
Another EC-Tariff Preferences case?

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Introduction

In 1971, the European Communities¹ (EC) decided to implement a General System of Preferences (GSP) for the first time. A GSP scheme consists of tariff preferences which are implemented by developed countries and entail that the goods which are imported from developing countries are not submitted to the normal customs duties.² Tariff preferences result in different treatment of trading partners. However, this is not something new. During the colonization period and thereafter, West-European countries primarily had preferential relations with their colonies of which they were profiting. In the years after decolonization the focus changed and developing countries started to raise their voices and demanded a change.

In addition, the perspective on the development discourse changed from a focus on economic growth to a more comprehensive approach of ‘sustainable development’.³ Almost from the start the European Communities has seen the GSP as an instrument for development cooperation.⁴ By providing tariff preferences to products from developing countries, an incentive to traders is given to import these products. This gives developing countries a stronger position to compete on the international markets, which is important for their economical development. Besides, in the context of the Treaty of Maastricht, the EC recognized the potential of the GSP for a broader approach of development as an economic, social, cultural and political process.⁵

Differential treatment is allowed by the rules of the World Trade Organization (WTO); however, this does not exclude disputes about this issue. Like most international agreements, the GATT/WTO agreements are made by diplomats after extensive negotiations and bargaining.⁶ As a result of this process, ambiguity is

¹ Under the WTO the Member States of the EU are individually Members of the WTO but the European Communities as a whole is also a WTO Member (see Art. XI WTO). It depends on the topic of discussion inside the WTO which Member(s) have the competence to decide. In this paper the term European Communities/EC is mainly used. Concerning more general statements ‘EU’ will be used.
² A more in-depth description of the EC GSP scheme will be provided in paragraph 1.3.
⁵ Commission Communication on The Integration of the Developing Countries into the International Trading System: Role of the GSP COM (94) 212 final (1 June 1994).
⁶ Recall why the GATT formed the foundation of the world trade system for almost fifty years instead of the International Trade Organisation (ITO).
created and different interpretations of the provisions, by Member States, WTO Dispute Panels and the Appellate Body (AB), are possible.\footnote{Gregory Shaffer, and Yvonne Apea, ‘Institutional choice in the generalized system of preferences case: who decides the conditions for trade preferences? The law and politics of rights’, Journal of World Trade, 2005, 977-1008, 987.}

Reconsidering the history of the EC Generalized System of Preferences, attention is drawn to a dispute started in 2002. India questioned the validity of the EC GSP system with regard to WTO law. While the claim of India concerned all of the EC GSP ‘special incentives’, eventually only one of the special incentives, the Drug Arrangements, of the EC GSP system was challenged.\footnote{India, G/L/521 WT/DS246/1 ‘European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries - Request for Consultations by India’ 12-03-2002.} According to India the Drug Arrangements were inconsistent with Article I of the GATT and could not be justified by the Enabling Clause. In the ‘European Communities-Conditions for the granting of tariff preferences to developing countries’ case (EC-Tariff Preferences), a dispute settlement Panel and the Appellate Body of the WTO have provided conclusions concerning this issue.\footnote{WTO DS 1 December 2003, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/R. WTO AB 7 April 2004, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R, (AB-2004-1) (hereinafter ‘Panel Report’ and ‘AB Report’ respectively). We will mainly use these Reports and academic literature to provide a review of the case. The written submissions of the parties are not examined in depth since this would provide too much detail for this research, besides; the main points are stated in the reports.}

After the dispute, the EC was still convinced of the development potential of tariff preferences while taking into account the necessity of the compatibility of their GSP with the rules of the WTO. The EC consequently stated “Trade preferences are intended to ensure that the Common Commercial Policy is consistent with development policy. The Community aims to help eradicate poverty and promote sustainable development and good governance in developing countries, while still abiding by the rules laid down by the World Trade Organization.”\footnote{Website EU (2007) ‘Generalized System of Preferences 2006 – 2008’, retrieved May 2008 from: http://europa.eu/scadplus/leg/en/lvb/r11020.htm.}

The outcome of the dispute, however, had important implications for the conditions that the GSP special incentive schemes needed to meet in order to achieve consistency with WTO rules.\footnote{See amongst others: James Harrison ‘Incentives for development: the EC’s generalized system of Preferences, India’s WTO challenge and reform’, Common Market Law Review, 2005, 1663-1689.} The conclusion of the Appellate Body resulted in
several requirements which a GSP has to meet to be WTO compatible.\textsuperscript{12} For the new Generalized System of Preferences of the EC this has had an impact as well.

Consequently, it is interesting to analyse whether the requirements of the Appellate Body are taken into account by the EU when designing a new GSP scheme. The foundation of the analysis will be the question what has happened to the EC Generalized System of Preferences (GSP) after India challenged the system within the WTO and are the 2006-2015 EC GSP guidelines WTO consistent.

\section*{Methodology}
A literature review will form the underpinning of this research and will be accompanied by own analysis. By evaluating the new GSP system based on the AB criteria, the objective of this research is to determine whether the EC has made a WTO compatible GSP system and whether new complaints can be avoided.

The EC GSP scheme is based upon general guidelines and is valid for cycles of ten years. The more concrete implementations of the GSP measures are provided in a regulation which is, in general, valid for three years. The guidelines for the recent scheme of 2006-2015 were adopted in 2004, following the dispute conclusion. The regulation for the GSP for the period 2006-2008 was accepted in 2005. Consequently, the focus of this research will be the EC Regulation 980/2005 ‘Applying a scheme of generalized tariff preferences.’\textsuperscript{13}

Shortly before the research of this thesis, a proposal for the coming ‘2009-2011 regulation’ was proposed by the European Commission. The contents of the proposed regulation were discussed within the European Union during this research.\textsuperscript{14} This research will concentrate on Regulation 980/2005, since this was the first regulation after the Appellate Body report and only minor adaptations are made by the Commission for the coming regulation.

We will, besides, focus mainly on the special incentive arrangement for sustainable development and good governance (section 2 art. 8-11 Council Regulation 980/2005). This arrangement has replaced the special arrangements to combat drug production and trafficking; the special incentive arrangements for the protection of labour rights and the special incentive arrangements for the protection of the environment. Since the EC had to bring their regulation in conformity with WTO rules as fast as possible after the dispute, this incentive became already operative in July 2005.  

Related to the new GSP scheme, the European Commission recognized the need of a change in the ‘rules of origin’ in preferential trade arrangements. Rules of origin are essential for the world trade system because the origin of products determines whether these are subject to tariff preferences. The communication of the Commission is however only a proposal and will not be examined due to the limited scope of this research.

To understand the setting of the issue, the research will start by analysing the background of the GSP. Preferences under GSP schemes are by definition violations of the Most-Favoured Nation (MFN) principle which is one of the core principles of the WTO. However, the WTO Members have decided to allow preferences for developing countries by means of the Enabling Clause. The Enabling Clause forms the foundation of the GSP and is analysed extensively by the Panel and Appellate Body during the EC-Tariff Preferences case. A short review of the GSP history and the case will be given. Also, the current EC GSP scheme will be described to comprehend the matter of issue.

Chapter two will focus on the, from the Appellate Body conclusions derived, requirements or criteria a GSP scheme needs to meet to be WTO compatible. The

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Appellate Body modified the panel ruling and discerned the non-discrimination requirement. From the conclusion of the AB a number of requirements can be derived which a developed country must show in order to be allowed to provide different levels of preferences to different developing countries. The requirements will be based upon the interpretation of the Appellate Body combined with analyses of several scholars.

