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**The MFN Provision Contained In The CARIFORUM-EC Economic Partnership
Agreement And Its Consistency With WTO Law¹**

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¹ This memorandum is a research paper prepared on a *pro bono* basis by students at the Graduate Institute of International and Development Studies (IHEID) in Geneva. It is a pedagogical exercise to train students in the practice of international trade law, not professional legal advice. As a result, this memorandum cannot in any way bind, or lead to any form of liability or responsibility for, its authors, the supervisors of the IHEID trade law clinic or the Graduate Institute.

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Executive Summary

1. OXFAM has requested IHEID's trade law clinic to examine the inclusion of Most Favoured Nation (MFN) provisions in Economic Partnership Agreements (EPAs) between African, Caribbean, and Pacific (ACP) countries on the one hand and the European Community (EC) on the other. Some of these agreements are currently being negotiated and one has already been concluded between CARIFORUM and the EC. The memorandum sets out to provide OXFAM with a number of legal arguments that are useful at both the legal and policy level in addressing the MFN clause contained in the EPA.

2. After discussing the GATT MFN clause, exceptions to it, ACP-EC EPAs under GATT Article XXIV and the MFN clause as it appears in the CARIFORUM-EC Economic Partnership Agreement, this memorandum considers several scenarios where the EPA's MFN provision might give rise to potential challenges. Brazil is used as a representative, or proxy, for a "major trading economy" which is not a party to the EPA. Jamaica is used as an example of an ACP country party to an ACP-EC EPA, in this case the CARIFORUM-EC treaty.

3. Several arguments, considerations and options that emerge are organized by focusing first on those that exist under WTO law and second those that are relevant within the EPA context. Within the WTO context, we first whether less-developed countries like Brazil have a stand-alone right to differential and more favourable treatment, exemplified by the Enabling Clause, and ask whether the EPA's MFN clauses violate this right. We conclude that if there is such a self-standing right under WTO law, the EPA arguably violates this right. Second, we discuss the requirements of Article XXIV and conclude that these are arguably met by the EPA. We also investigate whether specific provisions of the EPA can or must be justified by its parties (for example, the EC) according to the Enabling Clause, and conclude that the differential threshold for application of the EPA's MFN Clause must be justified according to paragraph 2(a) of the Enabling Clause, notwithstanding the fact that the CARIFORUM-EC EPA is concluded according to Article XXIV (not the Enabling Clause). We conclude that criterion chose in Article 19(4) to define a "major trading economy" arguably violated paragraph 2(a). Finally in regards to the WTO context, we examine the possibility of a non-violation complaint and conclude that such an approach is best reserved in the alternative.

4. With respect to considerations within the EPA, we conclude simply that a party to the EPA is likely to be bound by the terms of the EPA agreement, including any MFN clause it contains. However, a less-developed party, such as Jamaica, might attempt to use WTO rules as defences at an EPA arbitration proceeding. If Jamaica chooses to do this, we conclude that

it is possible that MFN treatment might not have to be extended to the EC, depending on how the Panel rules. Nevertheless, Jamaica has a choice of extending or not extending MFN treatment; that is, it might elect to respect or to violate the terms of the EPA. This fundamental choice arguably gives rise to considerations about potential liability under WTO law towards a less-developed country like Brazil (if Jamaica does extend MFN treatment to the EC), or liability in the EPA vis-à-vis its EPA partner, the EC (if Jamaica refuses to extend MFN treatment to the EC). We conclude that it is advisable for a country like Jamaica to extend MFN treatment, respecting the terms of the EPA, since it is less likely that a less-developed country not a party to the EPA, say Brazil, will choose to challenge Jamaica rather than the EC. Jamaica could enjoy the benefits of any litigation, assuming it would regard an attack on the EPA's MFN clause as a benefit. However, if Jamaica wishes to refrain from extending MFN treatment to the EC, Article 19(5) obliges the EC to consult with Jamaica prior to any litigation on the issue, a potentially powerful tool for Jamaica.

5. Several general conclusions can also be drawn. First, Brazil has the most and best choices of arguments for attacking the EPA's MFN clause. Second, Brazil's best argument focuses on the Enabling Clause paragraph 2(a), suggesting that the threshold for a "major trading economy" is not an objective criterion. Third, The argument under paragraph 2(c), that Brazil enjoys a self-standing right whereby it is entitled to differential and more favourable treatment, is more controversial but potentially also successful. Finally, Jamaica's scope for action is constrained, though it retains the fundamental choice to either extend or not extend MFN treatment. Depending on the choice made, Jamaica will potentially find itself liable either to Brazil or to the EC. The question might therefore be one of mitigating risks.

A. The MFN Clause in GATT Article I:1 and derogating from it through GATT Article XXIV and/or the Enabling Clause.

6. The WTO agreements and the CARIFORUM-EC EPA contain MFN provisions. We deal with them in turn.

7. First, in the WTO system, both the GATT and the General Agreement on Trade in Services (GATS) establish the principle of MFN.² The MFN clause provides that discrimination between countries is prohibited. Article I:1 of the GATT, setting out the MFN provision, states the following:

² General Agreement on Tariffs and Trade 1947 (GATT 1947), Article I; General Agreement on Tariffs and Services (GATS). Article II.

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article II, *any advantage, favour, privilege or immunity granted by any [Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [Members]*. (emphasis added)

8. While the MFN obligation is not absolute, derogations from it must meet specific other provisions of WTO law, such as GATT Article XXIV, providing for the lawfulness of free trade areas and customs unions, or the Enabling Clause, allowing for developing countries to give and receive differentiated treatment notwithstanding Article I:1.

The MFN clause, Article XXIV, and the Enabling Clause are viewed as facilitative of trade since measures adopted pursuant to these principles must be done in a manner and form that keeps with the WTO objective of enhancing trade.

9. GATT Article XXIV is an exception to the MFN clauses under WTO law, and is relevant to this memorandum, not least because it is the means by which the EC and ACP countries conclude EPAs. It has a broad scope of application, authorizing developed and developing countries to enter FTAs with trade partners regardless of whether those partners are developing or developed. GATT Article XXIV excuses non-compliance with the GATT MFN clause, allowing for the creation of customs unions and FTAs as long as certain requirements are met.

10. The requirements for a GATT compliant FTA reflect a core purpose, which is “to facilitate trade between the constituent territories and not to raise barriers to trade of other contracting parties with such territories.”³ Paragraph 5(b), applicable to FTAs, states the following:

... the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of ... a free-trade area or the adoption of an interim agreement necessary for the formation ... of a free-trade area; *Provided* that ...the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area... (emphasis added)

11. An additional requirement is found at Paragraph 8(b) of Article XXIV, which 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... are eliminated on substantially all the trade between the constituent territories in products originating in

³ GATT 1947 Article XXIV, para. 4.

those territories.”⁴ Consequently, any agreement seeking to make use of the Article XXIV exception to the MFN clause must conform to the Article’s requirements.

12. Another derogation to the GATT MFN clause is in the Enabling Clause, an integral part of WTO law.⁵ The Enabling Clause is among the WTO's special provisions reflecting developing countries’ special rights and granting developed countries the possibility to treat developing countries more favourably than other WTO Members. Paragraph 7 of the Enabling Clause recalls the right enjoyed by less-developed countries to differential and more favourable treatment, which exists at WTO law:

The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.⁶

13. In pursuing this aim, the Enabling Clause provides an exception to the GATT MFN provision and lays down various mechanisms by which Members may pursue the WTO development objectives.⁷ The Enabling Clause provides as follows at paragraph 1:

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.

14. Among these mechanisms, the "[p]referential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preference" at paragraph 2(a) allows developed countries to provide preferential treatment to products originating from developing countries.

15. Another relevant mechanism is in paragraph 2(c), which provides less-developed countries with the right to establish regional trading arrangement amongst themselves:

Regional or global arrangements 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 [Members], for the mutual reduction or elimination of non-tariff measures, on products imported from one another.

⁴ GATT Article XXIV:8(b).

⁵ Appellate Body Report, *EC – Tariff Preferences*, para. 90

⁶ Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, GATT Document L/4903, 28 November 1979, BISD 26S/203, (Enabling Clause), para. 7.

⁷ Appellate Body Report, *EC – Tariff Preferences*, para. 98

B. The Economic Partnership Agreements established between EC and ACP countries has development objectives but seeks compliance with the WTO through the Article XXIV exception and not the Enabling Clause

16. The EC also recognizes the importance of trade as a development tool in its policies, recently establishing a new trade and development framework under the Cotonou Agreement based on reciprocal trading arrangements. The parties to Cotonou decided "to conclude new World Trade Organisation (WTO) compatible trading arrangements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade."⁸ These partnerships use the GATT Article XXIV exception to GATT Article I:1 (MFN Clause) because it is the only WTO provision authorizing FTAs between developed and developing members (the Enabling Clause only covers regional arrangements amongst less-developed countries).

17. Several EPAs are currently under negotiation,⁹ with one such agreement between the EC and CARIFORUM having already been concluded.¹⁰ The CARIFORUM-EC treaty parties reaffirm "that the objective of sustainable development is to be applied and integrated at every level of their economic partnership, in fulfilment of the overarching commitments set out in ... the Cotonou Agreement, and especially the general commitment of reducing and eventually eradicating poverty in a way that is consistent with the objectives of sustainable development."¹¹ In particular, the objectives of the agreement are the following:

- Reducing and eradicating poverty through a trade partnership
- Promoting regional integration, economic cooperation and good governance
- Ensuring the gradual integration of the CARIFORUM countries into the world economy
- Improving the CARIFORUM countries capacity to trade policy and trade related issues
- Promoting economic growth, increasing investment and improving private sector capacity and competitiveness in CARIFORUM
- Strengthening CARIFORUM – EU trade relations.¹²

⁸ Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States of the Other Part, Signed in Cotonou, Benin on 23 June 2000 (Cotonou Agreement), Article 36(1).

⁹ European Commission, *Introduction to the CARIFORUM-EC EPA*, Fact Sheet, October 2008, p. 4. Available at http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_141029.pdf (date last visited: 5 April, 2009). Negotiations are occurring with ACP countries divided into six blocs: one Caribbean negotiating region, one Pacific negotiating region; and four African negotiating regions.

¹⁰ Economic Partnership Agreement between the CARIFORUM States, of the One Part, and the European Community and its Member States, of the Other Part, CARIFORUM/CE/en 1, 16 December 2008 (CARIFORUM-EC EPA, 2008).

¹¹ *Ibid*, Article 3.

¹² *Ibid*, Article 1.

18. The CARIFORUM-EC EPA was notified to the WTO on 24 October 2008 under GATT Article XXIV and GATS Article V.¹³ The scope of the agreement covers trade in goods,¹⁴ as well as trade in services related to commercial presence¹⁵ (overlapping with GATS Mode 3), cross-border supply of services¹⁶ (overlapping with GATS Mode 1), and the temporary presence of natural persons for business purposes in the territory of a Member State¹⁷ (overlapping with GATS Mode 4).

