

## **Proposal for a Regulation of the European Parliament and of Council Applying a Scheme of Generalised Tariff Preferences – Some Pointers - by Felix Maonera**

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## Abstract

The European Commission Proposal for a Regulation of the European Parliament and of the Council Applying a Scheme of Generalised Tariff Preferences seeks to review the 2008 EC GSP Regulation and put in place a new scheme by 2014.

It is stated in the EC GSP scheme proposal that the proposed GSP modalities build on solutions that comply with the requirements of the World Trade Organisation. This paper interrogates this assertion, as well as various other aspects of the EC GSP scheme proposal, taking into account the fact that WTO developing country Members often draw significant benefits from the operation of the GSP schemes of developed country Members, and that the setting up of the GSP was greeted very positively by the WTO membership as a whole. The paper makes the point that the way is not open for the setting up of special preferences favouring different selected developing countries without proper justification.

The paper concludes that its a fallacy that when the EC excludes from its GSP scheme, as it proposes to do, middle and upper-income countries then the poor vulnerable developing countries will be able to take advantage. The impact of different preferences and changes in those preferences will depend on the exporting structure of individual GSP beneficiary countries. What might help poor beneficiary countries is not the shutting out of other beneficiaries, but the offering of improved preferences to the poor countries to help their exports to the EC, the paper observes, and encourages GSP beneficiaries that include ACP Members to examine the details of the EC GSP scheme proposal so that the scheme does not remain preferences on paper.

## 1. Introduction

The European Commission (EC) Proposal for a Regulation of the European Parliament and of the Council Applying a Scheme of Generalised Tariff Preferences (the EC GSP scheme proposal) seeks to review the 2008 GSP Regulation which was due to have expired by the end of 2011, but will be given a new lease of life until the end of 2013. The EU proposal seeks to put in place a new scheme by 2014.

A recap of the Generalized System of Preferences (GSP) seems in order here so as to put the EC GSP scheme proposal in context. It is stated in the EC GSP scheme proposal that the GSP modalities proposed therein build on solutions that comply with the requirements – in particular the Enabling Clause – of the World Trade Organisation, and its objective to provide preferences to developing countries.<sup>[1]</sup>

The GSP has its origins in discussions that took place in the First Session of UNCTAD during the mid-1960s. During the Second Session of UNCTAD, in March 1968, a Resolution was adopted on the "Expansion and Diversification of Exports of Manufactures and Semi-manufactures of Developing Countries."<sup>[2]</sup> In this Resolution, UNCTAD agreed to "the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences which would be beneficial to the developing countries," and established a Special Committee on Preferences as a subsidiary organ of the Trade and Development Board, with a mandate to settle the details of the GSP arrangements.<sup>[3]</sup>

In 1970, UNCTAD's Special Committee on Preferences adopted Agreed Conclusions which set up the agreed details of the GSP arrangement. UNCTAD's Trade and Development Board took note of these Agreed Conclusions on 13 October 1970. In accordance with the Agreed Conclusions, certain developed GATT contracting parties sought a waiver for the GSP from the GATT Council. The GATT granted a 10-year waiver on 25 June 1971. Before the expiry of this waiver, the CONTRACTING PARTIES adopted a decision on "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries" (the Enabling Clause) on 28 November 1979.<sup>[4]</sup>

The Enabling Clause is one of the most important instruments in the GATT and the WTO providing special and more favourable treatment for the developing countries. WTO developing country Members often draw significant benefits from the operation of the GSP schemes of developed country Members. The setting up of the GSP was greeted very positively by the GATT contracting parties as a whole. Against this background, it is important to be particularly cautious in the interpretation of the provisions of the Enabling Clause [5] And the EC is no doubt aware of this, having been the first GATT member to initiate a GSP scheme following the UNCTAD decision.

It goes without saying that the EC GSP scheme proposal needs to maintain the basic principles and values of the Enabling Clause. This is important because as has been noted by others, although essentially conceived as a development tool meant to provide market access at preferential rates to developing and least developed countries, the EU GSP scheme has also served the purpose of promoting certain fundamental values and principles which the EU views as important [6]

## 2. Unsubstantiated Claims

In the Explanatory Memorandum and the preamble of the proposed Regulation, the EC makes what can only be termed one-sided, unsubstantiated claims and statements regarding the trade and development of developing countries. It can be expected that the EC will argue that the CARIS Report provides all the needed evidence to back up the EC claims. But in several instances in the EC GSP scheme proposal the EC says things that do not appear to be in tandem with the conclusions of the CARIS Report, but gives the impression that there is support for such things in that Report.