In chapter three some perspectives concerning the new EC GSP will be pooled together which results in an analysis whether the EU 2006-2015 GSP meets the requirements of the Appellate Body and consequently is WTO compatible. The research will conclude with remarks on whether the EC has made a WTO compatible GSP system and whether new complaints can be avoided.

\[18\] AB Report para 165-174.
1. History and present GSP

To understand the setting of the issue, the research will be started by analysing the background of the Generalized System of Preferences system. A short summary of the history of special and differential treatment will form the foundation of the review followed by a clarification of the EC-Tariff Preferences case and a brief description of the current EC-GSP. An answer will be given to the questions: what is the background of the EC GSP and how is the EC’s 2006-2015 GSP scheme organized?

1.1 Background of the GSP

A commonly recognized principle of the multilateral trade system is that economic development is best achieved through non-discriminatory free trade. The WTO incorporated non-discrimination in their core principle of Most-Favoured Nation treatment. This entails that when a WTO Member offers a preference to another country all other WTO Members need to be offered the same preference. Accordingly, trade related treatment needs to be non-discriminatory.

Preferences under Generalized System of Preferences schemes which provide a more favourable treatment of developing countries are, hence, by definition violations of the MFN principle. Nevertheless, the members of the WTO also acknowledge the importance of development and the special need of developing countries. The preamble of the WTO states: “there is need for positive efforts designed to ensure that developing countries, (…), secure a share in the growth in international trade commensurate with the needs of their economic development.”

During the first decade of the GATT, the perception of the GATT as a rich countries club arose in many developing countries. Besides, they were not benefiting from the increased trade liberalization and their economic conditions were not much improving. Within GATT the deprived development of the developing countries was recognized by the contracting countries and steps were taken to assist developing countries to integrate in the world trading system. To concede to the need of

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economic development of the developing countries, the GATT contracting parties decided to redraft Article XVIII GATT in 1955.

With this Article, the contracting parties recognized the problem of economic development as an obligation of the GATT.23 This positive progress concerning the development issue was followed by a report on the trends in international trade made by a panel of experts chaired by Haberler, in 1958.24 The experts concluded in their ‘Haberler report’ that the contracting parties had to examine ways in which developing countries could achieve greater access for their exports in world markets.25 In 1958 this suggestion was put into practice, by the introduction of a programme called the ‘Programme for Trade Expansion’, and followed by the Declaration on Promotion of the Trade Developing Countries in 1961 and an action programme in 1963.26 The action programme called for preferential tariff treatment of developing-country exports to developed countries. Eventually, these developments led to an amendment of the GATT in 1965, and part IV ‘Trade and Development’ was added to GATT 1947.27

**UNCTAD and GSP**

As pointed out before, the developing countries felt mistreated in the GATT context since they were not profiting much from the economic progress. It was decided to stimulate development outside GATT as well, by means of the United Nations Conference on Trade and Development (UNCTAD).28 Consequently, in the same period of the amendment of the GATT, the first UNCTAD conference was hold.

The succeeding developments inside the two different institutions where influencing each other and became interconnected.29 This is, however, not very surprising. When examining the ‘Appointment of the panel experts’ we can see that Prebish, who became the first Secretary-General of UNCTAD, in 1964, is one of the experts responsible for GATT’s ‘Haberler Report’ of 1958. It is consequently clear

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23 See Kennedy supra note 22 at 1531-1535 for an extensive analysis on art. XVIII GATT.
25 Kennedy, supra note 22. 1535.
26 Ibid, 1531.
27 GATT document L/2355, Protocol Amending the GATT to Introduce Part IV on Trade and Development, 12-2-1965.
29 The panel in the EC-Preferences case recognized this interconnectivity. Panel Report para 7.85-7.88, but this has become a controversial issue under legal scholars. See Shaffer, supra note 7, 985.
that the same ideas about the position of developing countries in the world trading system where circulating in both institutions.\textsuperscript{30}

While the MFN principle was crucial for the GATT provisions, under the auspices of UNCTAD this principle was rejected since it formed an inappropriate basis for conducting trade among countries of unequal economic power.\textsuperscript{31} This was not a novel perspective. During the negotiations for the Havana Charter, which formed the foundation of the never operative International Trade Organization, equal treatment was unacceptable for the developing countries.\textsuperscript{32}

During the first UNCTAD conference the concept of a Generalized System of Preferences was introduced.\textsuperscript{33} A GSP would have, according to developing countries, several benefits. Under GATT 1947 there were preferential treatments for developing countries accepted already.\textsuperscript{34} These preferences were, however, ‘special’ and only for certain groups of countries, like old colonies. After implementation of the generalized preferences the special preferences of these ex-colonies would disappear which would ideally provide all developing countries a more equal treatment.\textsuperscript{35}

The concept of generalized preferences was, ultimately, adopted on the second UNCTAD conference in 1968.\textsuperscript{36} In Resolution 21 (II), 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.”\textsuperscript{37} Also, a Special Committee on Preferences which had as task to settle the details of the GSP arrangements was established. In 1970 the Special Committee adopted the Agreed Conclusions which were designed to lead to the establishment of

\textsuperscript{30} GATT document L/782.

\textsuperscript{31} Oliver Long, ‘Law and its limitations in the GATT multilateral trade system’ 1985, found in Kennedy supra note 22, at 1529.

\textsuperscript{32} Kennedy supra note 22, 1530-1531.


\textsuperscript{35} The EEC was the main opponent of the initiatives, since this would reduce the preferences available to its former colonies. Consequently the EEC has been able to give the ACP countries a more preferential treatment under free trade arrangements. Compare: Lorand Bartels, ‘The trade and development policy of the European Union’, \textit{The European Journal of International Law}, (2007), 715-756, 730.

\textsuperscript{36} Website UNCTAD ‘about GSP’ Also: the panel report on EC-Preferences reflects in paragraph 7.81-7.83 to the history of the Enabling Clause.

\textsuperscript{37} Panel report para 7.82.
a GSP.  

The Committee also agreed that UNCTAD would review the effect of the GSP schemes.  

The work under the auspices of UNCTAD became openly interconnected with the GATT when some developed countries requested for a waiver in 1971. A temporary, ten-year, waiver of the MFN provisions of Article I was necessary, to be able to implement the GSP system and at the same time be consistent with the rules of the GATT. In the waiver was stated that “unanimous agreement was reached in favour of the early establishment of a mutually acceptable system of generalized (...) preferences beneficial to the developing countries.” The expression of ‘mutually acceptable’ clearly shows the connection with the previous developments in UNCTAD.

During the Tokyo Round, which took place in the turbulent timeframe 1973-1979, the 1971 MFN waiver became a topic of discussion again. It is necessary to take into account the developments of the international context. After the collapse of Bretton Woods several developed countries had raised their tariffs to protectionist levels. Besides, the oil crisis had shown that developing countries could have some important leverage.

In 1973, the Ministerial Declaration of the Tokyo Round had raised hope for the developing countries by stating that “additional benefits for the international trade of developing countries” had to be secured. Some tough and lengthy negotiation, however, led by Brazil, were necessary to provide a permanent legal basis for the GSP under GATT. In 1979, the political motivation to make the GSP an integral part of the GATT finally existed and the decision on ‘Differential and more favourable treatment, reciprocity and fuller participation of developing countries’ was adopted. The ‘Enabling Clause’, which enables developed countries to accord preferential tariff treatment to developing countries, came consequently into existence in 1979.

