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In Defence of the ACP Submission on Special and Differential Treatment in GATT Article XXIV

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Rationale to the ACP submission

Negotiations between the African, Caribbean and Pacific (ACP) states and the European Union (EU) on economic partnership agreements (EPAs) pose significant challenges, and possible opportunities. The challenges are to design the contents of EPAs that would promote the opportunities agreed upon in the Cotonou Partnership Agreement (CPA), that EPAs would be instruments of development and fuller integration of ACP states into the world economy, and to strengthen their regional integration processes. Critical to this process is for ACP states to secure in concrete, explicit, operational and mandatory terms, special and differential treatment (SDT) in EPAs while ensuring their WTO-compatibility. This challenge has become important, *inter alia*, in light of the 'Stop EPAs Campaign' launched in November 2004 by some non-governmental organisations.[1] These civil society groups oppose EPAs in their current form, which includes reciprocity between ACP states and the EU. Such concerns with regional trade liberalisation are not only specific to the EU and ACP states, but to the international trading community at large, and need to be addressed in providing global legitimacy to and acceptance for regional trade agreements (RTAs) formed between developing and developed countries as instruments of both economic development and social development.

The CPA stipulates that SDT is a key principle in ACP–EU trade relations and in the international trading system generally (Article 37). It then provides that the SDT will be built into the EPAs in the form of flexibilities for ACP states in respect of: *(i) the duration of a sufficient transitional period; (ii) final product coverage, taking into account sensitive sectors; and (iii) asymmetry in terms of timetables for tariff dismantling*. Furthermore, the CPA provides that the ACP states and the EU are to 'co-operate closely and collaborate in the WTO with a view to defending the arrangements reached, in particular with regard to the degree of flexibility available'. In short, the development-oriented EPAs must contain SDT for ACP states, and both the ACP states and EU should work in the WTO to ensure that EPAs with SDT are defended (and pass the test) *vis-à-vis* compatibility with WTO rules then existing.

The need for flexibilities in EPAs is developmental in nature. SDT for ACP states under EPAs will be important to facilitate smooth and gradual transitions and adjustments of their economies towards a more open and competitive trading environment with their major trading partner, the EU. The case for SDT is very strong as many ACP states, including least-developed countries (LDCs), have small and vulnerable economies and industries. Many are commodity-dependent economies, deriving a substantial proportion of their export revenue from one or two commodities such as bananas, sugar, cotton, coffee or minerals. For example, four commodities account for over 70 per cent of the exports of Burundi, Ethiopia, Gambia, Guinea-Bissau, Malawi, Rwanda, Solomon Islands, Sudan and Uganda. For these countries, the adjustment costs that would arise from increasing liberalisation and eventually implementing full reciprocity with the EU (or other trading partners) can bring about adverse results in the form of loss of government revenue without alternatives to fill the gap; loss of

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competitiveness in already small and weak domestic industries and enterprises which, in turn, will lead to loss of industries with few alternatives to diversify into; and weak social security systems in which to cater for increasing unemployment. Instead of serving as an instrument for development of ACP states, EPAs with strict reciprocity could engender loss of local ACP industries due to competition from EU products, and even undermine their exports into the EU. Such concerns underpin the case of SDT in the CPA generally and in EPAs specifically.

Whether or not future EPAs that incorporate SDT can meet the test of WTO-compatibility depends on (i) how such SDTs are specifically defined under EPAs, and (ii) how WTO disciplines applying to RTAs treat such SDTs and most importantly, any such disciplines that may be agreed upon under the Doha Round should be in place prior to the conclusion of the EPAs. Regarding EPAs with SDTs, the actual content will depend on current ACP–EU negotiations.[2] The ACP states are currently negotiating market access conditions with the EU under the framework of reciprocal free trade agreements that would include, as a key component, SDT for ACP states. It would be important to address such SDTs in EPAs as a cross-cutting issue for all ACP regions, so as to achieve uniformity in defining the flexibilities that would be accorded to ACP states. A disaggregated, regional-based approach to SDT in EPAs should be avoided as it would result in differentiated SDTs to different regions and may weaken the SDT. The EU is committed under the CPA to provide SDTs to ACP states so there is no question about EPAs with SDT – the issue is to what extent and in what form would the SDT exist.

Regarding WTO rules on RTAs, the ACP states have taken the position that the current terms and conditions in the WTO under which RTAs (involving developed and developing countries) exist and operate should be reformed to provide developing countries with SDTs. Such WTO rules pertain primarily to GATT 1994 Article XXIV and the Uruguay Round Understanding on this article.[3] The Doha negotiations afford an avenue for the ACP states to negotiate such improvements in WTO law, as it specifically stipulates in paragraph 29 of the Doha Ministerial Declaration[4] that WTO members would negotiate to clarify and improve disciplines and procedures under existing WTO provisions applying to RTAs, and that 'the negotiations will take into account the developmental aspects of regional trade agreements'. The rules negotiations would affect the way GATT 1994 Article XXIV terms and conditions are interpreted and applied, and hence the future determination of whether or not SDTs provided under EPAs are consistent with existing GATT Article XXIV criteria. Importantly for EPAs, the negotiations should not be concluded until the reformation of GATT Article XXIV has been achieved in terms of incorporating SDTs for developing countries. This point was made in the 'AU's Ministerial Declaration on EPA Negotiations' adopted by African Union (AU) Trade Ministers in June 2005, to the effect that 'Conclusions of the market access aspects of the EPAs should take place upon completion of the amendment' (the amendment referring to the amendment of GATT Article XXIV to reflect special and differential treatment).[5]

Key aspects of the ACP submission

The ACP states submitted to the WTO on 28 April, 2004 a proposal on 'Developmental aspects of regional trade agreements and special and differential treatment in WTO rules: GATT 1994 Article XXIV and the Enabling Clause'.[6] The proposal aims to formally and explicitly incorporate SDTs in the application of terms and conditions set out in paragraphs 5–8 of GATT 1994 Article XXIV when these are applied to RTAs formed between developed and developing countries or North–South RTAs, as will be the case of future EPAs. It specifically responds to the aspect of the Doha Work Programme (DWP) in paragraph 29 that provides that the developmental aspects of RTAs will be taken into account in the negotiations to clarify and improve existing disciplines affecting RTAs.

The key objective in the ACP submission is to introduce SDT into GATT Article XXIV and, in doing so, secure legal security of future EPAs with SDTs from legal challenges as to their compatibility with WTO disciplines. Such security will enable EPAs to have a strong component of SDTs, which will enable ACP states to adjust their economies at

a pace and level consistent with their resources and ability to develop the competitiveness necessary to trade with the EU on a reciprocal basis in a distant future. There are four key aspects of the ACP submission as follows:

- Article XXIV:8(a)(i) and (b) on 'substantially all the trade' (SAT) in respect of duties and other restrictive regulations of commerce;
- Article XXIV:5(c) and paragraph 3 of the 1994 Uruguay Round Understanding on this article on the 'reasonable period of time' in respect of the transition period for RTAs;
- Article XXIV:7 and paragraphs 7–10 of the 1994 Uruguay Round Understanding on notification, reporting and review of RTAs in the Committee on Regional Trade Agreements (CRTA); and
- Paragraph 12 of the 1994 Uruguay Round Understanding on dispute settlement.

