(Conference Draft)

Is Kenya Contravening WTO Rules by Pursuing Industrial Promotion

George Owuor Jr.

2017 Law and Development Conference

Cape Town, South Africa
September 2017

Contents

1. Introduction

The paper examines the industrial policies being pursued by Kenya in the context of its obligations to the World Trade Organization (WTO). Over the last two decades, East African nations, through the East African Community (EAC), have pursued regionalization in their trading and laws. However, the last 5 years has shown that Members States of the Community, are pursuing more nationalistic agendas which are potentially putting them in contravention with both EAC and WTO rules.

Objective:

The objective of the proposed paper will be to:

- Analyze the WTO rules to understand the limits it places on industrial policy activities.
- Illustrate case studies on different industrialization policies developed by the Kenyan Government.
- Analyze the compatibility of the policies with WTO law.
- Provide context as to why the policy space being accorded to Kenya by the WTO is working or not working.

2. Industrial Policy and the WTO

A. Introduction to the WTO

The Marrakesh Agreement was signed by 124 nations in 1994, paving the way for the establishment of the World Trade Organization (WTO). The WTO established rules and regulations for trading in an increasingly globalized world. The WTO rules provide a level playing field for all countries and preclude the intervention of governments.

The global economic crisis of 2007 saw many developed and developing nations have their governments intervene in the 'level playing field' that the WTO had created in-order to boost their fledgling economics. Most of these interventions were heavily rooted in industrial policy tenets. There is still much debate as to whether many of the policies instituted by Governments contravened WTO law. There was a huge shift from the focus on financial industries to manufacturing. In 2017, this can still be felt in the populist governments in the United Kingdom, the United States, Poland and Tanzania.

It must be noted that any policy measure is not considered to be WTO inconsistent unless it is explicitly prohibited. When policy measures lie in a grey area, either there will be political pressure from other WTO members to remedy the situation or seek determination by a dispute settlement panel. If an area is not governed by WTO law, then a dispute claim cannot be brought against the issuing Member State.

Per Harsha Vardhana and Rashmi Jose[1] the most widely used industrial policies, especially in the promotion of the manufacturing sector are:

- Local content requirements;
- Government procurement;
- Rules related to state-owned enterprises;

[1] Hasrsha Vardhana Singh and Rashmi Jose, EIS Expert Group on Reinvigorating Manufacturing: New Industrial Policy and the Trade System, ICTSC, September 2016

- The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); and
- Regulatory requirement/standards.

B. Subsidies

In common industry terms, a subsidy is defined as a sum of money granted by the government or a public body to assist an industry or business so that the price of a commodity or service may remain low or competitive. However, under the Subsidies and Countervailing Measures (SCM Agreement), the definition is far more complex. The definition contains three basic elements: (I) a financial contribution e.g. grants, loans, equity infusions, loan guarantees, fiscal incentives, the provision of goods or services, the purchase of goods etc. (ii) by a government or any public body within the territory of a Member (iii) which confers a benefit. All three of these elements must be satisfied in order for a subsidy to exist.[2] A subsidy is a measure that governments take at their own expense.

A subsidy will still not be considered as 'illegal' under the SCM Agreement even if it fulfils the above mentioned definition. The subsidy must be specific to a particular enterprise or industry (i.e. there must be a level of specificity). Additionally, the subsidy must distort the allocation of resources within an economy for it to be illegal.

There are 4 types of specificity within the meaning of the SCM Agreement[3]:

- **Enterprise-specificity.** A government targets a company or companies for subsidization;
- **Industry-specificity.** A government targets a sector or sectors for subsidization.
- **Regional specificity.** A government targets producers in specified parts of its territory for subsidization.
- **Prohibited subsidies**. A government targets export goods or goods using domestic inputs for subsidization.

The SCM Agreement categorizes subsidies in two for better understanding and clarity on the issue. The first are those that are prohibited in entirety and the second are those that are actionable. By actionable it is meant that the second category are subject to challenge under the WTO dispute mechanism or to measures that will remedy the hurt caused by the subsidy (countervailing measures).

