

ANALYSIS OF THE TWENTY-EIGHT AGREEMENT-SPECIFIC PROPOSALS

Communication by Kenya on behalf of the African Group

The following communication is being circulated at the request of the Delegation of Kenya on behalf of the African Group.

I. INTRODUCTION

Although developing countries account for more than three-fourths of the membership of the WTO, their share in world trade is around 30 per cent. The share of the majority of developing countries has stagnated or decreased, notwithstanding the implementation of far-reaching reforms in the last twenty years. The share of least-developed countries (LDCs) in world trade is less than 0.5 per cent, while the share of African countries is around 2 per cent. The inability of most developing countries, particularly African countries to benefit from the multilateral trading system has undermined the credibility of the GATT/WTO as an institution which caters for the interests of all its Members. The WTO has been keen to reverse the marginalisation of developing countries in the multilateral trading system by resorting to a number of measures, including special and differential treatment (S&D) for developing countries within the WTO legal framework and improved technical cooperation and capacity building programmes.

With respect to S&D, five broad classes of measures have been identified by the WTO Secretariat. The first set of measures are those which call upon developed countries to grant improved market access to products of export interest to developing countries. These measures are couched in hortatory language and are not legally enforceable. The second set of measures request developed country Members to safeguard the interests of developing country Members when imposing certain measures such as antidumping duties. These measures are also not couched in legally enforceable language, thus giving a wide discretion to developed country Members. The third set of measures allows developing country Members to assume lesser obligations than their developed country counterparts. Under the Agreement on Agriculture, for example, developed country Members were obliged to reduce their tariffs by 36 per cent, while developing-country Members were required to reduce theirs by 24 per cent. These measures are framed in legally enforceable language and as such are justiciable. The fourth set of measures allows developing-country Members longer transitional periods to comply with their obligations. Thus, under the Agreement on Agriculture, for example, whereas developed country Members had to implement their obligations within six years, developing country Members had ten years to comply with their obligations. These measures are couched in legally enforceable language and thus create rights and obligations for Members. The final set of measures request developed country Members to provide technical and financial assistance to developing country Members. These measures are couched in hortatory language and do not create rights and obligations for WTO Members.

It is thus clear that a majority of the S&D provisions in the WTO are unenforceable and have failed in their basic objective to facilitate the integration of developing countries into the multilateral trading system. It is against this background that developing countries, including African countries demanded in the run-up to the Doha Ministerial Conference that all S&D provisions should be reviewed and made legally enforceable. For African countries, it is pointless to have elaborate provisions in the WTO Agreement if they do not create effective rights and obligations. What is needed are effective measures that would facilitate the integration of our countries as well as other developing countries into multilateral trading system rather than empty words which would perpetuate the status quo. In response to the demands of developing countries, paragraph 44 of the Doha Ministerial Declaration provided that:

"We reaffirm that provisions for special and differential treatment (SDT) are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some Members have proposed a Framework Agreement on SDT (WT/GC/W/442). *We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational.* In this connection, we endorse the work programme on SDT set out in the Decision on Implementation-Related Issues and Concerns."¹ (italics added)

From the perspective of African countries, the mandate given by Ministers in Doha was unambiguous and very clear in terms of the results to be expected at the conclusion of the review exercise. All S&D provisions were not only to be legally enforceable, but should also contribute to the greater participation of developing countries in the multilateral trading system. Arguably, if a proposed measure does not meet this benchmark, then it does not comply with the Doha mandate. The objective of this contribution from the African Group is to assess whether the proposed 28 decisions meet the criteria set out in the Doha Declaration. It is the view of the Group that where a measure does not meet the benchmark, then its adoption is not warranted as it would not contribute to the integration of African and other developing countries into the multilateral trading system. In such circumstances, it would be preferable, if further work is carried out on those proposed decisions until such a time that they comply with the Doha mandate.

¹Paragraph 12 of the Decision on Implementation-Related Issues and Concerns provides that: "The Committee on Trade and Development is instructed: (i) to identify those SDT provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications for developed and developing Members of converting SDT measures into mandatory provisions, to identify those that Members consider should be made mandatory, and report to the General Council with clear recommendations for a decision by July 2002; (ii) to examine ways in which SDT provisions can be made more effective, to consider ways, including improved information flows, in which developing countries, in particular LDCs, may be assisted to make the best use of SDT provisions, and to report to the General Council with clear recommendations for a decision by July 2002; (iii) to consider, in the context of the work programme adopted at the Fourth Session of the Ministerial Conference, how SDT may be incorporated into the architecture of WTO rules. The work of the CTD in this regard shall take fully into consideration previous work undertaken as noted in WT/COMTD/W/77/Rev.1. It will also be without prejudice to work in respect of implementation of WTO Agreements in the General Council and in other Councils and Committees."

II. ANALYSIS OF THE TWENTY-EIGHT PROPOSED DECISIONS²

II.1 ARTICLE XVIII:C OF GATT 1994 – PROPOSED DECISION FOR ADOPTION

"The Ministerial Conference instructs the Council on Trade in Goods to develop and adopt procedures for recourse to Article XVIII:C. The concerns raised by developing countries, especially the least-developed countries, including those related to the suspension of concessions or other obligations under Article XVIII:C shall be addressed."

Original proposals as tabled by St. Lucia and the LDC Group

Proposal on Article XVIII:C by St. Lucia - TN/CTD/W/8

"The following proposals are advanced as a means towards enhancing the effectiveness of Article XVIII: Section C of GATT 1994 as a trade policy instrument which would address, *inter alia*, the needs of small and vulnerable developing country Members:

- Basic guidelines setting out the procedures for recourse to Article XVIII: Section C should be elaborated. The guidelines would assist in clarifying certain procedural ambiguities in the text.
- The condition limiting Article XVIII: Section C to circumstances involving 'infant industries' should be interpreted broadly to facilitate the implementation of sustainable economic development programmes in small and vulnerable developing country Members, including circumstances where established industries are threatened by an absolute or relative increase in imports. Additionally, there should be clear reaffirmation that the duration and review of the measure must be tied to achievement of the objectives for which the measure was imposed as opposed to any arbitrary absolute number of years.
- The right to compensation and/or retaliation should be waived for an initial period of application given the limited ability of small and vulnerable developing country Members to provide compensatory concessions and the limited impact which restrictions would have on global trade.³ It is worth noting that there is a lack of symmetry regarding the application of trade remedies. Generally, the unilateral response of a larger nation against a smaller nation carries markedly more impact than the reverse.
- Article XVIII: Section C should be affirmed as a new distinct special and differential (S&D) trade policy instrument for, *inter alia*, small and vulnerable developing country Members with limited administrative capacities; and not merely a measure of last recourse.⁴ Small and vulnerable developing country Members require effective trade policy instruments – considered vital for successful liberalization – to promote sustainable economic growth and development."

²This section follows the order of the 28 proposed decisions in Annex C of the Derbez Text (JOB(03)/150/Rev.2). For purposes of the analysis, it reproduces both the proposed decisions and the original proposals of the proponents.

³Note that the Agreement on Safeguards waives the right of compensation within the first three years provided that the safeguard measure imposed has been the result of an absolute rather than a relative increase in imports and that such a measure conforms to the provisions of the Agreement; see Agreement on Safeguards, Article 8.3. This grace period does not extend to measures taken under Article XVIII of the GATT 1994; see Article XVIII.7, 12 & 21 of the GATT 1994.