38 Greenwald, supra note 34, 115.
39 Agreed Conclusions of the Special Committee on Preferences, art 8 see Annex D-4 Panel Report.
41 Santos, supra note 20, 650-653
43 Santos, supra note 20, 651-652.
There has been discussion between scholars about the legal status of the Enabling Clause.\(^45\) It is not seen as a waiver, since it does not refer to the ‘waiver provision’ of the GATT. The AB, however, stated in EC-Tariff Preferences that the Enabling Clause had become an integral part of the GATT 1994 since it was adopted as a decision of the Contracting Parties.\(^46\) Another legal issue concerning the GSP is that developed countries are not obliged to give preferential treatment in light of the Enabling Clause but they could grant preferences on a voluntary basis. This was made clear in a meeting of the GATT Council and later on during a dispute settlement procedure.\(^47\)

### 1.2 The EC-Tariff Preferences case\(^48\)

While the GSP scheme is meant to be beneficial for developing countries, there have been complaints by beneficiary countries concerning certain provisions provided by the donor countries. In 2000, Brazil brought forward a complaint against the EU. Brazil's coffee exports were "graduated" from the GSP scheme while at the same time other South American countries could benefit from special concessions on coffee imports because of their efforts to combat drugs. This conflict was solved, thought, by a deal between the EC and Brazil.\(^49\)

The leading case concerning the legality of the GSP schemes under WTO law is the previously mentioned ‘European Communities-Conditions for the granting of tariff preferences to developing countries’ case. In 2002, India questioned the validity of the European GSP system with regard to WTO law. Consequently, the Drug Arrangements of the EC GSP system were challenged in a WTO dispute settlement procedure.\(^50\) The reason behind India’s claim was that while both India and Pakistan were beneficiaries of the General Arrangement of the GSP of the European

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\(^46\) AB Report para 90. compare Article I (b) (iv) GATT 1994

\(^47\) Bartels, supra note 45, 513, footnote 29. Also: Panel report ‘US-Denial of most-favoured nation treatment as to non-rubber footwear from Brazil’ (1992) found in: Kennedy, supra note 22, 1542.


\(^50\) WTO document G/L/521 WT/DS246/1 ‘European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries - Request for Consultations by India’ 12-03-2002.
Communities, Pakistan was qualified under the Drug Arrangements and therefore received extra tariff preferences. Income was lost for India, since Pakistan was their primary competitor and this was problematic for India.

The Drug Arrangements were one of the special incentive schemes of the EC GSP and under this arrangement the community provided duty-free market access to 12 beneficiary countries. The purpose of this provision was to compensate WTO members which had adopted active policies against drug production and trafficking and were consequently considered to be in need of special assistance.

India, though, observed this arrangement to be inconsistent with the Most-Favoured Nation principle of Article I.1 of the GATT and could not be justified by the Enabling Clause. The complaint was, consequently, brought for a dispute settlement Panel of the WTO and the Appellate Body. In the end, the claim of India was valid; the Drug Arrangements were found inconsistent with Article I.

The first fundamental question which had to be answered during the case was whether the ‘non-discrimination’ requirement of paragraph 2(a) of the Enabling Clause imposed a legally enforceable obligation upon GSP donors to provide identical tariff treatment to all their GSP beneficiaries. This was followed by the issue whether paragraph 3(c) of the Enabling Clause could be interpreted as allowing GSP donors to differentiate among their GSP beneficiaries and provide additional trade preferences, in order to ‘respond positively to the special needs of certain developing countries’.


52 Shaffer, supra note 7, 984.

53 Articles concerning Drug Arrangements, Reg 2501/2001, art. 1 (e), section 4: art. 10, title IV: art.25. The beneficiary countries for the Drug Arrangements can be found in annex 1, column I. It is, however, questionable whether this was the motive to add Pakistan. As pointed to in Shaffer, supra note 7. The European Commission has stated in memo 02/53 (12-3-2002) that ‘a package of trade measures designed to significantly improve access for Pakistani exports to the EU’ is presented in October 2001. Further ‘The package gives Pakistan the best possible access to the EU short of a Free Trade Agreement by making it eligible for the new Special Generalised System of Preferences Scheme for countries combating drugs’ Retrieved May 2008 from: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/02/53&format=HTML&aged=1&language=EN&guiLanguage=en. Also, in the notes of the 2397th General Affairs Council meeting of 10-12-2001 it is written: ‘The Council decided to add Pakistan to the list of countries included in the special arrangements to combat drug production and trafficking… The decision was taken in the context of the international community's efforts to support Pakistan following the events of 11 September.’ Retrieved May 2008 from http://www.sussex.ac.uk/Units/spru/hsp/2001-1210%20GAERC%20Concs.pdf.
In the following, both the Panel ruling and the Appellate Body ruling will be briefly explained.

**Panel ruling**

Based on the history of the Enabling Clause, described above, the Panel ruled that ‘non-discrimination’ means that a GSP scheme can not differentiate between the beneficiary countries and must treat all countries identically. The starting point of the analysis of the Panel was India’s claim that the EC’s GSP violated the MFN obligation of Article I GATT since Pakistan could profit from the Drug Arrangement and India could not.\(^{54}\) India argued further that the Enabling Clause portrayed the GSP as ‘generalized, non-reciprocal and non-discriminatory.’\(^{55}\) Consequently, India claimed inconsistency of the Drug Arrangements with paragraph 2(a) of the Enabling Clause, particularly with the requirement of ‘non-discriminatory’ in footnote 3 to this subparagraph.\(^{56}\)

For the understanding of paragraph 2(a) the Panel analysed paragraph 3(c), since this paragraph provided the context of the former. 3(c) states that a GSP must “respond positively to the development, financial and trade needs of developing countries.” The Panel consequently stated that “there is no reasonable basis to distinguish between different types of development needs” and “the appropriate way of responding to the development needs of developing countries is to take into account each and every developing countries’ development needs.”\(^{57}\) This made the Panel conclude that besides, safeguard mechanisms and differential treatment for least-developed countries (LDC’s), no differentiation between countries needs could be made.\(^{58}\)

Concerning the meaning of the term ‘non-discriminatory’ the Panel ruled that the intention of the negotiators of the preparatory work of the Enabling Clause was to “provide GSP equally and to eliminate all differentiation in the preferential treatment.”\(^{59}\) Further, “the function of the term ‘non-discriminatory’ in footnote 3 is to prevent abuse caused by discrimination in the granting of GSP among developing

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\(^{54}\) Panel Report para 7.21.

\(^{55}\) Stated in the preparatory work of the Enabling Clause see described above, consequently compare the Panel Report, para 7.69

\(^{56}\) Panel Report para 7.65, compare para 7.19 and para 7.20.

\(^{57}\) Ibid para. 7.103 and 7.105.

\(^{58}\) Ibid para. 7.107-7.116.

\(^{59}\) Ibid para 7.144.
Consequently the Panel concluded that “identical tariff preferences under GSP schemes must be provided without differentiation” to all developing countries. The Panel completed its analysis with the conclusion that the EC Drug Arrangements provided differential treatment which is not allowed according to paragraph 2(a) of the Enabling Clause and, in addition, can not be justified by paragraph 3(c).

The consequence of the Panel’s interpretation was that no longer any of the conditions requested for in GSP schemes could be justified. As stated by Robert Howse, this conclusion threatened to put an end to the existing GSP schemes, since both the EU and the US have GSP schemes which are filled with conditionality measures related to preferential treatment to stimulated certain behaviour of developing countries.

**Appellate Body ruling**

The Panel ruling was appealed by the European Communities in January 2004. While the AB concluded that the EC’s Drug Arrangement where still inconsistent with the Enabling Clause, the AB modified the ruling that ‘non-discrimination’ means ‘identical’ and stressed the fact that ‘development, financial and trade needs’ can differ per country and consequently can justify differential treatment.

The AB agreed with the EC that the term ‘non-discriminatory’ required merely the same treatment of beneficiary countries in the same situations and not as the Panel had held the same treatment of all beneficiary countries. Besides, WTO Members providing preferential treatment under a GSP scheme must ‘respond positively’ to the needs of developing countries. This does not mean that the preferences need to respond to all the needs of developing countries. Besides, these needs “are not necessarily common or shared by all developing countries.”