The EC GSP scheme proposal consists of a general arrangement, and two special arrangements [7] One of the two special arrangements is a special incentive arrangement for sustainable development and good governance, while the other is a special arrangement for the least-developed countries, commonly known as the Everything But Arms initiative, (EBA). It is not without interest to note that the EU 2002-2004 GSP scheme provided for five different tariff preference arrangements [8] consisting of, the general arrangements; the special incentive arrangements for the protection of labour rights; the special incentive arrangements for the protection of the environment; the special arrangements for least-developed countries; and the special arrangements to combat drug production and trafficking (the "Drug Arrangements") [9] The Panel and Appellate Body rulings in *European Communities – Conditions for Granting of Tariff Preferences to Developing Countries*, no doubt contributed (as discussed in Part 5 hereunder) to the amendment of subsequent EU GSP schemes.

What the EC GSP scheme proposal seeks to achieve, the Explanatory Memorandum tells us, are three things; greater simplicity, predictability, and better targeting of the EC GSP scheme so as to maximise its effectiveness. [10] But what the EC GSP scheme proposal appears to really seek to achieve is to restrict entry into the EU of exports from the so-called emerging economies for reasons other than the desire "to better reflect the contemporary global economic and trade landscape." [11] The CARIS Report tells us that for most developing countries "the majority of their exports do not go to the EU but to third countries" and that "for structural reasons the extent to which the EU via its preferential scheme can impact on these countries' total exports is constrained." [12]

In its GSP scheme proposal the EC observes that "furthermore, the use of tariff preferences provided under the scheme by high-income or upper-middle income countries increases the competitive pressure on exports from poorer, more vulnerable countries and therefore could impose unjustifiable burden on those more vulnerable developing countries." [13] Besides the fact that one could be forgiven for thinking that the EU is now the self-appointed spokesman for "poorer, more vulnerable" developing countries, amazingly, the CARIS Report does not say anything that could be interpreted as supporting the assertion that the use of tariff preferences provided under the scheme by high-income or upper-middle income countries increases the competitive pressure on exports from all poorer, more vulnerable countries and therefore could impose unjustifiable burden on more vulnerable developing countries. To the contrary, the CARIS Report states that for each of the countries considered, the degree of similarity on average with other countries is typically very low, and that from the point of view of changing preferences impacting on other developing countries, this might suggest a comparatively low level of impact [14]

On the possible competitive pressure each country faces from other countries by different category of trade – EBA, GSP, and GSP+, the analysis suggests that changing the preferences received by other GSP countries could have a significant impact on EBA exports into the EU market [15] The analysis also suggests that for the GSP+ countries, the largest amount of pressure stems from other GSP countries. So as we can see, it is only the EBA and the few GSP+ plus countries whose exports on the EC market, from the trade category perspective, could be said to be vulnerable. However, the EC gives the impression that competitive pressures from emerging economies impose an "unjustifiable burden on those more vulnerable developing countries."

On export similarity between countries and each of the preferential regimes, the CARIS Report states that EBA countries typically have the highest incidence of similarity with other EBA countries and, similarly, the GSP+ countries have the highest incidence of similarity with other GSP+ countries.

The question must then be asked; on what basis does the EC state that the use of tariff preferences provided under the scheme by high-income or upper-middle income countries increases the competitive pressure on exports from poorer, more vulnerable countries and therefore could impose unjustifiable burden on those more vulnerable developing countries? It would appear more appropriate for the EC to design its GSP scheme in response to developing countries' self-established and expressed needs, not on the basis of the EC's own perception.

What the CARIS Report also tells us is that the graduation of a country-sector combination is likely to have a positive impact on those countries competing in those same products, and that a detailed analysis would require a country by country consideration, which was outside the scope of the study. The report also observes that in aggregate, graduation would "appear to be a fairly crude or blunt way of helping those countries most in need." [16]

In the Explanatory Memorandum, without indicating the basis, the EC states that thanks to "increased trade", "many developing countries" and export sectors have successfully integrated within the global marketplace [17] Many developing countries' are unlikely to agree with the EU's assessment. The EU then gets futuristic, even in this present climate of economic uncertainty; "in such cases, they (developing countries) are able to continue to expand unaided..." [18] Building on this claim, the Explanatory Memorandum states that, therefore, the proposal "... identifies competitive imports and suspends unwarranted preferences." [19] Again, debatable.

The EU takes it as given, without any substantiation, that countries which are classified by the World Bank as high-income or upper-middle income countries have per capita income levels allowing them to attain higher levels of diversification without the scheme's tariff preferences, (emphasis added) and include economies which have successfully completed their transition from centralised to market economies. [20] And, according to the EC, "those countries do not share the same development, trade and financial needs as the remaining developing countries; they are at a different stage of economic development, i.e. they are not similarly-situated as the more vulnerable developing countries; and, so as to prevent unjustified discrimination, they need to be treated differently." [21]

In its claims, the EC appears to be overestimating the impact of preferences, especially considering that, in total, the EU comprises more than 50 percent of total exports for only 42 of the 175 countries and that, for many countries, most of their trade is not with the EU. [22] This indeed puts into perspective the extent to which preferential trade policy designed the way the EC suggests to do in its GSP scheme proposal, could impact on trade and development more generally.