Prohibited subsidies are export subsidies and local content subsidies (which require prioritization of domestic goods over imported ones) that assist Article 3.1 of the SCM Agreement[4] states the following:

'Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning

of Article 1, shall be prohibited:

(a) subsidies contingent, in law or in fact whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

[2] Subsidies and Countervailing Measures Overview, World Trade Organization, https://www.wto.org/english/tratop_e/scm_e/subs_e.htm
[3] Subsidies and Countervailing Measures Overview, World Trade Organization, https://www.wto.org/english/tratop_e/scm_e/subs_e.htm,
[4] Article 3.2, Agreement on Subsidies and Countervailing Measures, WTO

As mentioned above, actionable studies are not prohibited. However, they are subject to challenge if they cause adverse effects to the interests of another Member. There are traditionally three types adverse effects:

- There is an injury to a domestic industry caused by the subsidized imports;
- Serious prejudice because of adverse effects in the market of a subsiding member or in a third country market;
- Finally, there is nullification or impairment of benefits accruing under the GATT 1994.

The SCM Agreement applies agricultural products subject to the provisions on the Agreement on Agriculture[5].

C. Local Content Requirements:

Local content requirements (LCR) are measures put in place to ensure that a percentage of inputs in an industry are obtained from domestic suppliers. Tenants of these requirements include '

• Classic mandatory LCR percentages for goods and services;

• Tax, tariff, and price concessions conditioned on local procurement;

• Import licensing procedures tailored to encourage domestic purchases of certain products;

• Certain lines of business that can be conducted only by domestic firms; and

• Data that must be stored and analyzed locally or products that must be tested locally.[6]

Use of local content requirements is prohibited by several WTO provisions. Article III.4 of GATT 1947[7] states that:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."

Article III.5 of GATT 1947 states:

"No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph"

The Agreement on Trade Related Investment Measures (TRIMS) under the WTO states that a 'local content requirement' refers to a government obliging enterprises operating in its territory to source all or part of the components of their manufacturing processes from domestic suppliers. It is prohibited under This practice is prohibited under TRIMs Article III:4 and is based on the national treatment principle

[5] Article 21, WTO Agreement on Agriculture

[6] Hufbauer, G. C., J. J. Schott, C. Cimino, M. Vieiro and E. Wada (2013) "Local Content Requirements: A Global Problem." Policy Analyses in International Economics, Peterson Institute, Washington, DC.

[7] Article III.4, General Agreement on Tariffs and Trade, 1947, World Trade Organization

prescribed in Article 111 of GATT 1947. TRIMS only covers trade in goods as services is covered in the General Agreement on Trade in Services (GATS).

Prohibition on local content does not apply to government procurement. Article III.8(a) of the GATT 1947 states:

"The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale"

As per Singh and Jose[8] the above exception does not extend to subsidies that are combined with local content implemented through government procurement, owing to the prohibition under Article 3.1(b) of the Subsidies Agreement. Disciplines become operational, however, if the country concerned is a member of the plurilateral WTO Agreement on Government Procurement.

D. Government Procurement:

Government procurement is the purchasing of any goods or services by governmental agencies. Both goods and services purchased by the Government do not strictly fall under GATT or GATS. However, there is a plurilateral agreement known as the Government Procurement Agreement (GPA) does cover this area, which only one third of the WTO membership has joined the GPA. Kenya is not party to this Agreement.

E. State Ownership:

A state-owned enterprise (SOE) is a legal entity that is created by the government to partake in commercial activities on the government's behalf. It does not need to be 100% owned by the government. However, this is different from when Governments own stocks. SOEs or state run operation are in existence to mostly develop new sectors that require large amounts of capital that normal investors would deem too risky to invest in. State owned enterprises can also include sovereign funds.

Matoo[9]states that 'Multilateral trade rules on monopolies and state trading enterprises (STEs) do not create any general obligations to change either the market structure or the pattern of ownership. Nor are these rules primarily designed to prevent anti-competitive behavior to achieve economic efficiency. Rather, their purpose is to prevent monopolies and STEs from behaving in a way that undermines the multilateral market access obligations undertaken by governments. This concern arises because such enterprises may be subject to government control or, in the case of monopolies, because market power creates scope for autonomous behavior which has the effect of subverting multilateral rules.'

Article XVII.1 of GATT states:

(a) Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges,* such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.'

[8] Hasrsha Vardhana Singh and Rashmi Jose, EIS Expert Group on Reinvigorating Manufacturing: New Industrial Policy and the Trade System, ICTSC, September 2016, pg. 6

[9] Mattoo, A. (1998) "Dealing with Monopolies and State Enterprises: WTO Rules for Goods and Services," in Cottier, T., Mavroidis, P. C., and Schefer, K. N. (eds.) State Trading in the Twenty-first Century, University of Michigan Press, Ann Arbor.

