

THE AFRICAN GROUP  
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TECHNICAL PAPER ON RULES NETOTIATIONS

## **Anti-Dumping**

### Historical perspective

For a better appreciation of the subject and to understand the African Group submission, it bears emphasizing that the ADA has its origins in GATT 1947. The first attempt at a multilateral setting to revisit the subject was during the Kennedy Round which was launched 1963. The International Chamber of Commerce presented a proposal which recommended that all GATT contracting parties should either commit to conform their domestic laws to Article VI or to decide to start work either during the trade negotiations or immediately after upon the drafting of an international code of antidumping procedures.

2. The general acknowledgement was that dumping per se is not actionable, as it could be a commercial policy instrument which could be deployed for economic development. The argument posited was that it was the injury to domestic industry that was reprehensible. The negotiations led to what has become known as the Agreement on the Implementation of Article VI which entered into force in July 1, 1968.

3. The agreement established an International Anti-Dumping Code, clarifying the terms of Article VI. A plurilateral Code was thus created as a separate document from the General Agreement, and the Contracting Parties remained free to sign on the Code or to refrain from doing so. The Code was only to apply to those CPs who signed it, and as signatories had to agree to abide by its provisions – and pledge to conform their national legislation to bring it in line with the provisions thereof.

4. The Code provided that in order to find injury dumping must be “demonstrably the principal cause”. In addition, it required National Authorities to conduct dumping and injury investigations simultaneously, and provisional measures could only be applied upon affirmative finding.

### The Tokyo Round

5. The next development took place during the Tokyo Round. New issues and those which needed “clarification” were included in the agreement. These include: Sales at a loss; Allowances relating to price comparability; Definition of material injury; Regional protection; Price, Understanding; Standing; and Treatment of DCs.

6. Of interest to DCs was defining the term material injury, standing of domestic industry and more importantly, a provision on special and differential treatment for developing countries.

### Developing Countries: Provisions on DCs

7. Article 13 of the Tokyo provides:

***“It is recognized that special regard must be given by developed countries to the special situation of DCs when considering the application of anti-dumping measures under the Code. Possibilities of constructive remedies provided for by this Code should be explored before applying anti-dumping duties where this would affect the essential interests of DCs Members”.*** The provision does not define what constitutes constructive remedies, special regard and special situation.

### The Uruguay Round Agreement on ADA – Implementation of Article VI of GATT

8. In spite of changes made to the 1968 and Tokyo Code, certain basic concepts still remain unchanged. The definition of material injury remains unresolved. As indicated in footnote 3, the term injury is directly linked with the term material injury but what material injury is has not been defined. The provision on standing has also not changed materially. It is interesting to note that the wording of Article 13 of the Tokyo Code and the provision of Article 15 of the Implementation of Article VI of GATT 1994 is the same.

### Concerns by Developing Countries

9. In the run-up to the launch and during the Uruguay Round negotiations, some DCs raised concern on the implementation of the Tokyo Code. It was acknowledged that very few DCs had acceded to the Code, because the code in its substance or in its interpretation or implementation failed to take the particular interest of DCs into account. This was supported by a number of

Developed Countries. Hence the mandate was agreed as follows: ***"Negotiations shall aim at clarifying and improving disciplines under the Agreements and Agreements negotiated in the Tokyo Round of MTNs."*** One notes that the mandate has not substantially changed from the earlier mandates. There is therefore, very little difference in the Uruguay Round Negotiating mandate, vis-à-vis to DDA mandate on the Rules which is aimed at clarifying and improving disciplines under the Agreements on the Implementation of Article VI of the GATT 1994.....while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives and taking into account the needs of developing and least developed participants."

