however, subsidies under CAP are becoming unsustainable. The EU will have to respond to the reform needs probably not because of international ‘pressure’ to do it but because of budgetary problems associated with farm subsidies.<sup>18</sup> CAP has not only harmed livelihood of efficient farmers from other countries but also affected consumer interests within the EU itself. The OECD calculates that it raises the price of beef by 221 percent, milk by 70 percent, and food by 44 percent in EU countries. By 2004, 10 more countries will join the EU. Millions of farmers will then expect to benefit from CAP. For example, Poland alone will have more farmers than the United Kingdom (UK), France, and Italy combined. Obviously, the need to put a cap on CAP is becoming more acute everyday.

Recently (26 June 2003), The EU has agreed on “decoupling” farm subsidies and production. This means that farmers have no longer an incentive to produce more. However, farmers will still be receiving payments, which would be linked to other things such as rural development and environmental protection. On the other hand, the actual decoupling will begin in 2005, with countries having the option to delay it until 2007. And for some products (e.g., cereal and beef), decoupling will have only a partial coverage.<sup>19</sup> The much-hyped “breakthrough” in addressing the problems of farm subsidies represents thus only a half-hearted attempt to reform the system. However, it does mark a new beginning in the thinking of European policymakers.

### **Nepal’s agricultural trade**

Agriculture is the most dominant economic activity in Nepal. It absorbs the highest number of economically active population in Nepal. Some 24 percent of the population in urban areas and 81 percent in rural areas are engaged in agriculture. The proportion of women is larger than that of men. According to Nepal Living Standard Survey (NLSS) conducted in 1996, 79 percent of employed men and 94 percent of employed women are in agriculture. However, in the non-agricultural sector, women’s share has declined. This too indicates an encouraging concentration of women in agriculture.<sup>20</sup> The increasing “feminisation of agriculture”<sup>21</sup> demands improvement in agricultural trade, if women’s socio-economic status is to be enhanced.

The agricultural sector is therefore pivotal for any move to increase incomes, alleviate poverty, and enhance living standards. Accordingly, this sector has been given top priority in the Tenth Plan with a view to achieving broad-based growth. The 20-year Agricultural Perspective Plan (APP), formulated in 1995, aims at increasing the agricultural growth rate from less than three percent in the past 20 years to five percent during the next 20 years. APP expects the agricultural per capita income to grow from 0.5 percent to three percent and per capita food availability from 270 kg to 426 kg. Irrigation, roads, technology, and fertilisers are the four priority inputs for APP. The Plan is regionally balanced. It intends to prioritise investment in production pockets so as to transform the subsistence-based agriculture into commercialised agriculture. Its programmes for the hills and mountains are devoted to livestock

products and other high-value crops. Demand for these products is expected to come from the Terai region and also from export markets. However, the performance of APP has remained rather poor. The average annual investment projected for the APP sector amounts to Rs five billion. The current spending is about Rs two billion per year. This means that additional sources for the rest have to be identified. On the other hand, investment in rural roads, one of the main programmes of the APP, has remained insignificantly low at about 10 percent. Similarly, Rs. 8.5 billion will be needed as a net addition in agricultural credit to meet the APP requirement. Again, here, financial institutions, such as the Agricultural Development Bank (ADB), do not have sufficient funding.

Nepal's policy of trade liberalisation, progressively pursued since 1990, includes elimination of QRs and import licenses as well as reduction and rationalisation of tariffs. As a result, the peak tariff rate has been reduced from over 400 percent in the 1980s to 80 percent in 1999. This has improved trade performance in general. For example, the trade/gross domestic product (GDP) ratio has reached about 40 percent, with an average tariff rate of 13.8 percent. However, the encouraging trends seen in the initial years of reforms could not be sustained. The overall economic performance has been deteriorating after the mid-1990s. The year 2002 saw a negative growth rate for the first time in recent history. Moreover, the agricultural sector performed particularly badly. For example, the agricultural sector grew only by 2.5 percent during the 1990s against 4.0 percent in 1980s. The policy of economic liberalisation has benefited the non-agricultural sector with no positive impact on the agricultural sector. Poor growth in this sector has adversely affected the goal of poverty reduction. It is barely keeping pace with population growth.

As indicated, the policy of liberalisation also covers agriculture. Elements of liberalisation in this sector include:

- Deregulation in distribution of chemical fertilisers
- De-monopolisation of the supply of seeds by the Agricultural Inputs Corporation
- De-controlling prices of agricultural inputs
- Withdrawal of irrigation subsidy on shallow tube wells
- Withdrawal of transportation subsidy for food grains (given up to motorable roads)

- Creation of marketing centres
- Partnership and contracts-based extension services through private service providers
- Privatisation of veterinary services

As Nepal's trade with India accounts for nearly 48 percent of its total trade, improvement in the balance of trade depends much upon trade performance vis-à-vis India. Exports to India consist mainly of agricultural products such as vegetable oils, mustard and mustard seeds, medicinal herbs, dry ginger, pulses, oil cakes, catechu, jute products, and cardamom. Of the total exports to India, agricultural products account for about 30 percent. Some of these products are subjected to NTB measures such as quota, quarantine control and food-adulteration test. Nepal also imports agricultural products from India, which represent some 12 percent of the total imports from India.<sup>22</sup> Protection to agriculture in India through tariff and non-tariff barriers not only creates problems for Nepal's exports to India but also affects domestic market prices in Nepal mainly because of the free market access enjoyed by Indian agricultural products in Nepal.

This situation raises a question: has the AoA widened the export market for Nepal? There are at least three aspects to be examined in this context. Firstly, developed countries have remained, as already explained, too protective of their markets be it through high tariff walls or through the circumvention of provisions of the Agreement, including the elimination of subsidies. Secondly, exports from Nepal may be hit by the imposition of NTBs as examples from other South Asian Association for Regional Cooperation (SAARC) countries clearly show. Thirdly, Nepal has not been able to overcome the supply-side constraints, which would require a proactive policy environment. The very narrow export base in terms of agricultural products is itself an example.

The recently completed 'diagnostic trade integration study' (carried out on the initiatives of the World Bank) concludes that, although the share of agriculture in international trade is low, the potential for increasing it is high. The study also concludes that competitiveness of agriculture is "the single most important determinant of the economy's overall performance". This means that the impact of the WTO system on agriculture is also its impact

on Nepal. And this is not necessarily negative. What is most important is an appropriate policy environment for the development of agriculture.

### Conclusion and recommendations

The AoA has raised expectations that the world as a whole and different groups of countries, including the developing and the least developed, would benefit from agricultural liberalisation. In fact, it represents both an opportunity and a challenge for them. It provides them with an opportunity to tune the agricultural production system to the widening access in the international market with a view to addressing the problem of poverty through the expansion of trade. On the other hand, it brings a number of challenges in the form of competition, international obligation, and revived protectionism. However, the speed and scope of its implementation have belied the expectations of AoA. As a result, liberalisation of agricultural trade is being associated with an increasing marginalisation of a vast majority of the population from the developing and least developed countries. This may be attributed to cheap imports leading to unemployment of the farm labour, tariff and non-tariff barriers imposed by the developed countries limiting market access for developing country products, tendency to use lands for cash crops at the cost of food grains, declining food aid because of price increase led by reduced domestic support, and increase in the cost of agricultural inputs. Nepal will have to face these challenges if she wants to grab opportunities that arise basically from increased market access. In order to achieve this, measures should be taken both at national and international levels.

#### *Measures to be adopted at national level*

- Undertake in-depth studies on the implications of AoA and sensitise all stakeholders accordingly;
- Promote public and private investments in research and development in agriculture;
- Build rural roads and develop other infrastructure services to improve agricultural productivity and market conditions;
- Support production systems based on 'comparative advantage' of different ecological zones;
- Adopt policy consistency in the agricultural sector;

- Develop human resource through training and capacity-building measures;
- Secure farmers' rights through legislation;
- Cooperate with other countries (using, for instance, the SAARC platform) in promoting the interests of LDCs within the framework of the on-going review of AoA;
- Prioritise specific agricultural activities for an optimum use of foreign aid available in this sector;
- Invest in high-value products, which have demand in the international market;
- Provide special incentives to farmers who use local inputs in the production process; and
- Address all "behind-the-border" issues such as infrastructure development and good governance in order to improve the overall economic performance.

#### *Measures to be adopted at international level*

- Provide duty-free, quota-free access to LDC products in developed countries' markets;
- Phase out all forms of subsidies, including export subsidies and trade-distorting domestic supports being provided to farmers in developed countries;
- Ensure predictable market access in developed countries by doing away with tariff escalation, tariff peaks, and tariff dispersion;
- Make the provisions for Special and Differential Treatment (S&DT) envisaged for developing and least developed countries obligatory;
- Adopt measures to secure representation of least developed and developing countries in international standard-setting bodies;
- Provide technical and financial assistance to LDCs and other net food-importing countries in order to address the problem of food insecurity;
- Allow LDCs to adopt safeguard measures (i.e., control in exports or imports) to prevent potential food crises;

- Create, within the framework of the AoA, a “development box” for developing countries in order to enable them, among others, to:
  - a. use a positive list approach to include agricultural products or sectors they would like to have disciplined under the AoA provisions;
  - b. prohibit developed countries from the use of the Special Safeguard Clause in relation to LDC exports; and
  - c. discourage dumping in any form.

## Endnotes

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- <sup>1</sup> Croome, John 1995: Reshaping the World Trading System: A History of the Uruguay Round, Geneva: World Trade Organisation., pp. 110-1.
  - <sup>2</sup> Croome, 104-5.
  - <sup>3</sup> International Trade Centre/Commonwealth Secretariat 1999: Business Guide to the World Trading System, Geneva: ITC/CS, 185.
  - <sup>4</sup> Ingco, Merlinda D. 2003: Introduction and Overview, in: Ingco, Merlinda D (ed), Agriculture, Trade, and the WTO, p. 1.
  - <sup>5</sup> Tucker, Simon 2003: Lessons from implementation of the Uruguay Round Agreement on Agriculture: a Cairns Group Perspective, in: Ingco, Merlinda D (ed), Agriculture, Trade, and the WTO, pp. 60-62.
  - <sup>6</sup> Diakosavvas, Dimitris 2003: The Uruguay Round Agreement on Agriculture in Practice: How Open are OECD Markets?, in: Ingco, Merlinda D (ed), Agriculture, Trade, and the WTO, pp. 21-48.
  - <sup>7</sup> Johnson, Ian 2003: The New Trade Debate and Options for Developing Countries, in: Ingco, Merlinda D (ed), Agriculture, Trade, and the WTO, p. 13.
  - <sup>8</sup> Diakosavvas op. cit., pp. 38-39.
  - <sup>9</sup> Gulati, Ashok/ Sudha Narayanan 2000: Cork the genie back into the bottle, in: The Economic Times, 17.8.2000.
  - <sup>10</sup> Burfisher, Mary E. 2003: Options for Agricultural Policy Reform in the World Trade Organisation Negotiations, in: Ingco, Merlinda D (ed.), Agriculture, Trade, and the WTO, p. 136.
  - <sup>11</sup> The Kathmandu Post, 18 January 2003.

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- <sup>12</sup> This is being done under a quota system implemented by the EU covering eight countries including Nepal. Nepal's quota for 2003 is 9200 MT.
  - <sup>13</sup> Olarreaga, Marcelo/Francis Ng 2002: Tariff Peaks and Preferences, in: Hoekman, Bernard et al (eds), Development, Trade, and the WTO, Washington DC: The World Bank, pp 106-7.
  - <sup>14</sup> Diaz-Bonilla, Eugenio and Marcelle Thomas 2003: Trade Liberalisation, WTO, and Food Security, in: Ingco, Merlinda D (ed), Agriculture, Trade, and the WTO, p. 229-30.
  - <sup>15</sup> [www.fao.org/ur/fact/trade-fs-htm](http://www.fao.org/ur/fact/trade-fs-htm).
  - <sup>16</sup> It is an entirely matter that the USA has proposed to the WTO Committee on Agriculture to scrap all export subsidies, cap trade-distorting subsidies (currently, US\$ 100 billion) at five percent of agricultural production of each country. The new US proposal also seeks to bring global farm tariff from 62 percent to 25 percent in five years' time. The US move is targeted at EU for reciprocity.
  - <sup>17</sup> See, for example, The Economist, 5 October 2002, pp. 13, 48
  - <sup>18</sup> See, The Economic Times (editorial), 3 July 2003.
  - <sup>19</sup> See, The Economist, 28 June 2003, pp. 11, 51.
  - <sup>20</sup> Acharya, Meena 2000: Labour Market Development and Poverty. With Focus on Opportunities for Women in Nepal, Kathmandu, pp. 42-47.
  - <sup>21</sup> ADB (Asian Development Bank) 1999: Women in Nepal, Manila: ADB, p. xiv
  - <sup>22</sup> The huge volume (estimated at Rs 30 billion) of informal trade between Nepal and India, including illegal flow of goods across the border includes agricultural products. The actual share of agriculture in international trade may be higher than these official figures. For informal trade between these countries, see *The Kathmandu Post*, 7 May 2003.

## Special and Differential Treatment: Agenda for Cancun

Dr. Posh Raj Pandey\*

### Introduction

It has been widely recognised that developing and least developed countries (LDCs) are inherently disadvantaged in their participation in international trade due to their structural problems and, therefore, any multilateral agreement must take into account of this intrinsic weakness in specifying their rights and obligations. The international community, based on this rationale, has adopted the principle of positive discrimination in favour of developing and least developed countries in General Agreement on Tariffs and Trade (GATT)/World Trade Organisation (WTO) framework. The fourth Ministerial Conference also agreed to review all special and differential treatment (S&DT) provisions with a view to strengthening them and making them more precise, effective and operational.' Against this background, the paper proposes the ways to make S&DT provisions more precise, effective and operational from the perspectives of least developed countries. The next section briefly outlines the history of S&DT. The third section delves into the mandate of the Doha Declaration. The last section proposes the agenda for S&DT for the Cancun Ministerial.

### History of S&DT

S&DT denotes the GATT/WTO rights and privileges given to developing countries, but not extended to developed countries. It evolved from the debates in the 1960s as to how the growth and development of developing countries could be best facilitated by trade rules. In fact, it is the product of the coordinated political efforts of developing countries to correct the perceived inequalities of the post-war international trading system by introducing preferential treatment in their favour across the spectrum of

international economic relations.<sup>1</sup> The genesis of S&DT goes back to the 1979 Tokyo Round Declaration which recognised 'the importance of the application of differential measures in developing countries in ways which will provide special and more favourable treatment for them in areas of negotiation where this is feasible.'

Although about half of the 23 original members of GATT were what would be considered as developing countries, developing and developed countries were treated as equals at its inception. The fundamental rights and obligations of the agreement were to be applied on an equal basis. It was only in 1948 that the need for special rule was recognised for 'economic development' through the amendment of Article XVIII allowing the use of protective measures to promote particular industries or branches of agriculture. Though it was applicable initially to both developed and developing countries, this was an indicative first rationale for S&DT as special right to protect in order to meet the development objective.<sup>2</sup>

The demand for S&DT has economic rationale. It was widely believed that balance of payment (BOP) problems for developing countries were endemic to low economic status. This meant that liberalising trade by developing countries would widen trade deficits. Moreover, industrialisation process, based on the experiences of newly industrialised countries of that time, demanded protection on infant industry grounds. These arguments were complemented by reference to the Singer-Prebisch thesis, which argued that developing countries always faced a secular decline in terms of trade and suggested that developing countries would need to be given preferential access to developed country markets to offset these effects. The above arguments led to the creation of United Nations Conference on Trade and Development (UNCTAD) in 1964, the introduction of Part IV into the GATT in 1965, and to a developing country negotiating strategy in the Tokyo round of non-reciprocity.<sup>3</sup>

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**Table 3.1: History of S&DT in Multilateral Trading System: Pre-Uruguay Round**

Key elements of S&DT and Focus		Justification and Rationale
GATT 1947	No S&DT, equal treatment, Article XVII	Fundamentally no difference: 11 out of 23 members developing countries
1948-55	Developing countries as equal partners request under Article XVIII reviewed by working parties	1947-48 Havana Conference: challenges trade liberalisation and link to growth/development
1954-55	Article XVIII only for LDC right to protect Section A: flexible tariff structure to promote particular industry Section B: quantitative restriction for BoP Section C: tariffs and quantitative restrictions to support infant industry	Need to improve terms of trade; reduce dependence on primary commodities; correct instabilities from balance of payments; industrialisation through infant industry strategy and/or export promotion through export strategies through export subsidies
1964	Part IV on Trade and Development in GATT introduced: Article XXXVI: favourable market access for product of export interest of developing countries on non-reciprocity basis Article XXXVII: elimination of restriction between primary and processed products, taking account of trade policy instruments on developing countries Article XXXVIII: international arrangement to improve market access for products of export interest to developing countries	Part IV guidelines for preferential treatment for developing countries; flexibility, non-reciprocity, commodity stabilisation, but did not result in any action. Dissatisfaction with GATT, led to first UNCTAD and created Group of 77 as vehicle for developing countries to pursue trade agenda addressing their concerns.
1968-71	GATT waiver from most favoured nation (MFN) obligations in 1971 and for developing country members to grant preference among themselves.	Establishment of Generalised System of Preference (GSP)
Tokyo Round 1979	Enabling Clause establishes the principles: a. Preferential market access for developing countries on non-reciprocal and non-discriminating basis b. More favourable treatment in other GATT rules dealing with NTBs. c. Preferential trade between developing countries d. Special treatment for least developed countries. S&DT provisions embodied in codes Relaxation of Article XVIII disciplines	Legal basis for S&DT but applied in discretionary way; but allowed GSP and other trade preference schemes to be applied on permanent basis, with discretion on extent of preference and level of reciprocity at discretion of each country  Very few developing countries signed up  Introduced concept of graduation of developing countries whereby preference and non-reciprocal market access phase out

Source: Pangestu 2000.

In terms of formal GATT benefits, developing countries were given special treatment under Article XVIII, Article XXVIII*bis* (iii), Part IV of the GATT and the 1979 framework agreement, commonly known as the Enabling Clause. Article XVIII was the GATT's attempt in 1954 to accommodate developing countries' concern within its trade rules, and involve three separate components. Article XVIIIA allowed for developing countries to renegotiate tariff bindings in order to promote the establishment of particular industries. Article XVIII B was about the use of BOPs justified measures by developing countries. The criteria for imposing trade restriction under this provision involve slightly weaker formal criteria than those which apply to developed countries under Article XII. Article XVIII C allowed developing countries to use quantitative restrictions (QRs) protecting infant industries. However, Articles XVIII A and Article XVIII C provide for equivalent trade compensation for affected members and retaliation in the absence of negotiated agreement. Article XXVIII*bis* (iii) was a commitment that developing countries' use of tariffs for economic and fiscal purposes should be taken into account in tariff negotiations.

The above provisions justify special rights of developing countries to protect their economy, industry and trade. Part IV of the GATT, which was introduced at the end of the Kennedy Round in 1964, sets out various acknowledgements of special development needs of developing countries and concedes the principle of non-reciprocity by developing countries in trade negotiations. Three new articles were added that formed the principles of providing differential and more favourable treatment. First was that preferential market access would be allowed for developing countries for products of export interest to them and could be based on non-reciprocity (Article XXXVI). Second, priority was given to eliminating escalation of protection and requiring members to take into account the impact of trade policy instruments on developing countries (Article XXXVII). Third, joint action through international agreements to improve market access of products of interest for developing countries (Article XXXVIII) was encouraged. Part IV provided the basis to provide preferential access to developed country markets and in 1968 the GSP scheme was introduced. Under the GATT legal framework, Article XVI (4) allows developing countries to continue the use of export subsidies for manufactured goods. Other forms of S&DT introduced at the time

can also be found in the accession clause Article XXVI which enabled developing countries to accede to GATT without negotiation of bound tariff rates as part of their concession.<sup>4</sup>

Under the Tokyo Round, which ended in 1979, another pillar of S&DT was introduced. The *Differential and More Favourable Treatment, Reciprocity and fuller Participation of Developing Countries* better known as Enabling Clause had four parts: preferential marketing access to developing countries in developed country markets on a non-reciprocal and non-discriminatory basis; more favourable treatment with regard to GATT rules on NTBs; allowing greater flexibility in the formation of preferential trade regimes between developing countries; and introducing special treatment for LDCs. The Enabling Clause provided not only a permanent legal basis for GSP scheme but also S&DT under the Tokyo Round Codes.

