EPA's MFN PROVISION AND THE IMPLICATIONS FOR POST-EPA RTAs WITH CARIFORUM: SOME OBSERVATIONS FROM *THE EC-TARIFF PREFERENCES DECISION*

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The European Partnership Agreement's (EPA) MFN provision provides that any more favourable treatment resulting from a post-EPA RTA between CARIFORUM and a major trading economy must be extended to the European Union (EU), and similarly, that any more favourable treatment resulting from a post-EPA RTA between the EU and a major trading economy must be extended to CARIFORUM.

Controversy arising from this provision is apparently not about the reciprocal obligation captured in the language used; rather it is the obligation assumed by CARIFORUM whereby it is argued that this would serve to limit opportunities for South-South cooperation in the context of the formation of RTAs with major developing economies, but also cooperation at the multilateral level to ensure that the bargaining power of developing countries is not diluted.

Comparing the EPA-MFN provision with Article 1 of GATT 1994

The 'any more favourable treatment' language in the EPA MFN provision refers to benefits extended to another trading partner that must be extended reciprocally by either CARIFORUM or the EU to each other. Theoretically, these benefits may either be those implicated in the internal or external liberalization requirement under Article XXIV of GATT 1994. That is to say, greater liberalization granted in a post EPA RTA with respect to other restrictive regulations of commerce (the internal requirement) and other regulations of commerce (the external requirement) must be extended reciprocally by either CARIFORUM or the EU. There is little, if any, doubt that GATT Article XXIV does not require MFN to be extended to non-parties of an RTA with regard to the internal liberalization requirement.

Viewed in this way, the EPA MFN provision is not unique or different from the MFN provision in Article 1 of GATT 1994 in so far as the latter requires that benefits granted by a WTO Member to another be extended to other WTO Members immediately and unconditionally.

The perceived difference between the MFN provision in GATT and that in EPA may be due to the fact that there is an express reference to this obligation in EPA with regard to post EPA RTAs that appear to be attempting to settle the perplexing question of the relationship between Article 1 of GATT 1994 and Article XXIV of GATT 1994 that has so far not received any definitive ruling at the multilateral level.

The jurisprudence from the WTO has not resolved the issue of whether benefits granted by RTA members to each other with respect to their 'other restrictive regulations of commerce' (ORRCs) or the internal liberalization requirement should in general be

extended to WTO Members that are external to the RTA in question. And, there is still some uncertainty lingering on the relationship between Article 1 of GATT 1994 and the external liberalization requirement that 'other regulations of commerce' (ORCs) must not on the whole be higher than what existed before the formation of the RTA. For example, to the extent that an SPS measure may be classified under 'other regulations of commerce', a mutual recognition agreement under the SPS Agreement may violate MFN if not extended to all WTO Members although it may be impractical to extend the benefits of such an agreement to all WTO Members if their SPS measures do not meet a WTO Member's desired level of health protection.

Does GATT MFN apply to the internal liberalisation requirement?

It is arguable however that the MFN provision in GATT 1994 does not apply to the internal liberalization requirement as regards extending those benefits to WTO Members external to the RTA since the RTA by definition is designed to be a preferential arrangement for its members and this right is recognized by Article XXIV of GATT. That this has not been clarified within the text of the EPA may be due to some shared understanding that the EPA MFN provision applies to benefits extended with respect to other regulations of commerce.

However, there seems to be little basis for assuming that there is any such shared understanding given the uncertainty on this issue at the multilateral level. Several of the annexed agreements to the WTO Agreement, the general provisions of which can be found in several RTAs and are arguably classifiable under 'other restrictive regulations of commerce', contain MFN provisions that must be respected.[1]

As regards safeguard measures, in particular, the WTO has provided rulings that can be read as having the effect of extending the benefits accorded within an RTA under the other restrictive regulations of commerce category to non-members of the RTA, although no specific issue was raised in those cases with respect to the question of whether the benefits so extended must in general be extended to the RTA's non-members. Thus, although MERCOSUR parties do not apply safeguards against the imports of their members, the WTO Appellate Body held that the principle of 'parellelism' requires that a safeguard measure be applied to the imports of those RTA members if those imports were included in the determination of whether there is an increase in imports sufficient for the application of a safeguard measure.

Therefore, whatever benefit MERCOSUR parties thought they would have got from the removal of the application of safeguard measures amongst themselves was not only nullified, if not extendable to non-parties, but had to be extended to other WTO Members indirectly in the sense that those WTO Members external to the RTA against whom the safeguard measure is being applied cannot be made worse off than those within the RTA as it relates to the application of the measure.

The Appellate Body's decision in *Turkey-Textiles*[2] may also be read as requiring the application of the MFN principle in RTAs if its exclusion is not necessary for the

formation of the RTA based on the broad holding in the decision to the effect that GATT inconsistent measures are justifiable as an exemption under Article XXIV if they meet the necessity test, that is, but for the claimed exemption the RTA would not have been formed, and that the exemption must be applied upon the formation of the customs union.