The core pillar of the ACP submission is to introduce **SDT into the SAT requirement in respect of duties**. It proposes that appropriate flexibility shall be provided to developing countries in meeting the 'substantially all the trade' requirement in respect of trade and product coverage. This can be provided through the application of a favourable methodology and/or lower (i.e. differentiated) threshold levels in the measurement of trade and product coverage of developing countries' parties to a North–South RTA in meeting the SAT requirement.

The ACP also proposes an **SDT element on the SAT requirement in respect of 'other restrictive regulations of commerce'** (ORRCs). The proposal aims, *inter alia*, to apply a flexible interpretation that allows developing countries' members of a North–South RTA to apply contingency protection measures including safeguards and non-tariff measures on intra-regional trade. While contributing to the clarification of WTO rules, this is aimed at preserving the right to apply trade defence measures in future EPAs, if needed. The interpretation of ORRCs has been a major systemic issue, as depending on its interpretation an RTA member may or may not be allowed to impose such trade remedy measures to other RTA partners.

The ACP proposal on **SDT in respect of the transition period** for RTAs is another core element, buttressed by the need for a secure and sufficient period that would facilitate smother integration and adjustment of ACP economies under EPAs. It is comprised of two aspects. First, the ACP submission seeks to clarify that the full provisions of an RTA (primarily the reciprocal free trade agreement – FTA) would become fully operational at the end of the transitional period – in other words, ACP states would not be required to liberalise fully or substantially at the start of the formation of an EPA, but towards its end date. Specifically, the substantive and procedural requirements of GATT 1994 Article XXIV:5–8 becomes applicable only after the transition period expires. Currently, there is no agreement among WTO members as to when exactly the substantive disciplines of GATT 1994 Article XXIV start to apply to an RTA – at the beginning or at the end of the transition period. Second, the ACP proposal seeks to ease the conditions under which a transition period of longer than 10 years can be authorised and thus broadening the scope of the 'exceptional circumstances' under which such extensions can be granted. It seeks to link the transition period to the trade, development and financial conditions of developing countries, so that the ACP states' need for longer transition period under EPAs, which ACP states argue should not in any case be less than 18 years, can be legally sanctioned under GATT Article XXIV. The Commission for Africa Report says that a transitional period of over 20 years if necessary should be provided.

Another aspect of the ACP submission concerns the incorporation of **SDT into the procedural requirements** for RTAs in terms of notification, reporting and review by the CRTA. It has two aspects. First, there is an exhortation to WTO members to give due consideration to 'developmental aspects' when reviewing North–South RTAs and establishing their conformity. The injunction is that the developmental aspects of a North–South RTA, which would focus mainly if not solely on developing country members, should receive primacy in the procedural aspects of notification and review of RTAs. Second, the ACP submission calls for more streamlined, efficient and less onerous transparency

and examination procedures for North–South RTAs. This is a call for a simpler examination process in the CRTA, unlike the normally long and rigorous examination of RTAs that has come to characterise the examination of RTAs by the CRTA in the post-WTO period (even if such examination has so far not led to a concrete decision on the conformity or not of an RTA). An easier examination process is being requested owing to the limited administrative, human and financial capacities of many developing countries.[7]

The ACP submission relating to dispute settlement aims to guarantee the legal security of North–South RTAs from possible legal challenges. It proposes that the jurisdiction of the CRTA to determine the WTO-compatibility of RTAs is not unduly overridden by dispute settlement procedures and ruling. The proposal seeks to ensure that the CRTA holds precedence over the dispute settlement body on matters relating to the WTO compatibility of RTAs.

The arguments put forward by the ACP submission, primarily on less than full reciprocity and longer transitional period, have received support from the Report of the Commission for Africa on 'Our Common Interest'.[8] The Report recommends that in the context of making special and differential treatment work better for Africa and other developing countries, a review of Article XXIV of the GATT may be useful (paragraph 77) in order to prioritise development and better meet the needs of developing countries by: allowing developing countries flexibility to protect sectors as necessary (paragraph 111); reassessing and reducing reciprocal requirements in free trade agreements (paragraph 113); reducing reciprocal demands to a minimum, and over appropriate timeframes, up to 20 years or more if necessary (page 289). In March 2005, the United Kingdom's Department for International Development (DFID) and Department for Trade and Industry (DTI) issued a joint policy statement on EPAs in which it among other things expressed that 'EPAs must be designed to deliver long-term development, economic growth and poverty reduction in ACP countries' and to this end a number of policy recommendations were made including that:

- 'EPAs must ensure that ACP regional groups have maximum flexibility over their own market opening. The EU should therefore offer all ACP regional groups a period of 20 years or more for market opening, on an unconditional basis. Each regional group should be offered this full period.'
- 'In addition, the EU should propose within the WTO that Article XXIV of the General Agreement on Tariffs and Trade should be reviewed as suggested by the Commission for Africa, in order to reduce the requirements for reciprocity and increase the focus on development priorities.'[9]

The ACP submission received further support in the various preparatory meetings of developing countries for the July 2005 'approximation' of the Doha Round and for the 6th WTO Ministerial Conference in Hong Kong, China (13–18 December 2005). This implies that a suitable solution and response to the ACP submission must be an important part of any development package that will emanate from the Doha Round. For example, the issue was discussed by the African Union Conference of Ministers of Trade 3rd Ordinary Session (5–9 June 2005, in Cairo, Egypt) and highlighted in the common political and negotiating platforms adopted by that meeting in the form of 'The Cairo Declaration and Road Map on the Doha Work Program' and the 'AU's Ministerial Declaration on EPA Negotiations'.[10] In the Cairo Declaration and Road Map, African Trade Ministers advocated the following on WTO negotiations on rules for RTAs:

- 'The development aspects are taken fully into account in the negotiations aimed at clarifying and improving disciplines and procedures relating to regional trade agreements.
- Clarification and improvement of disciplines and procedures relating to regional trade agreements as mandated under Paragraph 29 of the Doha Ministerial Declaration should not reopen the Enabling Clause under transparency or systemic issues in RTA negotiations as this would not meet Africa's developmental needs.
- Negotiations on systemic issues must address the principle of less than full reciprocity, asymmetry

in market access and the development concerns of African countries entering into regional trade agreements with developed countries under GATT 1994 Article XXIV and GATS Article V.'

In the Declaration on EPA negotiations, the AU Trade Ministers adopted the following stance:

> *'We reiterate that Article XXIV of GATT needs to be appropriately amended to allow for necessary special and differential treatment, less than full reciprocity principle, and explicit flexibilities that are consistent with the asymmetry required to make EPAs pro-development. Conclusions of the market access aspects of the EPAs should take place upon completion of the amendment.'*

The 4th meeting of Trade Ministers of LDCs in June 2005, adopted a common platform for the Doha Round in the light of the 6th WTO Ministerial Conference[11] that included the following two negotiation priorities supportive of the ACP submission:

- 'Providing LDCs adequate policy space to engage in regional trade arrangements in the pursuit of their development goals and objectives;
- The need for the negotiations on systemic issues to address the principle of less than full reciprocity, asymmetry in market access and the development concerns of LDCs entering into regional arrangements with developed countries under the GATT 1994 Article XXIV and GATS Article V'.

