

Eleventh WTO Ministerial Conference and Nepal

State of play, interests, and possible positions and
negotiating strategies

South Asia Watch on Trade, Economics and Environment (SAWTEE), Kathmandu

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The Ministry of Commerce would like to acknowledge the authors of this position paper—Dr. Posh Raj Pandey, Chairman, SAWTEE, Dr. Paras Kharel, Research Director, SAWTEE and Ms. Pragati Koirala, Research Associate, SAWTEE.

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Executive Summary

In view of the fast-approaching Eleventh Ministerial Conference (MC11) of the World Trade Organization (WTO), scheduled for 10-13 December 2017 in Buenos Aires, Argentina, this paper presents the state of play of negotiations at the WTO, with a focus on issues of special interest and significance to the least-developed countries, identifies Nepal's interests, and suggests possible positions and negotiating strategies for Nepal.

MC11 is taking place at a time of a fragile global growth recovery and a tepid rebound in international trade. Against the backdrop of the Brexit vote in the UK and the new administration in the US with a decidedly protectionist stance on trade, the political will to advance multilateral trade negotiations at the WTO under the Doha mandate is in short supply. A preference for plurilateral negotiations expressed by some countries does not augur well for LDCs like Nepal as they have little or no say on the rules thus negotiated. The divisions over the Doha mandate and whether issues outside the Doha mandate should be negotiated at the WTO, as reflected in the Nairobi (MC10) Declaration, continue to shape the negotiations and the character of the stalemate in the lead-up to MC11 in Buenos Aires.

Nepal, as the first LDC to become a member of the WTO through the accession process, made far greater commitments than those LDCs that were already members of WTO at the time of its establishment. But on the bright side Nepal got a better deal than other LDCs that joined the WTO through the accession process. Nepal's active participation and effective negotiation during the accession process led to a better deal compared to other LDCs. The same level of active participation is needed now, at a time when the WTO is extremely divided on the fate of the Doha Development Agenda (DDA).

The DDA, launched in 2001 with the development dimension front and centre, had created high expectations for developing and least-developed countries, but those expectations have not been delivered 16 years after the commitment was made. This paper presents a brief introduction and review of the DDA and the decisions pertinent to the LDCs. The DDA addressed some 40 of the 100 implementation-related issues raised by developing countries. Substantial reduction and as appropriate elimination in tariffs, domestic support and export subsidies in agriculture were committed along with substantial reduction in tariff rates in non-agricultural market access (NAMA). Decision on compulsory licensing for the LDCs as well as the issue of special and differential treatment would also be addressed by the DDA. This paper also lists the limited progress made so far in the DDA. This is followed by a brief review of the Hong Kong Ministerial Conference which delivered a decision on duty-free and quota-free market access to the products of LDCs, among other things, and the Nairobi Ministerial Conference outcomes.

The paper then delves deeper into some of the most contentious issues being negotiated at the WTO, the biggest one being the negotiations in agriculture. Agriculture is an important area of negotiations for developing countries and LDCs as agriculture continues to be a major employer and a sector with significant export potential in many of them, and concerns food security, livelihood security and rural development. It provides the state of play of the negotiation on the three pillars of agriculture negotiation namely, market access (including special safeguard mechanism), domestic support (subsidies, direct or indirect, including those for public stockholding programmes), and export competition (including export subsidies) as well as the issue of cotton which is important to some African countries. Trade-distorting, capacity-enhancing fisheries subsidies, although not important for Nepal, are a strategically

important issue for other developing countries and LDCs; therefore, understanding this issue is also important.

Providing the LDCs with the necessary policy space in Domestic Regulations in Services so that these regulations do not militate against developmental needs of the LDCs is important and requires to be advocated strongly. While most developed countries have met the Hong Kong pledge of providing DFQF to at least 97 percent of products (tariff lines) from LDCs and major developing-country markets such as China and India have also provided the same, the less than 97 percent coverage of the DFQF in the US has been a major issue for the LDCs. Stringent rules of origin tend to hamper meaningful market access even where DFQF schemes are on offer. Some achievement was made in the area of Preferential Rules of Origin through the Bali and Nairobi decisions on making them simple, relaxed and flexible. The percentage of value addition was set at 25 percent. But their non-binding nature is making implementation challenging.

The paper also reviews the newest, and so far, the only, multilateral agreement successfully negotiated at the WTO since its creation, i.e., the Trade Facilitation Agreement, its implementation status as well as the challenges of implementation for the LDCs, including the need for technical and financial support. Another important achievement for the LDCs is the Service Waiver decision, last extended until 2030, that allows developed and developing countries to deviate from the WTO's MFN rule so as to provide preferential treatment to services and services suppliers from the LDCs. So far 24 developing and developed countries have made notifications of service waiver for LDCs. This paper also touches on the proposal made by the G-90 on Special and Differential Treatment for developing and least-developed countries, and issues in Intellectual Property Rights and Non-Agricultural Market Access. Aid for Trade (AfT), a vital issue for LDCs, is also discussed.

Emerging issues that were not a part of the DDA that are being increasingly discussed at the WTO are also discussed here. Investment Facilitation, Trade Facilitation in Service, and Micro, Small and Medium Enterprises are being pushed to be included in the WTO negotiations. E-commerce, although a part of the DDA, is being discussed with greater vigour. The 1998 work-programme on e-commerce provided an exploratory mandate but as e-commerce has been progressing rapidly some members have become increasingly eager to start negotiating the rules on the issue while others are sceptical about changing the 1998 mandate.

After providing the state of play in the above-mentioned issues the paper then identifies the position Nepal should take during MC11 on the remaining DDA issues as well as the emerging issues. There is a need to push for the expeditious conclusion of the DDA. In agriculture the LDCs need to be provided an exemption from *de minimis* calculations for the purchases made at administered prices under public stockholding programmes, as well as exemptions from new rules on domestic support. Recommendations are made on issues of Service Waiver, TRIPS, Aid for Trade, Special and Differential Treatment, Domestic Regulations on Services, E-commerce, Investment Facilitation, and other emerging issues. In addition to the issue-related recommendations, the paper also urges the negotiators of Nepal to utilize the existing diplomatic channels for bilateral trade talks as well as the regional forum provided by the South Asian Association for Regional Cooperation (SAARC). Building alliances with like-minded members, including those on track towards graduation from LDC status (like Nepal), provides one of the best ways for negotiations at the WTO.

1 Introduction

Nepal first sought membership of the General Agreement on Tariffs and Trade (GATT) in 1989, with freedom of transit uppermost in its mind. In 2004 it became the first least-developed country (LDC) to become a member of the World Trade Organization (WTO) by virtue of accession—a successor to the GATT with a greater scope and mandate for setting global trade rules. A motivation behind seeking WTO membership was that by being part of a rules-based multilateral trading system that aimed to create a predictable and transparent trading environment, this landlocked LDC would be able to not only better safeguard its transit rights but also achieve export expansion and diversification, a pathway towards high economic growth.

The Doha Round of WTO negotiations—with the development dimension at its front and centre—had been launched during Nepal’s accession negotiations. Hopes of the Doha Development Agenda (DDA) being delivered ran high. Although Nepal was able to secure a good accession deal overall, getting WTO membership by virtue of accession meant it unavoidably had to undertake more commitments, and concede more policy space, than required of LDCs who became WTO members straightaway at its creation in 1995. The promise of the DDA was expected to set the balance right. The first Ministerial Conference (MC) after the launch of the Doha Round—Cancun, 2003—which endorsed Nepal’s accession was a failure. The next Ministerial, in Hong Kong (2005), gave a shot in the arm of the DDA, with the resulting declaration containing substantive commitments and decisions.

Progress since has been arduously slow: many of the key issues remain outstanding. Divisions have reached a point where the very relevance of continuing with the DDA is being questioned by some members. The Ministerial Declaration issued at the Tenth Ministerial Conference, in Nairobi (2015), notes that while many members reaffirm their commitment to the DDA, other members do not reaffirm the Doha mandates, “as they believe new approaches are necessary to achieve meaningful outcomes in multilateral negotiations”. This is significant because, in the past, expressing commitment to the DDA—or at least not suggesting that it be ditched—was expected of all members. The Nairobi Declaration also noted there are differences among members on whether other issues, not part of the Doha mandate, should be identified and discussed.

On the eve of the Eleventh Ministerial Conference (MC11) in Buenos Aires, there are no expectations of any major breakthrough. In light of the current state of play, agriculture—notably public food stockholding, trade-distorting farm subsidies, special safeguard mechanism, and cotton—and fishery subsidies are likely issues on the agenda for MC11.¹ Negotiations are also taking place on domestic regulation. However, there remain deep disagreements within all these topics. Some members, especially developed countries, are pushing “new issues” such as investment facilitation; a new mandate for e-commerce negotiations; and rules to facilitate trade integration of micro, small and medium-sized enterprises. A mini-ministerial meeting in Marrakesh attended by more than 35 countries failed to bring any consensus due to continued entrenched positions on agriculture, fisheries subsidies, e-commerce, domestic regulation, and investment facilitation, among others.² Moreover, the United States (US) said no negotiated outcomes were possible at MC11 and the Doha negotiations were over in MC10 (Nairobi). It called for “reinvigorating” the WTO by,

¹ <https://www.ictsd.org/bridges-news/bridges/news/wto-conference-chair-malcorra-urges-members-to-prepare-for-post-buenos>

² <https://www.twn.my/title2/wto.info/2017/ti171012.htm>

among other things, reforming the functioning of the Dispute Settlement Body. It is blocking the selection processes to fill Appellate Body vacancies, an action that serves as a distraction from negotiations in Buenos Aires.

This paper discusses the key issues in WTO negotiations of interest to LDCs in general and Nepal in particular, and attempts to identify Nepal's position for MC11. Since Nepal voices its position in WTO negotiations collectively with the LDC Group, the concerns and positions of the LDC Group on outstanding issues of the DDA and new issues, including the possible items on the MC11 agenda, are highlighted. The implementation status of key recent WTO decisions and developments on LDC-specific issues, not necessarily on the MC11 agenda, are also discussed.

As Nepal is among the seven LDCs to be considered for graduation at the next Triennial Review of the Committee for Development Policy of the United Nations in March 2018, and graduation from LDC status by 2022 is a national-level goal, Nepal must start thinking about the implications of graduation for the flexibilities it currently enjoys at the WTO and additional flexibilities it is seeking along with other LDCs. While some preference-granting members are allowing an extended period of preferences to graduated LDCs and the Enhanced Integrated Framework has a provision allowing former LDCs to benefit from EIF resources up to five years from graduation, negotiations are required to produce legal instruments such as "waivers" to provide time-limited flexibility for a graduating LDC to comply with WTO rules—for example, currently LDCs are exempt from the rule banning export subsidies under the Agreement on Subsidies and Countervailing Measures, and are given a longer time period for the implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights.

Nepal's weak capacities and structural constraints—industrial, financial, technical, infrastructural, human resource-related, among others—that warrant the flexibilities it enjoys at the WTO will persist even after graduation. The distinct possibility of graduation in the near future makes issues concerning developing countries in general, such as a Special Safeguard Mechanism and treatment of food purchases at administered prices under public stockholding programmes, of greater interest to Nepal than would be the case if graduation were a far-off possibility. Nepal must start consulting with likeminded countries, including LDCs, and also concurrently propose new approaches at the UN to recognize the challenges faced by LDCs after graduation. The graduation aspect must be kept in mind while reading this paper and planning for Nepal's WTO position in the long term.

The rest of the paper is organized as follows. Section 2 discusses salient features of the Doha Development Agenda, and Section 3 briefly discusses the Hong Kong Ministerial Declaration, setting the scene for the rest of the paper. Sections 4 through 7 discuss items likely to be on the MC11 agenda: Section 4 discusses agriculture issues, Section 5 fishery subsidies, Section 6 emerging issues (investment facilitation, trade facilitation in services, electronic commerce, and micro, small and medium enterprises), and Section 7 domestic regulation in services. Sections 8 through 14 discuss issues of special interest to LDCs, although they may not feature prominently in the forthcoming Ministerial. Section 8 deals with duty-free and quota-free market access, Section 9 trade facilitation, Section 10 LDC service waiver, Section 11 special and differential treatment, Section 12 intellectual property rights, Section 13 non-agriculture market access, and Section 14 aid for trade. Section 15 concludes.

2 Doha Development Agenda

The Doha Declaration came at the end of the Doha Ministerial Conference in 2001. It launched the Doha Round of negotiations—the first round after the establishment of the WTO. Also known as the Doha Development Agenda (DDA), its fundamental objective is to improve the trading prospects of developing countries. Below are highlights of the key decisions taken during the Doha Ministerial Conference and the key agendas for negotiation.

2.1 Implementation-related issues and concerns

This is related to the concerns raised by the developing countries regarding the implementation of agreements that were the outcomes of the Uruguay Round. As around 100 implementation-related issues were raised, the Doha Ministerial adopted a two-track solution to address them:

- a. More than 40 items under 12 headings were settled at or before the Doha Ministerial for immediate delivery. The 12 headings were: General Agreement on Tariffs and Trade (GATT), Agriculture, Sanitary and Phytosanitary measures (SPS), Textiles and Clothing, Technical Barriers to Trade (TBT), Trade-Related Investment Measure (TRIMS), Anti-dumping (GATT Article VI), Customs Valuation (GATT Article VII), Rule of Origin, Subsidies and Countervailing Measures, Trade-Related Aspects of Intellectual Property Rights (TRIPS), Cross-cutting issues. The implementation-related issues mostly pertain to special and differential treatment for the developing countries, financial and technical assistance as well as phased implementation wherever possible.