## 3. Suspension of Imports and Withdrawal of the GSP Scheme

Although it clearly sets out three arrangements for GSP preferences in the proposal, with three different (and at times additional requirements) for qualification, the EC cites for all three, one reason that has to be taken into account for the temporary withdrawal of the arrangements. And this reason is "...serious and systematic violations of the principles laid down in certain international conventions concerning core human rights and labour rights, so as to promote the objectives of those conventions." [23] While it makes sense that tariff preferences under the special incentive arrangement for sustainable development and good governance should be temporarily withdrawn if the beneficiary country does not respect its binding undertaking to maintain the ratification and effective implementation of the conventions or to comply with the reporting requirements imposed by the conventions, it does not make sense to cite, for all three, one reason for the temporary withdrawal of the arrangements, i.e. the serious and systematic violations of the principles laid down in certain international conventions which not all GSP beneficiaries are required to be party to.

Although in the substantive provisions of the proposed regulation [24] it is stated that the preferential arrangements may be temporarily withdrawn for any of the reasons listed, including the serious and systematic violation of principles laid down in the core conventions, the Appellate Body states in the Explanatory Memorandum must be taken as indicative of the EU's paramount interest and how the proposed Regulation is likely to be interpreted and applied. This is supported by the fact that both the EC Communication of 2004 and the Council Regulation of 2008 applying the GSP Scheme clearly emphasise core principles and values as a means to achieving sustainable development, and that these values and principles are presented as an overarching objective of the EU. [25]

## 4. Use of Loose and Elastic Terms

Where a product originating in a beneficiary country of any of the three arrangements is imported in volumes and/or at prices which cause, or threaten to cause, "serious difficulties" to European Union producers of like or directly competing products, normal common customs tariff duties on that product may be reintroduced. [26] Note should be taken here of the use of the phrase "serious difficulties" instead of "serious injury" as used in the WTO Agreement on Safeguards in similar situations. The WTO Agreement on Safeguards provides [27] that a Member may apply a safeguard measure to a product only if that Member has determined that such product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. "Serious difficulties" is a term a lot looser than "serious injury."

According to the EU GSP scheme proposal, serious difficulties will be deemed to exist where European Union producers suffer deterioration in their economic and/or financial situation[28] while according to the Agreement on Safeguards[29] serious injury shall be understood to mean a *significant overall impairment* in the position of a domestic industry. 'Deterioration' is a lot looser than 'impairment.'

Where imports of products threaten to cause, serious *disturbance* to European Union markets, tariffs may be re-introduced[30] Further, products originating in beneficiary countries may be subject to a special surveillance mechanism in order to avoid *disturbances*. Again, not the *impairment* of European Union markets as per the standard of the Agreement on Safeguards.

The EC can be expected to argue that it can use this loose and elastic language because when the preferences are withdrawn, imports from the concerned country are no being suspended altogether. The only 'punishment' meted out to the concerned country is the re-instatement of MFN treatment of the imports. While one could imagine that the EC could get away with this argument if challenged at the WTO, one wonders why the EC would make it easier than is generally allowed in the WTO, to suspend imports from those 'countries most in need.' [31] This approach appears to defeat the prophesied purpose of the GSP scheme.

## 5. Compatibility With Other Instruments

The EC states that the proposed GSP modalities build on solutions that comply with the requirements – in particular the Enabling Clause – of the World Trade Organisation, and its objective to provide preferences to developing countries.[32] As has been observed elsewhere in this paper, it is important to be particularly cautious in the interpretation of the provisions[33] of the Enabling Clause since it is one of the most important instruments in the GATT and the WTO providing special and more favourable treatment for developing countries, and from which the WTO developing countries often draw significant benefits. In addition, both the Panel and the Appellate Body have pronounced themselves on the provisions of the Enabling Clause in the 2002-3 case, *European Communities – Conditions for Granting of Tariff Preferences to Developing Countries*[34] As will be recalled, the EU's 2002-2004 GSP scheme was challenged under the Enabling Clause before a WTO Panel by India in 2003 [35] This case also provides an interesting background to the EC GSP scheme proposal.