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60 Ibid para. 7.58  
61 Ibid para. 7.161.  
62 The Panel concluded, related to the intention of the negotiators to provide GSP equally, that ‘developing countries’ means all developing countries Report para 7.167-7.174.  
63 Panel Report para 7.177.  
65 AB Report para 153-156.  
66 Ibid para. 162 see para 160, were both parties recognize the changing nature of the ‘needs’.
According to the AB, preferences may be ‘non-discriminatory’ but only when these respond positively to ‘development, financial or trade needs’ and “are made available to all beneficiaries that share that need.”

The AB also requires that the existence of a ‘need’ “is assessed according to an objective standard.”

The AB finalized their report by concluding that the EC’s Drug Arrangements were inconsistent, even though the AB reversed the Panels finding on the term ‘non-discriminatory.’ The Drug arrangements, however, lacked transparency and the preferences granted were not available to all GSP beneficiaries similarly affected. Besides, the regime was operated through a ‘closed list’ that excluded a clear mechanism to assess the different situations of the potential beneficiaries and thus made it impossible to include new beneficiaries or remove ex-beneficiaries.

Following the ruling of the AB the EC, had to bring their regulation into conformity with their obligations under the GATT 1944. This resulted in a new regulation which will be examined in the following part.

1.3 The current EC GSP scheme
After the conclusions of the AB in the EC-Tariff Preferences case the EC had to adapt their GSP scheme. In a communication to the Council, the European Commission proposed a new GSP for the ten-year period from 2006 till 2015. In this communication the Commission made clear that the GSP is still seen as “a key instrument to assist developing countries to reduce poverty.” The Commission also pointed out that for the new scheme, previous experience will be taken into account and that a new scheme should be ‘stable, predictable, objective and simple.’ Furthermore, the Commission referred to the EC-Tariff Preference case in their legal framework and explained in their implementation paragraph that the new GSP scheme had to be in accordance with the conclusions of this case.

The EC GSP scheme is based upon general guidelines and is valid for cycles of ten years. The current GSP regulation is the first to implement the guidelines of the GSP scheme 2006-2015, and applies from 1 January 2006 until 31 December 2008.

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67 Ibid para. 165.
68 Ibid para. 163.
69 Ibid para. 181-183.
70 COM (461).
71 Ibid, 3.
At the moment, as mentioned before, the proposal for GSP regulation, which will apply from January 2009 until December 2011, is also circulating within the EU institutions.\textsuperscript{72} This regulation is, apart from some slight adaptations, the same as the previous and will therefore not be reviewed.

The GSP programme is available to developing countries that are both not ‘high-income’ and diversified in their exports.\textsuperscript{73} For simplification reasons it also excludes countries that obtain at least equivalent treatment under free trade agreements (FTA).\textsuperscript{74} This means that, for example, the ACP countries with which the EU has a (interim) FTA are excluded.

The current regulation provides for three arrangements.\textsuperscript{75} First, there is a general arrangement which provides duty reductions and applies to all developing countries. This arrangement makes a distinction between sensitive and non-sensitive products and provides for a tariff reduction of 3.5 percentage points compared to the standard MFN tariff for sensitive products and 100\% for non-sensitive products.\textsuperscript{76} The differentiation is based on the competitiveness of the products with domestic goods. In addition, there is a graduation mechanism for products of a country that take up a too large proportion of total GSP-covered imports.\textsuperscript{77} These products are assumed to be competitive on the world market and will be removed from the programme. This mechanism is an important instrument to meet the objective of the EC to target the GSP on the countries that most need it.\textsuperscript{78}

Second, the Community believes that it is important to provide “special incentives that respond positively to special development needs.”\textsuperscript{79} Consequently, additional preferences for certain non-trade reasons are provided. Under the previous scheme the EC provided three special incentive arrangements.\textsuperscript{80} However, as described above, India challenged the special arrangement to combat drug production and trafficking. To make the GSP compatible with the interpretation of Enabling


\textsuperscript{73} Reg 980/2005. Art. 3 (1).


\textsuperscript{75} Reg 980/2005.

\textsuperscript{76} Ibid, Art. 7. See Bartels, supra note 34, 740-741 for a more detailed description.


\textsuperscript{78} COM (461) para 6.2.

\textsuperscript{79} Ibid para. 6.5.

\textsuperscript{80} Reg 2501/2001.
Clause of the Appellate Body, the Commission proposed a “simpler GSP with easier access.”\(^{81}\) Since the special incentive arrangement replaced the special arrangement to combat drug production and trafficking this ‘GSP Plus’ arrangement entered into force before the whole regulation, in July 2005.\(^{82}\)

The ‘special incentives arrangement for sustainable development and governance’, which provides duty-free entry, is based on an “integral concept of sustainable development as recognized by international conventions.”\(^{83}\) The idea behind this arrangement is that sustainable development involves a variety of aspects which are interconnected. This entails that the previous three special arrangements should be incorporated into a broader scheme which includes fundamental human and labour rights, good governance and environmental protection.\(^{84}\) The motivation behind this idea is that, according to the EC, the ratification and effective implementation of international conventions places special burdens and responsibilities on developing countries. Consequently, they should benefit from additional tariff preferences.

The conditions to be applicable for this arrangement are set out in Articles 8 till 11 of regulation 980/2005. Sixteen core human and labour UN/ILO conventions need to be ratified and effectively implemented and at least seven of eleven selected ‘conventions related to the environment and governance principles.’\(^{85}\) Concerning the latter, there is also a strict deadline of ratification and implementation of the remaining conventions before 31 December 2008.\(^{86}\) Regarding the sixteen “core conventions” the special incentive arrangement may be granted when a maximum of two conventions are not ratified and implemented, presupposed that a formal commitment is made by the country to sign the convention no later than 31 October 2005.\(^{87}\)

To benefit from ‘GSP Plus’ developing countries must also demonstrate that their economies are poorly diversified and not well integrated in the world trade flows. These countries are therefore, according to the EC, dependent and vulnerable.

\(^{81}\) COM (461), para 6.3.
\(^{84}\) COM 699 para 4.
\(^{85}\) Reg 980/2005, Appendix III.
\(^{86}\) Reg 980/2005, Art. 9.1 (c).
\(^{87}\) Ibid Art. 9.2 (a).
To meet this ‘vulnerability criterion’, the country should, first of all, not meet the criteria for graduation. This entails that the five largest sections of its GSP-covered imports to the Community do not represent more than 75% of its total GSP-covered imports. The second element of the ‘vulnerability concept’ requires that the GSP-covered imports from that country must represent less than 1% of total EU imports under GSP.

The third arrangement of regulation consists of a special arrangement for the least-developed countries (LDC’s). Under the Enabling Clause it is permitted to treat least-developing countries more preferential than other developing countries. Unlike the ‘normal’ developing countries, which can determine by themselves to be categorised as ‘developing’, the least-developed countries are classified by the United Nations and this list is reviewed every three years.

The EC has applied special tariff treatment to LDC’s since 1979. However, this scheme was from the start not that extensive as the Free Trade Agreement (FTA) with the ACP countries. During the Doha Development Round in 2001, the WTO members confirmed their commitment to take special measures for the LDC’s. In this year the EC also proposed a new initiative for the LDC’s. The EC arrangement for LDC’s offers an additional preference of duty-free and quota-free access to the EC’s market for all products except weapons. This arrangement is therefore also known as the ‘Everything but Arms’ (EBA) provision. The EBA provision is in line with the objective of the EC to help the countries which are most in need. For some products the liberalisation is going through a transition period which gives the EC time to reform their existing markets inside the Union. Consequently, bananas, rice and sugar are determined as sensitive agricultural products for which this is the state of affairs.