Reactions by the WTO membership to the ACP submission

The WTO Negotiating Group on Rules has considered the ACP submission and some WTO members have raised a number of questions and comments. Also, a written submission to the ACP states has been made by Japan.[12] These comments are useful in enabling the ACP states to better understand the concerns of WTO members regarding the ACP submission and to respond to them, as expected by the WTO membership. Many of the comments seek to dismiss the case for SDTs in GATT 1994 Article XXIV, while others raise technical questions on the substantive and procedural aspects of the ACP submission. The ACP states need to respond to these queries in order to maintain the case for explicit SDT in GATT Article XXIV, even if it means revising the original submission to reflect some of these comments.

The comments made by WTO members can be categorised in six typologies, namely that (1) It is wrong to assume GATT Article XXIV is bad for development; (2) GATT Article XXIV is already flexible; (3) SDT should be discussed later; (4) Is this a covert way to cover unilateral preferences under GATT Article XXIV?; (5) What disciplines would apply during transition period?; and (6) It is not acceptable to weaken dispute settlement. These comments are reflected in the reports of the minutes of the meetings of the Negotiating Group on Rules.[13] Each of these comments and possible responses to them are examined below.

(1) 'It is wrong to assume GATT Article XXIV is bad for development'

Comment: Comments of this nature question the underlying assumption and philosophy of the ACP submission. They assert that it is erroneous for the ACP states to assume that compliance with GATT Article XXIV hinders development – that such compliance is inherently anti-development. They argue that in fact strict adherence to the GATT Article XXIV conditions is more appropriate for the purpose of development. Such comments therefore dismiss the value of SDTs for developing countries by asserting that strict adherence to the GATT Article XXIV conditions is more appropriate for the purpose of development of RTA members, including developing countries. A common element in these comments is the view that 'flexibilities' to be provided for developing countries under North–South RTAs cannot necessarily be considered as 'development friendly'. It is thus necessary to reach a common understanding as to what is meant by 'development friendly' RTAs.

Response: Typology (1) comments are based on the simplistic assumption that reciprocal trade liberalisation would automatically lead to trade and economic growth, with the attendant development and welfare gains for all parties. This assumption does not give sufficient consideration to the specific

developmental situation of low-income developing countries, particularly LDCs.

The ACP submission does not assume that compliance with GATT Article XXIV is anti-development. It points out the eventuality that strict compliance, such as full reciprocity, can cause significant adverse socio-economic impacts on developing countries, especially for those whose imports are highly concentrated on their main trading partners, who heavily rely on tariffs for government revenue and whose domestic economy is competitively weak, undiversified and vulnerable. ACP–EU negotiations of EPAs are unique in the sense of the sheer difference in the level of development between the two parties engaged in the negotiations – few developing countries have ever (yet) concluded such extensive RTAs with developed countries. This principle is already reflected in current practice. SDT and flexibilities have been considered and agreed to be necessary for developmental purposes in existing RTAs. They include certain product and sector exclusions, or transition periods, or exemptions of LDCs. These practices testify to the need for any RTAs to incorporate certain flexibilities for policy, economic and political considerations for the benefit of members who are economically weaker *vis-à-vis* others. The ACP proposal stresses that the need for such flexibility is far greater in the case of (low-income) developing countries when operating an RTA with advanced developed country partners, as would be the case of future EPAs. It is thus not relevant for the purpose of WTO rules negotiations to consider empirically whether or not the flexibilities *per se* actually lead to economic development.

Moreover, North–South RTAs are a recent phenomenon that was unknown in during the GATT 1947 era. Thus they were not envisaged in existing GATT rules and disciplines. The advent of North–South RTAs between countries with highly asymmetric levels of development presents a major systemic challenge to the multilateral trading system in finding a solution that serves the general trade and development interests of all the membership. The ACP submission responds to this challenge in the Doha negotiations wherein WTO members agreed 'to place the needs and interests of developing countries at the centre of the work programme'.

(2) 'GATT Article XXIV is already flexible'

Comment: Comments of this type question the rationale of the ACP submission by purporting that existing WTO rules contain the necessary flexibility for RTAs. They argue that GATT Article XXIV in itself is already an exception to the most-favoured-nation (MFN) principle; existing WTO rules already provide flexibility for RTAs; and that flexibilities provided for in the Enabling Clause for South–South agreements represented one good reason for the lack of SDTs in GATT Article XXIV. They also question how the codification of existing practices on flexibilities would actually serve the general interests of the WTO.

Response: Typology (2) comments actually endorse the merit of the ACP submission and are already addressed in the submission. The ACP submission recognises that there is 'some' *de facto* flexibility under GATT Article XXIV which is available to **all** countries, developed and developing, without distinction. Such 'existing flexibility' lies in the ambiguity in the terminology used in the terms of the conditions of GATT Article XXIV and in the permissive practice over the years regarding the testing of compatibility of RTAs. However, the *de facto* flexibility is neither secure in nature nor sufficient in scope and legal validity to provide the SDT required by developing countries in North–South RTAs. The Appellate Body report on *Turkey–Textile* showed that WTO Members should not indefinitely rely on the existing flexibility in WTO rules on RTAs arising from ambiguity of languages and permissive practices.[14] Moreover, in a rules-based trading system with an enforceable dispute settlement system, *de jure*, rather than *de facto*, SDTs is important for legal security. Thus, 'additional flexibility' needs to be formally and explicitly defined and its scope extended to only developing countries as SDTs. It can be noted that GATS Article V recognises SDTs for developing countries in North–South economic integration agreements. Hence there is no *a priori* reason why SDTs should not be incorporated in GATT Article XXIV. Furthermore, SDT is an integral aspect of WTO as recognised in WTO Agreements and successive Ministerial declarations including the Doha Ministerial Declaration and thus should

be mainstreamed into WTO Agreements, including any new generation clause on GATT Article XXIV.

Regarding GATT Article XXIV as an exception clause, the question at issue in the ACP submission (and in the Negotiating Group on Rules discussion in general) is not whether WTO members can deviate from the MFN principle enshrined in GATT Article I.1 for the purpose of RTAs. Rather, it relates to what conditions (requirements) members have to meet when deviating from GATT Article I.1 (and possibly other GATT Articles) for the purpose of RTAs and, for ACP states, what form of SDT is available to developing countries.

The comment that SDT is absent from GATT Article XXIV because it is already available in the Enabling Clause is actually precisely the reason why the ACP states are requesting SDT for GATT Article XXIV. The Enabling Clause only covers South–South RTAs and cannot be applied to North–South RTAs, such as future EPAs, covered by GATT Article XXIV, which lacks explicit and legally binding SDT. As a consequence, no SDT is applicable to North–South RTAs for developing countries in the application of WTO rules. The argument that SDT should not be applied to North–South RTAs stands in contrast with GATS Article V which provides explicit SDTs for developing countries forming economic integration agreements with developed-country trading partners. This therefore is an important legal lacuna or imbalance in the architecture of the WTO in relation to RTAs that stands at odds with the particularly acute need for SDTs in North–South RTAs. The lacuna thus needs to be addressed to install balance in the WTO legal architecture and meet the Doha negotiations mandate on rule's negotiations relating to RTAs. The ACP submission thus goes beyond a simple codification of existing flexibilities and redefines the scope of flexibility for developing countries as SDT.