The *European Communities – Conditions for Granting of Tariff Preferences to Developing Countries* dispute concerned special arrangements to combat drug production and trafficking (the Drug Arrangements) in the EC scheme of generalized tariff preferences for the period from 1 January 2002 to 31 December 2004. The Drug Arrangements applied to only 12 beneficiary countries [36]. The tariff reductions accorded under the Drug Arrangements to the 12 beneficiary countries were greater than the tariff reductions granted under the General Arrangements to other developing countries. In respect of products that were included in the Drug Arrangements but not in the General Arrangements, the 12 beneficiary countries were granted duty free access to the European Communities' market, while all other developing countries had to pay the full duties applicable under the Common Customs Tariff.

India requested the Panel to find that the Drug Arrangements were not justified under the Enabling Clause, and requested also that the tariff preferences granted under the Drug Arrangements be granted to all other developing country Members consistently with the Enabling Clause, or that the EC obtain a waiver from its obligations under Article 11 of GATT 1994 on terms and conditions satisfactory to Members. The EU argued, on the other hand, that the Drug Arrangements fell within the scope of the Enabling Clause. Both the Panel[37] and the Appellate Body[38] ruled, for different reasons, that the European Communities failed to demonstrate that the Drug Arrangements were justified under the Enabling Clause.

### (a) Differentiating Between Developing Countries

India had argued that all beneficiaries of a particular Member's GSP scheme are similarly-situated, implicitly arguing that any differential treatment of such beneficiaries constitutes discrimination, while the European Communities argued that GSP beneficiaries are similarly-situated only when they have *similar* development needs. The Appellate Body ruled that it read the Enabling Clause[39] as authorizing preference-granting countries to respond positively to needs that are not necessarily common or shared by all developing countries. Responding to the needs of developing countries, the Appellate Body further ruled, may thus entail treating different developing-country beneficiaries differently [40]

The Appellate Body further stated that, in its view, by requiring developed countries to respond positively to the needs of developing countries, which are varied and not homogeneous, the Enabling Clause indicates that a GSP scheme may be non-discriminatory even if identical tariff treatment is not accorded to all GSP beneficiaries. And, further, that tariff preferences under GSP schemes may be non-discriminatory when the relevant tariff preferences are addressed to particular development, financial or trade needs and are made available to all beneficiaries that share that need [41]

The Appellate Body also ruled that the needs of developing countries may vary over time, and stated that the objective of improving developing countries' share in the growth in international trade, and their trade and export earnings, can be fulfilled by promoting preferential policies aimed at those interests that developing countries have in common, as well as at those interests shared by sub-categories of developing countries based on their particular needs. So, according to the Appellate Body, the Enabling Clause allows not only for GSP schemes providing preferential market access to all beneficiaries, but also the possibility of additional preferences for developing countries with particular needs, provided that such additional preferences are not inconsistent with other provisions of the Enabling Clause, including the requirements that such preferences be generalized and non-reciprocal [42]

Obviously building on this, the EC states in the preamble of the EC GSP scheme proposal[43] that, "the general arrangement should be granted to all those developing countries which share a common developing need and are in a similar stage of economic development." It must be noted, however, that the Appellate Body also said that the Enabling Clause does not authorize any kind of response to any claimed need of developing countries, and observed that the types of needs to which a response is envisaged are limited to development, financial and trade needs. A 'need' cannot be characterized as one of the specified needs of developing countries based on an assertion to that effect by, for instance, a preference-granting country or a beneficiary country. Rather, the existence of a development, financial or trade need must be assessed according to an objective standard [44]. The EC claim that thanks to increased trade, many developing countries and export sectors have successfully integrated within the global market-place [45] and that in such cases, the developing countries are able to continue to expand unaided [46] can hardly be considered as objective.

One could imagine that the EC is relying on the World Bank per capita gross national income (GNI) figures, a measure that has generally served as the official yardstick for evaluating developmental success and is used to classify countries as low-, middle- or high-income. But the GNI's reliability is often questioned because of measurement challenges, and the fact that it ignores critical elements of national economic fortune [47] However, a rising per capita national income may not necessarily benefit all citizens if growth is inequitable. The GNI reveals nothing about inequality and poverty [48] the very elements that the EC GSP scheme purports to want to deal with [49] The GNI, it has been pointed out [50] also fails to reflect critical 'input' dimensions: capability and vulnerability. Not only does it fail to reflect the nature of the inputs driving GNI growth, but it also fails to give an indication of whether states are diligently minding critical gaps, especially on the external trade balance and the internal governmental fiscal balance, which can trigger economic crises [51]

As the Appellate Body pointed out, a 'need' and by inference, a 'lack of need', cannot be characterized as one of the specified needs, or lack of need, of developing countries based merely on an assertion to that effect by a preference-granting country or a beneficiary country as the EC seems to do here. Although there has never been any collective guidance by GATT Contracting Parties or the membership of the WTO on this aspect [52] the Appellate Body has made it clear that a basis for establishing whether or not a developing country qualifies for preferences under a scheme is necessary beyond a mere claim that the arrangements are available to all developing countries that are similarly situated.

