

MFN in the CARIFORUM - EC Economic Partnership Agreement: Policy Blunder or Legal Inconsistency?

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The CARIFORUM-EC Economic Partnership Agreement (EPA) represents a new era of development cooperation and trade relations between the European Union (EU) on the one hand, and a sub-grouping of the African, Caribbean and Pacific (ACP) group of countries on the other hand. The inclusion of Most Favoured Nation (MFN) clauses in the EPA, that require CARIFORUM countries to extend to the EU any more favourable treatment granted to third parties in future Free Trade Agreements (FTAs), has generated some controversy. This note critically examines the arguments that have been leveled against the inclusion of these clauses from legal, and policy perspectives. Notwithstanding the often nebulous distinction between law and policy, it will be argued here that questions of policy and issues of law must be bifurcated in order to meaningfully assess the value of MFN clauses in the EPA. A paradigm for assessing such clauses in other so-called North-South FTAs is also suggested.

1. INTRODUCTION

The conclusion of the CARIFORUM – EC¹ Economic Partnership Agreement (EPA) heralded the dawn of a new era of trade relations between the European Union on the one hand, and countries composing the CARIFORUM trade negotiating group on the other hand.² The EPA is an integral element of the Cotonou framework,³ and represents a concerted attempt to respond to the World Trade Organization (WTO) inconsistent

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¹ At the time of the EPA's conclusion the Treaty of Lisbon was not in force and therefore, the title of the EPA does not reflect the change from European Communities (EC) to European Union (EU) which the Treaty of Lisbon introduced.

² The EPA was notified to the WTO on 24 October 2008 under Article XXIV of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article V of the General Agreement on Trade in Services (GATS). At the time of the EPA's notification, the following CARIFORUM member states had signed the agreement: Antigua and Barbuda; Bahamas; Barbados; Belize; Dominica; the Dominican Republic; Grenada; Jamaica; Saint Christopher and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Suriname; and Trinidad and Tobago. Haiti signed the EPA on 11 December 2009.

³ The Cotonou Agreement between ACP countries and the EU replaced the Lome Convention which had been the basis for ACP-EU development cooperation since 1975. The Cotonou Agreement was signed in June 2000 and entered into force in 2003. For an assessment of the agreement, see generally, Abou Abass, 'The Cotonou Trade Regime and WTO Law', (2004) 10(4) *European Law Journal*, 439. See also Francis Matambalya and Susanna Wolf, 'The Cotonou Agreement and the Challenges of making the New EU-ACP Trade Regime WTO Compatible', (2001) 35(1) *Journal of World Trade*, 123.

preferences granted to the African, Caribbean and Pacific (ACP) group of countries under the Lome Convention.⁴ From a trade policy perspective, the broader significance of the CARIFORUM - EC EPA is two-fold: First, it may serve as a benchmark for ongoing negotiations on EPAs between the EU and other sub-groupings within the ACP group. Second, we may be witnessing a new paradigm for so called North-South cooperation insofar as the EPA - a free trade agreement necessarily predicated upon reciprocal, mutually advantageous preferences - purports to have a developmental dimension that takes into account the development objectives, needs and interests of CARIFORUM member states.

The EPA, from the stage of negotiations and thereafter, has met with scathing criticism from civil society, as well as academic circles within the CARIFORUM region.⁵ Negative criticism of the EPA has been grounded primarily in a perception that, the rights and obligations contained in the EPA are asymmetrical in nature, to the detriment of CARIFORUM parties. Although the EPA is by no means the saving grace of developing CARIFORUM states as they grapple to position themselves favorably within the multilateral trading system, in some instances, the stinging philippics concerning the EPA have been unwarranted and misconceived, primarily reflecting an obstinate yet understandable resistance to change from some quarters.

