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Trade and Investment Rules for Inclusive and Sustainable Development: Nepalese Legal Perspectives

by

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Introduction

Investment injects and enhances trade. Rules do permits and protect the investors. The chain relation of trade, investment, and rule could hardly be separated. Investment mainly concerned to get more benefit and economic development that again could use for investment. Sustainability of development and making investment sustainable are reinforcing, but are mutually exclusive. As a simple analogy, development is impossible without investment and the investment does not survive without sustainability of development, and the development depends on investment. Development which regenerates resource, enhance competitive economy and investment, can be termed sustainable. Insufficient investment undermines the need of communities and curtails domestic development.[2] Investment inflow depends on standard, conducive environment, compatible policies and legal provisions i.e. investment, repatriation and dispute settlement process. Development without ownership and trade for just influx money often turns to instability. The trio terminologies reinforce one to another, and serve numbers of issues.[3]

Initiation

Both Rio de Janeiro 1992[4] and Johannesburg 2002 Earth Summit reorient international trade, investment and sustainable development[5] that began in GATT 1947 and developed as WTO now. It is linked with poverty eradication, consumption, protection and management of natural resource hoping its[6] helps to achieve Millennium Development Goal,[7] which relates to Doha Round decision and Monterrey Consensus on Financing for Development[8]. Numbers of initiation has made[9] for productive capacity-building and structural transformation to achieve more balanced, equitable, inclusive growth and sustainable development.[10]

Requisite

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2 Foreign investment could help to development, mitigate investment crunch and supplement gaps transfer knowledge and skills, boosts trade and the trade generates more revenue which in turn is a source of sustainable development. It also creates jobs, increase productivity, competitiveness and help to eradicate poverty through economic growth and development. Trade mobilizes resources effectively and encourage slashing down tariff and non tariff barriers, and treat without discrimination.

3 Fight against worldwide severe threats to chronic hunger, malnutrition, illicit drug problems, organized crime, corruption, natural disasters, communicable and chronic diseases, i.e. HIV/AIDS, tuberculosis.

4 See, Chapter 2 of Agenda 21.

5 See, UN, *Report of the World Summit on Sustainable Development,* Johannesburg, South Africa, 26 August- 4 September 2002, para. 18

6 *Ibid*, resolution 2 (the issues were discuss on the topic of *Plan of Implementation of the World Summit on Sustainable Development)*

7 See, *Ibid*, para 1.1. 1.3

8 See, UN, *Monterrey Consensus of the International Conference on Financing for Development,* Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002

9 The Programme of Action for LDCS for the Decade 2001-2010, Global Programme of Action for the Sustainable Development of Small Island Developing States (SIDS) are the initiation to the development of LDCs and SIDS. Fourth UN Conference on LDCs - 2011 adopt Istanbul Programme of Action for the LDCs 2011-2020

10 The issues were sufficiently discussed at UNCTAD XIII Conference, 2012

Trade and investment agreements share and address numbers of issues.[11] Without free and fair trade and movement of individuals, and investment, neither trade nor sustainable development is guaranteed. Insufficient investment is a stumbling block to the development. Unguaranteed trade environment discourage trade and investment both. Thus, investment and environment are *de facto* and *de jure* pre requisite for trade and investment. The development is a response of both.

Investment policy, for long period, was limited to business.[12] “New generation” investment policy (NGIP), new alternative, is a comprehensive set of investment policy for inclusive growth, sustainable development, and benefit from investment.[13]

Sustainable Development[14] Principles[15] for Investment Policy

Inclusive growth, sustainable development and policy coherence are principles. Dynamic, open, stable and predictable investment policy, non-discrimination, fair competition, corporate social responsibility and good governance are essence of principle. Relationship between investors, host states and local communities and investment policy coherence is must for sustainable development. Investment-specific policies, regulations for investors' security, double taxation, competition, labor standards, environmental impact and access to land should consider except sensitive industries protection, as *logo centric,* while designing sustainable development.[16]

Sustainability and Inclusive Growth

Sustainability, social equity, inclusiveness and economic growth reinforce, enables and survives with each others.[17] Sustainability survives on the social, economic and environmental sustainability[18], which are considered three pillars of sustainable development. "Grow dirty and clean up latter" is a misleading conception, as 'competition to the bottom'.[19] Development indicators namely improvement of employment and economy, social cohesion, political stability, good governance, human rights, conducive regulatory and business environment, education, healthy population, physical infrastructure, labor standards, and international trade are related to sustainability.

Trade and Investment Laws in Nepalese Perspectives

Nepal had, at the time of WTO accession, committed to amend trade related investment measures i.e. Foreign Investment and One Window Policy 1992, Industrial Policy 1992, Industrial Enterprises Act 1992 and it Regulation, Foreign Investment and Technology Transfer Act 1992 and its Regulation to ensure full compliance with the WTO Agreement on Trade Related

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11 It discourages protectionism and discrimination between foreign and domestic products and services. Promotion of market access reducing tariffs, quotas, and other non-tariff barriers, and harmonization of international standards as well product-related health and safety measures is prerequisite for trade and investment

12 Corporate Social Responsibility (CSR) was limited rather special responsibility to development on logic that they are paying tax to the government. Environment pollution, labor and local issues, transparency, repatriation, are problems identified to be address for sustainability.

