

**PREPARATIONS FOR THE 1999 MINISTERIAL CONFERENCE**

Contribution to the Preparatory Process

*Communication from Kenya*

The following communication, dated 5 July 1999, has been received from the Permanent Mission of Kenya.

**I. INTRODUCTION**

1. Developing countries, Kenya included, have now the experience of the implementation of the WTO agreements for four years. During these four years, Kenya has encountered diverse challenges arising from her endeavour to implement the WTO agreements and fulfil her obligations. With this background, Kenya wishes to present proposals for the improvement of the agreements to bring about a degree of balance in them.

**II. THE AGREEMENT ON AGRICULTURE**

2. Agriculture is one of the most important sectors in the Kenyan economy. Kenya has certain major concerns regarding the implementation of the provisions of the Agreement on Agriculture.

3. Market access for products from developing countries continues to be adversely affected mainly because of the following:

- The lack of specific disciplines with regard to the implementation of tariff rate quotas which stifle market access opportunities.
- The trade-distorting measures of which export subsidies is perhaps the most prominent example that continue to prevent products from developing countries to compete on a level playing field.

4. These problems have been aggravated by the excessive budgetary resources allocated in this regard and because of the circumvention of existing rules by some developed countries leading to further distortion in the market. Kenya therefore, recommends the complete abolition of export subsidies by the beginning of the year 2001 except as a special and differential provision for developing countries. It is important that WTO comes up with rules to prevent circumvention of commitments by developed countries.

5. The tariffication in agricultural sector at the end of negotiations during the Uruguay Round, resulted in very high tariff levels particularly for products of interest to developing countries. The

recommended reduction percentage levels have not substantially lowered the tariff levels as expected by the developing countries. In this regard, Kenya recommends for drastic tariff reduction in order to improve market access in developed countries for agricultural products of interest to developing countries.

6. It is our view that while non-trade concerns such as food security has been mentioned in the preamble to the Agreement, very little has been done to address this issue. The agricultural liberalization advocated by the Agreement cannot by itself overcome the problems of food security for developing countries with sizeable rural population. It is therefore extremely important that a certain degree of flexibility be provided to developing countries for the adoption of domestic policies with the intention of providing continued food security and employment to a large segment of the population. This will improve the general levels of production and enhance the income levels of the rural poor.

7. The implementation of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least Developed and Net Food-Importing Developing countries (NFIDCs) has been a source of deep concern to them. The modalities of implementing the Decision require a close re-examination, particularly in the light of declining food aid.

8. Initial assessment shows that Kenya would have benefited more if the reductions in tariffs on goods of export interest to her were either the same or higher than those on the goods of export interest to developed countries. For example, goods of export interest to Kenya such as leather, coffee, tea and tropical fruits had their tariffs reduced by an average of 30 per cent against 56 per cent reduction in the tariffs on products of export interest to developed countries. Although there have been substantial reduction in average tariffs at every stage of production, the degree of escalation remains high for products of export interest to Kenya.

9. For example, some major countries still retain relatively high degree of tariff escalation on hides and skins, leather products, and tobacco.

10. Kenya recommends further reduction in tariff rates of products of export interest to developing countries. Kenya therefore, appeals to WTO Member countries to consider either the elimination of tariff escalation or the improvement of preferential schemes for products which are still subject to high tariff peaks, namely, agricultural products, fish and fish products, leather and footwear, and textile and clothing.

### **III. THE AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES (SPS)**

11. Kenya experiences numerous problems with the implementation of the provisions of the Agreement on SPS and looks forward for a comprehensive review of the operation and implementation during its review process by the SPS Committee.

12. Article 10 of the SPS Agreement, which stipulates that "developed countries should take account of the special needs of developing countries in the preparation and application of sanitary and phytosanitary measures", should be examined in the light of the difficulties facing developing countries in the implementation of these agreements. For example :

- Notification procedures should be simplified and/or have explanatory notes to enable developing countries understand monitor and notify their SPS measures promptly.
- All the vague areas within the SPS Agreement such as "reasonable time" should be clarified.

- Technical assistance offered to developing countries should be enhanced in terms of quality and should be delivered as and when required.

13. The participation of developing countries in international standard setting bodies remains inadequate. The issue of active participation of developing countries in these bodies in accordance with Article 10:4 of the SPS Agreement should be addressed from a wider perspective, namely that active participation requires adequate institutional infrastructure, human and financial resources and effective follow-up capabilities.