A topical legal issue with systemic implications concerning the EPA is the inclusion of a Most Favoured Nation (MFN) provision that requires CARIFORUM states to extend to the EU any more favorable treatment it gives to a "major trading economy" in future FTAs with third parties.⁶ Larger developing countries such as Brazil, which would meet the "major trading economy" threshold, have swiftly denounced the inclusion of such provisions in North-South trade agreements like the EPA. Such provisions would "discourage or even

⁴ Article 36(1) of the Cotonou Agreement provides: "In view of the objectives and principles set out above, the parties agree to conclude new World Trade Organization (WTO) compatible trading arrangements, removing progressively barriers to trade between them and enhancing cooperating in all areas relevant to trade."

⁵ See for example, Havelock Brewster, Norman Girvan and Vaughan Lewis, 'Renegotiate the CARIFORUM EPA', (2008) 7(3) *Trade Negotiations Insights*, 8.

⁶ It should be noted that "MFN" obligations are certainly not new to ACP – EU trade relations. In fact, the MFN clause in the EPA has its historical roots in the expired trade provisions of the Cotonou Agreement which provided for an MFN extension in favour of the EU in the event that ACP countries granted more favourable treatment to other developed states.

prevent third countries from negotiating FTAs with EPA parties”⁷ because deeper market access commitments secured by a third party developing country would ultimately have to be shared with Europe. The net effect of the MFN provision is, therefore, the creation of “major constraints to South-South trade.”⁸ Brazil’s contention, in the main, is that the MFN provision runs counter to the WTO’s Decision on “Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries” (the Enabling Clause), which is designed to facilitate and promote trade between developing countries on a preferential basis.⁹

An assessment of the arguments advanced by Brazil and supported by other developing countries is necessary, if only because these arguments purport to highlight, in the context of the multilateral trading system, the systemic implications of including MFN provisions in North-South FTAs. In assessing these arguments, the analysis contained in this paper treats questions of policy as separate to, and distinct from, issues of law. After a brief overview of the MFN clauses in the EPA, the arguments leveled against the inclusion of the clauses as advanced by Brazil will be examined from a legal and policy perspective in turn. The assertion that the MFN clause violates the Enabling Clause in a legal sense will be debunked, and further, it will be shown that while it is easy to question the value of the MFN clause in the abstract, it is very difficult to do so if one takes into account the benefits of the EPA as a whole.

2. OVERVIEW OF MFN PROVISIONS IN THE CARIFORUM – EC EPA

The CARIFORUM – EC EPA contains three MFN provisions: Article 19 relates to trade in goods while Articles 70 and 79 relate to trade in services. Much of the discussion on the MFN clauses contained in the EPA has centered on the provision relating to trade in goods. Consequently, the substantive scope of this paper is limited to an examination of Article 19 of the EPA.

⁷ Statement of Brazil to the General Council of the WTO, WT/GC/W/585 (5th February, 2008)..

⁸ *Ibid.*

⁹ Decision on “Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries” (the Enabling Clause) adopted on 28 November 1979. Para. 1 of the Enabling Clause provides: “Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.”

The scope of Article 19 is circumscribed in respect of the obligation it imposes on CARIFORUM parties. Sub-section (1) of Article 19 enjoins the EU to extend to CARIFORUM any more favorable treatment it gives to a third party in future FTAs. Therefore, irrespective of the level of development of a third party with which the EU enters into an FTA, any more favourable treatment granted would have to be automatically extended to CARIFORUM. On the other hand, the obligation imposed on CARIFORUM States – pursuant to subsection (2) – to extend to the EU any more favorable treatment granted in future FTAs with third parties is qualified, in the sense that it operates only in respect of FTAs concluded with “major trading economies”. Sub-section (4) of Article 19 includes in its definition of “major trading economy”, any country or group of countries that accounts for more than 1% or 1.5% respectively of world merchandise exports.¹⁰ Based on WTO data on merchandise trade, customs territories with 1% (or 1.5% for regional blocs) of world exports, which would meet the “major trading economy” threshold, include China, Brazil, Hong Kong, Singapore, Mexico, Taiwan, ASEAN and MERCOSUR.¹¹ It should be noted that the MFN provision as articulated in Article 19(2) is not triggered automatically upon the conclusion of a third party FTA. By virtue of Article 19(5), where a CARIFORUM party enters into an FTA with a third party, the parties to the EPA are mandated to enter into consultations, pursuant to which these parties may decide whether the CARIFORUM country concerned may deny the extension of more favourable treatment to the EU.

