Analytical Note
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ARTICLE XXIV AND RTAS: HOW MUCH WIGGLE ROOM FOR DEVELOPING COUNTRIES

SYNOPSIS

The issue of 'WTO Compatibility' of regional trade agreements (RTAs) has been intensely debated ever since the days of the GATT. RTAs are governed by Article XXIV in the GATT. The Article however does not have a development dimension. This paper argues for the need to insert strong Special and Differential Treatment clauses into Article XXIV in order to be legally consistent with GATS V. It also looks at the ways in which some WTO Members, especially developed countries, have protected their markets in their RTAs. These are grounds for developing countries to legitimately open up less fully.

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I. INTRODUCTION

1. The issue of 'WTO Compatibility' of regional trade agreements (RTAs) has been intensely debated ever since the days of the GATT. Today, as an increasing number of countries are pursing North-South RTAs, for instance, the African, Caribbean and Pacific (ACP) countries with the European Union, this issue is becoming even more pertinent. Many developing countries are grappling with developed countries' interpretation of 'WTO compatibility' as this has serious ramifications. In the context of the Economic Partnership Agreement (EPA) negotiations with the ACP countries, EU interprets GATT Article XXIV and its 'substantially all trade' in goods clause as making duty-free 80 percent of trade. If developing countries follow this interpretation, it is likely to deindustrialise and also destroy the agricultural sector in low-income countries since their producers and industries will not be able to compete with those of the developed country in the RTA.

2. Section II of this paper looks at what WTO compatibility for North-South free trade or regional trade agreements refer to.

3. Section III addresses the legal inconsistency and development deficits in Article XXIV. Whilst the GATS V contains Special and Differential Treatment for developing countries, this is not the case in Article XXIV. The section also highlights the likely impact if low-income developing countries go ahead with liberalising 'substantially all the trade'.

4. Section IV highlights the finished and unfinished business on Article XXIV – the transparency mechanism that was agreed upon at the WTO in 2006; and the debates on the systemic issues that have been and remain controversial – particularly the issue of 'substantially all the trade' and 'within a reasonable length of time'.

5. Section V looks at how developed and also certain developing countries have sometimes retained fairly high levels of protection – through protecting tariff lines in key sectors; use of the positive list approach for agriculture; tariff peaks; and subsidies amongst other measures. Whilst tariffs – the only real instrument developing countries have to protect their producers and industries - are being targeted in RTAs for reduction, the other instruments used by developed countries, particularly subsidies, which have a tariff-like effect in protecting domestic producers, have been overlooked in RTAs.

6. Section VI explores the likelihood that countries such as the African, Caribbean and Pacific (ACP) countries and the EU might be hauled to dispute settlement if ACP countries liberalised less than 80 percent of their trade with the EU in the EPAs. It concludes with the message that developing countries in North-South RTAs should assume a more flexible interpretation of the existing Article XXIV. The precedence has after all been set by the developed countries themselves, such as the EU and even Norway and Switzerland. However, with or without a Doha Round, the best outcome for developing countries is a change in the language of Article XXIV so that it clearly incorporates Special and Differential Treatment and flexibilities for the South.

II. WHAT IS 'WTO COMPATIBILITY'?

7. A cornerstone of the multilateral trading system is the most favoured nation (MFN) clause, which says that market opening offered to one country, must be extended to all other WTO members.

However, there are exceptions to the MFN rule. They include the following:

i) Under the 1979 Enabling Clause, developed countries can provide generalised non-reciprocal preferences to all developing countries or to all least developed countries (LDCs). The Everything But Arms preference programme provided to Least Developed Countries by the EU falls under this exception.

Alternatively, the preferences must apply to all developing countries that meet certain criteria. Eg. the EU's GSP + programme whereby countries that meet the criteria set by the EU have preferential access to the EU market in certain products.

In addition, under the Enabling Clause, developing countries can also freely and without constraint provide each other with preferential market access. That is, the Enabling Clause gives cover to South-South free trade agreements and customs unions. Many of the regional customs unions such as the trade arrangements in goods within Mercosur (in South America), or the Economic Community of West African States (ECOWAS) have been notified under the Enabling Clause.[1]

[1] There seems to be a trend recently where South-South free trade agreements are notified under Article XXIV instead of under the Enabling Clause. For example, the Singapore-India free trade agreement and the China-Pakistan free trade agreement. Even the Southern African Customs Union (SACU) and the Southern African Development Community (SADC) have been notified at the WTO under Article XXIV.

ii) Article XXIV of the GATT allows for the derogation of the MFN provision when developed countries enter into free trade agreements, customs unions and interim arrangements with each other.

Since the Enabling Clause only covers South-South trade agreements, the North-South RTAs negotiated in the recent years are provided legal coverage under Article XXIV.

iii) Waivers from the MFN are also possible, though difficult to obtain. The Fourth Lome Convention between the EU and the ACP countries was granted a waiver at the 2001 Doha WTO Ministerial Conference.

Since the Uruguay Round's Understanding in Respect of Waivers of Obligations under the GATT 1994 and Article IX: 3-4 of the Marrakech Agreement, members requesting a waiver must justify it with sound economic analysis and arguments, undergo a complex process of requesting WTO authorisation, and abide by stringent conditions for maintaining the waiver if it stretches over several years, including annual reviews by the WTO.[2] The waiver obtained by the ACP countries at the Doha Ministerial Conference came at a high price – ACP countries essentially agreed to the Doha Round in exchange for this waiver. The EU also had to give some market access to certain non-ACP countries (eg. in tuna) before the waiver was granted.

8. Given the difficulties in obtaining waivers, developing countries negotiating free trade agreements with developed countries are now doing so under Article XXIV. As Article XXIV was agreed to in 1947, it only covers trade in goods. Countries are therefore not obliged to negotiate services in these free trade agreements in order to be 'WTO compatible'. Should they choose to do so, these services free trade agreements or regional agreements are governed by the GATS Article V provision. However, nothing in the WTO's set of rules obliges developing countries to include services, intellectual property or the 'new issues' such as investment, competition and procurement in their non-WTO free trade agreements.

9. Over the years, as the EU has been a sought-after market, the Lome Conventions provided by the EU to the ACP countries have been brought into question by GATT and now WTO members. This issue was raised because the Central and South American countries wanted the same access to the EU market in bananas.

[2] Onguglo B and Ito T 2003 'How to Make EPAs WTO Compatible?', Discussion Paper No. 40, July, ECDPM.

Box: Lome Convention and GATT/WTO Compatibility

The EU sought legal coverage for the First, Second and Third Lome Conventions under Article XXIV of GATT 1947, to be read in conjunction with Part IV of GATT (trade and development). The EU's argument was that trade provisions of the Lome Convention provide for a free trade area in the meaning of Article XXIV, with Special and Differential Treatment provided to ACP countries in the meaning of Article XXXVI: 8 in Part IV of GATT on non-reciprocity.