C. The CARIFORUM-EC EPA contains an MFN Clause, which applies to countries meeting a defined threshold for “major trading economy”

19. The main provision at issue in OXFAM’s request is Article 19 of the EPA, which relates to “[m]ost favourable treatment resulting from free trade agreements”. (Articles 70 and 79 contain similar provisions in regard to trade in services; for the purposes of this memorandum, we focus on Article 19).

20. The EC is wary of extending generous trade concessions to ACP countries while potentially being exposed to an uncompetitive market position vis-à-vis third states which might sign or want to sign agreements with its ACP partners. As the EU Development Commissioner asserts, "the EC and our member states provide 56 percent of all development assistance in the world. It is difficult to say that Europe should let our partner [ACP] countries treat our economic adversaries better than us. We are generous but not naive."¹⁸

21. The CARIFORUM-EC EPA ensures that CARIFORUM states enjoy liberalization on a staggered basis, with the EC implementing concessions early on while the CARIFORUM states have a graduated scale toward opening up their domestic markets to EC products.¹⁹ The CARIFORUM countries also have wider scope for use of safeguard measures than the EC.²⁰

¹³ *Notification of Regional Trade Agreement*, WTO Document, WT/REG255/N/1/Rev.1, S/C/N/469/Rev.1, 24 October 2008, page 2.

¹⁴ *CARIFORUM-EC EPA*, Title I.

¹⁵ *Ibid*, Title II, Ch. 2.

¹⁶ *Ibid*, Title II, Ch. 3.

¹⁷ *Ibid*, Title II, Ch. 4.

¹⁸ Inter Press Service News Agency, *We are generous but not naïve*, Interview of M. Louis Michel, available at <http://ipsnews.net/news.asp?idnews=40762>, (date last visited, 25 April, 2009).

¹⁹ CARIFORUM-EC EPA Article 16. In matters related to trade in good, the CARIFORUM States are generally given a period of ten years after the signature of the Agreement to continue to apply customs duties on imported products originating in the EC Party, provided that the duties were already in place at the date of signature (Article 16(3)). CARIFORUM States are, again generally, not required to begin phased elimination of customs for a period of seven years subsequent to signature (Article 16(4)).

²⁰ *Ibid*, Article 25.

22. Several MFN clauses are contained in the EPA and are carefully designed to meet the EC's concern, while retaining some flexibility for CARIFORUM countries. Article 19, for example, provides as follows:

Most favourable treatment resulting from free trade agreements

1. With respect to matters covered by this Chapter, the EC Party shall accord to the CARIFORUM States any more favourable treatment applicable as a result of the EC Party becoming party to a free trade agreement with third parties after the signature of this Agreement.

2. With respect to matters covered by this Chapter, the CARIFUM States or any Signatory CARIFORUM States shall accord to the EC Party any more favourable treatment applicable as a result of the CARIFORUM States or any Signatory CARIFORUM State becoming party to a free trade agreement with any major trading economy after the signature of this Agreement.

3. The provisions of this Chapter shall not be so construed as to oblige the EC Party or any Signatory CARIFORUM State to extend reciprocally any preferential treatment applicable as a result of the EC Party or any Signatory CARIFORUM State being party to a free trade agreement with third parties on the date of signature of this Agreement.

4. For the purpose 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 an 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.

5. Where any Signatory CARIFORUM State becomes party to a free trade agreement with a third party referred to in paragraph 2 and such a free trade agreement provides for more favourable treatment to such third party than that granted by the Signatory CARIFORUM State to the EC Party pursuant to this Agreement, the Parties shall enter into consultations. The Parties may decide whether the concerned Signatory CARIFORUM State may deny the more favourable treatment contained in the free trade agreement to the EC Party. The Joint CARIFORUM-EC Council may adopt any necessary measures to adjust the provision of this Agreement.

23. Article 19(1) provides that all EC arrangements with third states are subject to the MFN principle. In contrast, Article 19(2) provides that it is only CARIFORUM arrangements with a "major trading economy", defined in Article 19(4), which are subject to the MFN principle. In other words, the MFN clause varies depending on whether it applies to the EC or CARIFORUM. For example, if a CARIFORUM country like Jamaica concludes a trade agreement with Brazil, which is a "major trading economy", and Brazil gets a better deal than the EC got, Jamaica must extend to the EC that better treatment. If, however, Jamaica concludes an agreement with Bangladesh, not a "major trading economy", and Bangladesh gets a better deal than the EC, the MFN treatment need not extend to the EC. The MFN provision at Article 19(2) raises several concerns dealt with in the following sections.

24. As noted, the MFN clause as it applies to CARIFORUM countries' obligations incorporates a definition of a "major trading economy", which is defined as either a developed country or any other country reaching a 1% threshold of world merchandise export or group of countries accounting for 1.5% of such exports. This threshold, while incorporated into the

MFN clause through Article 19(2), is distinct from the MFN clause as such, and raises somewhat different concerns. We will consider Article 19(2) separately below.

25. It is notable that Article 19(5) moderates Article 19(2), obligating parties to enter into consultations during which it may be decided that extension of the Article 19(2) MFN principle is not required. However, the wording of Article 19(2) is imperative, while the Article 19(5) wording is merely permissive, indicating that waiving the otherwise mandatory application of the EPA's MFN clause as it applies to CARIFORUM is discretionary and subject to agreement by both parties.

26. The EPA has similar provisions relating to some trade in services, notably those overlapping with GATS Modes 1 and 3.²¹ As mentioned, this memorandum focuses on Article 19.

D. Article 19 of the EPA is arguably not compatible with WTO law

27. The provisions of Article 19 give rise to separate, though related concerns under WTO law. First, in regards to Article 19(2), the existence of an MFN clause as it applies to CARIFORUM countries might discourage some developing countries (e.g. Brazil) from entering FTAs with ACP countries (e.g. Jamaica) as the concessions thereby extracted from ACP countries would have to be shared also with the EC. The mitigating effect of Article 19(5) is unlikely to reduce the hesitancy of third parties from entering trade agreements with ACP countries like Jamaica because, given the discretionary character of Article 19(5) coupled with the mandatory character of Article 19(2), a country like Brazil might expect that any concessions it wins from Jamaica will automatically be extended by Jamaica to the EC. Consequently, the ACP-EC EPAs could have the collateral effect of tying ACP countries more or less exclusively to the EC for trade-based development and casting a chill on major new trade initiatives between ACP countries and a "major trading economy" like Brazil. It is necessary, therefore, to explore whether Article 19(2) meets the requirement of Article XXIV and also whether it might violate the right to differential and more favourable treatment enjoyed by less-developed countries, exemplified by the Enabling Clause, paragraph 2(c).

28. Second, Article 19(4) and the definition of a "major trading economy" triggers concerns since the percentage threshold necessary to meet the definition, 1% of world merchandise trade in the case of an individual country and 1.5% in the case of a group of

countries, operates independently of their level of development. In fact, the percentage threshold is a means to group certain less-developed countries into the same category as developed countries, by deeming these countries “major trading economies”. The question here is whether a challenge can be brought on grounds that the provision violates WTO MFN rights of certain (major) developing countries in a way that is not justified under the Enabling Clause for not meeting the requirements of the Enabling Clause, paragraph 2(a).

29. While the EC might argue that the CARIFORUM-EC EPA places development at the heart of the agreement, including “[c]ontributing to the reduction and eventual eradication of poverty through the establishment of a trade partnership consistent with the objective of sustainable development, the Millennium Development Goals and the Cotonou Agreement”,²² the Article 19(4) percentage threshold and the Article 19(2) MFN clause more generally puts aside the WTO objectives in relation to the very issue of development.²³ Indeed, by making MFN provision’s application contingent on a percentage threshold, Article 19 fails to take into consideration the fact that WTO law provides a differential treatment to *all* less-developed countries, regardless of their share of world merchandise exports. There might be other factors, such as population size, which affect a Members’ overall share of world merchandise exports and are unrelated to that Members’ level of economic, financial or trade development. Therefore, a separate MFN claim in combination with the Enabling Clause might be possible and should be examined.

30. On the other hand, the EPA’s MFN clause is arguably similar to the WTO’s non-discrimination rationale, and as such can be construed as a provision that further liberalizes trade, albeit through the multilateralization of regional arrangements. Consequently, it is important to be cognizant of possible strong EC counter-arguments against any claims brought against provisions of the EPA.

E. Practical considerations: scenarios under which challenges can be brought

31. In examining the strength of arguments that might be used to challenge the CARIFORUM-EC EPA and its MFN clauses, it is a worthwhile exercise to bear in mind several hypothetical scenarios where the EPA’s MFN provision might come into play and be

²¹ CARIFORUM – EC EPA, Article 70 in respect of commercial presence (“Mode 3”) and Article 79 in respect of cross-border supply of services (“Mode 1”). Notably, no MFN provision applies to “Mode 4” trade in services, the temporary presence of natural persons for business purpose.

²² *Ibid*, Article 1(a)

²³ See for example the *Marrakesh Agreement establishing the World Trade Organization*, 15 April 1994, (WTO Agreement), Second recital of the Preamble, GATT 1947 Article XXXVI, and the Enabling Clause.

made subject to possible challenges. We have summarized these scenarios in this section, and use them throughout our analysis of the legal arguments, as concrete examples of how those arguments might play out.

32. In each hypothetical situation, a specific country is chosen as a proxy for a particular legal category of state. A “major trading economy”, defined by the CARIFORUM-EC EPA at Article 19(4) and discussed in sections C and D above, is represented by Brazil. Brazil is chosen because it is a less-developed country and consequently is an intended beneficiary of the Enabling Clause’s provisions. It is also conceivable that Brazil might wish to enter into new trade agreements with members of CARIFORUM and is a probable economic competitor to the EC in some sensitive areas.

33. It is important to emphasize, however, that the category represented by Brazil includes the distinct sub-category of a collective group of countries fitting within the 1.5% percentage threshold for a “major trading economy”.²⁴ Where this fact is relevant to a particular hypothetical scenario, and warrants a departure from the ‘Brazil example’, we specify this and refer to a ‘group of countries’ meeting the ‘major trading economy’ threshold. This sub-category is relevant because it is conceivable that one day a trade-bloc of less-developed countries, perhaps with some members classified as least-developed countries, might reach the EPA’s 1.5% threshold. Research reveals, however, that this possibility is currently hypothetical since with world merchandise exports topping \$12 trillion, a trade bloc will need to be responsible for around \$180 billion.²⁵ Nevertheless, low income countries accounted for

²⁴ World merchandise exports topped \$12 trillion in 2006, meaning that the 1% threshold is met at around \$120 billion. Brazil accounted for approximately \$137 billion; China \$969 billion; India \$120 billion; Indonesia \$103 billion; Malaysia \$160 billion; Saudi Arabia \$208 billion; and, South Africa \$58 billion. World export merchandise data is gathered from The International Bank for Reconstruction and Development/THE WORLD BANK, 2008: *World Development Indicators*, Washington D.C.: THE WORLD BANK, 2008 at 210-212. For data on trading groups and countries that are deemed to be Least Developed Countries, please see World Trade Organization, *International Trade Statistics 2008*, “Chapter IV: Metadata”, online: http://www.wto.org/english/res_e/statis_e/its2008_e/its08_metadata_e.pdf (last visited 2 May, 2008).