14. Kenya therefore proposes that a regional approach should be taken by the developed countries in order to assist developing countries participate effectively in international standard-setting bodies.

#### **IV. THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE (TBT)**

15. Besides circulating copies of notifications, the secretariat should also draw the attention of developing countries to any notifications relating to products of particular interest to them as provided for in Article 10:6 of the TBT Agreement.

16. Four years after the implementation of the TBT Agreement, the participation of developing countries in international standardising bodies remains inadequate. In addition to this, technical assistance as provided for in Article 11:2 has been far below the expectations of developing countries. To this end, technical assistance should be enhanced in order to develop financial and human resource capacities to enable an effective participation of developing countries in international standardizing bodies.

17. Kenya notes with concern that some countries are exporting products that are sub-standard, rejects, expired and/or environmentally damaging to developing countries. Kenya therefore proposes that all exported products meet the requirement of international standards where they exist or the national requirements of the exporting country.

18. A clear definition and understanding of standards of equivalence should be established for the promotion of trade where international standards do not exist.

#### **V. THE AGREEMENT ON TEXTILES AND CLOTHING**

19. Kenya has noticed that the integration of textiles and clothing products into GATT 1994 have not been in favour of products originating from developing countries.

20. In the textile sector the major importing developed countries have not implemented the phase-out of the Multi-Fibre Arrangement (MFA) restrictions as was expected under the Textiles and Clothing Agreement. As a result, products of interest to developing countries are still excluded from the existing liberalization schedules. Of particular concern to Kenya is the quota restraint on our textile apparels in United States. This has not only contributed to loss of production and employment but also constrains in expansion of a sector with great potential for our export trade. The psychological impact of this action has been reduced investments in the textile sector.

#### **VI. THE AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES (TRIMS)**

21. Kenya has the following points to make in this area:

- Developing countries welcome direct foreign investment as a means of augmenting their capital and investment stock.

- Kenya does not maintain any of the prohibited trade-related investment measures as defined in the illustrative list annexed to this Agreement. These measures have been phased out in the course of the economic reforms that the country has so far undertaken outside the WTO framework in order to liberalize trade and create enabling environment for domestic as well as foreign investment. However, the removal of those measures have not attracted investment into the country as was expected. It is therefore suggested that when the Agreement on TRIMs comes up for review, investment friendly measures by developing countries should be incorporated. In particular these countries could benefit more from a longer transition period within the TRIMs.

## **VII. THE AGREEMENT ON ANTI-DUMPING MEASURES**

22. Exports of developing countries have been facing more frequent anti-dumping and countervailing measures. The frequent use of anti-dumping actions against exports from developing countries by major trading partners has become a matter of serious and growing concern. In some cases, benefits from trade liberalization have been considerably neutralized by the use of anti-dumping measures by developed countries.

23. The process of investigation on dumping is expensive and cumbersome. It should be simplified and lengthened to enable developing countries to undertake thorough investigations.

## **VIII. THE AGREEMENT ON RULES OF ORIGIN**

24. Kenya shares the concern, raised by others, that completion of the work programme to harmonize non-preferential rules of origin was not achieved within the three years set forth in the Agreement because of the following:

- the complexity and amount of technical work;
- lack of common understanding among Members as to the implications of the future discipline to "equally apply" the harmonized rules of origin for "all purposes".

25. The Council for Trade in Goods should look into the above-mentioned issues to enhance prospects for progress on the technical work.

## **IX. THE AGREEMENT ON PRESHIPMENT INSPECTION (PSI)**

26. For the past two years, a working party has examined the operation of this agreement. However, there appears to be a broad agreement within the Working Party that the absence of any regular monitoring by a WTO body has been unacceptable. Kenya does not support the creation of a preshipment inspection committee for monitoring of the implementation of the Preshipment Inspection Agreement. In fact, Kenya does not support the proliferation of WTO bodies as they tend to overburden developing countries whose Missions are in most cases suffering from inadequate staffing, technical, and financial resources. Kenya believes that the Committee on Customs Valuation can adequately address the Preshipment Inspection issues as and when they arise.

