Sant'Anna Legal Studies

STALS Research Paper n. 7/2009

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Sant'Anna School of Advanced Studies
Department of Law
http://stals.sssup.it

ISSN: 1974-5656

Distinguishing between developing countries by means of the Enabling Clause: Towards a "selective" Generalized System of Preferences?

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Abstract

The European Community grants special trade preferences to developing countries by means of a generalized system of preferences, known as a GSP scheme, which was challenged as "WTO inconsistent" by India. This essay will examine the *EC-Preferences* case and its consequences. It will be divided into the following parts: first, the factual and legal background to the dispute; second, the old GSP; third, the Panel and the Appellate Body reports on *EC-Preferences*; fourth, the new GSP and its possible WTO inconsistency. Finally, the conclusion will reflect upon the role of the GSP in promoting development.

Key-words

WTO, GATT, MFN, Enabling Clause, European Community, India.

Distinguishing between developing countries by means of the Enabling Clause: Towards a "selective" Generalized System of Preferences?

Luis Castellví Laukamp*

I never make exceptions. An exception disproves the rule.

The Sign of the Four, Sir Arthur Conan Doyle

1. Introduction

The most favoured nation ("**MFN**") clause is the cornerstone of the General Agreement on Tariffs and Trade ("**GATT**"), whose main aim is to liberalize trade. Not only trade as such, but also all domestic instruments which affect trade must respect this principle[1]. Why liberalize trade? International trade is one of the most effective tools for the promotion of development and the eradication of poverty[2]. In the words of Burda, *"la libéralisation des échanges participe au développement économique de tous les États, réduit le coût de la vie, stimule la croissance et, sans doute, contribue au maintien de la paix"*[3]. International trade allows countries to gain access to foreign markets at a reduced cost by limiting tariffs. The economic theory of comparative advantage suggests that trade liberalization is not a zero sum game but rather that it contributes to an increase in both domestic and global welfare. Accordingly, tariffs and other barriers obstruct global welfare and should

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1 Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization*, The Oxford International Law Library, New York, 2006, at 202.

2 Lukasz Gruszczynski, *The EC General System of Preferences and International Obligations in the Area of Trade – The Never-Ending Story*, available at http://works.bepress.com/luksupraz_gruszczynski/6/ (last visited on the 4th of June 2009).

3 Julien Burda, "L'efficacité du mécanisme de règlement des différends de l'OMC: Vers une meilleure prévisibilité du système commercial multilateral", 18(2) *Revue québécoise de droit international* (2005), at 2.

therefore be reduced step by step in order to foster liberalization. In this respect, the success of GATT, since 1947, and of GATT within the World Trade Organization ("**WTO**"), since 1995, is apparent: *"les droits de douane sur les marchandises sont aujourd'hui de 6,3% au lieu de 80% en 1947"*[4].

However, there are several arguments against free trade that we should also bear in mind, especially taking into account the current economic crisis. Laurence Boy has written that "*un certain nombre de crises ont révélé que la libéralisation et la mondialisation ne présentent pas que des aspects positifs mais qu'elles comportent de nombreux risques*"[5]. This is especially true in the case of developing countries, which have argued that "*the GATT world trade system operates in a manner that inhibits the economic development of societies with weaker international economic status*"[6]. To put it another way, some developing countries feel that they cannot compete for export markets with developed countries. The MFN rule is an impediment because it provides for non-discriminatory access to export markets, regardless of the level of development of the exporting country[7].

While a system of preferences aimed at developing countries does exist, the WTO case *EC-Conditions for the Granting of Tariff Preferences to Developing Countries*[8] ("***EC-Preferences***") demonstrates that the preference-granting entities (namely, the developed and industrialised countries), very often "*succumb to the temptation to use the preference systems as part of the 'bargaining chips' of diplomacy*"[9] rather than for the benefit of developing countries[10].

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4 Ibid.

5 Laurence Boy, "Le déficit démocratique de la mondialisation du droit économique et le rôle de la société civile", (3-4) *Revue internationale de droit économique* (2003), at 476.

6 John H. Jackson, *The World Trading System*, Massachusetts Institute of Technology, Cambridge, Massachusetts, 1997, at 159.

7 Matsushita, supra note 1, at 220.

8 Panel Report, *European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R; and Appellate Body Report, *European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, 7 April 2004.

9 Jackson, supra note 6, at 159-160.

10 In addition, from an economic perspective it is unclear whether tariff preferences yield higher economic welfare. According to Patrick Low, Robert Hudec considered that "*the putative effects of preferences cannot always compete, and even if they can, the degree of competition they bring is less that under an MFN*

This essay will examine the *EC-Preferences* case and its consequences. It will be divided into the following parts: first, the factual and legal background to the dispute; second, the old Generalized System of Preferences ("**EC's GSP**"); third, the Panel and the Appellate Body reports on *EC-Preferences*; fourth, the new Generalized System of Preferences ("**EC's GSP+**") and its possible WTO inconsistency. Finally, the conclusion will reflect upon the role of the generalized system of preferences ("**GSP**") in promoting development.

2. Factual and legal background to the dispute

The *EC-Preferences* case involved the interpretation of the GATT "Enabling Clause" and its relation to Article I of the GATT. This article contains the MFN principle, which requires WTO Member countries to make any favourable trade treatment of goods from one WTO Member "immediately and unconditionally" available to imports from all other WTO Members[11]. The principle of reciprocity or non-discrimination was based on the principle of sovereign equality under international law, which in turn was predicated upon the assumption that nation states had identical abilities. Article I of GATT transposed equality under international law into the economic field[12].

In the 1960s and 1970s, developing countries challenged this assumption, arguing that their exports should receive generalized preferential treatment so as to advance their economic prospects and development. In their view, the MFN principle did not take into account the inequality between countries, which were in different stages of development. This was the birth of the concept of Special and Differential Treatment ("**SDT**") from which the Enabling Clause would later emerge. "*SDT was based on the argument that 'equal treatment could secure equality only among identical parties' and*

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regime". A good deal of empirical analysis suggests that "*preferences have tended to offer relatively small gains to relatively few countries*". Thus, Hudec believed that an MFN-based regime is the only genuine protection available to developing countries. See Patrick Low, "Developing countries in the multilateral trading system: the insights of Robert E. Hudec", 37(4) *Journal of World Trade* (2003), at 808.

11 Maureen Irish, "GSP Tariffs and Conditionality: A Comment on EC-Preferences", 41(4) *Journal of World Trade* (2007), at 683.