²⁵ This possibility remains academic at this point. While a trade bloc like MERCOSUR fits within the provision, the largest trading blocs with a large contingent of least developed countries do not meet the 1.5% threshold (2006 data). World merchandise exports exceeded \$12 trillion in 2006, meaning that the 1.5% threshold is met at \$180 billion. The Common Market of Eastern and Southern Africa, for example, is composed of many least developed countries as well as states with relatively large GDPs like Egypt and Libya. The bloc’s share of world merchandise exports in 2006, the latest statistics published by the World Bank, indicates their share of this trade merely reaches around \$72 billion. Similarly, the Southern Africa Development Community, which also includes the economically large state South Africa, does not reach the \$180 billion threshold. World export merchandise data is gathered from The International Bank for Reconstruction and Development/THE WORLD BANK, 2008: *World Development Indicators*, Washington D.C.: THE WORLD BANK, 2008 at 210-212. For data on trading groups and countries that are deemed to be Least Developed Countries, please see World Trade Organization, *International Trade Statistics 2008*, “Chapter IV: Metadata”, online: http://www.wto.org/english/res_e/statis_e/its2008_e/its08_metadata_e.pdf (last visited 2 May, 2008).

approximately \$323 billion in 2006 of this trade, up from \$94 billion in 1995,²⁶ which suggests two things: that some combination of low income countries could conceivably hit the 1.5% threshold and that if the historical rate of growth continues, the threshold will be increasingly easy to meet. In some circumstances, this sub-category might be the subject of different considerations by particular actors involved in a dispute arising in connection with Article 19(4) of the EPA.

34. We have selected Jamaica as a less-developed proxy state from CARIFORUM. It represents an ACP party to an ACP-EC EPA. Bangladesh provides an example of a less-developed country, not meeting the EPA's threshold for a "major trading economy". Finally, the other relevant actor in the scenarios examined is the EC.

35. The scenarios which might unfold in relation to the MFN clause contained in the EPA are the following:

SCENARIO 1: Brazil challenges the EPA as such, without any other FTA being concluded yet, as a violation of the GATT (challenge by Brazil against EC and/or Jamaica)

SCENARIO 2: Brazil enters into an FTA with Jamaica and Jamaica extends the concessions it gave to Brazil to the EC (challenge by Brazil against EC and/or Jamaica)

SCENARIO 3: Brazil enters into an FTA with Jamaica and Jamaica refuses to extend concessions given to Brazil to the EC (challenge by the EC against Jamaica).

SCENARIO 4: Jamaica and Bangladesh conclude an FTA and Brazil challenges that FTA (challenge by Brazil against Jamaica and/or Bangladesh)

36. In the following section, we examine specific arguments and considerations available to Brazil and Jamaica, as the case may be, in WTO law and in any dispute within the EPA.

F. Overview of arguments: summary of the possible challenges to EPA Article 19

37. As noted, several concerns about the EPA's Article 19 exist in general WTO law. A different set of concerns exists in respect of Article 19 in terms of the EPA itself. For the most part, Brazil will be the Member most concerned with challenges under WTO law. As a non-party to the EPA, it has no recourse to that treaty's dispute settlement procedures. Jamaica, on the other hand, can also have any matters it raises with the EC settled within the EPA in accordance with the EPA's dispute settlement procedures. As we shall see, having recourse to EPA procedures is not necessarily an advantage for Jamaica if it seeks to impugn Article 19.

²⁶ *Ibid.*

38. This section is organized according to challenges under WTO law and considerations in the EPA. This method of organization focuses primarily on argumentation, with subsections under each argument indicating how the argument might play out depending on the scenario in question. For the most part, the WTO challenges will be made by Brazil, while matters before an arbitration panel struck under the EPA will involve Jamaica. Consequently, the WTO-EPA organizational dichotomy roughly mirrors a Brazil-Jamaica dichotomy.

39. The arguments and subsections are as follows:

WTO challenges (options mostly relevant to Brazil):

1. The EPA violates a self-standing right of a less-developed country like Brazil to differential and more favourable treatment, exemplified by the Enabling Clause, paragraph 2(c) (i.e. the right to preferential “[r]egional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs”). The Appellate Body in *EC – Tariff Preferences* found that the Enabling Clause paragraph 2(c) was an exception, but we argue that a stand-alone right exists, of which the Enabling Clause is merely exemplary. The Appellate Body referred only to the Enabling Clause. The CARIFORUM-EC EPA violates the self-standing right by potentially extending equally favourable treatment to the EC through Article 19(2).
 - Scenarios:
 - Brazil can challenge Article 19(2) as such, independent of any FTA between itself and Jamaica, and any argument is best made against the EC;
 - If Jamaica and Brazil conclude an FTA and Jamaica elects to extend MFN treatment to the EC pursuant to the EPA, Brazil can use this argument to construe a complaint against the EPA’s MFN provision. However, Brazil is unlikely to bring a claim if Jamaica refuses to extend MFN treatment to the EC because Brazil will enjoy differential and more favourable treatment;
2. The EPA’s violation of the GATT MFN clause cannot be justified under GATT Article XXIV because Article 19(2) raises a barrier to trade and/or in effect leads to “higher or more restrictive” trade policies than existed prior to the EPA vis-à-vis third states like Brazil.
 - Scenarios:
 - Brazil can employ this argument to challenge the EPA’s MFN clause as such, regardless of any FTA between it and Jamaica;
 - Brazil will not be able to make this argument if it concludes a trade agreement with Jamaica because there is arguably no barrier raised or more restrictive policies imposed (it has, after all, successfully established an FTA);
 - Brazil may make this challenge if Jamaica concludes an agreement with Bangladesh. While it shows that the “major trading economy” provision does not raise a barrier in respect of all developing countries, Brazil can

argue that it does a raise a barrier in relation to States reaching the threshold.

3. The EPA's "major trading economy" threshold at Article 19(4) violates GATT Article I:1 (MFN Clause) and cannot be justified under the Enabling Clause, paragraph 2(a) because it is not "objective".
 - Scenarios:
 - If Jamaica and Bangladesh conclude an FTA, Brazil may make this argument on grounds that Article XXIV does not permit discrimination between non-parties to an FTA. Consequently, the Article 19(4) threshold must meet the Enabling Clause's paragraph 2(a), which it does not because the criterion selected (1% of world merchandise exports) is no "objective". (An "as such" claim may be founded independent of an FTA, though the argument is the same as in a Jamaica-Bangladesh FTA)
4. In the event that any of Brazil's arguments showing a violation are unsuccessful, an alternative claim is possible. A non-violation complaint may be brought to enforce the "spirit" of WTO rules, including, for example, the Enabling Clause.

EPA considerations (options mostly relevant to Jamaica):

- Only EPA parties have recourse to the EPA's provisions and dispute settlement mechanisms. Jamaica will have difficulty making a claim about Article 19(2) and 19(4) because an EPA arbitration panel will likely regard Jamaica as bound by the provisions.
 - Scenarios:
 - Jamaica can enter into an FTA with Brazil and not extend MFN treatment to Brazil. It will not be susceptible to a Brazilian challenge, but it will most likely be subject to an EC complaint for violation of the EPA's MFN provision. At the same time, however, the EPA's Article 19(5) establishes an obligation on the part of the EC to enter consultations with Jamaica, which gives Jamaica an important tool to negotiate its way out of extending MFN treatment to the EC. In litigation, Jamaica might attempt to raise WTO rules as a defence. In particular, it might argue that the Article 19(4) threshold must be interpreted in light of the requirements of the Enabling Clause 2(a); i.e., that the 1% world merchandise export criterion is not

objective and therefore the provision should not be applied to a Jamaica-EC EPA.

- Jamaica can enter into an FTA with Brazil and abide with Article 19(2) and (4) by extending MFN treatment to the EC. It is susceptible to a Brazilian claim under WTO law, though Brazil might rather target the EC. Jamaica will not violate EC EPA rights.
- Jamaica can conclude trading arrangements with Bangladesh and justify the arrangements through the Enabling Clause. Jamaica is not obligated to extend MFN treatment to the EC under the EPA nor under WTO law.

As a result, Brazil has the most and best options for challenging the MFN clause contained in the CARIFORUM_EC EPA, in particular by referring the case to the Dispute Settlement Body. That is not to say, however, that Jamaica has no options: it could also go before the DSB as a WTO Member and contest the MFN clause.

G. Challenges on the basis of WTO law at the DSB (Options most relevant to Brazil)

40. In this section we flesh out the arguments that can be made at the WTO and do so by mostly referring to Brazil as the one making them. We show how they are likely to play out in particular situations.

41. As a preliminary matter, it should be noted that WTO law permits “as such” claims allowing Members to bring complaints against laws or regulations “as such”, independent from their application.²⁷ Therefore, while the focus of this argument is on the EC-CARIFORUM EPA, challenges might be brought not only against this instrument “as such” (or the implementing legislation of the EPA “as such”), but any negotiated EPAs “as such” even though they are not yet in force or have not yet been applied. The relevant question is whether the measure, as it will apply in the future, impacts market participants “engaging in international trade prior to its coming into force because these market participants typically plan their transactions ahead of time.”²⁸ In this regard, Brazil is likely to be able to demonstrate a trade impact by showing that market participants are likely to view their competitive position in connection with tariffs and customs regulations as affected.

²⁸ World Trade Organization, *A Handbook on the WTO Dispute Settlement System: A WTO Secretariat Publication*, Cambridge, Cambridge University Press: 2004 at 42.

a. The EPA violates a self-standing right of a less-developed country like Brazil to differential and more favourable treatment, exemplified by the Enabling Clause paragraph 2(c). The CARIFORUM-EC EPA violates this right by potentially extending equally favourable treatment to the EC through EPA Article 19(2) in conjunction with Article 19(4).

42. Brazil has a potentially strong argument that the EPA's MFN clause violates its right to make preferential regional agreements between developing countries pursuant to the Enabling Clause, paragraph 2(c), without seeing the negotiated benefits extended to developed countries like the EC. As noted, the Enabling Clause provides developing countries with the ability to conclude trade arrangements *between each other* (paragraph 2(c)) and, in a separate provision, allows developed countries to give preferences to products originating in developing countries. It exemplifies a special derogation from the GATT MFN clause. The Enabling Clause is composed of several provisions which reflect different aspects of the WTO's objectives.²⁹ Notably, the Enabling Clause has been recognized by the Appellate Body (AB) as "among the 'positive efforts' called for in the Preamble to the *WTO Agreement* to be taken by developed-country Members to enhance the 'economic development' of developing-country Members".³⁰ In fact, it has been the subject of some debate as to whether it is a self-standing right or an exception to the GATT's MFN clause.³¹

43. The AB has construed, through interpretation of paragraph 1, the Enabling Clause as an exception to GATT Article I:1.³² However, the AB ruled in *EC – Tariff Preferences* that "characterizing the Enabling Clause as an exception, in our view, does not undermine the importance of the Enabling Clause within the overall framework of the covered agreements and as a 'positive effort' to enhance economic development of developing-country Members."³³ Despite the fact that the Enabling Clause is an exception, it "in no way diminishes the right of Members to provide or to receive 'differential and more favourable treatment'."³⁴ The AB did not, therefore, exhaustively define the nature of the right and it

²⁹ See the GATT 1947 Preamble, which provides "that (Members) relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment, a large and steadily growing volume of real income and effective demand."