(b) The provisions of subparagraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations,* including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

Article VCII.2 goes further to exempt government procurement from these rules:

'The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods* for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment.'

Additional provisions include not breaching bound tariff levels and not implementing quantitative restrictions. In this area, the general spirit of WTO principles is the same as they are for other areas covered in the GATT. There are further measures taken to ensure that there is transparency in SOEs.

F. Intellectual Property:

The Agreement on Trade Related Intellectual Property rights (TRIPS) is vital in the protection and fair trading of goods and services who intellectual property must be protected. The discussion in this area, at a WTO level, mostly centers around the facilitation of transferring technology which is important for any developing country especially with the rise of China's influence in Africa. However, there is space under the Agreement for poorer countries to be slightly flexible.

G. Regulatory Requirements

Standards and regulatory requirements are genuine tools of ensuring that quality is maintained the in supply of goods and services. However, they are often used as an exclusionary tool to promote domestic over imported goods. Many developing countries, especially in Africa, find themselves unable to penetrate developed countries markets because of these requirements.

The most often used tool to bar access to markets is Article XX of GATT which states:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; … (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption …"

Further Article XXI states:

"Nothing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; or (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."

These kinds of requirements are covered in the Agreement on Technical Barriers to Trade and the Agreement on the Application of Sanitary and Phytosanitary Measures. regulations.

3. Kenya's Membership to the World Trade Organization

Kenya was among the founding members of the World Trade Organization (WTO) when the Marrakesh Agreement was signed in Morocco on 15 April 1994. Kenya is signatory to all WTO agreements including the General Agreement on Tariffs and Trade (GATT), the Agreement on Agriculture (AOA), the General Agreement on Trade in Services (GATS), the Agreement on Textiles and Clothing (ATC) and the Agreement on Trade-Related Intellectual Property Rights (TRIPS).

The Government is the main player in WTO negotiations and participation. The role of private sector and civil society is reasonable at best. The Ministry of Foreign Affairs oversees all WTO participation by the Government. However, this arrangement has come under fire from different quarters. The external trade docket is overseen by the Ministry of Trade, Industrialization and Cooperatives. This includes all trade matters. Due to internal disputes, the Ministry of Foreign Affairs used to hold the external trade docket, it was transferred to the Trade Ministry without WTO matters being transferred also. The above situation, leads to lack of coordination between the Ministries on WTO.

As per Odhiambo et al[10] Kenya established the Permanent Inter-Ministerial Committee (PIMC) in May 1995 to advise the government on all matters pertaining to the WTO. However, being an inter-ministerial committee, it excluded some key stakeholders, particularly those from the private sector and civil society. In recognition of the important role these actors could play in trade, in 1997 the government restructured the PIMC by including the private sector and civil society. Subsequently the PIMC was re-branded as the National Committee on WTO (NCWTO). Thus, the NCWTO is the body through which the government consults with the private sector and civil society on WTO matters.

4. Industrial Policy in Kenya

As the global trading landscape becomes increasingly protectionist, Kenya, typically a proponent of free trade principles, has increasingly been taking a more protectionist stance. This is attributable to the falling share of the manufacturing contribution to Kenya's GDP. Growth in the Kenyan manufacturing sector in 2016 has been on a downward trajectory, with the growth rate of 1.9 percent in the last quarter of 2016 being the sectors worst performance since 2015 when the country grew at 3.5%. This performance is also slower than the country's overall economic growth rate and the deceleration is at odds with Kenya's plan to industrialize by 2030.[11]

Kenya's industrial policy is guided by three important document; Vision 2030, the Kenya Industrial Transformation Programme (KITP) and to a lesser extent, the trade sector plan for the third medium term plan.

---

[10] Walter Odhiambo, Paul Kamau and Dorothy McCormick, Kenya's Participation in the WTO: Lessons Learned, http://wtocenter.vn/wto/case-studies/kenya%E2%80%99s-participation-wto-lessons-learned

[11] Kenya Association of Manufacturers, Driving Industrial Transformation for Job Creation and Inclusive Economic Growth, pg. 16

Vision 2030 is the long-term plan for the development of the country which includes various projects to be undertaken so that Kenya can be industrialized by the year 2030. The plan is divided into 5-year term plans. Industrialization projects fall under the economic pillar and the goal is to attain and sustain economic growth of 10 percent.

