Reporting
International
Treaties

The World Trade Organization (WTO) Agreements: Their Impact on Kenya

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Foreword

Formal relationship between states is best established through Treaties. To this end, treaties, being international legal binding instruments are fundamental in contemporary state affairs. The rights and obligations of states more often than not, emanate from established principles in treaty law. Treaties are also used to bestow rights on third party states and citizens. In practice, treaties regulate a wide spectrum of international relationship in the economic, social and political arena.

The idea of writing this handbook arose from the need to simplify for journalists and the ordinary citizens the concept of treaties, the treaty making process and the impact of treaties at various levels. The handbook uses Kenya as a case study. The handbook gives journalists a guide and quick reference to key issues in treaty law and interpretation.

To cover the various treaties in one easy to read book is somehow difficult. The treaties are, therefore, covered in four handbooks namely: Environmental, Human Rights and other Treaties Relevant to Kenya; the World Trade Organisation (WTO) Agreements: Their Impact on Kenya; the East African Community Treaty: Its Impact on Kenya and finally, the Cotonou Treaty Establishing the EU-ACP Partnership: Its impact on the East African Economies.

Journalists are targeted as the primary users and consumers of the information in this book. The focus on journalists emanates from the view that the media is one of the links to ordinary citizens. By raising awareness of the treaty making process and impact amongst journalists, it is expected that frequent reporting and highlighting of treaty issues and impact will find its way in the print and electronic media.

The Friedrich Ebert Stiftung is proud to be associated with this noble objective. The Foundation wishes journalists a good reading and understanding of the concept of treaties.

Dr. Roland Schwartz
Resident Director
Friedrich Ebert Stiftung

Nairobi Office
July 2002

Acknowledgements

This book is a product of a collaborative exercise that began with the discomfort of a group of Nairobi-based business writers and the patience of Dr. Otieno Odek who graciously shared his wide knowledge on international trade and development issues with them.

We at African Women and Child Features take pride in acknowledging all the business writers and correspondents from *The Nation Media Group*, the *East African Standard*, *The People, Kenya Times*, *Kenya Television Network* and *Kenya Broadcasting Corporation,* who actively participated in the workshop on reporting trade. We value our long association with them and our enviable history of a rich professional relationship.

With tonnes of information coming out of the numerous national, regional and international trade bodies, and every shade of opinion from hundreds of lobby groups around the world, reporting trade and development is at once exiting, and a daunting undertaking. There is simply too much to write, analyse and interpret.

In view of the technical nature of this book project, Dr Otieno Odek, a lawyer and expert in this area, co-ordinated the compilation of the data, while we at AWC Feature Service took charge of editing all the material to fit the purposes and specification of this project, that is: initially compilation of a single handbook on reporting key international treaties to serve as a guide to journalists.

The product of this exercise was a huge manuscript which, to our knowledge, could not serve as a handbook. The manuscript was then separated to cover individual treaties for ease of reference. The products are four reader-friendly handbooks under the standing title of "Reporting International Treaties". Each handbook bears the name of the treaty/agreement it covers. They include: The Cotonou Treaty Establishing the EU-ACP Partnership: Its Impact on the East African Economies, The East African Community Treaty: Its Impact on Kenya, World Trade Organization (WTO) Agreements: Their Impact on Kenya and the Environmental, Human Rights & Other Trade Treaties Relevant to Kenya.

Finally, all these activities would not have been possible without the unstinting support of the Friedrich Ebert Foundation (FES) which provided support for the logistics for holding the workshop as well as the framework for publishing the handbooks.

We acknowledge Esther Kamweru who was instrumental in the birth of this exciting project. Special thanks go to Wanjiku Mbugua, Programme Officer at FES, who provided technical support at the final production stages to make this book a reality. We could not have asked for a better team.

It is our hope that these books will shed to light and promote a better understanding in interpretation, analysis and how to bring out the real issues when writing on issues related to this treaty.