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88 Ibid, Art. 9.3 (a).
89 Ibid, Section 3.
90 Enabling Clause para. 2(d).
91 Kennedy, supra note 22, 1526-1527.
94 See Faber, supra note 92 for a detailed analysis of the EBA provision.
95 Panel Report para. 7.103 and 7.105.
1.4 Conclusion
The background of the EC GSP can be traced back to the developments within GATT and UNCTAD at the end of the 1950’s and 1960’s. In this timeframe the improvement of the economic conditions of developing countries was recognized as an objective for the existing trade system. The GSP became an integral part of the GATT during the Tokyo Round in 1979 when the Enabling Clause became into existence. While the GSP is a voluntary mechanism and has as aim to benefit developing countries, beneficiary countries have been critical of the system and may challenge the schemes. The primary case is the EC-Tariff Preferences case in which India challenged the EC’s GSP. As result the European Communities had to change their GSP arrangements from three special incentive arrangements to one, integrated, arrangement to promote sustainable development and good governance.

During the dispute investigation the Appellate Body gave an interpretation of the term “non-discriminatory” which allows preference-granting countries to differentiate between countries. However, this can not be done without following the requirements which can be deducted from the AB ruling. These requirements will be examined in the next chapter, followed by an analysis of the current EC GSP assessed for the requirements, in chapter three.
2. GSP requirements
A number of authors claim that with its interpretation of the Enabling Clause during the EC-Tariff Preferences case the Appellate Body has given a “framework”, “guidelines” or a “checklist” for the GSP schemes.98 In this chapter the guidance given by the AB concerning tariff preferences will be examined by analysing the Appellate Body report assisted with studies of several scholars. Eight, interrelated, requirements can be derived from the AB’s interpretation of non-discrimination. In this chapter an exploration will be given.

Three ways to derive the GSP Requirements
The authorisation of preferential treatment is given by the Enabling Clause and provides already three requirements in paragraph 2(a) which the must be fulfilled. The preferences must be “generalized, non-discriminatory and non-reciprocal.”99 In addition, the Appellate Body in the EC-Tariff Preferences case found that the term 'non-discriminatory' allows preference-granting countries to differentiate their preferences given, under the conditions that “identical treatment must be available to all GSP beneficiaries with the ‘development, financial or trade need’ to which the differential treatment is intended to respond.”100 This does not give donor-countries the freedom to decide unilaterally who benefits from additional tariff preferences and who does not.

The AB stated in its report that paragraph 3 (c) “imposes requirements that are separate and distinct from those of paragraph 2(a).”101 Several requirements can be derived from the Appellate Body’s interpretation which donor-countries must show in order to be allowed to provide different levels of preferences to different developing countries. Besides, from the conclusion of the AB that the Drugs Arrangements were invalid some requirements can also be obtained.

We will start the analysis by first looking at the requirements given by the Enabling Clause. This will be followed by an analysis of the interpretation of the Enabling Clause by the AB from which five of the eight requirements can be derived.

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98Respectively Irish, supra note 19, Harrison supra note 11, and Switzer supra note 48.
99Enabling clause, para 2(a) footnote 3.
100AB Report para. 165.
101Ibid, para.179. Compare para. 156: ‘provisions such as paragraphs 3(a) and 3(c) impose specific conditions on the granting of different tariff preferences among GSP beneficiaries’
To conclude, attention will be given to the findings of the AB concerning the Drug Arrangements in specific. The three last requirements, while part of the general AB conclusion, can be unmistakably drawn from these findings.

2.1 Generalized, non-discriminatory and non-reciprocal

In the previous chapter is explained that at the second UNCTAD meeting an agreement was reached for the establishment of a system of ‘generalized, non-reciprocal and non-discriminatory preferences.’ This was incorporated in the 1971 GSP decision, which formed the basis of the Enabling Clause. In the 1971 decision we can read the ambition of the developed countries to extend their preferential tariff treatment on a more general basis. This aim was turned into a binding condition as established by the Appellate Body with the implementation of the Enabling Clause. Consequently, only preferential tariff treatment which is ‘generalized, non-reciprocal and non-discriminatory’ falls under the MFN exception made by the Enabling Clause.

The term ‘generalized’ is used in the GSP Decision of 1971 in two ways, for the whole system and for the preferences. Since a general system of preferences has never been established, this expression should be deemed legally redundant. The other meaning is related to reveal the difference with the special preferences as given to (ex) colonies. Subsequently, ‘generalized’ can be seen as a sort of “primitive non-discrimination norm.”

The Appellate Body has interpreted ‘generalized’ in a comparable way. The AB turned to the analysis of the meaning of the term for the understanding of the context of ‘non-discriminatory.’ According to the AB, the GSP scheme must “apply more generally” and “requires that the GSP schemes of preference-granting countries remain generally applicable.” The term ruled out the ‘special preferences’ based on colonial relationship as was mentioned in the previous chapter as well.

The requirement of ‘non-reciprocity’ was not explicitly disputed in the EC-Tariff Preferences case, even though it could have been questioned when we recall the reason why the EC added Pakistan to its Drug Arrangements. The ordinary

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103 Bartels supra note 45, 520.
104 Ibid, 523.
105 Ibid.
106 AB Report para. 155.
107 See Chapter 1, footnote 47. The EC gave Pakistan addition preferences in return for its support in the war against terrorists.
meaning of reciprocity is: "state or relationship in which there is mutual action, influence, giving and taking, correspondence, etc., between two parties." 108 While, reciprocity is not defined in GATT, it forms the basis of the negotiations concerning the reduction of trade barriers. However, with the introduction of part IV of GATT 1994 it does not apply fully for developing countries. 109

Non-reciprocity is consequently an important aspect of differential treatment. The objective of the tariff preferences implies that donor-countries are not expecting anything in return when giving preferential treatment. However, the historical background of the concept of non-reciprocity shows a more limited meaning. At the time of the drafting of the GSP decision, non-reciprocity meant only to apply to 'concessions involving a reduction in barriers to market access.' 110 It is therefore questionable whether conditionality not aimed at reducing trade barriers must be non-reciprocal as well. In addition, the principle of non-reciprocal treatment for developing countries is widely recognized in the international trade system and applies in this context only to trade barrier reducing negotiations. 111

Nevertheless, whether the conclusion that the principle of non-reciprocity should not prohibit other non-trade conditions on the granting of preferences is correct or not, paragraph 5 of the Enabling Clause needs to be viewed in this perspective as well. 112 In paragraph 5 is stated: "...the developed countries do not expect the developing countries (...) to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs." It appears from this assertion that reciprocity which is consistent with the 'individual development, financial and trade needs' is allowed.

Concerning the third requirement it can be concluded form years of execution that developed countries have interpreted the term 'non-discrimination' of the GSP connected to the conditionality of preferences. 113 Preference-giving countries saw this

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109 Peter van den Bossche, The law and policy of the world trade organization. Text, cases and materials (Cambridge 2005) 393.
110 Bartels, supra note 45, 526.
111 Ibid, 528-529.
112 Ibid, 529.
113 Ibid, 524.
as a way to impose conditions on their tariff preferences as long as the conditions requested were applied on a non-discriminatory basis. As made clear in the description of the EC-tariff preferences case, the interpretation of the term ‘non-discriminatory’ was fundamental in the dispute. The analysis by the Appellate Body resulted in additional guidelines for preference-giving countries. The requirements connected to non-discrimination will consequently be described in the following part.

2.2 Following the Appellate Body interpretation
Based on his extensive writing on the EC-Tariff Preferences case and GSP schemes in general we start with analysing Robert Howse’s requirement design. Also, his analysis of the EC-tariff preferences case gives us a starting point to screen the guidelines of the Appellate Body step by step. According to Howse, a donor country must show that its GSP scheme meets four requirements when it provides different levels of preferences to different beneficiaries. First of all it must be made clear that countries which receive additional preferences are “not similarly situated and have special development needs.” Second, “the tariff preferences given must be an effective means of addressing the special needs of developing countries.” Third, “all countries who have the same special needs must be offered the same (greater) preferences.” The fourth requirement concerns the necessity of objectiveness, transparency and non-discrimination of the conditions attached to the preferences. We will refer back to this latter requirement in the last part of the chapter as well.

