

**THE IMPACT OF
AGRICULTURE-RELATED
WTO AGREEMENTS ON THE
DOMESTIC LEGAL
FRAMEWORK IN THE
KINGDOM OF NEPAL**

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EXECUTIVE SUMMARY

Under the terms of its accession to the World Trade Organization (WTO), Nepal committed to review existing laws and regulations to ensure compliance with several technical Agreements affecting trade in agricultural goods, including the General Agreement on Tariffs and Trade (GATT), the Agreement on Agriculture (AoA), the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), the Agreement on Technical Barriers to Trade (TBT Agreement), and the Agreement on Trade Related Intellectual Property Rights (TRIPs).

Many of the legislative changes and amendments made prior to accession as well as the commitments made during accession to the WTO have a direct impact on Nepal's agricultural trade policies. Since the early 1990's, Nepal has been committed to market-based reforms as a means to increase agricultural productivity and economic growth. However, Nepal has yet to obtain the benefits of sustainable growth in the agricultural sector from increased market access under the WTO regime. Nepal remains heavily reliant on bilateral agricultural trade with India, and its trading infrastructure remains very weak. Although it has generally been successful at reduced tariff barriers and subsidies to comply with WTO commitments, it is in great need of public investment in the agricultural sector to provide the basic conditions for private investment.

In addition, Nepal faces considerable challenges to full implementation of the WTO trade agreements despite the concessions and the transition periods that it has been granted as a Least Developed Country Member. This paper will explore the implications of WTO accession on the agricultural sector and assess the extent to which legislative reforms undertaken to date have been consistent with Nepal's WTO commitments.

1. INTRODUCTION

This paper will provide a review of Nepal's agricultural reform commitments under the terms of its accession to the WTO. The opening section of the paper will provide a background on some of the key factors influencing Nepal's potential for agricultural trade. In the second section, a brief overview of recent trade policies, as well as some of Nepal's important bilateral and multilateral trading arrangements will be explored. The third section will focus on the national framework

through an analysis of Nepal's legal institutions and domestic legislation to assess the level of compliance with WTO commitments. It will review of GATT related principles, including tariff measures, customs valuation, anti-dumping, subsidies, countervailing measures, state trading enterprises and safeguards as they are applied in Nepal. Under the fourth section, Nepalese institutions and legislation will be assessed within the context of the Agreement on Agriculture, Sanitary and Phytosanitary measures, Technical Barriers to Trade and Trade Related Aspects of Intellectual Property Rights. The concluding section of the paper will provide a prognosis for Nepal's agricultural trade policies under the WTO regime.

1.1 Country Background

Nepal is one of the least developed countries in the world and a net food importer. It is heavily reliant on foreign aid to pursue its economic development goals and has actively pursued an open trading policy to encourage investment and growth. However, significant socio-economic, geographic, political and institutional weaknesses continue to impede Nepal's potential for trade in the agricultural sector.

Poverty is a key factor affecting Nepal's potential for both domestic and international trade. Nepal ranks among the poorest countries in the world. The per capital income was less than 300\$ US and 31% of the population is estimated to live below the poverty line. There is also a wide regional disparity of poverty levels. More than 90% of the poor live in rural areas, with over 56% percent living in the remote mountains in the western region.¹ Although only 20% of the land is arable, agriculture is the primary source of income and employment in Nepal. It provides a livelihood for over 80% of the population and accounts for 38% of the GDP². However, agricultural output is highly dependant on the monsoon and is limited by the lack of infrastructure and rugged terrain between rural production areas and urban markets.³ Nepal currently has the lowest farm

¹ Integrated Framework for Trade Related Technical Assistance, 2003. *Nepal Trade and Competitiveness Study* p.2 "Trade and Competitiveness Study"

² The Economist 2005. *Nepal Country Report*, September 2005, p.3 "Economist Country Report"
<http://www.un.org.np/uploads/reports/EIU/2005/Nepal-September-05.pdf>

³ Asian Development Bank, 2004. Nepal Background Information available at
<http://www.adb.org/gender/practices/agriculture/nep004.asp>

productivity in South Asia.⁴ Given the importance of agriculture in the Nepalese economy, it is clear that increasing the competitiveness of agricultural production will have a decisive effect on poverty reduction.⁵ Significant investments in the provision of roads, irrigation, electricity and communications are needed to improve the agricultural output and increase food security in rural areas.⁶ It is a considerable challenge for Nepal to reduce its reliance on subsistence agriculture, to promote commercialization and new technologies and to diversify its economy as a result of poor access to local, regional and international markets.

Geography also has an important influence in Nepal's agricultural trading policies. As a land-locked country, Nepal remains heavily dependant on trade relations with its neighbors, and particularly with India. Not only is the Indian economy and infrastructure much more developed, but Nepal must rely on India for access to the closest seaport. Alternative routes to the sea through Bangladesh or the Tibet Autonomous Region of the People's Republic of China are not feasible for large movements of freight due to the mountainous terrain, poor road conditions and high costs of transportation for perishable agricultural goods.⁷ However, Nepal's land-locked situation could be used to its advantage as it ensures a certain degree of protection to domestic industries such as agriculture. In addition, Nepal may also stand to gain from India's expanding economy, as long as it can ensure open access to the Indian market.⁸ Despite a trade treaty that was designed to ensure an open border policy, in recent years, India has renegotiated higher tariff barriers on certain Nepalese products and granted subsidies to domestic agriculture that Nepal has been unable to reciprocate.⁹ This has kept Nepal at a disadvantage with its closest trading partner.

In addition, Nepal remains dependant on relatively few exports and the sources of its imports are limited to a few countries, making it extremely vulnerable to external shocks. Nepal's main export items are garments, leather goods, woolen

carpets and jute goods¹⁰. Major imports include petroleum products, vehicles and machinery parts, and textiles.¹¹ 58% of Nepal's imports come from India, while only 6% come from Singapore, 4% from China and 3% from Thailand. India also accounts for 57% of Nepal's exports, while its other main trading partners, the US, Germany and the UK account for 18%, 7% and 3% respectively.¹² While exports to India have remained steady since the Nepalese Rupee was pegged to the Indian Rupee in 1993, exports to other countries have been declining in recent years.¹³ Exports of readymade garments have declined dramatically since the WTO Agreement on Textiles and Clothing expired on January 1, 2005. Given the lack of trading infrastructure, it is increasingly difficult for Nepal to compete on the global market with the much larger neighboring economies of India and China, who have also joined the WTO trading regime.¹⁴

1.2 Trade policy history

Nepal has been pursuing an open trading regime since the 1950's. However, over the thirty year period of single-party rule that lasted until the mid-1980s, there was a very high level of state intervention in all spheres of the Nepalese economy. During this time, economic distortions and inefficiencies fueled high fiscal and external sector deficits and inflation. Structural adjustment programs were introduced to target these problems and to open up the Nepalese economy to market driven reforms. When the multi-party majority was restored in 1991, Nepal embarked on a more comprehensive policy of trade liberalization. The reforms were designed to accelerate the process of economic and social development by promoting a more efficient system of national production and improved access to foreign markets.¹⁵

Many of the market-based initiatives in Nepal since 1991 have focused on the areas of trade,

⁴ Pyakuryal, B, Thapa Y.B., Roy, D, 2005. *Trade Liberalization and Food Security in Nepal* International Food Policy Research Institute October 2005, p.55 "IFPRI"

⁵ Trade and Competitiveness Study supra note 1, p.98

⁶ Trade and Competitiveness Study supra note 1, p.99

⁷ Trade and Competitiveness Study supra note 1, p.55

⁸ FAO, 2004. *A Review of the Agricultural Policies and Legal Regime in Nepal* p. 10 "FAO Review"

⁹ FAO Review supra note 8 at 2

¹⁰ Nepal's exports in garments, leather goods, woolen carpets and jute goods totaled 826 million US\$ according to 2004/2005 IMF statistics available at <http://www.imf.org/external/np/sec/pn/2006/pn0612.htm>

¹¹ Nepal imports in key areas such as petroleum products, vehicles and machinery parts, and textiles, totaled \$1.8 billion IMF statistics 2006

<http://www.imf.org/external/np/sec/pn/2006/pn0612.htm>

¹² Economist Country Report, supra note 2 at 5

¹³ Economist Country Report, supra note 2 at 5

¹⁴ Economist Country Report, supra note 2 at 22

¹⁵ UNDP, 2004. *Human Development Report*, 2004.

Chapter 3 Barriers to Empowerment, p.37

<http://www.undp.org.np/publication/html/nhdr2004/Chapter3.pdf>

industry, finance and taxes. Although most of these policies have not been targeted towards the agricultural sector, each have the potential to contribute to agricultural development.¹⁶ For example, Nepal introduced the Foreign Investment and One Window Policy in 1992,¹⁷ to generate income and employment by encouraging broader participation of the private sector and improved productivity in domestic markets. The Policy is also designed to encourage the import of foreign capital, modern technology, management and technical skills to increase the competitiveness of Nepalese industries in international markets. To implement the Policy, the Foreign Investment and Technology Transfer Act of 1992¹⁸ was also introduced. It contains specific provisions aimed at attracting foreign investment in the form of equity participation, direct investment in domestic production, reinvestment of earnings derived from these investments, and the transfer of technology. The Foreign Investment and One Window Policy and accompanying legislation do not provide for the opening up of the agricultural sector to foreign direct investment. However, they have provided an important framework to encourage agricultural growth. Notably, by encouraging foreign participation in the banking sector, Nepal increased the potential to improve the supply of available agricultural credit for farmers.¹⁹ Nonetheless, net foreign direct investment in Nepal has remained negligible, as a result of poor infrastructure, rigid labor markets and a weak business climate.²⁰

The Industrial Policy of 1992²¹ introduced another key area of market-based reform that has important implications for the agricultural sector. The policy is targeted towards increasing the contribution of industrial sector to the national economy by encouraging industrial production and productivity. The emphasis is on the development of export-oriented industries and industries using local resources, but an important element of the policy is the goal of reducing unemployment and under employment in the agriculture sector. The Industrial Enterprises Act

1992²² was implemented under the Industrial Policy and amended in 1997 to balance the regional development of the country by encouraging labor intensive industries in areas of low agricultural output. Article 15 of the Act has provisions to allow for subsidies to certain priority industries. These include tax reductions and excise duty rebates of up to 35% for industries established in report, undeveloped and underdeveloped areas, as well as for export-oriented products.²³ Although the industrial sector was an area of considerable growth for Nepal in the 1990s, reduced foreign demand, increased competition among trading countries and an adverse shift in the policies in the countries that import Nepalese goods, have been some of the factors limiting its export performance in recent years.²⁴ In addition, the implementation of the Industrial Policy has been hampered by weak institutions, trading infrastructure and supply-side constraints arising from the Maoist insurgency.

Reforms in the agricultural sector have been primarily implemented under the 1995 Agriculture Perspective Plan (APP). This plan was developed in conjunction with the Asian Development Bank to provide framework to encourage agricultural growth, stimulate the economy and reduce poverty over a 20 year period. The primary objective is to improve the diversity of agricultural products and to develop commercial agriculture by enhancing cereal production in the plains (the *Terai* region) and the production of fruits as well as high value crops and livestock in the hills and mountain regions. It also sought to increase investments in irrigation, rural roads, fertilizer and technology. However, due to lack of resources, central coordination and monitoring, implementation of the APP has progressed on a piecemeal basis.²⁵

In 2002, the Government of Nepal introduced the Tenth Plan of its Poverty Reduction Strategy Paper, to be implemented over a 5 year period. The original goal was to reduce poverty from 38% in 2001 to 30% in 2007 on the basis of a four pillared development approach. The strategy was designed to encourage broad-based and sustained economic growth, to improve infrastructure, social and economic services in rural areas, to reduce social and economic exclusion from disadvantaged groups and to

¹⁶ FAO Review supra note 8 at 15

¹⁷ Foreign Investment and One Window Policy 1992 available at <http://www.nepalchamber.org/>

¹⁸ Foreign Investment and Technology Transfer Act 1992 available at <http://www.yomari.com/epb/foreign.php>

¹⁹ FAO Review supra note 8 at 14

²⁰ IMF 2006, *Nepal: Selected Issues and Statistics* IMF Country Report 2006 No 06/45, p. 19 <http://www.imf.org/external/pubs/ft/scr/2006/cr0645.pdf>

²¹ Industrial Policy 1992 available at <http://www.tpcnepal.org.np/pex/main.htm>

²² Industrial Enterprises Act 1992 available at http://www.supremecourt.gov.np/main.php?d=lawmaterial&f=industrial_enterprises_act

²³ Industrial Enterprises Act 1997, art. 15.