Before the Panel, the European Communities provided two elements as constituting objective criteria for differentiating among developing countries, indicating that (i) the difference in treatment must pursue a legitimate aim; and (ii) the difference in treatment must be a reasonable means to achieve that aim. While the aim of the EC GSP scheme proposal, the pursuit of actions in order to foster the sustainable economic, social and environmental development of developing countries with the primary aim of eradicating poverty, might be legitimate, the means to achieve that aim cannot be said to be reasonable. Worse still, the Panel refused to uphold the EC interpretation, point out that if it were to do that, the way would be open for the setting up of an unlimited number of special preferences favouring different selected developing countries. The end result would be the collapse of the whole GSP system and a return back to special preferences favouring selected developing countries, precisely the situation that negotiators aimed to eliminate back in the late 1960s [53]

As was pointed out by the Panel, the levels of product coverage and depth of tariff cuts contained in the GSP offers were negotiated and mutually agreed between developed and developing countries. There is no express mention in the Enabling Clause of any change to the details of the GSP arrangements earlier agreed in the Agreed Conclusions and incorporated into the 1971 Waiver Decision. It can be argued, therefore, that the arrangements on product coverage and depth of tariff cuts agreed upon in the Agreed Conclusions are still valid elements dealing with the design of GSP schemes under the Enabling Clause. The practice of CONTRACTING PARTIES after the 1971 Waiver Decision continued to reflect this common understanding, so that where a developed country wished to provide more favourable treatment to a limited number of developing countries, a waiver was sought from the GATT or the WTO.

It cannot be assumed that GSP schemes providing for lesser product coverage or depth of tariff cuts would have been acceptable to the developing countries. In other words, although the Enabling Clause allows the possibility of GSP schemes providing additional preferences for developing countries with particular needs, it cannot be assumed that GSP schemes providing for lesser product coverage or depth of tariff cuts would have been acceptable to developing countries when GSP was agreed to in the 1960s. In fact, the Panel stated that in relation to future implementation of GSP schemes, it saw no basis for concluding that the level of product coverage and depth of tariff cuts in general could be less than the level and depth offered and accepted in the Agreed Conclusions [54] It can be argued that by 'graduating' some countries out of the GSP scheme, the EC is in actual fact providing lesser product coverage than the developing countries would have considered acceptable when the GSP schemes were negotiated and agreed to in the 1960s. A GSP giving country cannot chop and change the product coverage and the depth of tariff cuts as it pleases.

One issue that both the Panel and the Appellate Body did not deal with, because the issue did not arise, but which is very relevant is whether the EC could completely exclude from its GSP scheme countries claiming developing country status. The issue did not arise because India and all the countries enjoying tariff preferences under the Drug Arrangements were beneficiaries under the EC's GSP scheme. The Appellate Body therefore did not rule on whether the Enabling Clause permits *ab initio* exclusions from GSP schemes of countries claiming developing country status, or the partial or total withdrawal of GSP benefits from certain developing countries under certain conditions.

What the EC has done in excluding completely from the GSP scheme some countries [55], for whatever reasons, cannot stand scrutiny before a WTO Panel or the Appellate Body, it can be argued. Based on the context and the preparatory work of the Enabling Clause, the term "generalized" is to be understood as having two meanings: one, of providing GSP to all developing

countries, and the other of ensuring sufficiently broad coverage of products in GSP [56] India's view expressed before the Panel that preference-giving countries do not have a legal right to exclude any country claiming developing country status must be taken as the correct interpretation of the Enabling Clause.

And it can further be argued that what the EC seeks to do by withdrawing practically all GSP benefits from some developing countries but maintaining their names on the list as 'eligible' but 'not beneficiaries', cannot stand scrutiny before a WTO Panel and the Appellate Body. Withdrawing GSP benefits from some developing countries under certain conditions to the extent that these countries' participation in the scheme becomes meaningless, is as good as excluding them altogether.

In its request for the establishment of a Panel, India had made claims not only with respect to the European Communities' special arrangements to combat drug production and trafficking, but also with respect to the European Communities' special incentive arrangements for the protection of the environment and labour rights. India later decided to limit its complaint to the tariff preferences granted by the European Communities under its Drug Arrangements since no preferences had thus far been granted under the special incentive arrangements for the protection of the environment and that only one country, Moldova, had at that stage been accorded preferences under the special incentive arrangements for the protection of labour rights. However, India made it clear that it reserved its right to bring separate new complaints on the environmental and labour arrangements if the European Communities were to apply them in a manner detrimental to India's trade interests or if the European Communities were to renew them after the lapse of its General System of Preferences scheme on 31 December 2004. It is quite likely, therefore, that if the EC were to apply the special incentive arrangement for sustainable development and good governance in a manner detrimental to some developing countries' trade interests, then that scheme could be challenged before a WTO Dispute Settlement Panel or the Appellate Body.

