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SUBMISSION ON REGIONAL TRADE AGREEMENTS

Paper by the ACP Group of States

The following submission, dated 26 April 2004, is being circulated at the request of the ACP Group of States.

DEVELOPMENTAL ASPECTS OF REGIONAL TRADE AGREEMENTS AND SPECIAL AND DIFFERENTIAL TREATMENT IN WTO RULES: GATT 1994 ARTICLE XXIV AND THE ENABLING CLAUSE

Communication by the Mission of Botswana on Behalf of the ACP Group of States

INTRODUCTION

1. Economic integration, in the form of regional trade agreements (RTAs), is a core development strategy for African, Caribbean and Pacific States. The Group therefore attaches importance to the Doha work programme on WTO rules. It will participate constructively in the work of the Negotiating Group on Rules with a view to "clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements" while taking into account their "developmental aspects".[1]

2. To date the Negotiating Group on Rules has identified specific substantive and procedural systemic issues to be discussed on a priority basis based on the "Compendium of issues related to regional trade agreements" (TN/RL/W/8/Rev.1) prepared by the Secretariat. The ACP Group of States note that several proposals, such as by the European Communities (TN/RL/W/14) and Turkey (TN/RL/W/32), address some of their concerns regarding "developmental aspects" of RTAs. In the preparatory process leading to the Third WTO Ministerial Conference, Jamaica submitted a proposal "to examine the relevant provisions of Article XXIV of GATT and Article V of GATS relating to regional trade agreements in which developing countries are participating, with a view to providing these countries with adequate scope for absorbing the adjustment costs of trade liberalization and ensuring that these agreements make a sustained contribution to their economic development" (WT/GC/W/369).

I. DEVELOPMENTAL ASPECTS OF REGIONAL TRADE AGREEMENTS

3. ACP Group of States consider that the clarification and improvement in WTO rules on the formation and operation of RTAs should support the development strategy of developing countries through regional integration by providing a supportive multilateral framework. The multilateral rules

[1] Doha Ministerial Declaration (WT/MIN(01)/DEC/1), paragraph 29.

should not pose unduly restrictive constraints on economic integration efforts of developing countries being pursued as part of their fundamental development strategy.

4. The ACP Group of States are negotiating WTO compatible economic partnership agreements with the EU under the Cotonou Partnership Agreement, as a building block for their regional integration processes and to the multilateral trading system. In this context, ACP Group of States consider that the outcome of the negotiations on WTO rules on RTAs shall explicitly provide the necessary differential and more favourable to developing countries' parties to RTAs with developed countries.

5. Thus, the ACP Group of States submits that special and differential (S&D) treatment shall be made available to developing countries parties to RTAs formed by developing and developed countries; so that WTO rules applying to RTAs take due account of the developmental aspects of RTAs. It proposes clarifications and modifications in the existing provisions of Article XXIV of GATT 1994 to incorporate S&D treatment for developing countries. The ACP Group of States also submits that the Enabling Clause currently prevailing should be preserved in provide legal cover for South-South RTAs.

II. RATIONALE FOR DIFFERENTIAL AND MORE FAVOURABLE TREATMENT FOR DEVELOPING COUNTRIES IN GATT 1994 ARTICLE XXIV

6. The existing GATT 1994 Article XXIV provisions do not take into account developmental aspects of RTAs entered into between developed and developing countries, i.e., between countries with significant differences in levels of development, and productive and export capacities and competitiveness. This is in large part because Article XXIV of GATT 1947 was negotiated at a time in history when there existed very few (if not no) North-South RTAs. The only change to these GATT 1947 rules occurred in the Understanding on the Interpretation of Article XXIV of GATT 1994, negotiated and accepted during the Uruguay Round. These changes clarified some aspects of the article, including the provision on transition period for interim agreements.

7. Second, specific S&D treatment for developing countries' in North-South RTAs is absent from existing rules including in Article XXIV of GATT 1994, although S&D is a key principle and integral part of the legal architecture of WTO.