#### The African Group Paper

10. Like many developing countries, even including the more advanced ones, the African Group strongly feels that the SDT provisions in Article 15 of the ADA lacks specificity and above all, not legally binding. Infact, as could be gleaned from some AB Reports, developing countries have argued that they have not benefited from the provisions thereof. For example, in the US – Steel Plates case, (WT/DS 206/R para. 7-110) it was held that "Members cannot be expected to comply with an obligation whose parameters are entirely undefined." The need to bring some level of clarity to the provisions of the article is considered paramount.

11. It also necessary to stress here that the paragraph 28 mandate is being considered in tandem with the mandate on Special and Differential Treatment i.e. Paragraph 44.

12. The African Group's current submission TN/GL/GEN/154, a draft Text developed out of a Paper submitted by Kenya TN/RL/GEN/143 seeks to widen the scope of the S&DT to DCs "to facilitate the initiation of investigations for the application of anti-dumping duties." The draft also calls for increased technical assistance for national anti-dumping authorities. The Paper therefore seeks to ensure that developing countries are given some flexibility in the application of the ADA.

The Groups submission is placed in three categories:

13. First, it seeks to secure improvements in the provisions of Article 15 of S&D incorporated in the Agreement on Anti-Dumping.

Second, the Group acknowledges that governments of developing countries have a crucial role to play in assisting local industries in anti-dumping proceedings. The Paper therefore provides that where the governments find that local industries which are facing the brunt of dumped imports and are thus encountering difficulties in collecting information or data that is necessary for applying for anti-dumping investigations, they may be assisted by the government to collect the relevant data. Government's role in assisting local industry put some measure of surveillance on alleged dumped imports also forms a core component of the draft. Third, the Paper identifies areas where technical assistance could be provided to enhance their capacities to apply anti-dumping measures in accordance with the rules of the Agreement.

#### Negotiating Stance

15. The issue of constructive remedies and special circumstances:

Article 15 in the AD Agreement imposes an obligation on developed countries to give special regard to the special situation of developing countries while considering after investigation, the application of anti-dumping measures by exploring the application of constructive remedies other than anti-dumping duties. The negotiating strategy is to broaden the scope of the obligation of the investigation authorities and require them to give such special regard to the special situation of developing countries also in the initiation and conduct of investigations.

16. The Article however does not clarify the form which such constructive remedies could take. The Group has therefore proposed an illustrative list of constructive remedies that could be taken. See Article 15.2

These are:

- Price undertaking
- Application of lesser duty
- Non-application, including suspension or termination.
- Longer time frame to respond to inquiries.

17. It must however be noted that unlike in the past, when main users of anti-dumping measures were mainly the developed countries, some of the developing

countries which are at relatively higher stages of development (such as India, China, Argentina, Brazil, Chile, Peru, south Africa, Egypt and others) have now become important users of such measures. Over thirty per cent of the anti-dumping measures taken on worldwide basis, during the past few years were taken by developing countries. The draft therefore raises for discussions whether it would be desirable to extend the obligation to give special regard to the special situation of developing countries also to these developing countries which have become or are becoming important users of anti-dumping measures, in case where there are investigation complaints against imports of dumped products from other developing countries, or considering application of anti-dumping measures.

18. It is however recognized that the developed countries may not be willing at this stage to accepting any such obligation which is a fully binding nature. They are however showing willingness to take special measures in favour of other developing countries, on a case-by case basis, provided that the obligation to extend such treatment is voluntary and non-binding and does not result in the creation of new category of developing countries. An example of this is the extension of preferential tariff treatment by some of the developing countries to imports from least developed countries.

19. Against this background, a suggestion was made in the past discussions on the text of the draft paragraph that it could be modified to provide that the obligation to extend S&D treatment shall apply "to developed country Members and those developing country Members who are willing to accept such obligation or in a position to do so".