3. ARTICLE 19(2) OF THE EPA: AN ILLEGAL DISABLING OF THE ENABLING CLAUSE?

The opposition to the MFN provision, as articulated by Brazil and other developing countries, is based primarily on paragraph 2(c) of the Enabling Clause which recognizes the right of developing countries to receive differential and more favorable treatment in “regional or global arrangements entered into among less-developed contracting parties for the mutual reduction or elimination of tariffs.”¹² There can be little doubt that Article

¹⁰ Art. 19(4) of the EPA provides: “For the purposes of this Article, ‘major trading economy’ means any developed country, or any country or territory accounting for a share of world merchandise exports above one (1) per cent in the year before the entry into force of the free trade agreement referred to in paragraph 2, or any group of countries acting individually, collectively or through and free trade agreement accounting collectively for a share of world merchandise exports above one and a half (1.5) per cent in the year before the entry into force of the free trade agreement referred to in paragraph 2.”

¹¹ WTO statistics on world merchandise trade are available on the WTO’s website: <http://www.wto.org>

¹² Decision on “Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries” (the Enabling Clause) adopted on 28 November 1979. Para. 2(c) of the Enabling Clause, which should be read together with Para. 1 at nt. 9, provides: Regional or global arrangements

19(2) might prevent the formation of South–South preferential arrangements between CARIFORUM and third parties meeting the threshold of “major trading economies.” According to Brazil, the incentive to conclude South–South preferential trading arrangements would be curtailed since third parties could expect at best to be treated *similarly* to the EU, and not *more favorably* than the EU as contemplated by paragraph 2(c) of the Enabling Clause.

From a legal perspective, any contention that the MFN provision violates paragraph 2(c) of the Enabling Clause is necessarily premised on the Enabling Clause having a particular normative value or legal character. The proposition that the Enabling Clause can be *violated per se*, presupposes that the Enabling Clause constitutes a positive legal right to more favorable treatment for developing countries, in conjunction with a corresponding legal obligation on other WTO Members, to accord developing countries that legal right. The legal status or normative character of the Enabling Clause is thus called into question.

4. PARAGRAPH 2(C) OF THE ENABLING CLAUSE: A STAND-ALONE RIGHT OR AN EXCEPTION?

Despite the importance of the Enabling Clause for the further and deeper integration of developing countries into the multilateral trading system, its legal status within the framework of WTO rights and obligations is not entirely clear.¹³ The legal character of the Enabling Clause was examined in some detail in the Panel and Appellate Body Reports in *EC - Tariff Preferences*¹⁴ in the course of defining its relationship with GATT Article I:1 (the underlying issue there being the implications for burden of proof).¹⁵ The Panel in *EC - Tariff Preferences* stated that the Enabling Clause “does not provide positive rules

entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another;...”

¹³ Lorand Bartels, ‘The WTO Enabling Clause and Positive Conditionality in the European Community’s GSP Program’ (2003) 6(2) *Journal of International Economic Law*, 507 at p. 514.

¹⁴ Panel Report, *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R (1 December 2003) as modified by Appellate Body Report, WT/DS246/AB/R (7 April 2004).