³⁰ Appellate Body Report, *EC – Tariff Preferences*, para. 92. The *Marrakesh Agreement Establishing the World Trade Organization* provides in the second recital of its preamble the following: "there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development".

³¹ Appellate Body Report, *EC - Tariff Preferences*. Arguments of EC and intervention by Panama, paras. 64ff.

³² *Ibid*, para. 90.

³³ *Ibid*, para. 95.

³⁴ *Ibid*, para. 98.

might be open to argument, along the lines raised by Panama as an intervening party in *EC – Tariff Preferences*,³⁵ that there exists a self-standing right to differential and more favourable treatment. In other words, even if paragraph 1 of the Enabling Clause is construed by the Appellate Body as an exception, paragraph 2(c) itself might represent a self-standing right. In other words, it could be argued that the Enabling Clause is reflective of a right of less-developed countries to preferential “[r]egional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs” without seeing those benefits extended to developed countries.³⁶ This argument is strengthened by the acknowledgement of the AB to a “right” notwithstanding the language in paragraph one, which provides the permissive “may”, which seemingly suggests something more discretionary and less amenable to a right.

44. Following this logic, Brazil could argue that the Enabling Clause operates as an exception to GATT Article I:1 in respect of paragraph 1, there is also an independent positive right. It could be that the first paragraph of the Enabling Clause is meant to ensure that less-developed countries can exercise their right to differential and more favourable treatment under paragraph 2(c) by providing an exception to GATT Article I when doing so. Nevertheless, paragraph 1 does not arguably exhaustively define the right, because the Appellate Body has made clear that paragraph 1, as an exception, does not diminish the right of developing countries to differential and more favourable treatment.

45. This argument, while difficult to make, is relevant to several scenarios. If a positive right can be construed, it is a potentially strong argument. It might be argued that the EPA’s MFN Clause potentially impacts, even extinguishes, Brazil’s right to differential and more favourable treatment.

Scenarios

- *Brazil can challenge Article 19(2) as such, independent of any FTA between itself and Jamaica, and any argument is best made against the EC*

46. Brazil might argue that it, as a developing country, must be able to enjoy a right to differential and more favourable treatment, which Article 19(2) in conjunction with Article 19(4) operate as such to eliminate because any more favourable treatment it might win from Jamaica will automatically extend to the EC, a developed WTO Member. Therefore, its right

³⁵ *Ibid* para. 64.

³⁶ Enabling Clause, para. 2(c).

to conclude a differential trading arrangement with Jamaica, exemplified in paragraph 2(c) of the Enabling Clause, is inhibited.

47. In addition, the EPA's MFN clause arguably *de facto* extinguishes Brazil's right to differential and more favourable treatment, in violation of the general principle of law, *res inter alios acta*, which provides that a treaty cannot adversely affect the rights of a state which is not party to it. Since the EPA's MFN clause violates paragraph 2(c) of the Enabling Clause and considering the importance of the *res inter alios acta* principle endorsed by the International Court of Justice (ICJ),³⁷ the panel might declare it invalid or, at least, non-opposable to Brazil.

48. If the MFN clause in the EPA violates Brazil's Enabling Clause right to form a regional trade agreement with Jamaica on grounds where Brazil receives differential and more favourable treatment, then Brazil can theoretically bring a complaint against both the EC and Jamaica as parties to the EPA. This right exists as against the EPA's MFN provision as such, and is not dependent on an FTA between Brazil and Jamaica actually being concluded. However, as a matter of logic, it would make very little sense for Brazil to complain against a possible FTA partner before the WTO. Brazil would probably challenge the EC.

49. Given that a Brazilian complaint against the EC is the most likely course of action, it is necessary to explore what possible counter-arguments the EC has available against Brazil's assertion of a violation of its rights under the Enabling Clause (Jamaica will be able to use similar arguments to any Brazilian complaint against it). In particular, the EC might point out that according to the Enabling Clause at paragraph 7, "[l]ess-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement."³⁸ In addition, the terms of GATT Article XXXVI:3 state "the need for positive efforts designed to ensure that less-developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development."³⁹ With the increased power and size of some developing countries, including Brazil, and on the basis of Article XXXVI with additional support derived from Enabling Clause paragraph 7, the EC can potentially argue that applying

³⁷ ICJ, *Anglo-Iranian Oil Co. case (jurisdiction)*, Judgment, ICJ Reports 1952 p. 109.

³⁸ Enabling Clause, para. 7.

the MFN clause to “major trading economies” like Brazil is in keeping with the terms of Article XXXVI:3 because differential and favourable treatment is no longer “commensurate with the needs” of this country. In fact, the EC might further point to the Enabling Clause itself, adopting the approach of the AB in *EC - Tariff – Preferences* that paragraph 3(c) of the Enabling Clause is read “as authorizing preference-granting countries to ‘respond positively’ to ‘needs’ that are not necessarily common or shared by all developing countries. Responding to the ‘needs of developing countries’ may thus entail treating different developing-country beneficiaries differently”.⁴⁰ The Enabling Clause paragraph 3(c), along with the AB’s interpretation of it in *EC – Tariff Preferences*, supports this view.

50. However, it is open to Brazil to point out that Article XXXVI is a principle not given specific character as an obligation on Brazil. It is an objective of the WTO, which grounds, for example, the Enabling Clause exception to GATT Article I:1. The Enabling Clause in law applies to all developing countries. As long as Brazil considers itself a developing country, it is entitled to the benefits of the Enabling Clause, including the ability to enter FTAs with fellow developing countries per paragraph 2(c). Furthermore, the Enabling Clause merely says that “[l]ess developed [Members] expect” to become increasingly integrated into the General Agreement. It is not for the EC to arrogate to itself the capacity to determine when Brazil’s right to differential and more favourable treatment under WTO law is over and done with, especially considering that the status of “less-developed country” is self proclaimed. Moreover, it cannot do so by bilateral agreement concluded pursuant to the GATT Article XXIV exception to the GATT’s MFN clause. Brazil might also argue that it has conformed to the less-developed countries’ expectations, which are expressed at paragraph 7 of the Enabling Clause; that is, Brazil is making greater concessions and taking more actions under various provisions and procedures of WTO law, including through the the *Dispute Settlement Understanding*. It would argue, moreover, that the right to make regional trade arrangements, exemplified but not exhaustively defined by paragraph 2(c), remains available to it through the Enabling Clause and this must not be impaired by the EPA’s MFN provision.

para. Moreover, the EC may be tempted to argue that Brazil's rights remain intact, since, according to the EPA's MFN clause by which Jamaica agreed to "waive" its Enabling Clause rights, only Jamaica is required to extend its concessions to the EC. Hence, Brazil can still

³⁹ GATT 1947 Article XXXVI :3.

⁴⁰ Appellate Body Report, *EC – Tariff Preferences*, paras. 161-162. Paragraph 3(c) of the Enabling Clause provides as follows: “in the case of such treatment accorded by developed contracting parties to developing

enjoy preferential access to Jamaica's market, notwithstanding the fact that the EC will enjoy the same. Yet the situation still infringes Brazil's right to a differential and more favourable treatment, because granting Brazil the same market access enjoyed by the EC indicates treatment equal to the EC, not the differential and more favourable treatment of Brazilian products.

- *If Jamaica and Brazil conclude an FTA and Jamaica elects not to extend MFN treatment to the EC in violation of the EPA, Brazil can probably use this argument to found a complaint against the EPA's MFN provision, but is unlikely to bring a claim if it is enjoying differential and more favourable treatment*

51. Bearing in mind the above, if Brazil and Jamaica conclude an FTA and Jamaica does not extend to the EC the concession it granted to Brazil, Jamaica will arguably not be in breach of its obligations vis-à-vis Brazil as those are enshrined in the Enabling Clause. Putting aside for the moment the issue of any EPA breach, which is discussed in section H, Jamaica's agreement with Brazil, assuming it is concluded through the Enabling Clause for example, complies with the rights Brazil has as a less-developed country in WTO law.

52. Brazil might wish to challenge the EPA's MFN provision by bringing a complaint under WTO law per the Enabling Clause against the EC. The scenario is likely to unfold in the following way: Jamaica will be challenged by the EC within the terms of the EPA and in all likelihood extend MFN treatment to the EC; Brazil will then file a challenge. We discuss the Brazilian challenge in the event of MFN treatment being extended by Jamaica to the EC in the scenario immediately following this one. We discuss Jamaica's considerations under the section dealing with EPA challenges. It is nevertheless worth noting this situation, given that before MFN treatment is extended to the EC by Jamaica, Brazil might conceivably show a trade impact, since market participants might view EC litigation and extension of MFN treatment as likely and make market decisions accordingly.

- *Brazil can challenge the EPA's MFN clause using this argument in the event that Brazil concludes an FTA with Jamaica and Jamaica elects to extend MFN treatment to the EC.*

53. Brazil's Enabling Clause argument in a scenario where Jamaica extends MFN treatment in conformity with its EPA obligations bears striking similarity to the "as such"

countries [shall] be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries."

claim, the first scenario discussed under this argument. Brazil might argue that it, as a developing country, must be able to enjoy a right to differential and more favourable treatment through the establishment of an FTA with Jamaica. Its right is illustrated in part by paragraph 2(c) of the Enabling Clause. Extension of MFN treatment to the EC, a developed Member, violates Brazil's right to conclude these special agreements and extinguishes its right to differential and more favourable treatment. The EC and its trading partners cannot bilaterally affect Brazil's right by establishing an MFN clause in their EPA.

b. The EPA's violation of the GATT MFN clause cannot be justified under GATT Article XXIV because Article 19(2) raises a barrier to trade and/or in effect leads to "higher or more restrictive" trade policies than existed prior to the EPA vis-à-vis third states like Brazil.

54. As noted in Section A, there are several requirements to Article XXIV, which provides an exception to the GATT MFN clause by allowing Members to conclude customs unions and FTAs. For our purposes, the FTA requirements are at issue since EPAs establish FTAs, not customs unions. Article XXIV:4 provides that the purpose of FTA's "should be to facilitate trade between the constituent territories and not to *raise barriers* to the trade of other contracting parties with such territories" (emphasis added). The preamble of the *Understanding on Article XXIV* reaffirms this statement and further specifies that the constituent members should "to the largest possible extent avoid creating adverse affects on the trade of other Members". To this end, the AB considered that paragraph 4 "sets forth the overriding and pervasive purpose for Article XXIV" which "informs the other relevant paragraphs of Article XXIV".⁴¹ The AB stated that a "customs union should facilitate trade within the customs union, but it should *not* do so in a way that raises barriers to trade with third countries".⁴² Given that Article XXIV:4 applies equally to free trade agreements and customs unions, the AB's observation on this provision is applicable to FTAs.

55. Another requirement is Article XXIV:5(b), which provides that the duties and other regulations of commerce maintained by parties to an FTA shall not be higher or more restrictive than the corresponding duties and other regulations of commerce applied to the trade on Members not party to the FTA existing in the same constituent territories prior to the

⁴¹ Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, para. 57.