#### (b) No Foundation in the CARIS Report

It can be expected that the EC will argue that what it seeks to do in the EC GSP scheme proposal finds full support in the Report commissioned and financed by the Commission of the European Communities on the Mid-term Evaluation of the EU's Generalised System of Preferences, submitted by the Centre for the Analysis of Regional Integration at Sussex (the CARIS Report). To the contrary, the CARIS Report provides an interesting background to the EC GSP scheme proposal, with some conclusions that contradict rather than support what the EC seeks to do.

Tellingly, the CARIS Report concludes that there are limits to how much the EU's GSP scheme can achieve on its own, and that it is likely to be more successful when combined with appropriate domestic institutions and policies and when the EU is an important export market for a developing country. Further, the CARIS Report concludes that the structure of the EU's preference regimes is such that the scope for offering significant preferential access for developing countries is largely limited to a few sectors, and that overall, it is only in agriculture and processed foods, and textiles and clothing that there is such scope. All this, the CARIS Report tells us, indicates that on average the preference regimes do not appear to account for a lot of the relevant countries' trade with the EU and that once again, this would suggest that, on average, the structure of the GSP regimes may not be well directed towards the export needs of developing countries.

For the majority of GSP countries, the CARIS Report further tells us, first, that given their export structure, being offered GSP tariffs as opposed to MFN tariffs gives beneficiary countries only a small preference margin and, secondly, that even if all GSP countries were to be offered improved GSP+ tariffs, this would again not make a big difference on average for the majority of such countries. Importantly the CARIS Report states that for over half of the GSP countries the additional duty free access that the GSP scheme offers is unlikely to significantly impact on their trade flows. The reason for this being that a great deal of their trade already enters the EU market under MFN duty free. Similarly, for over half of the GSP countries, even if they were offered additional preferences, this would be unlikely to make a significant impact.

As we learn from the CARIS Report there are many other reasons for the non-utilisation of preference schemes beyond the EC's imagined crowding out of poor, vulnerable countries by the emerging economies. These other reasons include costs of compliance associated with preferential regimes, availability of the products to export, compliance with product specific rules of origin, and export administration.[57] And as we now know, most GSP countries enjoy preferences only for a subset of products. In any case, it is the rich countries that are more likely than poor countries to utilize tariff preferences.

It is a fallacy that when the EC excludes from its GSP scheme those middle and upper-income countries then the poor vulnerable developing countries will make use of those preferences and the space created. What the CARIS Report tells us, in a nutshell, is that the impact of different preferences and changes in those preferences will not only depend on the exporting structure of individual GSP beneficiary countries, but also on the structures of other competing countries. What might help poor beneficiary countries is not shutting out beneficiaries who are doing well. What might help is offering improved preferences to the poor countries to help their exports to the EU. There is no evidence that the GSP schemes have led to any export diversification and a move into new export products on the part of the beneficiary countries. This is still unlikely to happen for the poor countries if the emerging economies are kicked out of the scheme.

The conclusions of the CARIS Report, therefore, point in a direction different from the one the EC proposes to take.

#### 6. Special Burdens, Special Responsibilities

It is rather strange that the EU is willing to help those countries that commit to embracing core universal values on human, labour rights, environment and governance assume the special burdens and responsibilities resulting from the ratification of core international conventions on human and labour rights, environmental protection and good governance, as well as from their effective implementation.[58] What is not in doubt is that these countries would hardly ever willingly assume most of these 'special burdens and responsibilities' resulting from the ratification of 27 core international conventions if it were not for the enticement of benefiting from the GSP+ scheme. In fact, it is known that most countries ratified conventions around the dates required by GSP+ conditionality and that, in some instances, GSP+ obligations acted as the sole motivation for ratification.[59] It is also known that GSP+ beneficiaries hardly willingly commit to these conventions' effective implementation. While there is some evidence that the GSP+ scheme may have a positive impact on the ratification of given conventions, the evidence that there is actual active implementation of the relevant conventions is much weaker.[60] The case studies appear to suggest that countries may ratify in order to meet the minimum requirement but then do much less to implement those conventions.[61]

The EC GSP scheme proposal places the burden of proof for compliance with its obligations resulting from the binding convention undertakings[62] on the GSP+ beneficiary country.[63] In other words, not only are these countries enticed and coerced into assuming the 'special burdens' and responsibilities resulting from the ratification of core international conventions on human and labour rights, environmental protection and good governance, but they are expected as well to carry the special burden and responsibility of proving that they are doing that which they never willingly agreed to do.