²⁴ Trade and Competitiveness supra note 1 at 2

²⁵ FAO Review, supra note 8 at 69-70

improve governance strategies for transparency, efficiency and accountability. Under the Tenth plan, agricultural reform strategies included mobilizing the private sector and NGO service providers, promoting cooperative/contractual farming, adopting commodity policies to create favorable investment climates for private entrepreneurs, devolving local agricultural programs to local bodies and strengthening agricultural farms/stations as resource centers to ensure the supply of quality seeds and planting/breeding materials for multiplication.²⁶ It also included land reform packages and the development of sustainable irrigation facilities as envisaged under the Agricultural Perspective Plan. Nonetheless, a result of conflicts in many of the rural areas, the budget for the 10th Plan was substantially reduced, and Nepal continues to struggle with implementation measures.²⁷

The 2005 IMF Progress Report on the Tenth Plan suggests that Nepal's growth in trade was successful in fueling a considerable increase in per-capita growth of up to 5% in the 1990s, compared to the less than 1% growth rate for most of the country's prior economic history. However, the Progress Report noted that growth in recent years has been seriously reduced by political turmoil and conflict, averaging at only 2% during the period of 2000-2004. In addition, it has been acknowledged that economic gains from liberalization policies have been uneven among the three major geographical regions, the mountains, hills and plains. The concentration of economic activity, the manufacturing base, the level of agricultural production, and access to markets are varied. The *Terai* has the highest tier of development in all of these areas, and the mountains have the lowest.²⁸ In conclusion, although studies suggest that the Nepalese economy responded well to market-based reforms in the 1990's, weak institutions and a lack of resources continue to undermine the poverty reduction strategy process, as well the full transition to a competitive trading economy.²⁹

²⁶ FAO Review supra note 8 at 24

²⁷ Pyakuryal B, Thapa, YB, Roy, D, 2005. *Trade Liberalization and Food Security in Nepal* supra note 4 p.26

²⁸ Roy, D, 2005. *Liberalization in Nepal: Bridging the Geographical Hierarchy* in Trade Insight, Vol No.4 2005

²⁹ Trade and Competitiveness Study supra note 1 at 2

2. THE INTERNATIONAL FRAMEWORK

2.1 Bilateral and Multilateral Trade Arrangements

The WTO provisions on Most Favored Nation (MFN) treatment status allow for countries to take advantage of bilateral and multilateral trade agreements outside of the WTO system, as long as they do not discriminate among member states. The principle of Most Favored Nation treatment is set out under Article 1 of the GATT. It provides that the benefits of concessions among member states must be "immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." The principle has been incorporated into many of the bilateral and multilateral trading agreements to which Nepal is a party. Prior its accession to the WTO, Nepal had signed bilateral trade treaties with 17 trading partners.³⁰ Since its Accession to the WTO, Nepal has been actively pursuing a further trade diversification and membership in other regional trade regimes in Asia, such as BIMSTEC and SAFTA. A review of some of Nepal's important bilateral and multilateral agreements and their implications under the WTO Most Favored Nation treatment principle are set out below.

2.1.1 Trade with India

India is Nepal's most important trading partner. It is by far the greatest source of imports to Nepal, as well as its primary country of export.³¹ Nepal has generally had stable trading relations with India since the first trade and transit agreement,

³⁰ Nepal has Trade Agreements with The Republic of Bangladesh (1976), The Republic of Bulgaria (1980), China (1981), the Czechoslovak Social Republic (1992) the Arab Republic of Egypt (1975), the Republic of India (1991), the Democratic People's Republic of Korea (1970), the Republic of Korea (1971), Mongolia (1992), the Islamic Republic of Pakistan (1982), the Republic of Poland (1992), the Republic of Romania (1984), The Democratic Social Republic of Sri-Lanka (1979), the United Kingdom of Great Britain and Northern Ireland (1965), the United States of America (1947), the Union of Soviet Socialist Republics (1970), the Socialist Federal Republic of Yugoslavia (1965). The full text of Bilateral Trade Agreements are available on the Nepal Trade Promotion Centre website at <http://www.tpcnepal.org.np/pub/main.htm>

³¹ In 2004, India accounted for 57% of Nepal's total exports, and 59% of the total amount of Nepal's imports. Nepal Trade Promotion statistics 2005 <http://www.tpcnepal.org.np/t-ap/main.htm>

the Treaty of Trade and Commerce of 1950, recognized Nepal's right to import and export commodities through Indian territory and ports without customs levies. However, security concerns over Nepal's relationship with China in 1989 led in India to freeze trade relations with Nepal for 15 months, with devastating effects on the Nepalese economy. After trading relations with India were restored, the India-Nepal Agreement of Cooperation³², was established in 1991 to ensure the free movement of capital, labor and payments between the two countries. The India-Nepal Treaty that was implemented under this Agreement been renewed every 5 years and the current agreement will remain in force until March 5, 2007.³³

The Treaty has specific provisions for trade facilitation and expansion of trade between the two countries. Article II states that "The Contracting Parties shall endeavor to grant maximum facilities and to undertake all necessary measures for the free and unhampered flow of goods, needed by one country from the other, to and from their respective territories." Article IV of the Nepal grants duty free access to the Indian market without quantitative restrictions and on a reciprocal basis for all primary products, with the exception of some manufactured goods, which are specified in the Protocol to the Treaty. Nepal benefited greatly from this trading arrangement in the late 1990's by obtaining privileged access to trade in India's booming market. However, the 2002 renewal of the Nepal India Trade Treaty introduced more restrictions on the amount of high quality items that can be exported from Nepal, and included further safeguard measures to protect domestic industries in India. As a result, Nepal has amassed a large trade deficit with India, amounting to 66,893.500 US\$ in 2002-2003.³⁴

The India-Nepal Trade Treaty has elements of both a free trade agreement and a preferential trade agreement, as the two are characterized

under the WTO rules. On the one hand, Article III of the Treaty grants unconditional most favored nation treatment to each other, suggesting that the arrangement is a free trade agreement. Free trade agreements may be compatible with WTO rules as long as the effect of the agreement does not lead to an increase trade barriers to third parties are not increased, and substantially all trade is between the parties to the agreement. The Treaty appears to be WTO compliant in this respect as it covers the large majority of in primary products, including unprocessed agriculture, horticulture, forest produce and minerals and does not impose additional barriers to trade for third parties. However, Article V and its Protocol grants preferential market access for the export of Nepalese manufactured products to India. This provision for non-reciprocity on industrial goods would suggest that the arrangement is closer to a preferential trade agreement, in contradiction with the WTO most favored nation treatment principle. In order to justify such an agreement under WTO rules, India would be required to similar preferential treatment to other least developed countries. In South East Asia alone, there are two other least developed countries, Bangladesh and Bhutan which do not have preferential trading arrangements with India.³⁵ In light of India and Nepal's commitments to ensure compatibility WTO, the Treaty is currently under review.

2.1.2 Trade with China

Nepal has had stable trading relations with China since the first bilateral trade treaties were signed with the Government of the People's Republic of China in the 1950's. A Peace and Friendship Treaty was signed in April 1960, followed by a Boundary Treaty in October 1961. The 1981 Trade and Payment Agreement³⁶ is the basis for China and Nepal's current preferential trading regime. The Agreement focuses on developing trade overseas and overland and further consolidation of traditional trade between Nepal and the Tibet Autonomous Region of People's Republic of China. Article 3 of the Agreement also provides for a list of products to be exchanged and the trading points along the frontier of the two countries. Article 7 provides for "most favoured nation treatment in all matters relating to customs

³² Agreement of Cooperation between His Majesty's Government of Nepal and the Government of India, full text available at

<http://www.tpcnepal.org.np/tagree/agreofcoperatind.htm>

³³ 2002 Treaty of Trade between His Majesty's Government of Nepal and the Government of India, full text available at

<http://www.tpcnepal.org.np/tagree/treatyoftradeind.htm>

³⁴ UNDP/HMG Nepal 2004. *Ensuring Food Security in Nepal, Facing threats and Seizing opportunities at WTO Accession* Workshop Report submitted to Multilateral Trade Integration and Human Development in Nepal Program Columbia University, New York USA Spring 2004 p.29 www.multitrade.org.np/publication/Facing.pdf

³⁵ FAO/UNDP, 2004. *Implications of the WTO Membership on the Nepalese Agriculture* Kathmandu 2004, p. 183 "Implications of WTO"

³⁶ 1981 Trade and Payment Agreement between the Republic of China and His Majesty's Government of Nepal, full text available at <http://www.tpcnepal.org.np/tagree/china.htm>

duties and other taxes, fees and charges to be levied on exportation and importation of commodities and to the rules, formalities and charges of customs management". Finally Article 8 of the Agreement allows for the border inhabitants of the two countries, within an area of 30 kilometers to carry out the traditional trade on barter basis. Despite China's long history of providing Foreign Aid to Nepal, bilateral trade between the two countries has remained low in comparison to India-Nepal trade.³⁷ In addition, with India and China's rapid economic growth in recent years, there has been a renewed interest in developing further trading relations, and in particular, in developing Nepal as a trade transit corridor between China and India.³⁸

2.1.3. Trade with Bangladesh

In 1976, Nepal and Bangladesh signed the Trade and Payment Agreement with its Protocol as well as the Transit Agreement with Protocol³⁹. Under the Trade and Payment Agreements, Nepal and Bangladesh agree to grant most favored nation (MFN) treatment to each other in respect to licenses, customs formalities, customs duties and other taxes, storage and handling charges, fees and other charges of any kind levied on exports and imports of goods to be exchanged between them.⁴⁰ Schedule A of the Trade and Payment Agreement lists certain Nepalese primary commodities, semi-manufactured and manufactured good for export into Bangladesh. There are no specific requirements for documentary evidence for export. The Protocol establishes that points of entry, exit procedures and storage and other related facilities should be the same as applied by the Transit Agreement. All payments in connection to bilateral trade between Nepal and Bangladesh shall be effected in any convertible currency unless otherwise agreed upon.⁴¹

³⁷ In 2004, China accounted for only 3.9% of Nepal's imports.

³⁸ See Dahal, T., 2005. *Nepal as a Transit State: Emerging Possibilities* Nepal Institute of Foreign Affairs <http://www.ifa.org.np/pdf/new4.pdf>

³⁹ Trade and Transit Agreements between His Majesty's Government of Nepal and the Government of the People's Republic of Bangladesh, full text available at <http://www.tpcnepal.org.np/tagree/tradeagrebang.htm#t&p>

⁴⁰ United Nations Economic and Social Commission for Asia and the Pacific, 2004. *Trader's Manual for Least Developed Countries Nepal* p.26 "Traders Manual"

⁴¹ *Traders' Manual* supra note 40 at 26

2.1.4 Trade with the EU: Everything But Arms Initiative (LDCs)

Nepal is beneficiary of preferential trade treatment with the European Union under the Everything But Arms (EBA) Regulation, which was adopted by the EU Council in February 2001. This regulation grants duty-free access to imports of all products from least developed countries without any quantitative restrictions, except for arms and munitions. The only import items that were not immediately released from duty free tariff quotas were fresh bananas, rice and sugar. The regulation provides for the gradual release of duties on those products, with duty free access granted for bananas in January 2006, for sugar in July 2009 and for rice in September 2009. The EBA Regulation does not have a restricted time frame for these special arrangements for Least Developed Countries and is not subject to the periodic renewal of the EU framework of generalized trading preferences.⁴² This agreement provides Nepal with opportunities to increase export growth, however, the EBA is not a clear guarantee of market access preferences for Nepal, because it is a unilateral and conditional arrangement.⁴³ Unlike bound MFN tariffs under the WTO system, the EBA trading arrangement can be withdrawn at any time by the EU without the need to provide justification to Nepal.

2.1.5 SAARC and SAFTA

Nepal has been actively involved in negotiations to establish the South Asian Association for regional Co-operation (SAARC) which includes Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka and is now the host of the SAARC secretariat. Nepal was a contracting state of SAPTA (SAPTA), the South Asian Preferential Trade Agreement which entered into force on December 7, 1995. It is now a signatory of SAPTA's successor agreement, the South Asian Free Trade Area Agreement (SAFTA), which came into force on January 1, 2006.⁴⁴ This agreement for trade in goods, services, investment liberalization and improvement of competitiveness was signed at the 2004 SAARC Summit in Islamabad. It provides a framework to fulfill commitments designed to address tariffs,

⁴² Everything But Arms Regulation (EC) 416/2001

⁴³ UNESCAP, *Case study: Nepal*, The Doha Development Agenda: Perspectives from the ESCAP Region UNESCAP Document ST/ESCAP/2278

http://www.unescap.org/tid/publication/t&ipub2278_nep.pdf

⁴⁴ Agreement on South Asian Free Trade Area <http://www.saarc-sec.org/main.php?id=12&t=2.1>

para-tariffs, non-tariff and direct trade measures by 2016. Provisions for sensitive lists of products, Rules of origin, technical assistance as well as a mechanism for compensating revenue loss for Least Developed Member States are still under negotiation.