⁴² *Ibid.*

formation of free-trade area. In other words, both the EC and Jamaica must ensure that their trade policies vis-à-vis Brazil do not impose higher or more restrictive duties and other regulations than existed prior to the formation of the EPA.

56. Article XXIV:8(b) is another requirement, providing that “the duties and other restrictive regulations of commerce [are to be] eliminated on *substantially all the trade* between the constituent territories” of the FTA (emphasis added). While an agreement has never been reached on the term “substantially”,⁴³ the EPA provides for the liberalization of 80% of trade over 15 years. This likely meets a “substantially all... trade” requirement, and as such, our arguments focus on Articles XXIV:4 and XXIV:5(b).

Scenarios:

- *Brazil can make this challenge against the EPA as such, regardless of any FTA between itself and Jamaica*

57. In regards to GATT Article XXIV:4, Brazil might argue that the MFN clause raises a barrier to trade between Jamaica and Brazil. Similarly, GATT Article XXIV:5(b) might be relied on to indicate that the EPA’s MFN clause leads to “higher or more restrictive” trade policies against Brazil because it significantly reduces the likelihood that Jamaica and Brazil will conclude an FTA. Jamaica will be less willing to enter an FTA with Brazil knowing that any additional concessions it gives to Brazil must then be given also to the EC.

58. Brazil might wish to argue that Articles XXIV:4 and 5(b) must be interpreted in light of the objectives and purposes of the WTO, which include trade liberalization and development objectives.⁴⁴ Article 31 of the *Vienna Convention on the Law of Treaties* (VCLT) directs a Panel to interpret Article XXIV with reference to the objectives and principles of the WTO. Consequently, any interpretation of Article XXIV in the present context must take account of the right of developing countries to form regional trading arrangements, in line with the WTO’s principles and objectives which are facilitative of trade including with respect to developing countries.⁴⁵ The chilling effect cast by the EPA’s Article 19(2) in conjunction with Article 19(4) has the effect of “raising a barrier” and effectively leading to “higher or more restrictive” trade policies. In other words, by discouraging Brazil from potentially entering into an FTA with Jamaica, an FTA which is otherwise viewed as

⁴³ *Ibid*, para. 48.

⁴⁴ WTO Agreement, Second Recital. The notion is repeated in GATT 1947 Article XXXVI:3.

⁴⁵ GATT 1947, Article XXXVI; WTO Agreement, Second Recital

facilitative of trade,⁴⁶ the EPA's MFN clause prevents increased trade between Brazil and Jamaica. From this perspective, it might be argued that the MFN clause "raises a barrier" to trade in violation of Article XXIV:4 and, possibly, establishes "higher or more restrictive" trade policies.

59. The arguments are susceptible to a strong counter from the EC, also incorporating the principles and objectives of the WTO. The EC will argue that the MFN provision does not "raise a barrier" to trade, nor does it impose "higher or more restrictive" trade policies. First, the MFN clause is designed to lower trade barriers and does exactly that, by enshrining the possibility of barriers evolving lower over each subsequent agreement signed by Jamaica with any "major trading economy", including Brazil. The fact that the EC is accorded non-discriminatory treatment as between Jamaica and Brazil, with which Jamaica might conclude an FTA, is in keeping with the general GATT Article I:1 MFN provision. Second, in regards to the Article XXIV:5(b) requirement that no "higher or more restrictive" trade policies be put in place, the EC will likely point out that this requirement references those policies that existed "prior" to the establishment of the EPA. Therefore, any argument that an EPA might reduce the likelihood of new FTAs being created indicates only that Jamaica's trade policies are more restrictive than would *otherwise* be the case. The EPA therefore meets the test. Absent some additional evidence showing, for example, that Jamaica has changed its trade policies toward non-EPA parties in more restrictive way, these arguments are likely to be unsuccessful.

- *Brazil will not be able to make this challenge if it concludes a trade agreement with Jamaica*

60. If Brazil shows that it is able to conclude an agreement with Jamaica, it will render spurious any allegation that GATT Articles XXIV:4 and XXIV:5(b) are not met. Brazil's argument in an "as such" claim, one made against the EPA "as such" regardless of whether an FTA has been concluded with Brazil, could be very difficult to make if Brazil and Jamaica conclude an FTA. In that event, it would difficult for Brazil to say that an agreement with Jamaica is less likely when there is in fact an agreement. Consequently, it would need to rely on an argument that MFN treatment is a barrier to trade. At this stage, the EC would have

⁴⁶ GATT Article XXIV:4 recognizes "the desirability of increasing freedom of trade by the development... of close integration between the economies of the contracting parties to such agreements."

recourse to the strong counter-arguments discussed above in the scenario immediately preceding this one (i.e. the Brazilian “as such” challenge).

○ *Brazil may make this challenge if Jamaica concludes an FTA with Bangladesh*

61. If Jamaica and Bangladesh conclude an FTA with one another, the GATT Article XXIV:4 and 5(b) arguments used by Brazil to challenge the EPA’s MFN on its face may be employed by Brazil as against either Jamaica or the EC. While it shows that the EPA’s MFN clause does not “raise a barrier” or render more restrictive trade policies vis-à-vis all less-developed countries, the complaint from a less-developed “major trading economy” meeting the Article 19(4) threshold, like Brazil, remains valid. However, if Brazil intends to conclude an FTA with Jamaica, Brazil is unlikely to make a claim against Jamaica since targeting a future FTA partner for a WTO violation in a related matter is likely in conflict with Brazil’s interest. Besides, the EC is available as a target for litigation.

c. The EPA’s “major trading economy” threshold in EPA Article 19(4) violates GATT Article I (MFN) and cannot be justified under the Enabling Clause, paragraph 2(a) because it is not “objective”.

62. Another argument is available to Brazil on the basis of GATT Article I (MFN) and paragraph 2(a) of the Enabling Clause, the provision which allows developed countries to give preferences to products originating from developing countries. Brazil might bring a challenge against Article 19(4), which defines “major trading economy” as any individual country with 1% or any group of countries with 1.5% of world merchandise exports. It could argue that Article 19(4) discriminates between countries like Brazil and other developing countries in violation of GATT Art. I (MFN) and that this discrimination cannot be justified by the Enabling Clause as it does not conform to the Enabling Clause, paragraph 2(a). The argument is relevant because the Enabling Clause is the only way for countries to discriminate between non-parties to an agreement. Therefore, while the EC will attempt to justify the EPA in accordance Article XXIV, Article XXIV cannot be used to allow non-parties to the EPA to be differentially treated vis-à-vis one another. This would violate the GATT Article I:1. Paragraph 2(a) of the Enabling Clause must be implicated if the differential treatment on inherent in Article 19(4) (the major economy threshold) is to be ruled valid. In other words, Brazil can point out that the 1% discriminates between it and other developing countries, and therefore must meet the requirements of Enabling Clause’s paragraph 2(a).

63. Paragraph 2(a) requires several things: the product must originate in developing countries; preferential tariff treatment must be given by developed countries in accordance with the Generalized System of Preferences; and, the preferences must be generalized, non-reciprocal and non-discriminatory. While discrimination between developing country beneficiaries is permissible, the criteria selected to determine differentiation must be “objective” and reflect “similarly-situated GSP beneficiaries”.⁴⁷ The Appellate Body, in *EC – Tariff Preferences* stated things succinctly:

We have concluded, contrary to the Panel, that footnote 3 and paragraph 3(c) do not preclude the granting of differential tariffs to different sub-categories of GSP beneficiaries, subject to compliance with the remaining conditions of the Enabling Clause. We find, therefore, that the term ‘developing countries’ in paragraph 2(a) should not be read to mean ‘all’ developing countries and, accordingly, that paragraph 2(a) does not prohibit preference-granting countries from according different tariff preferences to different sub-categories of GSP beneficiaries.⁴⁸

64. In bringing this claim against the EPA’s Article 19(4), Brazil will need to raise a violation of the GATT MFN Clause and state specifically that it considers the measure not justified through paragraph 2(a) of the Enabling Clause. While the AB characterized the Enabling Clause paragraph 1 as an exception,⁴⁹ it also considered the “fundamental role of the Enabling Clause” as “dictating a special approach” which demanded departure from the allocation of burden of proof that exceptions traditionally require.⁵⁰ A claimant alleging inconsistency with the Enabling Clause must, when requesting the establishment of a panel, identify which obligations in the Enabling Clause have been contravened and make written submission in support of this allegation.⁵¹

65. Brazil in raising this complaint, might argue that the 1% threshold of a “major trading economy” is discriminatory and cannot be justified under paragraph 2(a). While the EC may make determinations as to which countries it gives differential and favourable treatment to, assuming the criteria by which Members are selected are “similarly-situated GSP beneficiaries”,⁵² in the sense that they are less-developed members with development financial and trade needs to which additional preferential tariff treatment is intended to

⁴⁷ Appellate Body Report, *EC – Tariff Preferences*, para. 187

⁴⁸ *Ibid.*, para. 175.

⁴⁹ *Ibid.*, para. 90.

⁵⁰ *Ibid.*, para. 106.

⁵¹ *Ibid.*, para. 118.

⁵² *Ibid.*, para. 187

respond,⁵³ the 1% threshold is arbitrary and discriminatory in the sense that it takes no account of relevant matters to determine whether states are “similarly-situated”.

66. This argument is strong, but remains somewhat uncertain. In *EC – Tariff Preferences*, the leading case on the matter, the AB offered no specific guidance as to appropriate objective criteria or standards to determine whether selected countries are “similarly-situated”.⁵⁴ The reason for this gap in the case law is because the EC, the responding party in the case, provided no criteria or standards by which the impugned measures were to be applied, so no criteria or standards could be clearly assessed by the AB.⁵⁵ At the same time, the decision does shed some light on the issue. In *EC – Tariff Preferences*, the measures were meant to address the “drug problem” related to drug production and trafficking.⁵⁶ The fact that a country could remain a beneficiary even if no longer suffering from this problem became one ground for finding a lack of objective criteria.⁵⁷ In the EPA context, there are several things which suggest this approach might give rise to a relatively strong argument. From Brazil’s perspective, the EPA’s Article 19(4) threshold captures countries which are not similarly-situated in regards to the EPA’s objective of improving development through trade, or in line with sustainable development goals. The 1% threshold might exclude similarly-situated countries independent of the EPA’s goals, discriminating between developing countries without any objective criterion. The threshold is arguably arbitrary because it applies independent of the development needs of a particular state, whose share of world merchandise exports might depend not on its “development, financial and trade needs”, as required by paragraph 2(a), but on something else entirely such as population size.

67. From the EC’s point of view, the 1% criterion is a clear standard. It must nevertheless relate to the “trade needs” of the beneficiaries. Exploring these perspectives in context provides better insight.

68. As noted, the CARIFORUM-EC EPA is notified under GATT Article XXIV. While Article XXIV provides an exception to GATT Article I (MFN), ensuring the legality of preferential treatment among EPA parties vis-à-vis other WTO Members, it does not permit discrimination between WTO Members which are not party to the EPA. Therefore, the most relevant scenarios in this regard are a complaint by Brazil against the provision “as such” and

⁵³ *Ibid*, para. 173; see also Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge: Cambridge University Press, 2005, p. 682.