20. If the African Group decides on revising the draft to extend the obligation to such developing countries on the above basis, following the general practice followed in such cases, and in order to maintain unity, cohesion and solidarity of the developing countries as a group, it would be necessary to consult them and take into account their views

#### Pre-initiation investigation

21. The main thrust of this proposal is to impose an obligation on the investigating authorities of developed countries to enter into consultation with the governments of the developing countries, "in the period between the

acceptance of the application and the initiation of investigations, with a view to arriving at mutually agreed upon solution, short of investigation". It thus aims at avoiding unwarranted investigation against imports from developing countries. In this context, it may be relevant to note that the procedures which investigating authorities are required to adopt in accordance with the provisions of the AD Agreement can be broadly divided into the three segments. These are periods between the:

- Acceptance of the application and decision to initiate investigations;
- Initiation of investigation and recommendation by the investigation authorities on whether duties should be imposed; and
- Decision by the government on the imposition of duties and their levels.

Since the Agreement provides that investigations should be completed as a rule within a period of 12 months from the receipt of the application (which may be extended to 18 months) the time period allocated by most of the investigating authorities for taking decision on initiation of investigations, after the application is accepted, is generally short and does not exceed two months or so.

22. The main tasks which the investigating authorities are expected to perform during this period of investigations are laid down in Art. 15.5 of the AD Agreement. It imposes an obligation on the investigation authorities to notify to the government of the exporting member concerned, "the receipt of the properly documented application before proceeding to initiate investigation". The main purpose of this provision is to enable the government of the exporting countries to inform the exporters of the product which is alleged to be dumped, that investigations into the alleged dumping and the imposition of anti-dumping measures may be initiated. The Article does not contain at present any obligation to enter into consultations with the government of the exporting countries.

**23. The provision** of the AD Agreement regarding investigation of the complaints and those contained in the Agreement on Subsidies and Countervailing Measures (SCM) are, with a few exceptions, more or less analogous. However, while the AD Agreement does not provide any obligations to enter into consultations with the governments of the exporting countries before initiation of investigations, Art. 13.1 of the SCM Agreement provide that "as soon as possible after an application is accepted and in any case, before invitation of an investigation, the governments of the exporting countries shall be

invited for consultations with the aim of clarifying the situation and arriving at mutually agreed solutions”.

24. The drafting history of the two agreements shows that that the provisions for consultations with the governments of the exporting countries, were not included in the relevant Article in the AD Agreement as it was considered that since dumping resulted from the pricing policies pursued by private enterprises over which governments have no control, the consultations with the government may not in practice prove very helpful in arriving at solutions that could avoid investigations. In the case of countervailing measures, however it was thought that if consultations were held, governments of the exporting countries could avoid imposition of countervailing duties, by agreeing to make suitable changes in the subsidy practices.

25. It is important to note that the obligation to enter into consultations with the government of the exporting countries under the SCM Agreement applies to the investigation authorities in all countries. Against this background, the Group is therefore confronted with whether the obligation to invite consultations should apply to developed countries only or should it be extended also to developing countries also.

26. Some delegations have indicated that the obligation should apply only to developed countries, particularly as the investigating authorities in a number of developing countries may not be able to cope, with their limited technical and financial resources, the additional burden which such consultations obligations may impose. In the light of this, it may be desirable to consider, whether an alternative would be to provide, that the obligation to enter into consultations should apply only to those developing countries, which are willing to accept such obligation. To facilitate discussions on these issues it is being suggested the following draft should be considered.

“Developed country member should invite consultation, within a reasonable period of time, before the initiation of an investigation against goods originating in or exported from developing country member. Such consultations should explore constructive remedies, with a view to arriving at a mutually agreed upon solution, short of investigations or imposition of measures by the developed country against the developing country member”.

Would it be desirable to spell out in the Agreement the “type of solutions” short of application of anti-dumping duties which could be adopted during consultations but before the initiations of investigations?