Unlike its predecessor agreement, SAPTA, the SAFTA agreement has specific provisions referring to member state commitments under GATT and the WTO. Article 5, states that "each Contracting State shall accord national treatment to the products of other Contracting States in accordance with the provisions of Article III of GATT 1994 Article III of the GATT 1994."⁴⁵ In addition, Article 16 provides that "All investigation procedures for resorting to safeguard measures under this Article shall be consistent with Article XIX of GATT 1994 and WTO Agreement on Safeguards."⁴⁶

The Trade Liberalization Program under in Article 7 of the SAFTA Agreement commits members to progressively reduce customs duties on products from the region. The tariff reduction by the Non-Least Developed Contracting States from existing tariff rates to 20% is scheduled to occur within a time frame of 2 years, from the date of coming into force of the Agreement. If actual tariff rates after the coming into force of the Agreement are below 20%, there is a provision for an annual reduction on a Margin of Preference basis of 10% on actual tariff rates for each of the two years. The tariff reduction by the Least Developed Contracting States to 30% from existing tariff rates is scheduled within the time frame of 2 years from the date of coming into force of the Agreement. If actual tariff rates on the date of coming into force of the Agreement are below 30%, the Agreement provides for an annual reduction on a Margin of Preference basis of 5 % on actual tariff rates for each of the two years. The subsequent tariff reduction by Non-Least Developed Contracting States from 20% or below to 0-5% is scheduled to occur within a second time frame of 5 years, beginning from the third year from the date of coming into force of the Agreement. The subsequent tariff reduction by the Least Developed Contracting States from 30% or below to 0-5% shall be done within a second time frame of 8 years beginning from the third year from the date of coming into force of the Agreement. There is an additional reference to multi-lateral commitments where it states that "contracting Parties shall eliminate all quantitative restrictions,

except otherwise permitted under GATT 1994, in respect of products included in the Trade Liberalization Program."⁴⁷

Nepal, Bhutan and the Maldives entered SAFTA as Least Developed Countries, and as such, they are expected to benefit from additional special and differential treatment measures under Article 11 of the Agreement. These may include special regard to the situation of the Least Developed Contracting States when considering the application of anti-dumping and/or countervailing measures, greater flexibility in applying quantitative or other restrictions on imports. It will also require special consideration of direct trade measures to enhance sustainable exports from Least Developed Contracting States, such as long and medium-term contracts containing import and supply commitments in respect of specific products, buy-back arrangements, state trading operations, and government and public procurement. In addition, Contracting states commit to give special consideration to requests from Least Developed Contracting States for technical assistance and cooperation arrangements designed to assist them in expanding their trade with other Contracting States and in taking advantage of the potential benefits of SAFTA. Finally, until alternative domestic arrangements are formulated to address the potential loss of customs revenue of LDC by implementing the Agreement, Contracting States agree to establish an appropriate mechanism to compensate the Least Developed Contracting States for their loss of customs revenue. Full implementation of the agreement for LDCs is anticipated for 2017, with tariffs to be eliminated from "fast track" products by 2011.⁴⁸

2.1.6 BIMSTEC

In July 2004, Nepal joined the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Co-operation (BIMSTEC), which also includes Thailand, Myanmar, India, Bhutan, Bangladesh and Sri Lanka. The organization was established in 1997 and is designed to promote economic and trade relations between member states in South Asia and South East Asia. Nepal is also a party to the BIMSTEC Free Trade Agreement (FTA) that is scheduled to enter into force for trade in goods in July 2006.. In the preamble, the Agreement makes specific

⁴⁷ Agreement on South Asian Free Trade Area Art. 7

⁴⁸ Nag, B., 2005. *Trade Cooperation and Performance in East and South Asia: Towards a Future Integration* Asia Pacific Development Journal Vol 12, No.1 June 2005 (www.unescap.org/pdd/publications/.)

⁴⁵ Agreement on South Asian Free Trade Area Art. 5

⁴⁶ Agreement on South Asian Free Trade Area Art. 16

reference to the “rights, obligations and undertakings of respective Parties under the World Trade Organization (WTO) and other multi-lateral, regional and bi-lateral agreements and arrangements” and acknowledges that “least developed countries in the region need to be accorded special treatment commensurate with their development needs.”⁴⁹ Under the Agreement, trade in goods will be liberalized by eliminating tariff and non-tariff barriers in two phases, with products to be identified as either fast-track or normal track. Non-LDCs commit to eliminate fast track product tariffs for LDCs by June 30 2007, and among themselves by June 30, 2009. LDCs commit to do so for non-LDCs by June 30, 2011 and among themselves by June 30, 2009. For normal track products, non-LDCs agree to eliminate tariffs for LDC by June 30, 2010, but among themselves by June 30, 2012. The LDC agree to eliminate tariffs of normal track products for non-LDC by 2017 and among themselves by June 30 2015.⁵⁰ Agreements on services and investment that are scheduled to enter into force on January 1, 2008.

2.2 Nepal's Accession to the WTO

Nepal's accession to the WTO was the result of a long and complicated process of negotiations at multilateral, bilateral and domestic level that lasted over fourteen years. A working party was established to examine Nepal's application for accession to the GATT in June 1989. Nepal obtained observer status in 1993 and became an observer to the World Trade Organization after it succeeded the GATT in January 1995. In 1997, Nepal converted its application for accession to the GATT to an application for membership to the WTO. In 1998, in accordance with WTO accession procedures, Nepal submitted a Memberandum of Foreign Trade Regime for circulation to all of the member states. A direct question and answer period between member states and the Nepalese Government followed until 1999. After this time, the WTO working party to Nepal's Accession, formed from the original GATT working party, was established and convened regularly over the course of 2000-2003 to consider the application and to make recommendations. Nepal was finally approved for membership in September 2003 along with another LDC, Cambodia, during the 4th WTO

Ministerial in Cancun, Mexico. On March 24, 2004, Nepal notified the WTO that the process of ratification and acceptance of the Protocol of Accession were completed by Royal Ordinance as there was no Parliament in session.⁵¹ On April 23, 2004 the Protocol entered into force and Nepal became the 147th member of the WTO.

Nepal undertook 25 systemic commitments under the terms of its accession to WTO, but many challenges remain for full compliance. Nepal must not only create the legal and policy environment for WTO reforms, it must also create effective enforcement mechanisms. It must increase its capacity to compete internationally while ensuring compliance with the technically demanding provisions of the agreements it has signed.

2.3 Participation in the WTO as a Least Developed Country

The acute challenges for Least Developed Countries (LDCs) in opening up their economies to world trade were formally acknowledged by the WTO in Doha Ministerial Declaration of 2001. The Declaration commits member states to encourage and accelerate negotiations for LDC's to accede to the WTO. On December 10, 2002, the WTO General Council adopted a Decision on the Accession of LDCs to introduce guidelines for streamlined procedural requirements, as well as eligibility criteria for special and differential treatment provisions in existing WTO agreements. In addition, the Decision advocates restraint on behalf of existing members seeking concessions in market access negotiations, so as to favor LDCs. Under the Decision, member states agreed that accession commitments to be commensurate with the level of development of the LDCs and that technical, financial assistance should be provided in their accessions process. Currently, Nepal is one of 50 LDC members of the WTO. As an LDC member, Nepal was granted a transition period until 1 January 2007 for implementing TRIPS, the Agreement on Customs Valuation, the SPS and the TBT. In addition, Nepal, along with the other LDCs, has been seeking further provisions for preferential treatment under the Agreement on Agriculture over the course of the WTO's Doha Round of WTO trade negotiations.

Nepal participated in the December 2005 Hong Kong 6th Ministerial Meeting of the WTO for the first time as a member of the WTO, and played an important role in the Meetings in advancing the position of LDCs. The Ministerial was held to

⁴⁹ Preamble to the BIMSTEC Framework Agreement available at

<http://www.mofa.gov.bd/bimstec/BIMSTEC%20FTA.pdf>

⁵⁰ BIMSTEC Framework Agreement Protocol p. 2

<http://www.mofa.gov.bd/bimstec/bimstec%20FTA%20protocol.pdf>

⁵¹ IFPRI, *supra* note 4 at 55

discuss the Doha Round issues taken up by the July Package, which was adopted by WTO members in August 2004. The five key issues for negotiations under the July Package were agriculture, non-agricultural market access (NAMA), services, trade facilitation and development. Of all of these priorities, agriculture was the primary concern for least developed countries.

During a meeting held in Livingston, Zambia in June 2006, Nepal adopted a common position with the other LDC countries on all five issues to project stronger negotiating voice at the Hong Kong ministerial. LDCs asked for binding commitment from WTO member states on duty-free and quota-free market access for all their products to be granted and implemented immediately, on a secure, long-term and predictable basis, without introducing restrictive measures.⁵² For agriculture negotiations, they called for the elimination of all forms of export subsidies and a significant reduction of all forms of trade distorting domestic support.⁵³ At the same time, the LDCs argued that Special and Differential Treatment provisions and transitional measures were necessary to offset the negative, short-term effects of removing subsidies or removing LDCs' preferential margins into the markets of developed countries.⁵⁴ They sought a substantive increase in resources for "Aid for Trade" measures as well as a strengthening of the Integrated Framework, which was designed to provide technical assistance.⁵⁵ The LDCs argued that the Integrated Framework is important not only to build up their supply-side capacity, and technological and physical infrastructure but also to support them to diversify their production and export base.⁵⁶ Likewise, they called for binding commitments on targeted and substantive technical assistance programs to enhance their capacity to meet sanitary and phytosanitary measures, standards requirements, rules of origin and other non-tariff measures in the importing countries.⁵⁷ They also reaffirmed the need to implement the flexible conditions for LDCs that were agreed in the Modalities for Negotiations on Trade Facilitation.⁵⁸ Under this arrangement, LDC Members will only be required to undertake

commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

In a statement at the Hong Kong Ministerial Meeting, Nepal emphasized that LDCs were seeking commitments from member states not only to increase market access opportunities but also help to strengthen supply side capabilities in LDC countries.⁵⁹ At the Hong Kong Ministerial, the LDCs were successful in obtaining a pledge from all member states to provide duty free and market quota-free market access for 97% of LDC goods for export by 2008.⁶⁰ Member states also reaffirmed that LDCs would only be required to undertake commitments and concessions to the extent that they are consistent with their level of development, financial or trade needs, or administrative and institutional capacities.⁶¹ In addition, member states pledged to institute an Aid for Trade program, acknowledging for the first time that market access alone does not necessarily lead to development for the poorest countries facing acute supply-side constraints to trade.⁶²

3. NATIONAL FRAMEWORK: LEGISLATIVE AND INSTITUTIONAL ANALYSIS

3.1 Overview of the Legal System

In 1990, a party-less system of government that had presided in Nepal for almost three decades was replaced by a multi-party system within the framework of a constitutional monarchy. The Constitution of the Kingdom of Nepal, 2047 (1990)⁶³ established well-defined and separated executive, legislative and judicial powers. It also guaranteed the protection of fundamental human rights, equality rights and property rights. Within the constitutional context, Nepal is guided by the principles of a democratic welfare state. It strives to promote an equitable distribution of productive resources and the benefits of development.

⁵² Article 1 Livingstone Declaration available at http://www.integratedframework.org/files/Livingstone%20Declaration_final.doc

⁵³ Article Livingstone Declaration

⁵⁴ Article 5 Livingstone Declaration

⁵⁵ Article 8 Livingstone Declaration

⁵⁶ Article 7 Livingstone Declaration

⁵⁷ Article 14 Livingstone Declaration

⁵⁸ Article 37 Livingstone Declaration

⁵⁹ Statement by Honourable Buddi Man Tamang, Minister of Industry, Commerce and Supplies at the Hong Kong Ministerial Conference 17/12/2005

⁶⁰ Article 36 Annex F Special and Differential Treatment Hong Kong Ministerial Declaration 18 December 2005

⁶¹ Article 38 Annex F Special and Differential Treatment Hong Kong Ministerial Declaration 18 December 2005

⁶² Article 57 Ministerial Declaration 18 December 2005

⁶³ Constitution of Nepal 1990 Full text available at <http://www.supremecourt.gov.np/main.php?d=lawmaterial&f=constitution>

The Constitution upholds the principles of promoting justice and moral values, and encourages public participation in state affairs through a policy of decentralization. Under the Constitution, there is three-tiered, independent judicial system. The highest court is the Supreme Court of the Kingdom of Nepal based in Kathmandu, followed by the Court of Appeal and then the District courts. The Chief Justice of the Supreme Court of Nepal is appointed by the King on recommendation of the Constitutional Council, which is comprised of the Prime Minister, the Chief Justice, the Speaker of the House of Representatives, the Chairman of the National Assembly and the Leader of the Opposition in the House of Representatives.⁶⁴ All judges on the Appellate and District courts are appointed by the King upon the recommendation of the Judicial Council. In addition to the regular courts, the constitution also provides for special courts or tribunals, under which four revenue tribunals, an administrative court and a labor court have been established.

Articles 44-67 of the Constitution establish the powers of the Legislature under the bicameral parliamentary system of Nepal. The Parliament consists of 205 members of the House of Representatives elected on the basis of a first past the post constituency system and 60 members of the National Assembly, 10 of which are nominated by the King, 35 of which are elected by the House of Representatives and 15 of which are elected from 5 Development regions. Articles 68-72 empowers Parliament to enact laws by passing bills through both houses of parliament before they may obtain the Royal Assent required for bill to become an Act. The Government may also provide for rules and regulations under an Act of Parliament delegating legislative powers.

As provided under Article 35 and 41 of the Constitution, four ministries are designated with the responsibility for making and enforcing policies that affect foreign trade in goods and services. These include the Ministry of Industry, Commerce and Supplies, the Ministry of Finance, the Ministry of Culture, Tourism and Civil Aviation, the Ministry of Labor and Transport Management and the Ministry of Agriculture and Cooperatives.⁶⁵

3. 2 GATT and related Principles- Tariff and Non Tariff barriers

The General Agreement on Tariffs and Trade (GATT) established the precedent for prohibiting quantitative restrictions and limiting the rights of member states to impose tariffs. This principle was extended to Most Favoured Nation treatment for trade in goods under the WTO. Nepal's tariff binding commitments under the WTO are designed to stabilize and provide security for the country's import and export regime. By securing market access, the commitments are designed to encourage Nepalese export industries to invest in domestic markets under greater conditions of certainty, allowing for expansion and diversification of their production base with a greater export orientation. In addition, the WTO rules on binding tariffs should give security to importers and domestic industries, by ensuring stable prices of imported raw materials. This should to help facilitate price determination for Nepalese industries. The WTO provisions requiring reductions to tariff barriers should also guarantee that importers and domestic industries will be able to import materials without delay and at the most competitive prices. In terms of trade in agricultural goods, entry into the WTO provides increased opportunities for market access of farm products.