12 Cosmas Milton Obote Ochieng, "The EU-ACP Economic Partnership Agreements and the "Development Question": Constraints and opportunities posed by article XXIV and special and differential treatment provisions of the WTO", 10(2) *Journal of International Economic Law* (2007), at 374.

that only SDT could mitigate the negative effects of economic asymmetries between the developed and developing countries"[13]. Developing countries tried to increase their influence in international economic relations through the Group of 77[14].

The Group of 77 pushed for the establishment of the United Nations Conference on Trade and Development ("**UNCTAD**") in 1964 as a permanent intergovernmental body. In addition, it also lobbied the GATT for the addition of Part IV (Trade and Development). Part IV of GATT came into effect on the 27th of June 1966. It contains 3 articles: (i) Principles and objectives (Art. XXXVI GATT); (ii) Commitments (Art XXXVII GATT); and (iii) Joint Action (Art. XXXVIII GATT).

In principle, none of the articles contained in GATT Part IV creates binding legal obligations. They are just "good intention" clauses, a wish list. This is at least how authors like Matsushita[15], Milton[16] and Breda dos Santos[17] view them. However, other authors like Raj Bahla[18] believe that there is a substantive "hard law" content in Part IV. In any case, what is indisputable is that Part IV influenced the creation of the Enabling Clause. The principle of non-reciprocity, analysed below, was established for the first time in Art. XXXVI.8 GATT[19]. Part IV "entailed a new perception of developing countries concerning the means through which they could achieve development. One of

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13 Ibid.

14 The Group of 77 was founded on the 15th of June 1964 by 77 developing nations that wanted to promote their common economic interests and increase their bargaining capacity in the United Nations. The list of member states (which nowadays are 130) can be checked in http://www.g77.org/doc/members.html (last visited on the 4th of June 2009).

15 Matsushita, supra note 1, at 223.

16 Milton, supra note 12, at 374.

17 Norma Breda dos Santos, Rogério Farias and Raphael Cunha, "Generalized System of Preferences in General Agreement on Tariffs and Trade/World Trade Organization: History and Current Issues", 39(4) *Journal of World Trade* (2005), at 642-643.

18 Raj Bahla, *Modern GATT Law. A Treatise on the General Agreement on Tariffs and Trade*, Sweet and Maxwell, London, 2005, at 1059-1060.

19 Petros C. Mavroidis, *Trade in Goods. The GATT and the Other Agreements Regulating Trade in Goods*, Oxford University Press, New York, 2007, at 142.

the most direct means was the developed countries' non-reciprocity of concessions for developing counterparts"[20].

UNCTAD set up a Special Committee on Preferences in 1968 that worked with the Organization for Economic Co-operation and Development ("**OECD**") Trade Committee. In October 1970, both Committees adopted the so-called "*Agreed Conclusions*"[21] on the establishment of a GSP. However, the GSP could not yet be applied due to Art. I.1 of the GATT. As a consequence, GATT Members agreed, in June 1971, to a ten-year waiver. The waiver authorized each industrial country to establish its own GSP scheme, providing that each of those scheme benefited all developing countries[22].

Although the waiver expired in 1981, as part of Tokyo Round, GATT Members adopted a declaration entitled "*Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*", more commonly known as the Enabling Clause, allowing for the extension of the GSP scheme, which continues to be in effect today. "*In terms of concrete measures in favour of developing countries, the Enabling Clause transformed the ten-year waivers for GSP and trade preferences among developing countries into permanent arrangements. In this regard, the clause did not create any new legally binding obligations for developed countries: it merely made the legal introduction of preferential and non-reciprocal market access schemes less problematic*"[23].

The first paragraph of the Enabling Clause contains the permanent waiver from the MFN obligation: "*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*". Apart from this paragraph, other provisions in the Enabling Clause were subject to contestation in *EC-Preferences*. Paragraph 2(a) states that developed

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[20] Breda dos Santos, supra note 17, at 642.

[21] For a study of the contents of the "Agreed Conclusions" and its influence in the GSP see Henning Jessen, *WTO-Recht und "Entwicklungsländer". "Special and differential Treatment for Developing Countries" in multidimensionalen Wandel des Wirtschaftsvölkerrechts*, Berliner Wissenschafts-Verlag, Berlin, 2006, at 325-328.

[22] Jackson, supra note 6, at 322-323.

[23] Breda dos Santos, supra note 17, at 652.

countries may accord differential treatment in accordance with the GSP. Footnote 3 to this paragraph specifies that the GSP should be applied "*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*".

Preferences under the GSP have been rather controversial. In particular, they "*have engendered highly contentious legal (e.g. their relationship with Article I of the GATT most-favoured-nation principle), political (e.g. their use as political leverage against developing countries) and economic debates (e.g. whether they have been efficient in boosting developing country export-led growth)*"[24].

A recent and prominent example of this is the EC's GSP, which was challenged as WTO inconsistent by India. India benefited from the EC's GSP[25]. However, 12 developing countries mentioned in a closed list received extra preferences because they were beneficiaries of the special arrangement to combat drug production and trafficking ("**Drug Arrangements**"). India affirmed that this was a violation of Art. I.1 of the GATT that could not be justified by the Enabling Clause. According to India, when a GSP donor grants a preference on a particular product, it must extend that preference to all developing countries, with the only exception being the least developed countries ("**LDCs**"), which are able to receive even greater preferences. As the preferences granted by the EC were only for the 12 countries included in the closed list, with no possibility of adding new countries, India contended that this was a violation of the non-discriminatory requirement of both Art. I.1 of the GATT and the Enabling Clause.

At the outset, India challenged both the Drug Arrangements and the special incentive arrangements for observance of environmental and labour standards. However, on the 28th of February 2003, "*India dropped its challenges to all aspects of the Enabling Clause incentive schemes other than to the Drug Arrangements, apparently because the Drug Arrangements had the greatest negative*

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[24] Ibid, at 638.

[25] The list of beneficiary countries of the EC'S GSP is placed on the Annex I of the mentioned Council Regulation (EC) No 2501/2001 applying a scheme of generalized tariff preferences for the period from the 1 January 2001 to the 31 December 2004, OJ 2001 L 346/1.

commercial impact on India and India did not wish to prejudice its claim by raising more politically sensitive trade labour and trade-environment issues"[26]. As Pakistan is India's main competitor in Asia, India estimated that its textile industry had suffered trade diversion to the extent of 250 million euros annually as a consequence of the EC's GSP[27].