27. Since the consultations under these provisions are expected to take place before the commencement of the investigations, it would not be possible to adopt at this stage the constructive remedies listed under draft text of Art. 15 which in most cases, can be considered for application only after investigations, the investigating authorities are satisfied that the goods are being dumped and such dumped imports are causing injury to the domestic industry. For instance, the countries requesting for consultations cannot request for the application of lesser duty, as at this stage, the level of duty would not have been determined. The Agreement also provides that price undertakings should not be demanded by the investigating authorities or offered by exporters, unless it has been established that dumped imports are causing injury to the domestic industry in the importing country. The rule is intended to protect the trade interests of exporting countries, against arbitrary demand for price undertakings by the investigating authorities. Acceptance by the investigating authorities of price understandings during this stage of the investigations could therefore be considered as constituting deviation from the principle which the Agreement lays down.

18. Taking into account the above considerations, it was thought that one of the solutions, which it may be possible to adopt, was to secure agreement from the investigating authorities that the investigations should not be initiated, if the government of the exporting country is able to establish, on the basis of the evidence submitted by it, that the margins of dumping of its exporters are de-minimis and the volume of their exports is negligible. Ordinarily however, it would be possible for investigating authorities to agree on not to commence investigations on this basis, only if the producers who have applied should willingness to agree to the proposal.

De-minimis and mutually agreed solution

29. It is being proposed that one of the ways in which mutually acceptable solution could be found was by requiring investigating authorities not to impose anti-dumping duties “where it is established that the margin of dumping is de-

de-minimis or the volume of imports is negligible". Article 5.8 defines the de-minimis margin as a "margin less than 2 percent, expressed as a percentage of the export price." On the other hand, the volume of dumped imports is considered as negligible "if the volume of dumped imports from a particular country is found to account for less than 3 percent of imports of the like product in the importing Member, unless countries which individually account for less than 3 percent of the imports of the like product in the importing Member collectively account for more than 7 percent of imports of the like product in the importing Member." It must be borne in mind that the de-minimis and the negligible margins are concepts for deciding whether or to continue/terminate proceedings.

30. The proposal also suggests that in order to ensure developing countries are able to take full advantage of these proposals the figures provided for de-minimis margins and for negligible imports in the ADP Agreement should be revised upward, as suggested in another context by India, China and some other countries. The negotiating strategy here is that once the margins are raised, the less likely it would be for dumping proceedings to continue and therefore this provides some shelter for developing countries.

This issue needs to be examined further in the light of the comments made by some delegations in the discussions on the draft that such upward revision of the figures for de-minimis margins and negligible imports would benefit primarily larger countries.

31. In considering further this proposal, it may be also desirable to consider, whether it may be appropriate at this stage, not to spell out the nature of the practical solutions that could be found in the consultations at the pre-investigation stage and leave it to the discretion of the exporting government and investigating authorities to adopt appropriate solutions, taking into account the rules of the AD Agreement.

32. It may be also desirable to keep in mind that from the Working document circulated by the Chairman of the Negotiating Group on Rules, (TN/RL/W/232), it would appear that the following proposal has been made for modifications of the provisions of Article 5.5 of the AD Agreement which deals with the actions which the investigating authorities are expected to take during the period from the acceptance of the application and initiation of investigations.

“The governments of the exporting Members and the exporters and foreign products concerned shall have at least 15 days to comment on the standing of the applicant and the evidence justifying the initiation of the investigation. Authorities shall address those comments before initiation. If this is not practicable, they shall address these comments within 60 days of the initiation”.

33. This provision only gives right to the exporting countries to “comment” on the information contained in the application and calls on the investigating authorities to take them into account before initiating investigations. A question that could be asked is whether the parties could enter into consultations, even though it is not spelt out. These obligations, according to the proposal, would apply to the investigating authorities in all member countries, both developed and developing.

#### Special Circumstances and the role of Government

34. The Group feels that there is an important role that governments of developing countries should play in securing information critical to any investigation to be conducted by national anti-dumping authorities in developing countries. This is due to the fact that national anti-dumping authorities may not have access to every information or data needed to trigger investigations. In this regard, the proposal seeks to define in very precise terms what the role should be.