¹⁵ For a good overview and analysis of the issues in this case, see James H. Mathis, ‘Benign Discrimination and the General System of Preferences (GSP) WTO - Report of the Appellate Body, 7 April 2004, *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries*. WT/DS246/AB/R’, (2004) 31(4) *Legal Issues of Economic Integration*, 289.

establishing obligations in themselves.”¹⁶ The EU challenged this aspect of the Panel Report before the Appellate Body, submitting that the Enabling Clause “is *per se* an autonomous rule that permits the granting of more favourable treatment to developing countries.”¹⁷ In the final analysis, the Appellate Body upheld the Panel’s characterization of the Enabling Clause as an exception to the MFN principle embodied in GATT Article I:1.¹⁸ Notably, however, the Appellate Body was cautiously tempered in its approach. In seeking to ensure that the characterization of the Enabling Clause as an exception did not emasculate the critical role which the Enabling Clause should play for developing countries, the Appellate Body stated that “the characterization of the Enabling Clause as an exception in no way diminishes the right of Members to provide or to receive differential and more favourable treatment.”¹⁹

The characterization of the Enabling Clause as merely an exception to GATT Article I:1 should render futile any attempt to use paragraph 2(c) of the Enabling Clause as the legal basis for challenging Article 19(2) of the EPA. If the Enabling clause is merely an exception to GATT Article I:1, then it follows that the Enabling Clause cannot be *violated per se*. Rather, the Enabling Clause may, or may not, sanitize a violation of GATT Article I:1, depending on whether the relevant measure(s) at issue can meet the conditions set by the Enabling Clause. Indeed, the view has been expressed that a WTO Panel would lack a direct jurisdiction to hear a claim that the Enabling Clause has been violated, because the scope of a Panel’s substantive jurisdiction is limited – by Article 1.1 of the Dispute Settlement Understanding (DSU) – to claims brought under the dispute settlement provisions of one or more of the covered agreements.²⁰ That a Panel would lack direct jurisdiction over a claim that the Enabling Clause is violated does not mean that WTO adjudicating bodies are precluded from examining or applying the Enabling Clause in a given dispute. Indeed, a WTO adjudicating body is authorized to apply the Enabling Clause as applicable law, on the basis that the Enabling Clause constitutes an instrument

¹⁶ Panel report at nt. 14, para 7.35 quoting from Appellate Body Report, *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (25 April 1997) at p. 16.

¹⁷ Appellate Body Report at nt. 14, para. 64.

¹⁸ *Ibid* at para. 99 (“In the light of the above we uphold the Panel’s finding, in paragraph 7.53 of the Panel Report, that the Enabling Clause is an exception to Article I:1 of the GATT 1994.”).

¹⁹ *Ibid* at para. 98.

²⁰ Bartels at nt. 13, p. 516.

forming part of GATT 1994.²¹ However, a legal challenge implicating the Enabling Clause would have to be framed in the form of a claim stating that a relevant measure has violated Article I:1 of GATT and does not fall within the exceptions of the Enabling Clause.²²

On the other hand, the Appellate Body's statement in *EC - Tariff Preferences* that "the characterization of the Enabling Clause as an exception in no way diminishes the right of Members to provide or to receive differential and more favourable treatment" may provide some latitude for developing countries to stretch the outer limits of that proposition, and to argue that the Enabling Clause is a *sui generis* exception that entails a positive legal right to more favourable treatment for developing countries. Admittedly, this proposition might be strengthened by the Appellate Body's allocation of the burden of proof in respect of the Enabling Clause, and its statement that the "Enabling Clause is not a typical 'exception' or 'defence' in the style of Article XX of the GATT."²³

As attractive as that argument might seem at face value, it is nevertheless vulnerable to invalidation upon serious legal analysis. Even if one were to characterize paragraph 2(c) of the Enabling Clause as a legal right to more favorable treatment for developing countries, it is, at best, a conditional right. As special a type of exception as the Enabling Clause might be, what it is not is a positive rule that establishes a legal right, in conjunction with a corresponding obligation that operates automatically.²⁴ While a developing country such as Brazil might be entitled to expect differential and more favourable treatment in a trade arrangement with a CARIFORUM country, this right does not impose a corresponding obligation on any CARIFORUM country to afford Brazil the preferences contemplated by paragraph 2(c) of the Enabling Clause, without extending these preferences to other WTO Members. Rather, the *right* of Brazil – if characterized as such – is conditioned upon the

²¹ The Enabling Clause would be an instrument forming part of GATT 1994 by virtue of Article 1(b)(iv) of the GATT 1994 which states that the GATT 1994 shall consist of inter alia "other decisions of the CONTRACTING PARTIES to GATT 1947. On the issue of applicable law in WTO dispute settlement see Lorand Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 35(3) *Journal of World Trade*, 499. See also, Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95(3) *The American Journal Of International Law*, 535.