(3) 'SDT should be discussed later'

Comment: Comments of this form recognise the need for discussing the development aspects of RTAs as mandated by Doha Declaration, but stress that negotiations should first focus on clarifying and improving the substantive core disciplines. Some of these comments explicitly recognise that negotiations may be engaged on SDT and additional flexibilities for developing countries once systemic issues are clarified. Countries making such comments seem prepared to discuss the ACP submission on SDT in GATT 1994 Article XXIV, but only after resolving outstanding systemic and other issues. They also assert, however, that while the developmental aspects of RTAs should be taken into account, SDT should not become the overriding rule with respect to RTAs. Any flexibility provided will have to be well defined and targeted so as not to undermine the rules-based multilateral trading system. They also point out that the negotiations should result in a better functioning of the CRTA and strengthened role for the WTO *vis-à-vis* RTAs.

Response: Typology (3) comments propose to delay consideration of SDT until systemic issues are resolved and seem symptomatic of the general debate on SDT in the Doha negotiations of giving it low priority. Moreover, it is contestable as to whether the lack of SDT in GATT 1994 Article XXIV is not a systemic issue, as implicitly expressed in the suggestions to take up SDT after systemic issues have been resolved. In fact, the general question of desirability of SDT in GATT Article XXIV can only be considered as a major systemic issue in the context of rules negotiations. This is evident if one considers the apparent inconsistency and imbalance in the legal structure between GATT Article XXIV and GATS Article V. Thus, the notion of SDT cannot be dismissed off-hand. It deserves to be addressed in parallel with all systemic issues concerning RTAs. In relation to the EPAs, it is important that such systemic issues are resolved positively in integrating SDT into GATT Article XXIV and concluded prior to conclusion of the EPAs so that the future EPAs can be based on the new generation disciplines that contain SDT.

(4) 'Is this a covert way to cover unilateral preferences under GATT Article XXIV?'

Comment: Questions and comments of this kind raise concerns over the systemic implications of the ACP submission. They assert that the ACP proposal would provide for the consolidation, within

the WTO system, of existing unilateral preferences such as Lomé/Cotonou preferences. It is assumed that if flexibilities are authorised for developing countries under reciprocal North–South RTAs, there would be no distinction between reciprocal and unilateral preferences. Thus, these ask whether the adoption of the ACP submission would encourage developed countries to develop preferential arrangements with some (minimum) level of reciprocal benefits so as to avoid the WTO waiver process needed in the case of non-generalised, non-reciprocal preferential arrangements. Questions are also raised as to what would be the defining difference between those arrangements that now require a waiver and those that could be considered to be free trade agreements.

Response: Typology (4) comments and questions raise very important issues *vis-à-vis* the ACP submission. The response to them could point out that the ACP submission addresses North–South reciprocal RTAs and not unilateral preferences. The ACP submission is about instituting credible and reasonable levels of additional flexibility in respect of the SAT requirement and other GATT Article XXIV conditions. It does not seek to create legal cover for non-generalised, unilateral preferences of the type under the current Cotonou Partnership Agreement carried over from the Lomé Convention. It seeks to make available an appropriate degree of flexibility for developing countries that are greater than those (implicitly) available to developed countries under GATT Article XXIV. These flexibilities, however, may be less extensive than those available under unilateral preferences, although the exact scope of such flexibilities is of course subject to negotiations under the Doha Round. In view of the fact that GATS Article V already provides, without specific definition, flexibilities (SDT) for developing countries in forming North–South economic integration agreements, and that a number of existing RTAs provide more favourable treatment for developing country members (which are claimed to be within the scope of existing flexibilities entitled under GATT Article XXIV), it is too simplistic to assume that RTAs with SDT for developing countries would amount to non-reciprocal preferential schemes.

(5) 'What disciplines would apply during the transition period?'

Comment: Comments of this style relate to the core substantive aspects of the ACP submission. It is notable that only a few such comments are made, and the most significant relate to the transitional period for an interim arrangement leading to an FTA or customs union. Some such comments criticised the ACP proposal in seeking that no obligations would apply during the transitional period, including in relation to notification and transparency requirements.

Response: It can be noted that these comments seem to miss the underlying and more important systemic issues of what disciplines are indeed applicable during the transition period. Existing practices of some RTAs often provide longer transition periods than what the rules currently provide for, namely a 10-year transition period that can be exceeded only in exceptional circumstances. As noted earlier, the Commission for Africa Report says that a transitional period of over 20 years if necessary should be provided for African countries in EPAs. If this recommendation is to be taken on board, then it would have to be explicitly allowed under GATT Article XXIV. The point is that in North–South RTAs, there should be no limitation imposed by WTO as to the length of time for a transitional period for developing countries in case a longer than the 10-year period is required.

The applicability or otherwise of transparency requirements during the transitional period may be further studied. It may be conceded that existing transparency obligations applicable to 'interim agreements' may continue to apply during that period.

The more important point is that for an RTA with a transitional period, it is quite normal that the full SAT requirements may be achieved only at the end of the transition period when substantially all the trade is liberalised among parties. This makes sense, as this is why those agreements are called under GATT XXIV 'interim agreements' and not free trade areas or customs unions. The ACP submission seeks to codify such practices (and presumably the current interpretation of the 'interim agreements') by clarifying explicitly that SAT requirements

should be achieved at the end of the transition period, especially for developing countries. This would serve to ensure that not meeting SAT requirement during the transition period cannot be used as the basis of legal challenges of say EPAs in which the ACP states would end-load the liberalisation of trade *vis-à-vis* the EU. In this respect, it can be clarified that the reference to '18 years' in the ACP proposal as the reasonable length of a transitional period is only indicative.

(6) 'Is there a need for SDT on procedural obligations'

Comment: Comments of this type query the adequacy of instituting SDT for the transparency (notification) and examination requirements. It is argued that it is in the interest of all WTO members to identify 'more streamlined and efficient examination procedures' of RTAs, as underlined by the Doha mandate based on past experience. Also, as regards North–South RTAs, developed countries may take charge of the examination processes. Hence, there is no need for SDT in the examination process. Further comments seek clarification on specifying what constitutes 'developmental aspects' of RTAs that would need to be taken into account during the examination process as advanced in the ACP submission.

Response: Type (6) comments require further in-depth consideration regarding the procedural aspects of the ACP submission, in particular the pure transparency obligations relating to notification. The 'development aspects' referred to by the ACP states that should be carefully considered may include, *inter alia*, the effect of tariff dismantling on the domestic economy, industrialisation, competitiveness, government revenue, poverty reduction, rural development, food security and livelihood. It would also include the limited institutional and administrative capacity of developing countries. The ACP case for taking into account 'developmental aspects' is important in that even in the absence of substantive SDT in respect of SAT and other requirements, the end result in terms of WTO compatibility of a given North–South RTA would be similar to the case wherein substantive SDT had existed. Where SDT is substantively provided for, then the procedural injunction to take on board 'developmental aspects' provides additional security that SDT considerations would play an important role in assessing the compatibility of a North–South RTA.

(7) 'It is not acceptable to weaken dispute settlement'

Comment: Comments of this variety show that the ACP submission relating to the non-applicability of dispute settlement proves to be very controversial. Although there was a need to clarify the legal status of the examinations carried out by the CRTA and any possible further ruling by the dispute settlement mechanism if instituted, the point was made that recourse to dispute settlement should always be possible, irrespective of discussions and assessments made in CRTA, and that this right should not be overridden.