Non-discrimination
Howse’s first requirement is based on the conclusion of the AB that “distinguishing among similarly-situated beneficiaries is discriminatory.” Consequently, it is only allowed to give additional preferences when a country is different than the other

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118 Ibid.
119 AB report para. 153.
beneficiaries. Strongly related to this first requirement is Howse’s third requirement, “all countries who have the same special needs must be offered the same (greater) preferences.”\footnote{Howse, supra note 12, 6. Compare: Howse in Charnovitz, supra note 114, 248.} This entails the conclusion of the AB that “a scheme may be ‘non-discriminatory’ even if ‘identical’ treatment is not accorded to ‘all’ GSP beneficiaries.”\footnote{AB report para. 165.} The non-discrimination requirement is consequently met “when the relevant tariff preferences are addressed to a particular ‘development, financial or trade need’ and are made available to all beneficiaries that share that need.”\footnote{Ibid.}

The AB stated in its report that the conclusion following the above requires donor countries to make identical tariff preferences available to all similarly-situated beneficiaries.\footnote{Ibid para 153 and 154.} By most scholars these two requirements of Howse are merged and called the non-discrimination requirement.

Marín Durán & Morgera make, besides, a distinction between de jure and de facto discrimination.\footnote{Marín Durán, supra note 12, 176.} Concerning the first, preferential tariff treatment must be available to all GSP beneficiaries who share ‘special needs’ and are similarly-situated. As Bartels states it “there will be an obvious de jure discrimination if one country is expressly treated differently from another in an equal situation.”\footnote{Bartels, supra note 45, 524.} De facto discrimination is more difficult to identify since discrimination can arise from the unequal effects of a measure which seems non-discriminatory. The Appellate Body recognizes the de facto discrimination and point consequently to paragraph 3(a) of the Enabling Clause. This paragraph provides that any “differential and more favourable treatment…shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties.”

Marín Durán & Morgera claim that a separate requirement can be derived from this interpretation. They incorporate the requirement that no ‘unjustifiable burden’ may be imposed upon other GSP beneficiaries by the conditions attached to these ‘special incentive arrangements.’\footnote{Marín Durán, supra note 12, 176, Compare AB report para 167.} For Harrison this latter condition is also a separate requirement which he summarizes as “the conditions for preferential

\footnote{Howse, supra note 12, 6. Compare: Howse in Charnovitz, supra note 114, 248.}
\footnote{AB report para. 165.}
\footnote{Ibid.}
\footnote{Ibid para 153 and 154.}
\footnote{Marín Durán, supra note 12, 176.}
\footnote{Bartels, supra note 45, 524.}
\footnote{Marín Durán, supra note 12, 176, Compare AB report para 167.}
treatment should not be so onerous that they place unjustifiable burdens on any developing country that wishes to take advantage of them.”

Related to the non-discrimination requirement it is pointed out that it can be arguable whether this leads to a legal obligation to treat dissimilar countries in a dissimilar manner. Bartels and Regan argue that this conclusion could be drawn from the US-Shrimp case where was decided that a failure to differentiate between unequal situations could be discriminatory. The implications of this interpretation, however, would be a specific GSP program for each and every GSP beneficiary. This would consequently deteriorate the whole principle of the generalized system of preferences.

**Effective, ‘positive response’ to ‘special needs’**

Connected to the non-discrimination requirement we can distinguish another requirement which is not clearly discerned by Howse but which we can find incorporated in his second requirement and is additionally related to his third requirement as will be shown below.

According to the Appellate Body donor-countries have the obligation to ‘respond positively’ to the needs of developing countries. In writings from UNCTAD this requirement is recognized: “any such ‘response’ must be a ‘positive’ one.” In addition, in the AB report this is clearly stated as requirement: “paragraph 3(c) does not authorize any kind of response.” Further, the AB gives a definition of ‘positive’ and concludes that ‘the response of a preference-granting country must be taken with a view to improving the development, financial or trade situation of a beneficiary country, based on the particular need at issue.’

Howse’s second point consequently, entails that must been shown that the tariff preferences are an effective means of addressing the special needs of the developing country. Based on the statements of the AB we can draw the conclusion that this point includes the ‘positive response’ requirement. The AB concludes that

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125 Harrison, supra note 11, 1675.
126 Charnovitz, supra note, 114, 249 and 263.
127 Ibid 249.
128 AB report para. 158.
130 AB report para .162.
131 Ibid, 164.
“the need at issue must be such that it can be effectively addressed through tariff preferences. Therefore, only if a preference-granting country acts in the ‘positive’ manner suggested, in ‘response’ to a widely recognized ‘development, financial or trade need’”\(^{132}\)

Marín Durán & Morgera have positioned the ‘positive response’ criterion in a separated requirement which will be described below and for their “effectiveness requirement” they focus only on the nature of the ‘special needs’ at issue which need to be effectively tackled through tariff preferences as measure.\(^{133}\) The same is done by Harrison, who states that this requirement has the objective that tariff preferences “must effectively address the need at issue”.\(^{134}\) McKenzie points in this effect to the request of the Appellate Body that “sufficient nexus” should exist between the preferential treatment provided, and the “likelihood of alleviating the relevant ‘development, financial or trade need.’”\(^{135}\) He sees the positive response request as a condition for GSP donors to comply with paragraph 3(c).\(^{136}\)

The AB concluded that the ‘needs’ of developing countries are “subject to change” and “are not necessarily common shared”\(^{137}\) Also, the AB makes clear that the “types of needs” to which donor countries may respond (positively) by giving tariff preferences, are “limited to ‘development, financial and trade needs.’”\(^{138}\) Besides the ‘effectiveness requirement’, this can also be seen as an obligation which donor-countries are supposed to meet. Marín Durán & Morgera call this requirement the “specific intent requirement.”\(^{139}\) This requirement entails preference-giving countries to aim their special incentive arrangements positively to the special ‘development, financial and trade needs’ of the GSP beneficiaries.

If we analyse Howse’s third requirement, “all countries who have the same special needs must be offered the same (greater) preferences.” We see that he mentions ‘the same special needs.’ With this expression he makes the connection to the requirement of the AB that the ‘types of needs’ are “limited to ‘development,

\(^{132}\) Ibid.
\(^{133}\) Ibid.
\(^{134}\) Marín Durán, supra note 12, 176.
\(^{135}\) Harrison, supra note 11, 1675.
\(^{136}\) McKenzie, supra note 19, 133. See AB report para 164.
\(^{137}\) McKenzie, supra note 19, 133.
\(^{138}\) AB report para. 160 and 162.
\(^{139}\) Ibid. para. 163.
\(^{139}\) Marín Durán, supra note 12, 176.
financial and trade needs.” However, this is not explicitly pointed out by him in any of his articles and therefore we can only assume this connection.

Concluding, we can derive the requirement that tariff preferences must be a positive response to development needs, which entail effective improvement of the development, financial or trade situation of developing countries.

Nevertheless, this requirement leaves room for many discussions. Firstly, the effectiveness of the whole Generalized System of Preferences idea is questioned by several economic oriented scholars. They have tried to examine whether the economic growth of developing countries, which relates to the ‘development, financial or trade situation,’ has improved as a result of the GSP. There are opposing views and while the economic benefits may be positive, the accompanying compliance costs make the overall benefit relatively small.

Secondly, the discussion is going on whether ‘negative conditionality’, can be viewed as a positive response. Negative conditionality entails a withdrawal of preferences when a country fails to meet certain conditions. This has been the practise until the EC introduced ‘positive conditionality’ in 1994. The US GSP scheme has many forms of negative conditionality; therefore the conclusion that withdrawal of preferences is not a positive response would have major implications for the US scheme.