27. Kenya proposes that the PSI Agreement be reviewed with the aim of incorporating the importers interests/concerns.

## **X. AGREEMENT ON CUSTOMS VALUATION**

28. Within the Agreement on Customs Valuation, Kenya has noted with concern the following:
- compliance with the provisions of the Agreement is difficult to administer in countries with high tariff rates;
  - the provisions of the Agreement are inadequate to deal with cases of collusion between the importer and the supplier with intent to defraud; and
  - the Agreement tends to allow for exclusion from the Customs Value of abnormal discounts, which do not demonstrate evidence linking them to the quantities purchased.
29. Kenya, therefore, recommends that where REFERENCE PRICES can be demonstrated to be representative of the value, the Agreement should allow for it to be a basis for rejecting the transaction value and resort to the alternative methods.

## **XI. AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES (SCM)**

30. Kenya's observation and recommendation is that:

There should be a provision in Annex VII to the effect that a developing country will be excluded from the annex only if its GNP per capita stays above the critical level mentioned in the annex for a continuous period of two years. Furthermore it would be proper to wait for some time before a country is excluded in order to see whether or not the higher level of GNP per capita is stable. There should also be a provision in the annex that a developing country will be automatically included in this annex if its GNP per capita falls below this critical level.

## **XII. THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)**

31. Kenya has noted various imbalances and deficiencies in the implementation of the TRIPS Agreement. These include:
- The implementation of the TRIPS Agreement is a very complex task, due to the Agreements coverage and the need to reform many, if not all, national statutes on the matter in the short transitional period of five years ending on 31 December 1999.
  - There are instances where the ambiguity of the text of the TRIPS Agreement allow for different and controversial interpretations, as exemplified in Article 27:3(b) on the protection of plant varieties by patents or effective 'sui generis'.
  - The short period given to the developing countries for implementation of the TRIPS Agreement is not adequate. Kenya recommends for an additional five years to fully implement and realize the impact of the TRIPS Agreement.
  - Kenya like a few other WTO Member States considers the scope of protection of Article 23 of the TRIPS Agreement on the protection of geographical indications as not satisfactory, since relevant sectors other than wines and spirits were not given the same. The scope or additional protection of geographical indications should be expanded to include foodstuffs, agricultural products, beers, mineral water and

handicrafts etc in the wake of the growing importance of geographical indications in a globalized trading system.

32. Kenya therefore proposes the following:

- Amendment of the TRIPS Agreement's Article 23 on geographical indications to provide for the protection, notification and registration of agricultural products, foodstuffs and handicraft in addition to wines and spirits.
- Amendment of Article 27:3(b) to increase the scope of protection to include protection of indigenous knowledge and farmers rights.
- Harmonize the Convention on Bio-Diversity (CBD) and TRIPS Agreement on the protection of indigenous knowledge, farmers' rights and pieces of intellectual creation.

### **XIII. SPECIAL AND DIFFERENTIAL (S&D) PROVISIONS UNDER THE WTO AGREEMENTS**

33. One of the objectives of the Uruguay Round Agreements was to create a fair and equitable multilateral trading system that would lead to increased development and improved income levels for all Members. The Marrakesh Agreement Establishing the WTO thus has in its preamble, "... there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the need of their economic development". Special and differential provisions were hence based on this recognition.

34. The developing and least-developed countries, Kenya included, need effective and implementable S&D provisions due to low levels of industrialization, high cost of capital, lack of adequate technology, inadequate infrastructure, inadequate trained or skilled manpower, vulnerable balance of payments, high dependence on primary products in their export regimes, etc.

35. For successful, equitable and beneficial integration into the global economy, developing countries need the effective implementation of all the special and differential provisions in the various WTO agreements.

36. Since the entry into force of the WTO agreements, most of the developed countries have not honoured their commitments to the S&D provisions. As a result, developing countries have not achieved desired access to the markets of the developed countries.

37. Kenya therefore, proposes the following:

- Given that circumstances that led to the inclusion of S&D provisions in the WTO agreements still persist, S&D provisions should be made a permanent feature in the WTO agreements. Countries should apply them until they graduate to the status of a developed country.
- "Best endeavour" clauses should be reinforced by WTO Members through clarity and conversion into specific obligations instead of being just aspirations.
- Developed countries should faithfully and effectively implement the S&D provisions of the WTO so as to create market access for developing countries. This is because developing countries have made more market access commitment without adequate

trade-off in market access accruing to them in sectors and modes of supply of export interest to them.