⁴"The condition stated in paragraph 13 of Article XVIII, permitting recourse to Section C only where 'no measure consistent with the other provisions of this Agreement is practicable', appears particularly restrictive; arguably, suggesting that this provision is a measure of last recourse."

Proposal on Article XVIII: C by the LDC Group - TN/CTD/W/4/Add.1

"Members shall exercise restraint in seeking compensation from least-developed countries when they need to modify or withdraw a tariff concession.

In order to facilitate adoption by developing countries, particularly by least-developed countries, of such measures in appropriate cases, it would be necessary to examine how the existing procedures prescribed by Article XVIII:C, for granting of approval are modified and improved. One possible approach would be to make the rules applicable to safeguard actions taken for 'development purposes' under Article XVIII:C comparable to those applicable under the Agreement on Safeguards, to safeguard actions taken 'in emergency situations'. In the latter case, countries can take actions involving increase in the bound rates of duties or imposition of the quantitative restrictions, if the conditions laid down by the Agreement on Safeguards are met. There is no need to seek prior approval of WTO, except in cases where the safeguard action takes the form of application of quantitative restrictions to imports on a selective country basis.

The improvements in the rules governing the use of safeguard measures for development purposes on the above basis would, by assuring countries that they could when needed, provide increased protection across sectors on a selective basis for the attainment of development objectives, also enhance their willingness to continue with the overall liberalization process."

Commentary on proposed decision:

While the first sentence of the proposed decision reflects the views of the proponents – St. Lucia and LDCs – in the sense of instructing the Council for Trade in Goods to develop and adopt procedures for the recourse to Article XVIII:C, it does not capture the underlying objectives of St. Lucia and LDCs. It should be borne in mind that there is no guarantee that a consensus would be reached in the CTD as to the nature of the procedures to be followed by a country wishing to have recourse to Article XVIII:C. Some Members could insist on authorization being granted by the Council for Trade in Goods before the adoption of any measures pursuant to Article XVIII:C.

The statement that the "concerns of developing countries, especially the least-developed countries, including those related to the suspension of concessions or other obligations under Article XVIII:C, shall be addressed" is very vague and does not commit developed countries to agreeing to the demands of LDCs and St. Lucia. What the proponents are demanding are (i) the right to impose restrictive measures to protect their infant industries, including those which are firmly established but are experiencing difficulties, (ii) exemption from the requirement to pay compensation upon the adoption of those restrictive measures and (iii) denying countries which might be affected by the measure the right to suspend equivalent concessions or other obligations. As explicitly stated by the proponents, they want the rules and procedures to be comparable to those under the Agreement on safeguards, which had been invoked by the United States to offer protection to its lamb and steel industries.

The economic value of this proposed decision cannot be determined with any degree of certainty. Such a definitive assessment can only be made after the rules and procedures have been agreed in the Council for Trade in Goods.

II.2 ARTICLE XXXVI OF GATT 1994 – PROPOSED DECISION FOR ADOPTION

"The Ministerial Conference agrees that the Committee on Trade and Development shall annually review the implementation of Article XXXVI of GATT 1994, and report to the General

Council with concrete recommendations, as agreed, no later than the last General Council of each year."

Original proposal by the African Group - TN/CTD/W/3/Rev.2

"The phrase 'shall be a matter of conscious and purposeful effort' in paragraph 9 used in relation to paragraphs 2 to 7 of Article XXXVI, and read together with paragraph 8 of Article XXXVI, shall be understood to mean that the provisions of paragraphs 2 to 7 are binding commitments on the part of developed country Members in favour of developing and least-developed country Members to,

- (a) ensure a rapid and sustained expansion of export earnings of the developing and least-developed country Members;
- (b) ensure that developing and least developed country Members secure a share in the growth in international trade commensurate with the needs of their economic development;
- (c) provide the maximum market access to products of export interest to developing and least-developed country Members and take measures to stabilise and improve conditions in world markets for these products particularly measures to attain stable, equitable and remunerative prices;
- (d) assist in the diversification of the economies of developing and least-developed country Members; and
- (f) ensure coherence in global economic policymaking and implementation in a manner that ensures that gains and opportunities in the multilateral trading system are supported and not undermined by programmes implemented by international lending agencies and vice versa;
- (g) It is further understood that this Decision shall be without prejudice to the acquis under any preferential regime governing the exports of developing and least-developed country Members by developed country Members.

Accordingly, implementation of the provisions of Article XXXVI shall be subject to reviews twice in every 12 months, in the Committee on Trade and Development. In the reviews, objective criteria shall be used to determine whether the implementation is meaningfully attaining the objectives set out in the provisions, in light of specific targets set by the Committee on Trade and Development."

Commentary on proposed decision:

The proposed decision is markedly different from the proposal by the African Group. It only partially addresses the issue of the review of the implementation of Article XXXVI. Instead of the proposed bi-annual reviews by the African Group, the proposed decision provides that there will be only one review each year. It is surprisingly silent on the underlying reasons of the proposal. It does not indicate the nature of obligations to be assumed by developed country Members towards meeting the very clear objectives set out by the proponents, including the need for developed countries to increase market access opportunities for developing countries by impliedly eliminating or reducing tariff peaks and tariff escalation which prevent African and other developing countries from diversifying their exports and also by assisting actively in the stabilisation of commodity prices.

Without any clear objectives, it is questionable which benchmark would be used in the assessment. The proposal as it currently stands will not have any economic impact on developing countries.

II.3 ARTICLE XXXVII OF GATT 1994 – PROPOSED DECISION FOR ADOPTION

"The Ministerial Conference agrees that any Member may initiate discussions in the Committee on Trade and Development on the basis of Article XXXVII and decides that a Member shall, upon request, provide a detailed explanation to matters raised in regard to the provisions under paragraph 1, with a view to reaching a solution that is satisfactory to all Members concerned."

Original Proposal by the African Group - TN/CTD/W/3/Rev.2

"Paragraphs 1 and 3 of Article XXXVII provide for binding obligations and it is understood that the commitments set out shall be fully implemented and where it is felt that this would not be possible, leave shall be sought in the General Council by the concerned developed country Members on the basis of consultations on specific grounds advanced."

Commentary on proposed decision:

The proposed decision is at variance with the original proposal and does not even remotely address the concerns of developing countries. The first part of the sentence of the proposed decision is not a concession as under normal WTO rules and procedures, as any Member can raise any matter in connection with any of the covered agreements. The proposed decision side steps the issue whether paragraphs 1 and 3 of Article XXXVII are mandatory and as such create legally enforceable obligations.

Under the present formulation, any proposed solution to the problem raised by the developing country Member has to be agreed not only between the developed country and developing country concerned, but also with other Members meaning that any Member could potentially block the adoption of the proposed solution. As a result, this proposal will not bestow any economic benefits on developing countries, and the impact of this proposal can only be determined when an agreement is reached, making it difficult to determine the extent of its impact.

II.4 ARTICLE XXXVIII OF GATT 1994 – PROPOSED DECISION FOR ADOPTION

"The Ministerial Conference instructs the Director-General to pursue and conclude cooperation arrangements as may be necessary to further the objectives set forth in Article XXXVI of the GATT 1994. The Ministerial Conference further instructs the Committee on Trade and Development to receive studies and reports from relevant international agencies and organizations that may assist Members in analyzing the development plans and policies of individual developing and least-developed country Members, export potential and market prospects over the short and medium terms, measures that could be taken in the WTO framework and by other international agencies and organizations as well as the assistance required by developing and least-developed country Members to help achieve their respective development goals."

