

Submission of the Australian Fair Trade and Investment Network (AFTINET) on the policy of the Australian Government for the WTO Ministerial Meeting to be held in Doha, Qatar in November 2001.

Prepared by Dr Patricia Ranald

Convenor Australian Fair Trade and Investment Network (AFTINET)

Principal Policy Officer

Public Interest Advocacy Centre

Level 1, 46-48 York St

Sydney 2000

Ph 02 92997833

Fax 02 92997855

pranald@piac.asn.au

The Australian Fair Trade and Investment Network (AFTINET) is a network of churches, unions, environment groups, human rights groups and other community organisations and individuals which conducts public education and debate about trade policy.

AFTINET been very active in efforts improve community consultation about trade policy in Australia. We successfully lobbied JSCOT to hold a public Inquiry into Australia's relationship with the WTO. AFTINET and many of its member organisations made submissions to that inquiry. AFTINET also publicised the DFAT consultations held in July in capital cities around Australia, and many of its members attended those consultations.

This submission presents an overview of responses to the DFAT policy papers for the Ministerial Meeting. It does not represent the detailed policy positions of all member organisations. Members of the network will be making more detailed submissions on policy areas of particular interest to them.

AFTINET supports the development of trading relationships with all countries and recognises the need for regulation of trade through the negotiation of international rules. The public debate and subsequent collapse of the negotiations on the Multilateral Agreement on Investment (MAI) in the OECD and the failure to launch a new WTO negotiating round in Seattle in November 1999, demonstrated growing public discontent with the process and content of international trade negotiations. These experiences revealed the lack of transparency of Australia's trade policy processes and the need for community consultation and public accountability. We believe that changes are needed both to Australia's trade policy processes and to the international trade negotiation framework. In this context we do not support the introduction of new issues for a new round of WTO negotiations or the expansion of existing WTO agreements. Rather the current structure of the WTO and the content of its existing agreements should be reviewed. We note that many developing country member governments of the WTO share this view.

1) Transparency and NGO representation in Australian Trade Negotiations

Since 1995 WTO agreements have broadened in scope to affect many more areas of government policy. It is therefore essential that government policy be open, publicly discussed and publicly accountable before agreements are signed. Better consultation processes will enhance not only democratic decision-making, but also the effectiveness of trade policy. We also note that, despite the tabling of most treaty proposals for a limited time in parliament, decisions on trade agreements are made at the Cabinet level, not by parliament.

We welcome the current community consultations on Australia's relationship with the WTO. However, there are other negotiations which may also have profound impacts on Australian public policy, and on which there is no consultation. For example, there have been no consultations on the proposed US- Australia Free Trade Agreement, which may deal with many of the issues being canvassed in the WTO. The Trade Minister conceded that the US government has an agenda for the US- Australia free trade agreement which could require changes to current Australian policies on foreign investment, cultural policy on Australian content in film and television and quarantine policy (Sydney Morning Herald, April 4, 2001). Such proposals, whether they are made through the WTO or through bilateral agreements, would remove these vital areas of public policy from national public accountability. Bilateral and regional agreements are becoming increasingly important in the light of uncertainty about a new WTO round. It is therefore essential that the community be consulted about them.

While we welcome the current consultation process, we note that policy positions for many areas of the WTO discussion paper (like the trade in services negotiations) were

developed and put forward in WTO meetings before the community consultation occurred.

We welcome the development of an Advisory Panel on the WTO. However we note that this panel deals only with the WTO and does not cover other important trade policy areas, including regional agreements and bilateral agreements. Furthermore, current representation of community organisations on the WTO Advisory Panel is too narrow. Only 4 out of 16 representatives are from community organisations. Nine are from business or industry associations.

Recommendations:

Community consultation sessions should take place on all aspects of Australia's policy, not only on the WTO. They should be well publicised in advance, free of any costs, held at convenient times and locations and have time for genuine input from the community.

Consultation and public debate on policy positions should take place before the development of the Australian government's policy positions and before negotiations.

The Australian government's policy for negotiations should be public and documents should be made available.

There should be full and parliamentary scrutiny and debate on draft trade agreements before they are signed.

There should be a general trade advisory panel which deals with all areas of trade policy, including the WTO, regional agreements and bilateral agreements. Such a panel should include representatives from a wide range of community organisations. There should be a balance between community and business representation

Non government community organisations should be included in government delegations to the WTO, with a balance between community and business representation.