The underlying idea of the GSP+ scheme is that although the effective implementation of conventions in these spheres may be costly for developing countries, the benefits of GSP+ would compensate for and outweigh such costs. Although the CARIS Report was unable to gather evidence for a cost-benefit analysis of the implementation of the conventions, [64] it tells us that the overview of the existing relevant research indicates that there is still little consensus on the effectiveness of human rights, labour standards, governance and environmental provisions in trade agreements and unilateral preferences.[65] One could go further and state that there is no consensus at all on this issue, given the very few number of countries designated over the years for GSP+.

In research findings relating to the three countries benefiting from GSP+, the CARIS Report stated that the GSP+ conditionality is believed to have had a very limited impact on enforcement incentives and compliance with convention mandates. Further, knowledge of the details of the GSP+ programme appears very limited among the general public; domestic political dynamics prove to be very important in determining relative progress in the various fields covered by the conventions and; enforcement of existing legislation is much more difficult than passing legislation, related to limited resources and administrative capacity, among other factors.

This is quite some indictment, in the CARIS Report, of the GSP+ scheme.

#### 7. Some Concluding Thoughts

The EC GSP scheme proposal appears an attempt by the EU to do two things: first, solve in its favour matters still under discussion at the WTO and, secondly, coerce the ACP countries into concluding and signing the Economic Partnership Agreements, (EPAs).

It is common knowledge that developed countries have at the WTO been arguing for a differentiation between developing countries so that the so-called emerging economies assume greater responsibility in world trade. Developed countries would want this differentiation so that Brazil, China and India take on more responsibilities than say, Chad. China is very different from Chad, and this needs to be clearly recognized in WTO talks. The current US Ambassador to the WTO, Michael Purke, said in January 2011. [66] Referring to India and Brazil he said: "What we're hoping is they will step up and take up their leadership role," and added, "At the end of the day we have to ask, are the advanced developing economies ready to accept the responsibility and leadership that goes with their new roles?" A key change, Ambassador Purke argued, would be "the need to go beyond a monolithic notion of the developing world to recognize complexity." The EC appears to be advancing this argument in its GSP scheme proposal by seeking to exclude from the scheme emerging economies on some unsubstantiated basis.

Developing countries at the WTO have made it clear that they do not contemplate discussing labour standards; that customs controls on the export or transit of drugs should not prevent access to medicines by developing countries; that they are losing a lot of revenue by being allowed to only easily export into the EU raw materials; and that they are not the guilty parties in over-fishing. The EC has made it equally clear in the GSP scheme proposal that any action that is not in its favour on these issues, will be punished by the withdrawal of preferences.[67] As could be expected, the EC could argue that this language in the GSP scheme proposal has always existed in previous EC GSP schemes. That might well be true, but it does not change the fact that the EC is taking advantage of the GSP scheme, purportedly crafted for the benefit of developing countries, to settle in its favour some issues still under discussion at the WTO and on which developing countries hold views divergent to the EC's.

The second thing the EC seeks to do by the GSP scheme proposal is firmly 'persuade' those doubting ACP countries to

conclude and sign the Economic Partnership Agreements (EPAs) by making the GSP preferences a bed of nails. Others<sup>[8]</sup> have stated that a key strategic consideration is whether the reform should provide a 'soft landing' or a 'hard fall' for countries that are not able or willing to conclude an FTA with the EU. The way its currently crafted, the proposal takes away the refuge that ACP countries must have thought they had in the GSP scheme if the whole EPA negotiations collapse.

It is important at this stage that the GSP beneficiary countries address the technical detail of the EC GSP scheme proposal. It seems to me that failure at Doha of the developing countries to address the detail of the Doha Ministerial Declaration, which launched the current round of WTO negotiations, has now put the whole Doha Round in a spin. So details do matter, and must be worked out, and preferably understood and agreed to, right from the beginning, especially in a GSP scheme that suggests pushing out of the market some developing countries supposedly in favour of other developing countries.

Yes, developed countries have the choice whether or not to put in place GSP schemes to benefit developing countries. But when they chose to do so, no, they cannot fashion these GSP preference schemes in a manner that is self-serving. It need not be forgotten that the EC GSP scheme is also a visibility exercise for the EC. The EC can put its hand up in different fora and tell all how it is doing wonderful things for the developing countries in its GSP schemes. Therefore, the EC preference scheme must not be allowed to remain preferences on paper.