⁵⁴ *Ibid*, para. 183.

⁵⁵ *Ibid*, para. 188.

⁵⁶ *Ibid*, para. 29.

⁵⁷ *Ibid*, para. 183.

in the event of an FTA between Jamaica and a third party not meeting the 1% threshold, like Bangladesh. The similarities in the arguments in each scenario are striking. It is useful, however, to consider the latter scenario because it provides more detail.

Scenarios:

- *Brazil may make this challenge if Jamaica concludes an FTA with Bangladesh*

69. If Jamaica and Bangladesh conclude trading arrangements, the EPA's MFN treatment might violate Article 2(a) of the Enabling Clause. While the EC might attempt to argue that the EPA's MFN clause is justifiable under Article XXIV, Brazil may point out that Article XXIV only allows preferential treatment among EPA parties vis-à-vis all other WTO members. In the Jamaica-Bangladesh FTA scenario, there is discrimination in that Brazil and Bangladesh, both non-parties to the EPA, are not subjected to the same treatment by virtue of the Article 19(4) threshold. Consequently, the GATT Article I:1 is violated.

70. Brazil, in accordance with the case law, will need to make a written submission indicating that the measure is not justified under paragraph 2(a) of the Enabling Clause.⁵⁸ In other words, the only permissible way to discriminate *between* third parties to the EPA is on the basis of the Enabling Clause. Furthermore, the only mechanism available to the EC to justify the discrimination is paragraph 2(a) of the Enabling Clause, which relates to preferential arrangements between developed and developing countries. Brazil must point this out to prompt a response by the EC. It might say that the EPA's Article 19(4) threshold discriminates against similarly-situated countries and this criterion is not objective in light of the development goals of the EPA. According to the Appellate Body, as long as the conditions set out in the Enabling Clause are not met, other WTO Members can invoke the right to MFN treatment, so a claim is open to Brazil.⁵⁹

71. As noted elsewhere in various place, the EC constitutes the most likely target for Brazilian litigation on the matter and consideration of the EC's counter-arguments is warranted. The EC might attempt to argue that the measure is justifiable on grounds "that the term 'developing countries' in paragraph 2(a) should not be read to mean 'all' developing countries and, accordingly, that paragraph 2(a) does not prohibit preference-granting countries

⁵⁸ *Ibid.*, para. 118.

⁵⁹ This can be inferred by an *a contrario* reading of the Appellate Body's following findings: "we cannot agree with India that the right to MFN treatment can be invoked by a GSP beneficiary vis-à-vis other GSP beneficiaries in the context of GSP schemes that meet the conditions set out in the Enabling Clause" (*EC – Tariff Preferences*, para 166).

from according different tariff preferences to different sub-categories of GSP beneficiaries”.⁶⁰ The world merchandise export threshold of 1% constitutes a reasonable way to differentiate between subcategories and create beneficiaries that are “similarly-situated in regards to their ‘development, financial and trade needs’ to which the treatment in question is intended to respond.”⁶¹ The appropriate standard to determine whether developing countries are similarly situated must be objective and the percentage share of world merchandise exports reflects the development goal of the EPA.

72. As noted earlier in this section, there currently exists no specific case law on what exactly constitutes “objective” criteria. However, *EC – Tariff Preferences* suggests a context-sensitive approach, with attention paid to, for example, the objectives of the differential policy. The 1% of world merchandise exports suggests a degree of objectiveness. Yet the threshold might be susceptible to the argument that the 1% criterion is overly formal and not really “objective” in light of the case law. In other words, it does not keep with the underlying rationale of the Enabling Clause (for a discussion on the underlying rationale, see paragraphs xxxx), which requires that Article 19(4) threshold applies to countries “similarly-situated” mindful of the fact that the provision is meant to respond to the development, financial, and trade needs of those similarly-situated developing countries.

73. Consequently, Brazil might counter with the argument that the threshold is arbitrary. Factors like population size might affect the level of merchandise exports from a country, independent of the “development, financial and trade needs” of developing countries. The threshold appears designed to insulate the EC from major developing country competitors,⁶² which is not the basis of the underlying policy rationale behind the Enabling Clause. The EPA’s Article 19(4) threshold does not respond to the trade needs of members, which is required for the measure to be justified by the Enabling Clause. Brazil will have recourse to the Appellate Body’s decision in *EC – Tariff Preferences* in support of this assertion.⁶³

74. In light of the above, we can assess this argument as fairly strong, albeit somewhat risky given the gaps in the case law.

⁶⁰ *Ibid*, para. 175.

⁶¹ *Ibid*, para. 173.

⁶² See the comments of the EC Trade Commissioner, *Supra* note 18.

⁶³ Appellate Body Report, *EC – Tariff Preferences*, para. 173.

d. In the event that any of Brazil's arguments showing a violation are unsuccessful, an alternative claim is possible. A non-violation complaint may be brought to enforce the "spirit" of WTO rules, including for example, in regards to the Enabling Clause.

75. Should the various arguments attempting to show a WTO violation prove unsuccessful, a non-violation complaint might be made in accordance with GATT Article XXIII(b), which states the following:

If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of ... (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, ... the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

It is advisable to use this avenue of redress in the alternative, since there are indications from the Appellate Body that this remedy is "exceptional".⁶⁴ If Brazil, for example, fails to establish a claim that the EPA's MFN clause violates its right to make regional trading arrangements between itself and Jamaica, a benefit that it expects from the Enabling Clause is still being "nullified or impaired". In other words, Brazil might attempt to file a claim against the EC for violating the "spirit" of the Enabling Clause while conforming to the strict letter of the law.

76. While nullifying or impairing a benefit is strongly presumed in cases where a violation occurs, meaning that in practical terms it need not be proven, in the case of a non-violation complaint, nullification or impairment must be proven.

77. In *Japan – Film*, the Panel provided for a three-stage test based for Article XXIII:1(b), writing the following:

The text of Article XXIII:1(b) establishes three elements that a complaining party must demonstrate in order to make out a cognizable claim under Article XXIII:1(b): (1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure.⁶⁵

78. Following this logic, it is possible to regard the EPA's MFN provision as a "measure" taken by the EC (or indeed by CARIFORUM Members). A measure has been defined

⁶⁴ Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, para. 186. As a Panel noted in *Japan – Film*, "The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules." (para. 10.37).

⁶⁵ *Ibid*, para. 10.41.

relatively broadly,⁶⁶ and while not every “utterance” of a public official will constitute a measure, there is no doubt that the EPA’s MFN clause is a measure.

79. At the second step, the benefit that might accrue under a relevant agreement is, for example, Brazil’s expectation to differentiated or more favourable treatment as set out in Enabling Clause (even if it were defined only as an exception and not as a self-standing right) or, indeed, that Brazil will be able to conclude agreements without barriers or more restrictive trade policies being put in place. In the latter case, this would suggest that even if no barrier or more restrictive policies are established as existed “prior” to the FTA (and required for a violation of Article XXIV:5(b) to occur), the EPA’s MFN provision nevertheless frustrated a benefit which Brazil legitimately expected to receive under WTO law. In other words, the chilling effect of the MFN clause contained in the EPA might have a non-violation component. This is the most difficult of the three steps for the complaining party to establish. It is for the party asserting the non-violation claim to show that “the claimed benefit has been that of a legitimate expectation of improved market-access opportunities arising out of the relevant tariff concessions.” For example, if the EPA’s MFN clause upsets the competitive relationship between Brazil and the EC, Brazil might have a claim. Brazil originally enjoyed a legally enhanced position because of a right exemplified by paragraph 2(c) of the Enabling clause. Brazil legitimately expects to enjoy the right of trading among developing countries, like Jamaica, without needing to extend those benefits to developed countries. Further, Brazil could assert that the EPA’s MFN clause could not reasonably have been anticipated by Brazil and a non-violation wrong occurred.⁶⁷

80. However, the EC might argue in accordance with observations contained in *Japan – Film* that the measure taken, which is the MFN clause in the EPA, “could have been reasonably anticipated at the time of the concession” of more favourable treatment toward developing countries. It might raise similar counter-arguments in a non-violation context as it raised in a violation context; namely, that Article XXXVI:3 states “the need for positive efforts designed to ensure that less-developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development.”⁶⁸ In addition, as noted, the AB has indicated that the Enabling Clause does not prohibit distinguishing between sub-categories of countries receiving preferences. With Brazil, “commensurate with its needs”, no longer requires differential and favourable treatment. In

⁶⁶ *Ibid*, para. 10.43.

⁶⁷ *Ibid*, para. 10.73; *Australian Subsidy on Ammonium Sulphate*, BISD II/188, para. 12.

this scenario, the EC might add that at the time the WTO was concluded, there was no legitimate expectation that “positive efforts” in regards to less-developed Members would remain a static concept.

81. Brazil might find it difficult to meet this issue on a “non-violation” basis. However, it could be argued that the competitive relationship was upset and this relationship, embodied through positive efforts, creates a legitimate expectation. It is not reasonable, Brazil could argue, to expect that more favourable treatment is displaced by an MFN clause similar to Article I:1, from which the specific positive efforts and other matters referred to in Article XXXVI are meant to depart.

81. At a third stage, Brazil might argue that its benefit to differential or more favourable treatment is nullified or impaired *as a result of* the MFN clause. This essentially means that the measure must be shown to have caused the nullification and impairment.⁶⁹ In this case, Brazil’s expectation of differential and more favourable treatment is disrupted by the EPA’s MFN clause.

H. *The EPA's dispute settlement procedures*

82. Article 212(2) suggests that forum-shopping is permissible and that Jamaica will be able to bring a claim to the WTO if so desires. It states the following:

Recourse to the dispute settlement provisions of this Agreement shall be without prejudice to any action in the WTO framework, including dispute settlement action. However, where a Party or Signatory CARIFORUM State has, with regard to a particular measure, instituted a dispute settlement proceeding, either under Article 206(1) of this Part or under the WTO Agreement, it may not institute a dispute settlement proceeding regarding the same measure in the other forum until the first proceeding has ended. For purpose of this paragraph, dispute settlement proceedings under the WTO Agreement are deemed to be initiated by a Party or Signatory CARIFORUM State’s request for the establishment of a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO. (emphasis added)

In the WTO context, Jamaica might make arguments similar to Brazil’s arguments presented under Sections G.a and G.c.. The purpose of this section, however, is to examine Jamaica’s options as an EPA party.

83. The EPA's dispute settlement procedure is threefold. It first provides for an obligation to consult⁷⁰ and offers the option to enter mediation.⁷¹ More importantly, Article 19(5) provides for a layer of consultation specifically geared to the question of whether the EC should have MFN treatment extended to it in the case of any more favourable treatment given

⁶⁸ GATT 1947 Article XXXVI :3.

⁶⁹ Panel Report, *Japan – Film*, para. 10.82.

⁷⁰ CARIFORUM-EC EPA, Article 204(1).