Original Proposal by the African Group - TN/CTD/W/3/Rev.2

"(a) It is understood, under Article XXXVIII of GATT 1994, that the WTO shall arrange with the United Nations and its agencies, and with all international and regional organisations that have observer status in WTO bodies, to annually provide studies and reports pertaining to elements indicated in Article XXXVIII to the Committee on Trade and Development, which shall deliberate on them and report with recommendations to the General Council.

- (b) The studies and reports, and the recommendations to the General Council shall provide guidelines on, development indicators and goals, desirable rates of growth in actual market access levels for products of export interest to developing and least-developed country Members, targets to be achieved over the short and medium terms, measures to be taken in the WTO framework and by other international organisations as well as the assistance required by developing and least-developed country Members to ensure the achievement of goals and targets, and deal with any relevant matters."

Commentary on proposed decision:

The first sentence of the proposed decision accurately reflects paragraph (a) of the original proposal by the proponents. It is more specific in calling upon the Director-General of the WTO to conclude cooperation agreements with relevant international organisations to further the objectives set forth in Article XXXVI of the GATT 1994. The second sentence of the proposed decision does not fully reflect the views of the proponents. First, there is no mention in the proposed decision that after receiving the reports, the CTD would have a discussion on them and make recommendations to the General Council. The advantage of having the reports discussed in the General Council, which is the highest political body when the Ministerial Conference is not in session, would thus be lost. Usually matters before the General Council are handled very seriously at the level of Heads of Delegation and routinely receive attention in the media than those before subsidiary bodies.

Second, the proposed decision dilutes the wording of the original proposal which implicitly would require developed countries to take action to improve market access for products of export interest to developing countries. Under the proposed decision, there is no mention of measures being taken to improve market access for products of export interest to developing countries. Analysing the export potential and market prospects of developing countries is not enough if they are not accompanied by effective measures which would open markets for their products. Third, the proposed decision weakens the original proposal by not making it mandatory for the reports of the various international organisations to be taken into account. It merely provides that "measures that could be taken in the WTO framework", instead of "measures to be taken in the WTO framework".

Thus, it follows that the proposed decision does not impose any substantive obligations in favour of developing country Members. Its economic value is therefore limited.

II.5 UNDERSTANDING ON THE INTERPRETATION OF ARTICLE XVII OF THE GATT 1994 – PROPOSED DECISION FOR ADOPTION

"While acknowledging that the provisions of Article XVII of the GATT 1994 apply to all Members, Members recognize that state trading enterprises may have a significant role to play in promoting and protecting public policy objectives in developing and least-developed country Members."

Original Proposal by the African Group - TN/CTD/W/3/Rev.2

"Members agree that state trading enterprises may have a significant role to play in protecting public policy in developing and least-developed country Members."

Commentary on proposed decision:

The proposed decision strays a little bit from the original proposal by the African Group as it was intended to be a reaffirmation of the importance of state trading enterprises for developing and least-developed countries. Arguably, the opening sentence is redundant as it was not the intention of the proponents to state that the relevant rules of the WTO on state trading enterprises were only applicable to developing and least-developed countries.

In any event, this proposal does not have any economic value, as the current rules of the WTO permit Members to have state trading enterprises provided they operate in accordance with commercial considerations.

II.6 UNDERSTANDING ON BALANCE-OF-PAYMENTS PROVISIONS OF THE GATT 1994 – PARAGRAPH 8 – PROPOSED DECISION FOR ADOPTION

"The Ministerial Conference mandates the Committee on Balance-of-Payments Restrictions to examine ways and means of simplifying the administrative requirements within the full consultation procedures."

Original Proposal

"The General Council mandates the Committee on Balance-of-Payments Restrictions to examine ways and means of simplifying the administrative requirements within the full consultation procedures."

Commentary on proposed decision:

The proposed decision fully reflects the proposal by the proponents. The proposed decision does not have any economic value, as it would not result in an increase in the exports of developing countries. While simplifying the administrative requirements will lower transaction costs, they will not confer any substantive benefits on developing-country Members.

II.7 ENABLING CLAUSE – PROPOSED DECISION FOR ADOPTION

"The Ministerial Conference confirms that the terms and conditions of the Enabling Clause shall apply when action is taken by Members under the provisions of this Clause."

Original Proposal

"The General Council confirms that the terms and conditions of the Enabling Clause shall apply when action is taken by Members under the provisions of this Clause."

Commentary on proposed decision:

The proposed decision fully reflects the original proposal by the proponents. However, it is not clear which terms and conditions are being referred to. The proposed decision as currently drafted will not have any economic value for developing countries. It should be added, however, that the recent decision by the Appellate Body decision in the EU – GSP case has clarified the scope of the Enabling Clause.

II.8 AGREEMENT ON AGRICULTURE – ARTICLE 15.2 – PROPOSED DECISION FOR ADOPTION

"The Ministerial Conference confirms that least-developed country Members remain exempt from reduction commitments, as provided in Article 15.2, unless decided otherwise by consensus."

Original Proposal

"The General Council confirms that least-developed country Members remain exempt from reduction commitments, as provided in Article 15.2, unless decided otherwise by consensus."

Commentary on proposed decision:

The proposed decision fully reflects the original proposal by the proponents. Its economic value to LDCs is, however, highly questionable as it is generally accepted in the current round of negotiations that LDCs do not have to undertake reduction commitments. Paragraph 45 of Annex A of the July 2004 General Council Decision provides that: "Least-Developed Countries, which will have full access to all special and differential treatment provisions above, are not required to undertake reduction commitments. Developed Members, and developing country Members in a position to do so, should provide duty-free and quota-free market access for products originating from least-developed countries."

II.9 PSI AGREEMENT - ARTICLE 3.3 – PROPOSED DECISION FOR ADOPTION

"(a) The Ministerial Conference agrees that technical assistance for purposes of the Agreement on Preshipment Inspection shall address the concerns of developing and least-developed country Members relating among others to:

(i) training customs and revenue officials to promote and achieve the objectives of the Agreement on Preshipment Inspection through the activities defined in Article 1.3 of the Agreement, in order to ensure the proper inspection of consignments to be exported to the user Member, and the prevention of false declaration, wrong classification and any fraud;

(ii) regulation of preshipment entities.

(b) The Ministerial Conference further agrees that customs authorities of Members shall, in accordance with paragraph 8.3 of the Decision on Implementation-Related Issues and Concerns, closely cooperate in the context of the Agreement on Customs Valuation, and of the Decision Regarding Cases where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value."

Original Proposal by the African Group - TN/CTD/W/3/Rev.2

"Technical assistance for purposes of the Agreement shall address the concerns of developing and least-developed country Members or user Members relating among others to:

(i) training customs and revenue officials to ensure that the objectives of preshipment inspection are achieved; particularly those relating to prevention of false declaration, wrong classification, and any fraud;

- (ii) ensuring that it is duly inspected consignments that are shipped to user Members; and
- (iii) regulation of preshipment entities.

In this regard, and in the context of the Agreement on Customs Valuation and of the Decision Regarding Cases Where Customs Administrations Have Reasons To Doubt The Truth Or Accuracy Of The Declared Value, it is agreed that customs authorities of Members shall closely co-operate with a view to fully assisting user Members achieve the objectives of the Agreement on Preshipment Inspection."

