EC Incentive Arrangements for Sustainable Development and Good Governance (GSP Plus) and WTO Law – Critical Analysis

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International trade appears to be one of the most effective tools for the promotion of development and the eradication of poverty. By limiting tariffs, nations gain access to foreign markets at considerably reduced costs. As proposed by the theory of comparative advantage, countries should specialize in the production of goods whereby their limited domestic resources, when invested in specific activities, can provide the largest gains and increase the total output, and hence raise overall economic welfare. In consequence, it is argued that development of international trade contributes to reduction of poverty. ¹ Tariffs and other barriers, the theory holds, can disturb this model and divert the gains from consumers around the world to powerful protected industries. ² However, in the real world tariffs


² There are also arguments against unlimited liberalization of international trade (e.g., the concept of optimal tariff and infant industries, revenue-raising function of tariffs as well as national security considerations); for details, see M.J. Trebilcock & R. Howse, The Regulation of International Trade, Routledge, London and New York: 2005, pp. 6–10.
are actually quite frequently used by national governments. Therefore, the effort of international trade liberalisation concentrates, on the one hand, on the reduction of existing tariffs, and on the other hand, on the maintenance of equal opportunities for all countries (i.e., applicability of the same tariffs irrespective of the exporting country). At the same time, it is also widely recognized that, due to specific needs of developing countries, some trade incentives are required to promote export from such countries. This special treatment is intended to help developing countries compete more effectively on international markets and to promote their industrialization, at the same time encouraging the diversification of their economies and acceleration of their economic growth.\(^3\)

The subject of this article is precisely located in the above context. It attempts to analyze the specific part of the general system of preferences (GSP), a regulatory scheme of the European Communities (EC) established in 2005 that aims at assisting developing countries in their integration with the international trading system. The analysis is undertaken in the light of EC’s trade obligations arising from law of the World Trade Organization (WTO) and corresponding case law of the Appellate Body. In this context, the article argues that there are certain aspects of the new system which may potentially conflict with the requirements of international trade law. According to the article, one of the problematic areas is special incentive arrangements for sustainable development and good governance.

This article proceeds as follows. The first part briefly discusses the relevant obligations of WTO law. The second part describes the basic elements of the old GSP scheme, while the third concentrates on the new regime. Against this background, the fourth part attempts to assess the conformity of the new system, in so far as it concerns the special incentive agreements for sustainable development and good governance, with WTO law. Finally, the last part intends to draw some overall conclusions on the new GSP scheme.

1. THE WTO AND INTERNATIONAL TRADE OBLIGATIONS

The WTO is an international organization responsible for liberalization of international trade. This aim is primarily achieved through maintenance of a rule-based system, which regulates different aspects of the international trade of goods and services as well as related matters (e.g., intellectual property rights). In addition,

the WTO constitutes a convenient venue for negotiations rounds on liberalisation of international trade. Besides these functions, the WTO also plays an important role as a place for settlement of international trade disputes between its Members. In legal terms, such controversies are decided by *ad hoc* panels and can be appealed with respect to issues of law to a permanent tribunal (the Appellate Body). The final report of the Appellate Body is subject to approval from the Dispute Settlement Body (DSB), being the congregation of all WTO Members. In contrast to the old system created by the General Agreement on Trade and Tariffs (GATT 1947), the adoption of reports is now *quasi* automatic, since only the rejection by all Members (including a winning Member) results in the dismissal of a report. A loosing WTO Member is obliged to bring its policy in line with the recommendations of the DSB. If it fails to do so, the DSB may authorize the winning Member to impose limited trade sanctions in the form of suspension of tariff concessions.4

The EC5 as well as its Member States are all members of the WTO. Nevertheless, it became common practice that it is only the EC which speaks for and represents both itself and its Member States. This results from the fact that the external trade policy of the EC belongs to its exclusive competences. This also means that the EC is solely responsible for the adoption and maintenance of special tariff preferences granted to developing countries.