Contents

Introduction

The World Trade Organization (WTO) system is a product of the Uruguay Round Trade Negotiations which was held between 1986-1994. In addition to the Marakesh Agreement that set up the World Trade Organization, there are 13 other agreements that were concluded during the Round.

Objectives of WTO

The objective of WTO is to establish an orderly and transparent framework within which barriers to trade could gradually be reduced. To facilitate this goal, import restrictions are to be reduced and non-discrimination to be practised.

Key features of the WTO

- It is a single institutional framework for negotiating trade amongst its member countries.

- It is headed by a Ministerial Conference which meets every two years.

- The General Council of the Organisation oversees the operations of the organisation and its ministerial decisions and acts as a dispute settlement body and a trade review mechanism.

- The General Council has established subsidiary bodies: a Goods Council, a Services Council and a Trade Related Intellectual Property rights (TRIPS) Council.

Functions of the WTO

- To facilitate the implementation, adminstration and operation of the Uruguay Round Agreements.

- To provide the forum for negotiations among members concerning their multilateral trade relations.

- To administer an integrated dispute settlement mechanism.

- To undertake the adminstration of the Trade Policy Review Mechanism (TPRM).

- To initiate and conduct co-operation with other multilateral institutions such as the IMF and the World Bank and its affiliated agencies.

Agreements making the WTO System

At the end of the GATT Uruguay Round of Trade Negotiations, several agreements were signed. One of the Agreements was the World Trade Organization (WTO) Agreement which created the WTO. This Agreement is at times referred to as the Marakesh Agreeement named after the City in Morocco where the Agreement was signed. The WTO came into existence as an organization in January 1995. All in all, the WTO Agreements signed at the end of the Uruguay Round are as follows:

1. Multilateral Agreements on Trade in Goods with two main components:
   (a) GATT 1994 Agreement consisting of the following:
      (i) GATT 1947, (i.e the original GATT with its amendments as it stodd before 1st January 1995)
      (ii) Decisions taken under GATT 1947 before 1st January 1995.
      (iii) Understanding reached in Uruguay Round on duties, balance of payments, customs unions, free trade areas, waivers on obligations and tariff obligiations.
      (iv) Other Agreements in the area of goods covering Agriculture, Sanitary and Phytosanitary Measures, Textiles, Technical Barriers to Trade, Trade Related Investment Measures, Anti-dumping, Customs, Valuation, Pre-shipment Inspection, Rules of Origin, Import Licensing, Subsidies and Safeguards.

2. Agreement on Trade in Services (GATS);

3. Agreement on Trade-related Intellectual Property Rights (TRIPS);

4. Trade Policy Review Mechanism;

5. Understanding on the Settlement of Disputes;

6. Plurilateral agrements in four sectors: Civil Aircraft; Government Procurement; Dairy and Bovine Meat.

For purposes of this Handbook, not all these agreements will be analysed. Only the key agreements will be examined. These are the TRIPS Agreement, Agreement on Agriculture, the TRIMS Agreement and the GATS Agreement.

Agreement on Agriculture

This paper examines this Agreement under the following headings:

(a) Relevance of the Agreement to Kenya
(b) Salient Features,
(c) Kenya's obligation under the Agreement;
(d) Legal and policy impact of the Agreement;
(e) Economic and Social Impact of the Agreement.

Significance of the Agreement on Agriculture

The relevance of the WTO Agreement on Agriculture emanates from the position of Agriculture in the economies of states. FOr purposes of analysis of the importance of the Agreement, Kenya's agricultural sector will be used as an example. The Agreement is pivotal due to the following facts:

(i) Kenya relies largely on the agricultural sector both for subsistence and export earnings;
(ii) over the last two decades, food production in Kenya rose at a rate one percentage below the population growth rate;
(iii) Kenya is dependent on food import and food aid;
(iv) exports from Kenya still largely consists of traditional agricultural commodities which cannot keep up with the increasing need to earn foreign exchange;
(v) Kenya's participation in the global economy is increasingly becoming insignificant;
(vi) the Agricultural sector of the developed countries, particularly the OECD states, is heavily protected and subsidized and determine trends in world market pricing thereby affecting Kenya;
(vii) the protection of developed country agricultural sector implies that food prices and the food import bill of Kenya is determined by events in developed countries;
(viii) surplus production in developed country markets is exported at artificially low prices thereby having a dumping effect in Kenya and depressed world market prices;

(ix) trade preferences enjoyed by Kenya under the Lome framework or the Generalised System of Preferences (GSP) are continuously being eroded in a liberalized trading environment; and

(x) agricultural sector is the major employer in Kenya.

Salient Features

The major elements of the Agreement can be enumerated as:

(i) Country Schedules
(ii) Market Access Commitments
(iii) Domestic Support Commitments
(iv) Export Subsidy Commitments

Country Schedules

A country schedule comprise a statement by each member government, on a commodity by commodity basis, of their position on each of the issues concerned (tariffs and non tariff barriers (NTBs), domestic support and export subsidies) prior to the implementation of the provisions of the Agreement on Agriculture, together with an outline of how the provisions will be achieved. The country schedules were to be **verified** before April 1995 and from that time they are legally binding. The country schedules contain **commitments** made by countries; for example, a commitment to reduce tariffs on particular commodities by a given amount over a period of time. Once the commitment has been made, there is a legal obligation on the part of member governments to implement them. The commitments in the country schedules are to be made over the **implementation period**. The period is Six years beginning 1995, for developed countries and ten years for developing countries.

Market Access

The commitments defined by the country schedules with regard to market access include a number of important elements. These are:

(i)**tariffication**, which is the obligation to convert non-tariff barriers to trade into tariff equivalents. The base period for this is 1986-88. Developing countries have an option of offering **tariff bindings** instead of equivalents. The requirement of tariffications discourages the use of future NTB. In cases where there were no NTB at the start of the Uruguay Round, the value of the baseline tariff was taken to be either the customs duty that was prevailing in September 1986 or where this was lower than an existing tariff binding, the value of the latter.

(ii)**tariff reduction**
For implementation purposes, developed countries are to reduce the NTB over a six year period, while developing countries over a ten year period. At the end of the implementation period, all tariffs are bound at the final level and in future may not, unless exempted, be raised above these levels. (The exemptions are under the Special Safeguard Provisions that enable a country apply additional tariffs on specified commodities where import prices are particularly low or where there is a sudden surge in imports).

(iii)**market access provisions** that oblige countries to provide low import tariffs for fixed quota of imports.

Market access provisions are designed to encourage the development of trade and to ensure that existing markets are maintained. There are four aspects of market access provisions.

(a) Where there is little existing trade or where existing levels of imports are not maintained, importing countries are required to allow stipulated quantities of imports at a reduced rate of tariff.

(b) Countries are in the first instance required to maintain current levels of access for each individual product at 1986-88 levels.

(c) Where the current levels of imports is negligible, a minimum access should be established at not less than 3 per cent of domestic consumption during the base period. The minimum level is to rise to 5 per cent by year 2000 for developed and 2004 for developing countries.

(d) The access provisions do not apply when the commodity in question is a traditional staple of a developing country.

Domestic Support Commitments

The Agreement introduces commitments intended to curb domestic support measures that distort production and trade. The commitments are to be attained by:

(a) **quantifying** all domestic support deemed by the Agreement to have a distortionary effect on trade **(creation of what is known as the Aggregate Measure of Support (AMS))** and
(b) progressively reducing these quantitative measures.

The AMS policies are categorised into three:
(a) those policies which do have a substantial impact on pattern and flow of trade **(Amber Box)**
(b) polices that do not have a major effect on production and trade **(Green Box)**
(c) policies that fit in neither **(Blue Box)**

Amber box policies must be included in the calculation of AMS and a commitment made to reduce them.