Commentary on proposed decision:

The proposal as currently drafted could have some economic value to developing countries as it could prevent customs fraud and improve efficiency of customs. This would also in turn depend on the degree to which customs cooperate. It would be recalled that in the context of implementation, a number of countries objected to a proposal by India which would have obliged customs to pass on information requested by other customs authorities.

II.10 AGREEMENT ON RULES OF ORIGIN – PROPOSED DECISION FOR ADOPTION

"In regard to preferential rules of origin under the Common Declaration in Annex II to the Agreement, the Ministerial Conference agrees that in their arrangements for mutual reduction or elimination of tariffs or non-tariff barriers, developing and least-developed country Members shall have the right to adopt preferential rules of origin designed to achieve trade policy objectives relating to their rapid economic development, particularly through generating regional trade.

Furthermore, the Ministerial Conference instructs the Director-General to take action to facilitate the increased participation of developing and least-developed country Members in the activities of the Technical Committee on Rules of Origin of the World Customs Organization as well as to coordinate with this organization in identifying technical and financial assistance needs of developing and least-developed country Members, and report to the Committee on Rules of Origin and the Council for Trade in Goods periodically, and the General Council as appropriate."

Original proposal

"In regard to preferential rules of origin under the Common Declaration in Annex II to the Agreement, the General Council agrees that in their arrangements for mutual reduction or elimination of tariff or non-tariff barriers, developing and least-developed country Members shall have the right to adopt preferential rules of origin designed to achieve trade policy objectives relating to their rapid economic development, particularly through generating regional trade.

Furthermore, the General Council instructs the Director-General to take action to facilitate the increased participation of developing and least-developed country Members in the activities of the Technical Committee on Rules of Origin of the World Customs Organisation as well as to coordinate with this organization in identifying technical and financial assistance needs of developing and least-developed country Members, and report to the Committee on Rules of Origin and the Council for Trade in Goods periodically, and the General Council as appropriate."

Commentary on proposed decision:

The proposed decision fully reflects the original proposal. The proposal could have some economic value to developing countries, and lead to the adoption of preferential rules of origin which would facilitate trade between themselves. It is important to note, however, that in the absence of common rules, WTO Members are free to adopt whichever rules they want subject to the non-discrimination principle and other relevant principles of the WTO. It should, however, be borne in mind that it would be open to any Member to have recourse to the dispute settlement mechanism to challenge the consistency or otherwise of the preferential rules of origin adopted by a Member. The possibility of adopting harmonized preferential rules of origin in the near future cannot be discounted.

II.11 AGREEMENT ON IMPORT LICENSING PROCEDURES – ARTICLE 1.2 – PROPOSED DECISION FOR ADOPTION

"It is understood that the requirement to take into account the 'development purposes and financial and trade needs of developing country Members' in Article 1.2 of the Agreement means that the burden of the administrative procedures used to implement import licensing regimes shall be further reduced in order to facilitate trade of developing country Members and minimize possible adverse effects to their trade, including by making import licensing procedures as expeditious as possible."

Original proposal by the African Group - TN/CTD/W/3/Rev.2

"It is understood that the requirement to take into account the 'development purposes and trade needs of developing country Members' in Article 1.2 of the Agreement means that import licensing regimes shall be designed in a manner that prevents adverse effects to the trade of developing country Members. In this regard, the regimes shall specifically be expeditious in relation to the trade of developing country Members."

Commentary on proposed decision:

The proposed decision does not fully reflect the objectives of the proponents. Under the original proposal, developed countries must ensure that all adverse effects to the trade of developing countries are eliminated as a result of the administration of import licensing regimes. Under the proposed decision, the obligation on developed countries is to minimize possible adverse effects to the trade of developing countries. In effect, there could still be some adverse effects on the trade of developing countries. As currently drafted, the economic value of this proposed decision is quite limited. It could be of enormous value to developing countries if developed countries were to implement their regimes in a simple and transparent manner so as to avoid transaction and related costs.

II.12 ARTICLE IV OF GATS – PROPOSED DECISION FOR ADOPTION

"Pursuant to Article IV.3 of the GATS, in all services negotiations, whether broad-based rounds of negotiations or separate negotiations on specific sectors, modalities shall be developed in order to allow the priorities of least-developed country Members to be presented and duly taken into account."

Original proposal

"Pursuant to Article IV.3 of the GATS, in all services negotiations, whether broad-based rounds of negotiations or separate negotiations on specific sectors, modalities shall be developed in order to allow the priorities of least-developed country Members to be presented and duly taken into account."

Commentary on proposed decision:

The proposed decision fully reflects the original proposal. However, it is difficult to assess the impact the proposed decision would have on the services trade of least-developed countries. Potentially, it could increase their services trade, but that would very much depend on the commitments assumed by other WTO Members, particularly developed countries in their favour.

II.13 ARTICLE IV.3 OF GATS – PROPOSED DECISION FOR ADOPTION

"The Ministerial Conference agrees that the information to be provided by Members shall indicate how the requirement that special priority be given to least-developed country Members in the implementation of paragraphs 1 and 2 of Article IV is being met, and that contact points, in this context, shall provide information of particular interest to services suppliers from least-developed country Members."

Original proposal

"The General Council agrees that the information to be provided by Members shall indicate how the requirement that special priority be given to least-developed country Members in the implementation of paragraphs 1 and 2 of Article IV is being met, and that contact points, in this context, shall provide information of particular interest to services suppliers from least-developed country Members."

Commentary on proposed decision:

The proposed decision fully reflects the original proposal. From an economic perspective, it would not confer any specific or direct benefit to LDCs. Its main advantage lies in the fact that apart from making information more accessible to LDC service providers, the proposed decision would put pressure on developed countries to fulfil their obligations under Articles IV:1 and 2 of the GATS. Developed countries might take the view that the obligations are not legally binding, making the proposed decision valueless.

II.14 ARTICLE XXV OF GATS – PROPOSED DECISION FOR ADOPTION

"The Ministerial Conference instructs the WTO Secretariat to pursue with a view to concluding arrangements with relevant international institutions that have the technical assistance capacity to assist developing and least-developed country Members in addressing their supply-side and infrastructural constraints and their development needs in the services sector. This shall be without prejudice to the prerogative of the Council for Trade in Services to decide upon technical assistance to developing countries which shall be provided at the multilateral level by the Secretariat, in accordance with Article XXV.2."

Original proposal

"The General Council instructs the WTO Secretariat to pursue with a view to concluding arrangements with relevant international institutions that have the technical assistance capacity to

assist developing and least-developed country Members in addressing their supply-side and infrastructural constraints and their development needs in the services sector. This shall be without prejudice to the prerogative of the Council for Trade in Services to decide upon technical assistance to developing countries which shall be provided at the multilateral level by the Secretariat, in accordance with Article XXV.2."

Commentary on proposed decision:

The proposed decision fully reflects the original proposal. As currently drafted, the proposed decision's economic value is limited. As to whether developing countries would benefit from it would depend on the nature of agreements to be concluded and also the sort of assistance that would be provided in addressing the supply-side constraints faced by developing countries. If the agreements are couched in non-legally enforceable language, then it cannot be expected with a high degree of certainty that developing countries would benefit from this proposal.

II.15 PARAGRAPH 6 OF THE GATS ANNEX ON TELECOMMUNICATIONS – PROPOSED DECISION FOR ADOPTION

"The Ministerial Conference instructs the Council for Trade in Services to put in place arrangements for prompt notification of any measures taken with regard to the implementation of subparagraphs (a) to (d) of paragraph 6 of the Annex on Telecommunications."