To the extent that Articles XI[3] and XIII[4] of GATT 1994 (the specific articles found to have been breached by Turkey) may be classified as either ORRC'S or ORCs, *Turkey-Textiles* may either be read as covering both the internal liberalization and external liberalization requirement in so far as the MFN principle is concerned. That said, the MFN provision in EPA is not at variance with WTO jurisprudence. Indeed, the EU's interpretation of Article XXIV is for a strict interpretation that seemingly informed the inclusion of this MFN provision.

In other words, the EU's interpretation of Article XXIV is that the MFN principle should be respected despite the Enabling Clause that provides for special and differential treatment in the formation of RTAs involving developing countries that would seemingly include relaxation of the application of the MFN principle.

Relationship between the Enabling Clause and Article XXIV of GATT 1994

This raises the question of the particular relationship between the Enabling Clause and Article XXIV of GATT 1994. There is yet no definitive ruling on this relationship but some tentative general observations may be made from the *EC-Tariff Preferences*[5] case and the general interpretive principles applied in resolving seemingly conflicting provisions in the WTO Agreement.

In *E-C Tariff Preferences*, the Appellate Body held that developed countries have the right to extend special and differential treatment to developing country beneficiaries under a GSP scheme but that similarly situated beneficiaries must not be subject to discriminatory treatment. A GSP scheme is usually operated under the Enabling Clause and the Enabling Clause is an exception to MFN. However, *EC-Tariff Preferences* has clarified that the exception to MFN in the operation of a GSP scheme is not absolute. Rather, the MFN provision is to be respected with regard to similarly situated beneficiaries.

An important aspect of the Enabling Clause is that it seemingly permits developing countries to form RTAs without the need to observe the requirements of MFN.

A significant interpretive question is whether the MFN provision must be observed for RTAs formed among developing countries pursuant to the Enabling Clause to be consistent with Article XXIV of GATT 1994. A related question is whether the MFN provision, if it is excluded under the Enabling Clause for RTAs with developing countries, is also excluded for RTAs between developed and developing countries.

Paragraph 3(a) of the Enabling Clause provides the rudiments of an answer. Paragraph 3 (a) states that "[any differential and more favourable treatment provided under this

clause] shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties; . . ."

This language appears to establish a legal condition for the operation of the MFN exception in the Enabling Clause. The use of the term 'contracting parties' in reference to the obligation for the special and differential treatment to not raise barriers to trade is not limited to the trade of developing countries. The trade of all WTO Members is therefore implicated in this obligation. The MFN override in the enabling Clause is therefore not absolute but is dependent on whether or not its operation can be characterized as raising barriers or creating undue difficulties for the trade of other contracting parties, whether developed or developing. Provided this obligation is met, it seems therefore that MFN need not be observed for RTAs with developing countries in so far as the external liberalization requirement is concerned.

Under what circumstances are barriers to be considered raised in the operation of differential and more favourable treatment? In the context of RTAs formed pursuant to Article XXIV of GATT 1994, this may arise whereby duties and other regulations of commerce are on the whole higher than what existed before the formation of the RTA.

If this reading is correct, the Enabling Clause would not exempt the application of Article XXIV and its requirement with respect to the external liberalization requirement regarding other regulations of commerce as they apply to parties external to an RTA with developing countries, or even an RTA between developed and developing countries.

Do the principles of interpretation as applied by the Appellate Body exclude consideration of Article XXIV for RTAs formed under the rubric of the Enabling Clause?

Concern is raised by Brazil that EPAs MFN provision would prevent the formation of RTAs with certain developing countries in breach of the Enabling Clause.[6]

The Appellate Body has stated that consistent with the principles of interpretation it is bound to follow under Article 3.2 of the Understanding and Rules on Procedures Governing the Settlement of Disputes (DSU) all covered agreements under the WTO must be given effect. It has gone further in recognizing that all provisions in a treaty must be given effect according to the principle of effective interpretation. Thus, it has held in *US-Reformulated Gasoline* that '*One of the corollaries of the "general rule' of interpretation" in the Vienna Convention is that interpretation must be given meaning and effect to all terms of a treaty. A treaty interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility'*.[7]

Informed by the principles of interpretation applied by the Appellate Body, an RTA formed between developing countries under the Enabling Clause would not exclude observance of the requirements of Article XXIV of GATT 1994. The essential question

that arises is whether the Enabling Clause would operate as an exception to Article XXIV or whether Article XXIV is an exception to the Enabling Clause to the extent that the Enabling Clause establishes a positive right.[8]

It is arguable that Article XXIV establishes a legal obligation regarding the requirements for a GATT consistent RTA and that the Enabling Clause should be read as an exception to these requirements. Given that Article 1 of GATT can only be excluded in an RTA if it is necessary to do so, the MFN obligation would remain as an obligation to be met regarding the formation of an RTA, at least with respect to other regulations of commerce. And, given the *EC-Tariff Preferences* decision, the Enabling Clause would operate as an exception to the MFN obligation to be met under Article XXIV if the necessity test cannot be met for its non-observance.