Article XXIV:8(b) states that 'A free trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories'.

Article XXXVI says that 'The developed contracting countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.'

Other GATT contracting parties, however, did not share this view. They argued that the non-reciprocal preferences were not extended to all developing countries and therefore did not fulfil the obligations of generalised preferences; Part IV of GATT does not allow for discrimination among developing countries); nor could Lome preferences be considered as free trade agreements (Article XXIV) because they were not reciprocal.

The legality of the Lome Convention was questioned in the 1990s in the context of a series of disputes concerning the EC's import regime for bananas. The complainants were from Central and South America and they wanted better access to the EU market.

In order to implement the Fourth Lome Convention, EU and the ACP states resorted to a GATT waiver to allow the EU to maintain the Lome trade preferences. The waiver applied from 9 December 1994 to 20 February 2000 – the expiry date of the Convention. When the Convention came to an end, the parties agreed to continue the system of non-reciprocal trade preferences for a *preparatory period* that was scheduled to last till 31 December 2007.

Sources: Onguglo B and Ito T 2003 'How to Make EPAs WTO Compatible? Reforming the Rules on Regional Trade Agreements', July, ECDPM.

10. Article XXIV stipulates that RTAs should lead to the liberalisation of 'substantially all the trade' and this should be done 'within a reasonable length of time'. The most problematic characteristic about Article XXIV is that it did not provide for any Special and Differential Treatment. It was not envisaged in 1947 that there would be RTAs between developed and developing countries.

11. As a result of this glaring lacuna, and legal inconsistency (see below), and the proliferation of North-South RTAs, developing countries pushed for the renegotiation of disciplines on RTAs in the Doha mandate. The Doha Ministerial Declaration therefore states that

> 'We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the development aspects of regional trade agreements'. (Paragraph 29, WTO Doha Ministerial Declaration, WT/MIN(0)/DEC/1, 14 November 2001).

III. ARTICLE XXIV AND ITS MISSING DEVELOPMENT DIMENSION

a. *The Main Controversial Elements of Article XXIV*

12. Article XXIV was negotiated when developing countries were colonies mostly of developed European countries. As such, it did not provide for the rise of RTAs between developed and developing countries. The implicit understanding was that partners in RTAs would be of similar levels of development.

13. The most contentious parts of Article XXIV have been paragraphs 8a and b which state that the 'duties and other restrictive regulations of commerce...are eliminated with respect to substantially all the trade' between the constituent territories.

14. These paragraphs imply that such trade agreements are reciprocal between developed and developing countries, and that substantially all duties and other restrictive regulations are to be eliminated.

15. Article XXIV 5(c) also states that such customs union or free-trade area should be formed 'within a reasonable length of time'. In the 'Understanding on the Interpretation of Article XXIV of the GATT' that was adopted in 1994, paragraph 3 notes that:

> 'The reasonable length of time' referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Members parties to an interim agreement believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period.'

16. Since there has never been an interpretation of what 'substantially all the trade' means, countries have interpreted it according to their interests. (This becomes apparent in Section IV).

b. *Article XXIV's Legal Inconsistency with the Rest of the WTO*

17. In the EPA negotiations with the ACP countries, the European Union has been asking the ACP to liberalise up to 80% of their trade. Liberalisation in this context is understood to mean bringing duties on tariff lines to zero, rather than the WTO's concept of liberalising tariffs from the Uruguay Round bound rates (which may or may not lead to cuts into countries' real applied tariff rates).

18. However, a view held by some analysts, and shared by a large number of developing countries, such as the ACP group is that Article XXIV must be revised and updated in order to reflect the realities of the current time. In fact, it is noted by the ACP countries that there is a 'deficiency in the legal structure of WTO rules applying to RTAs'.[3]

19. This deficiency shows up most clearly because the General Agreement on Trade in Services (GATS) Article V on regional services trade agreements, negotiated in the Uruguay Round some forty-five years after Article XXIV came into effect, provides for Special and Differential Treatment for North-South services RTAs.

20. GATS Article V 3a states that where developing countries are parties to a regional services agreement, 'flexibility shall be provided for' in relation to 'substantial sectoral coverage' and particularly the 'elimination of existing discriminatory measures' or 'prohibition of new or more discriminatory measures'. The flexibility enjoyed by developing countries in these RTAs will be 'in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors'.

21. This legal deficiency is even more glaring in the light of the above mentioned Enabling Clause. The Enabling Clause, negotiated as part of the Tokyo Round Agreements and concluded in 1979, makes central the developmental concerns of developing countries. In preferential trade arrangements between developed and developing countries, paragraph 5 of the Enabling Clause says that

[3] WTO 2004 Submission on Regional Trade Agreements: Paper by the ACP Group of States, TN/RL/W/155, 28 April.

> 'The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs.'

22. It does not stand to reason that whilst developed countries can provide non-reciprocal preferential trade arrangements to developing countries under the Enabling Clause, once these countries are in a North-South regional trade agreements, the liberalisation of 'substantially all the trade' applies on both sides.

23. It is also a clear inconsistency that North-South RTAs will have Special and Differential Treatment (S&D) provisions when it comes to services, but that these are absent in the trade in goods.

24. In order to redress these inconsistencies, developing countries such as the ACP group have called for S&D to be inserted into Article XXIV.

c. *A Case in Point – Least Developed ACP Countries' Difficult Predicament*

25. The lack of S&D provisions in Article XXIV is problematic for most developing countries. The legal inconsistency is most glaring in the case of Least Developed Countries (LDCs). LDCs have not been asked to commit to liberalization commitments in the Doha Round. This exception for all LDCs is allowed under the Enabling Clause.

26. These same LDCs also enjoy quota-free and duty-free access to the EU market on nearly all items under the EU's preferential 'Everything But Arms' (EBA) programme.

27. Yet many of the LDCs are being heavily penalized in their Regional Trade Agreement negotiations with the EU. Being in regional trading blocs with non-LDC countries which operate under Article XXIV, LDCs are being asked to liberalise and bring the majority of their tariffs down to zero also! To refuse would lead to the break up of regional groupings.

