Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, 28th November 1979 (L/4903, BISD 26S/203)

MARQUET, Clément

Reference


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Subject(s):
Developing countries — Most-favoured-nation treatment (MFN) — Regional trade
Core Issues

1. The changes brought about by the Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries to the most-favoured-nation principle.

2. The non-discriminatory basis for granting preferential treatment to developing countries.

3. The modification of the obligations regarding free trade agreements between developing countries.

4. The inclusion of development as a normative concept in international trade law.

This headnote pertains to: Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, an instrument the text of which has been prepared by and/or adopted in the framework of an international organization. Jump to full text

Background

The Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries (‘Enabling Clause’) allowed, but did not oblige, contracting parties of the then General Agreement on Tariffs and Trade (GATT)—now World Trade Organization (WTO) members—to provide preferential tariff treatment to developing countries, as well as special treatments to least developed countries (LDCs). It also granted developing countries more flexible conditions regarding the application of some GATT rules, in particular in relation to regional trade agreements. The Enabling Clause is a milestone in regard to the impact of decolonization on the membership of international organizations’, as well regarding as the growing power of developing countries in decision-making.

During the 1960s, developing countries’ discontent grew at the state of international trade. The decolonization process had meant that more and more developing countries were taking part in international trade. It was in this context that the United Nations Conference on Trade and Development (UNCTAD) was created in 1964, which soon allowed for the inception of the so-called Generalized System of Preferences (‘GSP’) (see Proceedings of the United Nations Conference on Trade and Development, Second Session, New Delhi, 1 February—29 March 1968, Volume 1, Annex I(A)(21(I))). In 1965, mirroring the progresses of UNCTAD, some rather programmatic provisions were included in Part IV of the GATT 1947. In 1971, a GATT waiver was adopted (Waiver Decision on the Generalized System of Preferences (‘1999 Waiver’)), legally allowing the contracting parties to grant preferential tariff treatment to imports from developing country GATT parties, as an exception to the most-favoured-nation (‘MFN’) provision. The waiver’s validity was, however, only for a limited period of ten years. In 1979, in order to render the GSP perennial and broaden the preferential treatment of developing countries’ trade, the GATT contracting parties adopted the Enabling Clause and expanded the flexibilities to include some non-tariff flexibilities, special treatments to LDCs, and more flexible conditions regarding the formation of regional trade agreements among developing countries.

The adoption of the Enabling Clause was the result of a long process of legitimization of developing countries in an organization first created by a majority of developed countries. In return for this preferential treatment, developing countries were expected to progressively undertake more trade obligations as their level of development increased.

The Enabling Clause was the main provision of the GATT legal system regarding the treatment of imports of goods from developing countries. It is also symbolic of the rise of developing countries’ interests in international relations in general. The Enabling Clause is now part of the GATT 1994 and of the Agreement Establishing the World Trade Organization (‘WTO Agreement’). The WTO Appellate Body itself recognized the importance of this decision as playing a ‘critical role in
encouraging the granting of special and differential treatment to developing-country [m]embers of the WTO’ (European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (‘EC – Tariff Preferences’), para 98).

Summary

The GATT contracting parties implemented the GSP regarding tariffs in a perennial manner. This allowed developed parties to deviate from the MFN principle contained in Article I(1) of the GATT 1947, in granting preferential tariff treatment to goods originating in developing parties. [para 2(a)]

The granting of such preferences should be made on a ‘non-discriminatory’ basis. [para 2(a), footnote 3]

Preferential treatment can be granted regarding non-tariff measures as well. The exact scope of application of this subparagraph is a matter of debate. [para 2(b)]

The GATT contracting parties allowed for deviations from the rules on regional trade agreements contained in the GATT when a Regional Trade Agreement (RTA) is concluded among developing countries. An RTA does not need to cover ‘substantially all the trade’, nor does it require the ‘elimination’ of tariffs, allowing for a mere ‘reduction’ of these. [para 2(c)]

The situation of LDCs could be taken into account by allowing for a special treatment of their situation, even among developing countries. [para 2(d)]

Analysis

The adoption of the Enabling Clause represented a major step towards the inclusion of development as a normative concept in international trade law. Building upon a recommendation of UNCTAD made a few years earlier, the Enabling Clause creates new rights for developing countries under the GATT roof.

Developing countries can be granted preferential access, contrary to the MFN rule. This means that preferential treatments granted to developing countries did not need to be extended to the rest of the GATT membership—and today the WTO membership. Importantly, those preferences are to be granted on a non-reciprocal basis, meaning the GATT contracting parties—now WTO members—receiving the preference are not expected to grant anything in return.