In sum, S&DT rested on two operational pillars: (a) enhanced access to markets through preferential access under the GSP, the right to benefit from multilateral trade agreements without being obliged to reciprocal concessions and the freedom to create preferential regional and global trading arrangement; and (b) policy discretion in their own markets concerning access to their markets and the right to offer governmental support to their domestic industries using various industrial and trade policy measures that otherwise would be inconsistent with their multilateral obligations.<sup>5</sup>

Despite the provisions of positive discrimination under S&DT, the benefits that stemmed from them had been outweighed by increasing discrimination against the trade of developing countries. Developed countries had been invariable using voluntary export restraints, putting bilateral pressure to open up markets, resorting to increased use of anti-dumping measures, and application of GSP in a conditional and discriminatory manner. The benefits of S&DT were further eroded by the extension of free trade agreements and customs unions among developed countries, imposition of relatively higher MFN tariffs on products of export interest, and GATT exemption on agriculture trade.<sup>6</sup> At the same time, there had been rethinking of development strategy based on import substitution and promotion of infant industries. This shift in development paradigm was overlapped with the acceptance by

many developing countries of International Monetary Fund (IMF)'s structural adjustment programmes, their adoption of an export-oriented development model and unilateral liberalisation of quantitative import restrictions and reduction of tariffs. Taking into account of these ground realities, the thrust of the initiative of developing countries shifted during the UR (Uruguay Round). While seeking to preserve the differential treatment in their favour, developing countries also began to defend the integrity of the unconditional MFN clause, obtaining MFN tariff reductions and strengthening the discipline of GATT.<sup>7</sup> Moreover, the difference between developing countries (large/small/middle income, least developed, industrialised, commodity exporters/importers and other differences) had become such that in the Uruguay Round the grand coalition of all developing countries no longer operated.<sup>8</sup>

The UR Agreements continued to be guided by the general S&DT principles agreed in previous negotiating rounds, which were actually extended in a number of ways. But without formally giving up on the principle of non-reciprocity, developing countries eschewed past practices and participated more actively in the exchange of reciprocal liberalisation in goods and services. In other respects, S&DT provisions regarding market access through GSP were maintained. Flexibility was also maintained e.g. by permitting developing countries certain practices in support of agriculture which were not allowed to other countries, and similarly regarding export subsidies. Moreover, the UR Agreements introduced new elements of S&DT providing transitional timeframes and technical assistance in the implementation of the various agreements introduced in the WTO. The universe S&DT consists of 145 provisions spread across the Multilateral Agreements on Trade in Goods” the General Agreement on Trade in Services (GATS); the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), the understanding on rules and procedures Governing the Settlement of Disputes and various Ministerial Decisions. Of the 145 provisions, 107 were adopted at the conclusion of the UR, and 22 apply to LDC Members only. The WTO Secretariat has broadly classified S&DT provisions as follows.<sup>9</sup>

- a. provisions that recognise the right of developing country governments to take measures to assist their domestic industries, and provisions requiring developing and least developed countries to undertake only such commitments

or obligations that are consistent with their development needs and within their means, such as Part IV of GATT 1994 and the Decision on Measures in Favour of Least Developed Countries.

- b. flexibility in procedures concerning the enforcement of the rights of, or complaints/disputes brought against or requirements on developing and least developed countries, such as the special procedures under the Subsidies and Antidumping Agreements.
- c. waivers for collective efforts among developing countries to accord preferential treatment to one another or in the extension of special measures by developed countries to provide preferential market access for products from developing and least-developed countries, such as Part IV of GATT 1994 and the Enabling Clause.
- d. inclusion in the objectives and principles of the agreements in terms of targets to be achieved. Article IV of GATS envisages that developing countries need to have an equitable share in services trade and developed countries should assist them to take up available opportunities.
- e. provisions for technical assistance to developing and least developed countries.
- f. provisions for transition periods for developing and least developed countries.
- g. binding obligations to address important needs. Article 66.2 of the TRIPS Agreement provides for technology transfer to LDCs in mandatory terms or under binding provisions.

The S&DT provisions in the WTO Agreement were introduced in an *ad hoc* way, late in the process and lacked an integrated structure based on a consensus on the trade needs of developing countries or a clearly defined framework of lack of implementation capacity.<sup>10</sup> After the few years experience of implementation of these provisions, developing countries have expressed a number of shortcomings in the S&DT provisions because they felt that these are mainly in the form of provisions employing discretionary language [e.g. contracting parties may accord differential and more favourable treatment to developing countries (enabling clause)],

best endeavour clause (e.g. key words in the provisions are ‘urged’, ‘to the extent possible’, ‘if the condition allows’) de facto non-binding provisions [e.g. ‘developed countries shall to the fullest extent possible accord high priority to the reduction and elimination of barriers<sup>11</sup>, Members shall take into account of the special needs of developing country members in preparation and application of new sanitary and phytosanitary (SPS) measures (Article 10.1 of the SPS Agreement)]. Moreover, all the UR Agreements have been accepted by all Member countries as a result of the ‘single undertaking approach’. Undifferentiated liberalisation has become an obligation to developing countries and the S&DT as originally envisaged under the GATT has been undermined. Developing countries now have to assume obligations that are not ‘commensurate with the needs of their economic development’, as envisaged in the preamble to the Marrakesh Agreement Establishing the World Trade Organisation. Though UR has recognised the adjustment difficulties of developing countries in implementing their WTO obligations and need for technical assistance, it is silent whether there has been adequate technical assistance. Similarly, there are no objective criteria for the determination of the transition period. Moreover, as a related issue, acceding developing and least developed countries are also being asked to maintain the same transition period, which amounts to accepting obligations beyond the original WTO members.

### Doha mandate and state of play

Paragraph 44 of the Doha Ministerial Declaration reaffirmed that ‘provisions for S&DT are an integral part of the WTO Agreements’ and directed that ‘all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational.’ Ministers also endorsed the Work Programme on Special and Differential Treatment set out in the Decision on Implementation-Related Issues and Concerns, and as per paragraph 12.1 of the Decision directed the Committee on Trade and Development (CTD):

- a. to identify those S&DT provisions that are already mandatory in nature and those that are non-binding in character; to consider the legal and practical implications for developed and developing Members of converting S&DT measures into mandatory provisions, to identify those that Members consider

- should be made mandatory, and to report to the General Council with clear recommendations for a decision by July 2002;
- b. to examine additional ways in which S&DT provisions can be made more effective, to consider ways, including improved information flows, in which developing countries, in particular the LDCs, may be assisted to make best use of S&DT provisions, and to report to the General Council with clear recommendations for a decision by July 2002; and
  - c. to consider, in the context of the Work Programme adopted at the Fourth Session of the Ministerial Conference, how S&DT may be incorporated into the architecture of WTO rules."

In order to pursue this mandate, the Trade Negotiations Committee (TNC) agreed that the task of review of all S&DT provisions would be carried out by the CTD in Special Sessions. The General Council also instructed the Special Session of the CTD to proceed expeditiously to fulfil its mandate, as contained in paragraph 44 of the Doha Ministerial Declaration and paragraph 12 of the Decision on Implementation-Related Issues and Concerns, so as to be able to report to the General Council with clear recommendations for a decision by 31 December 2002. The General Council gave further instructions regarding, *inter alia*, the consideration of the Agreement-specific proposals, the analysis and examination of cross-cutting issues, the establishment of the Monitoring Mechanism, consideration of proposals on institutional arrangements and on technical and financial assistance and training, and consideration of how S&DT may be incorporated into the architecture of WTO rules. In December 2002, this deadline was extended and the Special Session was directed to report to the General Council by the date of the General Council's first meeting of 2003, that is 10-11 February 2003. No further deadlines have been established.

In the Special Session of the CTD, 85 plus proposals have been submitted by members on their own or on behalf of the groups. Although the Special Session has considered many of the proposals, position could not be bridged on most of them. An important area of difference has been the interpretation of some aspects of the Doha mandate. While Members recognised the importance that Ministers attached to the S&DT work programme, and accepted the need to review all S&DT provisions "with a view to strengthening

them and making them more precise, effective and operational", there were significant differences on how this could be achieved. The developing country Members considered that one way to make S&DT provisions more precise, effective and operational, was to make them mandatory by changing the existing language of some of the 'best endeavour' provisions, and that doing so was part of the mandate. But developed countries do not wish to consider amending the text of the Agreements or otherwise altering what they considered to be the existing balance of rights and obligations. Similarly, developed countries held the view that such proposals might be best referred to negotiating bodies, while developing country Members did not consider that this was a course consistent with the Doha mandate.<sup>12</sup> In May 2003, the Chairman of the General Council circulated his proposed approach for addressing the Agreement-specific proposal on S&DT. Accordingly, 85 Agreement-specific proposals were divided in three categories. Category I includes 38 proposals on which it seems that a positive outcome could be possible before Cancun including the 12 agreed to in principle. Category II is comprises 37 proposals made in areas that are currently under negotiation, or are otherwise being considered by other WTO bodies for referral. Category III comprises 10 proposals on which there appears to be a wide divergence of views and on which agreement may not be possible without significant redrafting.<sup>13</sup>

### Agenda for Cancun

There has been an ensuing debate on whether S&DT should be a permanent principle of multilateral trading system. Some suggest that developing and least developed countries should not ask for S&DT. Preferential market access, be it in the form of GSP or duty-free market access, undermines its effectiveness as the products of export interest to them are put under exceptions. There is every possibility that non-economic conditionalities would be attached for such preference (e.g., African Growth and Opportunity Act (AGOA)). The process of trade liberalisation will be delayed and resources would be misallocated. Thus, it has been argued that instead of demanding S&DT, developing countries have more to gain by participating fully and as equal partners in establishment of liberal world trading system and thus demanding open market access for their products.<sup>14</sup> Although market access justification has weakened

in course of trade liberalisation through various rounds of negotiations, there is consensus on the need for providing 'fairness' for developing countries in the multilateral trading system.<sup>15</sup> The requirement for resources and technical assistance as well as longer time period to fulfill their commitments and managing structural changes is still valid.<sup>16</sup> The Doha Declaration has also recognised the role of 'enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity building programmes' to ensure that developing countries, and especially the least developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development. It also attempted to place their needs and interest at the Work Programme.

The elements of the Work Programme on Special and Differential Treatment indicates that actions in three areas are required for the strengthening of S&DT : (a) identifying ways to make existing S&DT provisions to be more binding; (b) additional measures to make S&DT more effective; and (c) incorporating the principles of S&DT into the system and architecture of the WTO.

The S&DT framework, to make Doha Development Round a true development round, should place 'development dimension' at the centrestage so as to enable multilateral trade agreements to contribute to overcome the obstacles, which prevent developing countries from meeting their developmental needs. Thus, the framework, principles, rules, programmes and proposals in the WTO should be assessed in terms of 'development-distortion' rather than 'trade-distortion', in terms of 'development outcome' rather than 'market access'. For this, the review of S&DT should not be confined to examining existing provisions but should also come up with additional measures as envisaged in paragraph 12 of the Implementation-Related Issues and Concerns agreed at Doha.

The second element is strengthening and operationalising, or even the introduction of the general development principles within the agreements in the four major areas of the WTO, i.e. goods, services, intellectual property and dispute settlement. In each of these areas, the development dimension should be placed at the centrestage. There is a need for an explicit recognition, consolidation and strengthening of Part IV of GATT on Trade and

Development. The focus should be on reversing the erosion of the effectiveness of the enabling clause during the UR, through adoption of a mechanism for concrete operationalisation of the provisions. All the agreements relating to goods should be reviewed whether there are clauses or general provisions recognising the development principle similar to GATT Part IV, and if there are inadequacies, these should be redressed. Similarly, in services the development principles and the S&DT measures should be strengthened and operationalised in addition to existing provisions of recognition of the interest of developing countries (such as Part II Article IV, and Part IV Article XIX.2). The TRIPS Agreement should recognise and operationalise the development needs of developing countries in line with Part IV of GATT in addition to public health concerns. It should be recognised that developing countries face several special problems, due to their lack of resources and other imbalances in relation to the dispute settlement system. There should be a reflection on how the problems can be dealt within the context of development needs and S&DT.

The need of developing countries to have recourse to financial resources in order to enable them to undertake their obligations and enjoy their rights, including their rights under S&DT should be addressed. Similarly, the need to address supply-side constraints in developing countries and their need to retain the flexibility to adopt pro-development policies and options should be clearly articulated. For this, there should be an exemption or relaxation for developing countries with respect to obligations that distort their development needs as well as obligations on the part of developed countries to assist to build their supply-side capacity, including the development of technology, infrastructure, finance, etc., in order to foster national capacity to produce as well as the capacity to export.

As far as the third element is concerned, the following issues should be taken into account:

- a. The language of WTO Ministerial 'Decision on Measures in Favour of Least-Developed Countries' is not operational as it only enumerates goals and obligations not the means to achieve them. The procedures and the benchmarks that would allow for the assessment of its compliance should be defined.

- b. The duty-free and quota-free preferential market access for LDCs should be made through a legal instrument to make market access secure, stable and predictable. Any temporary withdrawal of duty-free treatment should be disciplined in a contractual manner. It should be provided to all products. Rules of origin requirements should be realistic and flexible to match the industrial capacity of LDCs in order to ensure the effective and full utilisation of preferences. The rules of origin should also be harmonised among preference-giving countries and subject to simplified customs documentation and procedures.
- c. With regard to technical assistance programme including that of Integrated Framework (IF), priority shall be given to the development, strengthening and diversification of their production and export bases including for services as well as trade promotion. Adequacy of technical assistance should be evaluated on the basis of some objective criteria.
- d. LDCs shall be exempted from undertaking reduction commitments in agriculture negotiation as provided in Article 15.2 of Agreement on Agriculture (AoA). Full flexibility should be provided to LDCs to adjust their tariffs and domestic support to agricultural producers for the purposes of agricultural development for long-term food security, employment and rural development.
- e. LDCs should be exempted from the disciplines of the Agreement on Trade Related Investment Measures (TRIMs) on local content requirements.
- f. The accession of LDCs should be streamlined with clear cut and transparent criteria for the commitments to be undertaken by acceding LDCs. The level of commitments should not be more than that assumed by existing LDCs and be commensurate with their level of developments. No WTO plus commitment should be sought. The S&DT provisions, including transition period applicable from the date of accession, should be automatically extended to acceding countries.

- g. A framework Agreement on Special and Differential Treatment incorporating all the provisions of S&DT should be agreed.

## Endnote

- <sup>1</sup> Gibbs, Murray. 2000. 'Special and Differential Treatment in the context of Globalisation'. in UNCTAD, *Positive Agenda and Future Trade Negotiations*. New York and Geneva : United Nations.
- <sup>2</sup> Pangestu, Mari. 2000. 'Special and Differential Treatment in the Millennium: Special for Whom and How Different.' *The World Economy*. Vol 23 (9) .
- <sup>3</sup> Whalley, John. 1999. 'Special and Differential Treatment in the Millennium Round'. *The World Economy*. Vol 22 (8) .
- <sup>4</sup> Gibbs. 2000, see note 1.
- <sup>5</sup> Gibbs 2000, see note 1.
- <sup>6</sup> Michalopoulos, Constantine. 2000. *Trade and Development in the GATT and WTO: The Role of Special and differential Treatment for Developing Countries*. World Bank (mimeo) .
- <sup>7</sup> Gibbs 2000, see note 1.
- <sup>8</sup> Whalley 1999, see note 3.
- <sup>9</sup> WTO. 2002. *Implementation of Special and differential Treatment Provisions in WTO Agreements and Decisions*. WT/COMTD/W/77
- <sup>10</sup> Whalley 1999, see note 3; Gibbs 2000, see note 1; South Centre. 1999. *Special and Differential Treatment for Developing Countries in the WTO*. Trade-Related Agenda Development and Trade Working Papers 2. Geneva.
- <sup>11</sup> GATT XXXVI:1.
- <sup>12</sup> WTO. 2003a. Committee on Trade and Development Special Session. *Report to the General Council*. TN/CTD/7.
- <sup>13</sup> WTO. 2003b. General Council Chairman's Proposal on an Approach for Special and differential Treatment. JOB (03) 68.
- <sup>14</sup> Srinivasan, T. N. 1998. *Developing Countries and the Multilateral Trading*, Finger, J.M. and L. A. winter. 1999. 'What Can WTO Do for Developing Countries?' in A. O. Krueger (ed.) *The WTO as an International Organisation*. Oxford University Press: Delhi.

<sup>15</sup> Stiglitz, Joseph, E. 2001. 'Two Principles for the Next round or, How to Bring Developing countries in from cold' in Bernard Hoekman and Will Martin (ed.) *Developing Countries and the WTO: A Pro-active Agenda*. Blackwell: Oxford.

<sup>16</sup> Pangestu 2000, see note 2.

## Implementation Issues in the WTO

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### Introduction

Following the political-economic debacle of the World War II, the General Agreement on Tariffs and Trade (GATT) was ratified in 1947 to facilitate the rules-based disciplines in the global trade. The original 23 members, consisting of the then big nations and their colonies, formed the GATT to oversee their interest in trade. GATT was primarily formed to work out the reduction of high tariff barriers, which had restricted the trade of the then big and rich countries. GATT did not have an effective implementing agency, so implementation was largely based on diplomacy and consensus largely avoiding confrontation.

All this changed with the formation of the World Trade Organisation (WTO). Today, the Organisation has 146 members and 28 countries, including Nepal, are on the waiting list. These countries include developing and the least developed countries (LDCs) and also the ones that were GATT members as colonies of the then superpowers. With level playing ground, at least in theory, these members are also advocating their rights and interests. The WTO now also includes services and trade in intellectual property rights (IPRs) in addition to the original agenda of trade in goods. However, the major breakthrough is the strong implementing authority reinforced by a separate and independent secretariat that is armed with a dispute settlement mechanism.

The dispute settlements, however, are on the basis of merit, or rather, on the basis of agreements, understandings and decisions made by the ministerial conferences. This increases the importance of the interpretations of the agreements, including the issues of implementations.

More importantly, in the ministerial conferences parties meet with conflicting interests and initiate negotiations and

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compromises. These compromises then take the form of declarations and agreements, albeit only in principle. The real negotiation, arm-twisting, and bargaining in terms of defining particularities of the declarations, or in other words, the details of implementation, are subsequently worked out. Since the details of commitments that have to be implemented in the foreseeable future are documented in such negotiations, different lobby groups try their best to hold on to their interests. This generally ignites a lot of media interests and also seeks to represent the interests of the common people.

Implementation issues are seen by the developing countries and the LDCs as an opportunity to re-balance the gains back to their favour. This has really picked up after the Seattle fiasco where the developing and the developed countries insisted that the developed countries fulfil their obligations made during the Uruguay Round (UR) in return for the opening up of their markets. Thus, implementation issues have become the latest buzzword of international trade negotiations. Nepal as an LDC can not afford to stay out of the discussion.

### Implementation issues explained

The question of implementation issue refers to the “lack of implementation, lack of any benefits to the developing countries as a result of the WTO and its annexed agreements and promises, and the asymmetries and inequities facing them”. It goes beyond the non-implementation of the obligations of the developed countries and the inequity posed by the WTO. It is certainly ‘the issue’ for an LDC like Nepal.

The gamut of implementation issues also includes the issues of clarification of the ambiguous texts of the agreements of the WTO to facilitate and expedite trade **with special emphasis on the interest of the developing and the least developed countries**. It also, at the least, should touch upon the issues of strengthening implementation capacity and facilitating effective participation of the developing countries and the LDCs in trade negotiations.

Thus, ‘implementation issues’ centre on:

- a. Non-implementation of the obligations (e.g. the UR Agreements) by the developed countries.
- b. Inability of the LDCs and some developing countries to implement multilateral agreements that are already in place and negotiate effectively to safeguard their interests.
- c. Vague words and ambiguous use of language in the WTO agreements and texts that encourage non-implementation of the obligations.

### *Non-implementation*

The non-implementation of obligations by the developed countries has been the agenda of foremost concern, threatening the livelihoods of the people in the South. The non-implementation issues range from export subsidies and farm subsidies to tariff reductions, removal of quotas and *ad hoc* imposition of anti-dumping duties. These issues had figured, though brushed aside, in the Singapore Ministerial Declaration (December 1996). They came up more prominently at the Geneva Meeting (May 1998) and were even made part of the work programme. In the build up to the Seattle Ministerial Conference, the developing countries prepared a detailed and concrete proposal, and even succeeded to put it in the ‘Mchumo Text’<sup>1</sup> for the Ministerial Decision. But, as always, apart from few cosmetic efforts like time extensions, the voice of the developing world was never heard.

An informal General Council (GC) meeting was called on 13 July 2001 in preparation for the Doha Ministerial, among others, to discuss the ‘Mchumo Text’. But again, in spite of the huge expectations of the developing countries, there was “continuous process of proposals being denuded of content”. There were 50 proposals in the paragraph 21 of the Mchumo Text, the submarine group (Argentina, Morocco, New Zealand, Norway, Switzerland and Thailand) reduced it to 20 and the GC’s Chair, Stuart Harbinson, further reduced it to 10.

### *Inability to implement*

The WTO is essentially a rules-based organisation. The developed countries overuse it, ostensibly in legitimate guises, while the

developing countries are unable to use the system at all. They have neither the technical nor the financial capacity to exercise their rights within the WTO mechanism. Equally, the developing countries do not possess the institutional, technical and financial capacities to implement the obligations of the WTO Agreements. In the Geneva Conference, for instance, developed countries had strongly expressed the opinion that "there is no point in asking developing countries to take on new commitments, when they still have difficulties in implementing existing commitments."

### *Vague phrases in WTO Agreements*

'Reasonable interval', 'to consider positively' and 'special regard' are few of the examples of ambiguous and vague phrases used in the WTO Agreements. These phrases are as complex as the negotiation itself, reflecting, to a certain extent, the lack of commitment on the part of the developed countries to implement the obligations arising out of the agreements and the ministerial decisions. This lack of clarity in legal interpretation allows the rich and powerful countries to interpret the agreements to suit their own national interests. The poor countries have no other alternative than to accept the interpretation of the developed countries.