28. The LDCs in the ACP group are therefore struggling between two negative options. They could either reject regional integration and stand

alone in their sub-regions, keeping their tariffs intact (i.e. the benefits they enjoy from being LDCs in the WTO). Alternatively, they could relinquish their LDC benefits in the multilateral trading system, stand together with other LDC and non-LDCs in their sub-region, and reduce their tariffs to zero on 'substantially all the trade'. This option is likely to bring about the risks highlighted in the following section.

d. *Consequences of Liberalising Substantially All Trade for Developing Countries*

29. Developing countries in general face tremendous challenges in liberalising 'substantially all trade' particularly as the EU interprets this clause as being at least 80 percent of trade. The following are very real likely consequences:

i) Collapse of Industries and the Agricultural Sector in Developing Countries

30. The industries and agricultural sector of many developing countries are not as advanced as those in developed countries. For most developing countries, it is likely that eliminating 'substantially all' duties and other barriers when entering into RTAs with developed countries will lead to the collapse of both their less competitive industries and their agricultural sector. As will be illustrated later, even the developed countries have very carefully protected certain sensitive sectors.

31. Exports in a small number of sectors in developing countries might even increase.[4] However, on the whole, the more competitive industries in the developed countries are likely to benefit much more by such a reciprocal trading arrangement.

32. This could lead to import surges into developing countries, deindustrialiation and the displacement of small farmers and consequently an increase in both rural and urban unemployment.

ii) Fiscal Considerations

33. Many developing countries still depend heavily on tariff revenues – sometimes even up to over 40 percent of government budgets. The elimination of duties when entering into RTAs with developed countries will drastically cut down on this important source of revenue. This could

[4] For example, as a result of structural adjustment liberalisation policies, Ghana increased their exports in the 1990s, but it also saw its manufactured value added becoming significantly negative during the 1990s, signifying severe deindustrialisation. (Shefaeddin S.M 2005 'Trade Liberalisation and Economic Reform in Developing Countries: Structural Change or De-industrialisation?' UNCTAD Discussion Papers No. 179 April.)

have serious ramifications on the ability of governments to provide health care, education, and essential services and infrastructure.

34. Until and unless governments have found other sources of income, cutting deeply and quickly into an important existing revenue source is not advisable.

iii) Regional Disintegration

35. Many developing countries are interested in regional integration within their own regions and sub-regions as an important pillar of their development strategy. Regionally based industries can have a better chance of producing for their regions rather than for the international market since competition will not be as stiff. Goods produced and traded within regions can use standards that are tailored to regional needs, realities and capacities.

36. If countries eliminate trade barriers on 'substantially all the trade' in RTAs with developed countries, it is likely that this goal of regional integration in terms of the building up of regional production capacities will not eventuate. Instead, such a regional trade arrangement will lead to a hub and spokes arrangement, where rather than trading with one another, exports are directed toward the developed country and imports are also likely to originate from the developed country.

37. The developing countries as 'spokes' essentially become the providers of inputs and raw materials, whilst the bulk of the transformation in production takes place in the developed country.

38. Instead of more trade integration amongst developing countries in such an RTA, these developing countries are likely to be strengthening their trade relationship with the developed country. The original objective of regional integration would thus be lost and the development goals resulting from diversification would also not have been achieved.

39. Clearly, a solution has to be sought, so that the development concerns of LDCs as well as other developing countries are recognised and appropriately addressed when they enter into North-South RTAs.

IV. FINISHED AND UNFINISHED BUSINESS ON ARTICLE XXIV

40. During the GATT, a Working Party would be set up to review each and every RTA that was established. The Party was supposed to 'examine' the RTA for GATT compatibility. When the WTO was established, the Committee on Regional Trade Agreements (CRTA) took the place of these Working Parties. Today, as in the GATT days, such attempts remain unsuccessful.

41. According to one observer, there has been some degree of political game playing. Members would allow others' RTAs to pass if their RTA was also not called into question. Even more importantly, given that the WTO functions on consensus, there would never be total agreement in the CRTA that an RTA fell short of the requirements of Article XXIV since the members of that RTA are also part of the jury.

42. These uncertainties contributed to the decision to subject Article XXIV to further clarification and negotiations in the Doha Round.

43. After the 2001 Doha Ministerial, a two-pronged approach was taken in these negotiations – one on procedural matters and the other on systemic issues. The negotiations on procedure eventually led to the adoption of a Transparency Mechanism in 2006. The systemic issues were fairly intensely discussed in the years proceeding Doha. However, since 2006 after the adoption of the Transparency Mechanism, no new proposals have been lodged. The conversation has come to a standstill. Some observers conclude that the Transparency Mechanism has fulfilled the needs of most members in shedding light on these RTAs. Others from the developing world remain dissatisfied, as they want Special and Differential Treatment inserted into the Article, but have been discouraged by the stance of countries pushing for radical trade opening in RTAs.

44. One major 'evolutionary' change in the work of the CRTA that is worth noting is that the Committee no longer attempts to 'examine' RTAs for compatibility. Recognising that consensus is difficult, RTAs are merely 'considered by Members' (Paragraph 5 of the Transparency Mechanism for RTAs, Decision of 14 December 2006, WT/L/671).

a. *The Transparency Mechanism*

45. Since the implementation of the Transparency Mechanism (TM), the information available on RTAs has improved significantly. Before this Mechanism was implemented, information was largely fielded by the

RTA members themselves. Some gave many details, others did not – even withholding information on tariff concessions.

46. Since the implementation of the TM, the WTO Secretariat has been charged with writing factual reports. The factual reports contain standardised and detailed information on the RTAs examined.

BOX: Transparency Mechanism and How the CRTA 'Considers' RTAs

RTA members are to notify the WTO as early as possible. 'As a rule, it will occur no later than directly following the parties' ratification of the RTA', and before the implementation of preferential treatment between the parties. Tariff concessions under the agreement, as well as Members MFN duty rates have to be submitted to the WTO – usually ten weeks after the date of notification of the agreement.

The RTA will be 'considered' by WTO members and this process 'shall be normally concluded in a period not exceeding one year after the date of notification'.
The WTO Secretariat prepares a factual presentation on the RTA which is circulated not less than eight weeks in advance of the meeting where Members will consider the RTA. 'In preparing the factual presentation, the WTO Secretariat shall refrain from any value judgement'.

'As a rule, a single formal meeting will be devoted to consider each notified RTA. Any additional exchange of information takes place in written form.

The CRTA will implement the transparency mechanism vis-a-vis RTAs falling under Article XXIV and GATS V. The Committee on Trade and Development (CTD) will consider RTAs between developing countries notified under the Enabling Clause.

Technical support from the WTO Secretariat is available to developing country Members and Least Developed Country (LDC) members in preparation of data and other information.

Source: WTO WT/L/671 Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006, 18 December.

47. It is important to note that whatever Members' views and disagreements about whether an RTA is WTO compatible or not, an RTA is only considered in one CRTA sitting. Further questions are fielded in writing.