#### **XIV. TECHNICAL ASSISTANCE**

38. Kenya attaches a lot of importance on technical assistance provided under the various WTO Agreements in order to fulfil its obligation and maximize benefits from the said agreements. While WTO has provided technical assistance in various forms, Kenya feels that more assistance to developing countries should be directed to the following areas:

- removal of legislative, institutional and human resource obstacles to improve participation at the WTO programmes and ensure compliance to the Agreements;
- identification of new trading opportunities aimed at increasing the volume, value and export baskets of developing and least-developed countries;
- developed countries should be requested to consider writing-off debts owed by developing and least-developed countries. This effort could help release scarce resources that could be re-directed to international trade development.

#### **XV. NOTIFICATION OBLIGATIONS AND PROCEDURES**

39. Since coming into force of the WTO Agreements, Kenya has experienced difficulties in meeting its notification obligations. In addition to the sheer number of notifications, there are also difficulties related to the quality and completeness of the content as well as the comparability between notifications provided by Members. Although the WTO has prepared a handbook aiming at helping developing countries in preparing the required notification on standard formats, there is need for additional assistance for capacity building.

#### **XVI. TRADE IN SERVICES**

40. Kenya has noted with concern the pressure on developing countries to liberalize areas of interest to the industrialized countries while meaningful market access has been delayed in areas of interest to them e.g. the movement of labour. This shows that the balanced concessions promised to developing countries as equal partners in the multilateral trading system has so far not been achieved. Kenya therefore proposes the removal of barriers to the movement of natural persons and that the issue be given equal treatment to the liberalization of other factors of production such as capital movement.

41. Kenya proposes that negotiations on various professional services should continue being covered individually and not in general form to ensure comprehensive coverage of each subsector.

42. Kenya observes that electronic commerce is a fairly new means of trade for which developing countries should be given time to study and analyse its impact on their trade and development activities. It is important that Members have an understanding of the impact of this new means of world commerce before new rules and increased responsibilities are introduced in the existing or new WTO rules.

43. Developing countries, can only benefit from this mode of trade delivery if they have access to the relevant telecommunication infrastructure, technology transfer and developed human capacity.

## **XVII. PROPOSED MULTILATERAL INVESTMENT AGREEMENT (MIA)**

44. Developing countries have already assumed major obligations in the field of investments under various WTO agreements such as TRIPS, TRIMs and GATS. Having obtained these concessions which tend to benefit multinational corporations, the industrialized countries are now seeking total freedom abroad for such investors.

45. In particular they are rooting for negotiation of a multilateral agreement on investment within the ambit of rights and obligations under the WTO.

46. The following observations on the proposed agreement are relevant in Kenya's view:

- Kenya would not consider undertaking commitments under any agreement that would curtail the right of host governments to direct investment in priority areas consistent with their economic and development objectives. Furthermore, the agreement should not seek to provide for cross-sector retaliation against countries deemed as violating the agreement provisions. Foreign investors should therefore not be allowed have recourse to restrictive measures without assuming commensurate responsibilities in the host countries.
- The mere signing of the MIA would not necessarily guarantee increased flow of investment in a developing country. This is because investors are invariably attracted in countries where they reap the greatest benefit for their investment and not to those most in need of such investments.
- On the other hand, governments wishing to attract foreign investment will naturally adopt policies that facilitate further, rather than scare away investors. Where they lack competitiveness to attract such investment, circumstances will force them to offer more attractive incentives to lure investors. Logically therefore domestic regulations are a more reliable and equitable means of promoting direct foreign investment than a multilateral negotiated package.

47. Taking all the above observations into consideration, Kenya joins those other developing countries that are resisting negotiations of an MIA under the WTO framework.

## **XVIII. NEW ISSUES**

48. Kenya is concerned about the inclusion of issues, which are not trade related into the agenda of the WTO. It is not quite clear why some countries, mostly developed ones, are pressing for the inclusion of these issues. Most will need further study before they are negotiated within the WTO. They include Trade and labour standards; Trade and environment; Trade and Competition Policy; Trade and Investment and Trade Facilitation.

49. Except for trade and environment whereby a work programme was agreed upon by the Ministers at the Marrakesh meeting in April 1994, the other three issues were formally introduced at the Singapore Ministerial Conference in December 1996. Trade and environment, and trade and labour standards raise some common issues particularly whether or not the trade rules should govern the production process. And whether the interest of the developed world in seeking discussions on the subjects really arises out of their concern for the environment and the human rights of the workers in the developing world or is merely a cover up for neo-protectionism.