Original proposal

"The General Council instructs the Council for Trade in Services to put in place arrangements for prompt notification of any measures taken with regard to the implementation of subparagraphs (a) to (d) of paragraph 6 of the Annex on Telecommunications."

Commentary on proposed decision:

The proposed decision fully reflects the original proposal. As currently drafted, the proposed decision's economic value is quite limited. What might confer potential economic benefits is the implementation of paragraph 6 of the Annex on Telecommunications. The main advantage of the proposed decision is that developing countries would be promptly kept abreast of measures taken pursuant to paragraph 6 of the Annex on Telecommunications.

II.16 ARTICLE 66.2 OF THE TRIPS AGREEMENT – PROPOSED DECISION FOR ADOPTION

"Members, having regard to Article 66.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, and having regard to the decision of the TRIPS Council of 19 February 2003, contained in document IP/C/28, reaffirm that this decision be expeditiously implemented in a way that ensures the monitoring and full implementation of the obligations in Article 66.2."

Original proposal by the African Group - TN/CTD/W/3/Rev.2

- "(a) It is agreed that in implementing Article 66.2:
- (i) developed country Members shall give incentives to enterprises and institutions in their territories through their laws or other administrative instruments;

- (ii) the incentives shall be of a magnitude and nature that will effectively operate as motivation to transfer technology to least-developed country Members taking into account the actual conditions in the least-developed country Members and the difficulties expressed by the enterprises and institutions; and
- (b) The incentives shall take any appropriate forms provided that the forms shall effectively operate as incentives to motivate the enterprises and institutions to transfer technology to least-developed country Members.
- (c) Developed country Members shall report on their implementation of Articles 7, 8, and 66.2 of the Agreement, according to a reporting schedule to be regularly drawn up by the TRIPS Council. The reports shall be evaluated in the TRIPS Council to establish whether or not the implementation is achieving the objectives of building sound technological bases in developing and least-developed country Members
- (d) 'Technology' for purposes of the Agreement shall include equipment, knowledge and skills including their tacit forms and trade secrets, practical and theoretical training, and insights into the history and global context of innovations and processes relating to particular technologies.
- (e) Accordingly, it is understood that co-operation arrangements between enterprises and institutions of developed country Members on the one hand and research and other learning institutions in developing and least developed country Members on the other, shall be essential components of implementing the Agreement. The reporting shall indicate implementation in terms also of arrangements with the research and learning institutions."

Commentary on proposed decision:

The proposed decision does not fully reflect the objectives of the African Group. It is not as self-contained as the original proposal, under which developed countries would be expected to provide effective incentives to their enterprises and institutions to transfer technology to LDCs, bearing in mind the conditions prevailing in these countries and the difficulties expressed by the relevant enterprises and institutions. Regular exchanges between developed countries' enterprises and institutions and developing countries' research and learning institutions would be encouraged and there would be an effective monitoring system to determine progress towards achieving the objective of transferring technology to LDCs.

The economic value of this proposed decision cannot be determined with any certainty, as very much would depend on the measures taken by developed countries and the response of their enterprises and institutions.

II.17 ARTICLE 67 OF THE TRIPS AGREEMENT – PROPOSED DECISION FOR ADOPTION

"The Ministerial Conference agrees that technical and financial cooperation, in accordance with Article 67, shall be provided on request and on mutually agreed terms and conditions, with due consideration given to comprehensive programmes comprising such components as improving the relevant legal framework in line with the general obligations of the Agreement, enhancing enforcement mechanisms, increasing training of personnel at the various levels, assisting in the preparation of laws and procedures in an effort to encourage and monitor technology transfer, making use of the rights and policy flexibility in the Agreement, and strengthening or establishing coordination between intellectual property rights, investment and competition authorities.

The Ministerial Conference instructs the Council for Trade-Related Aspects of Intellectual Property Rights to annually review the state of implementation of the Agreement between the World Intellectual Property Organization and the World Trade Organization, taking into account opportunities for technical assistance as provided for in the Agreement."

Original proposal

"The General Council agrees that technical and financial cooperation, in accordance with Article 67, shall be provided on request and on mutually agreed terms and conditions, with due consideration given to comprehensive programmes comprising such components as improving the relevant legal framework in line with the general obligations of the Agreement, enhancing enforcement mechanisms, increasing training of personnel at the various levels, assisting in the preparation of laws and procedures in an effort to encourage and monitor technology transfer, making use of the rights and policy flexibility in the Agreement, and strengthening or establishing coordination between intellectual property rights, investment and competition authorities.

The General Council instructs the Council for Trade-Related Aspects of Intellectual Property Rights to annually review the state of implementation of the Agreement between the World Intellectual Property Organization and the World Trade Organisation, taking into account opportunities for technical assistance as provided for in the Agreement."

Commentary on proposed decision:

The proposed decision fully reflects the original proposal. As to whether it would confer economic benefits on developing countries would depend on the terms of the technical and financial cooperation agreements to be mutually agreed between the donor country and the recipient country. In any event, the benefits that might accrue would not be direct. The assistance envisaged to be provided could help some developing countries to attract foreign direct investment into certain critical sectors of their economies.

II.18 ARTICLE 70.9 OF THE TRIPS AGREEMENT – PROPOSED DECISION FOR ADOPTION⁵

"For purposes of the requirement to grant exclusive marketing rights during transition periods, it is understood that there is a clear distinction between 'patent rights' on the one hand and 'exclusive marketing rights' on the other. Patent rights are set out in Article 28 of the TRIPS Agreement. Exclusive marketing rights are not the same as patent rights. Members have the right to define exclusive marketing rights, so long as the definition accords with the meaning of the term in the TRIPS Agreement as interpreted under the rules of public international law. There is no requirement to grant exclusive marketing rights unless marketing approval is granted in that WTO Member for which exclusive marketing rights is sought."

Original Proposal by the African Group - TN/CTD/W/3/Rev.2

"(a) It is understood that developing country Members shall be entitled to extensions beyond the additional 5 year period under Article 65.4 relating to other areas of technology required to be protected under the TRIPS Agreement.

⁵ Category II proposal.

- (b) For purposes of the requirement to grant exclusive marketing rights during transition periods, it is understood that there is a clear distinction between 'patent rights' on the one hand and 'exclusive marketing rights' on the other. The two shall not confer the same rights. Patent rights as set out in Article 28 of the TRIPS Agreement are the following: 'to prevent third parties not having the owner's consent from the acts of making, using, offering for sale, selling, or importing for these purposes the (patented) product' as well as the products obtained directly by the patented process. These rights conferred by a patent, are not the same rights as may be conferred by the grant of exclusive marketing rights. Members have the right and the freedom to define what constitutes exclusive marketing rights, and may do so in light of any interpretations that the General Council or the TRIPS Council may adopt. It is understood also that there is no requirement to grant exclusive marketing rights until and only if marketing approval is granted."

Commentary on proposed decision:

There are a number of differences between the original proposal and the proposed decision. First, the proposed decision does not reflect the proposal that developing countries should be entitled to extensions beyond the additional five year period under Article 65.4 relating to other areas of technology required to be protected under the TRIPS Agreement. Second, while the proposed decision mirrors the second element of the original proposal, there is one important distinction. Under the original proposal, while Members would have an unfettered right to define exclusive marketing rights in light of any interpretations adopted by the TRIPS Council and the General Council, under the proposed decision any definition has to be in accord with the relevant rules of public international law.