However, the benefits of WTO tariff reductions on Nepalese agricultural exports have been marginal given that Nepal has been an inefficient producer and has become a net food importing country in recent years. Agricultural products currently do not play a significant role in its export trade.⁶⁶ In addition, Most Favored Nations provisions have played a relatively small role in influencing trade and determining the level of protection to import competing sectors in Nepal. This is because of Nepal's heavy reliance on bilateral trade with India. The India-Nepal agreement already covers such a large proportion of Nepal's agricultural trade and provides duty free access for most goods. However, given that the India-Nepal trade treaty may be renegotiated for compliance with the WTO, Nepal should maintain higher bound tariffs so that it can match India's applied rates if and when trade with India begins to occur on a MFN basis. If it does not do so, India's applied

⁶⁴ *Report of the Working Party on Nepal's WTO Accession*, WTO Document WT/ACC/NPL/16 of 28 August 2003 "Working Party Report" p.8

⁶⁵ Working Party Report, supra note 64 at 9

⁶⁶ *UNESCAP Case study: Nepal/ The Doha Development Agenda: Perspectives from the ESCAP Region* Document ST/ESCAP/2278

http://www.unescap.org/tid/publication/t&ipub2278_nep.pdf

tariffs may end up being higher than Nepal's, to the disadvantage of Nepal's agricultural sector.⁶⁷

At the time of Nepal's accession to the WTO, the prevailing basic customs tariff rates were fixed at 5, 10, 15, 25, 40, 80, 130%, and many of the tariff lines were already set to zero.⁶⁸ Most items fell within the range of 10-20% and the highest tariff rates that were applied to vehicles were set to be reduced in subsequent years. The average bound tariff rate for agricultural goods was 51 percent, and was scheduled to go down to 42 per cent after three years. The bound rate was significantly higher than the average applied tariff rate for agricultural products (11%).⁶⁹ In addition, very few products were subject to specific duties. These included motor fuels, kerosene oils, gas and fuel oils, cement, liquor, and tobacco.⁷⁰ The Customs Tariff provides for certain tariff exemptions and reductions, in order to facilitate the import of specific goods on a provisional basis. The list of exemptions and tariff reductions is published in the Customs Tariff.⁷¹

Nepal did not have any import quotas at the time of accession, and very few products were banned from import, domestic production and sale under the Export Import (Control Act, 1957), the Narcotics Drug Control Act, and the Country Code (Muluki Ain).⁷² These include Narcotics such as opium and morphine, liquor with more than 60% alcohol, beef and beef products. Products restricted for import and domestic production include arms and ammunition, wireless audio communications, and valuable metals and precious stones that have not been manufactured into jewelry.⁷³

Although Article II 1(b) of the GATT allows member countries to maintain other duties and charges (ODCs) as long as they are bound at the prevailing level, given that all acceding countries had bound them to zero, Nepal also committed to eliminate all of its ODCs.⁷⁴ At the time of

accession, Nepal still had a significant number of ODCs, such as the local development fee of 1.5% charged on the value of imports, 11.5% levied on the import of industrial goods, and 2.5% to 14.5% on the value of imported agricultural goods.⁷⁵ These charges, in addition to charges for local and agricultural development, special fees, cigarettes and alcohol fees were not incorporated into the customs tariff rates. Under the terms of Accession, Nepal was granted a transition period of two to ten years to eliminate all of these other duties and charges, and committed not to introduce new ODC's⁷⁶

There is an automatic licensing system in Nepal for both the import and export of all non-restricted goods for information purposes.⁷⁷ Licensing is regulated under the Export Import (Control) Act 1957 and Export-Import Rules, 1978, Customs Act 1962 and Customs Regulation 1969, as well as the Annual Finance Act and the order made by the Ministry of Commerce pursuant to the Export and Import (Control) Act, 1957 and Rules, 1978.⁷⁸ The Department of Commerce is empowered to issue licenses, in accordance with WTO requirements. However, the Working Party to Nepal's Accession noted that s.3 of the Export-Import Control Act 1957 is not compatible with WTO non-discrimination requirements, because it was designed to control or prohibit the export or import of restricted items. It also has very little information on the process of registering export-import agencies, export promotion, sharing information, finance, export incentives, institutional arrangements and dispute settlement.⁷⁹

Under its terms of accession, Nepal was granted a period of delay for the full implementation of tariffs cuts until 2006. Nepal committed to codify the substance of the WTO Agreement on Import Licensing Procedures and to bring its licensing provisions for valuable metals and precious stones into conformity with WTO by applying automatic licensing to these products. It also committed to eliminating and not introducing, re-introducing or applying quantitative restrictions on

⁶⁷ FAO/UNDP, 2004. *Implications of the WTO Membership on the Nepalese Agriculture* Kathmandu 2004 p. 54

⁶⁸ "Working Party Report" supra note 64 at 13

⁶⁹ Sauvé, P. 2005 "Economic Impact and Social Adjustment Costs of Accession to the World Trade Organization: Cambodia and Nepal" *Asia-Pacific Trade and Investment Review* Vol 1. No 1. "Economic Impact and Social Adjustment" p.31

⁷⁰ Working Party Report, supra note 64 at 13

⁷¹ Working Party Report, supra note 64 at 13

⁷² Working Party report supra note 64 at 14

⁷³ Working Party Report supra note 64 at 14

⁷⁴ Ratnakar Adhikari and Navin Dahal, 2004. *LDCs' Accession to the WTO: Learning from the Cambodia and*

Vanuatu Cases of Nepal South Asia Watch on Trade, Economics & Environment (SAWTEE), Kathmandu, Nepal 2004 p. 8

⁷⁵ Working Party Report supra note 64 at 13

⁷⁶ Working Party Report supra note 64 at 13

⁷⁷ Working Party report supra note 64 at 15

⁷⁸ Working Party Report supra note 64 at 15

⁷⁹ Pant, B. 2002 "A Study on Trade in Goods Submitted to Nepal's Accession to the WTO Project" UNCTAD/UNDP/HMG p.67

<http://www.multitrade.org.np/publication/A%20Study%20Report%20on%20Trade%20in%20Goods.pdf>

imports or other non-tariff measures that are not justifiable under the WTO Agreement. Nepal obtained a 10 year transition period for full implementation of the provisions to bind at zero all other duties and charges on agricultural and industrial goods.⁸⁰

Nepal had made considerable progress in reducing tariff barriers before accession to the WTO, and has continued to implement reductions under the Tariff Schedule. By 2004/2005, customs prevailing customs duty rates had been reduced to 5, 10, 15, 25 and 40%. Some exceptions were still provided under special provisions to promote development of key areas of the economy. Import rates had also gradually declined in accordance with WTO commitments.⁸¹ However, the potential impact of Nepal's market access commitments have been estimated to include a revenue loss of about US \$55 million as a result of the elimination of customs duties and charges, particularly on imports of rice and tariffs on motor vehicles⁸². Estimates of overall trade creation would be equivalent to \$89 million, in the same sectors where customs revenue losses would be the highest.⁸³

3.3 Customs Valuation

The WTO provisions for customs valuations are found under Article VII Valuation for Customs Purposes, Understanding on Customs Valuation and the Agreement on the Implementation of Article VII of GATT 1994 (Annex I Interpretive Notes). The WTO rules on customs valuation commits member states to adhere to a fair, uniform and neutral system for the valuation of goods for customs purposes, in conformity with commercial realities. The provisions prohibit the use of arbitrary or fictitious customs values by requiring customs officials to use a systematic method for assessing the value of products to determine the amount of customs duties that may be imposed.

Customs tariff policy in Nepal is regulated by the Customs Act 1962 and its 1997 amendments⁸⁴. The Customs Tariff Schedule, based on the International Convention on the Harmonized Commodity Description and Coding System (HS)

has been in effect since 1992. An updated tariff schedule for 2005/2006 is available on the website of the Department of Customs.^{85 86}

Article 13 of the Customs Act as amended in 1997, provides for the valuation of goods on the basis of the invoice price shown in the invoice document provided by the importer. If there is a concern over the price actually paid for the goods, then the customs officer would refer to the value of similar goods imported into Nepal. If this information is not available, customs officers may refer to suggested manufactures price-lists, local or the international market prices "or available data or information or the suggestion of expert, related organization or body as basis in determining the value of goods" However, it was noted in the Report of the Working Party to Nepal's Accession that these provisions did not apply Article 5 and 6 of the Agreement on the Implementation of Article VII of the GATT 1994 regarding imputed or computed valuation.⁸⁷

Nepal committed to incorporate all of the provisions of the WTO Agreement on Customs Valuation into the Customs Act, 1962 and the Customs Regulation, 1969. As part of this commitment, Article 2 of a Final Ordinance enacted in 2003 expressly states that Customs valuations must adhere to the WTO principles for the assessment of Customs duties on the basis of the transaction value.⁸⁸ Nepal has until January 2007 to implement the Customs Valuation Agreement. However, Nepal continues to face major challenges related to the use of reference prices and is currently receiving technical assistance in this regard from international organizations, such as the World Bank and the World Customs Organization.⁸⁹

3.4 Anti-dumping, Subsidies and Countervailing Duties

Under the WTO system, member states are allowed to act contrary to the principles of most favored nation treatment and impose tariff barriers under certain prescribed circumstances. Article 6

⁸⁰ The Least Developed Countries Report 2004, chapter 3

⁸¹ Nepal Customs Tariffs available at <http://www.customs.gov.np/tariff.php>

⁸² Economic Impact and Social Adjustment" supra note 69 at 31

⁸³ Economic and Social Adjustment supra note 69 at 31

⁸⁴ Customs Act 1962 Full text available at www.nrn.org.np/aboutnepal/acts/customs_act.pdf

⁸⁵ Customs Duties, and Tariff Schedule 2005/2006 <http://www.customs.gov.np/tariff.php>

⁸⁶ Nepalese Custom Bulletin 2006 sets out current customs policies <http://72.14.207.104/search?q=cache:A7fZ4tlkOCAJ:www.customs.gov.np/pdf/Bulletin2006.pdf+india+export+inspecti on+fee+wto+nepal&hl=en&gl=ca&ct=clnk&cd=18>

⁸⁷ Working Party Report supra note 64 at 17

⁸⁸ Customs Valuation Act 1962 and Final Ordinance 2003 <http://www.customs.gov.np/valuation.php>

⁸⁹ Economic Impact and Social Adjustment, supra note 69 at 33

of the GATT allows countries to take action against dumping, where there is a material injury to the competing domestic industry. The Anti-Dumping Agreement provides a comprehensive framework for the provisions under Article 6 and sets out the conditions under which a country may take otherwise discriminatory actions against a trading partner. It sets out detailed procedures on how anti-dumping cases can be brought, how investigations are conducted, and the conditions to ensure that all interested parties are given an opportunity to present evidence. It also provides that anti-dumping measures must expire five years after they have been imposed, unless an investigation demonstrates that ending the measure would lead to injury. The Agreement on Subsidies and Countervailing Measures complements the Anti-dumping Agreement, in that it regulates the use of subsidies as well as the actions member states may take to counter the effects of subsidies. The Agreement allows for recourse to the WTO dispute settlement procedure to seek the removal of subsidies or adverse effects of subsidies. It also permits countries to investigate and charge extra duties as a countervailing measure against subsidized imports that are found to apply to the detriment of domestic producers. Finally, under Article XIX of the General Agreement, members are permitted to take a "safeguard" action to protect a specific domestic industry from an unforeseen increase of imports of any product which is causing, or which is likely to cause, serious injury to the industry.

By joining the WTO, member states commit to apply domestic legislation that will be compatible with these provisions, however, it is not necessary for them to have an established regime in this area. Generally, anti-dumping and countervailing measures have been applied in developed countries where tariffs are at low levels and where national legislation on such remedies was already in place before the GATT was established.⁹⁰

Nepal did not have an antidumping, countervailing duty regime at the time of Accession. Nor does Nepal have access to the Special Safeguards of the Agreement on Agriculture. However, the Government of Nepal was authorized to restrict imports by issuing an order under Section 3 of the Export Import (Control) Act 1957. At the time of accession, Nepal intended to amend this Act to authorize trade restrictions for trade remedies and for balance of payment purposes only in the cases specified under the WTO Agreements.⁹¹ The

gap between bound and applied rates in Nepal was expected to provide an adequate margin of flexibility to ensure that sudden increases in imports may be addressed by increases in applied duties, without the need for contingency protection measures.⁹² Under the WTO rules, Nepal is permitted to increase tariffs up to the bound rates for this purpose.⁹³ Although other accession commitments may need to be given more priority attention, Nepal has prepared draft Anti-dumping and Countervailing Duties Act.⁹⁴ The Act was expected to be adopted by the Council of Ministers in May 2004.⁹⁵ PROGRESS

Nepal provides subsidies in the form of exemptions from income tax, sales tax, excise duties and customs duties under the Industrial Enterprise Act 1992. For example, national priority industries, including agro-industries, are entitled to a 50% reduction on income tax from the time they begin operation.⁹⁶ Subsidies for seeds, plants, irrigation pipes and pumping are also provided directly to producer farmers.⁹⁷ However, as discussed further in the domestic support section below, the total subsidies on agricultural inputs have always been considered very low.⁹⁸ Other subsidies, such as those provided to the Agriculture Input Corporation for fertilizers were removed in 1999, well before accession to the WTO.⁹⁹ In addition, Nepal is entitled to benefit from Article 27 of the Agreement on Subsidies that allows for special and differential treatment for LDCs.¹⁰⁰ This provision exempts LDC countries from the general prohibition on the use of subsidies under the Agreement.