The following table presents a summary of the decisions taken under implementation-related issues and concerns:

Heading	Decisions
GATT	<ul style="list-style-type: none">• S&DT for developing countries to protect their balance of payments• Directs the committee on market access to give further clarification on the phrase “substantial interest”
Agriculture	<ul style="list-style-type: none">• Directs members to show restraint in challenging developing countries’ notification under Green Box that addresses rural development and food security concerns• Addresses the concerns regarding the possible negative effects of liberalization on net food importing countries and LDCs and approves the recommendations (i) food aid; (ii) technical and financial assistance in the context of aid programmes to improve agricultural productivity and infrastructure; (iii) financing normal levels of commercial imports of basic foodstuffs; and (iv) review of follow-up.• Defines tasks to be undertaken by the committee on the circumvention of export subsidy commitments• Takes note of the submission by countries of additional information on the administration of tariff quota while observing that these requirements should not put additional burden on developing countries

Heading	Decisions
SPS Measures	<ul style="list-style-type: none"> • Longer time frame (not less than 6 months) for developing countries to comply with other countries' SPS measures. • Reasonable interval between the publication of other countries' new SPS measures and their entry into force (at least 6 months) • Equivalence: where possible governments are supposed to accept that different measures used by other governments, which provide the same level of health protection for food, animals and plants, can be equivalent to their own • Review operations of the agreement at least once every 4 years by the SPS committee • Facilitate increased level of participation of members at different levels of development in the work of the relevant international standard setting organizations • Urges members to provide to the extent possible, financial and technical assistance so that the developing countries can respond to the SPS measures • Urges members to ensure technical assistance is provided to least-developed countries with the view to responding to special problems faced by LDCs
Textile and Clothing	<ul style="list-style-type: none"> • Effective utilization of early integration of products and the elimination of quota restrictions • Exercise particular consideration before initiating investigations in the context of antidumping remedies on developing countries previously subject to quantitative restriction for 2 years after the integration of this agreement into WTO • Members shall notify any changes in their rules of origin • Small supplier and LDCs should be given the most favorable treatment available when countries calculate quotas for the remaining years of the agreement
TBT	<ul style="list-style-type: none"> • Reasonable interval for developing countries to adapt their products or production methods to new regulations in importing countries • Developing countries' participation in the work of international standards-setting organizations • Urge members to provide adequate financial and technical assistance to LDCs
TRIMS	<ul style="list-style-type: none"> • Requests the goods council to consider positively the request by LDCs for the extension of transition period to 7 years
Anti-Dumping (GATT Article VI)	<ul style="list-style-type: none"> • Examination with special care, repeated anti-dumping investigation request • Developed countries must give special regard to the special situation of developing countries while

Heading	Decisions
	<p>considering anti-dumping measures and explore alternative “constructive remedies”</p> <ul style="list-style-type: none"> • Investigation into negligible volume of dumped imported products will be terminated and instruct the committee to prepare recommendation within 12 months to make the time periods predictable • Annual review of the implementation of the agreement
Customs Valuation (GATT Article VII)	<ul style="list-style-type: none"> • Give positive response to the request for extension of transition period made by LDCs, and also consider particular situation of LDCs when setting terms and conditions • Cooperation and coordination between customs agencies of member countries to prevent customs fraud
Agreement on Rule of Origin	<ul style="list-style-type: none"> • Urge committee to complete its work on harmonization of rules of origin by the end of 2001
Agreement on Subsidies and Countervailing Measures	<ul style="list-style-type: none"> • Annex VII(b) to the Agreement on Subsidies and Countervailing Measures includes the members that are listed therein until their GNP per capita reaches US \$1,000 in constant 1990 dollars for three consecutive years.
TRIPS	<ul style="list-style-type: none"> • TRIPS Council shall put in place a mechanism for ensuring the monitoring and full implementation of the obligations of Article 66.2. To this end, developed-country members shall submit prior to the end of 2002 detailed reports on the functioning in practice of the incentives provided to their enterprises for the transfer of technology in pursuance of their commitments under Article 66.2.
Cross-cutting issues	<p>The committee on trade and development was instructed to:</p> <ul style="list-style-type: none"> • to identify mandatory and non-binding S&DT to consider the legal and practical implications for developed and developing Members of converting special and differential treatment 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 • to examine additional ways in which S & DT provisions can be made more effective, including improved information flows, in which developing countries, in particular the least-developed countries, 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

b. The vast majority of the remaining items would enter negotiations immediately.

2.2 Agriculture

Comprehensive negotiations were aimed in the following areas:

- market access: substantial reductions
- exports subsidies: reductions of, with a view to phasing out, all forms of these
- domestic support: substantial reductions for supports that distort trade

Special and Differential Treatment for developing countries was made integral to the negotiations and should enable developing countries to meet their needs for food security and rural development.

2.3 Market access for non-agricultural products

Tariff cutting negotiations on all non-agriculture products was launched so as to reduce or as appropriate eliminate tariffs, tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries. The negotiations would take into account special needs and interests of developing and least developed countries.

2.4 Trade-Related Aspects of Intellectual Property Rights (TRIPS)

TRIPS and Public Health was one of the most important decisions taken under TRIPS from the perspective of least-developed countries. The TRIPS Council was directed to find a solution to the problems, countries may face in making use of compulsory licensing if they have too little or no pharmaceutical manufacturing capacity, reporting to the General Council on this by the end of 2002. The declaration also extends the deadline for least-developed countries to apply provisions on pharmaceutical patents until 1 January 2016.

2.5 Least-developed countries

The members committed themselves to the objective of providing duty-free market access to the products of least-developed countries.

2.6 Special and differential treatment

The members agreed to review the special and differential treatment provisions with the view of strengthening and making them more precise.

Several other areas of negotiations are included in the Doha Declaration but the above-mentioned issues were some of the most important ones for the least-development countries.

3 Progress in DDA so far

Progress in implementing the Doha Development Agenda has been extremely slow; nonetheless there have been a number of significant decisions and actions beneficial to the LDCs:

- As a result of the July Package and the Hong Kong Ministerial Conference, the LDCs secured duty-free and quota-free market access for at least 97 percent of their products in most, developed-country markets as well as in China and India.
- The transition period for implementation of the TRIPS Agreement by the LDCs has been extended to 2021.
- LDCs do not have to provide patent protection to pharmaceutical products until 2033.
- An amendment to the TRIPS Agreement—through a new article, Article 31b—entered into force on 2 January 2017, allowing LDCs and countries with insufficient

manufacturing capacities to import medicines produced under compulsory licensing. The 2003 General Council decision to that effect has thus been made permanent.

- The 2011 decision on Service Waiver for LDCs, last extended until 2030.
- The ratification in February 2017 of the Trade Facilitation Agreement, introduced at the 2013 Bali Ministerial.

4 Hong Kong Ministerial Declaration

The Hong Kong Ministerial (2005) delivered some very important decisions, including for LDCs, namely on the issues of non-agricultural market access, export subsidies on cotton, deadline for the elimination of agriculture export subsidy as well as modalities for the future negotiations on agricultural and non-agricultural market access.

The biggest decision that came as the Hong Kong Ministerial concluded was duty-free and quota-free (DFQF) market access for at least 97 percent of products originating from LDCs, to be provided by 2008 or no later than the start of the implementation period. Although this decision was welcomed, there was scepticism that developed countries could still put the products of export interest to the LDCs in the 3 percent list of excluded products. Elimination of all export subsidies on cotton by 2006 was another major decision.

On the issue of agricultural export subsidies, it was agreed that all forms of export subsidies would be eliminated by end of 2013. It was also agreed that the domestic support provided by the members would be divided into three bands. The member providing the highest amount of domestic support would have to make the greatest cut, followed by the members providing second and third highest support, while the developing and least-developed countries would make the cut in the third band.

The members also agreed on the adoption of “Swiss formulae” in non-agricultural market access in order to mandate higher cuts on higher tariffs, the modalities for which would be agreed by 30 April 2006.

In service negotiations, the Annex C of the General Council’s Decision (commonly known as the July package) would provide the modality for further negotiations on service trade liberalization. It was also decided that the LDCs are not expected to undertake new commitments.

5 Nairobi Ministerial Declaration

The Nairobi Ministerial Conference was a rather divisive one, as developed countries and developing countries had different views on the fate of the Doha Round. While developed countries were of the view that the members should acknowledge that the Doha round has failed and that it should not be continued. On the other hand, the developing countries were adamant that the Doha Round should be brought to its rightful conclusion.

Divisions were also evident on whether to include new issues in the WTO negotiation agenda. Developed countries pushed for the inclusion of new issues like e-commerce (changing the mandate from exploratory studies to negotiations) and investment facilitation, whereas most developing countries did not wish to get into new issues without the conclusion of the remaining Doha issues.

These two points of divisions were reflected in the Nairobi Ministerial Declaration. Amidst the divisions, some concrete outcomes were achieved at the Nairobi Ministerial Conference, including the following:

5.1 Agriculture

- Eliminate export subsidies (developed countries – immediately; developing countries by 2018)
- Support for marketing and transport costs for exports exempt until 2023 for developing countries and 2030 for LDCs and NFIDCs
- Disciplines on other export policies (e.g., export finance, activities of state-owned enterprises, food aid, with flexibilities for developing countries, LDCs and NFIDCs)
- To engage constructively in finding a permanent solution to public stockholding for food security purposes, through negotiations in dedicated sessions and in an accelerated time-frame
- Recognition of right of developing countries (including LDCs) to use SSM; negotiations to continue in dedicated sessions

5.2 Cotton

- DFQF market access for cotton produced and exported by LDCs, from 1 January 2016
- DFQF market access for relevant cotton-related products included in the list annexed to the Decision and covered by Annex 1 of the Agreement on Agriculture
- Export subsidies to be eliminated immediately (developed countries) or by 1 January 2017 (developing countries)

5.3 Preferential rules of origin for LDCs

- Detailed guidelines built on Bali decision
- 25% value addition for DFQF eligibility, simplification of rules for substantial transformation, and avoid requirements which impose a combination of two or more criteria for the same product
- Provisions for cumulation
- Template for notification of preferential ROO
- Availability of import data to be used for the calculation of preference utilization rates

5.4 Service waiver for LDCs

- Extension of the waiver period by four additional years, i.e. up to 31 December 2030,
- Members who have not notified their preferences were urged to notify promptly the services which have commercial value and promote economic benefits to LDCs
- Members encouraged to undertake specific technical assistance and capacity building measures targeting LDC service suppliers

5.5 TRIPS

- Extension of exemption of LDCs from providing patent protection for pharmaceutical products until 1 January 2033
- Waiver of obligations to provide for the possibility of filing mailbox applications under Article 70.8 and to grant exclusive marketing rights under Article 70.9
- Extension, by a year, until 2017 a moratorium on bringing non-violation complaints under the TRIPS Agreement

5.6 E-Commerce

- Extension of moratorium on customs duty on electronic transmissions

6 Agriculture (including cotton)

It was the Uruguay Round, which led to the creation of the WTO, that brought agriculture back within the ambit of a multilateral legal framework. Agriculture is an important area of negotiations for developing countries and LDCs because agriculture continues to be a major employer and a sector with significant export potential in many of them, and concerns food security, livelihood security and rural development. There are three key pillars of agriculture negotiations – market access (including special safeguard mechanism), domestic support (subsidies, direct or indirect, including those for public stockholding programmes), and export competition (including export subsidies). Cotton, of special interest to four countries -- Benin, Burkina Faso, Chad and Mali – is treated as a distinct issue under agriculture.

A framework for establishing negotiating modalities in agriculture was adopted as part of the July Package in 2004. It accorded flexibilities to LDCs in relation to all three negotiating pillars. It was stipulated that LDCs would not be required to undertake reduction commitments (paragraph 45, Annex A, WT/L/579).

6.1 Market access

As part of implementing the Doha Development Agenda, the 2008 draft texts propose tariff cuts – based on tiered liberalization formulas – by developed and developing countries. This market access expansion is tempered by a provision for sensitive products, eligible for reduced tariff cuts by developed and developing countries alike. In exchange for maintaining sensitive products, countries have to make market access offers through tariff rate quotas. In an attempt to address non-transparency in the administration of existing tariff rate quotas, resulting in underutilization of the quotas, the Ministerial Conference in Bali in 2003 produced a decision clarifying the tariff rate quota administration provisions as defined in Article 2 of the Agreement on Agriculture (WT/MIN(13)/39; WT/L/914), and stipulating procedures to be adopted for an effective reallocation mechanism.

Further, developing countries can place some products under the “special products” category, to be subject to much reduced or even zero tariff cuts, on the grounds that these products affect their food security, livelihood security and rural development. LDCs do not have to make any reduction commitments and will have full access to all special and differential treatment provisions. However, since LDCs already enjoy preferential access, including for agricultural products, to quite a few developed and developing country markets, MFN reduction in agricultural tariffs by developed and developing countries will erode the preferences LDCs are enjoying. Nepal has to identify agricultural products with export potential – say, those listed in the Trade Policy and/or the National Trade Integration Strategy – which stand to face preference erosion and seek measures and assistance to mitigate the possible adverse effects.

Agriculture products of export interest to LDCs are excluded from quite a few duty-free and quota-free (DFQF) market access schemes. Granting DFQF to such products has been a recurring demand of LDCs.

6.2 Special safeguard mechanism

The Special Safeguard Mechanism (SSM) has been a bone of contention in agriculture negotiations. Disagreement over it is said to have been the proximate cause of the collapse of the 2008 mini-ministerial. An SSM would allow developing countries to temporarily raise

tariffs on agricultural products above bound levels in the event of an import surge or a price fall. Discussions centre on the definition of the threshold allowed to trigger the measure, and the type and the magnitude of the safeguard. The G-33 group of developing countries has argued for a simple and accessible SSM as a trade remedy tool to mitigate price volatility risks and to balance distortions in agricultural trade. Other members, including some developing countries, are concerned by the possible trade-distorting impacts of the SSM if it is not subject to sufficient disciplines. A G-33 proposal of November 2015 suggests exploring an approach similar to the Special Agricultural Safeguard, a mechanism included in Article 5 of the Agreement on Agriculture that allows 34 members, both developed and developing, to raise tariffs above bound levels in the event of import surges.

Agriculture imports have been increasing rapidly in Nepal in recent years, but it is not in a position to restrict such imports by raising tariffs to bound levels – although entirely WTO-consistent – partly because imports largely are responding to inadequate domestic production. However, an SSM may be a useful tool for Nepal in the long run when supply-side constraints are alleviated and safeguarding domestic producers may be meaningful. In a decision in the Nairobi Ministerial (WT/MIN(15)/43; WT/L/978), members recognized that developing country members will have the right to have recourse to SSM as envisaged under paragraph 7 of the Hong Kong Ministerial Declaration, and agreed to pursue negotiations on SSM in dedicated sessions of the Committee on Agriculture in Special Session. In its latest proposal on SSM (Job/Ag/111), the G-33 group stated that "a concrete and operational SSM shall be established at MC11 in Buenos Aires."³ The proposal contained a draft legal text as well as an annex each for the volume-based SSM and the price-based SSM.⁴ A large majority of developing and least-developed countries supported the G-33 proposal on SSM.⁵ In their position paper ahead of the Nairobi Ministerial (JOB/TNC/56/Rev.1), the LDCs had also supported the then G33 proposal. On behalf of the G-33 group, Indonesia also said that the G-33 is open to pursuing an outcome on one of these at MC11, and would support such a decision as long as it contains at least a concrete and operational SSM that effectively addresses either import surges or price falls with immediate effect following the decision.⁶

The EU, the US and most members of the Cairns Group want the right to use an SSM to be linked to market access concessions. Agricultural exporters, including Argentina, Australia, Colombia, Pakistan, Paraguay, Russia, Uruguay and Viet Nam, want a complete phase out of the existing special agricultural safeguards, the use of which is currently allowed among 39 WTO members and which provides a motivation for the proposed SSM.