KITP is the implementation document that complements Vision 2030. It identifies projects that will double the amount of current formal manufacturing sector jobs to approximately 700,000 and add USD 2 to 3 billion to Kenya's GDP[12].

The 5-point action plan for the KITP is:

government seeks to create an industrial development fund to provide long term financing for industry.

1. Launch sector-specific flagship projects in agro-processing, textiles, leather, construction services and materials, oil and gas and mining services and IT related sectors.

2. Develop Kenyan small and medium enterprises (SMEs) by supporting rising stars and building capabilities with model factories.

3. Create an enabling environment to accelerate industrial development through industrial parks/zones along infrastructure corridors, technical skills, supporting infrastructure and ease of doing business.

4. Create an industrial development fund.

5. Drive results through the newly formed Ministerial Delivery Unit.

5. Examining Kenya's Industrial Policy Compatibility with WTO Rules

As Kenya embarks on its ambitious industrial policy journey, it is critical to examine the 3 of the Government's key industrialization projects.

A. Creation of Industrial Development Fund

The Ministry of Trade and Industry of Trade and Industrialization has announced advanced plans to create an Industrial Development Fund. The project involves the creation of a perpetual fund from where enterprises in export sector can draw low cost finance towards export processes; product development, market research, client development and promotion. Although yet to be operationalized, the fund will be implemented by 2020.

As the Fund, has not been set up, it is difficult to ascertain the legality of such an initiative in the context of WTO at this moment. However, as the plans are centered around providing low cost/preferential loans contingent on export, this could clearly fall under the category of export subsidies which has been discussed earlier in this paper.

Under Article 1 of the SCM, a subsidy exists if the following two conditions are both fulfilled: A government (or a public body within the territory of a WTO member) is providing either a financial contribution or income support, and this confers a benefit on a specific recipient. The requirement of financial contribution is well set out in the Agreement and case law. The contribution must be direct.

[12] Kenya's Industrial Transformation Program- Ministry of Industrialization- http://www.industrialization.go.ke/images/downloads/kenya-s-industrial-transformation-programme.pdf

However, if there is an indirect contribution, for instance the Government of Kenya delegating the responsibility of dispensing of the loan to a bank or requesting the bank to provide a firm a preferential loan, then there would be a different set of criteria. To constitute an indirect financial contribution, the action of the government must contain a notion of delegation (in the case of entrustment) or command (in the case of direction) that necessarily carry with them the following three elements: (i) an explicit and affirmative action, be it delegation or command; (ii) addressed to a party; and (iii) the object of which action is a task or duty.[13]

The Industrial Development Fund would provide loans. For a loan to be considered a subsidy, it would depend on the facts of the case. The International Trade Centre (ITC)[14] provides the following criteria:

❑ The type of information sought by the bank from any companies requesting a loan can be a factor. If the bank were to ask for information regarding export volumes/values, whether past or future, or similar information, a WTO panel may view this as an indication that the loan constitutes an export subsidy. The same comment applies to the eligibility criteria used by the bank, and considerations in deciding whether to grant assistance.

❑ Similarly, the text of the loan contract between the bank and any companies receiving the loans may be taken into account. If the contract sets forth a requirement to export all or part of the production of the new products, or a requirement not to sell all or part of the production domestically, then a WTO panel may consider that this fact points towards a conclusion that the loan constitutes an export subsidy.

❑ Sales performance targets set forth in the loan contract or other documents could be an indication. This factor may be seen in the light of the size of the market for the new products, which would likely be limited or inexistent. Thus, if a panel determines that the market for new products in the territory is non-existent or small, then the sales' performance target may be considered a hidden export performance target.

From the above, it is clear under WTO law that any Fund would need to be set up very carefully to ensure compliance. However, in this case of export subsidies, the prohibition does not apply to subsidies provided by least-developed countries (LDCs) and developing countries with a gross national product (GNP) per capita of less than US$1,000 per annum as per Annex VII of the SCM Agreement. Kenya is on the list that allows it to maintain export subsidies. This would mean Kenya would be in full compliance if indeed the Fund provided low cost loans.