Green Box policies include a variety of direct payment schemes that subsidize farmers incomes in a manner not deemed to influence production decisions. These include producer retirement programs, environmental protection programmes, research and market information schemes, extension services, rural infrastructure etc.

From the point of view of Eastern Africa states as developing countries, exemptions relating to food security, domestic food aid and the environment are of particular interest as part of the Green Box policies.

Blue box policies include compensatory policies and land set-aside programmes and deficiency payments. These payments are production - limiting programmes and are exempt from AMS reduction.

De Minimis Exemption

The AMS calculations are carried out for each commodity. The *de minimis* exemption allows any support for a particular commodity to be excluded from the total AMS calculation if that support is not greater than a given threshold level. For example, where the value of total domestic support for a given commodity is not greater than 5 per cent (10 for developing countries) of the total value of that product, then support need not be included in the calculation of the current total AMS which means that it will not have to be reduced.

Export Subsidy Commitments

Export subsidies, measured in terms of both volume of the subsidized exports and budgetary expenditure on subsidies, have been capped at base period levels. Countries are now committed to reducing export subsidies for a large number of agricultural commodities. The base period for export subsidies is 1986-88. An exemption is the **front loading accord** which allows base period to be 1991-1992 provided that the level of subsidies at this time exceeded those in the base period and provided that after the six year implementation period, the level of cut subsidies would be the level that would prevail had the base period of 1986-88 been used.

Legal and Policy Impact of the Agreement on Agriculture to Kenya

The WTO Agreement on Agriculture is likely to affect agricultural policies in Eastern Africa developing countries in a number of ways. As a word of caution, the impact will vary from country to country, product to product and sector to sector. In overall:

(i) Some areas of domestic and trade policy will need to be modified to comply with the Agreement's provisions. This is a direct influence.

(ii) The Agreement will also influence agricultural policies in an indirect way.

(iii) Since the Agreement will affect the rest of the world, particularly developed countries, Eastern Africa countries will be affect.

(iv) The Agreement categorizes countries into developed, developing and least developing states and makes room for **Special Safeguard Provisions and Special Treatment. The former allows countries under certain circumstances to raise tariffs above the level stipulated in their schedules, the latter permits a country to retain NTBs for certain sensitive products.** The safeguard provisions provide countries with additional protection against surges in the volume of imports or fall in world prices in the event that bound tariff rates prove insufficient for this purpose. The Eastern Africa countries can avail themselves the special safeguard and treatment provisions.

Impact of Market Access Commitments

(v) In the long run, tarrification of agricultural trade barriers under the

Agreement could act as a foundation for much deeper cuts in agricultural protection at the global scale and open markets to Eastern Africa states.

(vi) A main benefit of the Agreement is the greater transparency that it provides when compared to NTB. This should provide both traders and policy makers in Eastern Africa with easier access to knowledge of the levels of protection being imposed in various sub-sectors of the agricultural economy.

(vii) The access provisions may not have an immediate impact on the overall volume of imports to developed countries from the Eastern Africa states.

(viii) The overall level of protection at the global level in the short term will remain unchanged since the idea behind tariffication is to convert NTB into tariffs.

(ix) The Agreement on Agriculture seeks to protect exports of existing exporters i.e. to safeguard current access. Current access by Eastern Africa states to developed country markets, has frequently been provided under bilateral and preferential terms under the Lome Convention or the GSP. These arrangements are protected by the Agreement.

Impact on Domestic Support Commitments

(x) The current implications of the Agreement with regard to domestic policy may be limited. However, the future significance lies in the fact that the Agreement enshrines international law limitations on domestic policy formulations. Policies that distort agricultural trade will have to be avoided.

(xi) The Agreement is largely designed to affect domestic policies in developed countries where policies subsidize agricultural production. In contrast, developing country policies tax agriculture. *There is no provision in the Agreement which requires countries to reduce the volume of taxation.*

(xii) The domestic support commitments are less demanding on developing countries than on developed states.