Response: More study is required as to the specific ways to clarify the relationship between CRTA and the dispute settlement body due to its complexity and systemic implications. It will be difficult, if not improbable, for ACP states to obtain endorsement from the WTO membership to modify WTO members' rights of recourse to dispute settlement procedures on 'any matters arising from the application of those provisions of GATT Article XXIV'.

The latest submissions by Australia and the EC

A: Australia's proposal vis-à-vis the ACP proposal

Australia made a submission dated 3 March, 2005 (TN/RL/W/173/Rev.1), and further clarified in its submission of 12 May, 2005 (TN/RL/W/180). In the latter submission, Australia proposes specific interpretation and benchmarks for the key SAT and transitional period requirements of GATT Article XXIV. It appears that Australia had the ACP submission in mind when developing proposals on these systemic issues. It expresses willingness to discuss SDT, which is a positive recognition of the ACP submission. It however contains some substan-

tive elements that are contrary to the ACP submission. For example, on the SAT and the phase-in requirements, Australia proposes the liberalisation of at least 70 per cent of products in the first year of the transition period – this can be seen as a counter proposal to the relevant ACP submission which favours flexibilities in the staging of liberalisation, including the back-loading, by developing countries.

In general, Australia's submission is very ambitious in rendering more stringent the requirements of GATT Article XXIV while putting forward a particular interpretation of 'interim arrangements'. This undermines the ACP submission for greater flexibility for developing countries. The substantive aspects of the submission are as follows:

1. To measure SAT by a rigorous benchmark of elimination of duties and ORRCs – most notably tariff rate quotas (TRQs) – on at least: (1) 70% of all tariff lines at HS (Harmonised System) six-digit level **on entry into force** of an agreement; and (2) 95% of all tariff lines at HS six-digit levels **precisely** 10 years following the enactment of the agreement.

2. To further interpret SAT as requiring no exclusion of any 'highly traded' products to be applied on entry into force of any agreement. This 'highly traded' product test should be interpreted as 'where the value of a Member's imports in any single HS six-digit line as a proportion of their total imports from the RTA partner exceeds 0.2%'.[15] Alternatively, there could be a requirement, for example, that the top 50 imports of each RTA party at the HS six-digit level that are traded between the RTA partners must be included in the trade liberalisation process.

3. Discuss how to take into account those products that would have been traded if there were no trade barriers (protection) between RTA partners. Australia proposes a methodology for this by verifying that the 'significant exports' of each party is subjected to liberalisation by the other parties even if historically they are not markets for those products. The criteria of 'significant exports' is defined as products that represent at least 2% of a party's total exports in value at six-digit HS level (on the base period of the 3 years prior to the entry into force of the RTA).[16]

4. Provide formal disciplines for the phase-in period of 10 years for those FTAs and customs unions that are not notified explicitly as 'interim agreements', so that the SAT requirement of 95% tariff line liberalisation should be met precisely at the end of 10 years. Australia submits that a transition period longer than 10 years in meeting the SAT requirement should be strictly limited to those RTAs notified explicitly as 'interim agreements'.

5. The new rules should apply to all existing RTAs that are in force (operational). Older agreements not in force at the time would be exempted from the new rules.

The proposal on SAT ((i) above) is key. Australia favours a tariff-line-based approach, as opposed to trade-volume-based approach, in the measurement of the SAT requirement, and calls for a relatively high benchmark of 95% coverage at the end of the 10-year transition period, and starting at the entry into force of the agreement with a 70% benchmark. The tariff-line approach aims to ensure comprehensive coverage of all major sectors and pre-empt the exclusion of some sectors in which little trade takes place (like agriculture where little trade may be taking place because of exclusion from an RTA and the existence of prohibitively high barriers).

Australia explicitly refers to the elimination of TRQs, in addition to duties, to meet the SAT criteria although a number of existing RTAs have maintained TRQs, particularly in agricultural products. Thus, the implication is that even though in-quota rates are reduced to zero between RTA partners, this tariff line would not be counted for the purpose of SAT requirement. This may require substantial liberalisation in the agricultural sector.

Equally important is the proposal that calls for 70% liberalisation of all tariff line at the entry into force of RTAs. This seems to be made to counter the ACP submission that no obligation should apply during the transitional period. Australia proposes to put a limit on what RTAs can do in staging the liberalisation commitments. This poses substantial

constraints to future EPA negotiations and ACP interests, and would be contrary to the ACP submission on transition period.

Australia aims to increase the rigour of the substantive requirement for SAT via the proposal to combine the tariff-based approach with a volume-based approach. It is indeed this combination of the two approaches that renders the Australian proposal particularly ambitious. This is done by requiring the coverage of major products where there is substantial trade taking place between RTA partners, i.e. highly traded products ((ii) above). Australia proposes a 0.2% share of intra-RTA trade for the interpretation/definition of 'highly traded' products. The requirement would effectively preclude the flexibility to exclude 5% tariff lines from internal liberalisation. This may mean for those countries whose imports are relatively concentrated in a few tariff lines a liberalisation of close to 100% of intra-RTA imports in terms of trade volume. There is, however, no legal basis for the notion of 'highly traded products'. This terminology is not found in GATT Article XXIV or elsewhere – it is thus not a legal requirement. This means that the appropriateness of such a concept itself has to be a matter of negotiations.

Furthermore, Australia's proposal on the potential trade between RTA parties, namely 'significant exports' ((iii) above), appears to limit significantly the scope of flexibility available under the SAT requirement. Together with the notion of 'highly traded products', the proposal would bring about greater rigor to the assessment of the SAT requirement, as both notions require inclusion of currently and potentially traded products in the coverage of RTAs. Since 'significant exports' could reasonably be expected to be those products which RTA partners would find sensitive, the proposal would limit WTO member's discretion in the design of product coverage, hence less flexibility. Thus, it would surely render the SAT requirement more stringent if applied to developing countries as well, and thus would not serve the ACP's interests.

As regards the transition period 'phase-in commitments' ((iv) above), Australia raises the issue of the lack of legal basis for WTO members' practice of providing a transition period for tariff phase-in commitment (often longer than 10 years) under those RTAs not notified as 'interim agreements', as GATT Article XXIV:5(c) authorises a transition period of 10 years only for those RTAs notified explicitly as 'interim agreements'. Australia proposes to fill this gap by endorsing and formalising the existing practice, but with the limitation that no transition period should exceed 10 years without exception, unless the agreements are notified as 'interim agreements'. This proposal is closely linked to the timing for meeting the SAT requirement however defined. FTAs and customs unions have to meet the SAT requirement in 10 year's time at the latest, while interim agreements could do so over a longer time frame.

The proposal has substantial systemic implications, particularly for flexibility that was originally intended for 'interim agreements'. Firstly, the question arises as to how to operationally define 'interim agreements' in the case of North–South RTAs. It has to be clarified whether the RTA should be notified as 'interim agreement' even in cases where only developing country parties require a longer than 10-year period for meeting SAT. Secondly, the proposal appears to require, by logical extension, extending the phase-in time period applicable for 'interim agreements' (i.e., 10 years). The proposed provision of 10 years for FTAs and customs unions would render meaningless the provision of the same time period for the 'interim agreements' (or period longer than 10 years only in 'exceptional circumstances') under GATT Article XXIV:5(c) because 'interim agreements' are by definition those agreements requiring more than 10 years in meeting SAT requirement.