In paragraph 2(b), the Enabling Clause envisions preferential treatment regarding non-tariff measures. The exact status of this paragraph is debated, some arguing that the provision is useless after the formal disappearance of the Tokyo Codes—a set of optional agreements on non-tariff measures under the GATT, then merged into the WTO. Others claim that it could still find a use under the WTO.

In paragraph 2(c), the Enabling Clause also created an incentive to enhancing trade among developing countries. Regarding regional trade agreements, Article XXIV of the GATT 1947 requires countries to eliminate duties and other restrictions of commerce on substantially all the trade between the parties to an RTA. By contrast, developing countries entering into an RTA among themselves can decide to only reduce their tariffs, or to cover only specific sectors of their trade, or both. This provision allows for more flexibility in favour of developing countries’ trade, in derogation from the MFN principle which would dictate that the same treatment should be accorded to all the other trade partners.

In addition, the Enabling Clause took further into account the more difficult situation of LDCs. While status as a developing country is essentially a self-assessment and a self-declaration, status as an LDC is directly based on a list established by the United Nations. Under the Enabling Clause, LDCs
can benefit from even more special and differential treatment. The situation of those countries has since been further taken into account through the 1999 Waiver.

**Impact**

The impact of the Enabling Clause can be assessed on two fronts: first, the impact of its provisions on the trade and development levels of WTO members; and second, its impact on the way development concerns are further taken into account in the GATT/WTO afterwards.

Regarding actual trade impact, it has been argued that developing countries did not necessarily benefit much from the Enabling Clause. Since developed countries are free to decide the scope and sectors of their commitments, the GSP has not been used in the most crucial sectors for developing economies. The sectors in which preferences were granted did not necessarily allow for a transition in developing countries from an economy focused on the primary sector to a secondary sector focused economy.

The Enabling Clause also paved the way for further integration of development concerns in the WTO. It was integrated into the WTO through the GATT 1994; the preamble of the WTO Agreement refers to ‘sustainable development’ and ‘developing countries’, and provisions on development can be found in many covered agreements—ie the annexes of the WTO Agreement.

However, the status of developing countries is still an issue in the WTO, and negotiations on the topic move particularly slowly, if at all. One of the main roadblocks concerns differences among developing countries. Some countries—such as some members of the BRICS, who can be in the highest GDP percentile of developing countries—have different development needs to those closer to an LDC-level of development. In this regard, the Enabling Clause has been expanded through the adoption of the 1999 Waiver—renewed in 2009 (see Preferential Tariff Treatment for Least-Developed Countries: Decision on Extension of Waiver)—and has allowed developing countries themselves to grant tariff preferences on imports from LDCs.

Finally, it is instructive to note that the non-discrimination rule included in the footnote of paragraph 2(a) of the Enabling Clause has been interpreted by the WTO Appellate Body as meaning that imports from similarly-situated WTO developing-country members should be treated similarly. The Enabling Clause therefore allows for differentiated treatment among developing members under certain conditions (EC – Tariff Preferences, para 154).

**Further Analysis and Relevant Materials**

**Leading Comments**

N Zarrouk *Commerce & développement: Du GATT à l’OMC* (Rejjes 2008)
Cases Cited

World Trade Organization

*European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, Report of the Appellate Body, 20 April 2004, WT/DS246/AR/R; DSR 2004:Ill, 925

Materials Cited

General Agreement on Tariffs and Trade

Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries (28 November 1979) GATT Doc L/4903; BISD 26S/203
Waiver Decision on the Generalized System of Preferences (25 June 1971) L/3545; BISD 18S/24

United Nations Conference on Trade and Development


World Trade Organization

Preferential Tariff Treatment for Least-Developed Countries: Decision on Extension of Waiver (27 May 2009) WT/L/759
Decision on Waiver of Preferential Tariff Treatment for Least-Developed Countries (15 June 1999) WT/L/304
General Agreement on Tariffs and Trade (‘GATT 1947’) (signed 30 October 1947, entered into force 1 January 1948) 55 UNTS 187

Reporter(s): Clément Marquet

Source text

Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES decide as follows:

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries\(^1\), without according such treatment to other contracting parties.

2. The provisions of paragraph 1 apply to the following:\(^2\)

   (a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences, \(^3\)

\(^1\)\(^2\)\(^3\)
(b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;

(c) 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 CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another;

(d) Special treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

3. Any differential and more favourable treatment provided under this clause:

(a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;

(b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;

(c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:

(a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;

(b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.

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

6. Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

7. 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.

8. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.

9. The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to meet the development needs of developing countries and the objectives of the General Agreement.

Footnotes:

1 The words "developing countries" as used in this text are to be understood to refer also to developing territories.

2 It would remain open for the CONTRACTING PARTIES to consider on an ad hoc basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.

3 As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

1 Nothing in these provisions shall affect the rights of contracting parties under the General Agreement.