13 That focuses concern and responsibility of investors on environmental, social and poverty alleviation. “New generation” see, UNCTAD, *Investment Policy Framework for Sustainable Development*, UN, NY and Geneva 2012, p. 6

14 UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies*, UN, NY and Geneva 2012, p. xxvi

15 It comprise the UDHR and the UN Guiding Principles on Business and Human Rights, the Convention on the Establishment of the MIGA, the WB Guidelines on the Treatment of FDI, the UN Global Compact, the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and several WTO-related agreements, including the GATS, the TRIMs Agreement and the Agreement on Government Procurement

16 *Ibid*. p. xxvi

17 UNIDO, *Industry: Inclusive and Sustainable Development,* 2012, UNIDO, Vienna International Centre, p.7

18 World Bank, *Inclusive Green Growth: The Pathway to Sustainable Development,* Washington DC, 2012, p. 2

19 Sustainable development have minimum effect to the environment, biodiversity and natural resources help to minimize the level of vulnerability to natural disasters ultimately promote economy, create jobs and help reduce poverty.

Investment Measure (TRIMs).[20] Nepal had ensured to provide information about the State Trading i.e. Nepal Oil Corporation and Salt Trading Corporation in accordance with Article XVII of the GATT and the Understanding,[21] and apply its laws and regulations governing the trading activities with special privileges and conformity of Article XVII of the GATT 1994 and Article VIII of the GATS.[22] By now, except few, Nepalese laws are compliance with conformity to WTO standards.

Foreign Investment and One Window Policy 1992 has provided numbers of facilities regarding permission, tax, repatriation and other facilities to attract investors.[23] The *Industrial Policy 2010,* replaced previous policy 1992, has conformity with WTO Agreements on Subsidies and Countervailing Measures and on TRIMS. The policy includes direct payment to industry, flexible labor policy, tax holidays, IP protection etc as facilities.[24] *Trade Policy 2009* is consistent with the WTO principles and adhered liberal, open and transparent economic system.[25] *Foreign Investment and Technology Transfer Act 1992* allows investment on service sectors. Repatriation of capital investments and profits and visa facilities are facilities to the investors.[26] *Investment Board Act 2010* has formed a board to handle big investors.[27] *Industrial Enterprises Act 1992* has

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20 Nepal had committed to standardized 39 legislations, including Act, Rules, policy and ratification of convention

21 Para 108, 109 and 111, WTO, *Report of the Working Party on the Accession of the Kingdom of Nepal to the World Trade Organization,* WT/ACC/NPL/16, 28 Aug. 2003

22 *Ibid,* Para 111

23 The policy permits 100% investment for large and medium size industry only. Technology transfer is permissible to small and cottage industry. Franchising and technology transfer requires government permission (para 4). 15% tax is imposed on the income, income from interest, foreign loan, royalties, technical and management fee and income earned from export under Industrial Enterprises Act (para 6). No income tax lived on income earned from exports. Double taxation relief, reimbursed of custom duties, excise duties and VAT levied on raw materials of export oriented industries are other taxation provisions. Investors can repatriate amount received by sale of equity investment, benefit or dividend received from the investment, principal or interest of the foreign loan, amount received under technology transfer agreement, amount received as compensation for acquisition of property. Any foreigner works may repatriate 75% of the salary received at work. Six month non-tourist visa is granted to investors who conduct research and permanent residence visa to the investor who invests at a block, 100 thousand US$ or more. Foreign individuals are not permitted to own land, but resident companies may do so. Foreign ownership of commercial banks is limited to 66 per cent. Any industries listed in 'negative list' are not permitted for foreigner. The 'negative list' listed in *part A* of *Foreign Investment and Technology Transfer Act* (FITTA) could change only the parliament, and listed in *part B* (FITTA) could change by government.

24 Nepal does not provide direct payments to any manufacturing industry, except income tax, VAT, excise duty, and customs duties exemptions or deductions for certain industries. Export tax is levied to protect the environment such as wood export, ensure food security, and discourage trade diversion to India. Addition to, 13% VAT, corporate tax, income tax are levied. Its other provisions includes flexible labor policy, "no-pay-for-no-work"; use of local resources, materials, skills, labor and technology; deduction of taxable amount expend on research and development (paras 9-10); industrial infrastructure and their IP protection (para 9); industrial planning of industrial corridor, industrial district, industrial cluster and industrial village (paras 10.10-10.16); tax holidays for 10, 7, and 5 years; special economic zones and institutional arrangement i.e. Investment Board, *One Stop Service Center* (paras 10.20); effective industrial intellectual property right protection (paras 8.18-8.19, 9.8, 10.38-10.40, 11.5); and "One Village One Product (paras 11.6-11.10, 11.16)."