How did the EC respond to those claims? I will provide a brief summary of the EC's defence before analysing the EC's GSP and the Panel and Appellate Body reports about it:

First of all, according to the EC, the Enabling Clause did not create an exception to Article I of GATT, but removed GSP schemes altogether from the coverage of Article I of GATT. This argument was important because India's complaint alleged a violation of Art. I of the GATT but not of the Enabling Clause, and the panel can only adjudicate claims brought before it. As explained below, both the Panel and the Appellate Body dismissed this argument.

Once it was clear that GSP preferences fall under Art. I.1 of the GATT, it was also clear that India had made a *prima facie* case of violation. Could the EC invoke the Enabling Clause as a defence? They had three arguments to do so:

First, Paragraph 3(c) of the Enabling Clause states that any differential and more favourable treatment "*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*". The EC alleged that this article authorizes preferences to be modified to respond to the different needs from each developing country.

Second, the EC interpreted the term "discrimination", as meaning arbitrary differences in the treatment of similarly situated entities. Thus, as long as the differences are justified by a legitimate goal and are reasonable because they pursue this objective, there is no discrimination.

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[26] Gregory Shaffer and Yvonne Apea, "Institutional Choices in the Generalized System of Preferences Case: Who decides the conditions for Trade preferences? The Law and Politics of Rights", 39(6) *Journal of World Trade* (2005), at 983-984.

[27] Ibid.

Third, paragraph 2(a) of the Enabling Clause states that the provisions of paragraph 1 apply to "*Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the GSP*". Thus, it does not require preference-granting nations to grant preferences to *all* developing countries.

Both the Panel and the Appellate Body found the EC's GSP to be WTO inconsistent. However, there were significant differences in their respective interpretations of the aforementioned legal terms. Those differences justify a separate analysis of both reports. I will firstly provide a brief description of the EC's GSP in order to facilitate the understanding of the reports.

3. The European Community's old Generalized System of Preferences (EC's GSP)

The EC's GSP[28] provided five different schemes. Developing countries were granted different tariffs and products coverage according to the scheme which was applied to them:

(a) General GSP, benefiting all developing countries (Art. 7).

(b) Special incentive arrangements for observance of environmental and labour standards (Art. 8).

(c) Special arrangements for LDCs or so-called "Everything But Arms" arrangements (Art. 9).

(d) Drug Arrangements (Art. 10).

The tariff modulation classifies goods into "very-sensitive", "sensitive", "semi-sensitive" and "non-sensitive" products. "*Roughly speaking and with few exceptions, beneficiary countries receive tariff reductions of 15 percent, 30 percent, 65 percent and 100 percent, respectively, off the usual MFN rate for goods in each category*"[29]. The most important exception to this rule is the treatment for LDCs, which enjoy duty-free status in all categories of goods but arms.

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[28] Council Regulation (EC) No. 2501/2001 of 10 December 2001 applying a scheme of generalized tariff preferences for the period from 1 January 2002 to 31 December 2004, OJ 2001 L 346/1.

[29] Gene M. Grossman and Alan O. Sykes, "A preference for Development: The Law and Economics of GSP", *WTO Law and developing countries*, edited by George A. Bermann and Petros C. Mavroidis, Cambridge University Press, New York, 2007, at 260.

Special incentive arrangements for observance of environmental and labour standards provide additional preferences to countries that apply for them and satisfy some requirements. The labour arrangement applies to developing countries whose laws incorporate the substance of certain International Labour Organization Conventions related to subjects such as forced labour, freedom of association, right to collective bargaining, non-discrimination and child labour (Art. 14). The environmental arrangement applies to goods from countries whose national laws incorporate the substance of international standards concerning sustainable management of tropical forests (Art. 21).

The Drug Arrangements, the most relevant scheme for this essay as it was the only one that was finally challenged by India, was made available to 11 South and Central American developing countries, plus Pakistan. All of these countries had in common the fact that they had been struggling to reduce drug production and trafficking.

As Raj Bahla rightly noticed[30], a couple of considerations could be made in this respect:

First of all, the fact that Pakistan, but not India, qualified for the Drug Arrangements, annoyed India. The EC (particularly the United Kingdom, with its unique history and knowledge of the Indian subcontinent) should have foreseen this problem. Apparently, one of the reasons for the inclusion of Pakistan in the Drug Arrangements was in return for its cooperation against Taliban and Al-Qaeda after the September 11 attacks[31].

Second, at least one EC member (the Netherlands) has lax laws about drugs. There is a contradiction between fighting narcotics through trade preferences and discriminating between Third World countries on this basis, on the one hand, and not having EC-wide rules against drugs, on the other hand.

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30 Bahla, supra note 18, at 1068.

31 Shaffer and Apea, supra note 26, at 986.

4. **The report of the Panel**

There were three substantive issues that had to be resolved by the Panel:

First, was the issue of the relationship between the MFN obligation of Article I.1 of GATT and the Enabling Clause. Can the Enabling Clause be deemed an exception or does it remove GSP schemes altogether from the coverage of Article I of GATT?

Second, and related to the previous issue, was the question of who had the burden of proof under the Enabling Clause.

Third, the Panel had to decide whether there was a justification for the Drug Arrangements under the Enabling Clause, especially regarding paragraph 2(a).

We will study each of these issues separately.

(a) **Relationship between the Enabling Clause and Art. I.1 of the GATT**

This question had already been studied by some scholars before the report from the Panel was published. As a matter of fact, the legal status of the Enabling Clause was far from being clear. In a premonitory article that anticipated the judgment of the Panel, Bartels[32] reached the conclusion that the Enabling Clause functions more as an "exception" to the GATT than as an independent WTO instrument. In his opinion, the Enabling Clause could not be defined as a waiver because it does not mention Article XXV.5 of GATT (the waiver provision) and also because it is not included in the list of waivers set out in the footnote to paragraph 1 (b) (iii) of "*the language of Annex 1A incorporating the GATT 1994 into the WTO Agreement*".

The Panel examined the relationship between the Enabling Clause and Art. I.1 GATT, and also studied the Appellate Body Report in *US - Wool Shirts and Blouses*[33]. In this case the Appellate Body held that there are two criteria for determining whether a rule constitutes an "exception": (i) it

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[32] Lorand Bartels, "The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program", 6(2) *Journal of International Economic Law* (2003), at 514-517.

[33] Panel Report, supra note 8, at para. 7.35.

must not be a rule establishing legal obligations in itself; and (ii) it must have the function of authorizing a limited derogation from one or more positive rules laying down obligations.