(xiii) Least-developed countries are exempt from all domestic support reduction commitments.

(xiv) The Green Box Policies as exemptions to AMS are open to Eastern Africa developing countries. Annex 2 of the Agreement tabulates the Green Box policies. Of great significance to Eastern Africa countries are:

(a) Domestic food aid policies aimed at providing food aid to vulnerable sections of the community. These can be excluded from AMS calculation.
(b) Public stockholding of food security purposes. This refers to expenditure in relation to accumulation and holding of stocks of products which form an integral part of a food security program identified in a national legislation. Such expenditures may be excluded in the AMS calculations.
(c) General services. Policies under this heading involve programmes that provide services or benefits to agriculture or the rural community but which do not involve direct payment to producers.
(d) Direct payments to producers. Certain payments may be included in the green box category so long as they have no or minimal effect on production. Examples of the types of payments permitted are payments for relief from natural disasters, structural adjustment provided through producer retirement programmes or resource retirement programs and payments under environmental programmes.
(e) De Minimis provisions
(f) Blue Box policies.

(xv) Developing countries that are at present taxing their agricultural sector will be bound never to raise their support levels above those excluded from AMS calculation under the de minimis provisions.

Impact on Export Policies

(xvi) For countries that do subsidize exports, the Agreement requires that budgetary expenditure on export subsidies for the base period 1986-90 or 1991-92 whichever is higher to be reduced by 24 per cent over the ten year implementation period. Reductions are also required in the volume of subsidized commodities: a 14 per cent reduction over 10 years.

For developing countries, export policies have generally taken the form of export restraints rather than export subsidies. The restraints have been in the form of taxes, quotas and prohibitions. The Agreement introduces restrictions on the use of export restraints where such restraints relate to foodstuffs. These restrictions do not apply to developing countries unless they are net exporters of the particular foodstuff in question. However, there is no definition of what a net exporter means. For countries which are net exporters, the country instituting the export prohibition must give due consideration to the effects of such restriction on importing countries food security and before a restriction is imposed, notice in writing as far as in advance as possible, should be given to the Committee on Agriculture giving information regarding the nature and duration of the restriction. The Agreement allows for sanctions if the two conditions are not met.

Impact on Agricultural Trade

The developing country share in world trade is relatively small. However, their share of world imports of agricultural commodities is increasing. Since developed countries have taken a commitment on export subsidy and domestic support measures, developing countries of Eastern Africa will be affected in the long run as follows:

(xvii) there shall be a reduction in domestic support thus creating a reduction in supply available for exports or an increase in import demand in developed countries.

(xviii) the reduction in export subsidies should increase the opportunities on world markets in terms of volume for non-subsidizing exporters.

(xix) market access commitments in terms of specific tariff quota commitments provide an assured access to markets; the reduction of existing tariffs can provide improved access opportunities.

Loss of Preferential Trading Agreements

(xx) The commitments made towards greater liberalization of world trade and trade in agricultural products will have an impact on developing countries with regard to the level of preferences they will enjoy. The reduction in rates on an MFN basis will lead to a fall in value of preferences.

(xxi) The liberalized global trade implies loss in margin of preferences and thus an increase in competitiveness. The importance of the MFN rates is that their level determines the size of benefits from a preference. The lower the MFN tariff rate, the less the preference is worth. Since global liberalization lowers the MFN rate, it implies that over time, the preferences granted to the Eastern Africa states are worth less.

(xxii) The implication of the erosion of preferential margin makes the export impact of the Agreement less clear. Erosion could lead to a fall in export competitiveness and in market share. There is in overall a likelihood of losses of export market share for some developing countries.

Impact of the Agreement on Trade Creation

(xxiii) African countries tend to be importers of food, particularly wheat, rice and dairy products. The increase in prices of temperate food products normally imported into Africa implies that the food import bill will increase. (The increase is also attributed to other factors such as population growth).

(xxiv) As a result of export subsidy reduction, there is a possibility of trade creation as countries get a share of the world market.