This has been a common story, especially regarding the safeguards measures and the special and differential treatments (S&DTs), washing away all the hopes of developing and LDCs that had arisen out of the promises of the UR Agreement.

### **Doha Development Round – “Dissected”**

Para 13 of the Doha Ministerial Declaration, adopted on 14 November 2001, states that the member countries commit themselves to *“substantial improvements in market access, reductions of, with a view to phasing out, all forms of export subsidies, and substantial reduction in trade distorting domestic support...Special and Differential Treatment for developing countries shall be integral part of all elements of the negotiations...take note of the non-trade concerns...”*

Certainly, the Doha Ministerial Conference was meant to be an answer to the fiasco of the Seattle Conference. Here, it may be recalled that the Seattle Ministerial Conference could not even come up with a Ministerial Declaration due to wide spread protests both

within and outside the negotiating chambers against apathy towards the suffering of the developing countries and LDCs. At Doha, some breakthroughs were achieved on issues of concerns to developing world, albeit limited to 'in principle' expressions. Temporary exception to the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement in case of national emergency (the right to declare emergency was left to the individual countries) and effective integration of the S&DTs into core WTO agreements were the most significant symbolic gains.

There were three main texts agreed at the end of the fourth WTO Ministerial in Doha: **The Ministerial Declaration, the Decision on Implementation-Related Issues and Concerns, and the Declaration on TRIPS and Public Health.** Probably the most significant one, in the interests of the developing world, was the decision on Implementation-Related Issues and Concerns that provided a separate mandate for negotiations on the implementation of the present agreements, i.e. the agreements arising from the UR negotiations. The Implementation-Related Issues and Concerns were divided into a set of issues agreed at Doha, and a set of 'outstanding issues' (including many of the more important ones for developing countries), which will be negotiated as part of the single undertaking. *“Of 100 implementation issues raised in the lead-up to the Doha Ministerial Conference, more than 40 items under 12 headings were settled at or before the Doha conference, for immediate delivery; and the vast majority of the remaining items are immediately the subject of negotiations”.* These 12 issues are: GATT, agriculture, sanitary and phytosanitary (SPS) measures, textiles and clothing, technical barriers to trade (TBT), investment, anti-dumping, customs valuation (CV), rules of origin (ROO), subsidies, TRIPS, and cross-cutting issues.

Chief among the issues discussed at Doha was the section on textiles and clothing (Decision on implementation, Paragraph 4). Ever since the UR established a phasing out of textile quotas by the year 2005, developing countries had been complaining that the importing countries have been dragging their feet and twisting the rules to delay implementation until the last possible minute. But after fierce resistance from the United States (US) to any speeding up of liberalisation, Paragraph 4 merely 'requests the Council for Trade in Goods to examine' a range of proposals suggested by developing countries and report back by July 2002.

The Doha Declaration also agreed to extend the timeframe for developing countries to comply with new sanitary measures, and to consider requests for other extensions in the areas of Trade Related Investment Measures (TRIMs) and CV agreements. However, most of the significant implementation issues were not settled in Doha but were left for further negotiations to be included as part of the single undertaking. This meant that the outstanding implementation concerns would have to be addressed by developed countries, if they were to reach a successful conclusion. However, developing countries stated strongly that implementation issues should be settled before Doha. Thus, many feel cheated in that they are being 'made to pay twice' - first by signing a bad agreement in the form of the UR, then being able to rectify only some of the inequities in that round, that also by **negotiating further concessions** in other areas through a single undertaking.

The post-Doha negotiations have been proceeding, as usual, at a rate much slower than anticipated. The worldwide recession, epidemic of Severe Acute Respiratory Syndrome (SARS) and the growing Cross-Atlantic political differences have not helped either. As a result, the deadlines for several stages of negotiations have been missed, and some have been missed repeatedly.

Developed countries complain that developing countries have been especially slow in submitting their proposal documents for negotiations. Developing countries, on the other hand, cite lack of resources (technical and financial) as the reason for this. In addition, because of the single undertaking effort, countries face an overwhelmingly large agenda. For many LDCs having only one or two WTO specialists, it is simply impossible to meet all these deadlines in a well-informed manner.

In other areas where negotiations have already begun, agreements simply have not been reached. The most prominent case is the issue of S&DT. S&DT was an important opening during the Doha Conference, because no obligations were explicitly detailed regarding its implementation in previous WTO Agreements. As a result, the Doha Declaration mandated the Committee on Trade and Development (CTD) to review all S&DT provisions, and decide which should be mandatory.

Numerous deadlines for the negotiations on this topic have already passed, with developed and developing countries being

unable to agree on what constitutes fair conditions and concessions under S&DT.

Other deadlines missed include:

- a. 31 March 2003 deadline for agreement on modalities pertaining to negotiations on agriculture
- b. 31 December 2002 deadline to find a solution for LDCs who cannot use the compulsory licensing provision of the TRIPS Agreement due to inability to manufacture pharmaceuticals
- c. 31 May 2003 deadline for agreement on modalities pertaining to market access for non-agricultural goods

Almost all negotiations have a mandated deadline of 1 January 2005 for completion in accordance with the WTO's "single undertaking" agenda. The purpose of this agenda is to ensure that all issues are inextricably linked and form a coherent plan under the WTO's broad mission of liberalising trade to promote development. But there are reasons to believe that the Doha Development Agenda may not be fulfilled.

Considering the significance of the agriculture and textile and clothing, the main exports of South Asian countries, and also in view of their importance for Nepal, the paper discusses below the implementation of two agreements - Agreement on Agriculture (AoA) and Agreement on Textile and Clothing (ATC).

### *Agreement on Agriculture*

Agreements pertaining to agriculture have always enjoyed a special status right from the days of GATT 1947. It was included only under a special condition that the USA, under the Article 22 of its Agriculture Adjustment Act (AAA), would be allowed to impose import quota and other quantitative restrictions (QRs) to protect its domestic market. Flexibility was also allowed in the use of domestic and export subsidies.

The AoA marked a significant departure from this trend. It was an attempt to impose discipline on global agricultural trade by removing trade distortions resulting from unrestricted use of production and export subsidies and import barriers, both tariff and non-tariff.

**Table 4.1: Reduction Commitments for Developed and Developing Countries**

	Developed countries Implementation Period: 1995-2000	Developing countries Implementation Period: 1995- 2004
Tariffs		
<b>Average cut for all agricultural products</b>	<b>-36%</b>	<b>-15%</b>
<b>Minimum cut per product</b>	<b>-24%</b>	<b>-10%</b>
Domestic support		
<b>Total AMS cuts for sector (base period: 1986-88)</b>	<b>-20%</b>	<b>-13%</b>
Export Subsidies		
<b>Value of subsidies</b>	<b>-36%</b>	<b>-21%</b>
<b>Subsidised quantities (base period: 1986-90)</b>	<b>-24%</b>	<b>-14%</b>

Table 4.1 shows the details of the commitments both in terms of degree, spread and timeframe allowed, for the developed and the developing countries with regard to the AoA. It should be noted that the LDCs are exempted from these reduction commitments.

**Table 4.3: Total Support Estimate of Select OECD Countries (million US\$)**

Country	1986-88	1999-2001	Change from 1986-88 level (+ Increase, - Decrease)	
			Absolute Change	Percentage Change
Australia	1,674	1,376	-298	-17.82
Canada	7,161	5,231	-1,930	-26.95
<b>European Union</b>	<b>109,654</b>	<b>112,628</b>	<b>2,974</b>	<b>2.71</b>
Iceland	257	156	-101	-39.43
<b>Japan</b>	<b>58,165</b>	<b>64,775</b>	<b>6,610</b>	<b>11.36</b>
Korea	14,204	21,489	7,285	51.29
Mexico	1,287	6,999	5,712	443.93
New Zealand	580	162	-418	-72.02
Norway	2,977	2,489	-488	-16.39
Switzerland	6,151	5,047	-1,104	-17.95
Turkey	3,092	9,649	6,558	212.11
<b>United States</b>	<b>68,540</b>	<b>95,455</b>	<b>26,915</b>	<b>39.27</b>
OECD	302,078	329,564	27,486	9.10

Source: OECD website ([www.oecd.org](http://www.oecd.org))

**Table 4.2: Export Subsidies in OECD Countries, 1995-98 (million US \$)**

	1995	1996	1997	1998
Australia	0	0	0	1
Canada	37	4	0	0
Czech Republic	40	42	40	42
<b>European Union</b>	<b>6386</b>	<b>7064</b>	<b>4943</b>	<b>5968</b>
Hungary	41	18	10	12
Norway	83	78	102	77
Poland	0	16	9	14
Switzerland	447	369	296	292
Turkey	30	17	39	29
<b>United States</b>	<b>26</b>	<b>121</b>	<b>112</b>	<b>147</b>

Source: OECD document COM/AGR/TD/WP/(2000): 89

**Table 4.4: UR Tariff Bindings and Actual Tariff Equivalents of Agricultural Protection, 1986-2000**

Product	Actual Tariff Equivalent (percent) 1989-1993	Tariff Binding (percent) Final Period 2000	Proportional Reduction by 2000	Dirty Tariffification a* 1986-1988	Binding 2000/Actual Tariff Equivalent 1989-1993
<b>European Union</b>					
Wheat	68	109	36	1.60	1.60
Coarse Grains	89	121	36	1.42	1.36
Rice	103	231	36	2.36	2.24
Beef and Veal	97	87	10	1.00	0.90
Other Meat	27	34	36	1.32	1.26
Dairy Products	147	205	29	1.63	1.39
Sugar	144	279	6	1.27	1.94
<b>All Agriculture</b>					
<b>Un-weighted Average</b>	<b>45</b>	<b>73</b>		<b>1.61</b>	<b>1.63</b>
<b>Standard Deviation</b>	<b>57</b>	<b>96</b>		<b>1.58</b>	<b>1.68</b>
<b>United States</b>					
Wheat	20	4	36	0.30	0.20
Coarse Grains	2	2	74	2.00	1.00
Rice	2	3	36	5.00	1.50
Beef and Veal	2	26	15	10.33	13.00
Other Meat	1	3	36	0.67	3.00
Dairy Products	46	93	15	1.09	2.02
Sugar	67	91	15	1.50	1.36
<b>All Agriculture</b>					
<b>Unweighted Average</b>	<b>13</b>	<b>23</b>		<b>1.44</b>	<b>1.77</b>
<b>Standard Deviation</b>	<b>22</b>	<b>35</b>		<b>1.20</b>	<b>1.59</b>

Source: Panagariya, Arvind (1999), 'The Millennium Round and Developing Countries: Negotiating Strategies and Areas of Benefits', paper presented at the Conference on Developing Countries and the New Multilateral Round of Trade Negotiations held at Harvard University, November 5-6.

Note: a\* Announced base tariff rate as a ratio of actual tariff equivalent in the base period.

Tables 4.2, 4.3 and 4.4 make an attempt to plot the commitments in terms of the performance of the major economies.

Clearly, the increase instead of decrease of the domestic support by the US, the European Union (EU) and Japan, and the steep hike in the export subsidies by the US are a slap on the face of the 'good will' of the Doha Round. Equally, it has to be noted that the recent bill on US farm subsidies (2002) signed by President Bush is a clear violation of the commitment to reduce any trade-distorting measures.

Measuring subsidies as a percentage of farmers' total income, the EU stood at 35 percent, while for the US they have climbed to 21 percent from 14 percent in the mid-1990s. Rich countries gave about US\$ 57 bn in development aid in 2001 but paid more than US\$ 350 bn to their own farmers in subsidies. Such subsidies displace Third World produce from the global market. World Bank figures suggest that giving them more access to rich markets would result in developing countries gaining about US\$ 150bn a year.

### *Agreement on Textile and Clothing*

Up to the end of the UR, textile and clothing quotas were negotiated bilaterally and governed by the rules of the Multifibre Arrangement (MFA).

On 1 January 1995, it was replaced by ATC, which sets out a transitional process for the ultimate removal of these quotas. Under this agreement, the entire quotas will be integrated in four stages by the year 2004. The ratio of integration has been fixed at 16 percent, 17 percent and 18 percent and 49 percent respectively. But an analysis by ICTB shows that only 21 percent of the US imports by volume that are under restraint have been freed so far. The share integrated by the EU is only 19.5%. The US has removed only 56 of 757 quotas, the EU 164 of 219 and Canada 54 of 295. Norway has removed all of its 54 quotas.

While it is correct to say that for the US, Canada and the EU just over 50 percent of the volume of imports of textiles and clothing have been integrated into the WTO system (i.e., not restrained by quota), the ICTB analysis shows that most of the products integrated have been low-value products (such as yarn and fabric, and very little has been clothing which is a higher value product). It appears the US, the EU and Canada have also reported as integrated those product lines, which had not previously been restrained by quotas. A Heritage Foundation, a Washington-based

think tank on economic issues report cites tents and parachutes as typical products. **Worst of all, the Heritage predicts that, on the basis of action to date, by 2005 (when liberalisation is supposed to be completed), over 90 percent of clothing products imported into the US will still be under quota.**

Anti-dumping actions, and other customs and administrative formalities have also prospered in recent years. There is also the possibility for Non tariff Barriers (NTBs) emerging in the years after 2005 from the increased tendency to single out textiles and clothing for the purposes of environmental and social standards or other requirements.

### Nepal's agenda at the Cancun Ministerial

As per the present situation, it is widely hoped that Nepal would receive the WTO membership by the **Cancun Ministerial Conference** in September 2003. During her negotiations, before and after the membership of the WTO, Nepal should firmly put up her case on the issues of implementation by the developed countries and should demand that the issues be implemented effectively and that the provision-specific S&DT proposals be effective, timely operated, and further strengthened.

Implementation issues are crucial for LDCs like Nepal. Any benefits of accession depend upon a sincere implementation of the obligations by the developed countries. This is why it is all the more important to realise the Doha Round negotiations which, among others, have provided the framework for making the S&DT arrangements precise, effective and operational.

While non-implementation of the AoA would have negative impacts on market access and farm prices worldwide, non-implementation or continuation of the quota system for textile products could prove a blessing in disguise for a country like Nepal, where productivity has not risen to levels matching that of China or even India.

Nepal should join hands with other developing countries and demand for a genuine developmental round. Some of the important issues that Nepal should forcefully raise are:

- a. Developing countries need to be provided with technical support and extended deadlines to meet UR obligations.

- b. Developed countries have to honour and fully implement the UR Agreements.
- c. Market access for all exports from developing countries should be encouraged with zero tariffs.
- d. Rules of origin need to be simplified and enhanced for LDCs.
- e. Special and specific provisions should be provided for LDCs in terms of preferences.
- f. Anti-dumping rules should be revisited and revised.

However, Nepal should realise that even with her membership in the WTO, she would not be able to command the clout that can help her turn major decisions in her favour. Nepal also has to realise that the existing platforms, i.e. South Asian Association for Regional Cooperation (SAARC) and the LDCs are not coherent enough to expect any major favourable decisions. So, it will be in the best interest of Nepal to engage in bilateral and multilateral negotiations to come up with specific and special arrangements for landlocked LDCs.

On the lines of specific and special arrangements, Nepal should strongly put up her case as a landlocked LDC with per capita income of around US\$ 240 and a nation with a very narrow export base. The central themes of her argument at Cancun can be:

- a. Nepal should strongly argue that the numerous **deadlines** especially on TRIPS and those related to AoA should be **applicable only from the date of accession** of the individual countries not from the date of the formation of the WTO i.e., 1 January 1995.
- b. Garment products are our biggest export occupying nearly 70 percent of our exports. This export is even more important in light of the fact that it is mostly a labour intensive industry in Nepal, employing mostly the urban and the sub-urban poor. So it is very important on the part of Nepal to request **a special exemption in terms of the extension of the deadlines for the removal of quotas.**
- c. Nepal should also argue that action for compliance of WTO provisions, both legal and administrative, demands huge

financial commitments. Diversion of the already scarce government resources would only mean that there would be fewer funds for extremely crucial poverty alleviation activities. Thus, in light of the situation, we should demand for a **special preference on Technical Assistance (TA) from the existing developed WTO member nations.**

- d. Production of competitive products is not always enough. The small and medium entrepreneurs also require access to the markets of the developed countries to really benefit from Nepal's WTO membership. So Nepal should request **relaxed provisions for market access** from Japan and US in line with the existing everything but arms (EBA) provisions of the EU. The EU and other countries should also make their SPS and TBT standards realistic so that a country like Nepal has a real chance of exporting to these countries.

But, Nepal should realise that first she should put her house in order to gain credible benefits from her accession to the WTO. The government should join hands with the private sector, the NGOs and other stakeholders to raise awareness among the different actors of the economy. The government should immediately take steps to tackle corruption and inefficiency in its administration and the private sector should also acknowledge that the era of protection is long over. Competitiveness alone will be the basis of survival.

In addition to the suggestions mentioned above, investment in human resource will ensure her ability to 'implement' the WTO commitments. This forms a strong basis for her to gain from the membership. Otherwise, it will be yet another "out of the frying pan and into the fire" dilemma.

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## Endnote

- 1 Named after the then Chair of the General Council Amb. Ali Mchumo of Tanzania.

## TRIPS: Implications for Nepal's IPR Regime

Dr. Surendra Bhandari\*

### What are intellectual property rights?

Intellectual property law is that branch of law, which protects some of the finer manifestations of human achievements.<sup>1</sup> The right or monopoly granted to the creator or inventor is a reward as an inducement to bring forth new knowledge.<sup>2</sup> Every novel idea, realisation or development of which can become useful to society belongs primarily to [the person] who conceived, it would be a violation of the rights of [humanity] in their very essence if industrial inventions were not regarded as the property of their creator.<sup>3</sup> The whole concept behind the intellectual property rights (IPRs) and law is to enhance innovation and promote socio-economic and human development.

The protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.<sup>4</sup>

Furthermore, the intellectual property law is often justified on the basis that it stimulates investment of time and money in the creation of new works.<sup>5</sup> The works, creation and invention stimulate and secure the path of the development of human civilisation. The intellectual property system is based on reward theory. According to the theory, the state offers reward in the form of a time-honoured monopoly to induce inventors to invent. The underlying instrumentalist premise is that, without the inducement of the monopoly award, an inadequate number of inventions would be created, to the detriment of society.<sup>6</sup>

IPRs are those rights given to a person over the creations of minds. They usually give the creator an exclusive right over the use

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of his/her creation for a certain period of time.<sup>7</sup> Intellectual property, very broadly, means the legal rights, which result from intellectual activity in the industrial, scientific, literary and artistic fields. Countries have laws to protect intellectual property for two main reasons.<sup>8</sup> One is to give statutory expression to the moral and economic rights of creators in their creations and such rights of the public in access to those creations. The second is to promote, as a deliberate act of government policy, creativity and the dissemination and application of its results and to encourage fair-trading, which would contribute to economic and social development.

Generally speaking, intellectual property law aims at safeguarding creators and other producers of intellectual goods and services by granting them certain time-limited rights to control the use made of those productions. Those rights do not apply to the physical object in which the creation may be embodied but instead to the intellectual creation as such, intellectual property is traditionally divided into two branches, "industrial property" and "copyright."

Intellectual property, since the Paris Convention, 1883<sup>9</sup> has been divided into two parts - one, industrial property as recognised under the Paris Convention and the other, non-industrial intellectual property recognised under Berne Convention, 1886.<sup>10</sup> The distinction between industrial and non-industrial intellectual property rights dominated for a long time till the inception of World Intellectual Property Organisation (WIPO)<sup>11</sup> in 1967 and especially of the finalisation of Uruguay Round in 1993.<sup>12</sup>

### Classification of IPRs

The Uruguay Round concluded major trade agreements, including Trade Related Aspects of Intellectual Property Rights (TRIPS), in 1994<sup>13</sup> and established the World Trade Organisation (WTO).<sup>14</sup> TRIPS has defined all types of intellectual property rights as trade related intellectual property rights, which are:

- Copyright and related rights,
- Trademarks,
- Geographical Indications,
- Designs,

- Patent,
- Layout-Designs (Topographies) of Integrated Circuits:
- Undisclosed Information, and
- Control of Anti-Competitive Practices in Contractual Licences.

These eight types of intellectual property rights classified by TRIPS are briefly dealt here:

1. **Copyright and Related Rights:** The rights of authors of literary and artistic works (such as books and other writings, musical compositions, paintings, sculptures, computer programmes and films) are protected by copyright, for a minimum period of 50 years after the death of the author. Copyright also protects neighbouring rights (performers, phonograms and broadcasting). The rights of performers (actors, singers and musicians), producers of phonograms (sound recordings) and broadcasting organisations.

Subject of Copyright	Exclusion from Copyright
<ul style="list-style-type: none"> <li>• Mode of expression of ideas</li> <li>• Copyright subsists only in original works</li> <li>• Originality of the works is tested on the basis of judgement, skill and labour or capital</li> </ul>	<ul style="list-style-type: none"> <li>• Ideas, procedures, methods of operation and mathematical concepts cannot be subject of copyright</li> <li>• Copyright does not subsist on reproduction of another's original work</li> <li>• No copyright is granted to live events, despite judgement, skill and labour or capital</li> </ul>

2. **Trademarks:** Trademarks are a diverse and familiar feature in both industrial and commercial markets. Manufactures and traders to identify their goods and distinguish them from goods made or sold by others have long used Trademarks. They are a very valuable form of intellectual property because they associate with quality and consumer's expectations in a product or service.