²² Bartels at nt. 13.

²³ Appellate Body Report at nt. 12, para. 106. On the somewhat curious nature of the Appellate Body's allocation of the burden of proof in *EC – Tariff Preferences* see James H. Mathis at nt. 15.

²⁴ Ukpe, Aniekani Iboro, "Defining the Character of the Enabling Clause: Towards a More Beneficial GSP Scheme" (September 9, 2008). Available at SSRN: <http://ssrn.com/abstract=1265733>, at pp. 5 ("Though the Enabling Clause exists in response to the MFN obligations in Article I:1 of the GATT, though in itself it establishes no obligation from which rights automatically arise...").

exercise of a discretion retained by CARIFORUM countries to enter into preferential trading arrangements with developing countries under paragraph 2(c) of the Enabling Clause. Contextual support for this proposition is found in the Enabling Clause itself, which in paragraph 1, derogates from GATT Article I:1 by providing in discretionary terms, that contracting parties *may* accord differential and more favourable treatment to developing countries without according such treatment to other contracting parties.²⁵ Paragraph 1 of the Enabling Clause is inexorably linked to any interpretation of paragraph 2(c) because paragraph 2, merely sets out or describes, the preferences to which the exemption in paragraph 1 applies. Paragraph 1 of the Enabling Clause therefore constitutes relevant and immediate context for the interpretation of paragraph 2(c), in accordance with the established principles of interpretation that WTO adjudicating bodies are mandated to apply.²⁶ It follows from this analysis that the Enabling Clause would not prohibit a developing country from contracting away, in agreements with developed country partners, its future right to negotiate preferential trade arrangements with other developing countries. In negotiating Article 19(2) of the EPA, CARIFORUM members have, at least in a *de facto* sense, done just that.

5. CONTRACTING AWAY FUTURE RIGHTS: A QUESTION OF POLICY AND NOT OF LAW

The MFN provisions in the EPA clearly constitute so-called “WTO plus” commitments. The corollary of the EPA’s characterization as an FTA is that it is necessarily subject to the legal disciplines of GATT Article XXIV. And although the substantive legal disciplines of GATT Article XXIV are notoriously unclear, we can be certain that an MFN provision in the form of Article 19(2) is not a legal requirement for the formation of an FTA.²⁷ At the same

²⁵ See text of paragraph (1) at nt. 9.

²⁶ Article 3.2 of the DSU mandates WTO adjudicating bodies to clarify the provisions of the covered agreements in accordance with the customary rules of interpretation of public international law. WTO jurisprudence has consistently interpreted this to mean the rules of interpretation codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*. See for example, Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, (20 May 1996), at 17; see also Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, (1 November 1996) at 10 ff. Pursuant to Article 31 of the *Vienna Convention*, a treaty is to be interpreted in accordance with the ordinary meaning to be given to its terms, in their context and in light of its object and purpose. On the interpretation of WTO agreements see generally, Michael Lennard, ‘Navigating by the Stars: Interpreting the WTO Agreements’ (2002) 5(1) *Journal of International Economic Law*, 17.