Australia's proposal on the application of clarified rules ((v) above) is targeted at some previous proposals that call for the grandfathering of existing RTAs from new RTAs rules that may emerge as a result of Doha negotiations.[17] This proposal needs to be modified to say that such a proposal would be applicable to all GATT Article XXIV agreements (i.e. those involving developed countries and countries with economies in transition) and not the Enabling Clause agreements involving South–South RTAs.

The Australian submission indicates a willingness to discuss SDT elements. This is a positive consider-

ation that appears to be a direct response to the ACP proposal. At present, however, the Australian submission does not have any SDT elements. It therefore does not respond to the Doha Declaration paragraph 29 provision that the negotiations will take into account the developmental aspects of regional trade agreements. All the elements proposed by Australia should be examined under the systemic issue debate, and the ACP should ensure that whatever criteria, benchmark and rules are agreed upon, SDT should be the integral part of negotiations.

On a preliminary basis, it may be concluded that the Australian submission would lead to substantially stronger disciplines and thus less flexibility for developing countries in RTAs. The proposed reform on disciplines applicable to transitional periods would require careful assessment given its systemic implications. ACP states need to study what kind of approach to the SAT requirement (tariff line versus trade volume) and to what level (95, 80, or 70%?) is most suited to their collective interests. It is extremely important to ascertain whether the proposed method for SAT calculation in itself serves ACP interest – if the basic methodology is prejudicial to ACP, then future application of SDT may do little to compensate the initial harm that is already imbedded in the approach. Hence, the importance of a debate about systemic issues, and possible proposals by the ACP states.

B: The EC's latest submission *vis-à-vis* the ACP submission

The EC's submission of 12 May, 2005 (TN/RL/W/179) has five sections with proposals on systemic issues (Section 1), SAT (Section 2), transition period (Section 3), neutrality (Section 4) and developmental aspects (Section 5). These have to be carefully considered although generally the recognition of developmental aspects in the EC submission is supportive of the ACP submission, in some aspects.

Regarding systemic issues (Section 1) the EC argues that it is in the legitimate interest of all WTO members to clarify existing WTO rules on RTAs and that the development dimension needs full treatment (which is consonant with the ACP submission). Three principles are advocated by the EC to underpin the overall approach to rules negotiations on RTAs namely (a) shared systemic interest arising from the need to minimise the negative effects of proliferating RTAs on third parties, i.e., non-members; (b) reasonableness in making progress on clarifying the rules; and (c) development dimension relating to the developmental impact of RTAs.

Two of these principles, namely shared systemic interest and the development dimension, have also been advocated by ACP states but not for essentially the same reasoning as the EC. Regarding systemic concern, the EU underlines the need for clear and authoritative guidance from the rules, like the ACP as well, and the need to discipline the proliferation of RTAs in recent years. The ACP states pointed out that GATT Article XXIV as currently constructed is an anachronism of the 1940s era and needs updating to reflect the realities of the twenty-first century, including the rise to prominence of North–South RTAs.

The point on development is important and corollary to the systemic point – the recognition that development issues need to be treated, not as an afterthought but as integral to the negotiations on rules on RTAs and consistent with the focus, in the Doha negotiations, on the needs and interests of developing countries. However, while the EC recognises the need to give priority to development in clarifying and improving the rules, it also submits that such negotiations should also recognise that the potential impact of RTAs on third parties' trade and to the WTO at large may be different depending on their 'share of world trade and the level of development'. This may well serve the ACP's interest in that most of them, even if combined together in a regional grouping, would account for a small share of world trade. Many of them are LDCs, small islands, and landlocked states, which inhibits their development prospects. But the EC argument may imply 'differentiation' between developing country groupings and thus raising a larger systemic issue. This is not a concern of the ACP states – their simple concern is with North–South agreements under GATT Article XXIV, and not about South–South agreements under the Enabling Clause.

The principle of reasonableness needs to be clarified. The EC argues that for the clarification of

WTO rules for RTAs, there should be no *a priori* exclusion of certain subsets of RTAs. This needs clarity as to its meaning – does it mean that there should be no subsets among GATT Article XXIV agreements, and if so then this is a valid point. But if it means that developing country RTAs that would have normally been notified under the Enabling Clause should really be notified under GATT Article XXIV as they involve some with large developing countries, then this is a point that has not been raised by ACP states. It may have the effect of discriminating among developing country RTAs. This argument is somewhat related to the aspect of development dimension principle advanced by the EC relating to differences in addressing RTAs that may have a significant impact (as explained above).

With regard to **'substantially all the trade'** (Section 2), the EC provides some interesting ideas. A clear definition of SAT would be in the interest of ACP states, as it will be on the basis of such a clear definition and benchmarks that the specific provisions on SDT and explicit flexibility aspects can be elaborated for developing countries. Thus any proposal in this regard is worth careful consideration. The thrust of the EC submission in respect of the SAT requirement in tariffs is threefold:

1. **The SAT should be based on the coverage of trade, and not tariff lines as proposed by Australia.** This reflects the EC's preference to use the trade-volume- based approach, which allows for greater flexibility in excluding some sectors (like agriculture) from liberalisation. However, the EC indicates its readiness to consider a compromise option based on supplementing the coverage of trade with an assessment of trade coverage measured by number of tariff lines. An example, suggested by the EC, is a combined average threshold for trade and tariff lines. Such an approach needs to be clarified on how it would apply in practice. Whatever approach is adopted, the ACP would have to seek a favourable methodology (as proposed in the ACP submission) allowing appropriate and explicit flexibility, as with SDT.
2. The quantitative threshold level should be subject to negotiations pending agreement on the methodology to be adopted (trade-volume-based versus tariff-line-based approaches). Thus, again, the EC position is more nuanced than the Australian proposal, which explicitly call for a 95% coverage of HS 6-digit tariff lines. The EC calls for 'a reasonable balance' between the shared systemic interest (for effective disciplines) and members' interpretation to date (EC's interpretation has been on trade-volume coverage, not tariff-lines approach). The EC seems to accept the ACP call for a differentiated threshold level. It should be noted however that the ACP submission goes beyond different threshold levels and seeks the application of a favourable methodology in calculating SAT for developing countries.
3. Whatever criteria is applied for the SAT requirement in negotiations, it should form only ONE guiding element among many for determining the likely WTO-compatibility of an RTA, and not THE determining criterion. And any quantitative assessment should be done on a case-by-case basis, and should not automatically guarantee for conformity. This proposal by the EC seems to stem from its concern over the compatibility of some of its existing RTAs with SAT requirements (especially if the tariff-line-based approach is applied). Some suggested measures for clarification have been used under EU RTAs (such as TRQ, special sectoral safeguards, etc.). Thus, the EU position is that a holistic assessment on a case-by-case basis is needed to determine final WTO-compatibility of RTAs.

The EC submission on the SAT could have specified that SDT and flexibilities regarding the SAT would be provided to developing countries and that these would be elaborated during the negotiations. It is important that specific references to key aspects of GATT Article XXIV like the SAT make specific reference to SDT and flexibilities for developing countries, in addition to any generic suggestions that would be made under the development dimension proposition. The EC submission could also have added that the evolution of a 'common understanding' of the qualitative benchmark for RTAs could include an understanding on the development

aspects of RTAs in respect of developing countries.