As already mentioned, the WTO agreements set forth the “rules of the game” in international trade. One of the cornerstone obligations of WTO law (as well as the old GATT 1947 system) is the most-favoured nation principle (MFN). In short, it requires WTO Members to treat products of another Member no less favourably than like products of any other country.6 At the same time, as early as in 1960s, it was recognized that developing countries might require special treatment in order to address more effectively their development needs.7 Since such treatment

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6 Article I of the GATT 1994 specifically stipulates that “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 III, any advantage, favour, privilege or immunity granted by any contracting party 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 contracting parties”.

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would have constituted a violation of the MFN principle (some countries would be treated more favourably than others), a special waiver from the obligations of the GATT 1947 was adopted (GSP Decision\textsuperscript{8}). This decision was subsequently amended in 1979 (Enabling Clause\textsuperscript{9}) and incorporated in 1995 into the WTO legal system. The aim of all these efforts was to provide additional benefits to developing countries by increasing their export earnings, promoting industrialization and accelerating their rates of economic growth\textsuperscript{10} and at the same time, to guarantee the compatibility of any special schemes with WTO obligations.

Unfortunately, the Enabling Clause was formulated in very broad and ambiguous language leaving many aspects open for interpretation. In general terms, it provides that WTO Members may accord differential and more favourable treatment to developing countries (it is not an obligation but rather an option for WTO Members), without according such treatment to other Members. Developed countries that want to establish preferential treatment are, however, expected to observe certain requirements as any trade preferences need to be: (i) generalized; (ii) non-reciprocal; and (iii) non-discriminatory. Since the Enabling Clause does not explain the above terms, it is for the WTO case law and legal scholarship to clarify the content of these requirements. As far as first condition is concerned, the relevant literature explains that the term “generalized” was introduced in order to distinguish preferences that were applied to all developing countries from those which were allocated on a selective basis to predetermined recipients.\textsuperscript{11} In other words, the condition may be understood as requiring availability of the system to any developing country without \textit{a priori} exclusions.

The meaning of the second condition is ambiguous. One may read this term broadly and exclude any type of conditionality (i.e., preferential treatment cannot be conditional at all). On the other hand, a more limited interpretation would exclude only those types of conditionality which relate to market access

\textsuperscript{7} See generally, L. Bartels, \textit{The WTO Enabling Clause and Positive Conditionality in the European Community’s GSP Program}, 6(2) Journal of International Economic Law (2003), p. 507; the early efforts were particularly undertaken within the United Nations Conference on Trade and Development (UNCTAD).


\textsuperscript{9} GATT Document, Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979 L/4903.

\textsuperscript{10} Compare, Recital (1) of the GSP Decision.

\textsuperscript{11} Bartels, \textit{supra} note 8, p. 523; Bartels also notes that the term “generalized”, as used in the expression “generalized system of preferences”, may be seen as an attempt of the drafters to establish a common scheme that would be adopted by all major developed countries; of course no such system has been ever created.
(i.e., additional tariff preferences in exchange for trade concessions from developing countries). Note that both the *travaux preparatoires* as well as the recent ruling of the Appellate Body points to the second interpretation. In consequence, as a general rule it is arguably possible to offer special tariff preferences and subject them to some non-market access conditions (e.g., observance of certain labour and environmental standards as required by the EC).

The third requirement is probably the most important one. Both the panel and the Appellate Body concentrated on this condition when they assessed the compatibility of the old EC GSP scheme with WTO law. Moreover, it appears that its interpretation raises some particularly interesting legal questions. This is the reason why the subsequent parts of this article analyze the non-discriminatory requirement in more detail.

2. THE OLD GENERAL SYSTEM OF PREFERENCES

The previous EC General System of Preferences (Old GSP) provided for five different schemes: (i) general GSP, benefiting all developing countries (subject to the escape clause), (ii) special incentive arrangements for observance of environmental standards, (iii) special incentive arrangements for observance of labour standards, (iv) special incentive arrangements to combat drug production and trafficking (Drug Arrangements), and (v) special arrangements for least developed countries (LDCs) or so-called “everything but arms” arrangements. Depending on the scheme, developing countries enjoyed different trade preferences (i.e., different tariffs and products coverage).