Patents, designs and copyright are protected only for a limited period. On the other hand, in general, a registered Trade Mark can be protected in perpetuity subject only to the conditions that it is used and renewed periodically and the registered proprietor takes prompt action against infringers.

**Some of the distinctive characteristics of Trademarks<sup>15</sup>**

- It should be easy to pronounce and remember, if the mark is a word,
- Device mark should be capable of being described by a single word,
- It must be spelt correctly and written legibly,
- It must not be descriptive but suggestive of the quality of the goods,
- It should be short,
- It should appeal to the eyes as well as to the ears,
- It should satisfy the requirements of registration,
- It should not belong to the class of marks that are prohibited, and
- It can be renewed perpetually provided it is in use.

3. **Geographical Indications:** Geographical indications are those qualities, reputations or other characteristics of goods that are attributed to specific geographical location. TRIPS allows Members to prevent trademarks that use geographical indications through legislation.<sup>16</sup> However, it does not allow Members to assign protection of geographical indications through registration except for wines and spirits. Further, TRIPS provides legitimacy and requires Members to recognise the trademarks identical with or similar to geographical indications assigned before the date of application of the TRIPS Agreement.<sup>17</sup>

What next to be done on Geographical Indications in TRIPS?
<ul style="list-style-type: none"> <li>Members should be provided not only with negative authority to prevent use of geographical indications as marks but should also be provided with positive authority to protect geographical indications either as trademarks or goodwills of the goods or services to be governed by domestic laws,</li> <li>The scope of positive protection assigned to wines and spirits should not be limited rather should be expanded subject to national legislation.</li> </ul>

4. **Industrial Designs:** A design is aspects of or features applied to an article or product but it is not the article or product itself. Design is a plan or a scheme in written or drawn showing how an item or products or articles are arranged in their form or appearance. Customers choose goods with different judgements and among them one of the important aspects is the appearance of the goods that catches eyes, minds or attracts customers. For protection of a design, it needs to be new or original and need to be significantly differing from known designs or combinations of known design features. However, protection cannot be extended to designs that are dictated essentially by technical or functional considerations.<sup>18</sup>

Some characteristics of Designs
<ul style="list-style-type: none"> <li>Design is a different makeup or appearance of similar products.</li> <li>Designs can be protected either through Design Law or through Copyright Law.</li> <li>Essentially technical and functional combinations cannot be protected as design.</li> <li>The term of protection for design is to be granted at least for 10 years.</li> </ul>

5. **Patents:** A patent is a monopoly right granted to a person who has invented a new and useful article or an improvement of an existing article or new process of making an article. It consists of an exclusive right to manufacture the new article invented or manufacture an article according to the invented process for a period of 20 years. After the expiry of the terms of protection, anybody can make use of the invention.

What can be Patented	What cannot be Patented
<p>Any invention – product or process including micro-organism, non-biological process and micro-biological process in fields of technology provided that it is:</p> <ul style="list-style-type: none"> <li>New,</li> <li>Involves Inventive Step, and</li> <li>Capable of Commercial Application</li> </ul> <p>Patent can be protected for 20 years.</p>	<ul style="list-style-type: none"> <li>A patent is not granted for an idea or principle as such, but for some article or the process of making some article applying the idea.</li> <li>Patent may be excluded on the grounds:                     <ul style="list-style-type: none"> <li><i>Ordre public</i> or morality, including protect human, animal or plant life or health,</li> <li>Avoid serious prejudice to environment</li> <li>Diagnostic, therapeutic and surgical methods for the treatment of human &amp; animals</li> <li>Plants, animals and biological processes</li> </ul> </li> </ul>

6. **Layout-designs of Integrated Circuits:** 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.<sup>19</sup>

Member countries are required to protect the layout-designs of integrated circuits under Article 35 of TRIPS in accordance with the provisions of the Treaty on Intellectual Property in Respect of Integrated Circuits, negotiated under the auspices of WIPO in 1989. The term of protection is for 10 years.

7. **Protection of Undisclosed Information:** The TRIPS Agreement requires protection of undisclosed information as trade secrets or know-how. According to Article 39.2, the protection must apply to information that is secret and that has commercial value because it is secret and that has been subject to reasonable steps to keep it secret. The Agreement does not require undisclosed information to be treated as a form of property, but it does require that a person lawfully in control of such information must have the possibility of preventing it from being disclosed to, acquired by, or used by others without his or her consent in a manner contrary to honest commercial practices. "Manner contrary to honest commercial practices" includes breach of contract, breach of confidence and inducement to breach, as well as the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.<sup>20</sup>

8. **Control of Anti-competitive Practices in Contractual Licences:** Licensing practices or conditions pertaining to intellectual property rights, which restrain competition, may have adverse effects on trade and may impede the transfer and dissemination of technology. Therefore, TRIPS requires Member countries to adopt, consistently with the 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. The Agreement provides for a mechanism whereby a country seeking to take action against such practices involving the companies of another Member country can enter into consultations with that other Member and exchange publicly available non-confidential information of relevance to the matter in question and of other information available to that Member, subject to domestic law and to the conclusion of

mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member. Similarly, a country whose companies are subject to such action in another country can enter into consultations with that Member.<sup>21</sup>

## Genesis of TRIPS

There was no intellectual property rights agreement under General Agreement on Tariffs and Trade (GATT). It had very limited provisions on intellectual property rights.<sup>22</sup> As GATT had no substantive discipline with respect to protection of intellectual property (IP) and therefore the contracting parties brought a number of IP related disputes under different headings, which mainly concerned trade in counterfeit goods.<sup>23</sup>

Ideas for developing an important and quite broad scope treaty on intellectual property were first suggested in the late 1970s and early 1980s. There was a great deal of opposition, particularly from developing countries as they felt that they had a lot to lose and very little to gain from such an endeavour.<sup>24</sup>

When Uruguay Round (1986-1993) started in 1986 in Punta del Este, Uruguay, American companies, especially computer software, microelectronics, entertainment, chemicals, pharmaceuticals and biotechnology industries were claiming that they were heavily suffering from infringements of intellectual property rights in absence of strong protection mechanism abroad.<sup>25</sup> In 1987 a survey carried out by US International Trade Commission (ITC) validated that owing to lack of IP protection abroad the US companies were losing US\$ 50 billion per year. This led US to take up the issues of IP protection within GATT framework in the Uruguay Round.<sup>26</sup>

The USA was, on the other hand, not happy with the progress made towards intellectual property rights protection within WIPO. It pointed out the failure of Conferences in 1980 – 1984 to revise the Paris Convention on the Protection of Industrial Property, and therefore preferred the GATT Forum for negotiating effective regime for the protection of IP. They pointed out that the GATT Forum provided for effective enforcement of agreements and for dispute settlement mechanisms, which were practically lacking in the WIPO-administered Conventions.<sup>27</sup>

When the GATT's Ministerial Conference convened in Punta del Este (Uruguay) on 15 – 20 September 1986, to discuss the mandate

of the next round of negotiations, the United States mounted the campaign to include IP, beyond the question of counterfeiting and piracy, among the issues for discussion under the Uruguay Round of Multilateral Trade Negotiations. The result was that, borrowing from the language used in another item on the proposed mandate: (Trade-related Economic Measures), the Trade Ministers at Punta del Este, coined the expression "Trade Related Aspects of Intellectual Property Rights (TRIPS)" and included it on the agenda of the Uruguay Round. The inclusion of TRIPS issues on the agenda of the Uruguay Round did not, however, mean that the developing countries had abandoned altogether, their reluctance to have intellectual property rights issues discussed under the GATT Forum. It appears from the subsequent developments that the inclusion of TRIPS on the agenda was a last-minute political compromise whose legal foundation was yet to be clarified. As observed elsewhere, the TRIPS item "featured almost as a footnote on a crowded agenda [of the Uruguay Round] and it was uncertain whether that contentious item would survive the end of the round."<sup>28</sup>

Intensive lobbying and discussions on the actual commencement of negotiations on TRIPS continued between 1986 until 1989. During the Ministerial Meeting held in Montreal in December 1988 to carry out the Mid-Term Review of the Uruguay Round, the Ministers reached an agreement on eleven of the fifteen subjects under negotiation according to the mandate. However, the Ministers failed to agree on the commencement of negotiations on four areas: agriculture, textile and clothing, safeguards, and the trade related aspects of intellectual property rights, including, trade related aspects in counterfeit goods. They then decided that the Trade Negotiations Committee (TNC) should meet in Geneva during the first week of April 1989 to continue discussions and agree upon the remaining areas and review the entire package.<sup>29</sup>

During the Uruguay Round negotiation the issue of governance of intellectual property rights by WTO, originally Multilateral Trade Organisation (MTO) under TRIPS Agreement was a controversial one. When GATT Trade Negotiation Committee (TNC) took decision on 8 April 1989 on "the applicability of the basic principles of the GATT and of relevant intellectual property agreements or conventions" differences between developed and developing countries had mounted. The main differences were

between the positions of developed countries and developing countries although there were significant differences within each group of countries.

There was, therefore, a delay of three years between the decision to include TRIPS in the Uruguay Round in 1986 and the actual agreement to take it up for discussion in 1989 by the Negotiation Group 11 of the Trade Negotiation Committee of the Multilateral Trade Negotiation.

One main bone of contention during the negotiation was about applicability, practical consequences and implications for the basic principles of GATT and other intellectual property rights conventions to subjects of TRIPS. Underlying these controversies was a fundamental disagreement over how much freedom the multilateral intellectual property rights system should leave to countries to shape their national IP system.<sup>30</sup>

The question of the applicability of GATT principles was also controversial. Developed countries wanted to adopt prescriptive approach, i. e. it lays down fairly rigorous standards by which Contracting Parties have to abide. Developing countries wanted to adopt permissive rather than prescriptive approach; it allows Contracting Parties to adopt IP measures or legislation provided that they are not inconsistent to GATT. However, GATT itself had not adopted prescriptive approach.<sup>31</sup>

The discussion on the TRIPS Agreement began with a number of legal texts prepared, first in March 1990 by the members of the European Communities.<sup>32</sup> The submission of a complete text of TRIPS Agreement by the European Community, which thereby abandoned its earlier doubt about bringing the negotiation on TRIPS under the GATT framework, triggered an important phase of the negotiations. This was followed by a series of similar drafts of complete texts of TRIPS Agreement, submitted in May 1990 by the United States,<sup>33</sup> Switzerland,<sup>34</sup> and Japan,<sup>35</sup> all of which "borrowed substantially from the Community's text." These proposals represented one approach to the negotiation on TRIPS, envisaging a single TRIPS Agreement encompassing all the areas of negotiations and dealing with all categories of intellectual property on which proposals are made. Under this approach, the TRIPS Agreement would be implemented as an integral part of the General Agreement that was intended to produce the World Trade Organisation.

It was also not until May 1990 that a group of twelve developing countries (Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania, and Uruguay), later joined by Pakistan and Zimbabwe, agreed to participate in the actual negotiations on the TRIPS Agreement by producing their own detailed proposal. "The proposals of the group of fourteen" were divided into two parts.<sup>36</sup>

As a basis for negotiations towards a TRIPS Agreement, the Chairman of the negotiating Group 11, using the four proposals mentioned above, produced a composite text in which he grouped related points and arranged alternative proposals on the same issues and conveniently identifying them, emphasising that the composite text itself did not seek to prejudice the question as to how the instrument would be implemented and thus left that question wide open. Successive revisions of the composite text occurred as a result of further negotiations leading to the revision of the text,<sup>37</sup> which was placed before the Ministerial meeting in Brussels, 3 – 7 December 1990. The Brussels meeting produced tangible results and intensive negotiations resumed during the last quarter of 1991 leading to the tabling of the Draft Final Act in December 1991. In fact, this Final Act contained close to the complete Agreement on TRIPS. Thus, the subsequent discussions did not yield many substantive provisions different from it, apart from the addition of provision on semi-conductor technology in Article 31 (c) and the introduction of paragraphs 2 and 3 of Article 64 on the settlement of disputes, which were added to the final version of the Agreement adopted at Marrakesh in 1994.

### TRIPS from Marrakesh to Doha

Many of the WTO Agreements including TRIPS set timetables for future work during Marrakesh meeting in 1994. The "built in agenda" includes new negotiation in the same areas and review and assessment of the situation at the specified times in others.<sup>38</sup>

Article 27.3 (b) of the TRIPS Agreement, which is one of the most contentious provisions in the TRIPS Agreement had to be reviewed in 1999 i. e. after four years from the date of entry into force of the WTO Agreement.<sup>39</sup> However, it has not been reviewed.

The First Ministerial Conference that was held from 9-13 December 1996 in Singapore reinstated that the time frame for

review process as prescribed in TRIPS provisions will be respected. The Ministerial Declaration stated that as part of the WTO Agreements and decisions the conference agreed to a number of provisions calling for future negotiations or reviews on Agriculture, Services and aspects of TRIPS. The Declaration also agreed to a process of analysis and exchange of information, where provided for in the conclusions and recommendations of the relevant WTO bodies, on the built-in agenda issues, to allow Members to better understand the issues involved and identify their interests before undertaking the agreed negotiations and reviews.<sup>40</sup>

The Second Ministerial Conference was held in Geneva from 18-20 May 1998 that commemorated 50<sup>th</sup> anniversary of GATT. It did not take any major decision on TRIPS, however recommended that the negotiations already mandated at Marrakesh and initiated at Singapore begin on schedule.<sup>41</sup>

The Third Ministerial Conference held in Seattle, USA from 30 November to 3 December 1999 failed to arrive even at a 'Declaration'. However, Seattle was supposed to review and negotiate on a number of issues including geographical indications, intellectual property protection for biotechnological inventions and plant varieties under Article 27.3 (b) and the possibility that one country could take legal action under the TRIPS Agreement even if the agreement has not specifically been violated ("non-violation" cases).<sup>42</sup>

The review of Article 27.3 (b) began in 1999 as required by the TRIPS Agreement. The topics raised include: the pros and cons of various types of protection (patents, UPOV, etc); how to handle moral and ethical issues (e.g. whether invented life forms should be eligible for protection); how to deal with traditional knowledge and the rights of the communities where genetic material originates; and whether there is a conflict between the TRIPS Agreement and the Convention on Biological Diversity (CBD). Countries have expressed a range of opinions on all these subjects, and some are seeking clarification on issues such as the meaning of the term "micro-organism" and the difference between "biological" and "microbiological" processes.<sup>43</sup>

The Fourth Ministerial Conference held in Doha from 9-14 November 2001 has made specific decisions on TRIPS and produced

a separate declaration on TRIPS and Public health. It declared following major principles on TRIPS:<sup>44</sup>

- a. Implementation and interpretation of TRIPS in a manner supportive of public health by promoting both access to existing medicines and research and development into new medicines,<sup>45</sup>
- b. To negotiate and establish of a multilateral system of notification and registration of geographical indications for wines and spirits by the Cancun Ministerial Conference,<sup>46</sup>
- c. Review of Article 27.3 (b) of TRIPS,<sup>47</sup>
- d. Review of Article 71.1 of TRIPS,<sup>48</sup> and
- e. Examine the relationship between CBD and TRIPS, especially focusing on protection of traditional knowledge and folklore.<sup>49</sup>

The Fourth Ministerial Conference took another most important decision that recognised the TRIPS to be a part of national and international action to address the problem of public health including HIV / AIDS and other epidemics in developing and least-developed countries. It provided right to member countries to interpret and implement the TRIPS in a manner supportive to protect public health in particular to promote access to medicines for all.<sup>50</sup>

The Declaration has recognised following four rights to the Member Countries. They are:<sup>51</sup>

- a. In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.
- b. Each member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.
- c. Each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises,

including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.

- d. The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.

Further the declaration recognised the problems of Members that have insufficient or no manufacturing capacities of pharmaceuticals and instruct the TRIPS Council to find an expeditious solution to this problem by December 2002,<sup>52</sup> however the TRIPS Council could not develop such mechanism by December 2002.<sup>53</sup>

Another important decision that the least-developed country Members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 & 7 of Part II of TRIPS Agreement until 1 January 2016 and may seek another extension of transition period.<sup>54</sup>

Further, it was also decided that the developed country Members provide incentives to their enterprises and institutions to promote and encourage technology transfer to least-developed country Members pursuant to Article 66.2 of the TRIPS.<sup>55</sup> In this regard, the TRIPS Council has decided that the developed country Members shall submit annual report on action taken by them in this regard and detailed reports in every third year. TRIPS Council will review the reports.<sup>56</sup>

### **Nepal's accession to the WTO and negotiation on TRIPS**

Nepal had first applied for GATT Membership in May 1989 and a Working Party was established on 21-22 June 1989. Nepal had also submitted a memorandum on 26 February 1990.<sup>57</sup> Because of the political changes in Nepal the new government did not follow up the Working Party and also did not participate in the Uruguay Round negotiation. When WTO came into force on 1<sup>st</sup> January 1995, Nepal again applied to the WTO for Membership in December 1995.<sup>58</sup>

Nepal submitted a Memorandum on 10 August 1998 and also submitted replies of questions on 8 June 1999. The Memorandum

has explained altogether 364 questions. Out of 364 questions, 114 questions were related to intellectual property rights regime in Nepal.

The Working Party on the accession of Nepal was established on 21 June 1999. The first meeting of the Working Party held on 22 May 2000 asked for additional documents. Nepal submitted additional questions and replies on 15 October 2001 and a legislative action plan on 21 May 2002. The second meeting of the Working Party was held on 12 September 2002. In May 2003, informal consultations were held, and market access negotiations in goods and services are ongoing.

Documents submitted by Nepal to the Working Party are circulated to interested WTO Member Countries for their study, responses and participation in negotiations. However, all these documents are labelled as "restricted documents" and interested Nepalese citizens have been deprived of the opportunity to read, provide inputs and participate in decision-making process on such a serious national issue.

## TRIPS and CBD

Nepal is a contracting party to the Convention on Biological Diversity (CBD).<sup>59</sup> Nepal shares only 0.1 percent of the global land mass but in terms of biodiversity, it is one of the richest countries in the world. For example, it harbours 2.2 percent of the flowering plant species, 8.5 percent of birds, 2.2 percent of freshwater fishers of the world, 1.4 percent of reptiles and amphibians, 4.2 percent of mammals and 4.2 percent of butterflies.<sup>60</sup> Most of these species are globally endangered, and almost 500 of them are in imminent danger of local extinction.<sup>61</sup>

Nepal is well known for its greenery. The forests biodiversity deserves for international importance both in view of the number of globally threatened wildlife and floral elements as well as the diversity of ecosystems represented within these areas. A total of 118 ecosystems, 75 vegetation and 35 forests types have been identified.<sup>62</sup> Nepal's community forestry practice is one of the best examples of collaborative management of natural resources.<sup>63</sup>

Nepal is equally rich in agro-biodiversity. Among others, 4952 of cereals, 2685 of grain legumes, 427 of oilseeds, 299 of vegetables, 7 industrial crops and 12 spices of accession are derived from centres

of diversity, centres of cultivation and breeding programmes in Nepal.<sup>64</sup> Nepal has vast reservoir of agro-genetic resources in the eyes of the world. There are 223 collections of cash crop germplasm, 592 oilseed germplasm, 1156 germplasm of landraces of grain legumes, 869 accession of finger millet, 102 edible mushroom and 400 species of agro-horticultural crops.<sup>65</sup>

The biodiversity, known in Nepal in terms of its species diversity, ecosystem diversity and genetic diversity is smaller than the unknown aspects. The treasure of traditional knowledge associated with the natural resources is one of the very significant benchmarks of the affluence of biodiversity in Nepal. In this context, immense opportunities for access and use of genetic resources for equitable sharing of benefits are recognised as one of the significant possibilities to improve the socio-economic conditions and ecosystem in Nepal.<sup>66</sup>

The above mentioned facts indicate that biodiversity is a comparative advantage of Nepal. Therefore, the possible benefit from this has a very potential and conflicting linkage with TRIPS, especially Article 27.3 (b). The ill-assorted relationship between CBD Articles 8 (g), 8 (j) and Article 15 and TRIPS Article 27.3 (b) has been widely apprehended and that has been recognised by WTO Doha Ministerial Conference also.

The WTO Trade and Environment Committee has also recognised the potential relationship between CBD and TRIPS, especially TRIPS Article 27.3 (b) and Articles 8(j), 10(c), 7, 12, 13, 14, 17 and 18.<sup>67</sup>

The apprehension is on following areas:

- i. Life forms patent and farmers' deprivation,
- ii. Undisclosed access and use of genetic resources to the detriment of equitable benefit sharing,
- iii. Monopoly over traditional knowledge,
- iv. State of neglect to communities' rights of prior informed consent, and
- v. Risk associated with the use and release of GMO / LMO.