6.3 Domestic support

As outlined in the LDC Group's priorities set out before the Nairobi Ministerial (JOB/TNC/56/Rev.1), LDCs want reductions of all forms of market distorting subsidies and their eventual elimination, while preserving flexibilities for LDCs embedded in the Revised Draft Modalities for Agriculture (TN/4/Rev.4). These flexibilities include: exemption from tariff and domestic support reduction commitments, flexibilities for net food-importing developing countries (NFIDCs), and flexibilities regarding the implementation of special safeguard mechanism. Developed and developing countries are negotiating cuts to trade-distorting domestic support (amber box, de minimis box, blue box, and overall trade-distorting

³ As reported in: D Ravi Kanth, "Will not pay for mandated permanent solution for PSH", insist G33', Published in SUNS #8535 dated 20 September 2017.

⁴ *ibid.*

⁵ *ibid.*

⁶ https://www.wto.org/english/news_e/news17_e/agng_13sep17_e.htm#fnt-1

support – the sum of the three boxes). The 2008 draft texts propose a mix of tiered formulas and caps. Commitments as per the draft would bind US and EU farm support, for example, to levels expected to prevail by 2013 – due to “subsidy water” (Messerlin 2013).⁷ Since only subsidies tightly linked to prices and quantities are proposed to be cut, there is the spectre of box shifting, i.e., the shifting of subsidies from the amber or blue boxes – trade-distorting – to the green box, deemed to be non-trade-distorting (e.g., research and development) but may still have the same final impact on output and prices as amber or blue box support. Many members remain opposed to any change in the current disciplines on green box support (JOB/AG/109).

As an LDC and because its support to agriculture is minimal, Nepal is not required to make any commitments to reducing domestic support. Further, under existing rules developing countries (in general) and LDCs are allowed to provide trade-distorting de minimis non-product-specific support of up to 10 percent of the total value of agricultural output and product-specific support of at most 10 percent of the value of the product’s output. Agricultural subsidies in Nepal are considerably below the allowed de minimis levels. The position of developing countries that they be granted greater flexibilities for extending support through the green box was partly met through a ministerial decision in the Bali MC in 2013 (WT/MIN(13)/37, WT/L/912) that expanded the list of “general services” under the green box related to land reform and rural livelihood security, such as land rehabilitation, soil conservation and resource management, drought management and flood control, rural employment programmes, issuing land ownership titles and farmer settlement programmes. In negotiations on domestic support, Nepal must advocate, directly or subtly – as appropriate – measures to help mitigate the adverse effects on rural livelihood and development caused by trade-distorting support provided in developing countries. The subsidies provided by India to its farmers are likely to be having a more direct impact on the competitiveness of Nepali agriculture.

A range of proposals on domestic support have been tabled. A proposal tabled by the EU, Brazil and others (JOB/AG/99) calls for capping overall trade-distorting support (OTDS) as a share of farm output in developed and developing countries, with no such constraints on OTDS provided by LDCs. Developing countries are allowed a higher cap than developed countries. The exact limits are a matter of negotiation, but the EU and cosponsors want to maintain existing limits on domestic support in the Agreement on Agriculture. Trade-distorting support in both the amber box and de minimis categories is covered. Blue box payments are to be left for further negotiations at the 12th Ministerial Conference. An informal proposal of China and India tabled in July calls for eliminating amber box support (also called Aggregate Measure of Support) as a precondition for looking at other domestic support reforms.⁸ It wants developing countries to maintain their existing de minimis flexibilities, without any new ceilings or cuts.

A separate proposal from the ACP group calls for the elimination of amber box subsidies, together with greater flexibilities for developing countries. This is in line with the China-India proposal. Under the ACP group’s proposal, amber and blue box support in developed countries should not exceed ten percent of the value of agricultural production (5 percent product-specific support and 5 percent non-product-specific support). There is a provision for a longer implementation period, under exceptional circumstances, for developed countries facing critical difficulties. The proposed ceiling for developing countries is 20 percent. The ACP

⁷ Messerlin, P.A. 2013. The Doha round. In Lukauskas, A., Stern, R.M. and Zanini, G., editors, *Handbook of Trade Policy for Development*. Oxford Scholarship Online, doi: 10.1093/acpr of:oso/9780199680405.001.0001

⁸ <https://www.ictsd.org/bridges-news/bridges/news/wto-agriculture-negotiators-weigh-new-proposals-as-buenos-aires-meet>

group also wants product-specific limits on subsidies, a proposal echoed by the Cairns group of agriculture exporters. The ACP proposal faces stiff opposition from the G10 coalition of countries such as Japan, Norway, and Switzerland which have highly protected farm sectors, want existing entitlements for amber box and de minimis support to be a starting point for new disciplines and categorically rejected any new product-specific limits or anti-concentration clauses (JOB/AG/103). The G10 is, however, open to an overall cap on AMS and de minimis, with one possibility being a new limit based on AMS and de minimis entitlements, converted into monetary terms. It also wants developing countries to be covered by future domestic support disciplines. In yet another proposal tabled in October, New Zealand, Australia, Canada, Chile, and Paraguay – agricultural exporters – have advocated a fixed cap on OTDS levels. LDCs would be exempt from any ceilings. The LDC group wants a limit on the sum of all trade-distorting support, including blue box payments.

Reductions of domestic support by other countries are a double-edged sword for Nepal. On the one hand, by raising artificially depressed prices they have a potential to improve Nepal's agricultural competitiveness – although it is a matter for further research to determine which agricultural products of Nepal are facing unfair competition in domestic or export markets due to agricultural support in other countries. On the other, as a net importer of agricultural products, including food, Nepal faces adverse implications for food security. Discussions on product-specific limits or disciplines should also be of interest to Nepal.

6.4 Public stockholding programmes

A section of developing countries, including China and India, further want their public stockholding programmes involving price support – which fall under the amber box but are crucial for food security – to be allowed, preferably by counting them under the green box, even if they exceed agreed limits. The 2013 Bali Ministerial Conference agreed on a “peace clause” (WT/MIN(13)/38 and WT/L/913) that shields existing programmes of developing countries pertaining to certain staple crops against legal challenge if such support exceeds agreed limits, until a permanent solution is found. It mandated that a permanent solution is found by the 11th MC. The General Council meeting on public stockholding in November 2014 reconfirmed the “peace clause” in an even stronger language. Members also clarified that the “peace clause” would remain in force until a permanent solution was agreed, even if that meant going beyond the 2017 deadline. At the Nairobi Conference, ministers adopted a decision (WT/MIN(15)/44) which commits WTO members to engage constructively in finding a permanent solution to this issue, through negotiations in dedicated sessions and in an accelerated time-frame.

A submission by the G-33 on 16 July 2014 reintroduced the group's 2012 pre-Bali proposal to move the support provided under these programmes into the green box. In November 2015, the group submitted another proposal, which simply asks for public stockholding programmes of a certain kind not to be included in a country's calculation of AMS. Similarly, the LDC group, as articulated in its priorities for the 2015 Ministerial, wants purchase of food at administered prices by LDCs under public stockholding schemes for food security purposes to be exempted from the de minimis calculation. Countries with concerns about the G-33 proposal include developing countries such as Brazil, Colombia, Pakistan, Paraguay and Thailand as well as developed countries such as Australia, Canada, the European Union, Norway and the United States. There are concerns that PSH programmes may distort trade, and purchases under such programmes may turn into subsidized exports.

In a new document (Job/AG/99), the EU, Brazil, Peru, Colombia, and Uruguay have suggested that public stockholding programs for food security – involving traditional staple food crops – be exempt from the proposed reduction in trade-distorting domestic support and not be required to be accounted for in the AMS, subject to a number of criteria. Support provided by LDCs would be fully exempt. Support provided under programmes in place at the time of the 2013 Bali agreement would not count towards the existing and proposed limits, subject to transparency and other requirements stipulated in the Bali deal. Support under new programmes would be exempt provided that the value of the stocks procured is no greater than 10 percent of the average value of production in the three latest domestic support notifications. The G-33 has rejected the proposal, opposing any linking of PSH with reductions in domestic support.⁹ On its part, the G-33 has proposed the insertion of a new annex (as Annex 6) to the AoA as a permanent solution on public stockholding for food security purposes, where such stockholding programmes shall not be required to be accounted for in the AMS (JOB/AG/105). Unlike the EU-Brazil proposal, the G33 proposal does not confine eligible food crops to “traditional staple crops”. A large majority of developing countries and LDCs strongly supported the G33 proposal.¹⁰

A critical issue is the way market price support under PSH programmes is calculated at the WTO. It is calculated by comparing the current price of a product with the international reference price of that product during the base period 1986-88. This approach overestimates market price support, as the input costs of crops have increased substantially since the base period and the base period “international” prices were artificially low in the first place due to subsidies, especially those provided by developed-country governments.

Although Nepal’s public stockholding programme is too small to run afoul of WTO rules, the debate over exempting such programmes from standard WTO rules is important to Nepal from a long-term perspective. It is in Nepal’s interest to have the policy space to be able to expand its public stockholding programme in future. At the same time, the rules on public stockholding should not be so lax that stockholding by large developing countries distort trade, and further make Nepali agriculture uncompetitive.

6.5 Export competition

Export competition has been a long-standing issue in the WTO’s agricultural negotiations. A breakthrough was achieved in Nairobi MC in 2015. Under the Ministerial Decision on Export Competition (WT/MIN(15)/45) adopted in Nairobi, developed countries are required to immediately remove export subsidies, except for a handful of agriculture products, and developing countries are required to do so by 2018, with a longer time-frame in some limited cases. Developing countries are provided with a transition period until the end of 2023, and LDCs until 2030, regarding subsidies for marketing exports of agricultural products and for internal transport and freight charges on export shipments under the provision of Article 9.4 of the Agreement on Agriculture. The Nairobi decision also contains rules to minimize the possible trade-distorting impact of other export policies, such as export finance, international food aid and operations of agricultural exporting state trading enterprises. On export finance, it allows LDCs and NFIDCs to benefit from export credits with longer repayment terms for the acquisition of basic foodstuffs. On international food aid, it allows members to monetize international food aid for LDCs and NFIDCs under more flexible conditions than for other members. Nepal does not have any substantial export subsidy or export finance programme,

⁹ As reported in: D Ravi Kanth, “Will not pay for mandated permanent solution for PSH”, insist G33”, Published in SUNS #8535 dated 20 September 2017.

¹⁰*ibid.*

even if one considers the export cash incentive programme, introduced in 2011, as an export subsidy. However, the point about the implications of worldwide reduction in domestic support to agriculture for net food-importer countries discussed above also applies to the case of elimination of export subsidies and limits on other export policies. In general, export competition is not considered to be a priority topic for MC11 (JOB/AG/109).

Australia and the EU have initiated the process of implementing the Nairobi decision on eliminating export subsidies by submitting their revised schedules of commitments on export subsidies.¹¹

6.6 Cotton

Cotton is of key interest to the Cotton Four: Benin, Burkina Faso, Chad and Mali. Paragraph 11 of the 2005 Hong Kong Ministerial Declaration mandated discussing cotton "ambitiously, expeditiously and specifically", within the agriculture negotiations. In the Bali Ministerial Conference, it was decided to hold a dedicated discussion on a biannual basis in the context of the Committee on Agriculture in Special Session to examine relevant trade-related developments across the three pillars of Market Access, Domestic Support and Export Competition in relation to cotton (WT/MIN(13)/41; WT/L/916). In a major decision, in the Nairobi Ministerial Conference, developed country Members, and developing country Members declaring themselves in a position to do so, pledged to grant, to the extent provided for in their respective preferential trade arrangements in favour of LDCs, as from 1 January 2016, duty-free and quota-free market access for cotton produced and exported by LDCs (WT/MIN(15)/46; WT/L/981). They also pledged to provide duty-free and quota-free market access for exports by LDCs of relevant cotton-related products included in the list annexed to this Decision and covered by Annex 1 of the Agreement on Agriculture. In the area of export competition, the Nairobi decision on export competition was to be implemented immediately by developed Members and no later than 1 January 2017 by developing Members (WT/MIN(15)/45; WT/L/980). A key outstanding issue in cotton is trade-distorting domestic support. Nepal has little direct interest in the cotton issues except for their importance in the agenda of the LDC Group.

In a document (JOB/AG/90), the LDC Group suggested as an outcome for MC11 an overall limit on the sum of all trade-distorting domestic support measures for cotton, and listed different options available to set such a limit. Further, in October 2017, the Cotton Four called for capping the OTDS for cotton, as well as measures on green box support. This would entail cuts in the range of 70-90 percent. Developing countries which have committed to a WTO ceiling on amber box support would face cuts of around two thirds of those proposed for developed countries. The proposal, if implemented, would make it difficult for countries to provide product-specific green box support. The US has rejected the proposal.¹²

7 Fishery subsidies

Despite the failure to reach a deal on fishery subsidies at MC10, negotiations on crafting trade rules that discipline harmful fishery subsidies show more signs of promise to deliver an outcome at MC11 than do other issues. Negotiations to clarify and improve WTO disciplines on fisheries subsidies have been part of the DDA. At the Hong Kong Ministerial Conference in 2005 there was broad agreement on strengthening those disciplines, including through a

¹¹ https://www.wto.org/english/news_e/news17_e/agcom_17oct17_e.htm

¹² As reported in: D. Ravi Kanth, 'US NO to Cotton-four, but China-India Welcome Proposal', published in South-North Development Monitor (SUNS) #8554, 17 October 2017.

prohibition of certain forms of fisheries subsidies that contribute to overcapacity and overfishing. Annex D of the Hong Kong Declaration asserts that appropriate and effective special and differential treatment for developing and least-developed members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns.

An informal document, a “non-paper”, based on the proposals tabled so far was released in October 2017. The proposed fish subsidy bans cover subsidies that contribute to overfishing and overcapacity, subsidies related to overfished stocks, and subsidies related to illegal, unreported, and unregulated (IUU) fishing.¹³

Members appear to agree on the following areas: limiting the final deal to cover marine wild capture fishing and related activities, a focus on “specific subsidies” as described by existing WTO rules, and ensuring subsidies are linked to a particular member.