(xxv) The value of agricultural exports will rise but the gain from this will be reduced or eliminated by loss of preferences.

(xxvi) For Eastern Africa countries, the overall impact on trade creation may be negative and import bills high. To overcome this, policies to increase food production and promote diversification is necessary.

Impact on Agricultural Commodities

(xxvii) The impact of the Agreement on commodities is largely to be felt in temperate products. It is likely that there will be a reduction in world output of temperate commodities as production in some major developed countries fall. The effect is likely to be strong among OECD countries where protection has been substantial, namely cereals (wheat, rice, and coarse grains), meat, dairy and sugar.

(xxviii) It is expected that the quantity of temperate commodities sold at subsidized rates at the world market will decline and there will be an increase in import of these products by some developed countries.

(xxix) The effects on world market supply and demand will tend to push up the world market prices for the products concerned.

(xxx) There will be a shift in production and trade flows to less subsidizing net importers primarily in developing countries.

Impact on Food Security

Food security is defined by FAO to have three dimensions: **food supply; access to food; and stability of flows over time.**

The Agreement on Agriculture will influence food security in four ways:

(a) Influencing the foreign exchange earning capacity. There is the potential of increasing foreign exchange earnings from increasing markets. However, this depends on the response of supply. Developing countries may however be unable to make gains via export earnings due to supply inelasticities and loss of market share.

(b) Influencing the price of food imports and market stability. The projection is towards an increase in the food import bill. In the food-deficit countries, the import bill is set to rise as domestic policy reforms in developed countries will see reduction in the production of major agricultural food commodities and thus supply reduction.

(c) Influencing the availability of food assistance. The Decisions made at Marakesh compensates for the increased food import bill by accommodating the need for greater food aid.

(d) The likely impact of the Agreement is to create a **two-tiered system of food security** with rich and rapidly growing countries enjoying abundant affordable food supplies and poor countries suffering from malnutrition and food insecurity.

The losers from the Agreement are likely to be the net food importing countries such as the Eastern Africa states. The countries will be affected both as exporters and importers.

As exporters, developing countries face loss of preferential margin, increase in competition, limited trade creation and potential loss of market share.

As importers, developing countries will have an increase in food import bill as world prices increase. The negative impact will also result as export subsidies are removed thereby raising effective price paid by importers. The negative effect will be worsened by loss in market share which means lack of foreign exchange with which to pay the import bill.

Policy Impact of the Agreement on Food Aid

The Agreement indirectly addresses food security issues via the Special and Differential measures. The Agreement allows developing countries more time and smaller reductions in areas of market access, domestic policies and export subsidies. In addition, the *de minimis* commitment is raised to 10 per cent and there are further exemptions related to input subsidies and export marketing.

The Marakesh Ministerial Meeting foresaw and acknowledge the likely negative effects of the Agreement on Food Security and Food Aid. To this end, the Special and Differential treatment for developing countries had to be supplemented with other measures. Consequently, **The Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least Developed** and **The Decision on Net Food Importing Countries** was taken. Also the **Decision on Measures in Favour of the Least Developed Countries** was made. These Decisions address food security issues by reviewing the level of food aid and providing increasing amounts under grant terms. There is also provision for short term assistance in financing normal imports from international financial institutions and provision for differential terms with respect to export credit. These measures are aimed at alleviating the burden on the food import bill and balance of payment as well as to enhance the capacity of the developing countries in increasing their agricultural production capacity in order to reduce the high dependence on imports.

Impact of the Agreement on Regionalism

Regional Trade Arrangements are not a new phenomena in international scene. However, in most of these arrangements, agricultural policy has not been fully integrated.

(a) The impact of the Agreement on Agriculture on Regionalism stems from the fact that regional arrangements will have to integrate agricultural policy in their agenda.

(b) In general, the loss of preferential trading agreements will stimulate the growth of regional groupings.