⁷¹ *Ibid*, Article 205(1).

by Jamaica to Brazil. This procedural mechanism provides Jamaica with a less adversarial alternative dispute resolution process. In this context, Jamaica might find some arguments used by Brazil in the preceding sections of rhetorical value. In addition, the duty to consult, as a duty, cannot be an empty promise. It is possible that on good faith consultations, the political and policy force of some of the legal arguments expressed in this and preceding sections might be enough to compel the EC to mitigate a literal, or black letter, application of the terms of the EPA. In other words, Article 19(5) might provide the possibility to pressure, even embarrass, the EC into adopting a more moderate approach. For example, the argument that a developing Member of the WTO has the right to differential treatment and can enter into FTAs with other developing Members without extending the MFN clause to those developed Members might be asserted rather easily at the consultation level. With respect to any defences offered by Jamaica (and discussed below), these arguments might potentially gain greater traction in a relatively informal procedure. In litigation, the argument might potentially undermine the partnership and create less temperate climate for future agreements between the EC and the ACP EPA participants.

84. From a pragmatic standpoint, the EC would probably be less willing to forebear on arbitration where it saw a direct economic competitor achieving a competitive advantage based on preferential market access. Yet consultations could play a role in negotiating a practical and creative outcome like phasing-in MFN treatment after several years of a particular agreement. The usefulness of Article 19(5)'s consultation process should not be overlooked.

85. In last resort, the CARIFORUM-EC EPA dispute settlement procedures provide for the establishment of an arbitration panel⁷² with definitive authority.⁷³ The EPA arbitration procedure is open to EPA members only, excluding both Bangladesh and Brazil from the panel's jurisdiction. Jamaica is unlikely to introduce a claim before the arbitration panel, but the EC might. The final legal question is whether Jamaica has recourse to outside rules, including WTO rules, to make a defence to any EPA-based claims brought against it.

Scenarios:

86.. Considering the limited circumstances in which EPA considerations apply, it is possible to consider arguments and scenarios simultaneously. The main scenarios at issue are

⁷² *Ibid*, Article 206.

⁷³ *Ibid*, Article 210.

a Jamaica-Brazil FTA where Jamaica refuses to extend to the EC the MFN treatment it gave to Brazil. The other scenario is a Jamaica-Brazil FTA where Jamaica does extend MFN treatment to the EC. In the latter case, Jamaica is not in breach of the EPA, but must still bear in mind some practical consideration (discussed at the end of this section). The first scenario is more controversial, since it is the situation where the EPA's dispute settlement procedures are likely to be triggered. In this context, the EC would possibly challenge Jamaica as being in violation of the EPA (Article 19(2), EPA's MFN clause, in conjunction with Article 19(4), "major trade economy" definition).⁷⁴ The scenario as it is explored below, assumes that the Article 19(5) obligation to consult has proved fruitless. However, as discussed at the beginning of this section, this will not necessarily be the case and the consultation mechanism remains a powerful tool at Jamaica's disposal.

87. Jamaica will find itself on the defensive. The EC must show how the failure to extend the MFN treatment is incompatible with the EPA,⁷⁵ which at first sight should not be difficult. Jamaica must show that its failure to extend MFN treatment is justified. In this connection, it might be possible to raise WTO rules as a defence to an EPA-based complaint brought by the EC if the EPA might be regarded as *lex specialis* vis-à-vis WTO law.⁷⁶ This view is supported by the fact that certain "cross-cutting" norms of the WTO appear to form a *lex generalis* of sorts: "Indeed, the WTO forms a general and increasingly universal framework for all (or almost all) of the trade relations between states."⁷⁷ Notification of the EPA under Article XXIV of the GATT supports this view.

88. While the EPA excludes the possibility of adjudicating disputes between EPA parties under the Agreement establishing the WTO,⁷⁸ the EPA is silent on whether rights arising from the WTO can be invoked before an EPA panel. In other words, there is no question that Jamaica cannot formulate an EPA-based claim on WTO rules, but it might be able to use defences at WTO law in the EPA setting if the defences apply to the facts and circumstances of the EPA dispute.⁷⁹ The possibility of invoking WTO rules before an EPA Panel is supported by evidence that the EPA is not a self-contained regime. Article 212(2) indicates that forum-shopping is permissible, suggesting that the parties to the EPA did not contract out

⁷⁴ *Ibid*, Article 206(2).

⁷⁵ *Ibid*, Article 212(2)

⁷⁶ This argument is an adaptation from Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?", *AJIL* 95:3, July 2001, 535, p. 539.

⁷⁷ *Ibid*, p. 539.

⁷⁸ CARIFORUM – EC EPA, Article 221(1).

⁷⁹ Adapted from Joost Pauwelyn, "How Far Can We Go?", p. 560

of WTO norms.⁸⁰ Moreover, Article 219 requires that EPA “Arbitration panels... interpret the provisions of this Agreement in accordance with customary rules of interpretation of public international, including those set out in the Vienna Convention on the Law of Treaties” indicating that pre-existing rules of general international law can apply.⁸¹ In light of the silence elsewhere in the EPA, it is possible that Jamaica might attempt to invoke WTO rules as defences.

89. Jamaica might make several arguments. First, it could argue that paragraph 2(c) of the Enabling Clause creates a right, which it did not sign away with the EPA. Given the wording of Articles 19(2) and 19(4), and the consensual nature of the EPA, this is not likely to be successful because it is clear from the definition of “major trading economy” that developing countries are targeted..

90. Another argument, based on Article 2(a) might be more successful. Jamaica could argue that the 1% threshold should not be interpreted independently of WTO law. Indeed, Article 219 requires that EPA “Arbitration panels... interpret the provisions of this Agreement in accordance with customary rules of interpretation of public international, including those set out in the Vienna Convention on the Law of Treaties.” VCLT Article 31(c) mandates that a treaty interpreter take into account “any relevant rules of international law applicable in the relations between the parties”. Consequently, the 1% threshold must not be interpreted in isolation of the various requirements of the WTO rules on the issue, and the question as to whether the threshold applies to all similarly-situated countries as established by objective criteria or standards applies. (See discussion at sub-section G.c). In short, for these criteria and standards to be “objective”, some connection to the development objectives of the EPA is likely required. The 1% threshold must be determined in light of any considerations of the “development, financial and trade needs” of members, There might be grounds for not extending MFN treatment to the EC for concessions made by Jamaica to Brazil if it can be shown that the 1% threshold should not apply because Brazil is “similarly-situated” to other countries not subjected to the 1% threshold. Again, the plain terms of Articles 19(2) and 19(4) and the consensual nature of the EPA mean that making this argument is a daunting task. But Jamaica might attempt to argue that the EPA cannot be an “exit option” from special treatment guaranteed developing countries under WTO law.⁸²

⁸⁰ Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, Cambridge: Cambridge University Press, 2003, p. 475

⁸¹ Pauwelyn, “How Far Can We Go?” p. 540.

⁸² See more generally, Pauwelyn, *Conflict of Norms*, p. 476.

91. A third argument might be made, also on the basis of Article 2(a), whereby Jamaica could attempt to invoke VCLT Article 41(1)(b)(i), which provides that multilateral treaty may only be modified by a successive agreement if it “does not affect the enjoyment by the other parties of their rights under the treaty.” As mentioned, it can be argued that the EPA affects Brazil’s right to differential and more favourable treatment provided by WTO law, arguably modifying its rights. However, given that Brazil is not a party to the dispute, the argument is unlikely to have success since there is no reason for an EPA panel to rule on a third party’s rights. Jamaica’s argument probably also contravenes the principle of good faith, especially since Article 19(4) setting the definition of “major trading economy” does so in a way that specifically targets developing states, setting a threshold which Jamaica knew would implicate the rights of less-developed Members.

92. Finally, it might be observed that even if these arguments are currently unsuccessful, the possibility of new agreements emerging in the WTO context might give rise to a future situation where the “landscape” of norms applicable to the EPA is changed.⁸³ In other words, modifications to any rights of developing countries could over time either strengthen Jamaica’s defensive arguments or create new defences since the EPA is situated within a body of international law which is evolving.

93. Finally, from a purely practical standpoint, it is worth considering how Jamaica’s options play out if it concludes a trade agreement with Brazil. It could either extend or not extend MFN treatment to the EC. If it fails to extend MFN treatment to the EC, it will be in breach of obligations it owes the EC through the EPA’s MFN provision. At the same time, Brazil will likely be unwilling to challenge the EPA’s MFN clause since it would enjoy differential and more favourable treatment. Therefore, for Jamaica, it is advisable to extend to the EC any more favourable treatment that it gives to Brazil, assuming that Jamaica and Brazil conclude an FTA. Any breach of the EPA’s MFN provision is likely to be short-lived in the face of probable EC litigation within the EPA. Consequently, the most likely scenarios for challenging the MFN clause in the EPA is through a Brazilian challenge against it as such or in the event of a Jamaica-Brazil FTA where Jamaica extends MFN treatment to the EC. In such situations, the possibility that Brazil will bring a complaint against Jamaica as a less-developed trading partner is low. It also eliminates the possibility that Jamaica could be the subject to two proceedings: from the EC to obtain MFN treatment and, assuming this is successful, from Brazil for breach of WTO law. At the same, Brazil might pursue its WTO

rights by filing a complaint against the EC. If Jamaica wishes to challenge the EPA's MFN provision, this is an indirect route by which it could do so, using Brazil as a 'proxy' for its litigation attacking the clause.

I. Conclusions

94. As the above discussion makes clear, there are numerous arguments, options and considerations to be made in undertaking any challenge of the MFN clause contained in the EC-CARIFORUM EPA. Brazil clearly has the most options and best arguments available to it for challenging the provision. Several conclusions can be drawn about the best courses of action for both Brazil and Jamaica.

95. A relatively good argument available to Brazil is that paragraph 2(c) of the Enabling Clause contains a self-standing right to preferential "[r]egional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs". Brazil can use this to either challenge the EPA as such, independent of any FTA with Jamaica or, in case an FTA between Jamaica and Brazil has been concluded whereby Jamaica extends MFN treatment to the EC. In either case, Brazil will have an interest in pursuing a claim so as to realize its right to differential and more favourable treatment in accordance with the Enabling Clause paragraph 2(c). In examining the requirements of Article XXIV, it is likely the EPA is compliant with them, since the EC can argue that not only does the MFN clause not set higher or more restrictive trade policies than those prior to the EPA but it does not raise a barrier to trade. Rather, the EC might argue that the EPA's MFN clause constantly lowers barriers by establishing a rule that has the potential to continually reduce tariffs on an ongoing basis. Nevertheless, Brazil may argue that Articles XXIV:4 and 5(b) must be interpreted in light of the objectives and purposes of the WTO, including trade liberalization and development.⁸⁴ Any interpretation of Article XXIV must take account of the right of developing countries to form regional trading arrangements, in line with the WTO's principles and objectives.⁸⁵ The EPA's MFN Clause casts a chill on trade agreements between developing countries and has the effect of "raising a barrier" and effectively leading to "higher or more restrictive" trade policies. We also investigate whether specific provisions of the EPA can or must be justified by its parties (for example, the EC) according to the Enabling Clause paragraph 2(a). We argue that since the EPA's Article 19(4) threshold discriminates

⁸³ *Ibid*, p. 475.