Key disagreements include: how widely to craft subsidy bans; whether these bans should include any sort of exceptions; how to determine that IUU fishing is taking place or a decision leading to overfished stocks; how to deal with cases where a fish stock has not been evaluated; whether the ban should cover subsidies to capital costs or also subsidies for operating costs; special and differential treatment; whether to distinguish between domestic waters and those outside them; transparency; and how to address the concerns of subsistence, small-scale and artisanal fishers.¹⁴

8 Emerging issues

8.1 Investment facilitation

Investment facilitation aims to facilitate international investment procedure. It has been derived from the concept of trade facilitation and only deals with simplifying foreign direct investment and not investment promotion. Investment can drive productivity, create jobs, raise incomes, strengthen trade flows and spread technology and know-how internationally. Investment can bolster economic growth for developed and developing economies alike.¹⁵ Investment facilitation is the set of policies and actions aimed at making it easier for investors to establish and expand their investments, as well as to conduct their day-to-day business in host countries.¹⁶ Transparency in policies and procedures and easily accessible information regarding investment in a country could be the first step in investment facilitation. This is likely to make attracting investment easier for a country.

Facilitating investment is critical for achieving the Sustainable Development Goals (SDGs). According to UNCTAD’s calculations, developing countries face an annual SDG-investment gap of \$2.5 trillion.¹⁷ Therefore, an investment facilitation agreement with special and differential treatment in light of the needs of developing and least-developed countries could have the potential to lower this investment gap.

¹³ <https://www.ictsd.org/bridges-news/bridges/news/wto-negotiators-consider-integrated-text-on-fish-subsidies>

¹⁴ <https://www.ictsd.org/bridges-news/bridges/news/wto-negotiators-consider-integrated-text-on-fish-subsidies>

¹⁵ UNCTAD. 2016. *Investment facilitation and promotion: A global action menu*. Discussion Note. Geneva: UNCTAD.

¹⁶ UNCTAD. 2017. *Investment facilitation: A review of policy practices*. Research Note. Geneva: UNCTAD.

¹⁷ *ibid.*

On the other hand, it is important that the least-developed countries study and understand the proposals presented as well as to understand the implications for themselves before supporting the proposal. The cost of implementation and the need for capacity acquisition could be substantial for them. Lack of clarity over the definition of investment facilitation has contributed to developing and least-developed countries' wariness about the issue. One way of addressing the definitional issue is to decide whether to take a positive list approach or a negative list approach. Investment facilitation must explicitly exclude market access, investment protection and investor-state dispute settlement. The proponents of an investment facilitation framework have clarified that these three elements are excluded from their definition of investment facilitation.

In recent news, India and other developing countries have opposed the inclusion of investment facilitation in the upcoming Eleventh Ministerial Conference and following this opposition the General Council has decided that this issue cannot be discussed formally at the WTO.¹⁸ This indicates that the discussion on the future of investment facilitation is quiet uncertain at least for now, although the proponents of investment facilitation might still carry out informal discussions. In such a case, it is important for the LDCs to be involved in these discussions, analyse the cost and benefits and decide for themselves if investment facilitation would be beneficial for their economies. The LDC Group is yet to come up with a position on investment facilitation.

Investment facilitation could be a good thing for a country like Nepal which attracts a very small percentage of GDP as Foreign Direct Investment and as a country looking to increase FDI an agreement on investment facilitation could be a way to increase FDI in Nepal. It is important to understand that this agreement is not meant for investment promotion. Its sole focus is to make it easier for the foreign investors to invest in Nepal. The implications as well as the cost and benefit of such an agreement should be analysed before Nepal shows its support.

8.2 Trade facilitation in service (TFS)

Trade facilitation in service (TFS) is the proposal presented by India in October 2016. In light of the agreement on trade facilitation in goods, India called for a similar agreement on service facilitation. India presented a draft legal text on TFS based on the legal text on trade facilitation in goods in February of 2017. It aims to reduce transaction costs caused by regulatory and administrative burden as well as eliminate barriers related to all four modes of service trade. A component of investment facilitation comes under the TFS as a way to facilitate commercial presence in the host country.

For LDCs TFS could provide a means to develop their service sector. The role of the service sector in the economy of LDCs has been growing. Therefore, opening up their own markets for investment in services as well as being able to access the service markets of other countries could be beneficial for their development.

The cost of implementation is an important issue. The cost associated with trade facilitation in service could be similar to that in trade facilitation in goods. There is also a need to identify the capacity gap. For a country like Nepal with limited resources there might be a need to prioritize the implementation of different agreements. Therefore, there is a need for a deeper investigation of the cost and benefits. Moreover, Nepal also has to analyse how applicable the trade facilitation in services is for Nepal. Therefore, it would be advised that Nepal does not

¹⁸ <https://www.twn.my/title2/wto.info/2017/ti170518.htm>

support the proposal on TFS without any concrete study regarding its applicability as well as the cost of implementation. The negotiators have to be aware that without the legally binding commitment of assistance from developed countries on capacity building and technology transfer, the implementation of this kind of agreement could prove to be a burden for Nepal as well as other LDCs.

8.3 E-commerce

E-commerce became a part of WTO discussions in 1998 when the Work Programme on Electronic Commerce was launched. The Work Programme defines e-commerce as the production, distribution, marketing, sales or delivery of goods and services through electronic means.

As the digital age progresses, the scope of e-commerce is ever expanding. With the right regulations that take into account the needs of the least-developed countries in terms of infrastructure, capacity building and capital, LDCs can potentially leverage e-commerce to better integrate their firms in international trade thereby increasing and diversifying their exports. The service sector is another potential sector that could be developed with the help of e-commerce. The service sector is the biggest contributor to GDP in Nepal. And e-commerce can provide a cost-effective platform to reach the global marketplace for service providers.

Despite the potential opportunities, because e-commerce is a fast-evolving area where the development implications (e.g., for policy space) of opening up are yet to be fully understood, developing and least-developed countries in general prefer a cautious approach to the subject.

8.3.1 Work Programme on electronic commerce

The Work Programme on electronic commerce was established to examine all the trade-related issues concerning electronic commerce and report on its progress. The General Council would be responsible for the oversight and monitoring of the Work Programme and for the examination of imposition of custom duties relating to electronic transactions. Four WTO bodies were given the responsibility of carrying out the Work Programme, namely: Council for Trade in Services, Council for Trade in Goods, Council for TRIPs, Committee for Trade and Development.

Over the years there have been dedicated discussions and open-ended informal meetings on the Work Programme on electronic commerce. As the scope of e-commerce has come to light some members have been willing to move further and expressed their readiness to broaden the discussions on e-commerce. Some members have also called for the permanence of the moratorium on customs duties on e-commerce transactions imposed by the 1998 Work Programme that has been extended every two years. On the other hand, others are still unsure about broadening the discussions on e-commerce and are hesitant on making the moratorium permanent as the full implications of the moratorium are still not known. The developed countries have been pushing for negotiating multilateral rules on e-commerce. This does not come under the current mandate of the Work Programme on e-commerce. The mandate of the work programme only pertains to examining and reporting issues related to e-commerce with reference to WTO agreements and studying the development implications of e-commerce for developing and least-developed countries. Recently a large majority of the developing and the least-developed countries shot down the proposal to establish a “Working Party” or “Working Group” on e-commerce in the upcoming 11th WTO Ministerial Conference.¹⁹

¹⁹ <https://www.twn.my/title2/wto.info/2017/ti171015.htm>

8.3.2 Nairobi decision

During the Nairobi Ministerial Conference, Ministers reaffirmed the decisions made subsequent to the Work Programme on Electronic Commerce of 1998 and decided the following:

1. To continue the work under the Work Programme on Electronic Commerce since the last session, based on the existing mandate and guidelines and on the basis of proposals submitted by Members in the relevant WTO bodies as set out in paragraphs 2 to 5 of the Work Programme,
2. To instruct the General Council to hold periodic reviews in its sessions of July and December 2016 and July 2017 based on the reports that may be submitted by the WTO bodies entrusted with the implementation of the Work Programme and report to the next session of the Ministerial Conference,
3. That Members will maintain the current practice of not imposing customs duties on electronic transmissions until the next session, scheduled for 2017.²⁰

8.3.3 Issues for LDCs

E-commerce is an emerging issue but has been an uncharted territory when it comes to the multilateral trading system. The implications it could have for the least developed countries have not been understood completely. Therefore, understanding the various issues related to e-commerce and implications for the developing and least-developed countries is of high importance before the WTO moves from the current mandate of the Work Programme. The issues are as follows:

- A digital divide exists between the developed, developing and least-developed countries. Before the developing and the least-developed countries move into the e-commerce negotiations there is a need to close this digital divide which would require, among other things, technology and capital transfer from the developed countries. Infrastructure gaps in LDCs (e.g. access to electricity, access to and affordability of broadband) should be addressed.
- Trade facilitation also poses a challenge for the development of e-commerce for a country like Nepal that is already facing high trade costs and long lead times. Trade even though done via e-commerce does require the physical movement of the goods (in case of goods trade). Hence, trade facilitation is a necessity for e-commerce.
- Human resource capacity not just in the core technological aspects of e-commerce but also in the negotiations is required for the development of e-commerce and its regulations. There is a need to study the readiness of the least-developed countries to enter a multilateral negotiation.
- Some proposals seeking to initiate negotiations on multilateral rules on e-commerce present e-commerce as an instrument for enabling MSMEs of developing and least-developed countries to engage in international trade effectively. There are other more critical constraints that these firms in Nepal face – for example, poor domestic infrastructure, poor infrastructure in transit-providing country, constraints in the transit regime, inability to produce quality products in sufficient amounts, credit constraints, stiff import competition, etc. Even with regard to e-commerce, the potential effects of e-commerce on MSMEs are yet to be fully understood. In this regard, the need for examining the effects of “electronic commerce on the trade and economic prospects of developing countries, notably of their small- and medium-sized

²⁰ https://www.wto.org/english/thewto_e/minist_e/mc10_e/1977_e.htm

enterprises (SMEs)...” mentioned in the current Work Programme continues to be highly relevant.

- Some proponents of new rules on e-commerce propose applying existing WTO agreements to e-commerce. Taken at face value, this would imply that members’ existing schedules of commitments automatically apply to new technologies such as 3D printing, with adverse implications for domestic industrialization and government revenue.
- There is a need to study the full implication of the moratorium on e-commerce, especially for the LDCs.
- There is a need to study the implication of global e-commerce model where the players are global (i.e. the service provider, the service receiver and the service facilitator are operating in different parts of the world) in the banking, financial and insurance sectors of the LDCs.
- The implications for developing countries in general and LDCs in particular of proposals such as unrestricted cross-border data flows, ensuring free and open internet, preventing localization barriers, and protecting critical source code need to be carefully ascertained before even considering new rules on e-commerce. Data has emerged as one of the most valuable resources in recent times. Companies are vying for data. Numerous controversies regarding regulations of data and consumer protection are flooding the news media. There has been an increase in incidents of hacking into servers of large corporations to steal their data. Therefore, it is important to understand the value of data by the LDCs. Prohibitions to hold data locally in the name of eliminating localization barriers should be looked at with scepticism by the LDCs. Without server localization the data of one country could be sold without the knowledge of that country. There is an overall need to study the e-commerce readiness of the LDC before starting a multilateral negotiation.
- The 1998 Work Programme has not yet outlived its utility and relevance. Much work remains to be done under it.

8.4 Micro, small and medium enterprises

The topic of MSMEs has gained prominence since 2015 when the Philippines tabled a proposal on the subject. The proposal, following slight revisions and backed by other ASEAN countries, was tabled at the MC10 but could not garner consensus. It sought more focused and sustained discussion on MSMEs in some of the regular bodies of the WTO. Many developing countries were of the view that new issues such as MSEM would be a distraction from the outstanding DDA issues. There were also questions over whether WTO disciplines and flexibilities could target MSEM specifically. In a submission in February 2017, the Philippines identified the following actions that can be pursued at the WTO²¹:

- Increase access to information provided by governments to the WTO
- Improve implementation of the Trade Facilitation Agreement, addressing possible improvements for low value shipments of MSMEs in terms of procedural requirements
- In relation to countervailing duty investigations under the Agreement on Subsidies and Countervailing Measures (ASCM), introduce a ‘rebuttable presumption’ that MSMEs are too small to cause injury to a domestic industry in other countries
- Continue and improve technical assistance and capacity building, among others through

²¹ See, for a detailed analysis of the proposal, South Centre and ATPC Analytical Note, ‘[Micro, Small and Medium-sized Enterprises \(MSMEs\)](#)’, July 2017.

- establishment of a TBT counterpart to the Standards and Trade Development Facility (STDF)

It notes that many arrangements for helping MSEM's beneficial integration into the international trading can be made within the existing framework of the WTO. But it also suggests there might be a need for "a more sustained discussion on how the Multilateral Trading System can impact and benefit MSMEs, with particular consideration to the needs and interests of developing and least-developed countries". The submission also refers to other ideas that have been circulated: simplification of non-preferential rules of origin, exploring trade facilitation in services, pursuing e-commerce in the context of development.

There are questions from the perspective of the developing world over the need for a more sustained discussion on MSMEs in the WTO, for reasons such as²²: because the definition of MSMEs excludes farmers, self-employed people and the informal sector, a focus on MSMEs could distract attention from agriculture negotiations (and from other remaining DDA issues); moreover, there is no common definition of MSMEs, and MSMEs in developed countries are much larger than those in developing and least-developed countries, making it unreasonable to have blanket rules; the existing separate work programme on SMEs under the Government Procurement Agreement Committee seeks to reduce policy space for domestic SMEs; MSMEs can be discussed within existing mandates—for example, the 1998 Work Programme on Electronic Commerce provides for an assessment of the effects of electronic commerce on the trade and economic prospects of SMEs of developing and least-developed countries; and developed countries and multinational companies have a tendency of using discussions on MSMEs as a vehicle for pushing their proposals in other areas such as trade facilitation, service liberalization, intellectual property rights and e-commerce.

Some of the WTO rules on e-commerce proposed by developed countries and multinational companies that could hurt MSMEs are²³: ensuring free flow, storage and handling of all types of data in any sector; national treatment in licensing regimes for financial services; liberalize market access for retail, on-line platform, transportation, logistics, warehousing, delivery, electronic payments and other related services.

What LDCs like Nepal really need to enable their MSMEs to benefit from e-commerce are technology transfer, improved access to infrastructure, technology upgrading and capacity building, among other things. They are right in being wary of the proposed rules on different topics under the banner of aiding MSMEs because these rules threaten to severely restrict their already limited policy space to pursue goals of domestic industrialization, technological advancements and employment generation.