(c) Further, the process of liberalization indicates that agricultural policies in many developing countries are becoming closer. The commitments provided in the Agreement will provide the basis from which greater coherence could develop with respect to both trade policy via tariffication and tariff reduction.

Trade Related Intellectual Property Rights Agreements (TRIPS)

The TRIPS Agreement is another fundamental treaty of the WTO system. The Agreement regulates trade in intellectual property. It outlines minimum principles and obligations that signatory states must observe when protecting intellectual property.

Kenya's obligations under the TRIPS Agreement

There are several provisions in the TRIPs Agreement that impose obligations upon Kenya. Kenya having ratified the TRIPS Agreement, she is required to:

(a) adhere to and provide minimum TRIPS standards of protection of intellectual property;
(b) establish comprehensive IPR systems covering patents, copyrights, trademarks, industrial designs and trade secrets;
(c) put in place provisions on judicial and administrative procedures relating to dispute settlement, monitoring and review of the implementation of the minimum standards.

To this extent, the following must be observed by Kenya:
(i) Patent rights should be enjoyable without discrimination as to the origin

of the product or its place of invention.[1] Thus, the geographical origin of an invention should not be a factor to be considered in granting patent rights.[2]

(ii) Kenya must grant a twenty year minimum period of patent protection.

(iii) Kenya is required to adopt and incorporate the national treatment and the Most Favoured Nation standards enshrined in the TRIPs Agreement in her national laws.

(iv) Kenya should provide patent protection for any inventions in all fields of technology.[3] However, under the TRIPS Agreement, Kenya and other signatory states have the discretion to exclude patentability of certain inventions. Whereas animals, other than micro-organisms, may be excepted from patentability by national patent laws,[4] micro-biological,[5] and non-biological processes for the production of animals *cannot* be excluded.[6]

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1 Article 27 (1) of the GATT TRIPs Agreement
2 Article 27 (1) of the GATT TRIPs Agreement.
3 Article 27 (1) of the GATT TRIPs Agreement
4 *Ibid.* Article 27 (3) (b).

5 Micro-biological processes involve industrial processes utilizing micro-organisms and the use of plasmids, viruses and genetic engineering as well as processes for producing new micro-organisms. See E. Gutman, "The Protection of Biotechnological Inventions Within the Framework of the European Patent Organization and More Particularly France" (1991) 10 Industrial Property 377 at 379; see also Notice of the President of the European Patent Office dated 12 December 1981, see Official Journal of the European Patent Office (OJ EPO) 1/1982 at 19.

6 Central to patentability of microbiological processes lies the distinction between claims which directly utilize biological and natural phenomena that are non-patentable, and those which merely utilize natural phenomena to accomplish new and useful end results that are patentable. A leading United States case on this is Diamond V Chakrabarty. Chakrabarty applied to patent a bacteria from the genus *Pseudomonas* containing therein at least two stable energy generating plasmids, each said plasmid providing a separate hydrocarbon degradative pathway. The US Supreme Court held that "the patentee had produced a new bacterium with markedly different characteristics from any found in nature.... His discovery is not nature's handiwork, but his own, accordingly, it was patentable". See Diamond v Chakrabarty, 100 S. Ct. 2204, 2208 (1980).

Product Specific Obligation under the TRIPS Agreement

The TRIPS Agreement obliges signatory states to offer protection to three categories of products. These are:

(a) New Plant Varieties;
(b) Pharmaceutical Products;
(c) Microbiological and Animal Products.

In order to comply with the TRIPS Agreement, Kenya has enacted the Industrial Property Act of 2001 which domesticates Kenya's obligations under the Agreement.

General Agreement on Trade in Servives (GATS)

In addition to the TRIPS Agreements, the WTO also introduced regulations on international trade in services. The disciplines in the area of services are contained in the General Agreement on Trade in Services (GATS). The Agreement has braodly rwo types of disciplines: first, that relating to all service sectors and second, sectoral commitments. The former sets out the general commitments while the latter makes provision for sectoral commitments. Among the general commitments is the obligation to apply the Most Favoured Nation Treatment principle on the basis of non-discrimination between services and service-suppliers of various members of the WTO. There is a commitment to free moverment of capital associated with the commitments in the Agreement for Services. There is no such provision regarding the movement of labour.