35. As noted earlier, a few of the developing countries, which are at relatively higher stage of development have now been able to develop as a part of the framework they have adopted for pursuing open and liberal trade policies, mechanism to protect the industries from unfair trade practice by foreign producers, (such as dumping and sale of products at low prices by taken advantage of the subsidies provided by their governments), by applying anti-dumping duties on dumped imports and countervailing duties on subsidized imports. They have also established mechanism for taking safeguard measures, to restrict imports for temporary periods, by raising tariffs or imposing quota restrictions, where even though the competition presented by foreign producers is not unfair, the industry is being hurt as a result of sudden surge in imports.

36. A large number of developing countries particularly those in Africa and the Caribbean regions have not however as yet been able to establish at national level, the legal and institutional framework that is needed for applying anti-dumping measures. In countries where such institutional framework exists, the domestic industries which are being adversely affected by dumped or subsidized imports are often, not able to take advantage of the right which they have under the AD and SCM Agreements to apply to the investigating authorities for imposition of anti-dumping or countervailing measures, because of their inability to collect the relevant information on standing to apply and on volume of imports and prices, which they have to provide in the application as spelt out under the Agreements.

37. The two Agreements provide that domestic industries must provide in the applications:

- Information to establish that they have standing to apply by demonstrating that they constitute at least 50 percent of producers producing the product alleged to be dumped and at least 25 percent of them have supported the application.
- Information on volume of imports from countries in which dumped imports originate.
- Information on export prices charged by the exporter for and the price which is charged for sale in the domestic market for the like product.

38. As industries in most of these countries do not have well established industry associations or have not as yet formed associations on sectoral basis, they find it difficult to establish standing as well as provide in the application information on volume of imports and prices, particularly on prices charged by exporters in their domestic markets. The difficulties are more acute where the dumped or subsidized imports are injuring agricultural producers.

The difficulties which industries in many of the African countries encounter in applying for investigations, when they are being injured by increased imports, (which are in most cases, dumped or subsidized) is well brought out by the empirical studies on their experience of liberalization measures which they were required to take in the 1980s and 1990s under the structural adjustment programmes imposed on them by the IMF and the World Bank. These studies bring out that many of the industries producing consumer products like textiles,

shoes and other leather products and others, were wiped out, as a result of their inability to meet competition presented by imports coming at lower prices.

39. More recently there have been complaints in some of these countries that increased imports of such products as chicken legs and other poultry products and milk and other dairy product at low prices are increasingly displacing local production on which farmers living at subsistence level depend.

40. Against this background, proposals are being designed on "initiation of investigation" which aims at securing recognition that the governments of developing countries may, where they find that their domestic agricultural producers and manufacturing industries which are alleging that they are being injured by dumped imports, are not able to apply for investigations, assist them by collecting information which they are required to provide in the application to the investigation authorities for the imposition of anti-dumping measures.

These proposals aim at ensuring that the body responsible for providing assistance to industries in collecting information would be independent of the "investigating authority". This would go to ensure that the need to maintain "independence and impartiality" of the investigating authorities is not compromised by governments in providing such assistance to the requesting industry.

41. Would these provisions require creation of new body? It is envisaged that the responsibility for taking decisions to put the product under surveillance and for collection of the information to assist the affected industry, would be taken by "intergovernmental body headed by the Ministry of Commerce and consisting of Ministries of Industry, Finance and other Ministries, which the developing countries have been encouraged to establish.

**The issue of a Surveillance mechanism and Justification for Government intervention (Articles 15.1.2 – 15.1.6)**

42. It is recognized that most developing countries do not have the sophisticated mechanisms to easily detect dumping. In this regard, the Group strongly feels that a surveillance mechanism should be adopted to track products that are being dumped i.e. put the said dumped products under surveillance. This would serve as an alert or an early warning mechanism.