3.5 State Trading Enterprises

Article XVII of the GATT 1994 is the principal provision dealing with state trading enterprises and their operations. It provides that state trading enterprises must follow the principles of non-discrimination and that for decisions on imports and exports, they must be guided only commercial

⁹² Economic Impact and Social Adjustment, supra note 82 at 35

⁹³ Implications of WTO, supra note 35 at 56

⁹⁴ Bhansali, S, Ghimire, J.k. *Antidumping and Countervailing Duties Legislation for Nepal Multilateral Trade Integration and Human Development in Nepal* 2004 http://www.multitrade.org.np/publication/anti_dumping.pdf http://www.multitrade.org.np/publication/anti_dumping.pdf

⁹⁵ Economic Impact and Social Adjustment supra note 82 at 35

⁹⁶ Working Party Report supra note 93 at 27

⁹⁷ Working Party Report supra note 64 at 28

⁹⁸ Implications of WTO supra note 35 at 27

⁹⁹ Implications of WTO supra note 35 at 28

¹⁰⁰ Working Party Report supra note 64 at 28

⁹⁰ A Report on Trade in Goods 2002 Multitrade p.48

⁹¹ Working Party Report, supra note 64 at 23

considerations only. The WTO understanding on the interpretation of Article XVII sets out the definition of state trading enterprises, which are defined as governmental and non-governmental enterprises, including marketing boards, which deal with goods for export and/or import. Under the GATT 1994 Agreement, member states must notify the WTO of their state trading enterprises annually. While the WTO does not seek to discourage or prohibit the use of state trading enterprises, it seeks to ensure that they are not applied in a manner that is inconsistent with WTO principles, as they have the potential to distort the trading regime.

In the Report of the Working Party to Nepal's Accession, the representative of Nepal indicated that the state-owned enterprises in Nepal were established essentially with the objective of ensuring an adequate supply of raw materials and essential goods.¹⁰¹ He noted that because they operate on commercial considerations and provide equal opportunities for all suppliers, they would be considered compliant with Article XVII of the GATT 1994. However, the WTO working party was notified of two state trading enterprises in Nepal that may not be WTO compliant, because they enjoy exclusive rights and special privileges. The Nepal Oil Corporation has exclusive rights for the import of petroleum products, although it does not have exclusive rights over the import of lubricants. The Salt Trading Corporation has special privileges for the import of salt and sugar. Nepal agreed to notify the WTO and provide information on the activities of these organizations, although Nepal did not make any commitments to ensure the transparency of its privatization program and to make periodic progress reports on economic and trading reforms.¹⁰² Nonetheless, to date no notifications are available on WTO website.

3.6 Agreement on Agriculture

The Agreement on Agriculture (AoA) resulted from the Uruguay Round of negotiations that began in 1986 and concluded in 1994. The purpose of the AoA is to establish fair, market-oriented agricultural trading system by reducing domestic agricultural support and protection mechanisms. The agreement was specifically designed not to affect agricultural policies that do not distort trade. Agriculture under the AoA is defined to include crops, livestock and irrigation, although it excludes

the fishery and forestry sectors. There are four areas in which WTO members must make binding commitments under the AoA: market access, domestic support, export competition and the Agreement on Sanitary and Phytosanitary issues.

3.6.1 Market Access

The Provisions for market access under the AoA address the rules and commitments related to the import of goods. The goal is to encourage growth in trade by binding and reducing tariffs as well as by preventing non-tariff barriers. In addition, the market access provisions address the use of Tariff Rate Quotas (TRQs) and Special Safeguards (SSG) as trade remedy measures. The main provisions of the AoA referring to market access are found under Article 4, Article 5 and the Schedules. Article 4.2 of the AoA sets out prohibited measures, such as quantitative trade restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained by state trading enterprises, voluntary export restraints and similar border measures other than ordinary customs duties.

As Nepal does not have any TRQ commitments, nor does it have access to SSGs, the key market access instrument for Nepal is the applied tariffs to be set within the limits of Nepal's' WTO bound rates. Under the terms of Accession to the WTO, Nepal committed to bind all agricultural tariffs without exception. The simple average of bound rates for agricultural products were set to an initial 51%, and then designed to be reduced to 42% by 2006. 80% of bound tariffs concentrated in the 30-50% range, with tariff on 90% of the tariff lines being at least 30%.¹⁰³

Nepal's tariff structure is regulated by the 1996 Financial Act, which empowers the Government to apply and modify tariffs. Nepal further reduced customs tariffs under a Finance Ordinance issued in January 2006. With the latest adjustments, the average customs rate has been lowered from 9.6% to 8%, mainly for third country imports of manufactured goods so as not to adversely affect the competitiveness of domestic industries.¹⁰⁴

3.6.2 Export Competition

Article 8-12 of the AoA focuses on the regulation of direct and indirect forms of subsidies as a

¹⁰¹ Working Party Report supra note 64 at 37

¹⁰² UNCTAD The Least Developed Countries Report 2004 Part 1, Chapter 3 section 5

¹⁰³ Implications of the WTO supra note 35 at 44

¹⁰⁴ Nepal to Cut Tariffs on 125 Items see http://english.people.com.cn/200601/10/eng20060110_234279.html

means to enhance export competition. Article 12 addresses export prohibitions and restrictions, by referring to GATT Article XI. This provision requires member states to take into consideration the food security concerns of importing countries while instituting new prohibitions or restrictions on food products. However, developing countries such as Nepal who are not regular food exporters are exempt from the Article 12 provisions.¹⁰⁵ Unlike Cambodia and Vanuatu, who also joined the WTO under LDC terms, Nepal did not make any commitments to bind export subsidies for agriculture under the terms of its accession to the WTO.¹⁰⁶ Nonetheless, the Government asserted at the time of accession that it did not provide subsidies on agricultural exports.¹⁰⁷ However, agricultural producers in Nepal are assisted by government support programs, as discussed in the following section.

3.6.3 Domestic Support Measures

Domestic support provisions under Article 6 and 7 of the AoA are designed to limit government subsidies on measures distorting trade. Member states commit to reduce the value of mainly direct export subsidies to a level 36% below the 1986-90 base period level over the six-year implementation period, and the quantity of subsidized exports by 21% over the same period. In the case of developing countries, the reductions are two-thirds those of developed countries over a ten-year period. No reductions apply to the least-developed countries. Subject to certain conditions, there are no commitments on subsidies to reduce the costs of marketing exports of agricultural products or internal transport and freight charges on export shipments for these countries.

The AoA explicitly provides that limits will not be imposed on support measures that do not distort trade. A detailed list of measures except from WTO scrutiny is set out under the Green Box of Annex 2 and the Blue Box of the AoA. The Green Box exemptions include non trade-distorting general services, such as research, pest and disease control, training, extension, inspection, marketing and promotion services, and infrastructural services, food security stocks, domestic food aid and direct payments to producers, such as decoupled income support, insurance and safety net programs, disaster relief, retirement schemes, investment aids, environmental programs and regional assistance

programs. The Blue Box exempts direct payments under production-limited programs, if they are based on a fixed area and yield, made on 85% or less of the base level of production or made on a fixed number of head for livestock. In addition, the AoA exempts development measures under Article 6.2, such as agricultural investment subsidies, input subsidies and domestic support in developing countries to encourage agricultural growth, assist poor producers and encourage diversification from growing illicit narcotic crops. Finally, the AoA exempts *de minimis* levels of support for developing countries which are permitted for up to 10% of total value of agricultural products. These domestic support provisions are of significant importance for developing countries, given the role support and subsidies play in agricultural development.

Although Agriculture is the most significant sector of the economy in terms of GDP, employment and trade, it has been given relatively low priority in Nepal's market reform policies of the past two decades. The share of agriculture in total government expenditures fell steadily from about 15% in 1995 to around 10% in 2001, although there were notable budget increases for improving the infrastructure of irrigation.¹⁰⁸ Nepal currently does not take advantage of all of the Green Box measures that are except from WTO scrutiny, such as food security stocks, and direct payments to producers for income insurance.¹⁰⁹ Agricultural research has concentrated on improving technologies, soil fertility maintenance and disease prevention for crops, livestock and horticulture, as prioritized under the APP. However, actual expenditures on research were only about 2.5 to 5.5% of the total expenditure on agriculture, which is very low by international standards.¹¹⁰ Improving the infrastructure of agricultural roads in Nepal was also priority under the APP and has resulted in a considerable share of agriculture expenditures.¹¹¹

The Ministry of Agriculture and Commerce provides for annual expenditures on agricultural extension and related support services for crops, livestock, cooperative development and food technology and quality control services.¹¹² It also provides for domestic food aid programs implemented by Nepal Food Corporation for the distribution of food grain to remote areas.¹¹³

¹⁰⁵ Implications of WTO supra note 35 at 66

¹⁰⁶ UNCTAD Least Developed Countries Report 2004, Part 1, Chapter 3, section 4.

¹⁰⁷ Working Party Report, supra note 64 at 39

¹⁰⁸ Implications of WTO, supra note 35 at 23

¹⁰⁹ Implications of WTO, supra note 35 at 23

¹¹⁰ Implications of WTO, supra note 35 at 24

¹¹¹ Implications of WTO, supra note 35 at 25

¹¹² Implications of WTO, supra note 35 at 24

¹¹³ Implications of WTO, supra note 35 at 25

Nonetheless, there is no limit on these activities under the AoA, Nepal is simply obliged to notify the WTO periodically of its expenditures in this area. The Blue Box exemptions for limits on area production under the AoA do not apply to Nepal, where there is a currently a general lack of agricultural production rather than excess of production.

Compared to the 10% allowable limit under the AoA, actual subsidies in Nepal have been very low. Nepal does not have any program for crop-specific direct payments, and abandoned a minimum price support programs for paddy and wheat in 2001. Inputs such as fertilizers, irrigation, credit and seeds have been subsidized at very low levels, averaging 0.5% of the total value of agricultural production over the 1996-2001 period.¹¹⁴ Given that the average farm size is only about one hectare and is used largely for subsistence purposes, almost all farmers in Nepal fall under the low-income and resource poor category. As a result, they are exempt from limitations on government subsidies under article 6.2. Thus, there is ample room for Nepal to increase agricultural support measures as Nepal is not constrained by the domestic support restrictions under the AoA.¹¹⁵

3.6.4 The Marrakech Decision

At the end of the Uruguay Round of WTO trade negotiations held in Marrakech in 1994, least-developed and net food-importing developing countries obtained a formal recognition from the WTO of the negative effects that they may experience with respect to supplies of food imports on reasonable terms and conditions. A special declaration, separate from the Agreement on Agriculture and now referred to as the Marrakech Decision, was established to set out objectives for the provision of food aid and basic foodstuffs in full grant form as well as for aid for agricultural development. The Marrakech Decision also allowed for the possibility of assistance from the International Monetary Fund and the World Bank with respect to the short-term financing of commercial food imports. Follow-up mechanisms for the Decision were set to monitored by the WTO Committee of Agriculture. However, there has been little progress on full implementation the Marrakech Decision at the international level. Donors as well as beneficiaries of development assistance under the Decision have continued to voice concern over at major international

conferences, such as the World Food Summit, UNCTAD and the Ministerial sessions of WTO.¹¹⁶

Nepal was not classified as a net-food importing country at the time of the Marrakech Decision. Although it used to have a national surplus of food supplies, stagnant productivity in the Nepal's agricultural sector in recent years has led to a reliance on cheaper food imports from India.¹¹⁷ As a net-food importing country, Nepal is entitled to receive special considerations for the provision of food aid, financial and technical assistance, and differential terms in respect of export credits ad short term assistance from international institutions in financing imports.¹¹⁸

4. THE SANITARY AND PHYTOSANITARY (SPS) AGREEMENT

Under Article 20 of the 1994 GATT, governments can regulate trade in order to protect human, animal or plant life or health as long as the regulations are not discriminatory or disguised as protection for domestic markets. During the Uruguay Round of trade negotiations, member states decided that a further agreement was needed to set out the technical application of these provisions. The resulting Agreement on sanitary and phytosanitary measures provides a more comprehensive framework to support Article 20. It was designed to protect and improve the current human and animal health and phytosanitary conditions in all member countries and to protect member countries from arbitrary or unjustified discrimination through the application of different SPS standards.

Sanitary and Phytosanitary measures are defined under Annex A of the Agreement as any measure that is applied to protect animal or plant life or health within the domestic territory from risks arising from the entry, establishment and spread of pests or diseases carried or caused by organisms, animals, plants or products thereof. Measures may include laws, decrees, regulations, requirements and procedures such as testing, inspection, certification and approval procedures, quarantine treatments as well as requirements for the transport of animals or plants, provisions for sampling, statistics and risk assessments, as well

¹¹⁶ see http://www.fao.org/trade/negoc_aoa_marrakech_en.asp

¹¹⁷ IFPRI, supra note 1 at 60

¹¹⁸ IFPRI, supra note 1 at 58

¹¹⁴ Implications of WTO, supra note 35 at 30

¹¹⁵ FAO Review, supra note 8 at.5

as packaging and labeling methods directly relating to food safety.