2) Review of WTO structures and agreements

The Seattle WTO meeting revealed widespread criticism of WTO structures and agreements by many WTO member governments from developing countries. These governments have sought changes to WTO structures and reviews of existing agreements. Civil society organisations have also sought changes to WTO structures and review of existing agreements.

The WTO has made some improvements to the numbers of documents available on its website. However, not all documents are made available. The timing and criteria for making documents available is not clear. Documents from dispute panels are still not fully available and dispute hearings are still held behind closed doors.

WTO meetings are still held behind closed doors. The WTO secretariat has held some meetings and symposiums with NGOs. However they have been held mostly in Geneva and the numbers are strictly limited. These arrangements are very restricted compared with the arrangements for NGOs in other international organisations like the UN.

The decision to hold the next WTO Ministerial meeting in Doha, Qatar is symbolic of the continuing lack of transparency and access to WTO meetings. Access to the Doha meeting is restricted to those organisations which were able to apply for accreditation to the WTO by July 2. Those who are accredited must then also be granted an entry visa by the Qatari government. Travel to Qatar and accommodation in Doha are both very costly and the number of places available is strictly limited.

There have been no real changes to the structure of decision-making in the WTO. The drafting of documents and the consensus process is still dominated by the economically powerful quad countries. As the DFAT discussion paper acknowledges, many developing country governments still lack the resources to attend relevant meetings and have effective input.

Developing country governments are demanding reviews of existing agreements to address difficulties they have with implementation of them. These include the agreements on Agriculture, Trade Related Investment, Services and Intellectual Property rights.

Recommendations

Review of existing WTO agreements

The Australian government should support a comprehensive review of existing WTO agreements before any new negotiating round can be contemplated. The terms of reference for such a review should include:

- *review of the social impacts of WTO agreements in both industrialised and developing countries using the criteria of UN international agreements on human rights, labour rights, health and safety and the environment*
- *review of the adequacy of the definition of special circumstances of developing countries in WTO agreements and the provisions for dealing with them.*

Structural change

The Australian government should seek the following changes to WTO structures and processes

- *open public debate at major WTO meetings and publication of all documents;*
- *changes to decision-making structures to give more voice to smaller and developing countries through utilisation of the voting provisions in the WTO constitution;*

- *increased technical and funding assistance for developing countries to assist meaningful participation and*
- *access for non-government observers as occurs for UN meetings*

3) The WTO Disputes Process

Under the WTO disputes process, governments must seek to resolve disputes through negotiation and conciliation. If this fails, governments can complain about other government's regulation to a disputes panel of trade law experts which has strong powers of enforcement over member governments. The panel can allow the successful complaining government to ban or tax the exports of the losing government and can extend these sanction powers to other governments.

The existence of a panel is in theory an advance over the use of unilateral sanctions by the most powerful economies. However the United States, for example, still uses unilateral sanctions in addition to using the WTO process.

The difficulties for developing countries in using the disputes process are reflected in the statistics. Although developing countries make up the vast majority of WTO members, only one quarter of the complaints to the dispute panel has come from them.

Unlike most national and international judicial processes, the disputes process is conducted behind closed doors and there is limited public access to documents. Information on decisions is difficult to access and the language is obscure. This lack of transparency is unacceptable for a process which is now setting precedents in international law and this has been criticised by many international legal experts (Howse and Mutua, 2000, Van der Borgh, 1999).

Usually only governments are heard by the disputes panel. Environmental organisations have established a legal right to appear as *amicus curiae* representing the broader public

interest as is the case in most national and international judicial processes. However there is still resistance to this by some parties and panels are not bound to consider the evidence of public interest groups.

Since it operates within the context of WTO agreements, the panel must give priority to free trade over other issues. Governments must use the least trade restrictive forms of regulation. The panel's decisions are building up a body of trade law precedents on an *ad hoc* basis which can undermine legitimate national regulation in areas like health and safety, the environment and industry development policy .