The proposals on surveillance are based on similar provisions for “surveillance of imports” of products contained in the EU regulations on safeguards. The purpose of the EU Regulations as spelt out in their objectives is two fold. First, it is to assist the Commission in deciding whether the investigations for safeguard actions should be initiated. Second, it is to establish an early warning system for exporters whose exports are increasing.

43. The EU does not for historical and other reasons appear to use the system for such surveillance of imports which are alleged to be dumped. In the past however, the Commission had adopted a system for surveillance of prices for imports from East European countries, which it considered, were not adhering to market principles in determining prices for exports. It is possible that this authority is being used at present by the Commission for surveillance of imports from some of the countries, which in its view, do not adhere to market principles in determining prices.

The Community’s GSP scheme also provides for surveillance of agricultural imports from the beneficiary countries.

44. In the United States, the administration follows the practice of putting under surveillance imports of products, on which anti-dumping duties that were being levied have been removed, with the objective of ensuring that the removal of anti-dumping duties does not result in the recurrence of dumping.

45. The US AGOA scheme for preferential imports from African countries also provides for surveillance of imports under the scheme from preference receiving countries. Except in the case of imports under these preferential schemes, such surveillance is exercised by these countries, it appears, through introduction of systems for automatic licensing.

46. The rules of the Agreement on Import Licensing require that such licenses should be issued “automatically on receipt of the application within a period of 14 days”. The applicants for licenses are required to indicate in the application the quantities to be imported and their prices. The data collected under the licensing system on the volume of imports and their prices, is generally put on website, so that it is available to the international parties from the business world.

47. So far the developing countries are being encouraged to exercise surveillance of their exports in order to ensure inter alia that the target for exports are being met and the exported goods meet the mandatory standards of the importing countries. This situation may have to be reviewed in the light of the changes in the thinking on the role of governments in free market economies that are taking occurring as a result of the present crises situation through which the world economy is going through at present. There is increasing view amongst economists and policy makers that the represent practice where governments intervene only after market failures have occurred must change and it would have to be recognized that the governments have responsibility and role to play in ensuring that such market failures do not occur by adopting appropriate systems for surveillance of economic activities, in the financial as well as in agricultural and industrial sectors and of imports and exports.

48. It appears that some delegations have in the discussions suggested that since EU and USA practice for surveillance of imports has not been challenged by any country under the WTO law, it may be possible for a developing country wishing to exercise such surveillance, without having a specific provisions included for this purpose in the ADP Agreement.

49. It is in this context, it is important to note that even though so far no formal complaint has been brought to WTO, it would appear from the process reports that China considers that the EU's practice to put product under surveillance constitutes "unnecessary barrier to trade" and is not justified under the WTO law, as there is no specific provisions for adoption of such surveillance systems in the ADP Agreement. In the situation, unless specific provisions authorizing the use of surveillance mechanism is included in the ADP Agreement, the consistency of the adoption of such measure for surveillance of product alleged by the domestic industry, to be dumped would be left to be decided by the Appellate Body, if any country was to bring a complaint to WTO.

50. The inclusion of the provisions authorizing developing countries to put products, which are alleged by the domestic industry as being dumped on the lines indicated in the draft proposals, would further go to ensure that:

- There was uniformity in the mechanism adopted by developing countries for putting products under surveillance,

- The responsibility of putting a product or products under surveillance was taken by a body which was independent of the investigating authorities (generally inter Ministerial committee headed by Ministry of Commerce) on the basis of a criteria that was objective,
- Such surveillance was exercised for a limited period, not exceeding one year.
- The decision to put the product under surveillance would reported to the Committee on Anti-dumping Practice for scrutiny and examination.

51. It is important to note that the experience of the EU in resorting to the surveillance mechanism has shown that exporters often try to avoid application of safeguard measures by reducing the level of their exports. The adoption of such surveillance system in cases where allegations are being made that products were being dumped could also, lead to exporters who are dumping to review their export prices and thus avoid anti-dumping investigations being initiated against them.