The conformity of the Old GSP with WTO law was examined in 2004 by the panel and the Appellate Body upon India’s request. India specifically asked for the evaluation of the Drug Arrangements. In its report, adopted by the DSB on

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14 Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalized tariff preferences for the period from 1 January 2001 to 31 January 2004 (IJ 2001, L 346/1). Note also that the Old GSP was not the first EC scheme and the initial efforts can be traced back to 1971.
15 E.g. Article 12.1 of the Regulation No 2501/2001 provided a possibility of removing tariff preferences in respect of products originating in a beneficiary country if the EC imports from that country exceeded 25 % of EC imports of the same products from all beneficiary countries.
16 Initially, India challenged all three schemes (special incentives arrangements for observance of environmental and labour standards as well as the Drug Arrangements), and only afterwards limited its claim to the Drug Arrangements; for details see, G. Shaffer & Y. Apea,
20 April 2004, the Appellate Body found it incompatible with WTO law, particularly with the provisions of the Enabling Clause.\(^\text{17}\) It condemned the system as inflexible (no mechanism for adding new countries to the list of beneficiaries), non-transparent (no conditions for assessing the status of a beneficiary), and arbitrary (no explanations on how the Drug Arrangements responded to the needs of developing countries).\(^\text{18}\) In addition, the Appellate Body also made a number of more general observations, relating to non-discrimination condition of the Enabling Clause. It found among others, that:

- in granting differential tariff treatment, developed countries are required to ensure that identical treatment is available to all similarly situated GSP beneficiaries;\(^\text{19}\)
- the preference-granting country needs to positively respond to the development, financial or trade needs of developing countries, meaning that the response of a preference-granting country must be made with the view to improving the development, financial or trade situation of a beneficiary country, based on the particular need in question;\(^\text{20}\)
- the existence of development, financial or trade needs must be assessed according to objective standards; recognition set out in multilateral instruments adopted by international organizations could serve as such a standard;\(^\text{21}\)
- a sufficient nexus needs to exist between the preferential treatment and the likelihood of alleviating the relevant development, financial or trade needs;\(^\text{22}\)
- the tariff preferences accorded to some developing countries under the scheme cannot raise barriers nor create undue difficulties for the trade of any other contracting parties.\(^\text{23}\)

The Appellate Body also addressed the first condition of the Enabling Clause, finding that term “generalized” requires GSP schemes to be generally applicable. At the same time, the Appellate Body also confirmed that some

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\(^\text{19}\) *Ibidem*, para. 154.

\(^\text{20}\) *Ibidem*, para. 164.

\(^\text{21}\) *Ibidem*, para. 163.

\(^\text{22}\) *Ibidem*, para. 164.

\(^\text{23}\) *Ibidem*, para. 167.
The degree of conditionality in GSP schemes is acceptable under WTO law and does not violate the first requirement.\textsuperscript{24} The Appellate Body did not address the second condition at all.

3. THE NEW GSP SCHEME

On 7 July 2004, the European Commission adopted guidelines on the Community’s generalised system of preferences (New GSP) for the ten-year period from 2006 to 2015.\textsuperscript{25} Subsequently, on 27 June 2005, the Council adopted the Regulation, which set out the rules for the operation of the New GSP system for a period of the first three years (2006-2008).\textsuperscript{26} The new regulation (for the period 2009–2012)\textsuperscript{27} was adopted in 2008. It repeats most of the provisions of the Regulation 980/2005 and introduces only small changes. The list of beneficiaries of GSP Plus scheme was adopted in the form of a separate decision of the Commission on 9 December 2008.\textsuperscript{28}

The New GSP provides for three different schemes of tariff preferences: (i) the general arrangement; (ii) a special incentive arrangements for sustainable development and good governance (GSP Plus); and (iii) a special arrangement for LDCs. The General Arrangement and GSP Plus are both selective, in the sense that not all products are considered as eligible for preferential treatment (meaning that non-eligible products are treated under the MFN rule). The products that are excluded consist, for example, of some agricultural goods, pharmaceutical products, arms, and ammunitions. The eligible products are divided into sensitive and non-sensitive categories. Sensitive products consist of a mixture of agricultural, textile, clothing, apparel, carpets and footwear items. They receive lower tariff reduction as compared to non-sensitive...
products. Note that the distinction between those two categories reflects internal political considerations of the EC. Products that are classified as sensitive belong to those sectors of the EC economy which normally receive higher protection.