On the **transitional periods** (Section 3), the EC is open to consider 'clarifications of the limited circumstances' where departures from the 10-year rule may be justified and that such a longer transitional period and invocation of exceptional circumstances is only for developing countries, and not for developed countries. This view is coherent with the argument that the ACP has made – that the interim period should be linked to the trade, development and financial conditions of developing countries. However, the argument that the longer transitional period should apply to only a limited number of products can be problematic as it would mean that the list of such products has to be defined and legally provided for (so more negotiations); it can affect the flexibility that developing countries would have in defining the product coverage of the tariff phase down programme; and it may be that developing countries would want to back-load the full liberalisation (rather then front-load it) and this option could be constrained.

Thus, a substantially less stringent criteria should be applied to developing countries in determining 'exceptional cases', including a presumption that where developing countries are concerned they may quasi-automatically qualify for a longer-than-10-year period (possibly under some limitation if need be). Regarding the latter, it can be important to specify or clarify an understanding, as per the ACP submission, that the full provisions of reciprocal free trade would become fully operational at the end of the transitional period. The notion that the EC can consider favourably longer transitional periods for RTAs that have adopted requirements going beyond the SAT could be fine, but it should not be used in a manner to say that RTAs should go for stringent SAT and on that basis seek longer transition period. This could lead to situations in which developing countries are encouraged to go for stringent SAT (and forego flexibilities) and in return get longer transitional periods. So ACP states need to ascertain this uncertainty.

As regards the **'neutrality'** (Section 4) of impact of RTAs on interests of third parties in respect of other regulations of commerce (ORCs), the EC has a strong interest in ensuring that any future disciplines on this aspect do not prejudice its RTAs *vis-à-vis* third countries. With the EU enlargement, it has been under pressure to provide compensatory market access for third countries and this has proved to be a contentious process. Thus, clarifying rules on no-raising of trade barriers to third parties is important for the EC. This was not a priority issue in the ACP proposal, as, being a future RTA partner under EPAs, the ACP's concern was more directed towards WTO rules in terms of internal liberalisation such as the SAT requirements in duties and ORRCs, as well as the transition period, and not external 'neutrality' of RTAs. The EC suggestion on the need for 'different approaches to neutrality for different forms of "regulations of commerce"' needs be clarified. The assumption seems to be that as far as those measures with impact on third parties fall within the existing WTO agreement, it should not be questioned in terms of the raising of barriers to third parties. This means that the extra-RTA application of safeguards, anti-dumping or countervailing duties could not be questioned for the purpose of determining WTO conformity of RTAs as long as they comply with the respective WTO rules. This, however, needs clarification. The EC position seems to prefer to retain as much flexibility as possible in this area.

Finally the 'developmental aspects: fair and equitable treatment between different forms of RTAs to which developing countries are parties' (Section 5) of the EC submission is the most relevant to the positive agenda of ACP states. It has a twofold objective. One objective emphasises that RTAs among developing countries should enter into deeper economic integration agreements and the respective substantive requirements in the Enabling Clause should not be radically different from those in GATT Article XXIV which emphasises deeper integration. This seems to be an implicit call for the Enabling Clause to be reviewed and modified. The mentioning of the Enabling Clause as part and parcel of the Doha negotiations is strictly correct. However, it raises the spectre that the EC is willing to re-open aspects of the Enabling Clause and this would be contrary to the ACP submission which explicitly states that the Enabling Clause is an *acquis* of the WTO and should not be modified.

The EC calls for developing-country groupings to embrace deeper integration is based on the claim that developing-country RTAs tend to be preferential and partial liberalisation agreements and do not entertain full tariff removal for FTA status. This is a broad generalisation. Most developing country RTAs aim at fully fledged FTAs or customs union, at least in terms of objectives and instruments set by the developing country RTAs. Take CARICOM for example; it aims to set up a common market with full liberalisation of trade and a common external tariff among members. All the African integration groupings like ECOWAS, UEMOA, COMESA and SADC aim to achieve full free trade among members. The Pacific PICTA would be a partial liberalisation scheme with the eventual aim of achieving full liberalisation. The situation is similar for many of the Latin American integration agreements. Likewise, in Asia, the ASEAN states have embraced an ambitious free trade agreement. It is the South Asian countries which still focus on partial preferential agreements under the South Asian Preferential Trade Agreement (SAPTA), and similarly in the Economic Cooperation Organisation of Central Asian countries (ECO), and many of the Arab state agreements. So, the goal is indeed deeper integration. But the problem with South–South agreements has been that progress towards deeper trade integration has been slow in many groupings, although in recent years the process has accelerated as in CARICOM, ECOWAS/UEMOA, COMESA and SADC.

A related issue, for the EC, is that 'existing rules fail to establish fair and equitable treatment between different types of RTAs based on their potential effects on third parties'. As an example, the EC notes that there is no difference between those South–South RTAs that are relatively sizeable actors in world trade, presumably RTAs involving large developing countries, as compared to those RTAs whose members' share of world trade is marginal. The EC is calling for fair treatment of those South–South RTAs that cover a larger share of world trade on the same basis as developed country RTAs. This can mean either reviewing and modifying the Enabling Clause towards more stringent requirements, or obliging those South–South RTAs to be examined and approved under GATT Article XXIV conditions. These arguments pose the risk that they work for differentiation among developing countries. While the EC compares those RTAs falling under Enabling Clause and GATT Article XXIV to draw the conclusion that the current treatment of different RTAs involving developing countries is not fair, it is logically wrong and legally incorrect to compare the treatment of Enabling Clause and GATT Article XXIV, as the subject matters are different. The comparison should rather be drawn, as was done by the ACP proposal, between GATT Article XXIV and GATS V. The Enabling Clause is about South–South RTAs, and there is no foundation to compare it with GATT Article XXIV which is about North–South and North–North agreement.

The ACP has emphasised (as noted previously) that the sanctity of the Enabling Clause should not be touched. Some developing country groups may on their own volition choose the GATT Article XXIV route; such is the case for MERCOSUR or SADC. However, it should not be a legal requirement written to the Enabling Clause or elsewhere. This proposal may also affect at some stage the future of the Global System of Trade Preferences among Developing Countries (GSTP) Agreement as it involves larger developing economies. The GSTP is presently sanctioned by the Enabling Clause. Following the differentiation principle breaks down the common development denominator binding developing countries together and this is a political issue on which ACP states need to consider. It bears repeating that the ACP concern is with the new phenomena of evolving (deeper integration) North–South agreements under GATT Article XXIV, and not about South–South agreements under the Enabling Clause.

The second objective of the EC submission is to address the ACP submission, expressing the EC's willingness to clarify the flexibilities already provided within WTO rules on RTAs to ensure that the rules facilitate the necessary adjustments required by developing countries. It specifically indicates a commitment to considering separate and differentiated, i.e. lower, thresholds for developing countries and LDCs, and for these countries to have longer

than the 10-year transition period. This is a significant support for the ACP submission. Although the EC does not use the term SDT (an acceptable terminology in the Cotonou Partnership Agreement), this is welcomed. However, the magnitude of the SAT requirement critically depends on the methodology to be used for calculating the SAT requirement. Thus, apart from differentiated threshold levels, the ACP states would need to carefully follow and examine the approaches proposed by the EC (trade-volume-based approach) and Australia (tariff-line-based approach) and ascertain which approach, or any other approach, serves their interest most. Hence the need for continued active participation of ACP states in systemic issues debate. Also, when this welcome endorsement by the EC of the ACP submission is juxtaposed against the points made above by the EC on fair and equitable treatment between RTAs, it seems to convey the sense that the EC is open to flexibilities in rules on RTAs for those developing countries with a small share of world trade like the ACP states, and not for those which are likely to have an important impact on world trade.