#### Technical Assistance

52. Paragraph 38 of the Doha Ministerial Declarations emphasizes the importance of technical assistance and capacity building. It especially stresses on the need for technical assistance to be designed to assist developing countries, especially the LDCs and low income countries to adjust to the WTO rules and disciplines, implement obligations and exercise the rights of membership, including drawing on the benefits of an open, rules-based multilateral trading system. As most developing countries including those in Africa not have the institutional and legal framework, the Group has therefore proposed for the adoption of an Understanding or a Decision on the provision of technical assistance in certain areas. These should include

- Establishment and strengthening of national legal and institutional framework for the application of anti-dumping measures.
- Building and enhancing the technical capacities of officials of the investigating authority.
- Establishment of mechanisms for surveillance of imports of products that are alleged to be dumped and thus causing injury to domestic industry, with a view to assisting them collect the necessary information on trends of imports and their prices.

### Concluding remarks

53. It must be noted that the flexibility that developing countries currently have in hiking tariffs to counter dumping and subsidized products would be erased by the current negotiations on binding. In this regard, African countries have no alternative but to ensure that the mandates in paragraphs 28 and 44 are pursued to ensure that the development dimension through appropriate flexibilities is assured.

## **REGIONAL TRADE AGREEMENTS**

### Introduction

GATT rules on Regional Trade Agreements, as laid down in GATT Article XXIV and clarified in the Understanding on the provision, permit departures from the Most-Favoured Nation treatment as they allow parties to an RTA to grant each other trade preferences without multilateralising concessions. GATT Article XXIV is a conditional exception to the MFN Article as it subjects the formation of RTAs to compliance with a number of rules. It should be noted that the negotiations between the EC and the six ACP regions, in the context of the EP A, have, and are being conducted under GATT Article XXIV provisions, and as such, the rules exempting the parties from the application of GATT Article I apply. In other words, the basis on which EPA compatibility with WTO rules will be tested is on whether the substance of the agreement is consistent with the rules as prescribed at GATT Article XXIV.

2. This notwithstanding, the very rules on which WTO compatibility will be judged remain unclear. In particular, the requirements of GATT Article XXIV are broadly worded and consensus has yet to emerge on their interpretation. Secondly, RTAs are being reviewed for consistency with GATT rules by the Committee on Regional Trade Agreements (CRTA); however, the issue of consistency has been left unresolved in all cases but one.

3. It is against this backdrop that the Doha Ministerial Declaration at paragraph 29 calls members to *clarify and improve* disciplines and procedures of the existing WTO rules applying to regional trade agreements. Importantly, the declaration also called for negotiations to take into account the developmental aspects of RTAs.

4. It should be noted that, negotiations on regional trade agreements are taking place within the Negotiating Group on Rules (NGR). Under the purview of the NGR, negotiations have been dissected into systemic and procedural issues. This two-track approach has resulted in the discussion of myriad systemic issues related to GATT Article XXIV as well as procedural issues related to RTA transparency.

## **Regional Trade Agreement (RTAs)**

5. The object of negotiations on RTAs is to clarify and improve disciplines and rules that make them WTO compatible. The main elements of these rules were before the launch of the DDA, already established under GATT 1994 Article XXIV but had not been consistently applied, in spite of the adoption of an understanding on their interpretation in the Uruguay Round.

6. The current negotiations are focused on two main aspects of RTA rules: - the procedural aspect and the substantive rules. The procedural aspects, covered by transparency mechanisms, include:-

- early announcement to the WTO on the launching of an RTA;
- notification to the WTO on conclusion of RTAs arrangements;
- subsequent notification and reporting i.e. updating of information;
- procedures for examination of notified RTAs in the WTO.

7. Work on these procedural aspects was able to advance up to the adoption by the General Council in December 2006, of an Agreement on Transparency Mechanisms to significantly strengthen the surveillance of agreements concluded by WTO Members to form customs unions and free trade areas.