The general arrangement covers about 6,300 products. With respect to non-sensitive products, it exempts them from all duties; as far as the sensitive products are concerned, there is a general tariff reduction of 3.5 percentage points to *ad valorem* duties compared to the application of the standard MFN tariff (with some exceptions). The list of countries qualified for the General Arrangement scheme is predetermined in the sense that all beneficiaries are enumerated in Annex I to the Regulation 732/2008 and currently includes 176 countries and territories. In addition, Article 3 of the Regulation stipulates that a beneficiary country will be removed from the list when it is classified by the World Bank as a high-income country over three consecutive years, and when the value of exports for the five largest sections of its GSP-covered exports to the Community represents less than 75% of the total GSP-covered exports of the beneficiary country to the Community. The Regulation, however, does not contain any provision, which would allow for the immediate supplementation of a list with new countries. That can be done only in the review process, which takes place once every three years.

GSP Plus covers approximately the same products as the General Arrangement. In general terms, all sensitive and non-sensitive products under GSP Plus are duty-free. That relates to both *ad valorem* and specific duties. The scheme is designed for vulnerable countries with special development needs. Beneficiaries, however, must meet a number of additional criteria. Regulation 732/2008 in particular states that:

- a beneficiary country needs to be considered a “vulnerable country” meaning that: (i) it is not classified by the World Bank as a high income country during three consecutive years; (ii) the five largest sections of its GSP-covered exports to the EC represent more than 75 percent of its total GSP-covered exports; and (iii) its GSP-covered exports to the EC represent less than 1 percent of total GSP covered exports to the EC;

- a beneficiary country needs to ratify and effectively implement 16 conventions on human and labour standards and 11 conventions related to good governance and the protection of the environment;  

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29 Note also that the distinction between sensitive and non-sensitive products does not violate WTO rules since the Enabling Clause does not require consistency in tariff reduction.

30 Core human and labour rights UN/ILO Conventions include: International Covenant on Civil and Political Rights; International Covenant on Economic Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Convention Against
- a beneficiary country must give an undertaking to maintain the ratification of the conventions and their implementing legislation and measures, and accept regular monitoring and review of its implementation record in accordance with the implementation provisions of respective conventions.

The Regulation 732/2008 also enumerates situations in which the preferential arrangements may be temporarily withdrawn (e.g., serious and systemic violations of principles laid down in the conventions, export of goods made by prison labour).

As will be discussed below in more detail, the initial qualification round for GSP Plus status under the Regulation 980/2005 was very short. The applicants had approximately 5 months to submit their applications and fulfill required conditions. The second round was preceded by a considerably longer period of time (the deadline for application was set for 31 October 2008). Pursuant to the Regulation 980/2005, previous beneficiaries were also obliged to re-apply. Currently, there are 16 countries, which qualify for GSP Plus treatment.

Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; Convention on the Prevention and Punishment of the Crime of Genocide; Minimum Age for Admission to Employment (N° 138); Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (N° 182); Abolition of Forced Labour Convention (N° 105); Forced Compulsory Labour Convention (N° 29); Equal Remediation of Men and Women Workers for Work of Equal Value Convention (N° 100); Discrimination in Respect of Employment and Occupation Convention (N° 111); Freedom of Association and Protection of the Right to Organise Convention (N° 87); Application of the Principles of the Right to Organise and to Bargain Collectively Convention (N° 98); International Convention on the Suppression and Punishment of the Crime of Apartheid.