The Agreement provides for specific commitments and enforcement measures in the services sector. The commitments are contained in national schedules. A member is required to negotiate with outher members about the secotrs in which it wants to give commitments. The commitments agreed upon will be included in the schedule of the member.

Specific commitments are in three areas namely market access, national treatment and others. A member can prescribe the terms, limitations and conditions of market access. If a member has not mentioned a particular sector in its schedule, it will be presumed that it has undertaken no obligation in respect to that sector and thus it will be free to take any measure regarding market access and national treatment in that sector. However, if a member has mentioned a sector in its schedule and has not inscribed limitations, it will be presument to have accepted full market access commitments.

The commitments relate to one or more of the four modes of supply:

(i) supply of service from one country to another e.g supply of engineering design of a machine by a consultant in a country to a factory in another country;

(ii) supply of service in a country to the consumer of another country e.g the repair of a ship sent by a ship owner of another country;

(iii) supply of service by a supplier of one country through commercial presence in another country; e.g supply of banking services through a branch;

(iv) supply of service by a supplier of one country through presence of natural persons of one country in another country.

The Agreement thus implicitly recognizes four modes of service supply as: (a) Cross border supply (b) Consumption abroad, (c) Commercial presence and (d) Presence of natural persons.

Trade Related Investment Measures (TRIMS)

Prior to the signing of the WTO Agreement, the GATT system did not concern itself with investment matters. During the Uruguay Negotiations, regulating investments became a major issues for the developed countries. To this end, an Agrement on Trade Related Investment Measures was signed.

The salient features of the Agrement is that it prohibits restrictions on investments.

(i) The condition that an enterprise must purchase or use products of domestic origin at least up to a miminum extent is outlawed.

(ii) The condition that an enterprise must limit its purchase or use of an imported product up to a maximum value or volume related to its local production is also prohibited.

(iii) The Agreement specifies that the condition that the import of a product used in a local production process should be limited to a value or quantity related to the value or quantity of local production which it exports is inconsistent with Article XI of GATT 1994.

(iv) The condition that the enterprise can use foreign exchange for the import of a product used in the local production process only upto a maximum level which is related to the foreign exchange inflows on account of the activities of the enterprise is inconsistent with GATT.

(v) The condition that there will only be a limited export by the enterprise of its products is also inconsistent.

The agreement provides for notification of measures which are inconsistent with GATT 1994. Developing country members are required to eliminate these measures within five years while the least developed country's are to eliminate the same within Seven years.

Issues a Journalist must look for in analyzing a Treaty

(i) Full title of the treaty.
(ii) What are the objectives and subject matter of the Treaty.
(iii) Signatory and member states of the Treaty.
(iv) Date of Entry into Force.
(v) Are there any reservations.
(vi) What organs are established under the treaty and what are their functions.
(vii) How is the treaty to be implemented.

(viii) Interpretation and Dispute settlement under the treaty
(ix) Can ordinary citizens derive rights under the treaty
(x) Why was the treaty signed. (i.e) Objectives of the Treaty
(xi) Is the treaty potentially in conflict with other treaties
(xii) Is the treaty bilateral, regional or multilateral and why?
(xiii) What is the potential impact of the treaty on legal, social, policy or the political arena.
(xiv) What is the potential sectoral impact of the treaty to the signatory state economies.
(xv) Does the treaty require ratification.
(xvi) Has the treaty been signed or ratified by key states, if not, why?
(xvii) Where is the instrument of ratification to be deposited.
(xix) Are there amendement, termination and withdrawal provisions, if so, what are the procedures in place.
(xx) What are the fundamental principles of the treaty.
(xxi) What are the obligations imposed by the treaty upon member states.