Member states are encouraged to harmonize sanitary and phytosanitary measures on the basis of international standards, guidelines and recommendations as established by the Code Alimentarius Commission, the International Office of Epizootics, and the International Plant Protection Convention. The SPS Agreement permits member states to apply and enforce higher standards than those prescribed by international bodies, provided that they have justifiable and scientific basis, and are applied in a non-discriminatory manner between both domestic and imported products. Important aspects of the Agreement are the procedures for improving transparency. By signing the Agreement, Member states agree publish and notify the WTO SPS committee Secretariat of all proposed and implemented measures and establish an enquiry point for SPS measures.

Article 9 and 10 provides for technical assistance and special and differential treatment to be given to developing and least developed countries for capacity-building measures and compliance with the Agreement. These provisions recognize the particular challenges faced by developing countries in adhering to international standards that are often very costly to implement, requiring a significant public investment in research, monitoring and enforcement infrastructure.

Nepal committed to implement the SPS Agreement by January 1, 2007. The transition phase was permitted to allow Nepal to acquire technical assistance. During the period, Nepal committed to apply existing measures on a non-discriminatory basis, such as providing for national treatment and MFN treatment to all imports.¹¹⁹ It committed to establish an enquiry point by January 1 2004, and to acquire equipment and provide training for SPS enquiry point personnel by January 1, 2005. By July 1, 2005, Nepal also committed to review designate an authority responsible for making notifications to the WTO and to ensure the transparency of obligations. Notification to the WTO were scheduled to begin before January 1, 2006. In addition, Nepal committed to review regulations to ensure they were based on risk assessments and sufficient evidence, to upgrade human resources in SPS areas, and to provide reporting on pest or disease free areas prior to July 1, 2005. Nepal pledged to develop SPS guidelines before July 1,

2006. Finally, Nepal stated that the quality control, laboratories, quarantine systems and field veterinary systems would be upgraded, and standards, guidelines and recommendations harmonized by January 1, 2007.¹²⁰

The SPS commitments establish priorities for legislative reform in three areas, animal and plant health, food safety and food marketing. The following sections will provide a review of Nepal human and animal health and phytosanitary conditions legislation, and proposals for reform in the areas of trade in food products, trade in plant and plant products and trade in animal and animal products.

4.1 Trade in Food Products

The Food Act 2023 (1966)¹²¹ and Food Rules 2027 (1970) are the primary legal instruments governing Nepal's trade regime in food products. The Act and Regulation have been subject to several amendments in 1973, 1975, 1991 and 1998. Together, they were designed to regulate the provision of safe food to consumers through the involvement of food inspection, oversight and enforcement authorities.

Several provisions of the Act refer to food safety issues that are also addressed under the SPS Agreement. Article 3 bans production, sale, and distribution of substandard, contaminated, hazardous food items. Article 4 regulates the misbranding of sales by false statement. Provisions for the detention of food products are set out under Article 4a and the licensing of food establishments under 4b. Enforcement, penalty and penalty provisions are set out under articles 5-12. Article 13 provides for research and analysis laboratories. S. 7.2 of the Food Act designates the Department of Drug Administration at the Ministry of Health and the Department of Food Technology and Quality Control at the Ministry of Agriculture as responsible for verifying the import of health and food products comply with the minimum standards or specifications under the Food Act and Regulation. The latter was also established as the SPS Enquiry Point for Nepal.

However, the current Act does not set out a comprehensive food safety regime, nor does it provide minimum mandatory food standards that

¹¹⁹ Working Party Report, supra note 64 at 35

¹²⁰ Working Party Report, supra note 64 at 36

¹²¹ Food Act 2023 and Food Rules 2027 Full text available at <http://faolex.fao.org/faolex/index.htm>

are harmonized with the Codex system.¹²² It also does not establish a preventative approach with basic food safety procedures for producers, processors and food handlers. FAO studies indicate that the harmonization of food standards among SAARC countries, including Nepal, has made slow progress and that there is still a long way to go in harmonizing standards with Codex standards.¹²³ While there are Codex standards for many of the major food commodities traded between Nepal and India for example, including honey, orange juice, tomato paste wheat flour, lentils and sugar, food standards have often been applied differently in each country with respect to Codex standards.¹²⁴ In addition, Codex standards are lacking for many other food commodities traded within the SAARC region, such as vanaspati ghee, ghee, tea, coffee and spices. India and Nepal have harmonized some standards in these products, but differences in minimum food standards with other countries may not be WTO compatible.¹²⁵

Nepal has often experienced difficulties exporting food commodities as a result of quality issues, particularly with the export of vegetable ghee to India. Since Nepal entered the WTO, it has encountered SPS-related difficulties with the export of honey to Norway, and the export of orthodox tea to Europe as a result of non-compliance with pesticide residue levels. In addition, the Chinese authorities restricted imports of butter from Nepal because they were concerned about quality control procedures over milk processing.¹²⁶

The Food Act is in the process of amendment.

There are proposals to formulate more enforceable guidelines on food inspection, analysis and production and to harmonize the Food Act with the Consumer Protection Act, The Nepal Standard Symbol Act, Standard Measurement Act, Black Marketing and Social Crime and Punishment Act to ensure that penalty provisions are comparable.¹²⁷

4.2 Trade in Plants and Plant Products

Nepal has long been committed to the international regulation of trade in plants and plant products. Nepal joined the Asia Pacific Plant Protection Commission in 1965, which is a

regional plant organization that operates within the framework of the International Plant Protection Convention (IPPC). Nepal is not yet a member of the IPPC but it had initiated the process for ratification of the Convention at the time of accession.¹²⁸ A proposal to ratify the IPPC was submitted to the Parliamentary Secretariat, but Parliament was dissolved before the bill was tabled. Nepal also adheres to the FAO Plant Protection Agreement for the Asia and Pacific Region, and is a member of the OIE and Codex Alimentarius.¹²⁹

Despite the operation of plant protection legislation in Nepal since the 1970's, until recently, agricultural products have crossed the border between India and Nepal without any quarantine checks. However, in 2000, India enforced new regulations, increased quarantine inspection fees and required mandatory testing from its central laboratory. The additional costs and time constraints of these measures have made it more difficult for Nepal to export agricultural products and compete in agricultural exports. In addition, China has also begun to require quarantine regulations formalities on plants and plant products.¹³⁰

The Plant Protection Act 2029 (1972)¹³¹ and the Plant Protection Rules are the primary legislation governing Nepal's trade in Plants and Plant Products. The Plant Protection Rules 2031 (1972)¹³² provides for import restrictions on 19 plants and plant products from specific countries, and empowers Plant Protection Officers to confiscate infected plant and plant products and impose fines for non compliance with the legislation.¹³³ The Act also establishes the National Plant Quarantine Committee for the protection of plants from pests, diseases and infections. The body in charge of implementing Phytosanitary Measures is the central office of Plant Quarantine, under the administrative supervision of the Plant Protection Directorate in the Department of Agriculture.¹³⁴

Several shortcomings to the now 30 year old regulatory framework under the Plant Protection Act 2029 need to be addressed for compliance

¹²² Implications of WTO, supra note 35 at 88

¹²³ Implications of WTO, supra note 35 at 88

¹²⁴ Implications of WTO, supra note 35 at 88

¹²⁵ Implications of WTO, supra note 35 at 88

¹²⁶ Implications of WTO, supra note 35 at 101

¹²⁷ FAO Review, supra note 8 at 83

¹²⁸ FAO Review, supra note 8 at 72

¹²⁹ Working Party Report, supra note 64 at 35

¹³⁰ Implications of WTO supra note 35 at 115

¹³¹ Plant Protection Act 2029 (1972) Full text available at <http://faolex.fao.org/faolex/index.htm>

¹³² Plant Protection Rules 2031 (1972) Full text available at <http://faolex.fao.org/faolex/index.htm>

¹³³ Implications of WTO, supra note 35 at 114

¹³⁴ Working Party Report, supra note 64 at 32

with the SPS Agreement. The Act makes no reference to the objective of trade facilitation, and does not define several key concepts such as germplasm, infectious diseases, pests, parasites, bio-agents, predators, micro-organisms, quarantine pests and PRA, that are set out under the SPS agreement. For example, there is no definition under the current Act. In addition, the Act does not address import, export, transit and re-export measures for phytosanitary risks, and does not address land border plant quarantine issues. Finally, there are no guidelines under the act on the role of the private sector, quarantine fees and recovery of service charges.¹³⁵

The implementation of the Act has also not been very effective. Despite the enforcement provisions under s.8 of the Act, there have been no recorded charges of violations of the Plant Protection Act 1972, nor legal challenges to quarantine check post actions, suggesting that there has been 'a culture of compromise' among traders, customs clearing agents and PQ check posts.¹³⁶ Moreover, although the law requires that each consignment be inspected, regardless of its size and the purpose of import, most checkpoints focused only on the trading aspects of the bulk transfer of goods, rather than issues of personal consumption.¹³⁷

A major overhaul of the Plant Protection Act and Regulation was introduced in bill form in 2002. The Plant Protection Act, 2059 (2002)¹³⁸ is designed to prevent and control the spread of diseases in exported and imported plants and plant products and establishes a more comprehensive National Plant Quarantine Check Post. The Act establishes the requirement that all imports and exports of plants, seeds and related items be licensed by the Plant Quarantine Check Post. Under the Act, the powers of the Plant Quarantine Check Post are to be determined by the Government by notification in the Nepal Gazette. However, the Act has yet to be passed through Parliament.

Additional measures have been taken recently to strengthen the plant protection regime in Nepal within the framework of the WTO. The Ministry of Agriculture and Cooperatives, Department of Agriculture submitted a notification to the WTO on July 15, 2005¹³⁹ of a compulsory provision for

importers to submit a Phytosanitary Certificates and Declaration for plant and plant products at the entry point of the Kingdom of Nepal. The notification also extends the National Plant Quarantine Program at Nepal's border check posts with India and China and establishes a Plant Quarantine check post at Tribhuvan International airport, Kathmandu. Finally, the notification advises that as part of its accession obligations, the "Plant Protection Directorate" one of the Program Directorates under the Department of Agriculture, was assigned as the "National Plant Protection Organization (NPPO)". The measures for the protection of plants, animals, humans and the environment from pests and diseases were expected to be adopted on September 10, 2005.

In addition to the Plant Protection Act regime, two other important regulatory regimes affecting trade in plant and plant products in Nepal: the Pesticide Act and the Seed Act are in the process of reform to ensure compliance with WTO commitments.

The Pesticide Act 2048 (1991)¹⁴⁰ and Pesticides Rules 2050 (1994)¹⁴¹ regulate the export and import of pesticides. The legislation has specific provisions for the protection of the environment and health, and establishes sanitary measures that have direct application to the SPS Agreement. Section 7 and 8 of the Act establishes a Pesticides Registration Office for the registration of pesticides and the issuance of certificates for all pesticides intended for production, use, import and export. S. 8 also empowers the Pesticides Registration office to develop criteria for the use of pesticides. S.13-14 authorizes the government to appoint pesticides inspectors and outlines their duties and functions. The procedures for registration and licensing are provided under the Pesticide Rules. S. 4 of the Rules provides for a 5 year validity period for pesticide registration certificates. S. 15 of the Rules establishes a 2 year validity period for licenses for the production and use of pesticides. While the Act and Rules contain specific provisions to empower the Ministry of Agriculture and Cooperatives to prohibit or restrict any pesticides that are potentially hazardous to the health of "human beings, animals, birds or the environment,"¹⁴² the legislation does not provide sufficient detail or reference to the procedural requirements set out under the SPS agreement. Specifically, the

¹³⁵ Implications of WTO, supra note 35 at 116

¹³⁶ FAO Review, supra note 8 at 43

¹³⁷ FAO Review, supra note 8 at 43

¹³⁸ Plant Protection Act (2059) 2002 full text available at <http://faolex.fao.org/faolex/index.htm>

¹³⁹ Notification on WTO website

¹⁴⁰ Pesticides Act 2048 (1991) Full text available at <http://faolex.fao.org/faolex/index.htm>

¹⁴¹ Pesticides Rules (2050) 1994 Full text available at <http://faolex.fao.org/faolex/index.htm>

¹⁴² Pesticides Rules (2050) 1994 s.5

Pesticides Act does not provide for the disposal of outdate/confiscated pesticides, nor does it provide for import prohibitions on seeds improperly treated with the wrong pesticides, or the regulation of registered brand name pesticides.¹⁴³ It also does not implement sufficient penalties for compliance with the Act, nor does it provide for sufficient inspectors or preventative mechanisms for the excessive use of pesticides.¹⁴⁴ The legislation is currently under review to address these shortcomings.¹⁴⁵ UPDATE?

The Seed Act, 2045 (1998)¹⁴⁶ was designed to ensure timely seed supply for different crops. Two important objectives of the legislation are applicable to SPS measures. The Act and Regulation are designed to promote export of seeds, while protecting genetic material rights.¹⁴⁷ The Act also provides for establishment of the National Seed Board under s.4 and requires publication of notified varieties/species of crop in the Nepal Gazette. However the act has been considered ineffective and practically unimplemented to date. There have been no official notifications of crop varieties to date and the National Seed Board has yet to be established¹⁴⁸. Amendments to the act to address many of the legal shortcomings and implementation issues have been tabled and forwarded to Parliament. These include the provision of a seed quality control agency to serve as the Secretariat of the National Seed board, and specific provisions for WTO compliance, such as certification, labeling, registration and licensing provision for breeders, sellers, exporters and importers of seeds.¹⁴⁹

4.3 Trade in Animal and Animal Products

There is very little trade in livestock and animal products in Nepal. The livestock sector accounts for only approximately 11% of agricultural imports and 6% of total agricultural imports, and about 31% of the agricultural GDP.¹⁵⁰ Nonetheless, the percentage of agricultural GDP is expected to increase under the APP to 45% by 2015.¹⁵¹ Nepal has not encountered difficulties in relation to SPS measures in recent years when exporting

animals, animal products, animal feed and ingredients to India. However, there have been issues with the export of butter to China and the export of honey to Norway, as discussed in the previous section.