Further, Howse has, related to his effectiveness requirement, made the assumption that the AB does not necessitate an empirical proof of effectiveness, but has a rational connection in mind. This was emphasised in the US-Shrimp ruling. Consequently, according to Howse, this would mean that the Appellate Body meant to require a “reasonableness standard in assessing the fit between the [tariff] measure

141 Ibid, 63.
143 Bartels, supra note 45, 508.
145 Charnovitz, supra note 114, 248.
and the [development, financial and trade] goal.\textsuperscript{146} Whether this is the case need to be clarified by the AB in a latter litigation on the effectiveness requirement.

**Objectiveness**

Howse’s final requirement demand donor-countries to ensure that the conditions they impose are ‘objective, transparent and non-discriminatory.’ With this requirement Howse points already to the conclusions of the AB concerning the Drug Arrangements.\textsuperscript{147} We will elaborate on these conclusions below.

Nevertheless, besides a ‘positive response’, the AB draws the conclusion from paragraph 3(c) of the Enabling Clause that “the existence of a ‘development, financial and trade need’ must be assessed according to an ‘objective standard’”.\textsuperscript{148} Accordingly, the AB requires a “broad-based recognition of a particular need.”\textsuperscript{149} This means that the need at issue must be recognized as a ‘development, financial or trade need’ through an objective standard. As ‘objective standard’, countries may use the WTO agreement or multilateral adopted instruments.\textsuperscript{150}

Following the AB conclusions Marín Durán & Morgera as well as Harrison include this requirement as a separate criterion in their ‘requirement design.’\textsuperscript{151} Also McKenzie sees this requirement, as a one of the two conditions that GSP giving countries must meet to act in accordance with paragraph 3(c).\textsuperscript{152}

Maureen Irish perceives this requirement as a limit on the conditionality imposed by donor countries through tariff preferences.\textsuperscript{153} Preference giving countries are not able to determine unilaterally whether a need is a ‘development need’ and therefore needs to be tackled through tariff preferences. Further, Irish also recognizes that the response must relate to the needs of the developing country and not to the interests of the donor country.\textsuperscript{154} This makes the requirement of an ‘objective standard’ a reasonable demand.

\begin{itemize}
  \item AB report para. 177-189.
  \item Ibíd para. 163.
  \item Ibíd.
  \item Ibíd.
  \item Marín Durán, supra note 12, 176 and Harrison, supra note 11, 1675.
  \item McKenzie, supra note 19, 133.
  \item Irish, supra note 19, 687.
  \item Ibíd, 688.
\end{itemize}
As pointed out by McKenzie, preference giving countries are not bounded only by development needs recognized by the WTO.\footnote{155 McKenzie, supra note 19, 133.} Other multilateral conventions can be used as ‘objective standard’ as well. In addition, Irish claims that the EC-preferences reasoning do not call for the use of international standards. The objective standards and ‘broad-based recognition’ which are required refer only to the identification of particular issues as development, financial or trade needs.\footnote{156 Irish, supra note 19, 693.} Whether this, in addition, must be adopted internationally is not required.

However, the AB refers in its interpretation to the conditions used by the EC for its environmental and labour arrangements.\footnote{157 AB report para. 182.} Howse finds it encouraging that the AB cites these as examples of objective and transparent criteria.\footnote{158 Howse, supra note 12, 6.} The conditions imposed by the EC to become eligible for their Labour or Environmental Arrangement where based on the acceptance of conventions from the International Labour Organization (ILO) and acceptance of internationally recognized environmental standards.\footnote{159 Council Regulation 2501/2001 art 14(2) and art. 21(2).} Hence, the use of international standards is mentioned and perceived positively by the AB. In the following part we will return more extensively to the ‘objectiveness and transparency’ requirement.

\section*{2.3 Invalidity of the Drugs Arrangements}

When recalling the fourth requirement of Howse we see that he brings up ‘objectiveness, transparency and non-discrimination’ as criteria for the imposed conditions. As explained before, objectiveness can be related to the requirement of ‘broad-recognition’ of the development need which makes sure that the need tackled is not a de facto interest of the preference giving country. However, ‘objective’ and ‘transparent’ can also relate to the critique of the Appellate Body concerning the Drug Arrangements of the EC. Consequently, some requirements can be obtained from the conclusion of the AB that the Drugs Arrangements were invalid. These requirements are related to the explanation of the AB why the Drug Arrangements may be found (in)consistent with the ‘non-discriminatory’ requirement.\footnote{160 AB report para. 180.}
As explained above, only if the EC could prove that the preferences granted under the Drug Arrangements were available to all GSP beneficiaries that are similarly affected by the drug problem the EC would meet the non-discrimination requirement. The AB added besides that this obligation was an “at a minimum” requirement.\(^\text{161}\) This entails that during future dispute settlement procedures further requirements can be imposed.\(^\text{162}\) However, first we will look further into some of the specific requirements imposed during the existing dispute.

Based on the conclusions of the AB concerning the inconsistency of the Drug Arrangements with the Enabling Clause, McKenzie has designed a “two related test”.\(^\text{163}\) According to McKenzie this test provides which requirements a particular tariff preferences measure must meet in order to satisfy the non-discrimination requirement. Besides, the test also explains how to meet the objectiveness and transparency requirement.

McKenzie’s first element is the necessity of “a mechanism under which the list of beneficiaries receiving additional preferences can be modified.”\(^\text{164}\) This requirement can be derived from the conclusion of Appellate Body following their reading of the Articles of the EC regulation.\(^\text{165}\) The Labour and Environmental Arrangements of the EC did include provisions how the list of beneficiary countries could be augmented. For these arrangements there were provisions which clearly described how to apply for additional preferences and what steps accordingly would be taken by the EC to accept a request.\(^\text{166}\) The provisions concerning the Drug Arrangements, however, did lack any of these descriptions and consequently the list of beneficiaries could not be modified without amending the whole regulation.\(^\text{167}\)

An apparent mechanism to modify the list of beneficiaries corresponds with Howse’s transparency condition. For a regulation to be transparent it is very important that it is understandable what the foundation is of certain decisions and what steps are being taken to reach that decision. Since it was not clear how additional countries could be added to the list of the Drug Arrangement beneficiaries this regulation could

\(^\text{161}\) Ibid.
\(^\text{162}\) McKenzie, supra note 19, 132.
\(^\text{163}\) Ibid, 131.
\(^\text{164}\) Ibid.
\(^\text{165}\) AB report para. 182.
\(^\text{166}\) Reg 2501/2001 Articles: 16, 17, 18, 22, 23.
\(^\text{167}\) This point is also made by the AB in para. 185 concerning the fixed period duration of the Drug Arrangements.
not be seen as transparent. Besides, it could not be checked whether an enhancement of the list happened following objective procedures. The second element of McKenzie’s “two related test” is also much related to the transparency and objectiveness prerequisite of the regulation.

McKenzie derives from the AB’s conclusions the requirement that a “GSP scheme must contain criteria or standards to provide a basis for determining whether a developing country qualifies for preferences”\(^{168}\). This condition certainly makes a regulation more transparent, since countries are able to understand which criteria they need to meet to become a possible beneficiary and what the application process includes. Also, it can be determined as more objective since the donor-country has to pay attention to some fixed criteria before deciding to provide additional preferences.