The Panel then applied the test to the Enabling Clause [34] and affirmed that "*the legal function of the Enabling Clause is to authorize derogation from Article I.1, a positive rule establishing obligations, so as to enable the developed countries, inter alia, to provide GSP to developing countries*". Thus, there is no legal obligation in the Enabling Clause requiring developed countries to provide GSP to developing countries. The word "may" in paragraph 1 of the Enabling Clause makes the granting of GSP clearly an option rather than an obligation. In addition, this option is somewhat limited because the GSP has to be "*generalized, non-discriminatory and non-reciprocal*".

The Panel concluded that "*the Enabling Clause meets the two criteria that the Appellate Body established in US – Wool Shirts and Blouses for determining whether a particular provision is in the nature of an exception*"[35]. The Enabling Clause was, therefore, defined as an exception to Article I.1 of the GATT[36].

(b) **Burden of proof under the Enabling Clause**

The burden of proof issue has been studied before and after the publication of the Panel report. Grando wrote a detailed article about it which highlights not only the importance of this issue, but also the confusing state of WTO jurisprudence. Since 1996, questions about the burden of proof have been raised in almost every case and have determined the outcome of many of them.

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[34] Ibid, at para. 7.38.

[35] Ibid, at para. 7.39.

[36] The judgment of the Panel regarding the relationship of the Enabling Clause and Article I.1 of the GATT was not unanimous. See paras. 9.1-21.

The burden of proof is a concept related to the law of evidence, "which tells us which party – plaintiff or defendant – in a case must provide proof of a determinate issue at the risk of having the adjudicator rule against it with respect to that issue"[37].

In his insightful article about the Enabling Clause[38], Bartels wrote that the developing complaining party will have the burden of proving that the measure at stake does not fall under the protection of the Enabling Clause. This is exactly what the Appellate Body held in *EC-Preferences*.

However, the findings of the Panel regarding this issue were rather different. In its view, it is enough for a complaining party, when challenging a measure that has been taken under the Enabling Clause, to claim only a violation of Art. I GATT. Thus, "*it is sufficient for India to demonstrate an inconsistency with Article I.1. It is not the task of India to establish further violations of possible exceptions provisions that could justify the inconsistency of the European Communities' measure with Article I.1*"[39].

(c) **Is there a justification for the Drug Arrangements in the EC's GSP under the Enabling Clause?**

The Panel found that the relevant portions of the Enabling Clause were ambiguous. In light of the Vienna Convention on the Law of Treaties ("**VCLT**"), the Panel analysed the context of the text, its purpose and other aids to interpret it: "*the Panel therefore considers it helpful to review the drafting history in UNCTAD and to identify the intention of the drafters on issues relating to the GSP arrangements*"[40].

The Enabling Clause mentions the waiver granted in 1971, which in turn mentions "*mutually acceptable*" preferences. Those preferences were negotiated under UNCTAD and embodied in the "Agreed Conclusions". After having examined them, the Panel found there was nothing in the

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37 Michelle T. Grando, "Allocating the burden of proof in WTO Disputes: A Critical Analysis", 9(3) *Journal of International Economic Law* (2006), at 615.

38 Bartels, supra note 32, at 518.

39 Panel Report, supra note 8, at para. 7.40.

40 Ibid, at para. 7.80.

"Agreed Conclusions" that seemed to contemplate discrimination among developing countries on the basis of their development or other needs, except for the special treatment of LDCs (pursuant to paragraph 2(d)) and *a priori* limitations[41].

Thus, the Panel stated that "*footnote 3 as context for paragraph 2(a) does not authorize preference-giving countries to differentiate among developing countries in their GSP schemes, with the exception of the implementation of a priori limitations*"[42].

In addition, the Panel found that "*the term "developing countries" in paragraph 2(a) should be interpreted to mean all developing countries*"[43], except when developing countries were implementing *a priori* limitations.

To sum up, according to the Panel, the term "discrimination" has a neutral meaning[44]. Developed countries must therefore treat all developing countries in exactly the same way, with the only exception of *a priori* limitations and the special treatment for LDCs. Thus, the Panel concluded that the EC had failed to demonstrate that the Drug Arrangements were justified under paragraph 2(a) of the Enabling Clause[45].

As explained below, the Appellate Body reversed these finding in its report and interpreted the case in a rather different manner, though its conclusion regarding the WTO inconsistency of the EC's GSP remained the same.

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41 Ibid, at para. 7.116. According to the Panel, *a priori* limitations may be used to set import ceilings so as to exclude some imports originating in individual developing countries where the products concerned reach a certain competitive level in the market of the preference-giving country.

42 Ibid, at para. 7.170.

43 Ibid, at para. 7.174.

44 Shaffer and Apea, supra note 26, at 988.

45 Panel Report, supra note 8, at para. 8.1(d).

5. **The report of the Appellate Body**

(a) **Relationship between the Enabling Clause and Art. I.1 of the GATT**

Regarding the placement of the Enabling Clause in the WTO legal order, the Appellate Body upheld the findings of the Panel. Given that the Enabling Clause allows WTO Members to grant tariff preferences to developing countries, it must be considered as an exception of the MFN principle[46]. Furthermore, the Appellate Body also affirmed that when there is a conflict between the MFN principle and the Enabling Clause, the latter takes precedence over the former[47].

However, the Appellate Body added a nuance that had important consequences while interpreting the issue of the burden of proof. The Enabling Clause authorizes developed country Members to grant enhanced market access to products from developing countries beyond that granted to products from developed countries. This is intended to provide developing countries with increasing returns from their growing exports, which is critical for those countries' economic development. According to the Appellate Body, "*the Enabling Clause thus plays a vital role in promoting trade as a means of stimulating economic growth and development. In this respect, the Enabling Clause is not a typical 'exception', or 'defence', in the style of Article XX of the GATT 1994, or of other exception provisions identified by the Appellate Body in previous cases*"[48].

As Iboro explains in his article about the Enabling Clause[49], the Enabling Clause is not a positive rule establishing obligations in its own right but it is something more than a mere exception. Despite the fact that it exists in response to the MFN obligation, once a GSP scheme is set up, its validity is only determined according to the provisions of the Enabling Clause. In this sense, the Enabling Clause qualifies as a framework or a self-standing regime, a provision that exists without recourse to another whether for purposes of validity, interpretation, delimitation or existence. The

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46 Appellate Body Report, supra note 8, at para. 99.

47 Ibid, at para. 102.

48 Ibid, at para. 106.

49 Aniekan Iboro Ukpe, *Defining the Character of the Enabling Clause: Towards a more Beneficial GSP Scheme*, available at http://ssrn.com/abstract=1265733 (last visited on the 4th of June 2009), at 4-5.

other GATT exceptions merely exempt GATT-inconsistent measures in a prior defined framework, but they do not create frameworks in themselves.