8. Since the beginning of the Doha negotiations, and in particular, between 2005 and 2006, the NGR discussion on RTAs has focused on the improvement of the transparency of RTAs through the establishment of a mechanism that would, inter alia, clarify and improve the transparency and procedural requirements contained in the existing WTO provisions.

9. In December 2006, a transparency mechanism was agreed by the General Council to be implemented on a provisional basis in accordance with paragraph 47 of the Doha Ministerial Declaration. It should be recalled that this transparency mechanism is established within the Committee on Regional Trade Agreements and is restricted to reviewing RTAs notified under GATT Article XXIV and GATS Article V.

10. It must be borne in mind that the ACP Group of Countries which include the African Countries tabled a Submission entitled "Submission on Regional Trade Agreement". This Paper TN/RL/W/155 was officially submitted to the Negotiating Group on Rules on 26 April, 2004 and seeks to re-inforce the mandate by calling on Members to address Developmental Aspects of Regional Trade Agreement and Special and Differential Treatment in the WTO Rules: GATT 1994 Article XXIV and the Enabling Clause. The Paper stressed further on the need for the mandate to be executed i.e. clarifying and improving disciplines and procedures under the existing WTO provision applying to regional trade

agreements while taking into account their “developmental aspects”.

11. The more substantive issues are dealt with under sections 5-8 of the Article. These are:
  - Duties and other restrictive regulations of commerce must be eliminated with respect to **substantially all the trade**, among parties
  - Duties and other regulations of commerce must not be higher or more restrictive than prior to the RTA formation
  - Reasonable length of time must be given for the formation of the RTA should not exceed 10 years only in exceptional cases.
12. With a view to ensuring that the mandate is complied with, the African Group is taking a very close look at the Enabling Clause.
13. It must be stressed here that the scope of the Enabling Clause covers regional or global trade arrangements entered into among developing countries for the mutual reduction or elimination of tariffs and non-tariff measures. The Clause therefore aims at facilitating trade between developing countries and not to impede the liberalization of trade between the parties.
14. It bears emphasizing here too that the Enabling Clause does not assume a formal link with GATT Article XXIV conditions. It is less stringent in application than GATT XXIV as it permits reciprocal preferences on a limited range of products, and not “substantially all the trade”. The Clause also permits reduction in tariffs only, or non-tariff measures and not elimination like GATT XXIV.
15. Issues in the negotiations
  - What is “substantially all the trade” - is 90%. basis for the calculation
  - What are Other restrictive regulations of Commerce
  - Transition period for entering into RTAs ie. How long should the reasonable period of time be? And what are the exceptional cases.

It must be noted from the outset that the provisions under GATT XXIV makes no reference to SDTs for North-South RTAs, while GATS Article V makes no reference to SDTs.

### **The Group's Strategic Proposals**

The Group proposes that SDT provisions should be incorporated into GATT Article XXIV to allow for the following:

- Lesser product coverage
- Much more secure and longer transition period of 18 years.
- With respect to ORRT, the Group proposes that the term must be interpreted in a very flexible manner so that developing countries should reserve the right to apply trade contingency measures to protect their trade.
- An affirmation by the Group that the Enabling clause should be preserved to provide legal cover to developing countries to the extent that its provisions are not undermined by Article XXIV.

It must be borne in mind that it was envisaged that the DDA would be completed before the EPAs. The reasoning was that the conclusion of the Clarification of Articles XXIV of GATT 1994 and V of the GATS would give some sense of direction on how the EPAs would be moved. This has not been the case. Hence, there would definitely be inconsistencies between any final GATT Article XXIV and GATS Article V on the one hand and the current Interim EPAs on the other. This should be a matter of concern to the ACP Group of countries.

It is therefore proposed that harmonization between GATT XXIV and GATS V, the interim EPAs should be re-opened for negotiations.