⁸⁴ WTO Agreement, Second Recital. The notion is repeated in GATT 1947 Article XXXVI:3.

between developing countries, it cannot be justified under Article XXIV. Article XXIV requires that all non-parties to an FTA (or customs union) be given MFN treatment in accordance with Article I:1 of the GATT. Consequently, Brazil can raise a claim that the discrimination between developing countries must be justified under Article 2(a) of the Enabling Clause. In this respect, Brazil might make a relatively strong argument that the 1% threshold in Article 19(4) does not provide an objective criterion by which to determine whether a country getting beneficial treatment (i.e. not subject to the threshold) is similarly-situated. We also conclude a non-violation complaint might be possible, but the argument is relatively weak and best left in the alternative.

96. In relation to considerations and options in the EPA context, we conclude simply that a party to the EPA is likely to be bound by the terms of the agreement. However, Jamaica might be able to make a defence based on general WTO rules. In this regard, a defence founded on paragraph 2(a) of the Enabling Clause is likely the strongest such defence. Jamaica might argue that, in the event of an FTA agreement with Brazil, Brazil is similarly-situated with other developing countries falling below the 1% threshold from a development perspective. The 1% threshold must not apply to Brazil, and MFN treatment should not be extended to the EC. We also suggest that, practically-speaking, a less-developed party, such as Jamaica still has a choice of extending or not extending MFN treatment; that is, it might elect to respect or violate the terms of the EPA. This choice arguably gives rise to considerations about potential liability at WTO law to a less-developed country like Brazil, or liability in the EPA vis-à-vis its EPA partner, the EC. We conclude that it is advisable for a country like Jamaica to extend MFN treatment, respecting the terms of the EPA, since it is less likely that a less-developed country not a party to the EPA, say Brazil, will choose to challenge Jamaica rather than the EC. Jamaica could enjoy the benefits of any Brazilian litigation, assuming it would regard an attack on the EPA's MFN clause as a benefit. Nevertheless, should Jamaica elect not to extend MFN treatment, it still has a potentially powerful tool to use before extending MFN treatment to the EC, which is the obligation that the EC has to consult with Jamaica on whether MFN treatment should be extended. This provides an opportunity for a diplomatic solution.

⁸⁵ GATT 1947, Article XXXVI; WTO Agreement, Second Recital

Appendix I : The East African Community Partner States – EC Framework Agreement

1. The *Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part* (ESA – EC Agreement) is expected to be signed in June 2009.⁸⁶ It provides for one hundred percent liberalization of value by the EU as of January 1st, 2008, with transitional periods for sugar and rice, and an incremental liberalization of imports from the EU for the East and Southern Africa partners by 2022.

2. The ESA – EC Agreement provides for an MFN clause similar to the one enshrined in the EC – CARIFORM EPA. The scope for MFN treatment in the ESA – EU Agreement is nevertheless narrower since, unlike the EC – CARIFORUM EPA, there are no parallel MFN provisions in respect to services. Therefore, the MFN clause applies only to goods.

Article 16 of the Agreement provides that:

1. With respect to the subject matter covered by this Chapter, the EC Party shall accord to the Signatory ESA States any more favourable treatment applicable as a result of the EC Party becoming party to a free trade agreement with third parties after the signature of this Agreement.
2. With respect to the subject matter covered by this Chapter, the Signatory ESA States shall accord to the EC Party any more favourable treatment applicable as a result of the Signatory ESA States becoming party to a free trade agreement with any major trading economy after the signature of this Agreement.
3. The provisions of this Chapter shall not be so construed as to oblige the Parties to extend reciprocally any preferential treatment applicable as a result of one of them being party to a free trade agreement with third parties on the date of signature of this Agreement.
4. The provisions of paragraph 2 shall not apply in respect of trade agreements between Signatory ESA States with other African countries and regions.
5. For the purposes of this Article, "free trade agreement" means an agreement substantially liberalising trade and providing for the absence or elimination of substantially all discrimination between or among parties thereto through the elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time frame.
6. For the purposes of this Article, "major trading economy" means any developed country, or any country accounting for a share of world merchandise exports above 1 percent 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 a free trade agreement accounting collectively for a share of world merchandise exports above 1,5 percent in the year before the entry into force of the free trade agreement referred to in paragraph 2.

3. Like the CARIFORUM – EC EPA, this provision is time constrained, since it only applies to an FTA the ESA states would enter into after the signature of the Agreement.

⁸⁶ <http://www.acp-eu-trade.org/index.php?loc=epa/>

Therefore, this MFN provision does not affect the FTAs that ESA states are party to previous to the Agreement.

4. The "major trading economy" definition remains the same as in the CARIFORM – EC EPA, relying on the actor's share of world trade merchandise exports to trigger the application of the MFN clause. The threshold applicable in each agreement is also identical, with 1 percent for a single country and 1.5 percent for a group of countries collectively, and it also applies to the merchandise exports previous to the entry into force of the major trading economy's FTA with the ESA states. Since the definition remains unchallenged, it suggests that the same "major trading economies" like Brazil and other states mentioned in the memorandum will be concerned with this particular framework agreement.

5. The main difference between the two agreements is that the ESA – EC agreement does not provide for an obligation to enter into consultations with regards the extension of the more favourable treatment to the EC. The absence of this procedural requirement implies that the more favourable treatment must be automatically extended and therefore prevents any politically discussed outcome. As we argued with regard the CARIFORUM – EC EPA, this obligation to consult is a powerful tool at the ACP country's disposal, since it "might provide the possibility to pressure, even embarrass, the EC into adopting a more moderate approach".⁸⁷

6. Nonetheless, the general dispute mechanism of the Agreement is similar to the one enshrined in the EPA, insofar as it also provides for a consultations provision which provides that the "Parties shall endeavour to resolve any dispute concerning the interpretation and application of this Agreement by entering into consultations in good faith and with the aim of reaching an agreed solution".⁸⁸ Hence, if an ESA party enters an FTA with a major trading economy and refuses to extend the more favourable treatment to the EC, the EC will have an obligation to enter into consultations in good faith. Notwithstanding, the fact that the MFN provision in this agreement does not appear to enjoy a special status from the perspective of consultation, it is unlikely to be a special burden the EC will need with respect to applying the MFN clause.

⁸⁷ See supra p. 32.

Annex II : The Côte d'Ivoire – EC Stepping Stone Economic Agreement

1. The European Parliament gave its formal approval to the Stepping Stone Economic Partnership Agreement with Cote d'Ivoire (Stepping Stone Agreement) on March 24, 2009,⁸⁹ therefore marking the entry into force of an interim agreement which aims at avoiding the disruption of trade between the parties on the expiry of the transitional trade regime provided for in the Cotonou Agreement and at laying the foundations for the negotiation of a forthcoming EPA.⁹⁰

2. The Stepping Stone Agreement focuses exclusively on the importation and exportation of goods, thereby postponing the negotiations on services to the EPA itself. Article 17 of this Agreement provides for an MFN clause similar to the one encountered in the EC – CARIFORM EPA :

1. For the fields covered by this Chapter, the EC Party shall grant the Ivorian Party any more favourable treatment applicable as a result of the European Community becoming party to a free-trade agreement with third parties after signing this Agreement.

2. For the fields covered by this Chapter, the Ivorian Party shall grant the EC Party any more favourable treatment applicable as a result of Côte d'Ivoire entering into a free-trade agreement with a major trade partner after signing this Agreement.

3. If the Ivorian Party obtains from a major trade partner substantially more favourable treatment than that offered by the EC Party, the Parties shall consult each other and decide together on the implementation of the provisions in paragraph 2.

4. The provisions of this Chapter cannot be interpreted as requiring the Parties to reciprocally grant each other preferential treatment which would be applicable owing to one of the Parties being signatory to a free-trade agreement with a third party on the date on which this Agreement enters into force.

5. In this Article, 'free-trade agreement' refers to an agreement which substantially liberalises trade and substantially eliminates discrimination between the parties through the repeal of existing discriminatory measures and/or the prohibition of new discriminatory measures and measures which are more discriminatory in nature, either on the entry into force of this Agreement or on the basis of a reasonable timetable.

6. In this Article, 'major trade partner' refers to any developed country, or any country with a share in world trade greater than 1 per cent in the year preceding the entry into force of the free-trade agreement mentioned in paragraph 2, or any group of countries acting individually, collectively or through a free-trade agreement with a share in world trade greater than 1,5 per cent in the year preceding the entry into force of the free-trade agreement mentioned in paragraph 2.

3. The first two paragraphs of this clause are substantially the same than those in the CARIFORM – EC EPA, since they provide for an asymmetric automatic extension of benefits granted from an FTA entered into after the signature of the Agreement. The definition of a "major trade partner" is similar but distinct to the "major trading economy" criterion in the

⁸⁸ ESA – EC Framework Agreement, Article 54.

⁸⁹ *Stepping Stone Economic Partnership Agreement between Côte d'Ivoire, of the one part, and the European Community and its Member States, of the other part*, Official Journal of the European Union, 3 March 2009, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:059:0003:0273:EN:PDF> (visited on Mai 26, 2009).

⁹⁰ Stepping Stone Agreement, Article 2.

CARIFORUM – EC EPA. While the 1% and the 1.5% standards are set forth again, they apply to the "share in world trade" rather than to the "share of world merchandise exports", therefore broadening the definition's field of application. Such an approach potentially captures countries that are not as export dependent, and at first glance appears less targeted at the likes of major export-driven economies. It might have some impact in practical terms of the countries captured by the definition, but it is likely that these will remain the world's large less-developed countries like China, India, Brazil and eventually Indonesia.

4. Interestingly, the paragraph providing for consultations has been shifted up from the last paragraph in the CARIFORM – EC EPA to the third paragraph in this Agreement. This seemingly emphasizes the importance of the consultation procedure when extending the benefits of an FTA between Côte d'Ivoire and a "major trading economy" to the EC. The consultation provision is also designed slightly differently in terms of substance. MFN treatment extends to the EC, but consultation arises only in cases where Côte d'Ivoire obtains "substantially" more favourable treatment from its new trading partner, say Brazil, as opposed to the concessions granted to it by the EC. In other words, comparing the CARIFORUM – EC EPA with the Côte d'Ivoire stepping stone agreement, the extension of any more favourable treatment to a CARIFORUM state by a "major trading economy" is subject to consultation, whereas only a "substantially more favourable treatment" shall enjoy a consultation process in the Côte d'Ivoire Agreement, implying that a non-substantial more favourable treatment shall be automatically extended to the EC.

5. Raising the threshold for consultations actually provides a stronger deterrent for "major trading economies" to provide a more favourable treatment to the Côte d'Ivoire, since they will have to make bigger concessions to avoid their benefits being automatically extended to the EC. This might enhance trade liberalization on the one hand by encouraging deeper agreements. At the same time, it might cast a pall over new arrangements that aim to make measured, interim, or 'stepping-stone' agreements between Côte d'Ivoire and states like Brazil.

6. Moreover, the term "substantially" is open to interpretation. The wording is somewhat vague, particularly as a condition for opening consultations. It suggests a discretionary element in the determination of whether to open consultations, which might provide the EC with a certain amount of leverage with respect to a determination of whether to engage in consultations in the first place.