TRIPS Council has not yet come to the conclusion about developing mechanism that would ensure consistency between CBD and TRIPS. The Council is receiving communications and responses

from different countries on the issue of TRIPS and CBD. In this context, the EC has submitted a comprehensive communication<sup>68</sup> that has dealt with a number of issues covered by paragraph 19 of the Doha Ministerial Declaration. The communication has covered the review of Article 27.3(b), the relationship between the TRIPS Agreement and the CBD, and the protection of traditional knowledge and folklore. It also contained several proposals on disclosure of genetic resources used in an invention, plant variety rights, traditional knowledge and farmers' exemptions.<sup>69</sup>

However, the US has communicated a different view. It has claimed that TRIPS and CBD are mutually supportive. It has urged those Members seeking to regulate access to their genetic resources to carefully consider implementing an access regime based on a contractual system. Such a system could be built upon existing contractual law and could be implemented immediately. The system could even be associated with Members' visa systems in order that foreign nationals seeking to collect such materials respect domestic law. The domestic law could therefore be used to provide access and benefit sharing with citizens and residents as well as foreign nationals.<sup>70</sup>

On the other hand, India supports the assertion that TRIPS and CBD should not undermine each other's objectives and that the two agreements should be implemented in a mutually supportive manner. India supports the EC in their submission that Article 29 of the TRIPS Agreement does not prevent Members from requiring the patent applicant to disclose the source of origin or to provide evidence that access and benefit sharing rules have been respected, as long as such requirements do not constitute a patentability criterion or invoke the validity of the patent. The EC acknowledges that it would be important to have uniform requirements on disclosure globally and that the legal consequences of not respecting these requirements should lie outside the ambit of patent law. In other words, the EC believes that patent law should not be used to sanction the non-respect of the domestic access and benefit sharing requirements through rejection of patent application or the invalidation of patent. However, according to the Indian view, leaving the consequences of non-disclosure outside the realm of patent law would nullify the requirements themselves and that there should, therefore, be provisions in the patent law to enforce

this obligation in order not to reduce the requirement for disclosure of the source of origin to a mere formality.<sup>71</sup>

The question of harmonisation of CBD and TRIPS is further aggravated as the USA is not Party to the CBD and continues to espouse the doctrine of "common heritage of humankind" of the natural resources. Yet, the debate has been resolved through development of different international mechanisms that have recognised states' permanent sovereignty over natural resources and allow states to determine access process through domestic laws.

There are two fundamental concepts relating to the regulation of natural resources. One is common heritage of humankind and another is sovereignty of states over their natural resources. There are certain global common areas beyond national jurisdiction such as the high seas,<sup>72</sup> Antarctica, and outer space<sup>73</sup> that require international cooperation and have led to the advent of a new concept - the common heritage of humankind.<sup>74</sup>

The North, which is rich in technology and poor in biodiversity tried to expand the doctrine of the "common heritage of humankind" over the natural resources that would allow them to have free access, use and commercial utilisation of biological resources of the South. However, the South resisted all such attempts and demanded recognition of state sovereignty over their natural resources. The United Nations took the issue seriously and resolved a Declaration on Permanent Sovereignty over natural resources.<sup>75</sup> Similarly, full sovereignty over all natural wealth and resources is recognised as inalienable right of states as an inherent part of the right to development by the United Nations.<sup>76</sup>

National sovereignty over natural resources has been reaffirmed in many international agreements, declarations and resolutions. For example, the United Nations Education, Scientific and Cultural Organisation (UNESCO) Convention for the Protection of the World Cultural and Natural Heritage, 1972 while obliging contracting States to cooperate in protecting certain cultural and natural heritage sites, emphasises full respect for the sovereignty of States on whose territory the sites are located.<sup>77</sup>

States have in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that

activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of the national jurisdiction.<sup>78</sup>

The Convention on Biological Diversity 1992 is the culmination of the international efforts regarding states sovereignty over their natural resources. The CBD reaffirms states sovereign right over their biological resources.<sup>79</sup> It recognises the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.<sup>80</sup>

Article 3 of the CBD clearly stipulates the sovereign rights of states over their natural resources including exploit them pursuant to their own environmental laws and policies. However, like to the principle 2 of the Rio Declaration and principle 21 of the Stockholm Declaration it obliges the states not to cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.<sup>81</sup> The jurisdiction of the states over their natural resources is extended beyond the limit of national jurisdiction in case of processes and activities.<sup>82</sup>

FAO International Undertaking, 1983 had reflected the then widely accepted understanding that plant genetic resources were heritage of humankind and consequently should be available without restriction.<sup>83</sup> In 1993, the FAO conference adopted resolution to start negotiations for the revision of the Undertaking in harmony with CBD.<sup>84</sup> FAO adopted Leipzig Declaration and Global Plan of Action in 1996 that recognised states' sovereign rights over their plant genetic resources for food and agriculture in harmony with CBD.<sup>85</sup> Finally, FAO has developed a binding International Treaty, which recognises states' sovereign rights over their natural resources in line with the CBD.<sup>86</sup>

CBD has defined genetic resources<sup>87</sup> and genetic materials<sup>88</sup> but has not defined 'access'. Article 15 of the CBD specifically provides for access to genetic resources. According to the Article, states have sovereign rights over their natural resources, and the authority to determine access to genetic resources subject to national legislation.<sup>89</sup> The Contracting Parties are required not to

prohibit but facilitate access to genetic resources for environmentally sound uses by other Contracting Parties.<sup>90</sup> Genetic resources can be provided either by the country of origin<sup>91</sup> or by the party who has acquired the genetic resources.<sup>92</sup>

Access, where granted, shall be on mutually agreed terms<sup>93</sup> and subject to prior informed consent.<sup>94</sup> Similarly, each Contracting Party is expected to endeavour to ensure full participation of the resource provider country on scientific research.<sup>95</sup> Further, each Contracting Party is required to take legislative, administrative and policy measures for fair and equitable sharing of benefits arising out of the access to genetic resources.<sup>96</sup>

From this discussion, the following features of access regime are salient in the CBD:

- a. Access subject to national legislation,
- b. Facilitate access to Contracting Parties,
- c. Disclosure of the provider of genetic resources,
- d. Access based on mutually agreed terms (MAT),
- e. Prior informed consent including with local communities before access is granted, (PIC),
- f. Full participation in scientific research, and
- g. Fair and equitable sharing of benefits.

Patent is granted both for process and product.<sup>97</sup> Local and indigenous knowledge is the treasure of human civilisation as the depository of processes and products of uncountable number of medicines, plant varieties, food crops and animal husbandry. Traditional knowledge is not a subject matter of private property but property or right of all the local and indigenous people,<sup>98</sup> whereas, patent right is explicitly private form of property.<sup>99</sup> Only non-obvious i. e. novel things are subject matter of patent,<sup>100</sup> whereas, traditional knowledge is an obvious knowledge. Therefore, traditional knowledge both in the form of process and product cannot be patented but there is a danger of patenting traditional knowledge without any notice and recognition of the holder of traditional knowledge. This danger cannot be denied but it is also equally true that TRIPS does not legitimise patent over traditional knowledge. Such types of patents are illegitimate patents but if not challenged for revocation and the challenge is sustained such patents become valid and obtain legitimacy. Challenging for

revocation and preparation of legal battle requires high-level professional expertise and is very costly. These dangers arising from the TRIPS cannot be denied.

Unwise use of resources, both for commercial and non-commercial uses exacerbate the menace to the biodiversity. GATT article XX and other articles that mention trade measures should not be environment unfriendly aiming to balance the relationship between trade and environment.<sup>101</sup> In one hand, neither trade should encourage unsustainable use of resources nor on the other hand do states encourage trade at the cost of the environment or natural resources.<sup>102</sup> CBD recognises that states are free to regulate their natural resources under their domestic laws. However, Art. 15 of the CBD prescribes that Contracting Parties should not prohibit access to their genetic resources for other Contracting Parties, however the Contracting Parties are authorised to prohibit access if any such access is environment unfriendly.

CBD provides provisions, which favour least developed countries, especially resource provider countries in participation of research, technology transfer and financial cooperation. However, CBD also endorse the system of mutual agreement on transfer of technology and TRIPS article 7 also shows its concern that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligation. CBD Article 16 (2) recognises access and transfer of technology consistent with the adequate and effective protection of intellectual property rights. Also, Article 22 of the CBD recognises that the CBD shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. Similarly, when CBD article 15 provides for access to genetic resources and the Members are not authorised to rule out the access that provides a benchmark for patent, biotechnology and genetic engineering under article 27.3 (b) of TRIPS and the Budapest Treaty.<sup>103</sup>

## TRIPS in Cancun

The Fifth WTO Ministerial Conference is going to be held in Cancun, Mexico from 10 to 14 September 2003. The main task will be to take stock of progress in negotiations and other work under the Doha Development Agenda.

The role of Nepal and other least developed countries in the Cancun Conference is very important. Cancun is supposed to take far-reaching decisions on different areas, including TRIPS. In this regard, Nepal can highlight following issues in Cancun on TRIPS:

- a. Article 27.3 (b) of TRIPS has become one of the most contentious Articles because of its wider implications for and possibility of wider interpretation and meaning. Plants and animals are not patentable under the said Article but microorganisms are patentable. The distinction between organism and microorganism is based on level of scientific analysis but is not distinct composite whole or distinct individual entity. Grammatically, microorganisms are microscopic or ultramicroscopic animal, plant, bacterium, virus etc.<sup>104</sup> Nepal may join hands with other countries that are raising voice for clarity in this grey area and help to clarify it,
- b. Similarly, there is another complexity and confusion by granting patent to microbiological and non-biological processes. Article 27.3 (b) has excluded biological processes from patentability criteria but included microbiological processes, whereas the distinction between biological processes and microbiological processes is at the level of scientific analysis. Nepal may join hands with other countries that are raising the issue for clarity on this grey area and help to clarify it,
- c. WTO recognises UPOV as an effective *sui generis* system for the protection of plant varieties. For granting patent, any invention needs to be new, involve an inventive step and capable of industrial application but plant varieties right can be granted not only to new invention but also to discovery of plant varieties under UPOV 1991.<sup>105</sup> Granting of monopoly right to a discovered variety deprives local communities and

farmers' of their contingent rights. Therefore, Nepal can play a role to define *sui generis* system not conditional to UPOV modality but subject to farmers' rights guaranteed and protected by domestic laws.

- d. CBD does not rule out the system of patent over invention made through access to genetic resources. But communities conserving genetic resources and provider nations are not getting benefits out of the bio prospecting of genetic resources. The case of Basmati and Macca provide evidences. Patent over new and invented micro-organism seems unlikely to be prevented but it is also equally urgent to have a mechanism under TRIPS similar to CBD or respect and recognise the mechanism endorsed by Article 15 of the CBD while granting patent. This can only ensure disclosure of the provider of genetic resources and therefore sharing of equitable benefit. Nepal should develop a very convincing strategy to bring the international community to realise the need of disclosure and benefit sharing in bio prospecting.
- e. Similarly, the relationship between traditional knowledge and intellectual property rights are very delicate and striking. Traditional knowledge falls within the domain of public or community rights whereas the IP regime falls under the system of monopoly right. IP regime has ignored the significance of traditional knowledge for protection and conservation of biological and genetic resources. WIPO and TRIPS council both are carrying out studies on the relationship between traditional knowledge and intellectual property rights. In this respect, Nepal as a rich country in traditional knowledge has a potential stake on this issue. This necessitates to play a role for protection of traditional knowledge as a distinct discipline of perfect rights and not contingent upon TRIPS.
- f. The most important issue that needs to be taken seriously is the recognition of the rights of Member Countries on intellectual property recognised by Doha Ministerial Declaration and the Declaration on TRIPS

and Public Health as binding legal instruments. Declarations are soft international law and they do not have binding effects. The declarations have developed a model to make TRIPS favourable to the needs of developing and least developed countries, but these are not binding. Therefore, Nepal should join hands with other countries to develop either annex to the TRIPS Agreement or protocol to the TRIPS Agreement that would give binding effect to the rights recognised in Doha.

- g. The Doha Ministerial Declaration has extended transitional period on pharmaceuticals up to 1 January 2016 to least developed countries and opened possibility to ask extension of transitional period further. In this context, it needs to have a comprehensive study on specific areas by which Nepal can benefit by exploring the possibility for further extension of transitional period. Yet, during the accession negotiation, Nepal has expressed its commitment to make legal and administrative regime of Nepal compatible to TRIPS by January 2007.
- h. Doha has made far-reaching decision on implementation of Article 66.2 of the TRIPS that asks the developed countries to offer incentives to their enterprises and institutions that ease transfer of technology to least developing countries. However, no significant progress has yet been achieved in this regard. The mechanism developed by the TRIPS Council is more formal and less binding. Nepal needs to work for effective mechanism in this regard.

## Conclusion

It is expected that Nepal is going to get WTO membership in the near future. It creates both obligations and opportunities for Nepal. Nepal cannot get benefit remaining outside of the WTO system, rather it can address negative effects and promote benefits or advantages being part of the WTO. Nepal needs to effectively participate in the WTO forums, including in different Councils and Committees that provide her the opportunity to bring forth its stakes before the international community in a tangible form. There are many things to be done by Nepal, yet the following are urgent:

- a. Invest in and develop human resources,
- b. Carry out research and studies and disseminate them,
- c. Develop necessary laws and policies in a transparent manner that would provide opportunities for civil society and other stakeholders to participate in the process,
- d. Recognise intellectual property, traditional knowledge, biodiversity (especially agro-biodiversity), access to genetic resources and benefit sharing, farmers' rights, and bio safety as priority areas.

## Endnote

- <sup>1</sup> W. R. CORNISH, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS, 2nd ed., Sweets & Maxwell / Universal Book Traders, Second Indian Reprint, at 1, (1993).
- <sup>2</sup> *Graham v. John Deer Co.*, 383 US at 9.
- <sup>3</sup> French Patent Act, (1791), reprinted in part and translated in Frank D. Prager, *A History of Intellectual Property From 1545-1787*, 26 J. PAT. OFF. SOC'Y., at 756-757, (1944), cited in A. Samuel Oddi, *TRIPS-Natural Rights and a 'Polite Form of Economic Imperialism'*, 29 VA. J. TRANS. L 3, at 421.
- <sup>4</sup> Article 7 of the *Agreement on Trade Related Aspects of Intellectual Property Rights* [TRIPS], 33 ILM, at 44 (1994).
- <sup>5</sup> DAVID I BAINBRIDGE, CASES AND MATERIALS IN INTELLECTUAL PROPERTY LAW, Pitman Publishing, London, at 7, (1995).
- <sup>6</sup> A. Samuel Oddi, *TRIPS-Natural Rights and a 'Polite Form of Economic Imperialism'*, 29 VA. J. TRANS L. 3, at 418-419, (1996).
- <sup>7</sup> For example according to TRIPS copyright protection is given for 50 years, 20 years for broadcasting rights, trademark for at least 7 years to be renewal indefinitely, industrial design for 10 years, patent for 20 years and layout designs for 10 years.
- <sup>8</sup> See WIPO, BASIC DOCUMENT ON INTELLECTUAL PROPERTY RIGHTS, <http://www.wipo.org>, (2001).
- <sup>9</sup> *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.
- <sup>10</sup> *Berne Convention for the Protection of Literary and Artistic Works Paris Act* of July 24, (1971), as amended on September 28, 1979 Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at PARIS on May 4, 1896, revised at BERLIN on November 13,

1908, completed at BERNE on March 20, 1914, revised at ROME on June 2, 1928, at BRUSSELS on June 26, 1948, at STOCKHOLM on July 14, 1967, and at PARIS on July 24, 1971, and amended on September 28, 1979.

- <sup>11</sup> *Convention Establishing the World Intellectual Property Organisation*, (1967), as amended in 1979 and came into force from 1970.
- <sup>12</sup> GATT concluded eight rounds of trade negotiations before the establishment of WTO. The last or the eighth round of trade negotiation known as Uruguay Round started in 1986 and continued for almost 8 years up to the end of 1993. When GATT was established in 1947, only 23 countries had become parties to it and when Uruguay Round started 103, countries had become parties and at the time of the completion of the Uruguay Round 125 took participation.
- <sup>13</sup> This is one of the new Agreements under WTO regime. Developed countries, especially USA, Japan and Canada wanted to include intellectual property rights into the WTO regime, while on the other hand developing countries including India, Pakistan and Argentina wanted to exclude intellectual property rights regime from WTO. At the end of 1993 both developed countries and developing countries traded off between the Agreement on Agriculture and Agreement on Textile and Clothing in one side and TRIPS on the other side. Therefore, TRIPS is blamed for serving the interest of developed countries.
- <sup>14</sup> WTO came into existence from January 1st 1995 after substituting General Agreement on Tariffs and Trade, (GATT). Currently it consists of 144 Member Countries. The highest body of WTO is Ministerial Conference, which is held in each two years. Since its beginning, four Ministerial Conferences have been completed. The fourth and recent one is completed at Doha, Qatar from November 9-14, (2001).
- <sup>15</sup> P. NARAYANAN, INTELLECTUAL PROPERTY LAW, at 121-122 (Eastern Law House, 1999).
- <sup>16</sup> See Art. 22 of TRIPS.
- <sup>17</sup> *Id.* Art. 24 (5).
- <sup>18</sup> *Id.* Art. 25 (1).
- <sup>19</sup> See WTO, *Overview of the TRIPS Agreement*, available at < <http://www.wto.org/wto/intellect> >.
- <sup>20</sup> *Id.*
- <sup>21</sup> See WTO, *Overview of the TRIPS Agreement*, available at < <http://www.wto.org/wto/intellect> >.
- <sup>22</sup> See Arts. IX, XII.3, XVIII.10, & XX (d) of the General Agreement on Tariffs and Trade, (1947). Article IX is related to "Marks of Origin" that requires contracting parties to offer no less favourable treatment to the products of other contracting parties accorded to like products of any third country. Article XII.3 provides on restriction to safeguard the Balance of Payment and requires the contracting parties not to apply restrictions so as to prevent unreasonably the importation of any description of goods in minimum

commercial quantities, the exclusion of which would impair regular channels of trade, or restrictions which would prevent the importation of commercial samples, or prevent compliance with patent, trademark, copyright, or similar procedures. Article XVIII.10 provides that the contracting party may determine their incidence on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential in the light of its policy of economic development; *Provided* that the restrictions are so applied as to avoid unnecessary damage to the commercial or economic interests of any other contracting party and not to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and *Provided* further that the restrictions are not so applied as to prevent the importation of commercial samples or to prevent compliance with patent, trade mark, copyright or similar procedures.

<sup>23</sup> See BERNARD HOEAKMAN & MICHEL KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO* 151 (1995). IP related cases were brought for national treatment, trade mark and design infringement under Multifibre Arrangement, counterfeit civil aircraft parts under the Agreement on Trade in Civil Aircraft, access to and misuse of certification marks under Agreement on Technical Barriers to Trade, appraisal of the value of IPRs in connection with goods being imported under the Custom Valuation Agreement, and on marks of origin for prevention of unwarranted impediments and distortions to international trade arising from marking requirements.

<sup>24</sup> See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 310 (Second ed. 1998).

<sup>25</sup> A. O. Adede, *The Political Economy of TRIPS Agreement: Origins and History of Negotiation*, ICTSD (July 2001).

<sup>26</sup> See Foreign Protection of Intellectual Property Rights and the Effects on US Industry and Trade, USTIC Pub. 2065, 19858, ITC, *Economic Effects of Intellectual Property Rights Infringements* 22 J. W. T. 101 – 14 (1988), as cited in T. Collier, *The Prospects for Intellectual Property in GATT*, COMMON MARKET LAW REVIEW 383, at 385 (1991).

<sup>27</sup> A. O. Adede, *The Political Economy of TRIPS Agreement: Origins and History of Negotiation*, ICTSD (July 2001).

<sup>28</sup> A. O. Adede, *The Political Economy of TRIPS Agreement: Origins and History of Negotiation*, ICTSD (July 2001).

<sup>29</sup> A. O. Adede, *The Political Economy of TRIPS Agreement: Origins and History of Negotiation*, ICTSD (July 2001).

<sup>30</sup> Rajan Dhanjee & Laurance Boisson de Chazournes, *Trade-Related Aspects of Intellectual Property Rights (TRIPS): Objectives, Approaches and Basic Principles of the GATT and of Intellectual Property Conventions*, 24 J. W. T 5, at 5 (1990).

<sup>31</sup> See Art. XX (d) of General Agreement on Tariffs and Trade, 55 UNTS 194 (October 30, 1947). Article XX (d) states, "... nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including ... the protection of patents, trade marks and copyrights, and the prevention of deceptive practices."

<sup>32</sup> See GATT. Doc. MTN, GNG/NG 11, W/68 (29th March 1990).

<sup>33</sup> See GATT. Doc. MTN.GNG/NG. 11/W/ 70 (11th May 1990).

<sup>34</sup> See GATT. Doc. MTN/GNG/NG. 11/W/73 (14 th May 1990).

<sup>35</sup> See GATT. Doc. MTN/GNG/NG 11/W/74 (15th May 1990).

<sup>36</sup> See Annex 1 GATT. Doc. MTN/GNG/NG 11/W71 of 14 May 1990. Part I entitled "Intellectual Property and International Trade", dealt mainly with the norms and principles to be applied to trade in counterfeit and pirated goods. It provided for the establishment of certain procedures and remedies to discourage such trade, while trying to ensure an unimpeded flow of trade in legitimate goods. Part II, entitled "Standards and Principles Concerning the Availability, Scope and Use of Intellectual Property Rights", set out the objectives and principles underlying an agreement on such standards and specified the basic standards relating to different categories of IPRs – i.e. patents, marks, industrial designs, geographical indications, copyrights and neighbouring rights and integrated circuit layout designs. By separating the proposed text of a TRIPS agreement into two parts, the developing countries wanted, in the first instance, to signal their determination to emphasise the part dealing with trade in counterfeit goods while minimizing the part relating to substantive standards on IPRs. Secondly, with regard to the latter part, the developing countries wanted to highlight the importance of the public policy objectives underlying national IPR systems, the necessity of recognizing those objectives at the international level and the need to specify some basic principles, which could subsequently elucidate the application of any standards established in the TRIPS Agreement. Thirdly, they insisted on the need to respect and safeguard national legal systems and traditions on IPRs, in view of the diverse needs and levels of development of States participating in the IPR negotiations. The proposals thus represented another approach to the negotiations on TRIPS under which the resulting agreements would be implemented in the relevant international organisations, account being taken of the multi disciplinary and overall aspects of the issues involved.