Conventions related to environment and governance principles include: Montreal Protocol on Substances that deplete the Ozone Layer; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; Stockholm Convention on persistent Organic Pollutants; Convention on International Trade in Endangered Species; Convention on Biological Diversity; Cartagena Protocol on Biosafety; Kyoto Protocol to the UN Framework Convention on Climate Change; UN Single Convention on Narcotic Drugs (1961); UN Convention on Psychotropic Substances (1971); UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988); Mexico UN Convention Against Corruption.

Under Regulation 980/2005 a beneficiary country was obliged to ratify and effectively implement 16 core conventions on human and labour standards and 7 (out of 11) of the conventions relating to good governance and the protection of the environment. The remaining 6 conventions had to be ratified by 31 December 2008. The Regulation 980/2005 also provided that GSP Plus may be granted to the country which had not ratified and effectively implemented maximum of two out of 16 conventions on human and labour standards. However, such option was only available only if a country faced specific constitutional constraints (i.e., incompatibility between the provisions of the conventions with its constitution) and convention had to be ratified by 31 December 2006 anyway.

32 This includes the following countries: Armenia, Azerbaijan, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Georgia, Guatemala, Honduras, Mongolia, Nicaragua, Paraguay, Peru, Sri Lanka, and Venezuela.
Finally, there is a special arrangement for LDCs. The countries included in the list of LDCs receive exemption from duties on all products except for arms and ammunition. The list of countries, which qualify for a special arrangement is predetermined and all beneficiary countries are enumerated in the Annex I to the Regulation 732/2008. This list corresponds to the list of LDCs published by the UN High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States. The Regulation 732/2008 also grants a right for the Commission to remove a country from the arrangement when such a country is excluded by the UN from the list of LDCs. There is no analogous provision regulating the manner in which a list is supplemented. Arguably this can be done during the review process once every three years.

4. COMPATIBILITY OF THE NEW GSP PLUS SCHEME WITH WTO LAW

At the DSB meeting on 20 July 2005, the EC announced in a special Communication that the Drug Arrangements had been repealed as of 1 July 2005 and that a new regulation had been promulgated bringing the EC into compliance with the DSB recommendations. The Communication directly refers to the decision of the Appellate Body, while both Regulations 980/2005 and 732/2008 stress that the Community’s common commercial policy has to comply with the WTO requirements, and in particular with the Enabling Clause. At the same time, a number of developing countries have expressed their concerns with respect to the New GSP and its compatibility with WTO law. It is also worth noting in this context that a precise assessment of the New GSP Plus scheme is very difficult, as the Appellate Body findings refer predominantly to the Drug Arrangements, which do not have an equivalent in the new system. As discussed above, the GSP regime as such was addressed only in general terms and only with respect to one particular condition (the non-discriminatory requirement). Nevertheless, it seems that some parts of the New GSP may be incompatible with the obligations provided by WTO law. The subsequent section will analyze the potential problems in more detail.

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33 See, the Communication where the Commission stated that “the GSP ... must ... comply with the Enabling Clause as interpreted by the WTO Appellate Body in the recent case taken by India against Community’s existing GSP scheme.”
34 E.g., Recital (2) of the Regulation 732/2008.
35 See e.g., India statement during the DSB meeting on 20 July 2005, and more recently the discussion on the renewal of GSP Plus status for Sri Lanka (http://www.tamilstar.com/news/lanka/article_7693.shtml, last visited on 26 March 2009), see also “Not Many Pluses” in The Economist (14 August 2008).
4.1. Identical Treatment For All Similarly Situated GSP Beneficiaries

The term “non-discriminatory”, as interpreted by the Appellate Body, requires that identical treatment is accorded to all similarly situated GSP beneficiaries. It is disputable whether beneficiaries can be defined as “similarly situated” on the basis of their commitments and adherence to the international treaties and conventions. Countries that have not adhered to particular conventions may have exactly the same development needs (and in consequence be similarly situated) as those which have already gone through the ratification process. The same problem arises with respect to those countries, which, although have not ratified particular legal instrument, nevertheless observe its requirements (e.g., on the basis of their national law). It is not clear in what sense their situation differs from countries that are party to a particular convention. Moreover, even within the group of beneficiaries (those countries that in fact have ratified relevant conventions) there may be great differences. As noted by one of the commentators, a country whose starting point was very backward will “be facing an unjustifiable burden by being asked to effectively implement the conventions to the same extent as countries which start from much more advance position”.