8. Third, while there exists some *de facto* flexibility under GATT Article XXIV arising from the ambiguity in terminology used therein, and in the permissive practices evolved over the years of particularly the GATT history and now the WTO, there are no explicit provision on *de jure* S&D treatment for developing countries in meeting the requirements set out in Article XXIV of GATT 1994. Such *de facto* flexibility cannot constitute nor substitute for legally binding, operational and effective S&D provisions. The dispute settlement case on *Turkey-Restriction on Imports of Textiles and Clothing Products* limited the legal enforceability and scope of existing *de facto* flexibility in Article XXIV of GATT 1994.[2]

9. Fourth, the lack of S&D in GATT Article XXIV stands at odds with Article V of GATS (a counterpart article to Article XXIV of GATT 1994) dealing with economic integration agreements (EIAs) on trade in services, which explicitly provides for S&D treatment for developing countries in the application of the criteria entailed in Article V:1 of GATS. Furthermore, the GATS recognizes a distinction between EIAs that may involve developed and developing countries on the one hand

[2] *Turkey-Restrictions on imports of textile and clothing products. Report of the Appellate Body*, 22 October 1999 (WT/DS34/AB/R), paragraphs 48 and 57.

(Article V:3(a)), and those involving only developing countries (Article V:3(b)). In both, flexibility and more favourable treatment is provided to developing countries.

III. PROPOSAL

10. In the light of the developmental aspects of RTAs, and on the recognition of a deficiency in the legal structure of WTO rules applying to RTAs, the ACP Group of States submits the following proposal:

> Members agree that S&D treatment for developing countries be formally and explicitly made available to developing countries in meeting criteria set out in paragraphs 5 to 8 of GATT Article XXIV in the context of regional agreements entered into between developing and developed countries.

11. Without prejudice to the right of ACP Group of States to submit additional proposals and clarifications, special and differential treatment shall apply to the following procedural and substantive requirements of Article XXIV of GATT 1994:

(i) Article XXIV:8(a)(i) and (b) ("substantially all the trade"):

- With regard to duties, appropriate flexibility shall be provided for developing countries in meeting the "substantially all the trade" requirement in respect of trade and product coverage, including in terms of the application of favourable methodology and/or lower threshold levels, if to be applied, in the measurement of trade and product coverage of developing country parties to an RTA;

- With regard to "other restrictive regulations of commerce", the term shall be interpreted in a flexible manner, so that the right of developing countries to apply contingency protection measures including safeguards and other non-tariff measures (e.g. rules of origin) on intra regional trade is not unduly impeded, and that legal security and predictability is guaranteed for special and differential treatment measures in terms of asymmetry in rights and obligations of developed and developing country member under an RTA in respect of such non-tariff measures;

(ii) Article XXIV:5(c) and paragraph 3 of the 1994 Understanding ("reasonable period of time"):

- The legal standing of interim agreements during the transition period prior to effective application of provisions of Article XXIV of GATT 1994 should be clarified to the effect that the substantive and procedural requirements of GATT Article XXIV 5-8 becomes applicable to an RTA only after the transition period expires;

- The modality for determining "exceptional circumstances" should be clarified so that a transition period longer than 10 years will be made legitimately and more easily available to developing countries;

- The maximum length of the transition period permissible is to be established, the period should be determined in such a manner that is consistent with the

trade, development and financial situation of developing countries, but in any case not less than 18 years;

(iii) Article XXIV:7 and paragraphs 7-10 of the 1994 Understanding (Notification, reporting and review in the Committee on Regional Trade Agreements):

- Due account shall be given to "developmental aspects" of RTAs involving developing countries in determining their conformity with Article XXIV.

- There shall be streamlined, efficient and less onerous transparency and examination procedures of RTAs involving developing countries, which shall take due account of limited administrative, human and financial capacities developing countries;

(iv) Paragraph 12 of the 1994 Understanding (dispute settlement):

- The relationship between the DSU and GATT Article XXIV, and jurisdictions of DSB and the CRTA, should be clarified, so that the jurisdiction of the CRTA to determine WTO-compatibility of RTAs is not unduly overridden by the dispute settlement procedures and rulings.

12. With regard to the Enabling Clause, the ACP Group of States proposes that:

Members reaffirm the legal validity of the Enabling Clause to cover regional trade arrangements entered into among developing countries (i.e. South-South agreements) to the effect that developing countries' right to form such arrangements under the Enabling Clause are not undermined by paragraphs 5 to 9 of GATT Article XXIV.

- Developing countries may enter into regional trade agreements among themselves for mutual elimination of trade barriers, in accordance with the provisions of the Enabling Clause, and

- When developing countries notify RTAs under the Enabling Clause, it is the provisions of the Enabling Clause that exclusively apply in the determination of compliance with WTO rules.

13. The importance of the Enabling Clause as a development milestone in the history of GATT and the WTO cannot be overemphasized. The Clause is an "acquis" in the legal architecture of WTO. The negotiations on RTA rules should not prejudice the coverage of South-South agreement under the Enabling Clause.

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