Under the SPS Agreement, the Office of Epizootics (OIE) is designated as the international organization responsible for development and promotion of international animal health standards, guidelines and recommendations affecting trade in live animals and animal products. The OIE Terrestrial Animal Health Code defines animal health standards for compliance by WTO members when trading live animals and products of animal origin. In Nepal, the following institutions govern SPS issues related to animal health, animal production, production of feeds, products of animal origin and veterinary aspects: The Department of Livestock Services, The Department of Food Technology and Quality Control, the Department of Drug Administration, the Nepal Bureau of Standards and Metrology and Local bodies such as Municipalities and District Development Committees.¹⁵² The animal health information system meets OIE standards and requirements, as it provides for appropriate disease report formats. The Central Epidemiology Unit maintains a computerized national database for field information, and quarterly and annual reports on the status of animal diseases in Nepal are circulated among livestock and veterinary related institutions. The Unit has also been designated as the office responsible for reporting the status of animal diseases to the OIE in accordance with Nepal's WTO commitments.¹⁵³ Although the Central Epidemiology Unit meets the requirements of the SPS, the Department of Livestock Services will have to play a more important role in enforcing legislation, formulating and applying international standards for quality control, animal production input and animal products, as well as the control of animal diseases.¹⁵⁴

In recent years, Nepal has adopted and amended several laws to govern the production, marketing and trade of livestock and animal products. Of these, the most relevant in the context of SPS related issues are the Animal Health and Livestock Services Act 2055 and Regulation 2056, the Drugs Act, the Pesticide Act 1991, the Animal Feed Act 1976 and Regulation 2041, and the Nepal Standards (Certification Mark) Act.¹⁵⁵ With

¹⁴³ FAO Review, supra note 8 at 86

¹⁴⁴ FAO Review, supra note 8 at 86

¹⁴⁵ Implications of WTO, supra note 35 at 104

¹⁴⁶ Seed Act 2045 (1988) Full text available at <http://faolex.fao.org/faolex/index.htm>

¹⁴⁷ FAO Review, supra note 8 at 31

¹⁴⁸ FAO Review, supra note 8 at 75

¹⁴⁹ FAO Review, supra note 8 at 75

¹⁵⁰ Implications of WTO, supra note 35 at 99

¹⁵¹ Implications of WTO, supra note 35 at 100

¹⁵² Implications of WTO, supra note 35 at 105-107

¹⁵³ Implications of WTO, supra note 35 at 106

¹⁵⁴ Implications of WTO, supra note 35 at 109

¹⁵⁵ Implications of the WTO, supra note 35 at 104

the exception of the Pesticide Act 1991 and the Nepal Standards Certification Mark Act which are discussed in other sections, these Acts are outlined below, with specific reference to the need for further reforms to comply with the SPS agreement.

The Animal Health and Livestock Services Act, 2055 (1998)¹⁵⁶ and Animal Health and Livestock Services Regulation, 2056 (2000)¹⁵⁷ were enacted to develop livestock industry in Nepal. The legislation is designed to provide for the healthy production, sale, distribution, import and export of animals, animal products and animal production inputs. Section 3 of the Act sets out the rules for the establishment and management of animal quarantine. Section 8 permits the government to draft rules prescribing the terms and conditions to be followed by traders in exporting and importing animals, animal production input and animal products. Under Section 11, a quarantine officer may prohibit entry of an animal, an animal production input or an animal product if the importer fails to submit the prescribed certificate, or if there is information to suggest that the animal, animal products or production input have been brought from a contagious disease outbreak area or have been affected by a contagious disease. In this case, sections 12-14 authorize the issuance of orders to return of such products to the country of origin or to auction remove or destroy the animal or goods.¹⁵⁸ The Animal Health and Services Regulation implements the Act, by providing details of the requirements for establishing animal quarantine and inspections, standard setting, recommendation and licensing procedures.¹⁵⁹ It also establishes the powers and duties of quarantine officers and veterinary inspections. The FAO has proposed amendments to the Animal Health and Livestock Services Act and Regulation to provide greater detail on the functions, duties and rights of veterinary services as well as other animal health institutions in accordance with OIE guidelines under the International Animal Health Code. In addition, there is a need to provide definitions of terms under the Act and Regulations that are consistent with those in the OIE Code. Finally, the Act should include provisions for bees, bee products and production inputs to address Norway's SPS concerns.¹⁶⁰

The Drugs Act 2035 (1978) prohibits misuse of drugs or false or misleading information about drug efficacy and use. It also controls the production, import/export, storage, distribution and use of drugs which are not safe for use by people, efficacious and of standard quality¹⁶¹ Although the Drugs Act defines drugs widely to include drugs used on humans as well as animals, most references under the Act are to physicians and patients, rather than veterinarians and animals, suggesting that the main purpose of the Act is to address human drugs.¹⁶² The FAO has called for a new Veterinary Drug Act to complement the Drugs Act, with particular application to biological products, to legislate further quality control programs and safeguards against the introduction of animal disease from imported veterinary biological products.¹⁶³

The Animal Feed Act 1976¹⁶⁴ and Regulation 2041 were enacted to control the production, handling and marketing of feed for animals. It was designed to prevent the adulteration of feed materials and animal feeds as well as to maintain quality standards. Section 3 of the Act provides that no person shall produce, sell, supply, export, import or store defective animal feeds. Section 4 prohibits the fraudulent sale and distribution of sub-standard feed materials. Section 6 permits the seizure and impounding of sub-standard feed materials, and section 7 sets out the requirement for a license for the manufacture, sale, distribution, and storage of feed materials. Section 8 outlines penalties for violations of the act. Sections 10 and 12 grant powers to the government to establish the quality and standard for feed materials, as well as to form a feed standardization committee. Sections 14-6 provide for court enforcement under the Act. Procedural steps are addressed under the Regulation. However, the Animal Feed Act and Regulation cover only finished animal feeds, and does not establish a sufficiently collaborative and preventative approach to regulation. The regulatory framework also lacks provisions to address the risk of harm to animals and humans due to the misuse of pesticides on animal feeds.¹⁶⁵ The FAO has called for revisions to the Animal Feed Act and Regulation to govern the manufacturing, storage, transportation and selling

¹⁵⁶ Full text available at <http://faolex.fao.org/faolex/index.htm>

¹⁵⁷ Full text available at <http://faolex.fao.org/faolex/index.htm>

¹⁵⁸ FAO Review, supra note 8 at 101

¹⁵⁹ Implications of WTO, supra note 35 at 102

¹⁶⁰ Implications of WTO, supra note 35 at 109

¹⁶¹ Implications of WTO, supra note 35 at 103 but Act not found online

¹⁶² Implications of WTO, supra note 35 at 104

¹⁶³ Implications of WTO, supra note 35 at 109

¹⁶⁴ Animal Feed Act 1976 full text available at <http://faolex.fao.org/faolex/index.htm>

¹⁶⁵ Implications of WTO, supra note 35 at 105

of animal feeds and feed ingredients in a manner that is consistent with Codex or OIE standards.

5. TECHNICAL BARRIERS TO TRADE (TBT) AGREEMENT

The Technical Barriers to Trade (TBT) Agreement requires member countries to use WTO technical standards and regulations on goods to prevent economic deception and fraud. The Agreement is targeted towards all types of consumer products and covers existing standards such as quality requirements for food. Under the Agreement, member states must to provide most favored nation treatment in respect of technical laws to imported commodities and ensure that technical laws shall not be more trade restrictive than necessary to meet a legitimate objective. They are also encouraged to adopt international standards. In addition, an Enquiry Point must be established to respond to all pertinent queries from other member states. Member states from developing countries such are entitled to devise technical laws taking into consideration their specific development, financial and trade requirements. Requirements related to sanitary phytosanitary measures are excluded from the TBT Agreement as they are covered under the SPS Agreement.

The Nepal Standards (Certification Mark) Act 1980¹⁶⁶ and Standard Weights and Measures Act 1968¹⁶⁷ establish standards, regulations, certifications and licenses for all kinds of goods, processing and services in Nepal.¹⁶⁸ Article 5 of the Nepal Standards (Certification Mark) Act sets out the powers of the Nepal Bureau of Standards and Metrology. It is empowered to prepare all standards and technical regulations, with the exception of health and food products and it oversees all mandatory certification activities, following international standards.¹⁶⁹ These are submitted to the Nepal Council of Standards (NCS) for approval. Technical regulations are published in the Nepal Gazette and Standards are published in booklet form.¹⁷⁰ The Department of Food Technology and Quality Control under the Ministry of Agriculture and the Department of Drug Administration, under the Ministry of Health are

responsible for formulating standards and technical regulations based on international standards, to ensure the protection of health and food products.¹⁷¹ Given the provisions for transparency, laboratory testing and judicial review, this legislation has been considered compliant with Nepal's most favored nation and national treatment obligations to the WTO¹⁷².

WTO commitments:

Nepal agreed to implement the Agreement on Technical Barriers to Trade, as well as the Code of Good Practice by January 1, 2007.¹⁷³

Legislative amendments have been proposed to Nepal Standards Act and Regulations to comply fully with WTO. The Nepal Bureau of Standards and Metrology (NBSM) was established as the TBT enquiry point in June 2003. Amendments were being prepared in 2004 and September 2005 and were expected to be endorsed and adopted by the council of Ministers by the end of 2005. PROGRESS

6. INTELLECTUAL PROPERTY RIGHTS AND AGRICULTURE (TRIPS)

The TRIPs agreement was designed to promote the effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. The key provisions of the TRIPs agreement for the agricultural sector are the geographical indications under article 22.1 and protection of plant varieties under Article 27.3 (b).

Geographical indications under TRIPs Article 22.1 are typically place names used to identify products with particular characteristics because they come from specific places. Under the TRIPs agreement, there is a multilateral registration system for geographic indications. Most of the currently established geographical indications relate to agricultural products, and this means of protection is generally considered to favor rural economies by securing incomes and investments for farmers involved in producing and marketing products covered under the agreement. Currently, geographical indications have been granted only

¹⁶⁶ Nepal Standards (Certification Mark Act) Full Text available at <http://www.nbsm.gov.np/act1980.htm>

¹⁶⁷ Full text available at

http://www.nbsm.gov.np/acts_regulations.htm

¹⁶⁸ Working Party Report, supra note 64 at 29

¹⁶⁹ Working Party Report, supra note 64 at 29

¹⁷⁰ Working Party Report, supra note 64 at 29

¹⁷¹ Working Party Report, supra note 64 at 29

¹⁷² Working Party Report, supra note 64 at 29

¹⁷³ Working Party Report, supra note 64 at 31

wines and spirits, although many developing countries such as Nepal would like to see the list of protected products extended.¹⁷⁴ Nepal has a high degree of agro-climatic diversity, and could benefit considerably from promoting indigenous crops such as locally produced rice, fruit and paper on the international market. However, it has yet to develop a legal framework to protect such products.¹⁷⁵

Under Article 27.3 of the TRIPs agreement, all WTO members must provide for intellectual property protection for plant varieties, either “by patents or by an effective “sui generis” system or any combination thereof”. This allows for WTO members to implement their own system and provides considerable flexibility to account for country specific conditions, such as the level of economic development, resources, agricultural policies, research, and the local needs of farmers and indigenous communities. In addition, Article 27 provides for three main exceptions to general rule on patentability under the TRIPs Agreement. Member states do not have to render patentable inventions that are contrary to public order or dangerous to human, animal or plant life or health or the integrity of the environment. Diagnostic, therapeutic and surgical methods for treatment of humans or animals are also not subject to patents. Finally, plants and animals other than micro-organisms and biological processes for the production of plants or animals are also exempt from patentability. Article 27.3 has also been one of the most controversial provisions of the Agreement as the terminology surrounding several of the definitions, including the definition of plant varieties, is subject to considerable interpretation.

Under the WTO Accession Protocol, Nepal committed to enact an Industrial Property Protection Act to incorporate the substantive provisions of Section 2 through 7 of Part II of TRIPs Agreement by December 2005.¹⁷⁶ It also committed to provide national treatment and Most Favored Nation treatment from the date of accession and to ensure full application of the TRIPs Agreement by January 1, 2007.¹⁷⁷ It has sought technical assistance to provide enforcement mechanisms that conform with TRIPs, such as the provision of training to customs officials, police, judges and lawyers in intellectual property law.