²⁷ MFN clauses in FTAs while WTO plus are certainly not uncommon. See Cosmas Ochieng, *Legal and Systematic Issues in the Interim Economic Partnership Agreements: Which Way Now?*, (2009) International Center for Trade and Sustainable Development, Geneva, Switzerland. Available at: <http://ictsd.org/i/publications/61869/> at p. 12 (“Of the 20 Regional Trade Agreements reviewed by the

time, it is clear from the analysis above that the MFN clause does not in any legal sense violate the Enabling clause. As has been pointed out by the EU in response to the intervention of Brazil, “the Enabling clause permits trade preferences among developing countries, but it contains nothing that prohibits the extension of such preferences to other WTO members.”²⁸ It follows that any assessment or examination of the propriety of the MFN clause raises questions of policy and not of law.

The systemic concerns raised by Brazil concerning the MFN clause, and its implications for further and deeper South-South trade, while valid, may be somewhat exaggerated. To put it bluntly, it is far from obvious that the MFN clause has enough teeth to produce the type of bite that is feared and anticipated by Brazil and other developing countries. Fortunately, the parties to the EPA have negotiated significant constraints on the MFN trigger, which render the arguments espoused by Brazil less persuasive. First, the MFN clause is triggered only by the conclusion of FTAs with third parties meeting the “major trading economy” threshold. Therefore, the capacity of CARIFORUM countries to enter into preferential trade arrangements with the majority of developing countries, which are not able to meet the “major trading economy” threshold, is uninhibited by the MFN clause. The blanket proposition that the MFN clause inhibits South-South trade is consequently unsustainable. Second, the MFN clause is not triggered by every type of preferential trading arrangement. Rather, it applies only to *FTAs*, i.e. mutually preferential trade agreements notified under and subject to the disciplines of GATT Article XXIV. CARIFORUM parties therefore retain the policy space to extend preferential concessions to a developing country ‘major trading economy’, insofar as these concessions fall short of the depth of trade liberalization demanded by the disciplines of GATT Article XXIV. Therefore, sectoral or partial scope agreements between developing countries under the Enabling Clause should not trigger the MFN obligation. Third, by the terms of Article 19(5) of the EPA, the MFN clause is not triggered automatically. Rather, its application is subject to consultations between the EPA parties, pursuant to which these parties may decide whether the CARIFORUM State concerned may deny the extension of more favourable

Organisation for Economic Co-operation and Development (OECD) in 2008, only five did not have an MFN clause. Notable North-South FTAs with the MFN clause include the North American Free Trade Agreement, the Central-American Dominican Republic Free Trade Agreement, Japan-Mexico, Thailand-Australia and US-Morocco.”)

²⁸ See Q&A: “We are generous but not naive”, interview with Louis Michel, EU Development Commissioner, IPS, Bruxelles, 11 February 2008. Available at <http://www.ipsnews.net/news.asp?idnews=40762>

treatment to the EU. It is possible to hypothesize a scenario in which the liberalization of a good - in which the EU has little or no competitive interest - has taken place in the context of an FTA with a third party. Certainly, in such a situation a strong case can be made during consultations to deny the extension of more favourable treatment to the EU.

To the extent that CARIFORUM may have, in effect, given up its future rights by agreeing to the inclusion of Article 19(2) in the EPA, one may question on policy grounds the propriety of developing countries contracting away future rights in trade negotiations with their developed country partners. If the question of whether developing countries should contract away future rights is posed in the abstract then the answer should be absolutely not. It is obviously myopic to contract away all that you may in the future grant others, without regard for what those others may grant to you.²⁹ However, it is submitted that it is neither useful nor productive to form a value judgment of the MFN clause in the abstract. Rather, an assessment of the clause must take into account: the concessions received by CARIFORUM; the principle of asymmetric reciprocity upon which CARIFORUM liberalization in the EPA is based;³⁰ the developmental dimension of the EPA; and the extent to which third States such as Brazil can, or are willing, to offer trade preferences to CARIFORUM that are better than, or similar to, those contained in the EPA. In short, the question is whether on a balance, more was lost by the inclusion of the MFN clause than what could possibly have been gained by its exclusion.