This second EC conclusion is the most significant in terms of supporting the ACP submission on SDT and flexibility in GATT Article XXIV for developing countries. It provides support for the ACP submission (and is consistent with the CPA on EPAs). It can be said to take up the recommendations of the Commission for Africa Report. It is an important consensus, and a step forward towards supporting regional integration processes in making an impact on trade and development of developing countries, and facilitating their contribution to the timely implementation of the Millennium Development Goals (MDGs). It could have been made more explicit, as proposed by ACP states, that WTO members agree that SDT can be formally and explicitly made available to developing countries.

The EC submission needs to be further developed and in this regard, care should be taken in a number of respects. First, the EC maintains the position that flexibilities to be negotiated relate to 'flexibilities already provided within the existing WTO rules on RTAs'. The ACP proposal called for 'additional' flexibilities, rather than just 'existing flexibilities'. It is possible that in the current negotiations that the existing flexibilities, for example in respect of the SAT or the transition period, could be tightened. Second, the EC submission to achieve such flexibilities for developing countries by way of 'the length of transition period, the level of final product coverage and the degree of asymmetry for both' under GATT Article XXIV is correctly consistent with the CPA Article 37:7. The EC expresses that it is ready to 'confirm in the negotiations these specific justifications for developing countries parties to RTAs to depart from the general rule of ten years'. This endorses the ACP submission for lowering the criteria for developing countries to have recourse to a longer-than-10-year transition period. It must be noted that the ACP submission on the transition period is much broader covering (1) the length of period, (2) the legal rights and obligations during the transition period, and (3) the conditions under which the longer-than-10-year period is allowed. Thus, all such issues need to be carefully followed up. Third, a controversial issue would be whether the SDT that the EC is now willing to discuss applies to all developing countries as a rule or only to a limited number of small developing countries on an case-by-case basis. The EC seems to go for the latter case-by-case approach to exclude some large developing countries from the SDT treatment. This leads to differentiation of developing countries, and has a larger systemic implication which requires careful consideration, especially that such a debate should not divert from the heart of the ACP submission, namely SDTs for developing countries in GATT Article XXIV.

Conclusion

The ACP states made an important submission on introducing SDT and explicit flexibilities for developing countries into GATT Article XXIV. This submission has received support from the Report of the Commission for Africa. Recent trade ministers meetings of the African Union and the LDCs have reiterated further support for the ACP submission. It is becoming apparent that the Doha Round must include in its final package some concrete elements covering the ACP submission. At this stage in the

lead-up to the Hong Kong Ministerial Conference, the ACP states need to submit their revised proposal responding to the comments made so far on its initial submission and to respond to the submissions by Australia and the EC. The ACP states need to maintain the momentum they have generated on securing explicit, operational and mandatory SDT and flexibility in GATT Article XXIV as a major development objective, linked with their negotiations of EPAs with the EC. This link between the two spheres of negotiations is now clearing terms of the timing of their conclusions – the reform of GATT Article XXIV into a new generation set of rules that include SDT at its core must take place prior to the conclusion of market access negotiations under the EPAs, so that EPAs with SDT can satisfy existing WTO rules on RTAs that would have an SDT dimension.

Endnotes

1. The civil society organisations subscribing to the campaign include the African Trade Network, Accord Mali, ActionAid International UK, Agir Ici (France), Both Ends (Netherlands) Cafod (UK), Centre for International Development CECIDE (Guinea), Christina Aid (UK), Econews Africa (Kenya), 11.11.11 Coalition of the North–South Movement (Belgium), Enda Tiers Monde (Senegal), Eurostep (Belgium), Mwenge (Zimbabwe), Oxfam International, Southern & Eastern African Trade Information and Negotiation Institute – SEATINI (Zimbabwe), Traidcraft (UK), Third World Network (TWN) Africa (Ghana) and the Zambian Trade Network. www.stop epa.org
2. Various articles have been written on this issue. See, for example, Bonapas Onguglo and Taisuke Ito, 'How to make EPAs WTO compatible?: Reforming the rules on regional trade agreements', *ECDPM Discussion Paper No.* 40, July 2003. www.ecdpm.org/dp40
3. The ACP states have also clarified that the WTO rules affecting RTAs among developing countries, namely the Enabling Clause of 1979, should be considered as an *acquis* of the multilateral trading system and hence should not be reformed in any way whatsoever.
4. WT/MIN(01)/DEC/1, www.wto.org
5. Available at www.acp-eu-trade.org
6. TN/RL/W/155 (Communication by the Mission of Botswana on behalf of the ACP Group of States), www.wto.org
7. It can be noted that under the Enabling Clause, the notification and examination process by the WTO Committee on Trade and Development is fairly simple and straightforward. The Committee normally accepts the notification submitted by parties to a South–South RTA and endorses them without a major examination of their features nor their compatibility with the Enabling Clause provisions.
8. www.commissionforafrica.org
9. DFIF and DTI, 'Economic Partnership Agreements: Making EPAs Deliver for Development', March 2005, www.dti.gov.uk/ewt/epas.pdf
10. www.uneca.org/eca_programmes/trade_and_regional_integration/meetings/cairo/cairo_declaration.pdf and www.acp-eu-trade.org, respectively.
11. 'Livingstone Declaration', Fourth LDC Trade Ministers' Meeting, Livingstone, Zambia, 25-26 June, 2005.
12. TN/RL/W/165, 8 October, 2004.
13. TN/RL/M/16, 12 July, 2004, TN/RL/M/15, 15 June, 2004, and TN/RL/W/165, 8 October, 2004 (submission by Japan).
14. WT/DS34/AB/R. The case pertained to the quantitative restrictions introduced by Turkey, as of 1 January, 1996, on imports from India on 19 categories of textile and clothing products. Turkey considered that the measure was necessary to adopt 'substantially the same commercial policy' as the EC in the textile sector including the agreement on trade in textile and clothing by virtue of its association agreement with the EC aimed at the establishment of customs union. India complained that the quantitative restrictions were inconsistent with Articles XI and XIII of the GATT 1994, and Article 2.4 of the Agreement on Textiles and Clothing (ATC), and not justified under GATT Article XXIV. Turkey argued that quantitative restrictions were necessary for the formation of a customs union with the EC, particularly in adopting 'substantially the same commercial policy', thus justified under GATT Article XXIV. The panel and Appellate Body have concluded that GATT Article XXIV does not authorise Turkey to adopt, upon the formation of a customs union with the EC, quantitative restrictions that were inconsistent with Articles XI and XIII of the GATT 1994 and ATC Article 2.4.
15. This figure would be the average over the three-year base period (which is the three years before the entry into force of the agreement).
16. The required information could be obtained from the UN Commodity Trade Statistics Database (Comtrade).
17. See, for example, the submission by Turkey (TN/RL/W/32).