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The European Commission Proposal for a Regulation of the European Parliament and of the Council Applying a Scheme of Generalised Tariff Preferences

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[1] Paragraph 4 of the Explanatory Memorandum, page 3

[2] Resolution 21(II)

[3] As narrated in paragraph 7.64 of the Report of the Panel: *European Communities – Conditions for Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, 1 December 2003

[4] As narrated in paragraph 7.64 of the Report of the Panel

[5] Paragraph 7.31 of the Report of the Panel

[6] ECDPM Briefing Note, No. 24 April 2011 entitled GSP Reform: Principles, values and coherence, by Sanoussi Bilal, Isabelle Ramdoo and Quentin de Roquefeuil, page 2

[7] Article 1(2) of the EU GSP Proposal

[8] *European Communities – Conditions for Granting of Tariff Preferences to Developing Countries*, Report of the Panel, WT/DS246/R, 1 December 2003

[9] The benefits under the Drug Arrangements currently apply to 12 named countries: Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru and Venezuela.

[10] Paragraph 4, page 3

[11] Paragraph 3, page 1

- [12] Page 190 of the CARIS Report
- [13] Paragraph 9, preamble of the Proposed Regulation
- [14] Page 49 of the CARIS Report
- [15] Page 54 of the CARIS Report
- [16] Page 191 of the CARIS Report
- [17] Paragraph 4, page1, Explanatory Memorandum
- [18] *ibid*
- [19] *ibid*
- [20] Paragraph 10 of the Explanatory Note
- [21] Paragraph 10
- [22] Page 32
- [23] Paragraph 23 of the preamble of the proposed Regulation
- [24] Article 19
- [25] ECDPM Briefing Note, No. 24 April 2001 entitled GSP Reform: Principles, values and coherence, by Sanoussi Bilal, Isabelle Ramdoo and Quentin de Roquefeuil, page 3
- [26] Article 22 of the Proposal
- [27] In Article 2
- [28] (long list)
- [29] Article 4(1)(a)
- [30] Article 30 of the Proposal
- [31] Paragraph 4, page 1, Explanatory Memorandum
- [32] Paragraph 4 of the Explanatory Memorandum, page 3
- [33] Paragraph 7.31 of the Report of the Panel
- [34] Report of the Panel, WT/DS246/R, and Report of the Appellate Body WT/DS246/AB/R
- [35] European Communities – Conditions for Granting of Tariff Preferences to Developing Countries, Report of the Panel, WT/DS246/R, 1 December 2003
- [36] - Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru and Venezuela.
- [37] Paragraph 8.1(d) of the Panel Report
- [38] Paragraph 191(g) of the Appellate Body Report, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R, 7 April 2004
- [39] Paragraph 3(c)
- [40] Paragraph 162 of the Appellate Body report
- [41] Paragraph 165 of the Appellate Body Report
- [42] Paragraph 169 of the Appellate Body Report
- [43] Paragraph 9
- [44] Paragraph 163 of the Appellate Body Report
- [45] Paragraph 4, page1, Explanatory Memorandum
- [46] *ibid*
- [47] <http://www.dawn.com/2011/05/31/middle-income-status.html> <sup>[1]</sup>
- [48] *ibid*
- [49] Para 3 of the Preamble of the proposed Regulation
- [50] *ibid*
- [51] *ibid*
- [52] Report of the Panel, paragraph 7.100
- [53] Report of the Panel, paragraph 7.102
- [54] Paragraph 7.95 of the Panel Report, Resolution 21(II) itself did not set up the details of the GSP arrangements. Agreed Conclusions resulting from the negotiations mandated by the Resolution did set out the details.
- [55] Myanmar and Belarus
- [56] Panel Report, para 7.177
- [57] Pages 83 and 109 of the CARIS Report
- [58] Paragraph 11 of the preamble of the proposed Regulation
- [59] Page 187
- [60] The CARIS Report, page 190
- [61] *ibid*
- [62] Referred to in Article 9(1)(c),(d) and (e) of the proposed regulation
- [63] Article 15(2)
- [64] Page 173
- [65] Page 187
- [66] <http://genevalunch.com/blog/tag/michael-punke/> <sup>[2]</sup>
- [67] Article 19
- [68] ECDPM Briefing Note, No. 24 April 2011 entitled GSP Reform: Principles, values and coherence, by Sanoussi Bilal, Isabelle Ramdoo and Quentin de Roquefeuil/sites/acpsec.waw.be/files/geneva/Proposal%20for%20a%20Regulation%20of%20the%20European%20Parliament%20and%20of%20Council%20Applying%20a%20Scheme%20of%20Generalised%20Tariff%20Preferences%20%E2%80%93%20Some%20Pointers%20-%20by%20Felix%20Maonera.docx <sup>[3]</sup>

Tags: [Geneva](#) <sup>[4]</sup>

URL source: <http://www.acp.int/fr/content/proposal-regulation-european-parliament-and-council-applying-scheme-generalised-tariff-pre-0>

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[1] <http://www.dawn.com/2011/05/31/middle-income-status.html>

[2] <http://genevalunch.com/blog/tag/michael-punke/>

[3]

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[4] <http://www.acp.int/fr/category/story-type/geneva>