The economic value of the proposed decision is limited as it does not address the first proposal by the proponents and only clarifies the scope of Article 28 of the TRIPS Agreement. It does not add anything new to Article 28 and may even have restricted its scope by subjecting it expressly to rules of public international law.

II.19 UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES – ARTICLE 8.10 – PROPOSED DECISION FOR ADOPTION

"Pursuant to Article 8.10 of the DSU, the Ministerial Conference agrees that in disputes between a developing country Member and a developed country Member, at least one panellist shall be from a developing country Member, unless the developing country Member party to the dispute waives this right."

Original proposal

"Pursuant to Article 8.10 of the DSU, the General Council agrees that in disputes between a developing country Member and a developed country Member, at least one panellist shall be from a developing country Member, unless the developing country Member party to the dispute waives this right."

Commentary on proposed decision:

The proposed decision fully reflects the original proposal. The argument is usually made that a panellist from a developing country is more likely to understand and show appreciation of the challenges faced by developing country Members in the multilateral trading system. While that may be true, its economic value is highly questionable, as the outcome of a dispute is likely to remain the

same even with one or more of the panellists coming from a developing country. A panellist is expected to be neutral and has to apply WTO rules impartially. If the WTO rules under consideration are clear and confer effective special and differential treatment to developing countries, then every panellist whether from a developed or developing country, would have to give effect to them. It is in this sense that it is important for there to be very clear and legally enforceable S&D provisions.

II.20 PARAGRAPH 2(v) OF THE DECISION ON MEASURES IN FAVOUR OF LEAST-DEVELOPED COUNTRIES – PROPOSED DECISIONS FOR ADOPTION

"The Ministerial Conference agrees that the WTO through its participation in the Integrated Framework and JITAP and other relevant institutions will work to ensure that supply-side constraints of the LDCs are identified in the Diagnostic Trade Integration Studies (DTIS) and are addressed in the implementation and follow-up taking into account the specific circumstances of each beneficiary country. The Ministerial Conference also instructs the Sub-Committee on LDCs to undertake a biennial review of the implementation of the DTIS and to monitor the possible impact of assistance that is targeted towards the diversification of exports from LDCs, including through comparing the composition and concentration of LDCs' export structures over time and across LDCs and through the establishment of other relevant indicators."

Original proposal

"The General Council agrees that the WTO through its participation in the Integrated Framework and JITAP [and other relevant institutions] will work to ensure that supply-side constraints of the LDCs are identified in the Diagnostic Trade Integration Studies (DTIS) and are addressed in the implementation and follow-up taking into account the specific circumstances of each beneficiary country. The General Council also instructs the Sub-Committee of the LDCs to undertake a biennial review of the implementation of the DTIS and to monitor the possible impact of assistance that is targeted towards the diversification of exports from LDCs, including through comparing the composition and concentration of LDCs' export structures over time and across LDCs and through the establishment of other relevant indicators."

Commentary on proposed decision:

The proposed decision fully reflects the original proposal except that there appears to be some disagreement as to the extent of involvement of other relevant international institutions in the process. It is difficult to assess the potential economic benefits of the proposed decision, as its real contribution towards alleviating the supply-side constraints facing least-developed countries can only be determined after the implementation of the Diagnostic Trade Integration Studies. Thus, as currently drafted, the proposed decision has very little economic value.

II.21 RULES RELATING TO NOTIFICATION PROCEDURES – PROPOSED DECISION FOR ADOPTION

"Recognizing the practical difficulties faced by least-developed country Members in abiding fully by their notification obligations, the Ministerial Conference instructs the Sub-Committee on Least-Developed Countries to examine possible improvements to the notification procedures for least-developed country Members, taking into account the experience regarding Secretariat produced reports that helped fulfil some of these requirements. In conducting its examination, the Sub-Committee shall seek the input of relevant WTO bodies, which may be in a position to advise on practical means for improving the notification procedures in relation to

least-developed country Members, for example the possibility of longer timeframes, specified exemptions and simplified procedures for notifications, and cross-notifications. The Committee on Trade and Development shall forward the Sub-Committee's report to the General Council by 31 December 2003 for appropriate action."

Original proposal

"Recognizing the practical difficulties faced by least-developed country Members in abiding fully by their notification obligations, the General Council instructs the Sub-Committee on Least-Developed Countries to examine possible improvements to the notification procedures for least-developed country Members, taking into account the experience regarding Secretariat produced reports that helped fulfil some of these requirements. In conducting its examination, the Sub-Committee shall seek the input of relevant WTO bodies, which may be in a position to advise on practical means for improving the notification procedures in relation to least-developed country Members, for example the possibility of longer timeframes, specified exemptions and simplified procedures for notifications, and cross-notifications. The Committee on Trade and Development shall forward the Sub-Committee's report to the General Council by 31 December 2003 for appropriate action."

Commentary on proposed decision:

The proposed decision fully reflects the original proposal. Arguably, the proposed decision would not confer any direct economic benefits to developing countries. It would merely assist developing countries to fulfil their notification obligations.

II.22 ENABLING CLAUSE – PROPOSED DECISION FOR ADOPTION

"The Ministerial Conference agrees that in formulating schemes under paragraph 2(a), (b) and (c) of the Enabling Clause, and in furtherance of paragraph 3 thereof, developed country Members will take into account, among other factors, the needs of developing and least-developed country Members and consult with them with a view to ensuring that their products of export interest are accorded meaningful market access. The Committee on Trade and Development will annually review the progress made in this regard and report to the General Council with recommendations, if any."

Proposal by the African Group - TN/CTD/W/3/Rev.2

- "(a) In formulating schemes under paragraphs (a) and (b) of clause 2 of the Enabling Clause, developed country Members shall consult under the auspices of the Committee on Trade and Development with developing and least-developed country Members with a view to ensuring that products of export interest to developing and least-developed country Members are accorded meaningful market access that will achieve the objectives set out in Article XXXVI of GATT 1994.
- (b) In this regard, developed country Members shall show to the Committee on Trade and Development how they have included in the programmes specific products of particular export interest to developing and least-developed country Members and taken measures to ensure meaningful market access.
- (c) Meaningful market access shall be construed in accordance with targets set or adopted from time to time in the Committee on Trade and Development.

- (d) The Enabling Clause provides developing and least-developed country Members with the right to enter regional or global arrangements for the mutual reduction or elimination of tariffs or non-tariff barriers. It is understood that the arrangements can be for reduction or elimination of tariffs or non-tariff barriers, and that with regard to reduction or elimination of tariffs no WTO body or Members can prescribe any criteria relating to the arrangements. Members shall respect any such arrangements as an exercise of rights that developing and least-developed country Members have under the WTO Agreement.
- (e) It is understood that this Decision shall be without prejudice to the acquis under any preferential regime governing the exports of developing and least-developed country Members by developed country Members."