48. Essentially, light is shed on the agreement, but no judgement is made within the CRTA about whether an RTA is WTO compliant or not. This is an important point given the considerable pressure put on developing countries' RTAs to be 'WTO compatible'. Currently, the judgement on whether a country is 'WTO compatible' will only take place if a case is brought to the WTO's dispute settlement body.

49. It is also important to note that RTAs involving even one country that is not a WTO Member will not be 'considered' in the CRTA unless this rule is changed. No factual report is provided by the Secretariat. These RTAs are listed on the WTO site, but their factual reports are classified as being 'on hold'.

50. Most of the ACP sub-regions negotiating with the EU in their Economic Partnership Agreements have one country in the RTA which is a non-WTO member. For example, in the Cariforum-EU RTA, Bahamas is a non-WTO member.

b. *The Systemic Issue*

51. The second prong to the approach adopted after Doha was for negotiations on systemic issues pertaining to Article XXIV to take place. These 'systemic issues' include the aforementioned definition of 'substantially all the trade', how 'within a reasonable length of time' could be defined, as well as what 'other restrictive regulations of commerce' might include.

52. These negotiations had led to a number of proposals, but there has been no definitive outcome. The section below highlights the key systemic issues, and the positions of only a few countries, namely ACP, EU and Australia.

'Substantially all the Trade' (SAT) (Paragraph 8a and b)

53. This issue lies at the core of 'WTO compatibility'. The language is conveniently vague so that it has de facto allowed for countries to maintain their own flexible interpretation.

54. In order to resolve the ambiguities, a couple of approaches have been suggested in terms of how SAT should be defined. The quantitative approach measures the percentage of duty-free tariff lines countries offer in the RTA. Alternatively, it can also measure the percentage of trade which is made duty free. A qualitative approach has also been suggested – conditions to be applied to ensure that no major sector is left out of liberalisation.

55. This quantitative approach uses the liberalisation of trade between the two parties to indicate the extent of coverage of an RTA. The EU supports this approach. In its negotiations with the ACP countries, the EU has said that 'substantially all the trade' should be interpreted as the liberalisation of 90 percent of existing trade between the two sides. That is, the duties applied to tariff lines accounting for 90 percent of the existing trade

should be brought to zero. EU has told the ACP that they will liberalise 100 percent of their trade with the ACP and that the ACP countries will have to liberalise 80 percent in order to achieve the average 90 percent liberalisation.

56. The other quantitative approach has been the liberalisation of countries' tariff lines. Australia (TN/RL/W/173/Rev.1; TN/RL/W/180) calls for 95 percent of tariff lines at the six digit level to be liberalised (to zero tariffs) by the end of the RTA transition period. 70 percent of all tariff lines should already have zero tariffs at the start of the entry into force of an RTA. Tariff rate quotas must also be eliminated on the tariff lines that are part of the 70 percent of liberalised lines.

57. EC (TN/RL/W/179) has noted that whilst 'the percentage of trade method has been traditionally favoured as an indication of RTA coverage in the GATT/WTO context' (i.e. the method EU favours because it does not show up their protection of agriculture), they were open to exploring the possibility of supplementing the trade coverage benchmark with a benchmark measured by tariff line liberalisation. Exactly how this combination of measurement is done has not yet been clarified.

58. In addition, there have not even been any real discussions on the exact level of trade opening that should be achieved. EC (TN/RL/W/179) has officially said that this will have to be negotiated once there is some convergence on the methodology for calculating this combined benchmark. In its submission, the EC did not use the 90 percent trade opening figure it has used in negotiations with the ACP countries.

59. Interestingly, the EU has said that quantitative benchmarks can only be a guide to 'likely WTO conformity' (TN/RL/W/179). This is probably because the EU is notorious for protecting its agriculture sector, and does not want its ability to do so curbed.

60. Some have also raised the qualitative approach – no sector (or at least no major sector) should be kept out of RTA liberalisation. This has been the position of Australia.

61. Recognising that there are countries which have tended to exclude certain sectors from liberalisation, Australia proposes that the products which are excluded from liberalisation cannot include 'highly traded products'. This term has never been used before in the WTO and is not pre-defined anywhere. The Australians propose defining it as excluding products which exceed 0.2 percent of total imports from the RTA partner, or the top 50 imports from the RTA partner.

62. Regarding qualitative benchmarks, the EC says that it should be looked into in order to have more precise definitions of "major sector"; "other restrictive regulations of commerce"; clarification of the nature of the list of exceptions from the obligation to eliminate duties; assessment of the impact of possible seasonal restrictions; special sectoral safeguards; tariff-rate quotas; review clauses; and in-built provision for extension of the coverage of RTAs within established transition periods. (They have omitted the critical issue of subsidies).

63. The EU concludes that whilst there can be common understandings on these issues, any qualitative assessment of RTAs must be conducted on a case-by-base basis.

64. On Special and Differential Treatment, Australia 'reaffirms its willingness to consider S&D-specific provisions in enhanced disciplines for RTAs. Such provisions would be negotiated and applied to all developing countries whose RTAs are notified under Article XXIV. However, it did not go on to provide any more details on what such S&D provisions might be.

65. The ACP countries are open to a combination of methods. In their April 2004 submission (TN/RL/W/155), they stated that 'appropriate flexibility shall be provided to developing countries in meeting the 'substantially all the trade' requirement in respect of trade and product coverage…' They did not attempt to define the percentage of liberalised trade that should be covered by RTAs.

66. The EU reinforces that it is willing to explore flexibilities for developing countries along the lines of the ACP proposal.

67. 'The European Communities are prepared to explore ….the extent to which flexibilities might be appropriate with respect to, inter alia, the length of the transitional period, the level of final coverage and the degree of asymmetry for both under GATT Article XXIV. More specifically, the European Communities are open to consider separate and differentiated, i.e. lower, thresholds for developing countries and least developed countries, as proposed in the submission by the ACP-countries.' (TN/RL/W/179).

'Within a Reasonable Length of Time' (Paragraph 5c)

68. This clause has also caused a huge amount of unease for developing countries, since many are aware that they have supply side-constraints and that proper sequencing of liberalisation is essential. As such, the ACP countries, in their proposal (TN/RL/W/155) have said that 'a transition period longer than 10 years will be made legitimately and more easily

available to developing countries'. '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'.

69. On transition periods, the EU noted that 'exceptional cases' for going beyond 10 years (as allowed in the 'Understanding') should be used only for a limited number of products under RTAs, and should be a carve-out only for developing and especially LDCs, not by developed countries.

70. Australia wants to abide strictly to the 10 years - that precisely 10 years after entry into force of the agreement, duties will be eliminated on at least 95 percent of all the tariff lines. Presumably, Special and Differential Treatment for developing countries would apply.