As part of its commitment to establish a WTO-compliant intellectual property regime, Nepal has joined several international organizations in recent years. Nepal has been a member of WIPO since February 1997 and the Paris Convention for the Protection of Industrial Property since 2001. It also committed to join the Rome Convention and Treaty on Intellectual Property Rights by December 2006.¹⁷⁸ Nepal has been a party to the Convention on Biological Biodiversity since 1992. This Convention is designed to protect biodiversity and contradicts with TRIPs Agreement to the extent that it does not prioritize exclusive IP rights over community rights to genetic resources.¹⁷⁹ Nepal has not yet joined the FAO International Treaty on Plant Genetic Resources for Food and Agriculture 2001, which also provides a model for sui generis systems to protect farmer's innovations against patenting and encourages sharing of agricultural benefits. During Accession negotiations, Nepal was asked to commit to join International Union for the Protection of New Plant Varieties (UPOV) Convention 1991. The UPOV regulates Plant Breeder's Rights at the International Level and proposes a sui generis model for the protection of plant rights, although it has been criticized as protecting breeder's rights at the expense of farmer's rights.¹⁸⁰ As a result of lobbying pressure from Nepalese NGO's such as SAWTEE and Action Aid Nepal, the commitment was reduced.¹⁸¹ Nepal committed only to explore the possibility of joining other WIPO and IP related conventions, including the UPOV Convention 1991, while taking into account national interests.¹⁸²

In Nepal, The Patent, Design and Trade Mark Act 1965¹⁸³ is the primary instrument governing intellectual property rights as they relate to the agricultural sector. The Act was amended in 1989 and 1990, however, it has not been updated for compliance with the TRIPs provisions on plant protection or geographical indications.¹⁸⁴ Several

¹⁷⁸ Working Party Report, supra note 64 at 40

¹⁷⁹ Implications of WTO, supra note 35 at 131

¹⁸⁰ Implications of WTO, supra note 35 at 134

¹⁸¹ Ratnakar Adhikari and Navin Dahal “LDCs’ Accession to the WTO: Learning from the Cases of Nepal, Cambodia and Vanuatu” *South Asia Watch on Trade, Economics & Environment (SAWTEE)*, Kathmandu, Nepal p. 8 <http://www.un-ngls.org/SAWTEE.doc>

¹⁸² Working Party Report, supra note 64 at 40

¹⁸³ Patent, Design and Trade-Mark Act of Nepal 1965 available at <http://www.vakilno1.com/saarclaw/nepal/patentandtrademarkact/patent.htm>

¹⁸⁴ Bhandari, S. 2004 “Draft Report on TRIPs Related Legislation Multilateral Trade Integration and Human Development in Nepal” prepared for Multilateral Trade Integration and Human Development in Nepal 2004 p.24

¹⁷⁴ Implications of WTO, supra note 35 at 143

¹⁷⁵ Implications of WTO, supra note 35 at 143

¹⁷⁶ Working Party Report, supra note 64 at 40

¹⁷⁷ Working Party Report, supra note 64 at 40

amendments to Act are necessary to ensure compliance with the TRIPs Agreement, both in terms harmonizing procedural measures as well as establishing substantive rights. For example, Section 23 (a) prohibits the registration of industrial property outside Nepal without prior registration in Nepal, contrary to international intellectual property law, including TRIPs. Section 21 (c) states that patents, designs and trade-marks registered in foreign countries may be registered in Nepal upon presentation of a foreign registration certificate and without further enquiries. This does not adequately address the registration requirements under TRIPs. In addition, non-patentable subjects, the rights of patent holders and the terms of protection are not clearly defined under the 1965 Act.¹⁸⁵ The circumstances in which patents can not be registered are set out under article 6. While there is an exclusion of patentability for patents likely to adversely affect public health, conduct, morality or national interests¹⁸⁶, there is no reference to specific protections for plant varieties. A new Draft Patent, Design and Trade Mark Act was prepared in 2004 to include provisions requiring application and registration to protect industrial property rights, with the exception of geographical indications. It also has clearly defined enforcement provisions.¹⁸⁷

According to the Working Party Report, a new Plant Protection Act was also in the drafting process to address protections for plant varieties and would be promulgated by December 2005.¹⁸⁸ As Nepalese agriculture is largely at the subsistence level, it is highly dependent on the use of traditional seeds. It is therefore in the context of seeds that the TRIPs agreement is most relevant. Not only is the share of total seeds supplied by the commercial sector very small for most crops, but there is also a concern over the conservation of indigenous varieties and the culture of traditional seed exchange among farmers.¹⁸⁹ There are currently no comprehensive legal mechanisms in Nepal to provide for farmers rights relating to genetic resources, and the protection of traditional knowledge. However, there are several laws containing provisions for the protection of indigenous knowledge and natural resources. These include the Constitution of Nepal 1990, the Local Self-Governance Act 1999, the Lands Act of 1964, the Water

Resources Act 1992, the Aquatic Life Protection Act, 1961, the Forest Act, 1993, the Environment Protection Act, 1996, the Pesticides Act 1991, the Food Act 1967, the Plant Protection Act 1972, the Animal Health and Services Act 1998, the Nepal Agricultural Research Council Act 1991, the Industrial Enterprises Act 1992, the Cooperatives Act, 1991, and the Seed Act 1988.¹⁹⁰

7. TRADE-RELATED INVESTMENTS IN THE AGRICULTURAL SECTOR (TRIMS)

The TRIMs Agreement prohibits policies that give an unfair advantage to industries using domestic over foreign products. However, under the Hong Kong Ministerial Declaration, LDCs have been permitted to maintain measures that deviate from their obligations under the TRIMs Agreement, on a temporary basis. The current extended term for compliance with TRIMs for LDCs is five years. The extended term may also be renewed, subject to a comprehensive review of progress. Given these circumstances, Nepal has gained more flexibility to implement provisions such as local content requirement on foreign investment. Though Nepal's investment regime has by and large already been liberalized and many TRIMs inconsistent policies have been eliminated, the Hong Kong Ministerial Declaration will allow some room for Nepal to implement future industrial policy changes.¹⁹¹

The Agricultural Policy Plan of 1995, as well as the Ninth and Tenth Plans for Poverty Reduction in Nepal do not contradict the TRIMs Agreement, because although they prioritize certain agricultural inputs and outputs to accelerate growth, they do not discriminate against foreign products.¹⁹² The Tenth Plan seeks to encourage local development by exempting taxes for the distribution of animal products and export promotion industries based on raw materials, but these are not inconsistent with the guidelines under the TRIMs agreement. While the government has provided incentives to the use of domestic raw materials for the industrial sector, income tax reductions and exemptions under these policies are geared towards industries of

¹⁸⁵ Bhandari, S, supra note 184 at 27

¹⁸⁶ Article 6 (c) Patent, Design and Trade-Mark Act of Nepal 1965

¹⁸⁷ Bhandari, S., supra note 184 at 25

¹⁸⁸ Working Party Report, supra note 64 at 42

¹⁸⁹ Implications of WTO, supra note 35 at 136

¹⁹⁰ Implications of WTO, supra note 35 at 138

¹⁹¹ Dahal, N. *How Successful was the WTO Ministerial?*

<http://www.kantipuronline.com/columns.php?&nid=61932>

¹⁹² Implications of WTO, supra note 35 at 216

national priority. As most agro-based industries are considered within this category, they would be entitled to reductions regardless of whether local raw materials were used. Moreover, Nepal's VAT Act applies the same rates to both imported and raw materials.¹⁹³

Public investment in agriculture in Nepal has been weak and is declining at a time when Nepal is facing increased competition from entry into the WTO trading regime. Although there are few direct implications of the AoA because it limits only some forms of productive and trade-distort subsidies, the focus on reducing and eliminating subsidies to compete may not be the appropriate policy direction for a least developed country such as Nepal, especially since the AoA provides room for an increase in public spending on agriculture. For developing countries in particular, public investment is needed in the agricultural sector to create the basic conditions necessary for private investment. There is a growing consensus that an LDC such as Nepal will obtain few benefits to trade liberalization or WTO membership in the area of agriculture if supply-side constraints remain overwhelming.¹⁹⁴

8. CONCLUSION

Nepal joined the WTO with the conviction that global integration of the economy through WTO membership was needed to expand its trade opportunities and facilitate competition. It also sought to acquire knowledge and creating opportunities for growth and pursuing overall development goals. It committed to following a rules-based trading regime in order to ensure domestic policy stability and enhance institutional capabilities that in turn help increase productivity, foreign direct investment and exposure to new technologies.

Although Nepal's economic and trading policies were already very liberal at the time of Accession and go beyond many of the basis requirements of the WTO, the country still lacks the trading infrastructure needed to benefit from entrance into the WTO trading regime. Nepal's WTO commitments were aimed at expanding trade through market access that is predictable, secure and transparent. However, Nepal's membership in the rules-based trading regime will only be beneficial to the country if proper plans are implemented nationally to assist in the liberalization process. Factors such as internal and external institutions and social and policy preconditions will largely determine to what extent Nepal and the Nepalese people will benefit from trade. To make the WTO pro-poor and growth-friendly, Nepal needs further domestic policy reforms to protect vulnerable groups and improve infrastructure for agricultural development. As a least developed country, Nepal also needs to be a participant in WTO negotiations to apply the Marrakech decision and ensure that market access is effective and fair. An in-depth analysis of Nepal's trade potential while comparing the opportunities from market access commitments of other Member states as well as the countries currently in the WTO accession process will help pave the way for future reforms.¹⁹⁵

¹⁹³ Implications of WTO, supra note 35 at 217

¹⁹⁴ Implications of WTO, supra note 35 at 35

¹⁹⁵ <http://www.multitrade.org.np/background.html>

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Annex

Quarantine inspection licence and fee issues between India and Nepal

Nepal and India have often resolved trade disputes over agricultural products under the terms of the Nepal India Trade Treaty. Since the accession of both countries to the WTO, there have been increased concerns over agricultural trade between India and Nepal in light of their respective WTO commitments. For example, in order to comply with its SPS commitments under the WTO, the Government of India began requiring Nepalese traders to abide by new provisions under the Indian Plant Quarantine Order, 2003. The Order became effective on January, 1 2004 and overhauled the existing phytosanitary regime under the Plant, Fruits and Seeds (Regulation of Import into India) Order, 1989 and other related import regulations. The 2003 Order is a comprehensive framework that applies the standards for international phytosanitary measures under the International Plant Protection Convention, to which Nepal is not yet a signatory. Since Indian Order was enacted, Nepal has encountered increased difficulties in exporting certain Nepalese agricultural commodities to India. In particular, the export of Nepalese ginger has been restricted due to licensing requirements and high inspection fees imposed at Indian quarantine check points. The Agro Enterprise Centre (AEC) of Nepal has regularly taken up the issue with the concerned ministries in Nepal and India.¹⁹⁶

Chapter II (General conditions for import), number 3 clause 7 of the Indian Plant Quarantine Order 2003 states that “No import permits shall be issued for consignments other than those listed in Schedule –V, VI and VII, unless the pest risk analysis (PRA) is carried out in accordance with the guidelines issued by the Plant Protection Advisor (PPA) based on international standards”. Since fresh ginger was not included in Schedules-V, VI and VII, the AEC was concerned that the export of ginger to India would be restricted over the peak ginger production season, unless the Ministry of Agriculture and Cooperatives (MOAC) of Nepal provided timely information of the existing pest conditions in ginger growing areas to the Indian Directorate of Plant Protection, Quarantine & Storage. At the instigation of the Agro-Enterprise Centre, the MOAC was able to gather and present the relevant information to the Indian Government, but until after the Order had come into effect and trade in ginger had been restricted for several months.

On October 10, 2004 the Government of India released a circular allowing for Nepalese ginger rhizome to be imported into India under Schedule VI of the Plant Quarantine Order, 2003 without the requirement for additional certificates. However, the Nepalese Chamber of Commerce and Industry noted continued difficulties with the import of ginger to India because it remained amount the restricted commodities for import from Nepal under India’s 2004-2009 Foreign Trade Policy. Certain border checkpoints, including Bhairahawa-Sunauli, Kakarvitta-Panitanki, Nepalgunj-Rupedia refused to allow for the import of Nepalese ginger into India altogether. To address the issue, the AEC lobbied the Embassy of India as well as the Ministry of Agriculture and Cooperatives, requesting that the import of ginger into India be permitted according to the amendment of October 10, 2004 of the Plant Quarantine Order 2003. In a press release issued on June 22, 2005¹⁹⁷, the Embassy of India clarified that although import of fresh ginger into India is restricted and requires an import permit, the Government of India had decided that the import of fresh ginger from Nepal would be allowed freely, without an import permit.

In addition to the increased licensing requirements, the AEC raised the issue of high inspection fee being collected by the Plant Quarantine Offices of the Government of India at different border points. Under the Plant Quarantine Order 2003, inspection fees were charged on the basis of each trade transaction. As Nepalese exports of ginger and other agricultural products to India generally occurs in small volumes, the percentage of the inspection fee to the wholesale price of the commodity on the Nepalese market ranged from 22% for 500 kg of ginger to 102% for 50 kg of Radish seed, depending on the quantity and the seasonal price. As a result of the high inspection fees, small traders had almost stopped exporting to India and even when they exported, the export was done usually at the discretion of the plant quarantine officer at the plant quarantine office. At the initiative of the Federation of Nepalese Chambers of Commerce, the Government of Nepal approached the Government of India to seek a reduction in the current inspection fee of plant quarantine by at least 50%. In response, the Government of India agreed to give for Nepalese exports of farm products a concession of 50% on fees charged for quarantine checks in India in February 2005. These concessions were made exclusively for Nepal and were designed to benefit Nepalese farmers. However, there is a concern that they may not be compatible with India’s WTO commitments.

¹⁹⁶ See Agro Enterprise Centre and Federation of Nepalese Chambers of Commerce and Industry *Annual Progress Report for the USAID supported project “Improving the Policy Environment for Agricultural Trade, Production and Marketing in Nepal”* (Award No. 367-A-00-04-00021-00) for 25 November 2003 to 30 November 2004 available at http://pdf.dec.org/pdf_docs/PDACD015.pdf

¹⁹⁷ Embassy of India Press Release available at http://www.south-asia.com/Embassy-India/press_release_2005/no-requirements.htm