B. Local Content Requirements

One of the main pillars of the KITP is the development of local content requirements to support the local manufacturing (e.g., the steel industry). Currently, the Government of Kenya has initiated the process of introducing a raft of legislation to ensure that local requirement regulations are entrenched in law to drive industrialization in the country. The draft bills include the Local Content Bill, the Energy Bill and the Petroleum (Exploration, Development and Production) Bill.

Currently, there are local content requirements that the Government has already put in place to operationalize the above[15]:

---

[13] Panel Report, US – Export restraints, para. 8.29.

[14] International Trade Centre, Export Promotion and the WTO, A Brief Guide, 2009, 10

[15] Beatrice Nyabari and Christine Murangi, The Place of Local Content in Infrastructure Projects in Kenya, http://www.ikm.co.ke/export/sites/ikm/news/articles/2017/downloads/THE-PLACE-OF-LOCAL-CONTENT-IN-INFRASTRUCTURE-PROJECTS-IN-KENYA.PDF

- exclusive preference to citizen contractors in the case of tenders worth less than Kshs. 500 Million, where such projects are wholly funded by the National Government, County Government or a Kenyan body;
- a requirement for foreign bidders participating in international tenders to source at least 40% of their supplies from citizen contractors;
- a prescribed margin of preference to be extended to bidders offering goods manufactured, assembled, mined, extracted or grown in Kenya;
- a requirement for public entities seeking to procure items not wholly or partially manufactured in Kenya to prepare a report detailing evidence of inability to procure local goods. As a condition of award, the successful bidder must cause technological transfer or create employment opportunities for citizens; and
- in the construction industry, a requirement for foreign contractors to be registered in Kenya – a process which requires them to enter a joint venture with local contractors or to subcontract to such contractors not less than 30% of the value of the contract work for which registration is sought. There is also a requirement for employees of such joint venture to be recruited from the Kenyan labor market

The Buy Kenya, Build Kenya policy is a key part of the Government of Kenya's industrialization plans by promoting and marketing local goods and services. The overall objective of Buy Kenya - Build Kenya Strategy is to increase competitiveness and consumption of locally produced goods and services in both the domestic and international markets. Specific objectives of the strategy include to identify commodities and services where the country has competitive advantage; to enhance competitiveness and consumption of locally produced goods and services; to enhance standards and quality assurance (facilitate branding, packaging, innovation and trade); and to facilitate capacity building, and enforcing transparency in private and public procurement procedures as well as strengthen Public Private Partnerships. The following programs will be undertaken:

- Profiling and piloting specific local products and services
- Advocacy - Awareness and education campaigns

This initiative will also include the directive that 40% of government procurement, should be locally sourced in addition to labels on supermarket shelves labelled 'Buy Kenya, Build Kenya' on all shelves that have locally produced goods.

i. Legality of 40% Locally Supplied Government Procurement Directive:

The national treatment principle established in Article III of the GATT espouses that Members must not accord discriminatory treatments between similar domestic and imported products.

Article III.1 states:

"The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production."

The Kenyan Government's directive on 40% of government procurement being supplied locally would be a classic example of discrimination between local and imported goods/services. However, Article III.8a offers relief for governments when it comes to procurement:

"The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale."

Kenya is not a member of the Government Procurement Agreement (GPA) The implementation of this directive will be extremely problematic because there may be concerns on two fronts. Firstly, that it would be difficult to ensure the quality standards for the goods and services offered are maintained. Secondly, the Kenyan Government is currently on an austerity drive. Locally sourced goods and services may not be the best value for money. This may reverse the intended effect of the Government, by propping up firms that cannot survive and compete in a fair market place.

ii. Sectors Reserved in Part or Whole for Locals:

There are also several regulations that the Government of Kenya imposes limiting either participation of foreign entities or requiring that for a foreign entity to do business, they must partner with a local firm.

Construction Industry:

Trade in services are often grouped around the 12 WTO GATS sectors: business services; communication services; construction and related engineering services; distributional services; educational services; environmental services; financial services; health-related and social services; travel-related services; recreational, cultural and sporting services; transport services; and other services.

During the Uruguay round of talks that led to the creation of the WTO, Kenya made several commitments on the General Agreement on Trade in Services (GATS). These partial commitments were in the construction industry. However, as Kenya looks to drive its industrialization agenda, some of the measures it has put in place, is against the commitments it has made to the WTO.