9 Services: Domestic regulation

Following the Nairobi Ministerial, negotiations on domestic regulation in services have picked up. GATS Article VI has a mandate for developing necessary disciplines relating to qualification requirements and procedures, technical standards and licensing requirements. Domestic regulations can potentially undo offers under market access and national treatment by making it practically difficult for foreign services or services providers to penetrate the domestic market. Proponents include both developed and developing members, who have

²² See, for a detailed analysis of the proposal, South Centre and ATPC Analytical Note, '[Micro, Small and Medium-sized Enterprises \(MSMEs\)](#)', July 2017.

²³ See, for a detailed analysis of the proposal, South Centre and ATPC Analytical Note, '[Micro, Small and Medium-sized Enterprises \(MSMEs\)](#)', July 2017.

submitted a consolidated text (JOB/SERV/268/Rev.3). The proposed disciplines relate to enhanced transparency, licensing requirements, technical standards and qualification requirements, and development and administration of measures.

The African and LDC Groups are of the view that the proposed measures and disciplines can severely restrict governments' policy space to regulate services, and invite untrammelled competition. There is a possibility of the LDCs being exempted from the application of the proposed disciplines, if an agreement were reached.

10 Duty-free and quota-free market access, and preferential rules of origin for LDCs

The Hong Kong Ministerial Declaration of 2005 required developed members, and developing members declaring themselves in a position to do, to provide DFQF to at least 97 percent of products (defined at the tariff line level) originating from LDCs (WT/MIN(05)/DEC, Annex F). Since then, both developed and developing members have either introduced or enhanced their DFQF schemes for LDCs and, in most cases, have also notified these initiatives to the WTO (WT/COMTD/LDC/W/65). Most of the developed Members grant either full or nearly full DFQF market access, while developing Members, including Chile, China, India, Republic of Korea, Chinese Taipei and Thailand, have made notifications concerning their respective DFQF schemes for LDCs (WT/COMTD/LDC/W/65).

Most of them grant a significant degree of DFQF market access to LDC products, and a number of them have reached or are in the process of attaining comprehensive DFQF coverage for LDCs (WT/COMTD/LDC/W/65). The proportion of duty-free tariff lines for LDCs has risen from 49 percent in 2005 to 65 percent in 2015. In response to the devastating earthquake in Nepal in 2015, the US announced duty-free access to an additional 66 products falling under HS Chapters 42, 57, 61, 62, 63 and 65 from Nepal, with the new preferences entering into force on 30 December 2016 and ending on 31 December 2025.²⁴

Extending DFQF to products of export interest to LDCs that are still excluded from the schemes and simplifying rules of origin (ROO) to increase preference utilization are two key issues under DFQF market access. The coverage of quite a few DFQF schemes is less than 97 percent (for example, 82.6 percent in the US). Coverage is even lower when defined as the proportion of LDC exports to a preference-granting country that is not dutiable. For example, 60 percent of LDC exports to the US were dutiable in 2015 (WT/COMTD/LDC/W/65). There are differences within the LDC group, which surfaced in 2008, over seeking expanded product coverage in DFQF schemes of developed countries—for example, the US. Some African countries are concerned about preference erosion as they currently enjoy preferential market access in, say the US, vis-à-vis other LDCs. Further, in a special Committee on Trade and Development meeting on DFQF, some developing countries, including Mauritius and Pakistan, called for an assessment the possible implications of DFQF schemes for LDCs. Some customs union members faced technical difficulties in improving DFQF coverage as they needed to consult with their other customs union members. There was support for the need for a “clinical examination” of the DFQF status, its implementation issues and its impact, but the parameters of the study are yet to be agreed upon.

²⁴<https://www.gpo.gov/fdsys/pkg/FR-2016-12-20/pdf/2016-30738.pdf> ;
<https://www.nepaltradeportal.gov.np/index.php?r=site/display&id=173>

The 2013 Ministerial Conference in Bali yielded a ministerial decision on preferential ROO for LDCs which stipulated a set of guidelines aimed at making it easier for LDC exports to qualify for preferential market access. Furthering the Bali decision, the ministerial decision in the 2015 MC in Nairobi provided detailed guidelines for simplifying and relaxing ROO for LDCs under non-reciprocal preference-granting schemes (WT/MIN(15)/47; WT/L/917/Add.1.). Below is a discussion of the Nairobi guidelines and their implementation.

10.1 Requirements for the assessment of sufficient or substantial transformation

Paragraph 1.1 of the Nairobi Decision requires preference-granting members, when applying an ad valorem percentage criterion to determine substantial transformation, to adopt a method of calculation based on the value of non-originating materials, while allowing preference-granting members applying another method to continue to use it. It recognizes that the “LDCs seek consideration of use of value of non-originating materials by such preference-granting Members when reviewing their preference programme”. Preference-granting members shall also “consider” allowing the use of non-originating materials up to 75 percent of the final value of the product under their ROO (or an equivalent threshold if some other calculation method is employed). All these are in the nature of best-endeavour obligations. Moreover, countries that do not use the method based on the value of non-originating materials are not compulsorily required to adopt it when reviewing their ROO.

Paragraph 1.2 of the decision states that when applying a change of tariff classification criterion to determine substantial transformation, Preference-granting Members shall:

- "(a) As a general principle, allow for a simple change of tariff heading or change of tariff sub-heading;
- (b) Eliminate all exclusions or restrictions to change of tariff classification rules, except where the preference-granting Member deems that such exclusions or restrictions are needed, including to ensure that a substantial transformation occurs;
- (c) Introduce, where appropriate, a tolerance allowance so that inputs from the same heading or sub-heading may be used."

Paragraph 1.3 states that when applying a manufacturing or processing operation criterion to determine substantial transformation, preference-granting Members shall, to the extent provided for in their respective non-reciprocal preferential trade arrangements, allow: “if applied to clothing of chapters 61 and 62 of the Harmonised System nomenclature, the rule shall allow assembling of fabrics into finished products”. Similar measures are suggested for chemical products, processed agricultural products and machinery and electronics.

Paragraph 1.4 states that preference-granting members “shall, to the extent possible, avoid requirements which impose a combination of two or more criteria for the same product”. Those who have such requirements are required to be open to considering relaxation the requirements at the request of an LDC.

10.1.1 Implementation and analysis

There has been very limited progress on relaxation of stringent rules of origin. For example, notifications by the United States and Japan (G/RO/81; G/RO/83) do not contain evidence of significant new measures taken to implement the Nairobi decisions on preferential ROO for the LDCs. The US does not have LDC-specific DFQF scheme, although many African LDCs do enjoy DFQF under the AGOA scheme. As per a notification by the United States (G/RO/83), the domestic value addition requirement is generally 35 percent – which is more than the 25 percent threshold agreed in the Nairobi decision. However, the 25 percent threshold is not

binding given the weak phrasing – “shall” “consider”. It refers to AGOA allowing duty-free access of apparel from LDCs regardless of the source of fabric or yarn, subject to an annual quota. But it has not extended this rule to other LDC beneficiaries of its GSP in general. The US assessment of percentage criterion has not switched to value of non-originating material.

India’s duty-free market access scheme for LDCs requires a value addition of 30 percent and change in tariff heading at the six-digit level.²⁵ Duty-free access is available for 96 percent of tariff lines at HS 6 digit level, with an extra 2.2 percent of tariff lines subject to preferential rates (as per a revision in April 2014). The Indian duty-free tariff preference scheme was launched in April 2008 and became fully operational in October 2012 when the tariff phase-down was completed, with 85 percent of tariff lines duty free. Preferences granted by India to Nepal under the Nepal-India Trade Treaty – some elements of which, particularly in the area of non-primary products, are non-reciprocal and hence may come under the purview of the Nairobi decision – for manufactured products are also subject to the same value addition requirement. The value addition requirement is thus greater than what is recommended in the Nairobi decision.

India’s DFQF scheme for all LDCs excluded some products of interest to Africa LDCs – such as coffee, tea, some spices and oilseeds, milk and cream, onions, cashew nuts (shelled), tobacco, copper and related products.²⁶ African LDCs are likely to push for the inclusion of such products.

The change in tariff classification requirement is at a higher level of aggregation (4 digit level), and hence more stringent, in the Nepal-India Trade Treaty than under India’s DFQF scheme for LDCs. Furthermore, a notification of 10 March 2015 related to India’s DFQF scheme for LDCs allowed for the option of calculating value addition based on ex works prices instead of FOB value only – a change deemed to be an improvement by the Indian government.²⁷

Nepal can request for a lower value addition of 25 percent from India. A concern may be that if the request is granted the same preferential ROO will also be extended to other LDCs, and hence this would warrant making the request under the bilateral trade treaty. However, since India has been, over time, extending the preferences granted to Nepal to other South Asian LDCs and also, in large measure, to LDCs in general, it is most likely to do the same with preferential ROO even if the request is made and accepted through the bilateral route. Nepal on its part has to address other competitiveness issues to benefit from the lower value addition requirement, if granted.

China’s scheme, which covered 60 percent of tariff lines since 2010, was extended to 97 percent in 2015. China’s ROO require a 40 percent domestic value addition and a change in tariff heading at the four-digit level.

With respect to paragraph 1.4, to the extent multiple ROO criteria are restricting Nepal’s exports, Nepal must make appropriate requests for relaxation. For example, the Nepal-India Trade Treaty has twin criteria – value addition and change in tariff heading – as does China’s preferential scheme.

²⁵http://commerce.gov.in/trade/international_tpp_DFTP.pdf

²⁶<https://www.ictsd.org/bridges-news/bridges-africa/news/china-extends-97-percent-dfqf-treatment-for-ldc-imports>

²⁷http://commerce.gov.in/trade/international_tpp_DFTP.pdf

10.2 Cumulation

Paragraph 2.1 encourages preference-granting members to expand cumulation using four possibilities. Further, paragraph 2.2 encourages preference-granting members to consider requests from LDCs for particular cumulation possibilities in the case of specific products or sectors.

10.2.1 Implementation and analysis

There are only a few notifications about new measures taken to implement these provisions. Nepal should make product- or sector-specific requests, if any, for particular cumulation possibilities.

10.3 Documentary requirements

As a general principle, preference-granting members are asked to refrain from requiring a certificate of non-manipulation for products originating in an LDC but shipped across other countries unless there are concerns regarding transshipment, manipulation, or fraudulent documentation. Further, they are to consider other measures to further streamline customs procedures, such as minimizing documentation requirements for small consignments or allowing for self-certification.

10.3.1 Implementation and analysis

The first provision is especially relevant to landlocked countries. It must first be determined whether Nepal is facing any problem in this regard.

10.4 Implementation, flexibilities and transparency (paragraphs 4.1-4.4)

Each developed preference-granting member, and each developing preference-granting member undertaking the commitments, “shall” inform the Committee on Rules of Origin (CRO) of the measures being taken to implement the above provisions. Members have also reaffirmed their commitment to making available import data, which will be used for the calculation of preference utilization rates.

10.4.1 Implementation and analysis

The Nairobi decision reiterated the requirement for members to notify their preferential ROO for LDCs and their preferential trade imports from LDCs, as already stated in Paragraph 4 of Annex II of the Agreement on Rules of Origin, the Transparency Mechanism for Preferential Trade Arrangements (WT/L/806 of 14 December 2010) and the 2013 (Bali) Ministerial Decision on preferential rules of origin for LDCs (WT/L/917).

As per paragraph 4.3 of the Nairobi decision, the CRO has developed a template for the preferential rules of origin (decision of 6 March 2017; G/RO/84). The majority of preference-granting Members have already submitted information on their ROO using the new template. In a meeting on 4 October 2017, the CRO noted that it was examining notifications of preferential ROO from 14 countries: Australia, Canada, China, EU, India, Japan, Korea, Norway, New Zealand, Russia, Switzerland, Chinese Taipei, Thailand and the US (G/RO/85). Quite a few of those who have notified have not specified what new measures they have taken by way of implementation.

In 2015, Japan introduced a single transformation rule for certain apparel and clothing accessories. In 2016, Australia started a comprehensive review process of its GSP, including preferential ROO. China informed the CRO on 2 March 2017 that it had introduced a number of changes to its regulations on preferential treatment for the LDCs, including the expansion

of cumulation possibilities and the simplification of certification procedures (WT/COMTD/LDC/W/65). There is a provision for cumulation with China and between LDCs and members of a regional group. Importers' declaration is allowed based on any advance origin ruling issued by the customs administration of China, while no certification is required for low-value shipments (a de minimis value of 6,000 yuan). China is also rolling out a system of electronic certification. Norway has decided to expand cumulation possibilities for the LDCs. Canada has significantly expanded the list of countries for cumulation for T-shirts and pants.

Further, as of 1 January 2017, the EU, Norway and Switzerland have started to implement their new system of self-certification of origin – the Registered Exporter System (REX) – under their respective GSP schemes. The old system for proof of origin uses certificates of origin Form A issued by competent authorities. Under the REX system, Form A certificates will be replaced by statements on origin (SoO). In contrast to the current system, SoO will be issued by exporters. For this purpose, exporters have to be registered by the competent authorities of the exporting country. Is Nepal considering applying the REX system, and if yes, has it notified the relevant preference-granting countries? The introduction of the REX system and the non-alteration rule is expected to “significantly reduce administrative burdens related to documentary and procedural requirements” (G/RO/80). If this works, Nepal must press for other members to adopt it or a similar system.

Switzerland has also replaced the direct transportation rule with by a non-alteration rule, which makes it possible to split a consignment into sub-consignments without having to present a non-manipulation certificate mandatorily (G/RO/80).

Nepal can press for preference-granting members to notify the CRO about the measures they are taking to implement the provisions of the decision. Nepal can request for adoption of favourable ROO by other preference-granting countries.

As of 14 September 2017 (G/RO/W/168/Rev.1), data on imports was complete and available for the schemes of nine WTO preference-granting members: Australia; Canada; Chile; the EU; India; Korea; Chinese Taipei; Thailand; and the US. Data was not available for the schemes implemented by China; Iceland; Kazakhstan; Kyrgyz Republic; New Zealand; Russian Federation; Tajikistan; and Turkey. Submissions from Japan, Norway and Switzerland were being reviewed.