Commentary on proposed decision:

The proposed decision is very different from the original proposal tabled by the African Group. Under the proposal by the African Group, preference-giving countries would be obliged to consult under the auspices of the Committee on Trade and Development (CTD) with developing and least-developing countries before implementing their preferential schemes. Arguably, without the agreement of these countries, the developed country may not be able to implement its scheme. Put in another way, the original proposal would oblige preference-giving countries to demonstrate to the CTD that it has taken specific measures to increase market access for products of export interest to developing and least-developed countries in accordance with the guidelines set by the Committee on Trade and Development. Under the proposed decision, the obligation on preference-giving countries is less strict. They would only be required "to take into account, among other factors, the needs of developing and least-developed country Members and consult with them with a view to ensuring that their products of export interest are accorded meaningful market access". The obligation is not absolute and moreover preference-giving countries would be free to take into consideration other matters in designing their preferential schemes. They are not required to take account of the benchmarks set by UNCTAD in granting preferences to LDCs and developing countries. They would also not be required to demonstrate to the CTD that they have taken measures to boost market access for products of export interest to developing and least-developed countries. Instead, the CTD would conduct annual reviews to determine progress and make recommendations, if any, to the General Council. It should be pointed out that without the concurrence of developed countries, the CTD cannot formulate any recommendations to the General Council. In other words, assuming that substantial progress has not been made to improve the market access of LDCs and developing countries, there is no guarantee that the CTD would be in a position to make recommendations to the General Council.

The proposed decision is silent on the proposal which would have broadened the scope of the Enabling Clause to allow developing countries to not only exchange tariff preferences among themselves, but also non-tariff preferences. It is also silent on the proposed amendment of the Enabling Clause to dispense with the requirement that the exchange of tariff preferences should be in accordance with criteria prescribed by Members [General Council].

The economic value of the proposed decision cannot be determined with any certainty, as it would depend on the preferences that would be accorded by developed countries to products of export interest to developing countries.

II.23 REVIEW OF PROGRESS ON MARKET ACCESS FOR LEAST-DEVELOPED COUNTRIES – PROPOSED DECISION FOR ADOPTION

"We recall paragraph 2(d) of the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, and Members' commitment to the objective of duty-free, quota-free market access for products originating from least-developed countries, as contained in paragraph 42 of the Doha Ministerial Declaration. The Ministerial Conference agrees to review the progress made in providing access to the least-developed countries on the above basis."

Original proposal by the LDC Group

"For effective operationalisation of the provisions of the Decision on More Favourable Treatment and to ensure that the least-developed countries derive continued and sustained benefits from the special preferential treatment extended by the developed countries, it is suggested that its provisions shall be clarified as follows:

- (a) Special treatment to be extended to least-developed countries in accordance with the provisions of Paragraph 1 and 2(d) of the Decision shall take the form of duty-free and quota free access for all products.
- (b) The Committee on Trade and Development shall prior to the Fifth Ministerial Conference review the progress made by the developed countries in providing access to the least-developed countries on the above basis and shall make appropriate recommendations for consideration at the Ministerial Meeting."

Commentary on proposed decision:

The proposed decision is fundamentally different from the original proposal, as it is couched in hortatory language. Contrary to the original proposal, it would not oblige developed countries to grant quota-free and duty-free access to all products originating in LDCs. It would be left to each developed country to decide whether or not to grant duty-free and quota-free access to the exports of LDCs.

As currently drafted, this proposed decision would not confer any specific economic benefits to LDCs. The economic benefits can only be realized after developed countries make the necessary changes to their GSP schemes.

II.24 PARAGRAPH 2(ii) OF THE DECISION ON MEASURES IN FAVOUR OF LEAST-DEVELOPED COUNTRIES – PROPOSED DECISION FOR ADOPTION

"Without prejudice to the binding commitments that may result from work under Paragraphs 13, 16 and 42 of the Doha Ministerial Declaration, and building upon our commitment in the Doha Ministerial Declaration, Members shall continue to expeditiously pursue the objective of duty-free and quota-free market access for products originating from [all] least-developed countries in a manner that ensures security and predictability. We urge Members to adopt and implement rules of origin so as to facilitate exports from least-developed countries."

Original proposal by the LDC Group LDCs - TN/CTD/W/4

"The initiative to improve market access for LDCs was first contained in the 1996 Singapore Ministerial Declaration by which WTO Members agreed to a plan of action in favour of LDCs. Among the stated objectives of this initiative, was that of taking positive measures, for example, to provide duty-free market access on an autonomous basis, for products of LDCs and thus aiming at improving their overall capacity to respond to the opportunities offered by the trading system.

While recent initiatives undertaken by major trading partners in favour of LDCs such as the Everything But Arms and African Growth and Opportunity Act should be welcomed, further improvement of Generalized System of Preferences (GSP) and other schemes for products of particular interest to the LDCs should include not only expanding the product coverage, and lowering of barriers, but also include the important dimension of predictability and security of these access conditions. Binding of these measures are critical to strengthening the supply capacities in LDCs and necessary for the improvement of secure and beneficial market access for these countries.

- Establishment of a commitment that provides a contractual status to duty free and quota free preferential market access through the negotiation of a legal instrument to make market access secure, stable and predictable. Any temporary withdrawal of duty-free treatment should be disciplined in a contractual manner;
- Duty-free treatment should be provided to all products. Any temporary exceptions could provide for duty-free tariff quotas, which would be subject to an agreed phase-out programme;
- Rules of origin requirements should be realistic and flexible to match the industrial capacity of LDCs in order to ensure the effective and full utilisation of preferences. The rules of origin should also be harmonised among preference-giving countries and subject to simplified customs documentation and procedures;
- Existing S&D treatment provisions under the various WTO Agreements should be improved in an effective manner with a view to ensuring that duty-free access is not nullified by non-tariff measures;
- Technical and financial assistance to meet the cost of compliance with SPS measures and technical standards."

Commentary on proposed decision:

The proposed decision partially reflects the objectives of the proponents. Unlike the original proposal which would oblige developed countries to provide duty-free and quota-free access to products originating in [all] least-developed countries and improve security and predictability through the binding of these preferences, the proposed decision would leave it to developed countries to decide whether to grant duty-free and quota-free access to products of LDCs in a secure and predictable manner. Put in another way, the language of the proposed decision is hortatory in character.

The proposed decision does not provide the same level of details as the original proposal. For example under the original proposal, developed countries would be required to reach an agreement with the beneficiary countries, should they wish to temporarily withdraw duty-free treatment for certain products. Furthermore, developed countries would be obliged to establish a tariff rate quota for products in respect of which they had not extended duty-free treatment. The proposed decision does not fully reflect the underlying objectives of the proponents as far as rules of origin are

concerned. While the proposed decision "urges Members to adopt and implement rules of origin so as to facilitate exports from least-developed countries", the language in the original proposal would obligate preference-giving countries not only to adopt simple and flexible rules of origin which beneficiary countries could easily meet, but also to harmonise their preferential rules of origin so as to ensure consistency and transparency. The proposed decision does not reflect the proposal that S&D provisions in the various WTO agreements should be strengthened so as to ensure that duty-free market access is not circumvented through the adoption of non-tariff barriers. Finally, the proposed decision is silent on the proposal that developing countries should be provided with technical and financial assistance to facilitate their compliance with TBT and SPS measures imposed by Members.

In effect, as currently drafted, the proposed decision has very little economic value to developing countries.