The construction industry in Kenya is vibrant with the output of the construction industry rising 13.1% in 2014, compared to 5.8% in 2013. This increase is fueled by the large amount of infrastructure work the government of Kenya is undertaking and to the country's real estate boom. The construction sector accounts for over 4.5 % of the country's GDP as per 2015.

The Government of Kenya has introduced many measures in this industry that restricts the participation of foreign entities. See Table 1 below of some of the restrictive measures:

Table 1: Construction Industry Restrictions- Kenya

National Construction Authority Act, 2011 (No. 41 of 2011)

Section	Text	Comments
15	(2) A person seeking registration under subsection (1) shall, in the case of a firm, be eligible for registration if at least one of the partners or directors of the firm possesses such technical qualifications, skills or experience as the Board may from time to time prescribe.	Local contractors are required to pay registration fees between 10,000 - 50,000 Kenyan Shillings depending on their classification, while annual practice renewal

18	(1) The Board may accredit a firm incorporated outside Kenya to carry out construction works in Kenya for a prescribed period where the firm meets the conditions prescribed by the Board and satisfies the Board that the firm— (a) intends to be present in Kenya only for the purpose of carrying out the specific works for which it has been contracted, for which, the sum payable is not less than the sum prescribed by the Board for the class of works in respect of which registration is sought; (b) has a certificate of compliance from the Registrar of Companies showing that it is, or immediately prior to entering Kenya, was, trading as a contractor in the capacity which satisfies the Board with respect to its suitability to serve the public as a qualified contractor; and (c) has lodged an affidavit with the Board to the effect that, once the contracted works are completed and the period of defects liability or maintenance has elapsed, it shall wind up business and shall not engage itself in the construction business within Kenya.	licenses cost between 5,000 - 10,000 Kenyan Shillings. On the other hand, foreign contractors pay a registration fee of 100,000 Kenyan Shillings and are restricted to categories of tenders they win. Foreign contractors applying for temporary registration are required to commit to subcontract "not less than 30% of the value of the contract" to local contractors.

National Construction Authority Regulations 2014

Section	**Text**	**Comments**
Definitions	"foreign contractor" means- (a) a firm incorporated outside Kenya; or (b) a firm incorporated in Kenya in which 51 per cent of the shares are held by a non-Kenyan;	51% shareholding held by non-Kenyan is trade restrictive but was developed in an attempt to protect local contractors and maintain quality standards.
3(2)(c)	(c) in the case of a foreign contractor- … (ii) sufficient proof of financial capability of the contractor	The equivalent requirement for local contractors: financial statements of the person or firm for the period immediately preceding the application, or proof of existence of a bank account in the name of the construction company

6	**Exemption from registration for local contractors** Any skilled construction worker or construction site supervisor carrying out construction works specified in the proviso to section 16(1) of the Act shall be exempted from registration as a contractor.	Section 16 (1) of the Act states: Meaning of "Contractor" (1) For the purposes of this Act, a person carries on business as a contractor where such person, for reward or other valuable consideration, undertakes the construction, installation or erection, for any other person, of any structure situated below, on or above the ground, or other work connected therewith, or the execution, for any other person, of any alteration or otherwise to any structure or other work connected therewith, and undertakes to supply— (a) the materials necessary for the work, or is authorized to exercise control over the type, quality or use of the materials supplied by any other person; (b) the labour necessary for the work, or is authorized on behalf of the person for whom the work is undertaken or any other person, to employ or select workmen for employment for the purposes of the execution of the work, whether under a contract of service or otherwise: If a person shall not be deemed to be a contractor if the work undertaken— (i) does not incur a cost exceeding such sum or sums as the Board may from time to time determine; or (ii) consists of a residential house for private use, not requiring a structural design. This is a barrier to foreign service providers as local contractors are exempt.
9	Restriction (1) Registration of contractors under NCA-1 category shall be open to both local and foreign contractors. (2) Any	Foreign contractors are not cleared for (NCA1) category i.e. NCA1: Unlimited contract value: which has various