## **1. Trade and labour standards**

50. Although it is not clear whether the labour standards issue will feature in the Seattle Conference or not, Kenya continues to object to any linkage between trade and core labour standards.

51. Kenya's position is not to relate the application of trade rules to the production process as this would seem to be yet another protectionism approach by the developed world designed to hit the developing countries in the products where they have comparative advantage. Therefore, the collaboration between WTO and ILO should NOT address itself to re-introducing the core labour standards in any WTO forum.

## **2. Trade and the environment**

52. It is important to emphasize that Kenya is a keen proponent of environment conservation. However, Kenya objects to any move to use environmental measures as a barrier to trade. Kenya observes and agrees that Article XX of GATT 1994 is flexible enough to allow for exceptions to accommodate environmental issues. This Article allows trade measures, which are considered to be inconsistent with other WTO obligations to be used to achieve among others environmental protection. In addition, the conditions contained in the said article provide for the checks and balances in the new WTO systems that are aimed at preventing the abuse of such exceptions.

53. It is Kenya's view that environmental norm and standards are a function of the stage of development of the economy. Therefore, to impose on low income developing countries environmental standards prevailing in advanced countries would, internally, artificially raise their costs of production and externally, extinguish their comparative advantage in the export sector.

## **3. Trade and competition policy**

54. Kenya recognizes that restrictive business practices may impede the realization of the benefits that could arise from the implementation of the WTO agreements.

55. Furthermore, Kenya is of the view that restrictive business practices particularly those restraining competition, limiting access to markets or fostering monopolistic form of competition should be controlled. However, the inclusion of competition policy in the multilateral trading system is viewed by some developing countries as a way of "clipping the wings" of comparatively stronger firms of these developing countries so that they do not withstand the competition with the well established firms of the developed countries. Kenya would wish also to protect its economy by retaining its independence of action and decision making in the matter of development *vis-à-vis* the restrictive trade practices and other forms of assault by the transnational corporations on its sovereign economic space.

56. Kenya therefore, proposes that:

- should WTO Members agree to come up with an international regime on competition policy, then such a regime should consist of a code of conduct for transnational corporations aimed at curbing unfair trade practices;
- the regime should also fulfil the common rule that can be credibly enforced at the national level: and effective cooperation between the anti-trust authorities of the Member States;
- WTO should continue collaborating with UNCTAD in this regard.

#### **4. Trade and investment**

57. Having realized that the TRIMs Agreement did not comprehensively cover investment especially the element of foreign direct investment (FDI), some countries in the developed world felt that a new code could be worked out to exhaustively address the issues of full liberalization of investment regime. This regime is intended to encourage free movement of investment across national borders. However, most of the developing countries are apprehensive of this absolute freedom. The freedom is likely to erode the rights of national governments to implement national level investment policies. This may either restrict a foreign commercial presence in certain sectors or provide preferential treatment to national firms thus enabling them to grow and compete with large established transnational corporations.

58. Kenya's view is that the introduction of an international investment code could have a negative effect on her economy. Giving total freedom and rights to foreign firms under the proposed code may lead to the collapse of domestic enterprises, higher unemployment, greater capital flight thus leading to the balance of payments crisis.

59. Kenya therefore, suggests that:

- Investment matters be negotiated under the premises of the TRIMs Agreement, which is coming up for review in 1999. However, the TRIMs will be expected to take into consideration the development level of the WTO Member countries.

#### **5. Trade facilitation**

60. The existence of "invisible" trade barriers adds costs to traders, consumers and national economies, creating "an overall negative trading environment. These "invisible" costs exceed the actual level for duties paid on the products.

61. Kenya therefore recommends the following:

- WTO Member countries should help in removing obstacles hampering the movement of goods across borders through administrative barriers. WTO should play a coordinative role to ensure adherence to or awareness of existing and/or future instruments concerning trade facilitation.

### **XIX. CONCLUSION**

62. Experience has shown that due to their low negotiating capacity, developing countries' problems and concerns have often been ignored during the past ministerial conferences. At the same time industrialized countries continue to bring additional issues onto the negotiating table. These fresh issues tend to dominate the meetings while in Kenya's view the participants should be concentrating on tackling problems identified in implementing the existing agreements. Kenya hopes that during the Seattle Ministerial Conference, such a trend will not be repeated.

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