II.25 PARAGRAPH 2 OF THE DECISION ON MEASURES IN FAVOUR OF LEAST-DEVELOPED COUNTRIES – PROPOSED DECISION FOR ADOPTION

"We agree that:

- (a) Taking into account their development needs, least-developed countries, following application, shall in principle be eligible for extensions of their transition periods; where relevant procedural provisions exist in the WTO agreements, those provisions shall apply.**
- (b) Technical assistance to least-developed countries shall aim among other things to remove their supply-side constraints which limit their ability to benefit from the WTO Agreements, including market access opportunities and development of domestic productivity. In this context, the Ministerial Conference also instructs the Director-General to consult other institutions on programmes/assistance related to supply-side constraints in least-developed country Members to determine what additional technical assistance may be made available."**

Original proposal by the African Group - TN/CTD/W/3/Rev.2

- "(a) It is understood that notwithstanding any provision of any WTO Agreement, least-developed country Members shall always be entitled to extensions for their transition periods as they may require.
- (b) It is understood that technical assistance to least-developed country Members shall aim among other things to remove any supply-side constraints to benefits under all WTO Agreements, such as benefits of market access opportunities and development of domestic productivity."

Commentary on proposed decision:

The proposed decision does not reflect the original proposal of the African Group relating to the extension of transitional periods. Whereas under the original proposal, a request for an extension of the transitional period would automatically be granted, it would not be the case under the proposed decision. Given the fact that decisions are made by consensus, there is no guarantee that an application for an extension by an LDC would always be granted under the proposed decision. As currently drafted, the proposed decision does not have much economic value to LDCs.

II.26 PARAGRAPH 3(b) OF THE DECISION ON MEASURES IN FAVOUR OF LEAST-DEVELOPED COUNTRIES – MARKET OPPORTUNITIES ENABLING CLAUSE – PARAGRAPH 3(B) – PROPOSED DECISION FOR ADOPTION

"Accepting that extension of differential and more favourable treatment to developing countries should not constitute an impediment to the reduction or elimination of tariffs on an MFN basis, but recognizing that as WTO Members pursue improved MFN tariff liberalization some Members may have concerns about adjusting to the loss of preferences, we agree that this issue be considered, in close coordination with other relevant international organizations, with a view to identifying possible ways, including targeted assistance programmes, by which LDCs should be assisted."

Original proposal by the LDC Group - TN/CTD/W/4/Add.1

"Paragraph 3(b) of the Decision provides that the extension of differential and more favourable treatment to developing countries, including special treatment to the least-developed countries, shall not constitute an impediment to the reduction or elimination of tariffs on MFN basis. However, it should be recognized that MFN tariff reductions results in the erosion of preferential margins and the consequent loss of competitiveness for the affected LDC exports. In such a situation, the LDC affected would require compensatory or adjustment support measures in the trade, financial and technological fields to mitigate adverse effects on their export earnings as well as enable them cope with increased global competition, through, *inter alia*:

- (i) Elimination of all internal and border constraints inhibiting the full utilization of existing preferential access.
- (ii) Support diversification efforts including elimination of all tariff peaks and tariff escalation affecting semi-processed and processed products.
- (iii) Provide debt relief through cancellation to release resources for building productive capacities.
- (iv) Provide targeted incentives to their enterprises to facilitate technology transfer in the spirit of Article 66.2 of the TRIPS Agreement.
- (v) Remove all non-tariff barriers to all LDCs exports.
- (vi) Provide temporary financial compensation for fall in export earnings resulting from a reduction of MFN tariff rates in the case of products whose share in the total export earnings of an LDC exceeds 50 per cent."

Commentary on proposed decision:

It appears that the proposed decision does not reflect the original proposal by the LDC Group. Under the original proposal, developed countries would be obliged to adopt the following measures to compensate LDCs as a result of the erosion of preferences: the elimination of all non-tariff barriers affecting the exports of LDCs and also the elimination of all internal and border restrictions which prevent LDCs from fully utilizing preferences accorded them under GSP schemes and other schemes such as AGOA and EBA. Developed countries would also be obliged to eliminate all tariff peaks and tariff escalation and provide debt relief through the cancellation of debts of LDCs. They would also be required to provide incentives to their enterprises to facilitate technology transfer to LDCs in line with Article 66.2 of the TRIPS Agreement and also to provide temporary financial compensation as a result of MFN tariff cuts to LDCs in respect of those products which contribute at least 50 per cent of the export earnings of an LDC.

The proposed decision only recognises the problems which multilateral tariff reductions could pose for LDCs, but does not offer any specific measures such as those listed above to assist them to cope with the problems. The proposed decision merely mandates the WTO to cooperate closely with other relevant international organizations and identify possible ways, including targeted assistance programmes to assist LDCs. It is not clear what is meant by "targeted assistance programmes". The proposed decision is couched in non-binding language making it difficult to assess its economic relevance. In any event, as to whether it would benefit LDCs would depend on the measures which would be agreed between the WTO and other relevant international organizations to compensate LDCs as a result of the erosion of preferences. Thus, the proposed decision as currently drafted would not confer any tangible benefits on LDCs.

II.27 ARTICLE XVIII:B OF GATT 1994 – PROPOSED DECISION FOR ADOPTION

"In determining the need for taking measures under Article XVIII:B, full consideration shall be given to the impact of the volatility of short-term financial flows on the level of external reserves or surpluses of Members."

Original Proposal by the African Group - TN/CTD/W/3/Rev.2

"It is understood that short term financial flows shall not be included in determining the external reserves or surpluses of Members and financial instability shall be duly taken into account as a problem to be addressed over a reasonable period of time when measures under Article XVIII: B shall be maintained. The reasonable period of time shall not be less than 3 years, taking into account differences in industry types."

Commentary on proposed decision:

The proposed decision does not accurately reflect the views of the African Group and does not capture the underlying reasons for the introduction of the proposal. What the proponents want is quite clear: they do not want short-term financial flows to be taken into account in determining the external reserves or surpluses of Members. Under the proposed decision, it is not clear whether they would be totally ignored in the determination of whether a Member has adequate external reserves or surpluses.

The proposed decision is silent on whether the issue of financial instability shall be addressed over a reasonable period of time when the measures taken pursuant to Article XVIII:B remain in force. It does not also indicate whether the term "reasonable period of time" shall be construed to mean a period not less than 3 years, taking into account differences in industry types.

If by stating that "full consideration shall be given to the impact of the volatility of short-term financial flows on the level of external reserves or surpluses of Members", it is meant that short-term financial flows would be excluded from the analysis, then the proposed decision could be of some value to developing countries, as it would give them some room to adopt measures which would assist them to deal with their balance of payments problems. Overall, the economic value of this proposed decision to developing countries is very limited.

III. CONCLUDING REMARKS

As demonstrated above, most of the proposed decisions will not confer any economic benefits on developing countries, much less facilitate their integration into the multilateral trading system. They are framed in language which would not oblige developed countries to take positive measures to increase market access opportunities for developing countries. In many cases, the proposed decisions did not reflect the original proposals tabled by the proponents or capture the underlying reasons for the introduction of the proposals. Those which fully reflected the original proposals were only declaratory and confirmed existing WTO provisions or jurisprudence. The Doha mandate was explicit in stating that "all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational". By any measure, it cannot be argued that the proposed twenty-eight decisions meet these criteria.

The objective of S&D measures should be to facilitate the integration of developing countries, particularly the least-developed ones, into the multilateral trading system. As underscored in the preamble to the Marrakesh Agreement, "there is a need for positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development". Clearly, if the proposed decisions are of economic value to developing countries, we would have been the first to ask for their adoption. African countries are concerned about their marginalisation in the multilateral trading system and are prepared to work with other WTO Members to ensure that the grains from trade are spread around equitably. African countries are committed to the Doha Development Agenda negotiations as they consider trade as an engine of economic growth and development, which can assist them to deal effectively with poverty. To that end, they are committed to work towards the Doha mandates.