Arguably, there are other criteria, which better reflect the situation of potential beneficiaries. Moreover, these criteria also seem to fit more properly into other requirements enumerated by the Appellate Body (e.g., an objective assessment of the existence of development, financial and trade needs). As an example, one can give the Human Development Index (HDI) published annually by the United Nations Development Programme, which is a comparative index reflecting the level of poverty, literacy, education, life expectancy, childbirth, and other factors for countries. Would it not be natural to apply such a comprehensive indicator as a criterion for qualifying that two countries are similarly situated? If one applies the HDI to countries enumerated in the Decision 2008/938/EC, it appears that the beneficiary countries belong to completely different categories (e.g., Costa Rica, which is qualified as having high HDI, while Guatemala is specified as having medium HDI). However, under the Decision 2008/938/EC, they are in the same category. Besides, there are a number of countries qualified as having medium HDI, which are not included in the list (e.g., Brazil or India).

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4.2. Positive Response to Development, Financial or Trade Needs of a Developing Country

The Appellate Body made clear that GSP schemes must respond positively to the needs of developing countries, namely to their development, financial and trade needs. One may wonder what, under the GSP Plus scheme, actually constitutes a positive response to the above needs. Is it an adherence to international labour, human rights and good governance conventions? Or rather the possibility of additional tariff preference granted to those countries which comply with pre-requirements of the GSP Plus? Neither the Regulation 2008/938/EC nor the Communication provides a clear answer in this respect. For the sake of the subsequent analysis, I will assume that both functions can be qualified as positive response to the needs of developing countries.

One of the basic issues requiring clarification is the meaning of the expression “development, financial or trade needs of a developing country”. Some authors argue for a broad interpretation, submitting that the term “development need” should be understood as covering both economic and non-economic considerations. Indeed, such an approach finds some support in other international legal instruments. As pointed out by Bartels, the 1986 UN Declaration on the Right to Development defines development as a comprehensive economic, social and political process. A similar stance is taken by the 2002 UN Johannesburg Declaration on Sustainable Development, which supplements the above list with environmental concerns. This broad reading allows one to accept that the requirement for adherence to (and observance of) certain international conventions may indeed constitute a positive response to development needs (i.e., development also relates to social, political and environmental progress).

On the other hand, the above argument seems to contradict the explicit language of the GSP Decision, which enumerates solely economic objectives. According to the third recital of the GSP Decision, the goal of the generalized system is to increase export earnings, promote industrialization, and accelerate rates of economic growth of developing countries. Note that all these objectives have a purely economic character. Exactly the same language was used in the 1968 UNCTAD resolution, the document which was a basis for subsequent WTO instruments. This clearly shows that the negotiators wanted to limit the disciplines of the differential and special treatment within the GSP schemes only to economic considerations. This interpretation is also supported by the language used by the Appellate Body

38 Compare, Resolution 21 (ii) taken at the UNCTAD II Conference in New Delhi in 1968.
in its report. The Appellate Body, when discussing this issue stressed that a development need must be by its very nature something that can be effectively addressed through tariff preferences.\(^{39}\) This statement clearly indicated a strong economic dimension of a “legitimate” need.