Based on the notified data, the Secretariat was to calculate preference utilization rates. The preference utilization rates for Nepal in 2015, as reported by the Secretariat (G/RO/W/168/Rev.1), were 71.3 percent (Australia), 55.7 (Canada), 2.3 (Chile), 92.4 (EU), 0 (India), 80.4 (Japan), 42.4 (Republic of Korea), 99.7 (Norway), 46.9 (Switzerland); 37.7 (Chinese Taipei), and 0.4 (US). A number of caveats are in order – some of which have been recognized by the Secretariat. Utilization rates refer exclusively to preference-granting members' WTO LDC duty schemes – narrowly defined by the 1979 “Enabling Clause” (paragraph 2, Decision of 28 November 1979 (L/4903)) for developed members, and the 1999 waiver²⁸ for developing country members to provide preferential tariff treatment to LDC exports, renewed in 2009 for another 10 years. The caveat with regard to developed members' schemes may not be relevant to Nepal because their schemes that are applicable to Nepal are most likely covered in the calculation. The US's duty-free treatment to an additional 66

²⁸Preferential tariff treatment for least-developed countries (WT/L/304).

products from Nepal entered into force on 30 December 2016, whereas these data are for the year 2015.

However, preferences granted under the Nepal-India Trade Treaty are not covered. Surely, the utilization rate under this treaty is higher than 0 percent, but how much exactly? The utilization of preferences granted by India under the treaty would be useful information for Nepal. The treaty is a preferential trade arrangement, after all, with certain non-reciprocal preferences accorded by a developing country to an LDC and certain preferences exchanged on a reciprocal basis. The treaty would naturally come under the ambit of the Enabling Clause too since it approves differential and more favourable treatment provided in “Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another” (paragraph 2c). Intuitively, the treaty also has features—e.g., non-reciprocal tariff treatment—covered by the 1999 waiver.

Compared to Bangladesh, Nepal’s utilization rates are low in several destinations—for example, Bangladesh’s utilization rate in Korea is 87.3 percent versus Nepal’s 42.4 percent. Similarly, Bangladesh’ utilization rate is 89 percent in Canada versus Nepal’s 55.7 percent. This is likely due to Nepal’s competitiveness problems rather than ROO since the ROO applied by Korea should be the same for exports from both countries.²⁹ The same argument holds for other destinations too.

The utilization rates are calculated as actual preferential imports over imports under MFN dutiable but preference-eligible tariff lines. High utilization rates offer little cheer when the value of exports is relatively small—for example, Nepal’s exports to Norway or the EU. It is true that other competitiveness constraints, such as domestic supply-side constraints, are a major factor behind the low value of exports, but it is also possible that ROO are constraining not just preference utilization but also overall exports in preference-eligible tariff lines by restricting the sourcing of imports from least-cost suppliers.

It must be noted that preference utilization is but one indicator of the implementation of trade preferences. The value of total trade and the profile of products being traded are other important dimensions that merit consideration.

11 Trade facilitation

Trade Facilitation came into the WTO’s purview during the Singapore Ministerial Conference in 1996 and is commonly known as one of the “Singapore Issues”. Negotiations on trade facilitation were completed during the Bali Ministerial Conference in 2013. The Trade Facilitation Agreement (TFA) entered into force in February of 2017 when it was ratified by two-thirds of the WTO members.

Full implementation of the TFA is forecast to slash members’ trade costs by an average of 14.3 per cent, with developing countries having the most to gain.³⁰ The TFA is also expected to reduce the time to import goods by over a day and a half. The TFA’s aim is to make it easier for countries to trade with each other. Implementing the TFA is also expected to help new firms export for the first time. Moreover, once the TFA is fully implemented, developing countries

²⁹Or it could also be because the ROO, although the same for Bangladesh and Nepal, are especially stringent for products of export interest to Nepal. Confirming this is beyond the scope of the paper.

³⁰ World Trade Organization. 2015. *World Trade Report 2015*. Geneva: WTO.

are predicted to increase the number of new products exported by as much as 20 per cent, with least developed countries (LDCs) likely to see an increase of up to 35 per cent, according to a WTO study.³¹

The TFA is a welcome addition especially for poor landlocked countries, including Nepal. It is highly dependent on its neighbouring countries (mostly India) for import from and export to with the rest of the world. Trade in goods is plagued by a long lead time, resulting in high trade costs. Infrastructural, institutional, technological and/or human resource constraints both within the country and in transit-providing countries contribute to high trade costs. Implementation of TFA holds the potential of reducing trade costs for Nepal, thereby helping it increase and diversify its exports. Adoption of trade facilitation measures by existing and potential export destinations can also possibly help improve Nepal's export performance. Under the TFA, Nepal can seek support for building infrastructures, acquiring the necessary technology and creating the necessary human capital.

Table: Provisions of TFA

Article	Disciplines
Article 1: Publication and Availability of Information	<ul style="list-style-type: none"> • Publication of information regarding tariff, fees, procedure of importation and exportation etc. • Information available through internet • Enquiry points • Notification
Article 2: Opportunity to Comment, Information before Entry into Force, and Consultations	<ul style="list-style-type: none"> • Opportunity to Comment and Information before Entry into Force • Consultations with border agencies, trader and other relevant stakeholders
Article 3: Advance Ruling	<ul style="list-style-type: none"> • Addressing the request for advance ruling
Article 4: Procedures for Appeal or Review	<ul style="list-style-type: none"> • Right to administrative appeal or review and ensure it is non-discriminatory
Article 5: Other Measures to Enhance Impartiality, Non-discrimination and Transparency	<ul style="list-style-type: none"> • Notifications for enhanced controls or inspections • Detention information to the importation • Test Procedures
Article 6: General Disciplines on Fees and Charges Imposed on or in Connection with Importation and Exportation	<ul style="list-style-type: none"> • General Disciplines on Fees and Charges Imposed on or in Connection with Importation and Exportation • Specific disciplines on Fees and Charges for Customs Processing Imposed on or in Connection with Importation and Exportation • Penalty Disciplines for the breach of custom law
Article 7: Release and Clearance of Goods	<ul style="list-style-type: none"> • Pre-arrival Processing • Electronic Payment • Separation of Release from Final Determination of Customs Duties, Taxes, Fees and Charges • Risk Management

³¹ https://www.wto.org/english/news_e/news17_e/fac_31jan17_e.htm

Article	Disciplines
	<ul style="list-style-type: none"> • Post-clearance Audit • Establishment and Publication of Average Release Times • Trade Facilitation Measures for Authorized Operators • Expedited Shipments • Perishable Goods
Article 8: Border Agency Cooperation	<ul style="list-style-type: none"> • Coordination between border agencies within a country • Coordination and alignment between border agencies of border sharing countries
Article 9: Movement of goods intended for import under customs control	<ul style="list-style-type: none"> • Requires members, to the extent possible, to allow goods intended for import to be moved under customs control from one customs office to another within its territory.
Article 10: Formalities connected with importation, exportation and transit	<p>Aimed at minimizing the incidence and complexity of import, export, and transit formalities and decreasing and simplifying import, export, and transit documentation requirements, this article contains provisions on:</p> <ul style="list-style-type: none"> • formalities and documentation requirements • acceptance of copies • use of international standards • single window – a single entry point for traders to submit documentation to the participating authorities or agencies • preshipment inspection • use of customs brokers • common border procedures and uniform documentation requirements • rejected goods • temporary admission of goods and inward and outward processing
Article 11: Freedom of Transit	<p>Aimed at improving the existing transit rules, this article details provisions on restricting regulations and formalities on traffic in transit. It sets out provisions covering the following areas:</p> <ul style="list-style-type: none"> • fees or charges • voluntary restraints on traffic in transit • non-discrimination • separate infrastructure for traffic in transit • minimization of burden of formalities, documentation and customs controls • minimization of TBT technical regulations and conformity assessment procedures • minimization of transit procedure • provision for advance filing and processing of transit documents • expedition of termination of transit operations • making transaction guarantees publicly available • customs convoys/customs escorts • cooperation among members to enhance freedom of transit.

Article	Disciplines
Article 12: Customs Cooperation	<p>Obliges members to share information that would enhance coordination of customs controls while also respecting the confidentiality of shared information. The provisions cover the content and process of information sharing, as follows:</p> <ul style="list-style-type: none"> • measures promoting compliance and cooperation • exchange of information • verification prior to a request • the format of a request • protection and confidentiality • provision of information • postponement or refusal of a request • application of reciprocity • administrative burden of responding to request for information • limitations on information provided • unauthorized use or disclosure of information • bilateral and regional agreements.

11.1 LDCs and trade facilitation

Section II of the Agreement pertains to Special and Differential Treatment Provisions For Developing Country Members And Least-Developed Country Members. This section deals with the notification and timeline of the implementation of the provisions for the developing and least-developed countries, and notification and provision of capacity building requirements. The general principle calls for assistance and support for capacity building to help the developing and least-developed members in order to implement the provisions of the Agreement.

In the case of LDCs there are three categories of provisions:

1. Category A: contains provisions designated for implementation within one year after the agreement enters into force.
2. Category B: contains provisions that the LDC member designates for implementation on a date after a transitional period of time following the entry into force of the agreement, after the notification (Notification of provisions and, optionally, indicative dates for implementation: no later than 1 year after the entry into force; Notification of definitive dates for implementation: no later than 2 years from the first notification.).
3. Category C: contains provisions the LDC member designates for implementation on a date after a transitional period of time and as requiring the acquisition of implementation capacity through the provision of assistance and support for capacity building (Notification of provisions: 1 year after entry into force; Notification of support required: 1 year after first notification; Notification of arrangements for support and indicative dates for implementation: 2 years after second notification; Notification of progress in the provision of support and definitive dates for implementation: 18 months after the third notification.

The developing countries and LDCs can self-designate on an individual basis the provisions under each category. The Agreement also has a provision for the extension of the transitional period provided that the member requests for an extension before the stipulated deadline.

11.2 Implementation status

So far 99 developing member states have made notifications in category A, 27 have made in category B and 20 have made in category C. Nepal has also presented a notification in Category A dated 26 October 2015.³² The notification under Category A contains the following measures: Article 10.5 (Preshipment Inspection) and Article 10.6 (Use of Customs Brokers).

At the request of the developing and least-developed countries, the Trade Facilitation Agreement Facility (TFAF) was established in 2014 to facilitate the implementation of the TFA and ensure that these members have information regarding the grants provided as well as the procedure and mechanism of receiving those grants. The activities of the TFAF range from assisting members in preparing notifications, development and delivery of assistance and support for capacity building in the implementation of the TFA to making available the information on donor notifications.³³ The Trade Facilitation Committee established in May 2017 with the objective of reviewing the operations and implementation of TFA.

So far 12 members have made notifications under Article 22.1 pertaining to the information on the details of the grant to be provided: Canada, European Union, Finland, Germany, Japan, the Netherlands, Norway, New Zealand, Sweden, Switzerland, the United Kingdom and the United States of America. Similarly, 7 members have presented notifications under Article 22.2 pertaining to information on the process and mechanism for requesting assistance and related contact points.³⁴

The developing countries and LDCs can request for grants from the members that have presented notifications but they will have to identify their own needs first.

11.3 Issues of implementation

The commitments of assistance and support of capacity building from the developed countries are non-binding, and considering the massive cost of implementation for the developing and the least-developed countries, there seems to be a gap in the vision pictured for TFA and the reality of its implementation.

The various identified costs associated with the implementation of TFA are Regulatory Cost, Institutional Cost, Equipment/Infrastructure Cost and Sensitizing and Public Awareness Cost. Some LDCs may even require a complete overhaul of their existing systems of trade facilitation as well acquisition of new Information and Communication Technology, requiring both capital and technology transfer. Nepal is already struggling with poor infrastructure; therefore, diverting valuable resources to fulfil a multilaterally binding commitment all the while suffering from poorly developed road network might not align with development goals or priorities. Studies show that the TFA will bring benefits to LDCs but they also show that well-developed infrastructure will also bring benefits to trade. The Agreement does have provisions for assistance and support but it has to be reiterated that they are non-binding and are mostly related to grants for soft infrastructure development. Therefore, considering the limited resources of the LDC and their multiple needs the issue of cost of implementation of the TFA cannot be overemphasized.

³² <http://www.tfafacility.org/notifications>

³³ <http://www.tfafacility.org/implementation-support>

³⁴ <https://www.tfadatabase.org/notifications/assistance>

In light of Nepal's landlockedness, the implementation of trade facilitation measures by India—Nepal's major transit provider—is also important. Nepal should, therefore, monitor India's implementation of its obligations under the TFA, especially those related to transit matters, to ensure that whatever opportunities exist in the TFA to improve the current transit regime are realized.

12 LDC service waiver

The Nairobi Ministerial Decision on Implementation of Preferential Treatment in Favour of Services and Service Suppliers of Least Developed Countries and Increasing LDC Participation in Services Trade (WT/MIN(15)/48) extends by an additional four years, until 31 December 2030, the current waiver period under which non-LDC WTO members may grant preferential treatment to LDC services and service suppliers in terms of market access (Article XVI of GATS) or other measures if approved by the Council for Trade in Services. The waiver was first adopted at the Eighth MC in December 2011. A Ministerial Decision taken at the Ninth Ministerial Conference in Bali, Indonesia, on 3-6 December 2013, encouraged the "operationalization" of the waiver, in view of the fact that no WTO Member had yet made use of the waiver since its adoption in 2011. The Nairobi decision builds on that.

The Nairobi decision also instructs the WTO's Trade in Services Council to encourage discussions among members on technical assistance³⁵ aimed at increasing the capacity of LDCs to participate in services trade. Members are encouraged to undertake specific technical assistance and capacity building measures targeted at LDC suppliers. It also urges members who have not yet notified their preferences to the WTO's Trade in Services Council to promptly do so and set up a review to monitor the operation of the notified preferences.

Previous major decisions include the 2003 Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services (TN/S/13) and Annex C of the 2005 Hong Kong Ministerial Declaration. The modalities for the special treatment of LDCs in the services negotiations, adopted in September 2003, require members to provide "effective market access" in sectors and modes of supply of export interest to LDCs when making specific commitments. Wherever possible, members are requested to make commitments in "Mode 4" (individuals travelling from their own country to supply services in another). The modalities further stipulate that members should develop "appropriate mechanisms" to fully implement GATS Article IV: 3 and to facilitate the effective market access of LDC services and service suppliers to foreign markets. Annex C of the Hong Kong Declaration requires members to, among other things, develop methods for the full and effective implementation of the LDC Modalities.

On 21 July 2014, the LDCs submitted a collective request identifying the sectors and modes of services supply of particular interest to them. This collective request was tailored to the diversified needs of the group and a study conducted within the LDC group found the obstacles encountered by the service suppliers were more prominent in Mode 3 and Mode 4 of the services category. The collective request identified the following hindrances in the supply of service from the LDCs: onerous application fee, delays and paperwork for visa, licenses, residence permit, imposition of transit tax and other fees from tourists travelling to LDCs, visa denials stamped on passports and other measures that served to stigmatize qualified LDC suppliers as well as difficulties in recognition of LDC educational institutions, diplomas and

³⁵ https://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm

professional skills.³⁶ The request focussed on the category of contractual service suppliers and independent professionals.