<sup>37</sup> See GATT. Doc. MTN.TNC/W/35/Rev.1

<sup>38</sup> See WTO, *Trading into the Future: An Interactive Guide to the WTO*, electronic version available at <<http://www.wto.org>>. Originally, time was set for (i) First review of application of provisions on geographical indications by the end of 1996. (ii) Negotiation on creating a multilateral system of notification and registration of geographical indications for wines to be started in 1997. (iii) Review of certain exceptions to patentability and protection of plant varieties starting from 1 January 199 or after. (iv)

Examinations of methods of scope and methods for complaints where action has been taken that has not violated agreements but could still impair the rights of the complaining country (non-violation) by the end of 1999.

<sup>39</sup> Art. 27.3 (b) of the Agreement on Trade Related Aspects of Intellectual Property Rights provides that "Members may also exclude patentability: plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement."

<sup>40</sup> See WTO, *Singapore Ministerial Declaration*, WT/MIN (96)/DEC/W (13 December 1996).

<sup>41</sup> See WTO, *Geneva Ministerial Declaration*, WT/MIN (98)/DEC/1 (20 May 1998).

<sup>42</sup> See WTO, *Third Ministerial Conference Seattle: Press Pack* (28 Nov. 1999).

<sup>43</sup> See WTO, *Third Ministerial Conference Seattle: Press Pack* (28 Nov. 1999).

<sup>44</sup> See WTO, *Doha Ministerial Declaration*, WT/MIN(01)/DEC/1 (14 Nov. 2001).

<sup>45</sup> *Id.* para 17.

<sup>46</sup> *Id.* para 18.

<sup>47</sup> *Id.* para 19.

<sup>48</sup> *Id.* para 19.

<sup>49</sup> *Id.* para 19.

<sup>50</sup> See WTO, *Doha Declaration on the TRIPS Agreement and Public Health*, WT/MIN (01)/DEC/2 (14 Nov. 2001).

<sup>51</sup> *Id.* para 5.

<sup>52</sup> *Id.* para 6.

<sup>53</sup> See WTO, *Supachai Disappointed Over Government's Failure to Agree on Health and Development Issues*, Press/329 (20 Dec. 2002). Director-General Supachai Panitchpakdi today (20 December 2002) expressed disappointment over the failure by WTO member governments to meet the year-end deadlines for agreement in negotiations on special and differential treatment for developing countries and access to essential medicines for poor countries lacking capacity to manufacture such drugs themselves.

<sup>54</sup> *Id.* para 7.

<sup>55</sup> *Id.* para 7.

<sup>56</sup> See WTO, *Implementation of Article 66.2 of the TRIPS Agreement: Decision of the TRIPS Council of 19 February 2003*, IP/C/28 (20 Feb. 2003).

<sup>57</sup> See WTO, *Accessions Nepal: Status of Accession Working Party*, available at <<http://www.wto.org>>.

<sup>58</sup> See WTO, *Status of Working Party Accessions: Nepal*, WT/ACC/NPL/1 (December 19, 1995). Nepal had applied for GATT Membership in 1989 May 16 and Working Party established under the Chairmanship of H. E. Mr. R. Farrell (New Zealand) on 21-22 June 1989. Nepal could not get GATT Membership, as it did not follow up the working party. After the establishment of the WTO Nepal applied for Membership and requested to continue the established Accession Working Party. The WTO General Council on 31 January 1996 decided that the Working Party on the Accession of Nepal to the GATT 1947 will be continued as a WTO Accession Working Party and the Government of Nepal will have observer status in the General Council and its subsidiary bodies.

<sup>59</sup> U. N. Conference on Environment and Development (UNCED) held in Rio de Janeiro 3-14 June 1992 adopted five major documents relating to sustainable development. They are: Agenda 21, Rio Declaration, Forest Principles, Framework Convention on Climate Change and Convention on Biological Diversity. Currently there are 181 Contracting Parties to the Convention on Biological Diversity including Nepal. Nepal signed the CBD during the Rio Conference and ratified by the Parliament and deposited the instrument of ratification before the Secretary-General of the U. N. on November 23, 1993 and the CBD became applicable to Nepal from February 21, 1994 according to the Article 36(3) of the CBD; see HMG/N, *Nepal Gazette*, (Supplementary No. 58 (A) January 1994).

<sup>60</sup> See Tirtha Bhadur Shrestha, *Genetic Resources and their Importance in the Context of Biodiversity of Nepal and their ex-situ and in-situ Conservation Problems and Prospects*, (A paper presented in the Judges' Sensitisation Programme on MEAs organised by Judges Society Nepal and IUCN-The World Conservation Nepal held at Biratnagar on July 21 -23, 2001); see generally Pro PUBLIC, SOURCE BOOK ON BIOLOGICAL DIVERSITY CONSERVATION (Lekhnath Belbase & Narayan Belbase eds., 2000); see also IUCN, BIOLOGICAL DIVERSITY (Tirtha Bhadur Shrestha ed., 1999).

<sup>61</sup> See World Bank, *Saving Nepal's Forests: The Promise of Community Management*, at <<http://lnweb18.worldbank.org>>. The Bank suggests that as Nepal develops its forest resources, it needs to minimise the biotic pressures affecting the structure and dynamics of forests plant communities and wildlife populations and thereby reverse the current destructive pressures on the country's biodiversity.

<sup>62</sup> See MoFSC, *Nepal Biodiversity*, at <<http://www.biodiv-nepal.gov.np/dof.htm>> visited on (March 27, 2002).

<sup>63</sup> See World Bank, *Community Forestry in Nepal*, 217 PRECIS (Fall 2001). This article assesses the community forestry practices in Nepal and appreciates that, "Although Nepal is among the world's poorest countries, it is a global leader in engaging communities in forest protection and management. Nepal's community forestry programme, more than two decades old, has helped regenerate substantial areas of degraded forests - but implementation has not been smooth. With no precedents, the country has had to learn through trial and error and find innovative solutions as challenges emerged.

The experience of two Bank-supported projects has yielded valuable lessons for countries that are initiating community participation in forest protection and management. These lessons are also pertinent to community driven development, an approach rooted in community participation;" *see also id*, which states that involvement of local people in the management of forest has profound impact on the conservation of biodiversity. It has been proved by the community forestry practice in Nepal. So far, 10, 91,528 households are involved in the management of 7, 59,415 ha. community forest.

<sup>64</sup> See Laxman Serchand, *Access to Agro-Biodiversity and Benefit Sharing in Nepal*, (A paper presented in the Judges' Sensitisation Programme on MEAs organised by Judges Society Nepal and IUCN-The World Conservation Nepal held at Biratnagar on July 21 -23, 2001).

<sup>65</sup> *Id.*

<sup>66</sup> See HMG / MoFSC, Draft Policy on Access to Genetic Resources and Benefit Sharing in Nepal, (2002). The Policy is prepared by His Majesty Government of Nepal Ministry of Forests and Soil Conservation and is under the consideration of His Majesty Government for approval.

<sup>67</sup> See WTO Committee on Trade & Environment, *Environment and TRIPS*, WT/CTE/W/8 (8 June 1995).

<sup>68</sup> See WTO, IP/C/W/383 (Sept. 2002).

<sup>69</sup> See WTO TRIPS Council, para 229 *Minutes of TRIPS Council*, held on 25-27 & 29 November 2002 & 20 Dec. 2002.

<sup>70</sup> See WTO TRIPS Council, para 234 *Minutes of TRIPS Council*, held on 25-27 & 29 November 2002 & 20 Dec. 2002.

<sup>71</sup> See WTO TRIPS Council, para 232 *Minutes of TRIPS Council*, held on 25-27 & 29 November 2002 & 20 Dec. 2002.

<sup>72</sup> See UN, United Nations Conventions on Law of the Sea 1982, UN Doc. A/CONF.62/122, reprinted in 21 I. L. M. 1261 (1982). The Convention has come into force from Nov. 16, 1994. Nepal has ratified the Convention in October 1998. Arts. 136, 137 & 140 provide that the Area and its resources are the common heritage of mankind. No state shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources . . . . All rights in the resources of the Area are vested in mankind as a whole . . . the Authority shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area.

<sup>73</sup> Agreement Governing the Activities of States on the Moon and Other Celestial Bodies 1967, 610 U. N. T. S. 205 (1967), reprinted in 6 I. L. M. 386 (1967). This treaty, also known as the Outer Space Treaty, provides that the exploration and exploitation of the relevant areas shall be carried out for the benefit and in the interests of all countries and that, these areas shall be the province of all humankind.

<sup>74</sup> See David Hunter & et. al., *Environment and Trade - Concepts and Principles of International Law: An Introduction*, at < [gopher://gopher.undp.org/00/ungophers/unep/publications/monograph./law.htm](http://gopher.undp.org/00/ungophers/unep/publications/monograph./law.htm) >.

<sup>75</sup> See UN, Declaration on Permanent Sovereignty over Natural Resources 1962, G. A. Res. 1803 (XVII) (Dec. 14, 1962). The Declaration states that the rights of

peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the States concerned for the exploration, development and disposition of such resources, as well as the import of foreign capital required for these purposes, should conform with rules and conditions that the people and nations freely consider to be necessary or desirable with regard to the authorisation, restriction or prohibition of such activities.

<sup>76</sup> See UN, Declaration on the Right to Development, G. A. Res. ----- (Dec. 4, 1986). Art. 1(2) of the Declaration states that, "The human right to development also implies the full realisation of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources."

<sup>77</sup> See UNESCO, Convention for the Protection of the World Cultural and Natural Heritage 1972, 11 I. L. M. 1358 (1972).

<sup>78</sup> See Principle 2 of the Rio Declaration on Environment and Development 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), reprinted in 31 I. L. M. 876 (1992); see also Principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) 1972, UN Doc. A/CONF.48/14/Rev.1 (1973), reprinted in 11 I. L. M. 1416 (1972).

<sup>79</sup> See Preamble of CBD.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* Art 3, which stipulates that, "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

<sup>82</sup> *Id.* Art 4 states that, "Subject to the rights of other States, and except as otherwise expressly provided in this Convention, the provisions of this Convention apply, in relation to each Contracting Party:"; Art. 4 (b) provides, "In the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction."

<sup>83</sup> See Article 5 of the International Undertaking, adopted by the Resolution 8/83 of the FAO Conference (1983). Article 5 of the Undertaking stated that, "It will be the policy of adhering Governments and institutions having plant genetic resources under their control to allow access to samples of such resources, and to permit their export, where the resources have been requested for the purpose of scientific research, plant breeding or genetic resource conservation. The samples will be made available free of charge, on the basis of mutual exchange or on mutually agreed terms."

<sup>84</sup> See FAO Conference Resolution 7/93 for revision of the International Undertaking, at <http://fao.org/ag/cgrfa> . The negotiations for the revision of the Undertaking in harmony with CBD, started in the First Extraordinary Session of the Commission on Plant Genetic Resources, in November 1994. Although the scope of the Undertaking is limited to plant genetic resources

for food and agriculture, this mandate, adopted after careful negotiation, is not limited to the ex situ collections not addressed by the CBD. The Commission, at its Fifth Session in 1993, had requested for the preparation of a rolling Global Plan of Action (GPA) on Plant Genetic Resources for Food and Agriculture, in order to identify the technical and financial needs for ensuring conservation and promoting sustainable use of plant genetic resources. In 1996, FAO convened the Leipzig International Technical Conference on Plant Genetic Resources, where 150 countries formally adopted the Leipzig Declaration and the GPA. They also declared that it was important to complete the revision of the Undertaking.

<sup>85</sup> See FAO, Global Plan of Action for the Conservation and Sustainable Utilisation of Plant Genetic Resources for Food and Agriculture and the Leipzig Declaration, adopted by the International Technical Conference on Plant Genetic Resources Leipzig, Germany (June 17-23, 1996). Article 2 of the Declaration states, "Recognising that states have sovereign rights over their plant genetic resources for food and agriculture, we also confirm our common and individual responsibilities in respect of these resources."

<sup>86</sup> See FAO, International Treaty on Plant Genetic Resources for Food and Agriculture, adopted by the Thirty-first Session of the FAO Conference (November 3, 2001). Preamble of the Treaty states, "Recognising that, in the exercise of their sovereign rights over their plant genetic resources for food and agriculture, states any mutually benefit from the creation of an effective multilateral system for facilitated access to a negotiated selection of these resources and for the fair and equitable sharing of benefits arising from their use;" Similarly, Article 1 states, "The objectives of this Treaty are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security."

<sup>87</sup> *Id.* Art 2, which defines "genetic resources" as genetic material of actual or potential value.

<sup>88</sup> *Id.* "Genetic material" means any material of plant, animal, microbial or other origin containing functional units of heredity.

<sup>89</sup> *Id.* Art. 15 .1, which states, "Recognising the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation."

<sup>90</sup> *Id.* Art. 15.2, which states, "Each Contracting party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention."

<sup>91</sup> *Id.* Art. 2, which defines "countries of origin of genetic resources" are the countries, which possess those genetic resources *at in-situ* conditions.

<sup>92</sup> *Id.* Art. 15.3, which states that, "For the purpose of this Convention, the genetic resources being provided by a Contracting Party, as referred to in this Article and Articles 16 and 19, are only those that are provided by

Contracting Parties that are countries of origin of such resources or by the Parties that have acquired the genetic resources in accordance with this Convention."

<sup>93</sup> *Id.* Art. 15.4, which states, "Access, where granted, shall be on mutually agreed terms and subject to the provisions of this Article."

<sup>94</sup> *Id.* Art. 15.5, which states, "Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party."

<sup>95</sup> *Id.* Art. 15.6, which states, "Each Contracting Party shall endeavour to develop and carry out scientific research based on genetic resources provided by other Contracting Parties with the full participation of, and where possible in, such Contracting Parties."

<sup>96</sup> *Id.* Art. 15.7, which states, "Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, and in accordance with Articles 16 and 19 and , where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilisation of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms."

<sup>97</sup> Art. 27.1 of TRIPS, which states, "Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. . . ."

<sup>98</sup> See, Columbia University, Access to Genetic Resources: An Evaluation of the Development and Implementation of Recent Regulation and Access Agreements; Environmental Policy Studies Working Paper No. 4, at 10, (1999).

<sup>99</sup> P. NARAYANAN, INTELLECTUAL PROPERTY LAW, 2<sup>nd</sup> ed., Calcutta, Eastern Law House, at 9, (1999). The learned author focuses that, "A patent is a monopoly right granted to a person who has invented a new and useful article or an improvement of an existing article or a new process of making an article. It consists of an exclusive right to manufacture the new article invented or manufacture an article according to the invented process for a limited period. After the expiry of the duration of patent, anybody can make use of the invention."

<sup>100</sup> DAVID I BAINBRIDGE, CASES & MATERIALS IN INTELLECTUAL PROPERTY LAW, London, Pitman Publishing, at 144, (1995).

- <sup>101</sup> See, *United States - Standards for Reformulated and Conventional Gasoline Case*, WTO Doc. No. WT/DS2/9, May 20<sup>th</sup>, (1996). This is the first decision of the WTO Dispute Settlement Body, which established that trade and environment is to be dealt in a symbiotic paradigm, i. e. trade friendly environment and environment friendly trade. So, the concern of the protection of environment under Art. XX(g) or (b) is justified unless being discriminatory and disguised to trade.
- <sup>102</sup> See, Charles Zerner, *Towards a Broader Vision of Justice and Nature Conservation*, in CHARLES ZENER, ed., *PEOPLE, PLANTS, AND JUSTICE: THE POLITICS OF NATURE CONSERVATION*, New York, Columbia University Press, pp. 3-20, (2000).
- <sup>103</sup> WIPO, *Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purpose of Patent Procedure*, 28 April 1977 came into force from 1 February 2001.
- <sup>104</sup> See Webster's New World Dictionary.
- <sup>105</sup> See Art 1 (iv) of the International Convention for the Protection of New Varieties of Plants (March 19, 1991). The Article 1 (iv) defines "breeder" as the person who bred, or discovered and developed, a variety. Article 6 lays down the criteria of novelty as "The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purpose of exploitation of the variety."

## Cancun and Beyond: How Should Nepal Deal with Singapore Issues?

Ratnakar Adhikari\*

### Backdrop

Nepal is all set to enter the World Trade Organisation (WTO) and preparing for accession during the fifth Ministerial Conference to be held in Cancun, Mexico from 10 to 14 September this year. It has already submitted its final (revised) schedule of concessions for goods, schedule of commitments for services and legislative as well as institutional action plan in order to comply with the requirements of the WTO. It has also concluded bilateral negotiations with the trading partners (member countries of the WTO), who had shown interest to negotiate with Nepal. The final Working Party Meeting for Nepal's accession shall be held on 14 to 18 July, which will clear the way for preparing a "Draft Protocol of Accession". This document, if accepted by a two-thirds majority of the WTO members, will become the "Protocol of Accession", and Nepal shall be admitted to the WTO. Nepal will become member of the WTO once the process of ratification is completed at the national level.

Regardless of Nepal's intended membership, the Cancun Conference carries special significance for the acceding countries because of the mandate provided by paragraph 48 of Doha Declaration. This has opened the avenue for the acceding countries to become "active participants" as opposed to "passive observers" in the Doha Round of multilateral trade negotiations. Since the Conference will provide a platform for the mid-term review of the negotiating mandates set out by the Doha Round, it bears special significance even for the acceding countries.

There are at least 13 issues on which negotiations are being/going to be conducted as per the Doha mandate. However, Singapore issues are slightly different in that negotiations on these issues are to start only after the Cancun Ministerial. There is still a great deal of controversy on whether or not these issues are up for

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negotiations after Cancun. The major *demandeurs* feel that the wordings of the relevant paragraphs (20, 23, 26 and 27)<sup>1</sup> dealing with these issues have articulated that negotiations are going to take place after the Cancun Ministerial. They maintain that “explicit consensus” is required only for agreeing to the “modalities of negotiations”. However, the developing countries, which had opposed the inclusion of Singapore issues in the Doha Declaration, do not subscribe to this view. To them, “explicit consensus” is a must to decide whether to initiate negotiations on these issues or not.

When these issues had become a matter of heated discussion during the final session of the Doha Ministerial, the Chairman of the session<sup>2</sup> had to make a clarification with a view to bridging the difference. Though the Chairman’s clarification has strengthened the position of the developing countries to a greater extent, it has not been very helpful in defining and setting out a clear agenda.

### Political economy issues

The first major political economy issue concerning Singapore issues, from the perspective of the major *demandeurs* and supporters [i.e., the European Union (EU), Japan and South Korea] is that they feel their interests were severely compromised during the Uruguay Round (UR) of multilateral trade negotiations (MTNs) because of the inclusion of agriculture in the General Agreement on Tariffs and Trade (GATT)/WTO agenda.

Since Article 20 of the Agreement on Agriculture (AoA) clearly outlines that further negotiations on this issue would be conducted for the continuation of the reform process in agricultural trade,<sup>3</sup> these countries knew that they would have to provide some concessions to their trading partners in days to come. Their agricultural policies were highly protectionist, and they had a strong farm lobby which their politicians could not afford to antagonise in the name of ensuring free and fair trade at the global level. When they came to understand, albeit the hard way, that they would not be able to continue their highly distorting agricultural policies, they wanted to find such sectors/issues in which they could obtain concessions from their trading partners in lieu of them having provided concessions on agriculture. They found the following seven major areas/issues (some existing and some new ones) for this purpose:

- Industrial tariffs
- Environmental standards
- Labour standards
- Competition policy
- Investment
- Trade facilitations
- Government procurement

Therefore, they started making a push for the inclusion/strengthening of these issues within the WTO. In the very first Ministerial Conference of the WTO held in Singapore, they were able to include most of these issues, partly because developing countries were only beginning to understand the politics that influence the MTN fora such as the WTO. Of the seven issues mentioned above, competition policy, trade facilitation, and labour issues were completely new to the system, whereas other issues were already, directly or indirectly, part of the WTO proscenium. Developed countries managed to get six issues (except for industrial tariff) included in the Singapore Ministerial itself.

While labour standard could not survive the opposition of the developing countries during the Doha Ministerial, other six issues made it to the Doha Declaration. Two issues, namely industrial tariffs and environment – which are not Singapore issues, are being currently negotiated as part of the Doha Round.

A second political economy issue is that industrial countries are trying to include all those areas in the multilateral trading system on which they are better equipped as compared to the developing countries. For example, while the earlier GATT only dealt with goods, developed countries managed to get services and intellectual property rights (IPRs) – both areas of developed countries’ competence – included in the GATT/WTO during the UR. As if this were not enough, they managed to include the issue of investment in some respect within the WTO.