Whatever the position taken on this issue, the Appellate Body has usually given effect to seemingly conflicting provisions under the principle of effective interpretation, even if this has meant a nuanced or less than absolute application of the conflicting principles. For example, *E-C Tariff Preferences* demonstrates that MFN is to be applied in a limited way to an MFN exception for GSP Schemes. Here, there is neither absolute approval nor rejection of the MFN exemption in the Enabling Clause.

Giving effect to both provisions would mean that an Enabling Clause RTA with developing countries would have to fulfill the obligations of Article XXIV of GATT. That said, MFN would apply as to benefits extended to parties external to an Enabling Clause RTA. On this view, the MFN provision in EPA can be seen as a reiteration of the application of the MFN principle with regard to the extension of benefits to parties external to an RTA, in particular benefits extended as regards other regulations of commerce.

Would removal of EPA's MFN clause exclude MFN treatment for third parties?

Removal of the controversial MFN provision from EPA may be desirable as a political compromise issue, but the legal effect of the removal would not necessarily translate into the contemplated polar position, that is, CARIFORUM would not need to extend benefits given to third parties to the EC.

Except under specific agreements in which some variable geometry is permissible (e.g. GATS), or there is a permanent MFN override exemption as in the Enabling Clause, or some other MFN exemption in the WTO annexed agreements, the MFN obligation constitutes a core obligation within the single package arrangement at the multilateral level. Benefits extended must be extended immediately and unconditionally to other WTO Members. An MFN clause in EPA therefore is one that articulates an obligation that is already established to apply without the need for its express inclusion in the agreement.

What is unclear from EPA's MFN provision however is whether the reference to 'benefits' are those classifiable as restrictive regulations of commerce as opposed to other

regulations of commerce. If the reference to 'benefits' includes the former, in the sense of tariff concessions granted to third countries as part of a post-EPA CARIFORUM-other parties RTA, this would go beyond WTO obligations. This is because the MFN obligation as regards the removal of restrictive regulations of commerce need only be respected as between RTA parties for that internal liberalization requirement under Article XXIV of GATT 1994. This interpretation is consistent with the application of the principle of effective interpretation that would safeguard the rights of parties to enter into preferential trading arrangements under Article XXIV of GATT.

It bears repeating then that the MFN obligation when applied to several RTAs in which the parties in one RTA are simultaneously members of another or several other RTAs, does not require adherence to the MFN obligation with respect to 'other restrictive regulations of commerce' as regards the relationship between parties to the RTA and third parties.

On this view, an MFN provision in any RTA between developed and developing countries would not prevent the subsequent formation of an RTA between developing countries under the Enabling Clause.

Concluding remarks

The MFN provision in the EPA raises the issue of the relationship between GATT Article XXIV and the Enabling Clause, in particular whether the MFN provision has to be observed in RTAs with developing countries. No WTO decision has explored this relationship in detail and it remains to be seen whether the Enabling Clause would be seen as a provision that exempts MFN regarding other regulations of commerce. However, the lessons to be learned from the principles of interpretation used by the Appellate Body and the *EC-Tariff Preferences* decision suggest that this view is unlikely.

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[1] See, for example, Article 2.1 of the Agreement on Technical Barriers to Trade, and Article 2.3 of the Agreement on Sanitary and Phyto-sanitary Measures.

[2] *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R.

[3] Article XI (1) of GATT provides as follows: "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party".

[4] Article XIII of GATT provides as follows: "No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation

of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted".

[5] *European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS/246/AB/R.

[6] Brazil's communication to the WTO General Council, WT/GC/W/585.

[7] *United States-Standards For Reformulated and Conventional Gasoline*, (1996) WT/DS2/AB/Rt, at section IV.

[8] The distinction between a positive rule and an exception is not authoritatively settled in the context of WTO jurisprudence. In *US-Wool Shirts and Blouses*, the Appellate Body in interpreting Article 6 of the Agreement on Textiles and Clothing (ATC), for the purposes of determining which party bears the burden of proof, stated that in order for a provision to be an exception it must authorize derogation and must not be a positive rule establishing a legal obligation in itself. See, for example, *US-Wool Shirts and Blouses*, Appellate Body Report, at p. 9. However, the Appellate Body in interpreting other provisions where derogation from obligations is permissible has not necessarily resolved that such provisions are exceptions for the purposes of allocating the burden of proof. See, for example, *Brazil-Aircraft* where the Appellate Body interpreted the term 'shall not apply' in Article 27.2 of the SCM Agreement as not indicative of an exception provision, but rather an excluding provision.