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Why the MFN clause should not be included in EPAs

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Since the start of the Economic Partnership Agreement (EPA) negotiations, the European Union has considered the introduction of a Most-Favoured Nation clause one of its most beloved pet projects.

In fact, such a clause has already been introduced: one was included in the interim agreement that the EU signed with Côte d'Ivoire in 2007. That clause states that Côte d'Ivoire shall grant the EU the same trade preferences that it secures in a bilateral free trade agreement with any major trading partner. Most African countries reacted negatively to that clause, and the EU was forced to make concessions and accept that an MFN provision would no longer be automatically included in its future trade deals.

The debate over an MFN clause was given centre stage at a negotiating session between the EU and West Africa that was held in Brussels in March. At that meeting, the EU maintained that the MFN clause to be written into the EU-West Africa EPA should apply to preferences that the West African parties grant to any "major trading partner." That term, European officials proposed, should include any developed country or any country whose total trade represented more than one percent of world trade in the year before the EPA with the EU would take effect. (For a group of countries, the threshold would be a market share of more than 1.5 percent.)

During the March talks, the EU officially put on the table a list of 22 countries that meet its criteria. The list includes developing countries such as India, China and Brazil, Thailand, and Indonesia, among others. West African countries rejected this proposal, offering instead that the MFN clause in the EPA should apply exclusively to trade deals struck with developed countries.

By adopting an offensive posture, the EU has tried to develop a rationale that would allow it to introduce a far-reaching MFN clause into the EPAs. This paper looks at the various arguments that have been put forward and analyses them in the context of WTO law. It argues that, from the perspective of African countries, the MFN clause proposed by the EU should be removed from the EPA for four main reasons.

1. The MFN clause is intended to apply to future Regional Trade Agreements (RTAs) governed by Article XXIV of the General Agreement on Tariffs and Trade (GATT)

The EU rightly considers that there are two possible legal bases for an MFN clause that would cover RTAs with developing countries. The RTAs Enabling Clause consists exclusively of developing countries, and GATT Article XXIV for RTAs includes both "mixed" RTAs and RTAs between developed countries. Thus, the MFN clause could apply to all future trade agreements signed by the EU's ACP partners, with either the developed or developing countries.

But the initialling of the interim agreements that included a far-reaching MFN clause triggered an outcry from ACP countries. To defuse the tension, the EU argued that it would not seek to benefit from other RTAs signed by the ACP countries unless those agreements were made under the auspices of GATT Article XXIV; therefore, some future RTAs between developing countries would not be covered by the MFN clause. But this promise from the EU remains a purely verbal commitment and it will have no legal effect until it is clearly stated in the text of the EPAs. So far, this has not happened.

Moreover, Europe's verbal commitment is immediately contradicted by the contents of the interim agreements, which use the EU's preferred definition of "major trading partner." Countries like Brazil, India and China are covered by this definition and are nevertheless developing countries. What happens if one of these countries concluded an RTA with African countries under the aegis of the Enabling Clause? According to the European argument, the clause would not be activated in such a situation. But according to the interim agreements, it would be activated according to those agreements' definition of "major trading partner." This very plausible hypothesis shows the contradictions of the European argument.

2. The legal nature of exclusion lists is not clear: Are the lists objective or subjective?

The EU argues that ACP countries should not be allowed to give more benefits to other trading partners, even if the partners in question are developing countries. This raises the question of the "exclusion lists" - the lists of products that countries have been deemed "sensitive" and that are thus excluded from liberalisation - that are included in trade agreements. If an ACP country excludes a good from liberalisation with the EU, but allows for open trade in that good in an agreement with another country, then the good must not in truth be "sensitive," the EU argues; it should be allowed the same access granted to other trading partners. The EU has said that this should not be viewed negatively, even suggesting that African countries should even consider the MFN provision a "Happy clause" insofar as it allows them an easy way not to open up their markets to new trading partners.

This argument raises two points. The first is the obvious contradiction with the EU's argument that RTAs signed under the Enabling Clause would not be covered by the MFN provision. The second is that the sensitivity criteria that countries use to determine their exclusion lists are not inherently objective criteria. A product could be deemed "sensitive" and thus not open to the European market while remaining competitive compared to similar products from other major trading partners. In this case, the EU could not make a viable legal argument to challenge a differentiated offering of market access.

3. The legal status of the RTAs in the GATS goes against the EU argument.

The EU rationale on the scope of the MFN clause in the EPA seems to omit the totally different legal situation regarding RTAs on trade in services. In the field of goods, there is a clear distinction between the two legal bases of RTAs (Article XXIV of GATT and the Enabling Clause). But can this differentiation of RTAs by according to the parties' level of development be transposed to the services trade?

When it comes to services trade deals, there is no legal basis for differentiation according to countries' levels of development. RTAs between developing countries, RTAs between developed countries, and "mixed" RTAs are all regulated by Article V of the General Agreement on Trade in Services (GATS). This legal status makes the differentiation of the RTAs based on the size or wealth of the trading partners completely obsolete. In reality, all future RTAs concluded by ACP countries would be subjected to the MFN clause.

The EU does not seem to dispute or offer a solution to this situation. The EU could support a fragmented and uncoordinated implementation of the MFN clause with regard to ACP countries' future RTAs, perhaps by excluding services trade from any pooling possibilities. This scenario seems very unlikely, however, given the EU's offensive stance in the negotiations on services, both in the WTO and in the EPAs.

4. The MFN clause threatens the traditional patterns of S&DT at the WTO

The principle of non-discrimination is one of the cornerstones of the WTO, as is the recognition of its members' different stages of development. The WTO allows some discrimination in the application of the MFN clause, but always in favour of countries in the lower categories of development. This means that developing countries can be discriminated against for the benefit of least developed countries (LDCs) and that developed countries can be discriminated against for the benefit of developing countries. In contrast, developed country members can only "discriminate" if they extend the same terms to all other developed countries.

By introducing the MFN clause in the EPAs, the EU implicitly questions the possibility of discrimination in favour of LDCs and developing countries. The possibility of such special treatment — which has been legally enshrined in the Generalised System of Preferences (GSP) in 1971, the Enabling Clause of 1979 and the 1999 Decision on LDCs - offers exceptional trade benefits that cannot be pooled or "multilateralised." Indeed, developed countries are in a position to suffer legal discrimination in trade following the theory of compensatory inequality, which establishes the special and differential treatment (SDT).

For better or for worse, the EU is trying to guarantee itself a more favourable position in multilateral negotiations by ensuring that it is not discriminated against bilaterally. The EU has the solid advantage of benefiting from MFN

clauses at all levels: at the multilateral level, it is protected by the principle of non-systemic discrimination; at the bilateral level, the EU is looking to annihilate all possible exceptions to this rule. Therefore, all of the potential ways in which developing countries could secure extra trade benefits become meaningless. The EU, in effect, has secured its own version of special and differential treatment. This stance reflects Europe's desire to manage its competition with major trading partners. But the stance has not yet been considered by the WTO's Dispute Settlement System.

Developing countries often suffer the most from an erosion of their preferences, as developed countries are reluctant to give the same trade benefits to other developing countries that present themselves as potential competitors.

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