(b) **Burden of proof under the Enabling Clause**

"*Generally speaking, an exception does not have to be specified in a claim because it is the responsibility of the state relying on an exception to raise it in litigation*"[50]. However, this principle was questioned by the Appellate Body in *EC-Preferences*. Firstly, the Appellate Body said the Enabling Clause is not a typical exception. Secondly, the Appellate Body affirmed that it does not suffice in WTO dispute settlements for a complainant to allege inconsistency with Article I.1 of the GATT 1994, if the complainant seeks also to argue that the measure is not justified under the Enabling Clause. This is especially so if the challenged measure, like that at issue here, is plainly taken pursuant to the Enabling Clause[51].

To put it briefly, a challenge to a GSP scheme has two steps. First, the plaintiff must allege that the GSP is inconsistent with Article I.1 GATT. Second, he must also allege that it is not justified under the Enabling Clause. However, the Appellate Body did not set the bar too high. It affirmed that the plaintiff was required only to identify the provisions of the Enabling Clause with which the GSP scheme was allegedly inconsistent and did not have the burden of establishing facts necessary to prove an inconsistency. Subsequently, the defendant will have the burden of proving that there was no inconsistency[52].

In conclusion, it seems that there are now two types of exceptions in WTO Law: ordinary exceptions (waivers) and special exceptions (the Enabling Clause)[53]. The soundness of this approach is highly arguable[54] and further confuses jurisprudence on the attribution of the burden of proof.

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50 James Harrisson, "Legal and Political Oversight of WTO Waivers", 11(2) *Journal of International Economic Law* (2008), at 420.

51 Appellate Body Report, supra note 8, at para. 110.

52 Ibid, at para. 115.

53 Harrisson, supra note 50, at 420.

54 Mavroidis, supra note 19, at 143.

According to Grando, "*the jurisprudence has also created what appear to be artificial differences between provisions, which raises questions about the relevance of the criteria employed to distinguish provisions that must be proved by the defendant from those that must be proved by the complainant. Panels and the Appellate Body have got so entangled in the details of those distinctions that they seem to have neglected the basics*"[55]. In her view, it may be time to reflect upon the basic question of why the burden of proof should be attributed to a given party. Both the Panel and the Appellate Body should do their best in order to produce a consistent line of jurisprudence, to be used as a predictable model to solve future cases.

What is clear is that the Appellate Body reversed the findings of the Panel on the issue of burden of proof. From now on, it will not be enough for the complaining party to claim only a violation of Art. I GATT. The complaining party will also have to identify the provisions of the Enabling Clause with which the scheme is allegedly inconsistent.

(c) **Is there a justification for the Drug Arrangements in the EC's GSP under the Enabling Clause?**

The Appellate Body agreed to some extent with the Panel, in that it considered that the EC's GSP was WTO inconsistent. Nevertheless, its arguments and interpretation of the controversial terms of the Enabling Clause were rather different.

In the words of Shaffer and Apea[56], the Appellate Body gave a negative meaning to the term "discriminatory": preference-granting countries can differentiate between developing countries taking into account their different development contexts, but while respecting the conditions of the Enabling Clause.

The Appellate Body was of the view that, "*by requiring developed countries to 'respond positively' to the 'needs of developing countries', which are varied and not homogeneous, paragraph*

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[55] Grando, supra note 37, at 655.

[56] Shaffer and Apea, supra note 26, at 988.

3(c) indicates that a GSP scheme may be 'non-discriminatory' even if 'identical' tariff treatment is not accorded to 'all' GSP beneficiaries"[57].

However, there are three conditions that a GSP must satisfy in order to be allowed:

First, the identified "development, financial and trade need" must meet an "objective standard". According to the Appellate Body, "*broad-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations, could serve as such a standard*"[58].

Second, "*the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences*"[59].

Third, "*a sufficient nexus should exist between, on the one hand, the preferential treatment provided under the respective measure authorized by paragraph 2, and, on the other hand, the likelihood of alleviating the relevant development, financial [or] trade need*"[60].

Moreover, and as a consequence of the previous argument, the Appellate Body also reversed the Panel's finding, in paragraph 7.174 of the Panel Report, that "*the term developing countries in paragraph 2(a) of the Enabling Clause should be interpreted to mean all developing countries*". According to the Appellate Body, "developing countries" may mean *less than all* developing countries[61].

In spite of those reversals, the Appellate Body, not surprisingly, reached the same conclusion as the Panel: the Drug Arrangements were not WTO-consistent. It reached this conclusion for the following two reasons:

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57 Appellate Body Report, supra note 8, at para. 165.

58 Ibid, at para. 163.

59 Ibid, at para. 164.

60 Ibid.

61 Ibid, at para. 176.

First, the drug-related preferences were available only to a closed list of 12 countries: "*as the European Communities itself acknowledges, according benefits under the Drug Arrangements to countries other than the 12 identified beneficiaries would require an amendment to the Regulation. Such a 'closed list' of beneficiaries cannot ensure that the preferences under the Drug Arrangements are available to all GSP beneficiaries suffering from illicit drug production and trafficking*"[62].

Second, there were neither criteria for the selection of the countries, nor mechanisms for adding or deleting countries as their circumstances changed. Thus, "*although the European Community claims that the Drug Arrangements are available to all developing countries that are 'similarly affected by the drug problem', because the Regulation does not define the criteria or standards that a developing country must meet to qualify for preferences under the Drug Arrangements, there is no basis to determine whether those criteria or standards are discriminatory or not*"[63].

As a consequence, the Appellate Body found that the EC had failed to prove that the Drug Arrangements met the requirement in footnote 3 that they be "non discriminatory". Accordingly, the Appellate Body upheld, for different reasons, the Panel's conclusion, in paragraph 8.1(d) of the Panel Report, stating that the EC "*failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause*"[64].

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[62] Ibid, at para. 187.

[63] Ibid, at para. 188.

[64] Ibid, at para. 189.

6. **The new Generalized System of Preferences**

In response to the Appellate Body's report, the EC redesigned its GSP system. Regulation 980/2005[65], which entered into force on the 1st of July 2005, sets out the rules for the operation of the EC's GSP+ for the first three years (2006-2008). In addition, a new Regulation[66] has recently been adopted for the period 2009-2011. However, as this new Regulation reflects the basic provisions of the EC's GSP+ and only introduces small changes, the bulk of this section will focus on the EC's GSP+.