25 The policy has broadly classified potential Nepalese exports into two categories: Special Focus Area and Thrust Area Development. Four products are included under special focus area, most of which have already been established in the export market. Newly emerging fifteen products have been listed under the second category.

26 Its procedures for investment have been simplified by its first amendment. Few industries have been kept in negative list. Investor should get approval from Department of Industry (sub section 2 and 3 of section 3). Foreigner could invest up to 80% in banking service and 67% in other financial institution. FITTA guarantees full repatriation of the amount received from the sale of equity, profits, or dividends and interest on foreign loans, and the repatriation of the amount received under an agreement for the transfer of technology (section 5). Foreign investors are granted a business visa as long as their investment is retained. A resident visa would be provided for a foreign investor, and dependents who at a time make an investment in excess of US$100,000 or equivalent and retain it (sub section 2 of section 6).

27 Investment Board formed under this Act (section 3) invites mega project such as infrastructure or service of at least having fixed capital of 10,000 million rupees (section 9) and provides approval for investment by direct

classified industries as to the nature, guarantees against nationalization and provides speedy procedures.[28]

The legislation of Nepal has best effort to address suitable environment to foreign investment. The core principles, stipulated by UNCTAD, for the investment promotion, inclusive growth and sustainable development has been partially adopted in Nepal. The provisions regarding open, stable and predictable conditions for investment protection and non-discriminatory treatment are sufficient but corporate social responsibility and good corporate governance practice for sustainable development are so behind. Agriculture,[29] service business i.e. Tourism[30] and water resources[31] are some prosperous investment areas in Nepal.

Conclusion

Trade and investment with sustainable development is a need of today. The new generation investment policy is a pragmatic and progressive analogy inferred by experience, experience of trade, investment and development. Any entrepreneurs can be a billionaire exploiting resources and get satisfaction but left hundreds of thousands simmered dissatisfied that might be threat to peace, harmony and trust stumbling development for ever. Planning for sustainable development and responsibility for degrading of resources could narrow down the problems.[32] Addition to, 'new generation' principle could help to streamline upgrading policies and laws. Nevertheless, investment policy alone cannot provide a “one-size-fits-all” solution for all that depends on the eco-socio-political conditions of individual countries.[33]

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negotiation (section 16). The Act also provide guarantee against nationalization of the investment (sub section 1 of section 18).

28 That includes manufacturing, energy and agro-forest based, mineral tourism, service and construction (section 3) and such industries are divided into cottage, small, medium, large as to the nature and amount involved (section 4, 5, 6 and 7). Industries considered related on the security, public health and the environment should require obtaining permission (annex 1 and 2), the Department grants permission within 30 days (section 9). The Act has a 13 members 'Industrial Promotion Board' (section 13) and a 11 members 'one window committee' (section 18). The Act has guaranteed against nationalization of the industry. Repatriation of remuneration is permitted up to 75% of the employee (section 21, 22).

29 Nepal Trade Integration Strategy (NTIS) 2010 have identified agricultural products such as lentils, tea, ginger, large cardamom, etc. very potential goods for export however any product produced by organic farming has emerging demand within and out of the country. Non agricultural goods/products such as honey, noodles, medicinal herbs/essential oils, handmade paper, silver jewellery, iron and steel, pashmina, wool products, and service business such as tourism, labor services, information technology and business process outsourcing services, health services, education, engineering, and hydro-electricity are other prospective area of business as well investment. Other potential exports are sugar, dairy products, cement, and transformers.

30 Mountaineering and tracking in Nepal is suitable. Warm weather, majestic nature and assembles of high picks are the attraction of mountaineering and tracking. Nepal has eight of the world’s fourteen highest mountain peaks including the highest peak in the world-Mount Everest and other high peaks i.e. Kanchenjunga, Lhotse, Makalu, Cho-Oyu, Dhaulagiri Manaslu and Annapurna. It is a birth place of Lord Buddha, live museum of varieties of culture including about to extinct tribe, *Raute*

31 Nepal is richest in water resources. The Himalayan, above 16000 feet is covered with snow round the year, is the source of water. Around 6000 rivers and rivulets are crisscrossing the country. The estimated capacity of rivers and rivulets is 83000 MW, of which 43000 MW is technically viable and that is far greater than its domestic requirement, 1650 MW by 2020. Nepal is generating 700 MW. Nepal Government has prioritized five areas for foreign investment, i.e. hydro electricity, infrastructure and development, agro processing and herbs, tourism and other services and minerals and mine related projects.

32 Despite the uniformity and conformity of international standard for inclusive investment and sustainable development, degrading and excessive exploitation of local sources must be caped until the sources became affluent for use or reuse. Such as since last one and half decades Nepal is suffering from land plotting in the fertile land and boulder export is causing serious impact on environment destroying forest, habitat of birds, animals and tinny creatures, sources of water. International communities must encourage nudging sustainability for forestation, charging resources and preserving or reemerging water resource.

33 Countries have different social, cultural, geographical and historical differences so do the development. Government is free to define priorities and role of investment in their special context.