71. According to Australia, 'highly traded products', can be protected in 'interim agreements' but must be liberalised once the 10 years have expired, unless in exceptional circumstances.

72. It is not in the best interest of developing countries to state a definitive length of time for liberalising all their tariffs and non tariff barriers. Different developing countries will take different periods of time to develop. It might therefore be beneficial for them instead to argue for liberalisation to be advanced when certain development indicators have been attained. This will ensure that countries are not asked to liberalise prematurely.

'Other Restrictive Regulations of Commerce' (ORRCs) (Paragraph 8)

73. Article XXIV does not offer any definition of 'other restrictive regulations of commerce' which is found in paragraph 8. ('Duties and other restrictive regulations of commerce … are eliminated with respect to substantially all the trade…'). Generally, ORRCs have been interpreted to mean non-tariff barriers.

74. In the recent years, there has been almost no discussion on this issue. However, in earlier years, discussions on ORRCs had usually centered on safeguards and the application of anti-dumping measures. Clearly, other measures can also fall under ORRCs – such as quantitative restrictions, Sanitary and Phytosanitary measures, subsidies etc.

75. In their proposal (TN/RL/W/155), the ACP countries assert that the term 'other restrictive regulations of commerce' will have to be interpreted in a flexible manner for developing countries, so that developing countries can apply protection measures including safeguards and other non-tariff measures (e.g. rules of origin) on intra-regional trade.

Other Issues

A few other issues deserve mention:

76. Notification: The ACP countries have said that the notification, reporting and review clauses of the 'Understanding' should take into account the limited administrative, human and financial capacities of developing countries.

77. Dispute Settlement Body and the CRTA: On the relationship between the Dispute Settlement Body and GATT XXIV, the ACP proposal calls for the CRTA to be primarily responsible for determining 'WTO-compatibility' and that the jurisdiction of CRTA is 'not unduly overridden by the dispute settlement procedures and rulings'.

78. Enabling Clause: The ACP countries have also made clear that the Enabling Clause 'is an "acquis" in the legal architecture of the WTO. For them, it is a development milestone in the history of the GATT and they do not want the negotiations on RTA rules to change the flexibility the Enabling Clause now provides developing countries in South-South trade agreements (TN/RL/W/155).

79. In contrast, the EU, in considering the 'Developmental Aspects' of the negotiations (TN/RL/W/179), has questioned why South-South RTAs should have such broad flexibilities. EU wants this changed so that South-South RTAs also contain similar conditions as Article XXIV. The EU, in particular, wants the major developing countries, entering into RTAs with smaller developing countries to have much higher levels of liberalisation, similar to Article XXIV.

80. It is likely that the EU does not want greater integration between the bigger and smaller developing countries. EU's access to the raw materials in the smaller developing countries may be curtailed.

81. By placing the negotiations on the Enabling Clause side by side with the S&D aspects ACP countries have asked for in their 12 May 2005 submission (TN/RL/W/179), the EU seems to be indicating that reducing the flexibilities in the Enabling Clause is a quid pro quo. This is problematic for the development of South-South cooperation and regional integration.

V. HOW MUCH TRADE IS ACTUALLY LIBERATED IN RTAS?

82. If one looks into the recent history of RTA liberalisation, it is clear that whilst many countries have liberalised to about 75 or 80 percent of trade, there were also a significant number of RTAs which fell far from this target. The last comprehensive survey on RTAs and their trade liberalisation coverage, conducted by the WTO Secretariat, was in 2002. At that time, they concluded that product coverage in the RTAs they surveyed were rarely as low as 50 percent and usually higher than 75 percent – measured in terms of tariff lines that are duty free. However, if coverage is measured by what is actually traded, then the coverage in RTAs was higher. [5]

83. The study however shows that countries have very selectively and carefully liberalised – especially when there are competing products that might threaten their domestic sector. For instance, some Eastern European states, before joining the EU, had RTAs amongst themselves where liberalisation was even less than 50 percent of their tariff lines. Also, whilst the EU had opened up completely to these Eastern European countries in the industrial sector, the share of duty-free tariff lines in agriculture was only in the range of between 27 percent for Poland and 32 percent for the Czech Republic in 2000.

84. Drawing to a large extent on this 2002 WTO Secretariat study, the following are some of the ways in which countries continued their protection in the context of RTAs.

a. Positive List Approach to Protect Agriculture in Some RTAs

85. Whilst industrial products are usually liberalised on a negative list approach (all lines are liberalised unless specified), in some instances, countries have used a positive list approach (all lines are protected unless specified) to deal with agriculture, even within the same agreement. This is the case for EU-Tunisia. According to WTO calculations, in EU-Tunisia, the EU has 93 percent of lines duty-free. 59 percent of agricultural lines are duty-free and 100 percent of industrial tariff lines are duty-free. [6]

86. The EFTA (Iceland, Switzerland, Norway and Liechtenstein) – Turkey agreement, enforced in 1992 as well as the Japan- Singapore Free Trade Agreement (FTA) of 2005 use this positive list modality for agriculture.

[5] WTO 2002 'Coverage, Liberalisation Process a0.72nd Transitional Provisions in Regional Trade Agreements: Background Survey by the Secretariat', WT/REG/W/46.
[6] WTO 2002 ibid.

Japan, in the agreement with Singapore, protects up to 1,657 of its tariff lines – or the majority of its agricultural tariff lines. [7]

b. Low Percentage of Duty-Free Lines

87. Depending on the level of competition, countries' level of liberalisation (measured in terms of the percentage of duty free tariff lines) differ considerably. Prior to joining the EU, Hungary, for example, had RTAs with the EC, EFTA and the Middle Eastern countries wherein their share of duty-free lines were sometimes only slightly above 50 percent (See Box 1). For example, duty-free lines between Hungary and Turkey only amounted to 53 percent in 1999.

[7] OECD 2005 'Regional Trading Arrangements and the Multilateral Trading System: Agriculture', OECD Trade Policy Working Paper No. 15.