In place of the drug-related preferences, the EC proposes to provide additional GSP benefits to countries that have ratified certain key international treaties relating to labour standards, human rights, good governance and environmental protection. The 11 South and Central American nations that are initially eligible appear on a list, and they are precisely the same as those that received the drug-related preference under the prior scheme. Both India and Pakistan are missing from the list. This means that Europe has managed to continue as before while placating India by excluding Pakistan[67]. Pakistan and China are India's major rivals in the textile sector. Now both India and Pakistan are placed in an equivalent legal situation. Moreover, "*as part of the EC's tsunami relief package, India is to benefit from a reduced tariff rate for textiles of 9.5 percent compared to an MFN rate of 12 percent so that India has expressed some satisfaction with the EC's revised programme*"[68].

The EC reduced its five GSP categories to three by modifying the general GSP scheme, keeping the Everything But Arms programme for LDCs, and replacing the three special incentive schemes for environmental protection, labour protection and the Drug Arrangements with a new scheme:

(a) The General Arrangement (Art. 7).

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65 Council Regulation (EC) No. 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences (Regulation 980/2005), OJ 2005 L 169/1.

66 Council Regulation (EC) No. 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No. 552/97, (EC) No. 1933/2006 and Commission Regulations (EC) No. 1100/2006 and (EC) No. 964/2007, OJ 2008 L 211/1.

67 Grossman and Sykes, supra note 29, at 266.

68 Shaffer and Apea, supra note 26, at 1006.

(b) A special incentive arrangement for sustainable development and good governance (EC's GSP+) (Arts. 8-11)

(c) A special arrangement for LDCs (Arts. 12 and 13)

The General Arrangement and the EC's GSP+ are both selective, in the sense that not all products are considered eligible for preferential treatment. This means that non-eligible products are treated under the MFN rule. The excluded products are, for example: agricultural goods, pharmaceutical products, arms and ammunition. The eligible products are divided into sensitive and non-sensitive categories (Art. 7 and Annex II). Sensitive products are a mixture of agricultural, textile, clothing, apparel, carpets and footwear items. They receive lower tariff reduction as compared to non-sensitive products. Products that are classified as sensitive belong to those sectors of the EC economy which receive high protection.

The EC's GSP+ covers the same products as the General Arrangement. In general, all sensitive and non-sensitive products under the EC's GSP+ are duty-free. In addition to ratifying and implementing a list of 16 human rights and 11 good governance conventions[69], beneficiary developing countries must satisfy two additional conditions:

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[69] The list is placed in the Annex III of the Regulation 980/2005:

Conventions referred to in Article 9

PART A

Core human and labour rights UN/ILO Conventions

1. International Covenant on Civil and Political Rights

2. International Covenant on Economic, Social and Cultural Rights

3. International Convention on the Elimination of All Forms of Racial Discrimination

4. Convention on the Elimination of All Forms of Discrimination Against Women

5. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

6. Convention on the Rights of the Child

7. Convention on the Prevention and Punishment of the Crime of Genocide

8. Convention concerning Minimum Age for Admission to Employment (No 138)

9. Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child

First, a beneficiary developing country has to make a request to that effect by the 31st of October 2005 (Art. 10.1(a)).

Second, the applicant must be a "vulnerable country" according to two conditions (Art. 9.3). A vulnerable country is one (i) that is not classified by the World Bank as a high-income country during three consecutive years, and whose five largest sections of its GSP-covered imports to the EC represent more than 75 % in value of its total GSP-covered imports; and (ii) whose GSP-covered imports to the EC represent less than 1 % in value of total GSP-covered imports to the EC.

Labour (No 182)

10. Convention concerning the Abolition of Forced Labour (No 105)

11. Convention concerning Forced or Compulsory Labour (No 29)

12. Convention concerning Equal Remuneration of Men and Women Workers for Work of Equal Value (No 100)

13. Convention concerning Discrimination in Respect of Employment and Occupation (No 111)

14. Convention concerning Freedom of Association and Protection of the Right to Organise (No 87)

15. Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (No 98)

16. International Convention on the Suppression and Punishment of the Crime of Apartheid.

PART B

Conventions related to the environment and governance principles

17. Montreal Protocol on Substances that Deplete the Ozone Layer

18. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal

19. Stockholm Convention on Persistent Organic Pollutants

20. Convention on International Trade in Endangered Species of Wild Fauna and Flora

21. Convention on Biological Diversity

22. Cartagena Protocol on Biosafety

23. Kyoto Protocol to the United Nations Framework Convention on Climate Change

24. United Nations Single Convention on Narcotic Drugs (1961)

25. United Nations Convention on Psychotropic Substances (1971)

26. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)

27. United Nations Convention against Corruption (Mexico).

Therefore, "*this new incentive scheme targets smaller and more 'vulnerable' developing countries (and thus not larger countries such as India)*"[70]. However, if any of those vulnerable countries tried to challenge the EC's GSP+, it would certainly find it difficult to do so[71].

7. Compatibility of the new Generalized System of Preferences with WTO Law

The following section of this essay will analyse the WTO consistency of the EC'S GSP+. It will reflect upon whether it meets the Appellate Body's criteria for differential tariff treatment of developing countries. In addition, it will examine the EC'S GSP+ requirement that applicants must have applied for by a certain date.

(a) The identified "development, financial and trade need" must meet an "objective standard"

What does Paragraph 3(c) of the Enabling Clause's mean by "development, financial and trade need"? How can these needs be objectively identified? As mentioned, the Appellate Body affirmed that "(…) *when a claim of inconsistency with paragraph 3(c) is made, the existence of a 'development, financial [or] trade need' must be assessed according to an objective standard. Broad-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations, could serve as such a standard*"[72]. In saying this, the Appellate Body is likely to have been referring to such instruments as evidence of a standard.

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[70] Shaffer and Apea, supra note 26, at 1005.

[71] Many small developing countries have grave problems when they want to find financial and human resources to participate in the WTO's dispute settlement proceedings. Asoke Mujerki, member of the Indian Foreign service, wrote that "*the majority of international trade lawyers familiar with the WTO's DSU are in the United States, and hiring such lawyers would cost the developing country concerned tens of thousands of dollars per case. In addition to problems of co-ordination with such foreign lawyers, which include educating them in the nuances of governmental policies and practices of many developing countries, the costs of such representation are often prohibitive for developing country governments*". India is one of the largest developing countries and thus one of the more frequent users of WTO dispute settlement. But most developing countries have neither the incentives nor the resources to litigate. See Asoke Mujerki, "Developing Countries and the WTO. Issues of Implementation", 34(6) *Journal of World Trade* (2000), at 69.