	registrations that fall between NCA-2 to NCA-8 as set out in the Third Schedule of the Regulations shall be restricted to local contractors only.	classes: (i) Unlimited contract value [Contractors – Building] (ii) Unlimited contract value [Specialist Contractors] (iii) Unlimited contract value [Roads and other Civil Works]
12	12. Registration of foreign contractors (1) Subject to section 18 of the Act, a foreign person or firm shall be eligible for registration as a contractor on application to the Authority and payment of the prescribed fees. (2) Where a foreign firm applies under this regulation to undertake construction works or project under category NCA-1, such firm shall demonstrate to the Authority its capacity for such works. (3) The application under paragraph (1) shall be accompanied by— (a) the applicant's financial statements as at the date of the application; (b) detailed information on the value of construction works or projects done and completed locally in other jurisdictions; (c) proof of plant, equipment and machines holding; (d) an undertaking in writing that the foreign person or firm— (i) shall subcontract or enter a joint venture with a local person or local firm for not less than thirty percent of the value of the contract work for which temporary registration is sought; (ii) shall transfer technical skills not available locally to a local person or firm in	For local contractors, this is the process: 3. Application for registration as contractor (1) An application for registration as a contractor shall be made in the prescribed form and shall be accompanied by— (a) certified copies of certificates and other relevant documents as are necessary to prove qualification for registration: (b) certified copies of the shareholders' certificates of the company; (c) in the case of a trust, a copy of trust deed; and (d) financial statements of the person or firm for the period immediately preceding the application, or proof of existence of a bank account in the name of the construction company. The requirements for locals as seen above is much less than on foreigners. Further, the requirement that a joint venture must be entered into to the tune of 30% is restrictive. Additionally, the drafting in this law is ambiguous.

	such manner as the Authority may determine from time to time; (4) A registration under this regulation shall— (a) be valid for the period of the construction works contract or project in question; (b) where applicable be renewable every calendar year, failure to which the registration shall stand cancelled by the Board.	
16	16. Ratio of ownership of joint ventures (1) The ratio of ownership of a joint venture for construction works between a local firm and a foreign firm shall be at least thirty percent for the local firm. (2) The profits of the construction works shall be shared in line with the arrangements set out in paragraph (1). (3) The employees of the joint venture to which this regulation applies shall be competitively recruited from the local labour market, and recruitment or employment of foreign technical or skilled workers on such contract shall only be done with the approval of the Authority where such skills are not available locally. (4) The Authority may give such exemption on this regulation as the Board may deem appropriate	The ratio of ownership is restrictive. However, the exemptions that the authority may provide without a formal criteria leaves the measure open to abuse.

It is clear from the above table that some of Kenya's legislation goes against the commitments made to the GATS.

6. Conclusion

From the above, the main industrialization instruments used by the Kenyan Government, at large, are acceptable for use by the WTO. This is the case mainly because Kenya is a developing country and has not signed up to the Government Procurement Act. It would be factually correct to assume that the WTO, whilst limiting industrial policy for more developed nations, is going further to help developing countries like Kenya to pursue industrialization. However, the reality is that most developing countries such as

Kenya do not have the resources to drive the industrial policies and make use of the policy space accorded by the WTO.

Availability of resources to drive these policies aside, the implementation of the said policies sometimes has not yielded the results as hoped. For example, Kenya has been using export subsidies to try and increase the manufacturing sector's contribution to the national GDP. Year on year in the last decade, this contribution has been reducing. One problem may be that Kenyan firm have responded poorly to the availability of export subsidies. Implementation of the subsidies have often been misguided and opaque. Further, Kenya has touted an import substitution route which may also cause an anti-export bias.

Countries like Kenya, need to go back to the drawing board on issues of industrialization to ensure that the roadmap is one that is achievable and implementable.