BOX 1: Tariffs Applied by Hungary to MFN Imports and RTA Imports (1999)

Origin of goods	All Products				Agricultural Products				Industrial Products			
	Average applied tariff	Average applied tariff on dutiable items	Share of duty-free tariff lines	RMP ratio*	Average applied tariff	Average applied tariff on dutiable items	Share of duty-free tariff lines	RMP ratio	Average applied tariff	Average applied tariff on dutiable items	Share of duty-free tariff lines	RMP ratio*
	(% duty)		(% of total tariff lines)		(% duty)		(% of total tariff lines)		(% duty)		(% of total tariff lines)	
MFN	12.4	13.7	9		32.2	33.6	4		7.4	8.3	11	
EC	7.2	15.6	54	0.42	32.2	33.8	5	0.00	0.9	2.8	66	0.87
EFTA	7.0	15.2	54	0.44	30.9	33.1	7	0.04	0.9	2.8	66	0.87
Bulgaria	4.3	11.4	62	0.65	17.6	33.8	48	0.45	0.9	2.7	66	0.87
Czech R	3.7	18.1	80	0.70	16.6	32.0	48	0.49	0.4	3.4	88	0.94
Slovak R	3.7	18.1	80	0.70	16.6	32.0	48	0.49	0.4	3.4	88	0.94
Poland	3.5	16.9	79	0.72	15.8	30.7	49	0.51	0.4	3.2	87	0.94
Romania	4.0	16.5	76	0.67	17.9	34.3	48	0.44	0.5	3.1	82	0.93
Slovenia	4.5	17.7	75	0.64	20.0	37.7	47	0.38	0.6	3.0	82	0.93
Estonia	6.9	15.7	56	0.44	31.0	33.4	7	0.04	0.9	2.8	68	0.88
Israel	7.2	15.6	53	0.42	32.2	33.7	4	0.00	0.9	2.8	66	0.87
Turkey	7.2	15.6	53	0.42	32.2	33.6	4	0.00	0.9	2.8	66	0.87

*RMP refers to the relative margin of preference ratio. The higher the ratio, the greater is the liberalisation granted to the RTA partner. An RMP of 1 indicates full tariff liberalisation. The RMP ratio of zero indicates no tariff cuts.
Source: WTO 2002 'Coverage, Liberalisation Process and Transitional Provisions in Regional Trade Agreements', WT/REG/W/46, 5 April

88. Even Switzerland had liberalised close to, but less than 80 percent of its tariff lines in its RTAs with the EC in 1999 (76 percent of tariff lines) and the former Eastern European countries (about 77 percent) in 1999. Typically, Switzerland liberalised 100 percent of its industrial products, buts its liberalisation of agricultural tariff lines were only about 11-23 percent of its total agricultural tariff lines. See Box 2.

BOX 2: Tariffs Applied by Switzerland to MFN Imports and RTA Imports (1999)

Origin of goods	All Products				Agricultural Products				Industrial Products			
	Average applied tariff	Average applied tariff on dutiable items	Share of duty-free tariff lines	RMP ratio*	Average applied tariff	Average applied tariff on dutiable items	Share of duty-free tariff lines	RMP ratio	Average applied tariff	Average applied tariff on dutiable items	Share of duty-free tariff lines	RMP ratio*
	(% duty)		(% of total tariff lines)		(% duty)		(% of total tariff lines)		(% duty)		(% of total tariff lines)	
MFN	n.a.	n.a.	13		n.a.	n.a.	9		n.a.	n.a.	14	
EFTA	n.a.	n.a.	78	n.a.	n.a.	n.a.	19	n.a.	n.a.	n.a.	100	n.a.
EC	n.a.	n.a.	76	n.a.	n.a.	n.a.	11	n.a.	n.a.	n.a.	100	n.a.
Faroe Isl.	n.a.	n.a.	76	n.a.	n.a.	n.a.	11	n.a.	n.a.	n.a.	100	n.a.
Bulgaria	n.a.	n.a.	77	n.a.	n.a.	n.a.	16	n.a.	n.a.	n.a.	100	n.a.
Czech R	n.a.	n.a.	76	n.a.	n.a.	n.a.	12	n.a.	n.a.	n.a.	100	n.a.
Slovak R	n.a.	n.a.	76	n.a.	n.a.	n.a.	12	n.a.	n.a.	n.a.	100	n.a.
Hungary	n.a.	n.a.	77	n.a.	n.a.	n.a.	15	n.a.	n.a.	n.a.	100	n.a.
Poland	n.a.	n.a.	78	n.a.	n.a.	n.a.	20	n.a.	n.a.	n.a.	100	n.a.
Romania	n.a.	n.a.	77	n.a.	n.a.	n.a.	16	n.a.	n.a.	n.a.	100	n.a.
Slovenia	n.a.	n.a.	76	n.a.	n.a.	n.a.	12	n.a.	n.a.	n.a.	100	n.a.
Estonia	n.a.	n.a.	77	n.a.	n.a.	n.a.	14	n.a.	n.a.	n.a.	100	n.a.
Latvia	n.a.	n.a.	77	n.a.	n.a.	n.a.	14	n.a.	n.a.	n.a.	100	n.a.
Lithuania	n.a.	n.a.	77	n.a.	n.a.	n.a.	14	n.a.	n.a.	n.a.	100	n.a.
Israel	n.a.	n.a.	79	n.a.	n.a.	n.a.	23	n.a.	n.a.	n.a.	100	n.a.
Turkey	n.a.	n.a.	79	n.a.	n.a.	n.a.	23	n.a.	n.a.	n.a.	100	n.a.

Source: WTO 2002 'Coverage, Liberalisation Process and Transitional Provisions in Regional Trade Agreements', WT/REG/W/46, 5 April.

89. For some countries, a complex variety of instruments are used to protect tariff lines that are not duty free. Take the EU's agreements with the Mediterranean countries (Palestine Liberation Organization 1997; Tunisia 1998; and Israel and Morocco 2000). These are bilateral Free Trade Agreements (FTAs). According to analysis by the Economic Research Services and US Department of Agriculture (USDA), exports to the EU are limited largely to historical trade volumes. Much of it is administered by quotas. Seasonal restrictions and minimum import price requirements also apply. These Mediterranean countries are important suppliers of citrus fruit and vegetables, but largely confined to the early and late seasons.[8]

c. Tariff Peaks

90. Often, countries which apply MFN tariff peaks have also retained these peaks in their RTAs. Canada has MFN agricultural tariff peaks of up to 238 percent in agricultural products. These same tariff peaks apply in the NAFTA, as well as in Canada's RTAs with Chile and Israel. [9]

91. The US' highest agricultural MFN tariff is 350 per cent. In the NFTA, in 2000, six years after the agreement had come into force, US' highest tariff with Canada (which has competing agricultural products) was 164 percent and it was 25 percent with Mexico. This is clearly an illustration of countries setting their RTA tariffs according to the level of competition they expect from their RTA partners. [10]

92. Norway's RTAs contain tariff peaks in both the agriculture and industrial sectors. Its maximum MFN tariff is 550, and in 1999, it had applied this peak to all the RTAs that were in force then. Its industrial tariff peaks were as high as 258.5 percent. See Box 3.

[8] Hasha G 'European Trading Arrangements in Fruits and Vegetables', Electronic Outlook Report from Economic Research Service, VGS-303-01 July 2004, Economic Research Service / USDA.
[9] WTO 2002 ibid.
[10] WTO 2002 ibid.