[72] Appellate Body Report, supra note 8, at para. 163.

On the one hand, Bartels[73] argues for a broad interpretation, submitting that the term "development need" should be understood as covering both economic and non-economic considerations. He reaches this conclusion after interpreting some documents from the relevant context such as the Appellate Body Report on *US-Shrimp*[74], the 1986 United Nations (UN) Declaration on the Right to Development[75] and the 2002 UN Johannesburg Declaration on Sustainable Development[76].

On the other hand, the Appellate Body stated that "*[i]n the context of a GSP scheme, the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences*"[77]. This assertion, which will be examined in greater detail below, certainly has an economic connotation. Furthermore, this interpretation is confirmed by the "Agreed Conclusions" on the establishment of a GSP adopted in October 1970 by the UNCTAD and the OECD, which state that the objectives of a GSP are "(…) *increasing the export earnings of the Third World countries, promoting their industrialisation and accelerating their rates of economic growth*".

As for the fact that the selection of the beneficiaries of a GSP must be based on objective criteria, it is arguable whether countries can be defined as similarly situated (namely, as having the same "*development, financial and trade needs*") on the basis of their commitments and adherence to international treaties and conventions. Bartels considers that the criterion used by the EC's GSP+ is not appropriate. In his opinion, the statement from the Appellate Body "*(…) is wholly different from giving any importance to the formal act of ratifying such conventions (this being an independent condition for receiving the preferences). In fact, a country that has not ratified a convention may have precisely*

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73 Lorand Bartels, "The WTO Legality of the EU's GSP+ Arrangements", 10(4) *Journal of International Economic Law* (2007), at 874-877.

74 WTO Appellate Body Report, *US-Shrimp*, WT/DS58/AB/R, adopted 12 October 1998, paras. 129–130.

75 UN Declaration on the Right to Development, Adopted by General Assembly resolution 41/128 of 4 December 1986, available at http://www.unhchr.ch/html/menu3/b/74.htm (last visited on the 4th of June 2009).

76 Johannesburg Declaration on Sustainable Development, 4 September 2002, available at www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm (last visited on the 4th of June 2009), at para. 5.

77 Appellate Body Report, supra note 8, at para. 164.

the same development needs as one that has"[78]. Actually, there could also be countries that, not having ratified particular conventions or international treaties, nevertheless observe the relevant requirements in their national laws.

Gruszczynski affirms that "*(…) there are other criteria which reflect better the situation of potential beneficiaries*"[79]. He gives as an example the Human Development Index[80], published annually by the United Nations Development Programme, which provides an assessment of country achievements in different areas of human development such as level of poverty, literacy, education and life expectancy. This would probably be a more objective standard to use while determining whether two developing countries have the same "*development, financial and trade needs*" or not.

(b) **The particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences**

A particular problem of the current design of the EC's GSP+ is that there may be no direct link between the particular "*development, financial and trade need*" of a country ("objectively" identified by means of adherence to international treaties and conventions) and tariff preferences. As Bartels[81] comments, it is clear that tariff preferences are not likely to alleviate many needs that are mentioned in Annex III of Regulation 980/2005[82].

Should the EC's GSP+ then be considered as WTO inconsistent? Gruszczynski believes that "*(…) the relationship [between proposed action and the alleviation of a particular need] can be construed as being more indirect and remote (e.g. the requirement to adhere to a particular set of*

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78 Bartels, supra note 73, at 877.

79 Gruszczynski , supra note 2, at 11.

80 The Human Development Report 2008 can be consulted in http://hdr.undp.org/en/media/HDI_2008_EN_Tables.pdf (last visited on the 4th of June 2009).

81 Bartels, supra note 73, at 877.

82 Annex III includes conventions such as the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid. Even if some of the developing countries had the risk of suffering genocide or apartheid, it is difficult to imagine how these grave dangers could be alleviated by the mere fact of receiving tariff preferences from the EC.

conventions will only contribute indirectly to the alleviation of certain economic needs)"[83]. Actually, there is a Communication from the Commission of the 29th of September 2004 that clearly acknowledges "*(…) the link between development and the respect of basic human and labour rights, of the environment, and of principles of governance*"[84]. To my mind, this interpretation could justify the WTO consistency of the EC's GSP+.

(c) **Deadline for requests**

Regulation 980/2005 was adopted by the Council on the 27th of June 2005, while the deadline for the submission of requests was set for the 31st of October 2005. There was no possibility of adding new beneficiaries until 2009. As Gruszczynski points out, "*this short period may indicate that the selection of conventions was made in order to qualify predetermined countries*"[85]. As mentioned, with the only exception of Pakistan, all the beneficiaries of the EC's GSP also appear as beneficiaries of the EC's GSP+. Furthermore, there are four new countries that have joined the list (Mongolia, Sri Lanka, Moldova and Georgia). However, despite the inclusion of these new countries, it seems that the EC made a conscious choice to limit the benefits under the EC's GSP+ to those countries that previously benefited from the Drug Arrangements.

Nevertheless, this defect may have been resolved by the new Regulation 732/2008 on tariff preferences. The regulation was adopted by the Council on the 22nd of July 2008, while the deadline for the submission of requests was set for the 31st of October 2008, meaning that the term for developing countries to prepare the request was even shorter than with the previous Regulation 980/2005. However, Art. 9(1)(a) of Regulation 732/2008 includes a second paragraph with another deadline on the 30th of April 2010. This means that a country that complies with all the requirements after the 31st of October 2008 will still have a "second chance" to request the granting of tariff preferences. If the list of beneficiaries is therefore reviewed on an annual basis, the current scheme can

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83 Gruszczynski, supra note 2, at 13.

84 Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, COM(2004) 461, Official Journal C 242 of 29.9.2004 (Communication), at 10.

85 Gruszczynski, supra note 2, at 15.

be deemed flexible enough to respect the requirements of the Appellate Body Report. It is not a closed list anymore.

8. Conclusion

Do GSPs promote balance? Can they be considered as useful tools to foster development? On the one hand, GSPs promote trade volume and export earnings in the preference-receiving countries. Revenue gains are not irrelevant at all. GSPs are certainly a form of development aid[86]. Furthermore, "*there is a growing consensus (...) on the need for flexibility and progressivity in order to promote development objectives in any future trade and competition rule-making initiatives*"[87]. The main idea that underpins these arguments is that the trade needs of developing countries are rather different from those of developed countries. Thus, developing countries should not be subject to the same trade rules.