The thematic architecture of the request is in four main categories:

- a) Market access and Article XVII, national treatment restrictions
- b) Visa, work permit, and residence permit fees and measures
- c) Recognition, qualifications and accreditation matters, and
- d) A hybrid annex of sectors and professions of interest to members of the Group

Mode 3 is becoming an increasingly important mode of supply for LDC services SMEs, and faces similar barriers found in Mode 4. Therefore, the LDC collective request included a request that members, in a position to grant preferences, waive restrictions such as “conditions on local hires, sponsorship or guarantor requirements, prohibitions on repatriation of capital investments, and profits, ownership restrictions, restrictions on maximum lease terms and ownership of land, economic needs tests, restrictions against double taxation benefits, and expedited refunds and other tax administration benefits.”³⁷

12.1 Implementation and analysis

So far, 24 members have submitted notifications granting preferences to LDC services and service suppliers. They are Canada, Australia, Norway, Korea, China, Hong Kong, Taiwan, Singapore, New Zealand, Switzerland, Japan, Mexico, Turkey, the US, EU³⁸, India, Chile, Iceland, Brazil, Liechtenstein, South Africa, Uruguay, Thailand, and Panama. Those who submitted notifications during or after the Nairobi MC are Panama, Turkey (revision), Thailand, Uruguay and Canada (revision, during the Nairobi MC).

A count shows that 46 percent of the preferences notified exceed what was specifically asked for.³⁹ Preliminary analysis shows it is possible that more than 65 percent of the collective request will be treated, and in overall terms about 80 percent of the sectors in the collective request have been treated.⁴⁰ The largest sector in which preferences are notified is in the Business Service sector (professional services, computer services, etc.). Sub-sectors like accounting, engineering, nursing, IT and IT-enabled services are the ones where the LDCs enjoy comparative advantages and have been referenced in the collective request. The Transport sector follows the Business Service sector followed by the Recreational, Cultural and Sports Services sector. Most of the preferences notified pertain to market access. A few countries have also indicated assistance in capacity building initiatives for the LDCs.

However, a large number of notified preferences are at or below the level of DDA offers, which in turn reflect the applied regime. Offers in Mode 4, of particular interest to the LDCs, mostly do not constitute any meaningful market access, with hardly any reforms to licensing, recognition and means-testing requirements, among others.

³⁶ Drake-Brockman, J., Greenidge, A., Lan, J., and Zhao, Q. 2015. *Making the most of the LDC services waiver*. Geneva: ITC.

³⁷ *ibid.*

³⁸ <https://www.ictsd.org/bridges-news/bridges/news/eu-notifies-preferential-treatment-to-ldc-services-exports>

³⁹ Mendoza, M.R., Hannes, S., Christophe, B., Hadil, H. 2016. *The LDC services waiver: Operationalized?* Geneva: UNCTAD.

⁴⁰ Drake-Brockman, J., Greenidge, A., Lan, J., and Zhao, Q. 2015. *Making the most of the LDC services waiver*. Geneva: ITC.

A detailed assessment is necessary of the notified preferences, and the constraints faced by LDCs in utilizing these preferences effectively. It is incumbent on the LDC group to suggest a process to review the operation of the notified preferences.

12.2 Issues in the operationalization of the service waiver

One of the biggest challenges in the implementation is the creation of awareness among the service suppliers. An ongoing research at SAWTEE on services waiver reveals that Nepali service providers are just not aware of this new opportunity. Therefore, it is imperative that the service providers be made aware of the preferences provided by the developed and developing countries. Availability of information should not be confined to the WTO's online library where the notifications are archived. Service suppliers from LDCs may not have the capacity to extract the documents and/or understand their technical contents. Organizing workshops on the preferences provided as well as the ways to exploit those preferences are important to create awareness. Creating enquiry points and help desks to support the service providers in understanding the waivers as well understanding the procedure to make use of the waivers at the national level would also make operationalization easier and effective.

Supply-wide capacity constraints, including infrastructure gaps, in the LDCs also hinder the implementation and operationalization of the service waivers. The LDC's collective request did seek assistance to orient and assist LDC suppliers. The LDCs need to push for commitments in assistance in the aforementioned matters.

Yet another challenge could be the lack of information regarding the service providers within the LDCs and their comparative advantage. A through study needs to be conducted in order to identify the services suppliers, the challenges and threats they face as well as the service sectors that have high growth potential. This would help countries promote their service suppliers in the international market.

13 Special and differential treatment

The special and differential treatment (S&DT) provisions in the WTO were born of the recognition that developing countries, especially the LDCs and low-income countries, are significantly different from developed countries in their productive and export capacities, industrial structures and financial abilities, and hence their commitments and obligations must be tailored to their realities, capacities and development needs. However, most of the S&DT provisions have proved ineffective or inoperable. Since 1998 the developing country members have been pressing for an effective implementation of the S&DT provisions. Paragraph 12 of the decision of 14 November 2001 on implementation-related issues and concerns. Paragraph 44 of Doha Ministerial Declaration mandates a review of all special and differential provisions with a view to strengthening them and making them more precise, effective and operational. Since then developing countries and LDCs have made several proposals on improving S&DT provisions, but to little avail (JOB/DEV/48, JOB/TNC/60). Out of 145 S&DT provisions across WTO agreements and decisions, the members could reach agreement on only three specific provisions for LDCs during the Hong Kong Ministerial Conference (2005) relating to the Decision on Measures in Favour of Least-Developed Countries, Understanding in Respect of Waivers of Obligations under the GATT 1994 and the Agreement on Trade-Related Investment Measures.

In the run-up to MC10, the LDC Group, the ACP Group and the African Group—the G90—jointly submitted a proposal containing 25 agreement-specific proposals for improving S&DT provisions (JOB/TNC/51). It was subsequently revised twice (JOB/TNC/51/Rev.1 and

WT/MIN(15)/W/31) to accommodate the concerns of WTO members. Members could not reach a consensus on the proposal during MC10. In July 2017, the same groups made a fresh submission on S&DT with 10 agreement-specific proposals, with an eye to MC11. Initially, the LDCs had submitted a set of eight proposals. The 10 areas in the G90's proposal are:

- i. Agreement on Trade-Related Investment Measures
- ii. GATT 1994 (Article XVIII.A and C)
- iii. GATT 1994 (Article XVIII.B)
- iv. Agreement on the Application of Sanitary and Phytosanitary Measures
- v. Agreement on Technical Barriers to Trade
- vi. Agreement on Subsidies and Countervailing duties
- vii. Agreement on Customs Valuation and Decision on Minimum Values
- viii. Enabling Clause
- ix. Technology transfer
- x. Accession of LDCs

The justification advanced for these S&DT proposals is that they aid in achieving the development objectives of industrialization, diversification and structural transformation.

What follows are few examples from the proposals. A suggested change to the TRIMs Agreement would allow LDCs to introduce and maintain measures that deviate from their obligations under the Agreement. LDCs would not be obliged to implement, apply or enforce the provisions of the Agreement as long as they remain LDCs. Developing countries would be free to deviate from the provisions of Article 2 of the TRIMs Agreement and will be allowed to introduce new investment measures for an initial period of 15 years, and they can request for a further extension of the time period if their development objectives have not been met.

Regarding the GATT 1994, developing countries facing constraints and LDC members may deviate from the provisions of Section A and paragraphs 14, 15, 17 and 18 of Section C, and, accordingly, may temporarily modify or withdraw concessions included in the appropriate schedules annexed to the GATT, to achieve development objectives deemed necessary by the members concerned. Development objectives include: promoting the establishment of a particular industry, or establishment of a new branch in an existing industry, or achieving substantial transformation, bridging the digital and technological divide, modernization and upgrading and expansion of an existing industry, or reconstruction of an industry destroyed or substantially damaged as a result of hostilities or natural disasters including the impact of climate change with a view to achieving fuller and more efficient use of resources in accordance with the priorities of their economic development.

The proposed S&DT provisions with regard to the Agreement on SPS Measures and the Agreement on TBT contain specifics about, among others, notifications, consultations, financial and technical assistance. The proposal seeks a mandatory comment period of 180 days before the adoption of a new measure, for developing countries facing constraints and LDCs. A developed country member proposing an SPS measure shall consult directly, at an early stage, with any LDC member or developing country member facing capacity constraints, exporting a product that would be covered by the proposed SPS measure. When a phased introduction of an SPS measure is possible, the developed country member is required to provide to an LDC member or developing country member facing capacity constraints financial and technical assistance necessary for compliance with the measure, together with a compliance time-frame of at least 12 months.

Under the Agreement on Subsidies and Countervailing duties, developing country members, facing certain constraints, and LDC members, will be allowed to provide subsidies to achieve development goals, including regional growth, technology research and development funding, production diversification and development and implementation of environmentally sound methods of production, with such subsidies treated as non-actionable subsidies for a period of 10 years for LDCs (8 years for developing countries). The proposal also seeks to allow developing and LDC members to use subsidies contingent on the use of domestic over imported goods.

Under the proposed changes to the Agreement on Customs Valuation and Decision on Minimum Values, the LDCs seek the right to use minimum or reference values for up to 10 percent of their tariff lines to address the issue under-invoicing of imports. They also condition implementation of the Agreement by them on their acquisition of implementation capacity through technical and/or financial assistance or increased customs cooperation.

On technology transfer, it is proposed that the incentives mandated by Article 66.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) allow effective access, on fair, reasonable, and non-discriminatory terms, to technologies owned or controlled by enterprises and institutions in the territories of developed country members, in a manner that enables LDCs to absorb, adapt and improve on the received technologies. Developed country members shall adopt measures to enable enterprises and institutions in the territories of developing country members and LDCs to have access, upon demand and on fair, reasonable, and non-discriminatory terms, to technologies owned or under the control of developed country members and to technologies developed with public funding. Targeted technical assistance shall be provided to LDCs to support their domestic efforts to enhance their technological base and improve their innovation capacities and capabilities throughout the technology cycle of research, development, demonstration, commercialization and diffusion to enable these countries to advance up the technological ladder. Developed country governments shall establish a Publicly Owned Technology Inventory. Developed country Members shall promptly make available information concerning technologies patented or funded for at least 50 per cent, either directly or indirectly, by the government or any public body within their territory.

The key concern of developed countries with regard to the S&DT proposal is that it seeks flexibilities for *all* developing countries facing “capacity constraints”, which has not been precisely defined. Developed countries may be more amenable to the proposed S&DT provisions if they were only specific to, say, the LDCs, or linked to some indicators of economic vulnerability.

14 Intellectual property rights

Subjects pertaining to intellectual property rights under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that are of special interest to LDCs include patent protection for pharmaceutical products, importing medicines under compulsory licensing, technology transfer, and transition period for implementing TRIPS provisions.

LDCs are exempt from providing patent protection for pharmaceutical products until 1 January 2033. This exemption, which was last extended by the TRIPS Council in November 2015 (IP/C/73), can be traced to the Doha Ministerial Declaration on the TRIPS Agreement and Public Health which first gave LDCs the exemption until 1 January 2016

(WT/MIN(01)/DEC/2). A decision of the General Council waived the obligations to provide for the possibility of filing mailbox applications under Article 70.8 and to grant exclusive marketing rights under Article 70.9 (WT/L/971).

LDCs have insufficient or no manufacturing capacity to make use of compulsory licensing in the pharmaceutical sector. The Doha Ministerial Declaration on the TRIPS Agreement and Public Health instructed the TRIPS Council to find a solution to this problem (paragraph 6). In 2003, the General Council established a system that allowed LDCs and countries with insufficient manufacturing capacities to import medicines produced under compulsory licensing in another country (WT/L/540). In December 2005, WTO members agreed to amend the TRIPS Agreement to make the 2003 decision permanent (WT/L/641). The amendment—through a new article, Article 31b—entered into force on 2 January 2017. It was the first change to a WTO Agreement since the organization's establishment.

Article 66.2 of the TRIPS Agreement calls upon developed country members to provide incentives for technology transfer to LDCs. The Doha Ministerial Decision on Implementation-Related Issues and Concerns instructed the TRIPS Council to put in place a mechanism for ensuring the monitoring and full implementation of the article (WT/MIN(01)/17). A TRIPS Council decision of February 2003 ("Implementation of Article 66.2 of the TRIPS Agreement", IP/C/28) requires developed country members to submit annual reports on actions taken or planned in pursuance of their commitments under Article 66.2. Implementation of Article 66.2 continues to be weak. These submissions are reviewed by the Council annually. The decision explains that the annual review meetings provide members with an opportunity to, *inter alia*, pose questions in relation to the information submitted and request additional information; and discuss the effectiveness of the incentives provided in promoting and encouraging technology transfer to LDC members in order to enable them to create a sound and viable technological base.

The 14th annual review of developed-country members' reports was held in November 2016 during the Council's meeting (IP/C/M/83). Updates were received from Japan, Australia, Switzerland, Norway, Canada, the United States, New Zealand, the European Union and individual member States, namely Austria, Denmark, Finland, France, Germany, Ireland, Italy, Slovakia, Spain, Sweden and the United Kingdom (*ibid.*; IP/C/M/83/Add.1). Most developed members are yet to provide evidence of the specific incentives they have provided to their enterprises and institutes to meaningfully transfer technology to LDCs to enable them to create a sound and viable technological base. The EU's programmes and projects that have a semblance of technology transfer component cover groups of countries or regions rather than LDCs categorically, and most of the LDCs reportedly covered are African countries (IP/C/M/83/Add.1).

The LDCs want a uniform format for reporting by developed members, and greater examination of the scope of "technology transfer" and "incentives" to enterprises and institutions. Nepal can advocate the need for developed members to set up a dedicated programme that provides incentives to their enterprises and institutes to transfer technology to LDCs, not being confined to a particular region and taking into account the needs of individual countries.

Whether non-violation complaints should also be applicable to intellectual property, as in other areas under the WTO, is yet to find a permanent solution. WTO members have been extending a moratorium on bringing non-violation complaints under the TRIPS Agreement, pending a

permanent solution. The last time the moratorium was extended was at the Nairobi Ministerial (WT/L/976)—until 2017. Developing and least-developed countries, in general, fear legal insecurity and curtailment of flexibilities from allowing non-violation complaints into the domain of intellectual property.