Australian policies and laws have been affected by this process. An industry development subsidy to the Howe leather company was declared inconsistent with WTO rules by the disputes panel after a complaint by the US government. Australia's quarantine rules prohibiting the import of fresh salmon were also found to be a barrier to trade. Historically Australia as an island continent has been free of diseases found elsewhere and has had higher quarantine standards than other countries, including banning of some imports to prevent any risk of disease. Among the reasons for the WTO dispute panel decision was the argument that a low level of risk of disease was acceptable. The Tasmanian government has refused to accept this risk and has maintained its ban on fresh salmon imports. A Senate Inquiry also found that the salmon decision could "set a precedent which may undermine the quarantine requirements in other areas" (Senate Rural and Regional Affairs and Transport Legislation Committee,, 2000: 179)

Recommendations

The Australian government should support the following changes to the disputes process:

- *The disputes process should recognise the principles enshrined in UN agreements and the right to have national regulation based on the principles of those agreements;*
- *the disputes process should be public, as are most national and international judicial processes;*

- *all documents and decisions should be publicly available, with summaries of decisions in plain language;*
- *increased technical and funding assistance for developing countries to increase their access and*
- *community organisations representing bona fide public interest issues should have the right to be heard and their evidence should be considered with other evidence.*

4) Trade in Services

The current GATS agreement has certain clauses which recognise in principle the right of governments to provide and fund public services and to regulate public services. Also many GATS provisions only apply to those service sectors specifically listed by governments.

The DFAT discussion paper notes that the GATS agreement addresses investment issues because the sale of services often requires direct investment. Once a service provider is established it must be treated in the same way as a national provider. Some commentators have argued that this provision could be expanded to introduce some aspects of the Multilateral Agreement on Investment (MAI) (Sciarra, 1998). AFTINET strongly opposed the MAI and opposes any such proposals for the reasons set out in the discussion on investment below.

The definition of public services in the GATS agreement is ambiguous. The DFAT paper supplies only the first half of the definition in the agreement. The definition of a public service includes the words “a service supplied in the exercise of government authority” but adds “supplied neither on a commercial basis nor in competition with one or more service providers”. This leads to a limitation or at least an ambiguity in the exclusion of

public services, since many public services have been exposed to private competition through privatisation and competitive tendering policies. As the government of British Columbia has put it, the range of public services which fit this definition is quite small. Many parts of Australia's public health system and our public education system face competition from private providers.

Most governments, including the Australian government, have not listed public services like health and education, public transport or cultural and media services for full coverage by the GATS agreement. If there is no intention to change this policy, we urge the government to argue for the unambiguous exclusion of such services from the GATS and other trade agreements.

Most community concern about the GATS agreement is about the proposed changes to the agreement which are now being negotiated as part of the "built-in" negotiations on GATS, which will proceed whether or not there is a new round of WTO negotiations, or which may be incorporated into a new round .

Proposed changes include the application of a "necessity test" and a least trade restrictive test to some government regulation of services in Article VI. 4 of the GATS. These areas include qualifications, licensing requirements, and technical standards, all areas which are extremely important for the regulation of access to services in the public interest. Such a test could mean that regulation could be more easily challenged under the WTO disputes process and possibly defined as barriers to trade.

An EC discussion paper dated 24/2/01 for the GATS Working Party on Government Regulation argued that the necessity test raises the question of whether regulation is necessary and whether it achieves legitimate objectives. It then makes the observation that the same objectives may not be shared by all member governments, but attempts to devise a series of legitimate objectives. Such a list would surely be a restriction on the right of governments to regulate.

The test would also require that regulation be least trade restrictive in its application. One of the suggested tests for this is comparison with internationally recognised standards. In some technical and health and safety areas, international standards reached through consensus and compromise are lower than national standards. Also previous WTO disputes panel decisions which apply least trade restrictive criteria have given far more weight to trade considerations than to public interest issues.

The attempt to restrict policy objectives for regulation, the application only of existing international standards and the application of least trade restrictive criteria could have a detrimental effect on innovative areas of regulation or on regulation which addressed specific national conditions.

For example, the NSW government, following extensive community consultation, has recently introduced innovative regulation in the context of the introduction of competition into the retail electricity market. This regulation enables the entry of both domestic and international competitors but aims to protect consumers from the dramatic price fluctuations, company failures and power cuts which occurred recently under competitive regimes in the USA, notably in California.