The narrow reading (i.e., exclusion of non-economic needs from the coverage of the Enabling Clause) is, however, not necessarily fatal to the GSP Plus scheme. Arguably, there is nothing in the language of the Enabling Clause which would require a direct connection between proposed action and the alleviation of a particular need (in the economic sense). In consequence, it seems that the relationship can be construed as being more indirect and remote (e.g. the requirement to adhere to a particular set of conventions will only contribute indirectly to the alleviation of certain economic needs). This understanding also seems to be reflected in the Communication, which stresses that there is a link between development in the economic sense and respect for basic human, labour rights, environment and basic principles of governance.\(^{40}\) This is clearly uncontroversial in respect to good governance obligations. There are also some economic studies,\(^{41}\) which suggest a positive correlation between compliance with the core labour standards and higher levels of economic growth. As far as the protection of the environment and compliance with human rights is concerned, there is, however, less evidence and some researchers argue that no connection exists between observance of human rights obligations (or environmental standards) and economic growth.\(^{42}\)

4.3. Does Not Create a Barrier or Undue Difficulty For the Trade of Any Other Contracting Party

The Appellate Body also required that the special preferential treatment accorded to some developing countries under the scheme cannot raise barriers nor create undue difficulties for the trade of any other WTO Member. Some authors claim that the GSP Plus indeed creates such undue difficulties for non-beneficiary countries. Although there are only a few empirical studies assessing the influence of the GSP programs on the export from non-beneficiaries countries, it seems that the impact may be very limited. Note that countries, which benefit from GSP Plus

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\(^{40}\) Communication, \textit{supra} note 26, at 10.

\(^{41}\) OECD, \textit{Trade, Employment and Labour Standards; A Study of Core Workers Rights and International Trade} (1996).

scheme are rather small economies in terms of their export to the EC. Due to their size, they are not able to affect the prices of goods on the EC internal market because their export is insignificant relative to the size of the market as such. Moreover, the definition of a vulnerable country (which is a prerequisite for qualifying for GSP Plus) clearly stipulates that a country may qualify for the GSP Plus scheme only if its GSP-covered exports to the EC represent less than 1 percent of the total GSP covered exports to the EC. This additionally limits the influence of exporters from any beneficiary on the internal price in the EC. Since the prices of particular goods are not affected, the conditions of competition for non-beneficiary countries remain as they would be without a GSP Plus scheme. In consequence, it may be assumed that the GSP Plus system does not generally raise barriers nor create undue difficulties for the trade of any other WTO Member.

It also worth to stress in this context that what actually may be problematic for a developing countries is their withdrawal from the GSP Plus list. Note that the cost of production of a particular good in a beneficiary country may be at such a level that when combined with the applicable EC tariff, it could result in the price that will exceed the market price at which goods are sold on the EC internal market (either because of low efficiency of the production process in the exporting country, or because of high EC tariffs applicable to particular goods). In such a case, removal of the country from the list of beneficiaries will have serious consequences for its export. This aspect of the GSP, however, falls outside of the scope of this article.

4.4. Objective Criteria

According to the Appellate Body, selection of GSP beneficiaries should be based on objective criteria. At first sight, it seems that the GSP Plus complies fully with this condition. It establishes objective benchmarks against which the assessment of developing countries may be carried out. However, a closer inspection reveals some problematic issues. If one compares the list of the countries included within the Drug Arrangements and that of GSP Plus, it appears that the great majority of the countries are covered by both lists (including countries, which were in the application process under the Old GSP, i.e., Sri Lanka, Georgia and


\[44\] E.g., According to the research carried out at the University of Sussex, losing GSP Plus status by Sri Lanka would lead to a 4% cut in its garment exports and overall it would cost app. 2% of Sri Lanka’s gross domestic product (‘Not Many Pluses’ in The Economist (14 August 2008)).
Moreover, as was mentioned above, the initial deadline for application to the GSP Plus scheme under Regulation 980/2005 was very short, while the interim safeguards were rather weak (i.e., countries were obliged to immediately ratify and observe great majority of the conventions). This short period may also indicate that the selection of conventions required under GSP Plus scheme was made in order to qualify a predetermined set of countries. In consequence, one may argue that the EC did not base its selection on objective criteria, but designed the GSP requirement in such a way as to promote those countries that previously had benefited from the Drug Arrangements.