There are overt as well as covert motives behind the inclusion of newer issues in the WTO. The overt motive is that developed countries subscribe to Fred Bregston’s theory: “trade liberalisation is like a bicycle, it remains in balance as long as it is moving, but collapses when it stops.” Therefore, they would like trade liberalisation to continue, and one way of doing it, as the argument goes, is to “keep bringing new agenda in the system so that

negotiations and trade offs could continue”. The covert motive is that they would like to increase the access of their goods and services to the developing countries’ markets by tearing down trade barriers that are still prevalent.

### Current state of play

During the time of UR, developing countries’ negotiators were largely unaware of the issues discussed/negotiated. Further, they were unaware of the means to defend their interests. This continued almost up to the Singapore Ministerial. However, by the time of the third Ministerial Conference in Seattle in 1999, developing countries had realised that they were cheated during the UR and even during the Singapore Ministerial. Moreover, they started to develop their capacity to understand the issues involved and tricks of negotiations. By now, most developing countries’ negotiators know what they want out of the multilateral trading system and how to protect their national interests. They have also realised the significance of consensus-based decisionmaking process of the WTO.<sup>4</sup>

Therefore, it would be naïve on the part of the developed countries to assume that they would be able to continue taking the developing countries for a ride. Since developing countries have now fully understood the political economy of Singapore issues, they too are playing their cards right. They have been opposing the inclusion of these issues in the negotiating agenda of the WTO right from the beginning. They have also realised that the developed countries have reneged on the commitments they had made at Doha on public health, agriculture, implementation issues, and special and differential treatment (S&DT), among others. They know for a fact that, with the slipping away of a number of deadlines agreed as part of the Doha Development Agenda, the Cancun Ministerial Conference itself faces an impending gridlock. Therefore, nothing substantial is happening in the case of Singapore issues as well, partly because of developing countries’ hostile attitude towards these issues. The current status of these issues is as follows:

- The WTO Working Group on Transparency in Government Procurement met on 18 June 2003, where *delegates were divided* over launching negotiations at the WTO’s fifth Ministerial in Cancun.<sup>5</sup>

- At the Meeting from 12-13 June, the WTO Council for Trade in Goods focused its work on trade facilitation, with Members *continuing to disagree* on the need for a negotiated multilateral framework on this issue.
- The last Meeting of the WTO Working Group on the Relationship between Trade and Investment before the Cancun Ministerial was held from 10-11 June 2003. At the meeting some Members – notably Canada, Costa Rica and Korea – sought to pave the way for investment negotiations to begin at Cancun. However, most developing countries *remained non-committal*, clearly signalling a lack of willingness to begin negotiations despite arguments advanced by Members who considered the time ripe to launch negotiations.<sup>6</sup>
- Likewise, on the issue of competition, the WTO Working Group on Interaction between Trade and Competition Policy met from 26-27 May 2003. During the Meeting, many developing countries *opposed negotiations* and questioned whether the WTO would be an appropriate forum for the same. The Working Group Meeting was the last one prior to the Cancun Ministerial, and many developing countries stressed that they saw no agreement on launching negotiations and questioned the benefits of such an agreement for developing countries.<sup>7</sup>

Considering the development till date, consensus on launching negotiations on the Singapore issues seems far from imminent. Some developing country trade diplomats have explicitly stated that the lack of meaningful progress in the Doha Round, especially on agriculture, implementation issues, and S&DT for developing countries, negatively affects any movement on the Singapore issues. While this is the case for trade facilitation and transparency in government procurement, considered relatively ‘easier nuts to crack,’ it holds even more true for the more contentious Singapore issues of investment and competition.<sup>8</sup> Meanwhile, informal negotiations headed by the General Council Chair and the Chairs of WTO Working Groups on Singapore issues are ongoing.

It has been observed that all the Singapore issues are being clubbed together as if all of them merited equal attention from the multilateral trade negotiators, whereas in reality that might not be the case. Therefore, it is desirable not only to understand the concerns of both the poles on the negotiating table but also to appreciate the issues in detail before drawing any inference on whether these issues are likely to be beneficial for developing countries as well as least developed countries (LDCs) like Nepal.

## Detailed discussions on Singapore issues

### *Competition policy*

Competition policy is not a new issue – it has been around since the ill-fated International Trade Organisation (ITO) was drafted. Similarly, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the Set) prepared by United Nations Conference on Trade and Development (UNCTAD) provided a major fillip to the competition movement around the globe. Besides, organisations like the World Bank and Organisation for Economic Cooperation and Development (OECD) have carried out an enormous amount of intellectual works in the areas of competition policy and law.<sup>9</sup>

While developed countries, especially OECD members, were quick to adopt competition policy and laws as a means to protect and promote competition in the market place, developing countries, barring a few, did not show much interest in the issue until mid-nineties. After the formation of the Working Group on Trade and Competition Policy following the conclusion of the first Ministerial Conference of the WTO held in Singapore in 1996, the number of countries adopting competition policy and enforcing competition legislation has seen a phenomenal growth. However, developing countries are yet to be convinced of the need to adopt a multilateral competition regime within the WTO system.

Despite opposition by the majority of the WTO members, the push for inclusion of the competition policy in the multilateral discipline was so intense that its *demandeurs* finally managed to get it included in the Doha Ministerial Declaration. However, whether the negotiations will take place on this issue is still debatable.

### *Arguments in favour of the inclusion of competition policy in the WTO*

First, there is a great body of evidence to prove that the cartels prosecuted by the competition authorities in OECD countries have had a significant negative impact on the trade and welfare of the weaker nations.<sup>10</sup> It has been estimated that the average illegal gain from price fixing is 10 percent of the selling price, but in such cases the harm to society may amount to 20 percent of the volume of commerce affected by the cartel. These cartels were busted in the developed countries, but there is no evidence to suggest that developing countries were able to prosecute them.<sup>11</sup> Due to their limited capacity, there is no way these countries could prosecute them without cooperation from the developed countries. Multilateral rules on competition could be instrumental in creating an atmosphere for such cooperation.

Second, export cartels are generally outside the realm of domestic competition law, and often actively promoted by governments. As cooperation cannot be expected in these cases, there is a need for a supra national regime to tackle them.<sup>12</sup>

Third, the USA and the EU are the most frequent users (abusers) of anti-dumping rules. Due to lack of coherence between trade policy and competition policy, strong sectoral lobbies are able to push their governments into imposing anti-dumping duties without taking into account the interests of other stakeholders such as consumers. Therefore, there is a clear need to bring the anti-dumping issue within the ambit of an international competition policy.

Fourth, various GATT Agreements, namely General Agreement on Trade in Services (GATS), Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, Trade Related Investment Measures (TRIMs), the Agreement on Safeguards, Antidumping Agreement, and the Agreement on Subsidies and Countervailing Measures already contain provisions relating to regulation of anti-competitive practices of firms to a larger extent. There is a need to consolidate these provisions in a single agreement to create better impact.

### *Arguments against the inclusion of competition policy in the WTO*

First, while trade policy is meant to protect producers or sellers, competition policy's main objective is to protect the consumers. Inclusion of competition policy at the WTO may lead to hijacking of competition agenda by the producers. Fear is ripe in the minds of the consumers and governments of the weaker nations alike that multinational corporations (MNCs) could use international competition policy as a market access tool especially by forcing the dismantling of state trading enterprises of the developing countries.<sup>13</sup>

Second, the question of harmonisation of competition law across the globe is politically unfeasible. In terms of enactment of national laws too, there are some doubts. Only 90 countries have enacted competition law so far. Countries like Malaysia, Singapore, Hong Kong, Brunei, Vietnam and Russia have not yet enacted a national competition law, but it cannot be said that these economies are not doing well.<sup>14</sup>

Third, as per one school of thought, competition policy may hinder domestic firms' ability to become competitive because it makes it difficult for them to coordinate their business policies and consolidate operations through such strategies as mergers and acquisitions. In some countries such as Japan, South Korea and Taiwan, there is a long and strong tradition of the state working closely with large enterprises to foster innovation and competitiveness. A multilateral competition rule will outlaw such arrangement.<sup>15</sup>

Fourth, so far the developing countries are focusing on the 'structure' as the main indicator of competitiveness (or the lack of it) in a given market. However, protagonists of multilateral competition rules emphasise on 'conduct' rather than 'structure'. A conduct-focused analysis will require a significant increase in the capacity of the competition authorities. This, however, is lacking in most developing countries.<sup>16</sup>

Fifth, enforcement of law requires a competition authority with adequate powers and sufficient resources (financial, technical and human). Rigorous implementation of competition rules is a resource-demanding task. Since developing countries have limited resources at their disposal, they need to make optimum utilisation

of the same. Enforcement of a multilateral competition discipline may not become the number one priority area for them<sup>17</sup>

Finally, all the sectors in the economy may not be equally able to face competition, especially from foreign companies. For example, small and medium enterprises (SMEs) make enormous contribution to the economies of developing countries, but they continue to be weak and vulnerable. If the developing countries expose such enterprises to foreign competition, the vital nerve of the national economy may collapse. Therefore, a multilateral competition policy devoid of development dimension may spell disaster.

### ***Investment***

The decade of 1990s witnessed an unprecedented rise in the cross-border flow of investment. Such a massive growth, lit by economic buoyancy and fuelled by the growth of knowledge-based economy, could not sustain in the early part of this century. However, at present the stock of foreign investment in the world is one of the highest of our times. This, on one hand, underscores the importance of foreign direct investment (FDI) as a vehicle for economic growth, and on the other, the vast untapped potential of FDI.

However, so far there is no multilateral treaty governing the flow of FDI. Host country and home country often sign bilateral investment treaty (BIT) with a view to providing protection to the investor, while allowing the host country to regulate investment in order to meet the legitimate policy objectives of the country. BITs have been proliferating with leaps and bounds. In 2002, the OECD estimated that there were over 2000 BITs<sup>18</sup>. Moreover, some regional trading agreements (RTAs) too contain a chapter on investment.<sup>19</sup>

Given this scenario, a push is being made by several developed countries to include investment issue in the WTO. Developed countries insist that it is in the best interest of developing countries to proceed with negotiations on investment at the WTO. An investment agreement, they assert, will stimulate the economies of all WTO members by also spurring investment flows to developing countries, and making international investment easier and more transparent.<sup>20</sup>

During the Doha Ministerial, developed countries – led by the EU – managed to incorporate investment as one of the possible

issues to be discussed at the WTO. However, as mentioned above, there is a considerable degree of ambiguity in the text of the Doha Declaration relating to Singapore issues, including the investment.

#### *Arguments in favour of inclusion of investment issues within the WTO*

First, a multilateral investment agreement at the WTO provides a secured and predictable environment for the flow and protection of investment from the possible confiscation, expropriation or nationalisation by the host government. This enhances the confidence of investors to invest in the host country, which in theory could spur investment thereby contributing to its economic growth.

Second, it is often argued that in order to attract foreign investment, developing countries are reducing their environmental and social standards and are engaged in the so called “race to the bottom.” As countries compete with one another to attract foreign investment, many have tried to provide even more attractive investment climates than their competitors by disregarding key rights enshrined in national law. In a number of cases, the erosion of workers’ rights has been identified as a positive incentive to encourage foreign investment.<sup>21</sup>

In order to reverse such a trend by restricting the countries from going “out of the way” to attract investment and create a level playing field, it is necessary to negotiate an investment agreement at the WTO.

Third, in the BITs and RTAs, powerful countries often have an upper hand (due to power imbalance) and they are in a position to dictate their terms to the detriment of small and powerless countries. Since the decisions in the WTO are made on a multilateral basis, the interests of weaker nations would be better protected should there be an investment agreement at the WTO.

Fourth, even within the WTO it is not obligatory for the developing countries to open all the sectors of the economy for foreign investment. An argument is being made that a positive list (GATS type) approach could be followed, where the countries could choose which sector to liberalise, but once they liberalise any sector, they are bound to provide market access and national treatment to foreigners subject to certain reasonable conditions.

#### *Arguments against inclusion of investment issues within the WTO<sup>22</sup>*

First, investment is not a trade issue. The developing countries feel that they do not want to overload the WTO with too many agendas when the actual implementation of the existing agreements is yet to take place. They feel that inclusion of new issues will constrain the ability of the WTO to perform effectively as a watchdog of global trading order on other issues, which are of critical significance to the developing countries.

Second, they do not see any value addition on the investment agreement at the WTO, because they know countries signing BITs are not necessarily the ones receiving fair share in FDI inflows. This fact has also been substantiated by a recent study conducted by the World Bank.<sup>23</sup> Therefore, they argue that there is no guarantee of increased flow of FDI even if member countries of the WTO sign a multilateral agreement on investment.

Third, the investment agreement as envisaged by the developed countries only talks about protecting the rights of the investors and is conspicuously silent on the issue of their responsibilities. This, the developing countries fear, will provide extra leverage to the foreign investors, who are already interfering with the domestic affairs of the host country to maximise their profits.

Fourth, application of general non-discrimination principles (most favoured nation and national treatment) of the WTO to investment will constrain the ability of the host countries to regulate investment. This will be a major roadblock for the developing countries in the pursuit of their development objectives. ActionAid (2003) argues: “An investment agreement based on the national treatment principle threatens to expose the industrial and agricultural sectors of developing countries to direct competition from the world’s most powerful multinationals, and to undermine many of the pro-development conditions and requirements placed on foreign investors to contribute to the domestic economy.”<sup>24</sup>

Fifth, it is not clear from the discussions at the WTO whether the rights of foreign investors will be limited to post-establishment or to pre-establishment. If the latter is true, it would tantamount to providing *carte blanche* to the investors to make investment in any sector of the host country’s economy without having to pass through regulatory scrutiny.

Sixth, despite what is being argued by the developed countries, it is also not yet clear whether there will be an investment agreement like in the GATT – which will provide blanket authority to the investors to invest in any sector and get protected, or the GATS – which contains a positive list approach. Developing countries have a strong preference for the latter category because they can choose which sectors to liberalise and which not, keeping in mind their domestic interests.

### **Trade facilitation**

Trade facilitation may be defined as the simplification and harmonisation of international trade procedures, with trade procedures being the activities, practices and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade. This definition relates to a wide range of activities such as import and export procedures (e.g. customs or licensing procedures), transport formalities, and payments, insurance, and other financial requirements.<sup>25</sup>

It is being increasingly realised, both by the developed and developing countries, that trade facilitation could be instrumental in saving the traders a lot of hassles and wastage of resources. If a globally harmonised, computerised system of processing documents and clearing goods were introduced, there could be significant efficiency gains on either sides of the border (both for importers as well as exporters).

The facilitation of trade procedures is seen by all major international organisations as vital for economic development, not least for developing countries. Trade procedures are perceived to be a future bottleneck, and there are many factors that are fuelling the need for trade facilitation. The foremost factors are:

a) Large increase in international trade; b) explosive information technology (IT) development, which has led to faster, cheaper and more efficient modes of trade and transport systems [such as Just-In-Time (JIT) management and electronic commerce], c) rapid increase in bilateral and regional free trade agreements that often feature complex customs requirements (i.e. rules of origin); d) significant change in the nature of internationally traded goods (from complete goods towards intermediate and sub-assembled products); and e) increase in the comparative cost of

cumbersome and anachronistic trade procedures, as a result of the extensive work and progress done on other trade liberalising issues, such as tariff and quota reductions.<sup>26</sup>

The objective of trade facilitation is to reduce the cost of doing business for all parties by eliminating unnecessary administrative burdens associated with bringing goods and services across borders. The means of achieving this objective are modernisation and automation of import procedures to match established international standards.<sup>27</sup> Since trade facilitation is instrumental in removing the bottlenecks in import and export, it has also been referred to as the “plumbing” of international trade.

#### **Box: 6.1**

### **Some real life examples of improved trade facilitation**

Chilean Customs estimated that the introduction of their Electronic Data Interchange (EDI) system, which decreased the processing time, resulted in business savings of over US\$ 1,000,000 per month, for a system cost of only US\$ 5,000,000

The cargo release time has, after the 5-year reform of the Peruvian Customs, been reduced from an average of 30 days to a maximum of 24 hours for green channel cargo (one or two days for goods chosen for inspection), while at the same time quadrupling the revenue collection. At 12 percent interest and with the value of the Peruvian import in year 2000, this would very roughly have constituted a maximum gain to the involved companies of approximately US\$ 71,997,000.

Source: Swedish Trade Procedure Council and National Board of Trade (2002): 19

Trade facilitation cuts across and is related to a number of agreements of the WTO: Agreement on Import Licensing Procedure (ILP); Agreement on Technical Barriers to Trade (TBT); Agreement on Sanitary and Phytosanitary (SPS) Measures; GATT Article V dealing with freedom of transit; Article VIII calling for the simplification of fees and formalities related to importation and exportation of goods; and Article X dealing with transparency and judicial remedy.<sup>28</sup>

A number of international organisations are already involved in trade facilitation. They include: World Customs Organisation (WCO), established with the objective of improving the efficiency and effectiveness of customs administration; UNCTAD, which is responsible for implementing, among others, Automated System for Customs Data and Management (ASYCUDA)<sup>29</sup>; and Trade Point Global Network.<sup>30</sup> The objective of the proposed agreement in the WTO is to help coordinate these activities, not to duplicate the efforts made by other international organisations.

#### *Arguments in favour of inclusion of trade facilitation within the WTO*

First, trade facilitation could create significant economic gains for the countries participating in international trade. Wilson *et al.* (World Bank 2003) demonstrate that if those Asia Pacific Economic Commission (APEC) members below average on four trade facilitation indicators improved capacity only halfway to the average for all members, then intra-APEC trade could increase by approximately US\$ 250 billion with a consequential increase in APEC average per capita GDP of over four percent.<sup>31</sup> The study also asserts that the overall gains to trade from investment in trade facilitation would exceed those in tariff cuts on manufactured goods.<sup>32</sup> These, the *demandeurs* argue, are the compelling evidence to suggest that trade facilitation should be negotiated at the WTO.

Second, trade facilitation is the paradigm of good governance, through transparency, better regulation, due process and government-private sector cooperation. Moreover, experience shows that rationalised and efficient customs procedures boost customs duty collection. Since the majority of developing countries depend substantially on customs duties for resourcing public expenditure, improved trade facilitation would enhance their ability to augment their revenue.<sup>33</sup>

Third, since inefficient procedures represent a “fixed overhead”, the costs are likely to bear disproportionately heavily on the developing countries in general and SMEs of these countries in particular. Therefore, as the argument goes, it is in the interest of the developing countries to agree to negotiate trade facilitation accord at the WTO.

#### *Arguments against the inclusion of trade facilitation within the WTO*

The first major concern of the developing countries is similar to the one in competition policy and investment. They do not want new issues to be included in the WTO agenda because they do not want to overload the WTO, which is designed to perform much more useful functions.

A second major objection from the developing countries relates to the cost of implementation of the agreement. They rightly fear that the cost of implementation of an agreement on trade facilitation is going to be enormous, which resource strapped countries cannot manage. Developing countries, which are already facing resource crunch to implement the obligations made by them during the UR, would not like to take on additional burden and get branded as “defaulters”. This is despite the fact that the *demandeurs* of the agreement are willing to provide technical assistance to the developing countries and LDCs to implement the agreement. If the apathy of the developed countries towards providing technical assistance to implement the UR Agreements is any guide, their fear seems justified.

The third fear of the developing countries, which is related to the second one, is that they would like to avoid being dragged to the Dispute Settlement Body (DSB) of the WTO for their failure to implement the commitments made by them under the possible agreement on trade facilitation.

#### *Transparency in government procurement*

Since governments are important purchasers of goods and services in any country<sup>34</sup>, it is natural for them to favour domestic suppliers in order to boost their businesses. The underlying assumption is that if the business opportunity is provided to domestic suppliers/contractors, it would help stimulate domestic economy because they use local inputs (raw material, labour, technology, management) in the production process. This argument is driven by the Keynesian macroeconomic orthodoxy, which emphasised that the smaller the share of each dollar of government expenditure spent on goods produced abroad (imports), the larger the increase in national income caused by a rise in government expenditure.<sup>35</sup> However, it is argued that this method of favouring domestic suppliers/contractors has proven to be inefficient because of lack

of competition resulting from the “discrimination” against foreign bidders. Such a practice has, more often than not, helped breed vested interest groups and perpetuated rent seeking behaviours.

In order to address this problem, developed countries agreed to a “side-code” during the Tokyo Round of MTN on government procurement in 1979, which was converted into a plurilateral agreement during the UR. While developed countries wanted to incorporate a multilateral discipline in the GATT/WTO during the UR, this move was thwarted due to the opposition from the developing countries.

Economic analyses on government procurement point to the futility of a “non-discrimination” based government procurement agreement at the national level.<sup>36</sup> Evenett (2002:427) asserts, “When quantity demanded by the government is initially below domestic industry’s output, procurement discrimination merely reshuffles sales from foreign to domestic firms in markets and has no consequence for national welfare.”

What is more important to mention is that even if there is a discrimination against the foreign suppliers, they know exactly why they had been discriminated. Just as tariff is the first best and most transparent method of protecting domestic industries, “price preference” to the domestic suppliers is the first best and most transparent mode of favouring domestic suppliers. Therefore, the focus of discussion since the later part of 1990s has shifted to transparency. This is the reason for the establishment of a working group to conduct a study on transparency in government procurement practices at the Singapore Ministerial. The inclusion of this issue, again by the developed countries, in the Doha Ministerial Declaration shows their interest to eventually prepare a multilaterally binding agreement on this issue.