If the necessity test and least trade restrictive criteria were applied, the NSW regulation, which does not exist in the USA, might not be regarded as necessary or least trade restrictive by US companies wishing to enter the NSW market. Under such a GATS regime companies might prevail upon the US government to lodge a WTO complaint. If this occurred previous decisions of the disputes panel do not inspire confidence that the disputes panel would give due weight to the public interest considerations which have been extensively debated in NSW.

Australia has supported a necessity test and the least trade restrictive criteria in a paper which was made available on the DFAT website, but which has now been removed. We ask the government to reconsider this position on the grounds that it may reduce the

ability of Australian governments at all levels to regulate essential services in the public interest.

We also understand that there may be proposals to apply "national treatment" rules to government purchasing and subsidies. Australian policies to assist local industry development through government purchasing could come under challenge if national treatment rules were applied. "National treatment" applied to government subsidies could mean that transnational corporations could compete for the public funding of health and education systems.

All of these important public policies should be determined through democratic processes at national and local levels, not through trade agreements.

The Australian government should

- *support a review of the impact of the GATS agreement before further negotiations;*
- *oppose any attempt to expand the investment provisions of GATS to include aspect of the MAI;*
- *support the clear exclusion of public services from GATS and other trade agreements;*
- *support the exclusion from GATS of all measures which support Australian culture, including limits on foreign ownership of the media, local content rules for film and television, and specific funding and other measures to support and encourage all forms of Australian art and culture;*
- *oppose any reduction in the rights of national regulation in the public interest, including the application of a "necessity test" and "least trade restrictive" criteria;*
- *oppose any measures including those relating to "national treatment" applied to subsidies which would undermine the use of purchasing policy for industry development or compel governments to give to corporations access to public funding of health and education systems*

5) Investment

The DFAT discussion paper indicates that most countries are dealing with investment through regional and bilateral agreements. The Australian government is not making proposals in this area but would be prepared to consider a limited WTO work program on investment as part of a broad-based market access round of negotiations.

AFTINET is strongly opposed to any agreements or measures on investment which seek to remove or weaken national government powers to regulate transnational investment.

This opposition arises from our experience of the draft Multilateral Agreement on Investment. This agreement would have prevented limits on foreign investment in general, or in particular industries, prevented requirements on foreign investors to use local products or train local staff and prevented the use of government purchasing to develop local industry. It also contained provisions to give transnational investors the right to compete for government funding for services like education and health. The MAI was a top-down agreement which would have included all areas of government law and policy which were not specifically excluded. Even the exclusions would have had to be rolled back over time. It also proposed and investor-state complaints mechanisms through which investors would have been able to sue governments for damages if they could argue that government regulation was a barrier to trade. This was a fundamental affront to democratic governance. It was modelled on the North American Free Trade Agreement, under which US corporations have successfully sued the Canadian and Mexican governments by arguing that health and environmental legislation were barriers to investors (Ranald 1999).

The draft MAI met with fierce opposition when it became public precisely because it impinged on so many areas of national public policy and regulation which are seen as essential for social, cultural and environmental development. The negotiations eventually collapsed in 1998.

Investment liberalisation can challenge domestic policies on industry development, preservation of national culture, environmental protection and national investment in strategic industries. For these reasons there is continuing strong community opposition to investment liberalisation. It is also opposed by many developing countries which wish to retain the right to regulate transnational investment and have local industry development policies.

Recommendations:

The Australian government should oppose proposals for WTO negotiations on investment.

The Australian government should not support proposals for bilateral or regional investment agreements.

The Australian government should oppose any proposals in the WTO or in bilateral or regional agreements for investor-state complaints mechanisms.

6) Government Procurement

Australia has not signed the voluntary agreement on government procurement which emerged from the Uruguay Round. There are sound reasons for this, since the agreement would prevent any use of government purchasing policy to assist local industry development. Australia still has some industry development policies linked to government procurement at both national and state levels, and should retain the option to develop such policies.

Some new policies of this type are now being developed in some states. Such policies should indeed be debated and determined democratically at the national and local level, not through trade agreements. Many developing country governments also oppose such

an agreement as they wished to retain the option of linking government procurement to industry development.

Recommendation

The Australian government should oppose proposals for a WTO agreement on government procurement.