Box 3: Range of Tariffs Applied by Norway in 1999 to MFN Imports and to Imports from Selected RTAs

RTA partner / Importer	**MFN**	EC	EFTA	EEA	Faros Isl.	Hungary	Poland	Czech & Slovak R.	Estonia	Latvia	Lithuania
AGRI-Min	**0.1**	0.8	0.1	0.1	0.1	0.1	0.1	0.1	0.5	0.5	0.5
AGRI-Max	**550**	550	550	550	550	550	550	550	550	550	550
IND-Min	**170**	170	170	21.2	3	250	3	3	3	3	3
IND-Max	**210**	210	210	258	258.5	250	250	210	210	210	210

Source: WTO 2002 'Coverage, Liberalisation Process and Transitional Provisions in Regional Trade Agreements', WT/REG/W/46, 5 April.

d. Maintenance of Export Subsidies and Domestic Supports

93. Surprisingly, export subsidies in agriculture (already in principle outlawed in the WTO) are still entertained in the context for instance of the EPAs between EU and the ACP. In fact, export subsidies, as they are specifically targeted at some countries (and not others), can and should be eliminated without exception in RTAs since they are a clear form of dumping.

94. In the EPA, the European Commission has only offered to refrain from using them where ACP countries have committed themselves to eliminating their import tariffs on related products. Some interim agreements do not even make any reference to the EU refraining from using its export subsidies.

95. Domestic supports are even more problematic. No attention has been paid, in the context of RTAs, to the parallels between subsidies and tariffs. The argument that has prevailed has been that domestic subsidies cannot be reduced preferentially.

96. As such, they have been left off the table. Domestic supports, because of their large amounts, lower domestic prices and have a similar effect as tariffs. According to agricultural expert Jacques Berthelot, reducing domestic agricultural prices by 50 percent has the same impact as an increased duty of 50%.[11] The omission in dealing with domestic supports is therefore a glaring one, and is extremely unfair for developing countries, which typically do not provide subsidies to any substantial degree. Their tariffs are therefore their only avenue to protect their agricultural sector. The EU – Tunisia agreement did not have provisions on domestic supports nor export subsidies. The same holds true for EU – South Africa.

97. However, in a few cases of RTAs, some measures have been taken to address domestic supports, although these remain highly imperfect.

98. According to research by the OECD, the Australia-New Zealand Closer Economic Trade Agreement (ANZCERTA) restricts domestic subsidies on products which are intensively traded at the regional level. Canada – Costa Rica contains mandatory consultation procedures designed to address situations in which domestic subsidies are considered to be affecting internal trade. NAFTA contains best endeavour wording which recognises the legitimacy of domestic support measures in agriculture,

[11] This is the case if the price elasticity of imports is 1. Reducing prices by 50% would have the same effect as a 40% tariff if elasticity is 0.8.

whilst supporting the evolution of domestic agricultural policies in a manner that reduces trade distorting effects.[12]

99. The Canada – Chile FTA places attention on the issue of domestic supports. It establishes an independent Committee on Anti-dumping and Countervailing Measures with a mandate to 'consult with a view to defining subsidy disciplines further and eliminating the need for domestic countervailing measures on trade between them'.[13]

100. The Canada - Costa Rica FTA, as well as NAFTA contain wording on the objectives that RTA members will pursue rules on domestic agricultural subsidies at the multilateral level /WTO. These include:

a) The maximum possible reduction of trade distorting domestic support;
b) Establishing an overall limit on domestic support of all types;
c) A review of the criteria for 'green box' subsidies and
d) Agreement that green box support should not be countervailable.[14]

101. Unfortunately, the Doha negotiations are already at an advanced stage and both the EU and US have refused to agree to real reductions in domestic supports. The 'reductions' offered have been merely paper offers – to cut from the maximum limit of what they can provide (in terms of what is called 'trade distorting support'), but with no cuts into their actual applied domestic supports.[15]

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[12] Article III.13(3) of that agreement, cited in OECD 2005, COM/TD/AGR/WP(2004)9/FINAL, 'Regional Trading Arrangements and the Multilateral Trading System: Agriculture', OECD Trade Policy Working Paper No. 15.

[13] OECD 2005 ibid.

[14] Article III.13 of the Canada-Costa Rica FTA.

[15] The WTO's Agreement on Agriculture has place domestic supports into three categories: Amber Box subsidies hold subsidies such as price supports, which are considered to be 'trade-distorting'; Blue Box subsidies are traditionally tied to programmes that limit production (although in the Doha Round, the US is expanding the Blue Box to be a second Amber Box); and the Green Box, which supposedly has little or no trade distorting effect has not been properly reviewed. Over the years, the G20 coalition of developing countries on agriculture at the WTO, led by Brazil and India have relaxed their demands on reviewing the Green Box. As such, the Green Box, which allows unlimited subsidies, remains a major loophole. It has even been found by the WTO's dispute settlement body to house subsidies which are trade distorting. For example, the Appellate Body, in the Dairy Products of Canada case, in its 3 December 2001 report stated that "We consider that the distinction between the domestic support and export subsidies disciplines in the Agreement on Agriculture would also be eroded if a WTO Members were entitled to use domestic support, without limit, to provide support for exports of agricultural products. Broadly states, domestic support provisions of that Agreement, coupled with high levels of tariff protection, allow extensive support to producers, as compared with the limitations imposed through the export subsidies disciplines. Consequently, if domestic support could be used, without limit, to provide support for exports, it would undermine the benefits intended to accrue through a WTO Member's export subsidy commitments (para 91)…The potential for WTO Members to export their agricultural production is preserves, provided that any export destined sales by a producer at below the total cost of production are not financed by virtue of governmental acrion (para 92)".

102. Whilst domestic supports per se are not problematic, there are two problems with domestic supports in the context of EPAs.

i) Their tariff-like effect must be taken into consideration so that the developing countries are also given leverage to protect their tariffs.

ii) Supports to products that are then traded are essentially indirect export subsidies. They are the equivalent of dumping and subsidised exports from the EU have displaced poultry and rice farmers in Ghana; poultry farmers throughout West Africa (because of subsidised Dutch and other European poultry); tomato farmers in Africa; dairy farmers in Kenya, Uganda, Jamaica, Sri Lanka etc. The list goes on.

VI. HOW MUCH WIGGLE ROOM FOR DEVELOPING COUNTRIES ON `WTO COMPATIBILITY': CONCLUSIONS AND RECOMMENDATIONS

a. *Will Countries Bring EU to Court Because Small Developing Countries Have Not Liberalised 'Substantially All the Trade'?*

103. Developing countries negotiating North –South RTAs are sometimes put under tremendous pressures to liberalise (i.e. bring to zero) as much as 80 percent of their trade and/or tariff lines. Developing countries have been told, for instance, by the EU that if they do not, they and the EU will be brought to dispute settlement by other developing countries. The EU often uses the banana disputes (by Central and Latin American countries) as such a show case if the ACP countries do not shape up in the EPA negotiations.