LDCs have been given a transition period, which has been extended twice, allowing them to delay the implementation of the provisions of the TRIPS Agreement except those containing the core non-discrimination principles.⁴¹ In 2013, the TRIPS Council adopted a second extension of the general transition period until 1 July 2021 (IP/C/64). Nepal must submit its priority needs for technical and financial cooperation.

15 Non-agricultural market access (NAMA)

Under NAMA negotiations, LDCs are exempt from making any tariff reduction commitments and are only expected to increase their bindings substantially, leaving it largely to them to decide on the level and coverage of these new bindings (WT/COMTD/W/143/Rev.4). Nepal bound almost all its tariffs as part of its accession deal. Of major concern to LDCs, including Nepal, is preference erosion from tariff reductions by developed and developing members. In particular, sharp reductions in peak tariffs, for example in heavily protected sectors in developed country markets such as apparel, which would imply preference erosion for LDCs (Martin et al. 2011).⁴²

Major pending issues in NAMA include sectoral initiatives and non-tariff barriers (NTBs). Success in the former, which aims at full liberalization within well-defined sectors, would spell preference erosion for Nepal. Negotiations on NTBs are of interest to Nepal which has not been able to utilize its duty-free market access to developed markets partly due to NTBs. These two issues are yet to make to full-fledged text-based negotiations and that is likely to occur only towards the end of the negotiations (Messerlin 2013).⁴³

Nepal must identify products of export interest that are likely to be hit by preference erosion should the proposed tariff liberalization programme for developed and developing members on the table be implemented. Nepal must lobby for more targeted and effective delivery of aid for trade, including through the Enhanced Integrated Framework, aimed at alleviating its supply-side constraints and thereby shoring up its export competitiveness. This would help mitigate the adverse effects of preference erosion. In similar vein, because NTBs such as those related to standards are partly a supply-side issue, more targeted and effective assistance to help meet the standards set by destination markets should be part of Nepal's demands.

16 Aid for Trade

The Aid for Trade initiative, launched at the Hong Kong Ministerial Conference in December 2005, is aimed at supporting developing country members to build supply-side capacity and trade-related infrastructure. The Nairobi Ministerial Declaration of December 2015 refers to the Aid for Trade initiative and commits to accord priority to LDCs' needs.

The Enhanced Integrated Framework (EIF) is the main mechanism through which LDCs access aid-for-trade resources. Likewise, the Standards and Trade Development Facility supports

⁴¹ Article 66.1 of the TRIPS Agreement originally provided LDCs with an 11-year transition period.

⁴² Martin, W., Mattoo, A. and Winkler, D. 2011. Introduction. In Martin, M. and Mattoo, A., editors, *Unfinished business? The WTO's Doha agenda*. Washington, D.C.: The World Bank.

⁴³ Messerlin, P.A. 2013. The Doha round. In Lukauskas, A., Stern, R.M. and Zanini, G., editors, *Handbook of Trade Policy for Development*. Oxford Scholarship Online, doi: 10.1093/acprof:oso/9780199680405.001.0001

developing countries in “building their capacity to implement international sanitary and phytosanitary (SPS) standards, guidelines and recommendations as a means to improve their human, animal, and plant health status and ability to gain or maintain access to markets”. It maintains close contacts with the Aid for Trade initiative.

The Aid for Trade initiative has four components: technical assistance, infrastructure, productive capacity and adjustment assistance. Because of the broadness of definition of aid for trade, a substantial portion of traditional development assistance qualifies as aid for trade and it is difficult to gauge how much of aid for trade is additional (Adhikari et al 2011)⁴⁴, as called for by the report of the 2006 Task Force formed by the WTO to make recommendations for the effective operationalization of the initiative. Nepal received aid for trade worth US\$398 million in 2015, an increase of 217 percent over flows during 2006-08.⁴⁵ Aid for trade flows in 2015 were 29 percent of total official development assistance. Banking and financial services reportedly received the highest amount of aid for trade, at US\$125 million. Channelizing aid-for-trade resources through an umbrella fund at the national level in the recipient country can make for more effective monitoring and evaluation of the initiative in terms of its objective of building trade-related supply-side capacity. Cambodia, for example, has relatively successfully taken a sector-wide approach (SWap) to mobilizing aid for trade. Donor buy-in is crucial for the adoption of such an approach, and Nepal can take the lead in lobbying for it. Nepal must develop activities/projects for aid for trade funding for building its capacity to effectively utilize the preferential market access schemes for goods and the preferences granted under the services waiver, and to implement provisions under the Trade Facilitation Agreement.

Aid for trade flows into Nepal under the adjustment assistance category have been nil. This category includes assistance for coping with preference erosion, which is likely to be a serious issue for Nepal when developed and developing members where Nepal currently enjoys preferential market access embark on MFN trade liberalization. The importance of adjustment assistance will then be very important, and Nepal must start identifying needs and developing activities/projects to utilize this window.

17 Nepal’s position in Buenos Aires

17.1 Overall Doha Development Agenda

Nepal’s position on the overall Doha Development Agenda (DDA) should be: expeditiously advance, with a view to conclude, negotiation on the remaining Doha issues—the three pillars of agriculture, namely domestic support, market access and export competition, as well as non-agriculture market access, services, development, TRIPS and rules, in accordance with Bali and Nairobi declarations and other Ministerial declarations and WTO mandates. The DDA was launched to address the development needs of the developing and least-developed countries. Therefore, the conclusion of the DDA is of paramount interest to Nepal.

17.2 Early harvest of LDC issues

Implementation of decisions favouring the LDCs should not be held hostage to outstanding DDA issues and the completion of the Doha Round.

⁴⁴ Adhikari, R., Kharel, P. and Sapkota, C. 2011. *Evaluating aid for trade on the ground: Lessons from Nepal*. Aid for Trade Series, No. 23. Geneva: International Centre for Trade and Sustainable Development.

⁴⁵ Aid for trade figures are from OECD/WTO. 2017. *Aid for trade at a glance 2017: Promoting trade, inclusiveness and connectivity for sustainable development*. Geneva: WTO and Paris: OECD Publishing.

17.3 Agriculture

17.3.1 Domestic support for public stockholding

As part of the permanent solution, Nepal should demand that purchases under public stockholding programmes with price support be excludable from *de minimis* calculation of trade-distorting support provided in LDCs.

The permanent solution should cover not just traditional staple food crops⁴⁶ but also other food crops. It must also be backed by adequate safeguards against its possible abuse, which could hurt Nepali farmers.

If it is not possible to find a permanent solution at MC11, an extension of the Bali peace clause must be sought, with changes to the current peace clause such that a broader definition of food crops is adopted, new public stockholding programmes are also allowed, instead of just those in existence at the time of the Bali Ministerial, and a more realistic reference period used to calculate the support provided, as the current one (the average price for 1986-1988) inflates the amount of subsidy calculated artificially.

In view of Nepal being on track to graduate from LDC status by 2021, Nepal should support G33's proposal that purchases under public stockholding programmes be excluded from AMS calculation—but with adequate safeguards.

17.3.2 Domestic support in general

LDCs should be exempt from new disciplines on domestic support.

17.3.3 Special safeguard mechanism

In order to have the policy space to be able to temporarily protect domestic farmers from import surges and sharp price falls, Nepal should support the proposal for an operational special safeguard mechanism in principle, but also insist on sufficient conditions to prevent its abuse given that Nepal has significant agricultural export interest in the long run.

17.3.4 Export restrictions

As a net food importer, Nepal should call on WTO members not to restrict or ban exports, or set minimum export prices, with regard to LDCs, especially during times of high food price volatility.

17.4 Cotton, and fisheries subsidies

Nepal does not have an immediate, direct interest in cotton issues, and fisheries subsidies. Nepal has traditionally supported the Cotton Four on cotton issues. It should continue to do so for strategic reasons, including for the support that Asian LDCs are seeking from African LDCs for full implementation of DFQF market access decisions, although getting that support is slim at the moment. Reduction/removal of cotton subsidies globally could lead to an upward pressure on cotton prices, and in turn raise the prices of cotton textiles. As Nepal relies on imports of cotton textiles for its apparel exports, this could in principle adversely affect the competitiveness of its apparel industry. The government should consult with producers on the matter and explore ways, including through aid for trade, to help them adjust to the possible

⁴⁶ Defined in the Bali decision as “primary agricultural products that are predominant staples in the traditional diet of a developing Member” (WT/MIN(13)/38, WT/L/913).

rise in import cost. Special and differential treatment provisions for developing countries to, inter alia, help safeguard the livelihoods of their small and artisanal fishers in any deal on curbing fisheries subsidies would be in Nepal's interest in the long run, as there will be a basis for incorporating this feature in a future deal that covers inland fisheries.⁴⁷

17.5 Services

17.5.1 Service waiver

Transform service waiver to make it commercially meaningful and to contribute to economic development of LDCs. There should be a detailed assessment of notified preferences against the LDC collective request—from the perspective of individual LDCs. There must be a review of the operation of notified preferences, as called for in the Nairobi decision on service waiver. As the limited offers with regard to Mode 4, the focus of the collective request and also of significance to Nepal, do not amount to meaningful market access for LDCs, the measures sought in the collective request on Mode 4 to operationalize the service waiver (e.g., introduction of quotas, waiver from economic needs tests) must be demanded. Aid for trade to assess and enhance supply capacity is critical to utilize the preferences offered. Nepal must seek additional, targeted aid for trade.

17.5.2 Domestic regulation

LDCs should have full discretion to determine whether negotiated domestic regulations are necessary to implement while preserving their rights to regulate and pursue their development policy objectives.

17.5.3 Services trade facilitation

Any service trade facilitation agreement should recognize the capacity constraints faced by developing countries and LDCs in implementing its provisions, and should have special and differential treatment provisions, including a longer time frame and assistance for implementation.

17.6 New issues

Any decision to launch negotiations multilaterally on new issues should be taken only if it is agreed by all members.

17.6.1 E-commerce

Extend the current practice of not imposing customs duties on electronic transmissions by one year. Continue the existing 1998 Work Programme on Electronic Commerce, in order to have, inter alia, a clear understanding of the trade and development implications of e-commerce.

Nepal, in principle, should not support the formation of a Working Group on e-commerce issues, but if it is unable to object to the formation of such a Working Group, it should engage with the process to safeguard its interests.

17.6.2 MSMEs

Nepal must remain vigilant against the possibility of the proposed disciplines concerning MSMEs encroaching on the policy space to use trade and investment policies for industrialization and other development objectives.

⁴⁷ Current negotiations only cover marine fisheries.

There are substantial overlaps between the proposal(s) on MSMEs and the proposal(s) on e-commerce. These overlapping issues can be studied and discussed under the 1998 Work Programme on Electronic Commerce.

17.6.3 Investment facilitation

Nepal should engage in discussions on investment facilitation to safeguard its interests, but should not support initiation of negotiations on the issue.

17.7 Duty-free and quota-free (DFQF) market access

Nepal should join Asia-Pacific LDCs in pressing for the implementation of DFQF market access decisions: countries that are yet to provide DFQF market access to at least 97 percent of tariff lines must do so. The support of African LDCs is crucial in this regard. The US is the only developed-country market that is yet to meet the Hong Kong DFQF pledge. While it has extended DFQF access to an additional 66 products to Nepal (until 2025), products of significant export interest to Nepal, including many apparel items, still face MFN tariffs. Nepal must simultaneously bear in mind that if the expansion of product coverage for all LDCs includes the 66 products, it will face preference erosion.

Seeking expanded coverage of DFQF in terms of export value is also an option.

Nepal's poor preference utilization rate—for example, in the US (0.4 percent)—is a result of both its weak supply capacity and stringent rules of origin (ROO). In order to address the latter, LDCs must strongly press for the implementation of the Nairobi decision on preferential ROO, and seek ROO criteria of 25 percent value addition and single transformation.

17.8 TRIPS

Continue moratorium on non-violation and situation complaints under TRIPS.

17.9 Aid for trade

Aid for trade should be in the form of new funding, without diverting existing bilateral assistance in other areas. Substantially increasing assistance through EIF would help LDCs in strengthening their trade capacity more effectively.

17.10 Special and differential treatment

The 157 special and differential treatment (S&DT) provisions contained in WTO Agreements are mostly hortatory and non-binding in nature. Making them precise, binding and operational is important especially for LDCs. If it is not possible to secure the support of developed countries for the recent S&DT proposal covering tabled by the G-90, the LDC Group must table its own LDC-specific proposal, which is more likely to gain support. Nepal must press for effectuating the Monitoring Mechanism, established in the Bali Ministerial as a focal point to analyse, review and monitor S&DT provisions.

18 Negotiating strategy

18.1 Bilateral trade diplomacy

Bilateral trade talks with other members of the WTO through diplomatic channels are one of the options for trade negotiations. Existing diplomatic channels can be used to resolve trade-related issues between countries. Nepal could have bilateral talks with the US address the issue of DFQF market access.

18.2 Alliance with like-minded groups

Alliance with like-minded countries has been one of the most prominent strategies of negotiation for developed, developing as well as least developed countries. Negotiating groups include G-90, G-33, African, Caribbean and Pacific Countries, and Asian Developing Countries. These alliances are important in the negotiation process as they form common positions on issues pertinent to these countries. Alliances like these provide greater leverage to the members than while negotiating alone.

Alliance building is especially important to a country like Nepal as it lacks the necessary human resources for negotiations at Geneva. Developed countries tend to employ a flock of negotiators in Geneva while Nepal has just one Deputy Permanent Representative of Commerce posted in Geneva. It is virtually impossible for one representative to be present in every negotiation and be an expert on every issue being negotiated at the WTO. Forming alliances with like-minded members, thus, can be beneficial in terms of keeping abreast of all that is happening at the WTO as well as forming positions that can benefit the alliance.

Unfettered access to the sea is always an important issue for Nepal, as a landlocked country. Therefore, an alliance with other landlocked developing countries and least-developed countries can help push its transit-related agendas.

Another potentially useful alliance is with LDCs, including Bangladesh in South Asia, that are on the verge of graduation, just like Nepal. The challenge for these countries is that once they graduate, they will have to forego the S&DT provided to LDCs (after a transition period). They have to be prepared for this reality and an alliance can help develop a common strategy for those countries that will be graduating in the near future, and lobby for special consideration for these countries.

18.3 Activate SAARC Forum

It was agreed during the 1990s that the SAARC countries would have a common position in WTO negotiations. This forum could be utilized to form common positions on issues of importance to the region. Although there is no time to form such a position for MC11, such a regional strategy could be adopted for the Post-Ministerial Conference work plan.