However, there are divergent views on whether or not negotiations on this issue should start after the Cancun Ministerial. Like in the case of other Singapore issues, developing countries are sceptical about the benefits of such an agreement to their economies, though the developed countries are claiming significant welfare benefits. Let us now turn to this controversy.

### *Arguments in favour of the inclusion of transparency in government procurement within the WTO*

First, a transparent system of government procurement will reduce the possibility of red tape and corruption, which will provide predictable market access for the products of foreign origin. Greater openness acts as a better guarantee of predictability and fairness, which in turn also encourages international competition for procurement.<sup>37</sup>

Second, international standardisation of practices and information for purposes of transparency reduces costs in the procurement cycle, and international competition results in contracts offering better value for money.<sup>38</sup> Given that government procurement of goods and services is quite significant, increased efficiency could represent significant savings for the governments and taxpayers in question.

Third, implementing transparent decisionmaking in procurement is an essential part of economic reform for developing countries, as it is integral to the pursuit of sound macroeconomic policies and stabilisation measures, especially in public finance management. Bribery and corruption are a drain on public exchequer, which could otherwise be diverted to provide better health care and education to the needy public.

### *Arguments against the inclusion of transparency in government procurement within the WTO*

First, like in other Singapore issues, the developing countries would not want to overload the WTO agenda. They feel that the WTO has other useful functions to perform and its ability to do so will be constrained by the inclusion of new issues in the WTO.

Second, while developing countries are making their own efforts to combat bribery and corruption, they would like to receive support, not sanction, to control this menace. They fear that after signing on to the proposed agreement on transparency in government, they would be increasingly exposed to the dispute settlement system of the WTO because they would not be in a position to fulfil all the obligations they have made at the WTO –

some due to political imperatives (for example, to favour SMEs even at the cost of transparency) and some due to lack of institutional capacity (fulfil the notification requirements of the WTO under the proposed agreement).

Third, the cost of implementation of such an agreement (in terms of both time and resources – physical and financial) is going to be enormous for the developing countries despite the provision on capacity building outlined in the Doha Declaration.

Fourth, developing countries fear that developed countries would try to use the transparency in government procurement agreement as a Trojan Horse to force the developing countries to agree to sign on to a potentially multilateralised Government Procurement Agreement.

### The way forward for Nepal

As a country in the process of acceding to the WTO, Nepal has significant interest in the outcome of the Cancun Ministerial. As per Paragraph 48 of the Doha Declaration, Nepal could use multilateral track to put forth its position, views and arguments during negotiations on Doha issues. It should fully use this leverage to articulate its views on Singapore issues too. It should also realise the fact that any “unnecessary” commitments in the new areas would mean that it would have to take new obligations after its entry into the WTO.

The mere fact that all the four issues discussed above were included in the political decision made at the Singapore Ministerial does not justify further dealing with Singapore issues as a package. All of them are different in the magnitude of their impact on a least developed economy like Nepal. While some of them will have extremely deleterious impact on the policy flexibility for developing countries in general and Nepal in particular, some others are even beneficial to Nepal.

Therefore, as a priority strategy Nepal should propose an unbundling of Singapore issues and treat all of them on their own rights. This should be followed by the preparation of the following positions in the run up to Cancun, during Cancun and beyond Cancun.

**Competition policy:** While domestic competition policy has demonstrably significant welfare effects for consumers as well as business enterprises, the welfare effects of a global rule on competition are still ambiguous. Moreover, most developing countries are not likely to support the idea of negotiating competition policy at the WTO. Therefore, it is in the interest of Nepal to support and strengthen the position of the developing countries.

Since global competition policy may be required in the long run, Nepal should first have a competition policy and then move to have a regional competition policy. After having gained significant experience in tackling cross border competition problems, Nepal could support the negotiations on competition at the global level. However, where the global competition accord will be housed is still a mute question. Having this accord housed at the WTO may not be a good idea for a country like Nepal to support.

**Investment:** Nepal should take a position that the real impact of the inclusion of investment issue in the four agreements of the WTO has not yet been assessed. Therefore, there is a need for the Working Group on Relationship between Trade and Investment to continue its educative process. Given the vehement opposition of the developing countries to start negotiations on investment after the Cancun Ministerial, this issue is likely to be shelved for the time being. However, developed countries will once again make an attempt to play “divide and rule” politics and some developing countries might even be tempted to defect. Already, countries like Brazil, South Korea and Costa Rica are showing the sign of defection. Such a move could mean disaster for the developing world as a whole, which can be prevented only if developing countries maintain their common stand till the end.

Since a country like Nepal is not likely to receive substantial amount of FDI, even if an investment agreement is signed at the WTO, there is no real incentive for Nepal to support this cause. Moreover, barring three developing countries, no other developing country is in favour of negotiating an investment accord at the WTO. Therefore, Nepal should not support the idea of conducting negotiations on investment after the Cancun Ministerial. Rather, Nepal should support the idea that the educative process and the activities of the Working Group should continue.

**Trade facilitation:** Unlike in the case of competition and investment, there is a merit in negotiating trade facilitation agreement within the WTO after the Cancun Ministerial. The arguments against the negotiation of this agreement within the WTO after the Cancun Ministerial conference are not as convincing as in the case of investment and competition.

Indeed, trade facilitation is not only an instrument for enhancing trade efficiency but also a means to boost revenue collection and promote good governance. As mentioned above, this is more of an internal governance issue, which should be tackled even if the issue is not being discussed at the WTO.

Similarly, automated and computerised customs clearance procedure and resultant reduction in clearing time could save millions of rupees for our traders. Agreed that one time investment would be high, but the streams of benefits accrued from such investment over a period of years would definitely make a forceful case for the implementation of trade facilitation improvement measures. However, given the fact that due to resource and capacity constraints developing countries might find it difficult to implement all the trade facilitation improvement measures and that developed countries are showing increased interests to negotiate this agreement, developing countries and LDCs including Nepal should agree to sign this agreement only if technical assistance is provided. Moreover, given the tendency of the developed countries to sideline the implementation issues, time is ripe for developing countries to negotiate this agreement in tandem with the implementation issues i.e., by making the signing of this agreement conditional upon their concerns for implementation issues being addressed.

Given the non-implementation of a number of technical assistance provisions contained in various WTO Agreements, developing countries should be cautious about the language of the technical assistance provision. Therefore, they should insist on commitments with quantifiable targets and deadlines.

A final demand that should be made by the developing countries is that of “peace clause”, which will prevent the use of Dispute Settlement Understanding (DSU) rules of the WTO, for a given

period. This time should coincide with the year in which last instalment of trade facilitation technical assistance is to be provided by the developed member countries of the WTO.

**Transparency in government procurement:** For a country like Nepal, saddled with corruption, WTO membership is being viewed by some (including the author) as a means to improve governance. Non-discrimination, greater transparency and predictability all contribute towards reducing discretionary power and rent seeking behaviour. Moreover, the “policy lock in” which is a by-product of WTO membership provides stability to the business environment. This is undoubtedly beneficial to the trade and investment growth.

Transparency in government procurement is about market access, however, it cannot provide a powerful market access stimulus to foreign enterprises unless and until there is an explicit provision on “non-discrimination”. The proposed agreement is silent on “non-discrimination” issue. However, the fear of developing countries that this agreement could be used as a Trojan Horse by the developed countries to multilateralise Government Procurement Agreement (GPA, in which non-discrimination is a cornerstone) is not unfounded.

While it is true that developed countries are ultimately interested in market access, we should also get our priorities right. First, we should be clear whether or not we would like to promote good governance in our country. Second, we should be clear whether we want to continue protecting our near-monopoly inefficient domestic enterprises or infuse the element of “market contestability” so as to help them improve their performance. If the answers to these questions are affirmative, then Nepal has nothing to lose by agreeing to negotiate on transparency in government procurement. However, the issue of technical assistance, concerns regarding implementation issues, and DSU (peace clause) should apply equally well in this case as in the case of trade facilitation.

### Annex 6.1: Singapore Mandate

*The first regular biennial meeting of the WTO at Ministerial level was held in Singapore in December 1996. The Singapore Ministerial Declaration contained the following paragraphs:*

#### Investment and competition

20. Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement, and on the understanding that the work undertaken shall not prejudice whether negotiations will be initiated in the future, we also agree to:

- establish a working group to examine the relationship between trade and investment; and
- establish a working group to study issues raised by members relating to the interaction between trade and competition policy, including anticompetitive practices, in order to identify any areas that may merit further consideration in the WTO framework.

These groups shall draw upon each other's work if necessary and also draw upon and be without prejudice to the work in UNCTAD and other appropriate intergovernmental fora. As regards UNCTAD, we welcome the work under way as provided for in the Midrand Declaration and the contribution it can make to the understanding of issues. In the conduct of the work of the working groups, we encourage cooperation with the above organisations to make the best use of available resources and to ensure that the development dimension is taken fully into account. The General Council will keep the work of each body under review, and will determine after two years how the work of each body should proceed. It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO members regarding such negotiations.

#### Transparency in government procurement and trade facilitation

21. We further agree to:

- establish a working group to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement; and
- direct the Council for Trade in Goods to undertake exploratory and analytical work, drawing on the work of other relevant international organisations, on the simplification of trade procedures in order to assess the scope for WTO rules in this area.

22. In the organisation of the work referred to in paragraphs 20 and 21, careful attention will be given to minimizing the burdens on delegations, especially those with more limited resources, and to coordinating meetings with those of relevant UNCTAD bodies. The technical cooperation programme of the Secretariat will be available to developing and, in particular, least-developed country members to facilitate their participation in this work.

## Annex 6.2: Doha Mandate

*The Doha Ministerial Declaration, 14 November 2001, included the following paragraphs:*

### Relationship between trade and investment

20. Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term crossborder investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 21, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.
21. We recognise the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.
22. In the period until the Fifth Session, further work in the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; nondiscrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between members. Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public

interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable members to undertake obligations and commitments commensurate with their individual needs and circumstances. Due regard should be paid to other relevant WTO provisions. Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.

### Interaction between trade and competition policy

23. Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.
24. We recognise the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.
25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.

## Transparency in government procurement

26. Recognizing the case for a multilateral agreement on transparency in government procurement and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations. These negotiations will build on the progress made in the Working Group on Transparency in Government Procurement by that time and take into account participants' development priorities, especially those of least-developed country participants. Negotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers. We commit ourselves to ensuring adequate technical assistance and support for capacity building both during the negotiations and after their conclusion.

## Trade facilitation

27. Recognizing the case for further expediting the movement, release and clearance of goods, including goods in transit, and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations. In the period until the Fifth Session, the Council for Trade in Goods shall review and as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 and identify the trade facilitation needs and priorities of members, in particular developing and least-developed countries. We commit ourselves to ensuring adequate technical assistance and support for capacity building in this area.

## Annex 6.3: Chairman's clarification

Extract from speech with which conference chairman, Qatari Finance, Economy and Trade Minister Youssef Hussain Kamal introduced the ministerial declarations and decision in the closing plenary session of the Doha Ministerial Conference, 14 November 2001:

“I would like to note that some delegations have requested clarification concerning paragraphs 20, 23, 26 and 27 of the draft declaration. Let me say that with respect to the reference to an ‘explicit consensus’ being needed, in these paragraphs, for a decision to be taken at the Fifth Session of the Ministerial Conference, my understanding is that, at that session, a decision would indeed need to be taken by explicit consensus, before negotiations on trade and investment and trade and competition policy, transparency in government procurement, and trade facilitation could proceed. In my view, this would also give each member the right to take a position on modalities that would prevent negotiations from proceeding after the Fifth Session of the Ministerial Conference until that member is prepared to join in an explicit consensus.”

## Endnotes

- <sup>1</sup> While paragraph 20 deals with investment, 23 deals with competition, 26 deals with transparency in government procurement, paragraph 27 deals with trade facilitation. See WTO (2001), Ministerial Declaration, adopted on 14 November 2001, WT/MIN (01)/DEC/1, 20 November 2001 (01-5859), Geneva: 4-6.
- <sup>2</sup> The Chairman's understanding of the mandate contained in paragraphs 20, 23, 26 and 27 of the Doha Ministerial Declaration that any decision be taken by explicit consensus. See Annex 3 for the extract from the Chairman's speech.
- <sup>3</sup> This is the reason for considering Agriculture as one of the built-in-agenda items. As per this mandate, processes of analysis and information exchange and paper submissions have already started since 2000 and this is an ongoing process.
- <sup>4</sup> This realisation, for example, led the then Indian Minister for Industry and Commerce, Mr. Murosoli Maran to hold the entire Doha Development Agenda to ransom, if the developed countries did not agree to his countries'

- demand of resolving the implementation issues. He refused to join the consensus till the end, which led to the developed countries promising to make some concessions to the developing countries.
- 5 ICTSD (2003), “Singapore Issues Controversy Continue” in *BRIDGES Weekly Trade News Digest*, Vol. 7, Number 23 (25 June), Geneva.
- 6 ICTSD (2003), “Investment: Members Disagree on Negotiations, Informal Consultations To Proceed” in *Bridges Weekly Trade News Digest*, Vol. 7, No. 22 (18 June), Geneva.
- 7 ICTSD (2003), “Competition Policy: WG Sees No Agreement on Negotiations” in *Bridges Weekly Trade News Digest*, Vol. 7, No. 20, (4 June), Geneva.
- 8 ICTSD (2003), above, note 5.
- 9 Adhikari, Ratnakar (2002), *Competition Policy in Small Economies*, Discussion Paper, SAWTEE, Kathmandu and CUTS, Jaipur: 1.
- 10 A background paper for the World Bank’s World Development Report – 2001 concludes that, in 1997, developing countries imported US\$ 81.1 billion of goods from industries which had seen a price-fixing conspiracy during the 1990s, and that these imports represented 6.7 percent of the total imports and 1.2 percent of GDP in developing countries. See Mehta, Pradeep S. and Ujjwal Kumar (2001), “Let’s be Proactive on Multilateral Competition Policy”, *Viewpoint Paper*, Consumer Unity and Trust Society (CUTS), Jaipur.
- 11 Mehta, Pradeep S. (2003), Why not a Regional Competition Policy in South Asia?, *Trade and Development Monitor*, No. 2, Vol. 2, June/July 2003, South Asia Watch on Trade, Economics and Environment (SAWTEE), Kathmandu:16.
- 12 Adhikari, Ratnakar (2002), “Imperatives of Competition Policy” in *The Kathmandu Post*, September 14, 2002.
- 13 Ibid.
- 14 Ibid.
- 15 Basant, Rakesh (2001), “Synthesis of Phase –1 Country Report” in 7-UP Project *Comparative Study of Competition Regimes in Select Developing Countries of the Commonwealth*, CUTS, 7-8 September, Goa
- 16 Ibid at 19.
- 17 Adhikari, Ratnakar and Malathy Knight John (2003), “What Kind of Competition Policy and Law Should a Developing Country have?,” a paper presented at an International Symposium on *Competition Policy and Pro-Poor Development* organised by CUTS, 19 February 2003, Geneva.
- 18 Federal Trust (2003), *Expanding WTO Rules: Should there be WTO rules on competition, investment, trade facilitation and transparency in government procurement?*, A Federal Trust Report on Singapore Issues, London: 18.

- 19 This is the case with the European Union (EU), where movement of goods, services, capital and labour are free within the 15 member countries, is not surprising given their “deep” economic integration. However, various “shallow” integration arrangements also contain a Chapter on investment. For example, Chapter 11 of the North American Free Trade Area (NAFTA) – a free trade area of Canada, Mexico and the USA – also deals with Investment.
- 20 <http://www.cid.harvard.edu/cidtrade/geneva/investment.html>
- 21 ActionAid (2003), *Unlimited Companies: The Developmental Impacts of an Investment Agreement at the WTO*, London:8.
- 22 This section draws heavily on Adhikari, Ratnakar (2003), “Investment as a New Issue in the WTO” in *The Kathmandu Post*, 27 June 2003.
- 23 <http://www.cid.harvard.edu/cidtrade/geneva/investment.html>
- 24 ActionAid (2003), above, note 21: 21.
- 25 Federal Trust (2003), above note 18:14.
- 26 Swedish Trade Procedure Council and National Board of Trade (2002) *Trade Facilitation – Impact and Potential Gains* (August), Stockholm:5
- 27 Staples, Brian Rankin (2002), “Trade Facilitation: Improving the Invisible Infrastructure” in Bernard Hoekman, Aditya Mattoo and Philip English (eds.) *Development, Trade and the WTO: A Handbook*, The World Bank, Washington, D.C: 140.
- 28 Ibid.
- 29 A custom software programme used in 70 developing countries, ASYCUDA simplifies and automates customs functions with a view towards increasing revenue collection, speeding clearance of cargo, and improving data collection and dissemination. See Staples, Brian Rankin (2002): 141
- 30 180 trade points have been established by UNCTAD in 109 countries. See Ibid. In Nepal also two trade points have been established, namely, Himalayan Trade Point at the Trade Promotion Centre; and Kathmandu Trade Point at the Kathmandu College of Management.
- 31 Swedish Trade Procedure Council and National Board of Trade (2002), above, note 26: 14
- 32 World Bank (2003), *Trade Facilitation Improvements Would Reap Big Benefits in Asia Pacific*, News Release No: 2003/120/EAP, Washington, D.C.
- 33 DTI (2003), “Trade Facilitation” in *Europe and World Trade*, Department of Trade and Industry of the government of United Kingdom (6 May), London

- <sup>34</sup> Government procurement of goods and services typically accounts for 10-15 percent of GDP for developed countries, and up to as much as 20 percent of GDP for developing countries. Centre for International Development, Harvard University at <http://www.cid.harvard.edu/cidtrade/issues/govpro.html>
- <sup>35</sup> Evenett, Simon J (2002) “Multilateral Disciplines and Government Procurement” in Bernard Hoekman, Aditya Mattoo and Philip English (eds.) Development, Trade and the WTO: A Handbook, The World Bank, Washington, D.C: 417.
- <sup>36</sup> See for example Evenett, Simon J. (2000), *Reforming the Government Procurement Agreement: Promote Transparency then Non-Discrimination*, The World Bank (November), Washington, D.C; Evenett, Simon J (2002) “Multilateral Disciplines and Government Procurement” in Bernard Hoekman, Aditya Mattoo and Philip English (eds.) Development, Trade and the WTO: A Handbook, The World Bank, Washington, D.C.
- <sup>37</sup> Federal Trust (2003), above note 19: 14.
- <sup>38</sup> Ibid.

## Appendix

### Declaration of the National Workshop

Emphasising the special status to be provided to the least-developed countries (LDCs), and in particular to the land-locked LDCs, in terms of their integration into the multilateral trading system,

Remaining opposed to the “WTO-Plus” conditions imposed by the developed countries in the process of accession of the LDCs,

Disappointed with the slipping of deadlines concerning the issues of utmost importance to the developing countries and LDCs as mandated in the Doha Development Agenda,

Reiterating demand for the participation of all the stakeholders in the WTO processes and their inclusion in the multilateral trade negotiation process at all levels,

We, the representatives from government agencies, civil society, farmers’ groups, private sector, academia and media, gathered at the National Workshop on Road to Cancun, held from 10-11 July 2003 in Lalitpur, Nepal, have reached a consensus and would like to enumerate the following crucial points as a part of our Declaration:

1. There should be no patent on life forms and on food and agriculture.
2. Review Article 27.3 (b) of the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement as per the spirit of the Convention on Biological Diversity (CBD) and International Undertaking on Plant Genetic Resources for Food and Agriculture (ITPGR)
3. Developed countries should not be allowed to impose International Union for the Protection of New Plant Varieties (UPOV) model on developing and least developed countries as the *sui generis* model.
4. WTO members must respect, recognise and reward indigenous knowledge and practices.
5. A system of regulating the labelling and transferring of genetically modified organism (GMO) should be instituted

as per the spirit of the recent decisions of Codex Alimentarius Commission (CAC) and Bio-safety Protocol.

6. Developed countries should immediately and unconditionally remove all types of subsidies provided to their agriculture.
7. Developed countries should provide duty-free and quota-free market access to LDC products, and this should be made binding at the WTO.
8. Developed countries must undertake binding commitments on food security and food sovereignty in relation to Marrakesh Decision on Net Food Importing Developing Countries (NFIDCs).
9. Developed countries should provide technical assistance to secure representation of the LDCs and developing countries in international standard-setting bodies.
10. The transition period for acceding member countries should start from the date of accession.
11. Special and differential treatment (S&DT) should be legally binding, enforceable and operational as provided in the Paragraph 44 of the Doha Declaration.
12. Developed countries should unconditionally and immediately facilitate the process of technology transfer as provided for in Article 66.2 of the TRIPS Agreement and as reinforced by the Implementation Issues and Concerns adopted as a part of the Doha Ministerial Declaration.
13. Decisions related to new issues should be taken not just on the basis of experts' opinions, but also by considering the socio-economic status of the LDCs.
14. Technical assistance must be provided to implement the WTO Agreements and carry out studies to assess the impact of new issues. The studies should be undertaken in collaboration with local partners who are more aware of the local conditions.
15. Singapore issues need to be unbundled and each issue should be discussed on their own merit.
16. In order to protect the traditional knowledge of local communities, the "protection of local knowledge" itself should be taken up for negotiation at the WTO.