104. However, never in the history of the GATT or WTO has a country brought another to dispute based on the perception that the country had not liberalised 'substantially all trade' in an RTA.

105. In the case of the EU and ACP countries, it is questionable if any country would lodge such a case. The Central and South American countries had brought the EU to the WTO dispute settlement because of the preferences provided to the ACP in the area of bananas. They are unlikely to do so in the context of the EPAs since both these groups are currently negotiating similar FTAs with the EU. By the end of their negotiations, their access to the EU market would be equivalent or at least close to that which the EU gives to the ACP countries.

b. *Assuming a More Flexible Interpretation of the Existing Article XXIV*

106. Developing countries in North-South RTAs should assume a more flexible interpretation of the existing Article XXIV and not be cowed into liberalising 80 percent by developed countries. The precedence of low-ambition RTAs has after all been set by the developed countries themselves, such as the EU and even Norway and Switzerland.

107. The Eastern European countries prior to their inclusion into the EU27, in several cases, did not go far in their RTA liberalisation. Some offered liberalisation as low as 41 percent in the case of Lithuania's access offered to Hungary in 1999. Lithuania reduced tariffs on 76 percent of its agricultural products, but did not bring any single agricultural tariff line down to 0 percent.

108. The paper also outlined the many other ways in which developed countries such as the EU have protected themselves from liberalisation in RTAs – use of the positive list approach for the agricultural sector; quotas; seasonal restrictions; minimum import price requirements; tariff peaks; and subsidies.

109. In contrast, most developing countries do not have quotas and complex tariff structures. Most also do not provide subsidies to any significant extent to their industries or producers. That is, the tools that developed countries use have been retained, whilst the only main tool used by developing countries – tariffs – is being aggressively targeted for liberalisation.

110. It is therefore perfectly reasonable for much less developed ACP and other developing countries to offer much lower duty-free lines in RTAs, following what EU countries themselves have done, and following the example of the EU in keeping its subsidies intact.

111. More work will have to be done on calculating the tariff equivalents of subsidies that EU and other developed countries use. This must be factored into the comparison in liberalisation between the North and South.

c. Negotiate Special And Differential Treatment into Article XXIV

112. In order to avert pressures from the EU and other developed countries, it is preferable that developing countries push for the renegotiation of Article XXIV in order to insert Special and Differential into that Article. This will also right the legal inconsistency that currently

exists as compared with GATS V. This issue is an 'imbalance' left over from the GATT and the Uruguay Round, and should be negotiated irrespective of whether or not there is an eventual Doha Round conclusion.

In that light, the following recommendations can be made.

i) Development and Less than Full Reciprocity Must be Central Elements for RTAs Involving Developing Countries

113. Development must be placed at the centre of Article XXIV. Like both the development dimension in the GATS V and the development needs that have been acknowledged in the Enabling Clause, the development dimension should be inserted into Article XXIV: Regional trade agreements between developed and developing countries should provide for special and differential treatment and less than full reciprocity in the commitments that developing countries undertake when in RTAs with developed countries.

ii) Less than Full Reciprocity in Defining 'Substantially All Trade' for Developing Countries

114. Article XXIV paragraphs 8(a)(i) and 8(b) on 'substantially all trade' must be understood to mean that: Developing countries are not expected to liberalise in substantially all trade. For developing countries, flexibility and less than full reciprocity must be provided so that their commitments are in accordance with their levels of development, financial and trade needs. This flexibility must include both product coverage and the volume of trade. It will be up to developing countries in an RTA to define for themselves, a suitable level of liberalisation.

iii) Less than Full Reciprocity and Flexible Treatment on 'Other Restrictive Regulations of Commerce'

115. 'Other restrictive regulations of commerce' in paragraphs 8(a) and (b) shall also be interpreted in a flexible manner for developing countries. This means that developing countries will be able to invoke safeguard measures and other non-tariff measures, for example, rules of origin on intra regional trade. Special and differential treatment will allow developing countries in RTAs with developed countries the right to enjoy asymmetrical rights and obligations vis-a-vis such non-tariff measures.

iv) Less than Full Reciprocity and Flexibility in the Plan and Schedule for a Customs Union or Free Trade Area for Developing countries.

116. Article XXIV, Paragraph 5(c) states that any interim agreement shall include a plan and schedule for the formation of a customs union or a free-trade area 'within a reasonable length of time'. Paragraph 10 of the 'Understanding on the Interpretation of Article XXIV' also states that 'Should an interim agreement not include a plan and schedule, contrary to paragraph 5(c) of Article XXIV, the working party shall recommend such a plan and schedule. The parties must be prepared to modify their plan in accordance with these recommendations.

117. For developing countries, it will be understood that less than full reciprocity means that the plan and schedule can only take place as countries develop. Hence the schedule can be elaborated upon progressively. They will not be required to take on board the recommended plan and schedule of the working party.

v) Less than Full Reciprocity and 'a reasonable length of time' for Developing Countries

118. Paragraph 3 of the 'Understanding on the Interpretation of Article XXIV', on 'a reasonable length of time' must be understood in the context of countries' development process. It should be understood to be longer than 10 years. The schedule is 'reasonable' only in accordance with countries' particular pace of development. It is therefore reasonable for liberalisation commitments to be made in tandem with countries' development advancements.

vi) Flexible and Less Onerous Review, Transparency and Examination Procedures for Developing Countries in RTAs

119. Article XXIV 7(a) requiring parties to make available information about the RTA, and Paragraphs 7-10 of the Understanding shall be understood to be interpreted with flexibility for developing countries. Developing countries' limited administrative, financial and human resources must be taken into account in relation to these clauses.

vii) Dispute Settlement and RTAs

120. The use of the Dispute Settlement Understanding referred to in paragraph 12 of the 'Understanding' should be brought to a minimum in examining RTAs and their WTO compatibility. This work should primarily take place in the CRTA. The CRTA and Dispute Settlement Body must take into account the development, trade and financial needs of developing countries in these RTAs.

viii) The Enabling Clause Must Remain Intact

121. The negotiations on Article XXIV should not in any way change the terms of the Enabling Clause, as has been alluded to by the European Union.

READERSHIP SURVEY QUESTIONNAIRE
South Centre Analytical Note

ARTICLE XXIV AND RTAS: HOW MUCH WIGGLE ROOM FOR DEVELOPING COUNTRIES

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