When the MFN clause is considered together with the factors outlined above, it becomes difficult to sustain an offensive against the clause, even on policy grounds. What CARIFORUM gained from the EPA in terms of trade in goods is absolute, duty and quota free access to the EU market from the word 'go', whereas CARIFORUM enjoys a three year moratorium on its market access commitments, and an extension of that moratorium to 10 years for revenue sensitive items. The fact that the EPA has atypically introduced a developmental dimension into a North-South FTA, which seeks to take into account the development objectives of the CARIFORUM region, makes it even more difficult to build a case against the EU's position of ensuring that more favourable treatment is not accorded

²⁹ Cheigh Tidiane Dieye and Victoria Hanson, 'MFN Provisions in EPAs: a threat to South-South Trade?', (2008) 7(2) *Trade Negotiations Insights*, 1.

³⁰ The CARIFORUM – EC EPA can be seen as an example of an FTA that has embraced the principle of variable geometry according to which time-tabled liberalization commitments are undertaken at different speeds depending on the economic ability and interest of members.

to its commercial rivals. Lastly, although developing countries like Brazil formally voiced their concerns before the EPA was signed, these countries did not indicate even an intention to offer the CARIFORUM region a 'deal' that was better than or even close to what the EPA offers.³¹

6. CONCLUSION

The concerns articulated by developing countries regarding the inclusion of MFN provisions in the CARIFORUM-EC EPA become understandable, once placed in proper context against the backdrop of unequal bilateral trade negotiations between the world's largest bloc of industrial countries and the ACP group of countries, which includes Least Developed Countries (LDCs) and other vulnerable developing countries. The issue of the MFN clause can become emotive, especially since some may feel that the EU has used its leverage in trade negotiations to extract from CARIFORUM its future rights in respect of further trade liberalization between and amongst developing countries.³² At the same time, the EU's position is understandable insofar as the MFN clauses are designed to protect its own trade interests – which it is undoubtedly entitled to do. Indeed, the EU has made it quite clear that Europe's generosity in terms of aid for development does not mean that it should allow its FTA partners to grant more favourable treatment to its commercial rivals; the EU is "generous but not naive."³³

In assessing the MFN clause in the EPA, questions of policy and issues of law must be bifurcated. It is one thing to say that the MFN clause constitutes bad trade policy from a developing country perspective, but it is quite another thing to say that the MFN clause violates the Enabling Clause in a legal sense. As has been shown, any attack on the MFN clause on the legal ground that it violates the Enabling Clause is unsustainable, primarily because the Enabling Clause lacks the type of normative character that is necessary to

³¹ Frederico Alberto Cuello Camilo, "MFN in the CARIFORUM EPA is no threat to South-South trade", (2008) 7(4) *Trade Negotiations Insights*, 10 ("Are the complainants [Brazil] ready to provide a better treatment to the Caribbean (or indeed, to all ACP countries?) Can the Caribbean expect a similar or a better treatment from any other 'major trading economy'? Our region welcomes their negotiating requests as well as their liberalisation offers, which shall be evaluated according to their merits.")

³² See for example, Cheigh Tidiane Dieye and Victoria Hanson at nt. 29, at p. 3 ("Europe is within its rights to demand trading preferences from ACP countries on the same basis as those it grants to them. But the EU goes too far when it asks that the ACP gives in return all that it might 'one day' grant others, regardless of what those other might give them. This is certainly a 'preemptive' injustice for ACP countries and Brazil was justified to point it out.")

³³ See nt. 28.

ground such a legal assertion. Moreover, when the MFN clause is considered against the benefits of the EPA as a whole, it is far from obvious that attacks on the MFN clause are valid, even on policy grounds. The process of forming a value judgment of MFN clauses in North - South FTAs should involve a cost-benefit analysis that seeks to reconcile or balance how much is gained from the FTA as a whole, with how much is possibly lost by the inclusion of the MFN clause. In the final analysis, even if one takes the view that more was lost than gained in the CARIFORUM - EC EPA, the inclusion of the MFN clause would at best constitute a policy blunder rather than a legal inconsistency.