Raj Bahla summarised this viewpoint with his usual accurateness: "*The calls to re-balance the system by re-writing the rules governing it proceeded from a passionately held belief (...) that Third World countries could not compete in the great game of cross-border trade on an equal basis with developed countries. The Third World needed tariff preferences to ensure access for its goods to developed country markets. Through special market access (...) poor countries would be able to increase their exports and foreign exchange earnings. In turn, they could use those earnings, and the opportunities, linkages, and know how from increased exports, to diversify their economies. The end-result would be reduced dependence on foreign trade, specifically, on imports from the developed countries of the western world*"[88].

Moreover, in his article about SDT in the context of the EU-ACP Economic Partnership Agreements, Milton[89] studied international relations between the US, on the one hand, and Western European countries, on the other hand, after World War II. In his opinion, the example of post war

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86 Grossman and Sykes, supra note 29, at 274-277.

87 Hunter Nottage, "Trade and Competition in the WTO: Pondering the applicability of special and differential treatment", 6(1) *Journal of International Economic Law* (2003), at 46-47.

88 Bahla, supra note 18, at 1060.

89 Milton, supra note 12, at 391-392.

US-Western Europe relations shows that a proper SDT scheme can be beneficial for all the parties in the long term. If properly designed, SDT provisions such as GSPs can provide win-win situations for both developed and developing countries.

In addition, there are authors such as McKenzie[90] who consider that GSPs could also be used to promote developing countries' efforts to combat climate change. In his view, the EC's GSP+ is a good example of this, because additional tariff preferences are available to vulnerable developing countries that have previously ratified and implemented some international instruments such as the Kyoto Protocol.

However, there is another side to the coin. There has been increasing questioning of the main assumption of SDT, which is that less liberal trade policies are optimal for developing countries. "*This line of questioning points to a growing body of analytical and empirical work suggesting that developing country exemptions have had negative effects [on developing countries], culminating in the view that certain trade policies need not differ among development lines*"[91].

Despite the fact that GSPs are supposedly designed to help developing countries, they are sometimes used as political tools by developed countries[92], namely the US and the EC. From the outset, Communist countries have been denied access to the US' GSP[93]. In addition, the US' GSP scheme also excludes from its coverage "*(...) countries that withhold the supply of vital commodity resources (aimed at OPEC), countries that injure US commerce by affording preferences to other developed countries, countries that do not enforce arbitral awards in favour of US citizens, countries*

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90 Michael McKenzie, "Climate Change and the Generalized System of Preferences", 11(3) *Journal of International Economic Law* (2008), at 679–695.

91 Nottage, supra note 87, at 46-47.

92 For an analysis of how GSP were implemented in places like Japan or the former Socialist countries of Eastern Europe see Abdulqawi Yusuf, *Legal Aspects of Trade Preferences for Developing States. A study in the Influence of Development Needs on the Evolution of International Law*, Martinus Nijhoff Publishers, The Hague, 1982, at 136-142.

93 Robert Howse, "India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for "Political" Conditionality in US Trade Policy", 4(2) *Chicago Journal of International Law* (2003), at 386.

that aid terrorism (...)"[94]. Similarly, there are grounds to support the thesis that one of the reasons why the EC granted preferential benefits to Pakistan under the Drug Arrangements was to obtain its assistance against the Taliban in Afghanistan, and not to help Pakistan deal with its drug trafficking problems[95]. Thus, it is clear that "*(...) the beneficial welfare implications of GSP schemes could be frustrated by arbitrary decisions based on 'impressions' (likely driven by political/social preferences) on the part of the developed country*"[96].

One of the most dangerous consequences of this approach is that it may create unhealthy rivalry between benefiting and non-benefiting developing countries[97], which could cause a complete breakdown of the entire GSP regime[98]. In other words, the GSP may be used as bargaining leverage and thus may finally "*fragment coalitions among developing countries, thereby weakening their bargaining power in relation to the most developed nations*"[99]. As a consequence, "*while the initial purpose of the GSP was to create a general system to advance the interests of developing countries as a whole, the proliferation of specialized preference regimes with unilaterally determined conditions has placed developing countries in a less-advantageous negotiating situation*"[100]. This drawback was illustrated by the *EC-Preferences* case, where the beneficiaries of the Drug Arrangements supported the EC while India challenged its regulation.

In their insightful article about the GSP, Shaffer and Apea[101] focus on the historical context of the GSP. When the GATT was signed in 1947, the majority of Members of the current WTO were either colonies or colonizing countries. The colonizing countries granted these territories tariff preferences because the territories were often viewed as extensions of the state itself. On the one hand,

94 Mavroidis, supra note 19, at 147.

95 Nottage, supra note 87, at 46-47.

96 Mavroidis, supra note 19, at 147.

97 Ibid, at 147 on footnote 185.

98 Iboro, supra note 49, at 14.

99 Breda dos Santos, supra note 17, at 660.

100 Shaffer and Apea, supra note 26, at 995.

101 Ibid, at 991-992.

it was the "white man's burden" to assist with the development of these "uncivilized" lands. On the other hand, the preferences were part of larger imperial policies.

The mix of self-interest and other more "altruistic" values is a characteristic that applies equally to preference schemes of the colonial era and to the US' and the EC's current GSP schemes. In fact, the former imperial preferences schemes were the predecessors of today's GSP, which they were intended to replace, on a "generalized" basis. However, it seems that it will be rather difficult to do so. The Appellate Body report in *EC-Preferences* left so many questions unanswered that it is more likely that the GSP will be used at the arbitrary discretion of donor countries rather than as a tool to foster progress in developing countries[102].

All in all, there is no straightforward solution to the problems of developing countries. In any case, what is completely unacceptable is that, whereas in areas of interest to developed countries (manufactured products), liberalization has progressed quickly, in areas of interest to developing countries (raw materials), this is hardly the case[103]. Instead of GSP schemes, non-discriminatory access to the agricultural and textiles markets of donors would be much more beneficial to developing countries[104].

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[102] Moreover, from an economic viewpoint it is also highly arguable whether GSP have been effective in fostering growth among developing countries. There are empirical studies that have concluded that "*(...) developing countries with more liberal trade policies achieve higher rates of growth and development than countries that are more protectionist*". Chile and South Korea are two prominent examples of countries that have boosted their growth rates by liberalizing trade. See Mavroidis, supra note 19, at 147.

[103] Matsushita, supra note 1, at 221.

[104] Mavroidis, supra note 19, at 148.