7) Competition Policy

AFTINET supports national anti-trust legislation to curb the market power of large corporations. The last two decades have seen enormous growth in the size and market power of global corporations through global mergers. Many of these are now larger economic units than some governments. Australia has long-standing anti-trust legislation. However, the main impact of more recent national competition policy in Australia has been on public services and in areas of essential services like electricity, water, public transport and telecommunications. There is now a domestic policy debate about the social impacts of competition policy in these areas and the need for regulation to ensure equitable access to essential services. These issues need to be debated and determined democratically at the national and local level, not through trade agreements. Developing countries also require the opportunity to develop anti-trust and competition policy which suits their conditions.

Recommendation

The Australian government should oppose proposals for a WTO agreement on competition policy.

8) Environment

International law on the environment and health and safety is based on pre-eminent social values recognised by most governments through the UN. These values are enshrined various international environmental agreements.

The GATT Article XX provides that nothing in GATT agreements should prevent the adoption of measures necessary to protect human, animal or plant life or health, or measures relating to the conservation of exhaustible natural resources (World Trade Organisation 1995: 519). These clauses were developed before the adoption of the UN conventions and covenants on human rights and the environment. The preamble to the agreement establishing the WTO makes reference to raising standards of living, full employment, and environmentally sustainable development (World Trade Organisation 1995:6). These provisions are very basic compared with UN international agreements. However some commentators argue that they were intended to enable the WTO to take account of some international law in areas like human rights, health and safety and the environment, and should enable reasonable national regulation in these areas (Howse and Mutua, 2000: 11-12).

In reality, these clauses in the GATT and the WTO are too restricted and have been interpreted too narrowly in the context of trade law. Decisions of the disputes panel have found that environmental regulation, food safety regulation, and quarantine regulation can be defined as barriers to trade. These decisions are constructing a body of case law on which tends to undermine the principles of UN agreements and deny the right to regulation in these areas at the national level.

International trade law commentators have concluded that there are conflicts between aspects of trade law and other international law. For example, there are conflicts between individual and corporate intellectual property rights and the collective rights of indigenous people to their natural and cultural heritage (Coombe, 1998) . There are also

conflicts between aspects of trade law and the precautionary principle which is a principle of international environmental law (Charnovitz, 1998).

Recommendation

That the Australian government support revision of WTO agreements and processes to give clear recognition to the pre-eminence of UN international agreements on health and safety and the environment.

9) Human Rights and Labour rights

International law on human rights is based on pre-eminent social values recognised by most governments through the UN. These values are enshrined in UN Declaration on Human Rights, the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights.

The human rights of workers are recognised in the UN Declarations and Covenants. In addition, Australia and most other WTO member countries are also members of the International Labour Organisation. ILO members have endorsed the following basic rights for workers

- Freedom of Association
- The Right to Organise and the Right to Collective Bargaining
- Equality and Non-discrimination in the Workplace
- No Forced Labour
- No Child Labour.

Competition by governments to attract investment has led to the growth of export processing zones or free trade zones which often violate these rights. These are encouraged in developing countries by IMF structural adjustment programs, and by the WTO emphasis on rapid liberalisation and export development. These zones offer

transnational corporations concessions on taxes and tariffs, low cost infrastructure, and a low cost labour force, typically composed of young women.

The employment of women in free trade zones has been a key means of control over labour. Studies show that lack of access to equal pay with men, no maternity leave rights or child care result in low wages and high labour turnover (Caspersz, 1995). Women often have to resign upon pregnancy, and are sometime subjected to compulsory pregnancy testing, as has been documented in Mexico (Human Rights Watch Womens Project, 1996). Using male supervisors, employers also use socially constructed traditional patterns of masculine dominance and feminine deference to reinforce managerial authority in the workplace. Sexual harassment is also common. Many zones also have legal restrictions on the right of workers to organise and/or take industrial action. This prevents workers form organising to improve their conditions. Thus companies use gender inequality and violation of human and labour rights as a tool of labour control.

The favourable treatment for companies in zones has in the last decade often been extended to corporations producing for export but located outside the zones. In some cases, the restrictions on labour rights have also been spread more widely. In Malaysia, the government has banned union organisation in the whole of the electronics industry. In the Philippines, the use of short-term contract labour without organising rights, pioneered in free trade zones, has been spread throughout the economy. This is clearly leads to a downward spiral in which governments compete to reduce workers' rights.

Both the IMF and the WTO encourage the use of free trade zones through their stress on rapid trade liberalisation and export-led development, ignoring the violations of human rights and labour rights of workers.