The above observation on the arbitrary character of the list is additionally supported by the selection of the conventions for the purpose of the GSP Plus program. As noted by Bartels, the list includes, for example, the Apartheid Convention, which was not ratified by two-thirds of EU Member States. At the same time, the list does not contain the UN Migration Convention, which is considered as central to international human rights law. Moreover, inclusion of some conventions on the list seems to be motivated by internal political considerations rather than development needs of developing countries. For example, the EC requires ratification of the Cartagena Protocol on Biosafety, the convention, which is perceived by some countries as an instrument promoting the European regulatory model with respect to genetically modified organisms. This, in turn, may indicate that the GSP Plus is at least partially motivated by internal EC considerations rather than development needs of other WTO Members.

It also needs to be noted that the above problem (at least with respect to the time necessary for the required adjustments to take place) was somehow mitigated in the recent qualification round under Regulation 732/2008. Potential applicants have almost three years to meet the criteria set out by the Communication. Of course, this fact alone does not change the general concern with respect to the selection of the conventions.

4.5. Flexibility of the GSP Scheme

The Appellate Body, when assessing the Drug Arrangements noted that the system was not sufficiently flexible, in the sense that there was no mechanism for

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45 Note also that all countries included in the Drug Arrangements, except from Pakistan, became qualified the GSP Plus scheme.

46 Bartels, supra note 37, at p. 878 (also giving an example of the Genocide Convention which was not ratified by Malta, and another case includes the UN Convention against corruption which was not ratified by Estonia).

adding new countries to the list of beneficiaries. The New GSP Plus scheme definitively constitutes an improvement. Initially, under Regulation 980/2005, potential beneficiaries could be added to the GSP Plus list only during the review process that took place once every three years. The new Regulation 732/2008 goes even further. It provides an additional opportunity for applications in mid-2010 (which is half-way through the life of the Regulation). At the same time, the GSP Plus beneficiaries, which were successfully qualified in 2008 round, do not need to reapply and their status will normally be maintained throughout the three year period provided by the Regulation. Nevertheless, the lack of immediate procedure may still be questioned. It is possible that a country which complies with all the requirements of the Regulation 732/2008 cannot take advantage of tariff preferences until the new review process is completed. Moreover, the inflexibility of the system may be also criticized on more general grounds. Note that the GSP Plus system refers to formal requirements (adhesion to particular conventions) without providing an applicant with the possibility to prove the actual observance of certain labour, environmental or goods governance standards. Whether such an approach meets the threshold set by the Appellate Body is highly disputable.

CONCLUSIONS

This article analyses a part of the New GSP scheme, which establishes a special incentive arrangements for sustainable development and good governance. The article argues that the arrangements contain elements that may be inconsistent with obligations of the EC under WTO law. In particular, the article questions whether different countries may be considered as similarly situated on the basis of their adherence to international treaties. In this context, it proposes to apply other criteria such as HDI. The article also submits that development needs as provided in the Enabling Clause should be understood in an economic sense. In this context, the article recognizes that the EC as a party bearing the burden of proof in potential WTO proceedings, may have difficulties in providing evidence on the existence of a relationship between development and adherence to labour or environmental standards. Another feature of GSP Plus, which seems to be disputable from the perspective of WTO law, is the objectivity of the criteria used by the EC. The short initial application period and the selection of the conventions cast doubts as to the good faith of the EC actions. Finally, the article criticizes the inflexibilities, which are built into the GSP Plus system (i.e., lack of procedure to allow for the immediate inclusion of new beneficiaries).
On the other hand, one also needs to realize that despite the above legal deficiencies of the GSP Plus scheme, it may be politically impossible for developing countries to bring a case to the WTO. As noted in the literature, such an action could endanger the existence of the current system of preferences, since nothing in WTO law requires donor countries to maintain schemes that are no longer politically acceptable.\footnote{Grossman & Sykes, supra note 43, at p. 19.} Moreover, it also seems that the current Regulation 732/2008 addresses some flaws of the previous system in a manner, which is compatible with the obligations of the Enabling Clause. This can also reduce a tension between the EC and potential beneficiaries.