7. List of References and Reading Material

1. Vinod K. Aggarwal and Simon J. Evenett*- Do WTO rules preclude industrial policy? Evidence from the global economic crisis. Bus. Polit. 2014; 16(4): 481–509
2. Sperling, Gene, 2012. "The renaissance of American manufacturing" Speech given at the conference on the renaissance of American manufacturing in Washington DC on 27 march 2012.
3. Did countries invent WTO rules because they didn't need the protection at their stage of development- "Weiss, Linda.2005. "Global Governance, National Strategies: How Industrialized States Make Room to Move Under the WTO." Review of International Political Economy 12 (5): 723-749
4. Chang, Ha-Joon. 2003. "Kicking Away the Ladder: Infant Industry Promotion in Historical Perspective." Oxford Development Studies 31 (1): 21–32.
5. Hufbauer, Gary Clyde, Jeffrey J. Schott, Cathleen Cimino, Martin Vieiro, and Erik Wada. 2013. Local Content Requirements: A Global Problem. Washington: Peterson Institute for International Economics.
6. Amsden, Alice H. and Takashi Hikino. 2000. "The Bark is Worse than the Bite: New WTO Law and Late Industrialization." The Annals of the American Academy of Political and Social Science 570 (1): 104–114.
7. Aggarwal, Vinod K. and Simon J. Evenett. 2012. "Industrial Policy Choice During the Crisis Era." Oxford Review of Economic Policy 28 (2): 261–283. Available from: < http://basc.berkeley.edu/pdf/Aggarwal%20Evenett%20Oxrep%202012.pdf >. Accessed 28 October 2014.
8. Weiss, Linda. 2005. "Global Governance, National Strategies: How Industrialized States Make Room to Move under the WTO." Review of International Political Economy 12 (5): 723–749.
9. World Trade Organization. 2013. Trade Policy Review: Brazil. Document WT/TPR/S/283/Rev.1. 26 July 2013. Available from: < http://www.wto.org/english/tratop_e/tpr_e/tp383_e.htm >Accessed 28 October 2014.
10. Lewis, Joanna. 2014. "Industrial Policy, Politics and Competition: Assessing the Post-Crisis Wind Power Industry." Business and Politics 16 (4): 511–547.
11. Lin, Kun-Chin. 2014. "Protecting the Petroleum Industry: Renewed government aid to fossil fuel producers." Business and Politics 16 (4): 549–578.
12. Oh, Seung-Youn. 2014. "Shifting Gears: Industrial Policy and Automotive Industry after the 2008 Financial Crisis." Business and Politics 16 (4): 641–665.
13. Chinese wind turbine manufacturers received individual grants ranging from $6.7m to $22.5m in exchange for using domestic parts and components instead of imported ones. Since 2008, China had provided several million dollars in such grants. See http://insidetrade.com/Inside-US-Trade/Inside-U.S.- Trade-06/10/2011/china-agrees-to-halt-wind-power-subsidies-rather-than-fight-us-in-wto/menu-id-710.html

14. Amsden, Alice (1999) 'Industrialization under the New WTO Law'. High-Level Round Table on Trade and Development, UNCTAD TD(X)/RT.1/7 December 1999, Bangkok.
15. Wade, Robert Hunter (2003) 'What Development Strategies are Viable for Developing Countries Today? The World Trade Organization and the Shrinkage of "Development Space"', Review of International Political Economy, 10(4): 621–44.
16. WTO Agreement on Agriculture
17. Agreement on Subsidies and Countervailing Measures, WTO
18. Subsidies and Countervailing Measures Overview, World Trade Organization, https://www.wto.org/english/tratop_e/scm_e/subs_e.htm
19. Hufbauer, G. C., J. J. Schott, C. Cimino, M. Vieiro and E. Wada (2013) "Local Content Requirements: A Global Problem." Policy Analyses in International Economics, Peterson Institute, Washington, DC.
20. General Agreement on Tariffs and Trade 1947
21. WTO Agreement on Trade Related Investment Measures
22. WTO General Agreement on Trade in Services
23. Hasrsha Vardhana Singh and Rashmi Jose, EIS Expert Group on Reinvigorating Manufacturing: New Industrial Policy and the Trade System, ICTSC, September 2016
24. Mattoo, A. (1998) "Dealing with Monopolies and State Enterprises: WTO Rules for Goods and Services," in Cottier, T., Mavroidis, P. C., and Schefer, K. N. (eds.) State Trading in the Twenty-first Century, University of Michigan Press, Ann Arbor.
25. Walter Odhiambo, Paul Kamau and Dorothy McCormick, Kenya's Participation in the WTO: Lessons Learned, http://wtocenter.vn/wto/case-studies/kenya%E2%80%99s-participation-wto-lessons-learned
26. Kenya Association of Manufacturers, Driving Industrial Transformation for Job Creation and Inclusive Economic Growth.
27. Kenya's Industrial Transformation Program- Ministry of Industrialization- http://www.industrialization.go.ke/images/downloads/kenya-s-industrial-transformation-programme.pdf
28. International Trade Centre, Export Promotion and the WTO, A Brief Guide, 2009, http://legacy.intracen.org/publications/Free-publications/Export_Promotion_WTO.pdf