Recommendations

That the Australian government support a review of the impacts of trade liberalisation and free trade zones on workers' rights as part of the general review of WTO agreements.

That the Australian government support revision of WTO agreements and processes to give clear recognition to the pre-eminence of UN international agreements on human rights and workers' rights.

That the Australian government support the establishment of an ongoing dialogue between the ILO and the WTO to examine how workers' rights can be safeguarded in the context of trade agreements.

10) TRIPS

The TRIPS agreement extends the intellectual property rights on patents for inventions to all forms of technology, including plants, and means that royalties must be paid for 20 years. This agreement is not a free trade agreement but one which extends monopoly rights . As two leading analysts of business regulation have said:

It was an implausible accomplishment to persuade a trade liberalisation regime to incorporate a major new form of trade regulation, to persuade a body concerned to increase competition in the world economy to extend the life of patent monopolies and other intellectual property monopoly rights. More, it was a remarkable accomplishment to persuade 100 countries who were net importers of intellectual property rights to sign an agreement to dramatically increase the cost of intellectual property imports (Braithwaite and Drahos, 2000: 203-4)

There is mounting evidence that the pricing and royalty payments of many essential pharmaceuticals place them beyond the reach of those in developing countries, and is leading to the death of many from diseases which could be treated with generic drugs.

The TRIPS agreement was intended to have exceptions to enable governments to ensure access to pharmaceuticals when required, for example, to manufacture essential medical drugs locally at affordable prices to treat epidemics. However, in practice, companies and governments have used the threat of legal action under TRIPs to challenge these actions by governments.

Problems with the TRIPs agreement have been highlighted by the pharmaceutical companies' case against the South African government and the subsequent withdrawal of the case following a global campaign against it by developing country governments and community organisations. The US government case against Brazil under the WTO disputes process has now been withdrawn. In both cases the companies were alleging that the local manufacture or importing of cheap generic medicines to treat the AIDS epidemic violated the TRIPS agreement. The TRIPS agreement should be revised to ensure that such cases cannot occur in future and to ensure access to essential medicines for those in developing countries.

There is also conflict between the collective rights of indigenous peoples and traditional farmers to plants, culture and natural heritage, and the rights of corporations to take ownership of them. There have been huge protests in India because traditional farmers refused to recognise corporate patent rights over plant varieties which they had developed over thousands of years.

There is also an ongoing debate about the extent to which it is appropriate to allow patents on life-forms, and the inconsistencies between the UN Convention on Biodiversity and the TRIPs Agreement.

Recommendations

The Australian government should support a comprehensive review of the TRIPs agreement, including the development of measures to

- *ensure access to essential medicines for use in treating epidemics in developing countries;*
- *recognise the collective rights of indigenous peoples and traditional farmers to plants and cultural heritage ;*
- *protect biodiversity and prevent the patenting of life forms consistent with the principles of the UN Convention on Biodiversity*

11) Agriculture

Much of the discourse about liberalisation of agriculture assumes equal benefits to all countries from freer trade in agriculture, and especially developing countries. In fact, the Uruguay round forced many developing countries to remove tariffs on subsidies on food and agricultural products without affecting the levels of direct payments made to farmers in the US and Europe. Many developing countries have removed their import barriers and been flooded with cheap imports from the US and Europe which are still effectively subsidised. Local farmers cannot compete in this situation, which leads to rural unemployment, poverty, urban migration and loss of food security (Cairns Group, 2000).

The move away from local food production to the production of cash crops for export can leave the poorest countries at the mercy of falling world market prices for their exports and rising world prices for food imports. This threatens food security as basic foods become unaffordable for the poorest. Many of the poorest food importing countries do not have the foreign exchange required to buy food.

We urge the Australian government to support measures, which will address the concerns

of developing countries about food security, poverty and rural development.

Recommendations:

The Australian government should support a review of the Agreement on Agriculture, which would ensure that developing countries could take measures and obtain assistance to address poverty, rural development, rural employment and diversification of agriculture. Such measure would include

- *recognition of food security as an important principle*
- *flexibility in import tariffs*
- *domestic support measures for food security programs*
- *adequate technical assistance for food security provisions*
- *adequate financial assistance to address efficiency and diversification issues*
- *assistance to protect the interests of food importing developing countries and to assist them to cope with foreign exchange shortages*

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