As stated by the AB “the [2501/2001] regulation gives no indication as to how the beneficiaries under the Drug Arrangements were chosen or what kind of considerations would or could be used to determine the effect of the ‘drug problem’ on a particular country.”\(^{169}\) Based on these statements of the AB we see its acknowledgement of the relevance of the transparency and objectiveness. These conditions are strongly connected to the non-discrimination condition since without “objective criteria” it is not clear for countries affected by a problem to understand when they ‘are similarly affected’ and consequently should benefit from the same additional preferences.\(^{170}\) In addition, without criteria it is also unclear when a country is “no longer similarly affected” and consequently could be removed.\(^{171}\) Besides, the AB claims that without defined criteria it is not possible to determine whether these criteria are non-discriminatory.\(^{172}\)

‘Closed list’

In one of the last paragraphs of its report the Appellate Body explicitly expresses why the Drug Arrangements of the EC are not meeting the non-discrimination requirement. The AB recognizes that the list of beneficiaries to the Drug Arrangement is a “closed list”. The AB draws this conclusion because of the difficulty to add beneficiaries to the list without altering the whole regulation. According to the

\(^{168}\) McKenzie, supra note 19, 131, compare AB report para. 183.

\(^{169}\) AB report para. 183.

\(^{170}\) Ibid.

\(^{171}\) Ibid.

\(^{172}\) AB Report para. 188.
Appellate Body “a ‘closed list’ cannot ensure the availability of a measure to all GSP beneficiaries suffering from the same problem.” Consequently, we need to conclude that a ‘closed list’ is discriminatory and is therefore not required.

2.4 Conclusion

The exploration of which requirements a Generalized System of Preferences need to meet started with a short description of the requirements which can be derived from the Enabling Clause. The conditions ‘generalized, non-discriminatory and non-reciprocity’ can, however, be extended considerably as shown by the interpretation of the non-discrimination concept by the Appellate Body. The Appellate Body has restrained its analysis to the interpretation of the non-discrimination requirement of the Drug Arrangements. The consequence of this restriction is that the de jure non-discrimination requirement is elaborated in detail while it remains unclear what the specific implications are for the other requirements.

From the above, eight interrelated requirements can be derived from the Appellate Body’s interpretation of non-discrimination. First, it is important to realize that distinguishing among similarly-situated beneficiaries is discriminatory. Secondly, all countries which have the same special needs must be offered the same (greater) preferences. Third, no ‘unjustifiable burden’ may be imposed upon other GSP beneficiaries by the conditions attached to these ‘special incentive arrangements.

It is necessary that tariff preferences are a positive response to development needs, which entails effective improvement of the development, financial or trade situation of developing countries. This is consequently the fourth requirement that needs to be met. Requirement five demands that the existence of a ‘development, financial and trade need” must be assessed according to an ‘objective standard’. Objectiveness and transparency are aspects which can be met by taking into account the sixth and seventh requirements. This includes a mechanism under which the list of beneficiaries receiving additional preferences can be modified; accompanied by the request that a GSP must contain criteria or standards which provide a basis for determining whether a developing country qualifies for preferences. Finally, which goes along with requirement six, it is essential to be aware that a ‘close list’ is discriminatory and therefore not required.

174 Ibid para. 131.
In the following chapter we will test the current EC GSP scheme by means of the conclusions we have derived from the given analysis.
3. The EC 2006-2015 GSP and WTO consistency

To finalize their conclusions, the Appellate Body gave the recommendation to the Dispute Settlement Body to call for the adaptation of the European Communities’ GSP regulation. The EC had to bring their GSP policy “into conformity with its obligations under GATT 1994.” As explained in the first chapter, the EC has changed their GSP scheme and instead of three special incentive arrangements they have put in place a single arrangement. This arrangement is known as GSP+. In the following, an analysis will be made whether the EU 2006-2015 GSP+ meets the requirements obtained in the previous chapter and is, consequently, WTO compatible.

3.1 Objective standard

The EC has decided to fulfill the requirement of the AB concerning non-discrimination first of all by focussing on the incorporation of the objective standard requirement. The EC has related its assessment of eligibility of beneficiaries to that of a number of international conventions and utilizes the expertise of relevant international organizations and agencies. The two requirements are consequently considerably interdependent and it is necessary to analyze the objective standard requirement in depth before we move on to the non-discrimination requirements.

As explained in the first chapter, 27 international conventions need to be ratified and effectively implemented by developing countries to become applicable for the GSP ‘plus’. The EC believes, by establishing this criteria, to meet the requirement to assess the existence of a ‘development, financial or trade need’ according to an ‘objective standard’. However, several obscurities arise.

First, the Appellate Body has referred to multilateral instruments as potential ‘broad-based’ recognition of development needs. However, the AB has not mentioned the necessity of ratification. Therefore, this EC request has important implications for countries which have not ratified the necessary conventions but which have the same development needs. Bartels even suggests that it is likely that especially countries which have not ratified and implemented a certain convention

\[175\] AB report para. 191.
\[176\] Reg 980/2005.
\[177\] Reg 980/2005, Art. 9.1.
\[178\] AB report para. 163.
have the relevant development need.\textsuperscript{179} Because, countries which have implemented a convention are more likely working to ease their development need. In addition, there are territories which lack international legal personality and are consequently not eligible for GSP+ preferences since they can not ratify conventions.\textsuperscript{180}

Second, it can be questioned whether the convention selection of the EC is objective. The Commission has stated that the 16 conventions on human and labour rights are selected since they “reflect rules of customary international law” and “form the core basis of the concept of sustainable development.”\textsuperscript{181} This sounds very applicable however, it is the EC which has made the choice for explicit these conventions.

While the first six of the selected conventions are mentioned by the OHCHR as being part of the nine core human rights treaties as well,\textsuperscript{182} we can question why the EC only selected six of these nine. Similarly, conventions number eight till fifteen are seen as the eight fundamental labour conventions by the ILO.\textsuperscript{183} Further, the ILO also mentions four other conventions as “priority instruments” which are seen as necessary for the operation of the international labour standards system.\textsuperscript{184} Since the EC is promoting the functioning of the international labour standards system as being part of sustainable development, it remarkable that the latter four are not included.

It is interesting to take into account the concern of Philip Alston in this context.\textsuperscript{185} Alston points out that by fragmenting the labour standards and subtracting some “core” standards we are drifting away from international agreements. Also, labour issues are undermined for self-interests of the donor-countries.\textsuperscript{186}

While the conventions on the prevention of genocide and on apartheid are internationally recognized as customary law, these are selected by the EC out of the whole range of international customary law. Also selected by the EC are the eleven

\begin{thebibliography}{99}
\item COM 699.
\item Website ILO, Ibid.
\item Alston, supra note 185, 497.
\end{thebibliography}
conventions related to the environment and governance principles. Even though the selected environmental conventions capture a broad range of environmental topics it is still a selection out of a large list of agreements. In addition, the focus of the governance conventions is mainly on anti-drugs conventions; this is remarkable and strongly inclines to a biased selection.

The AB has not stated that it is not allowed to select certain international standards. However, it does show that the AB is unsuccessful to prevent ‘development needs’ from being selected illegitimately, while the AB had as aim to avoid this. Since there is no international checklist on international conventions, the EC has the power to decide which conventions they consider most significant and consequently which ‘needs’ are subject. This leaves developing countries affected by decisions made by the EC without them having impact on it. Besides, it can be questioned whether it is meant by the AB to require that beneficiaries have 27 ‘widely-recognized’ needs at the same time.

A third problem of the ratification requirement of the EC is how to measure ‘effective implementation.’ This criterion is subject to interpretation and while Article 9.4 of the GSP regulation speaks about “review of the status of ratification and implementation” it is not clearly written out what is intended with this review. The Commission has mentioned that “the relevant conventions [for the sustainable-development incentive] are those with mechanisms that the relevant international organisations can use to regularly evaluate how effectively they have been implemented.” Research has pointed out however, that not all listed conventions have monitoring mechanisms and that due to late reporting and lack of observations some flexibility for applying the ‘effective implementation’ criteria is necessary. This flexibility will, however, result in further deprivation of the objective standard as required by the Appellate Body.

188 Three out of four conventions are related to Drugs. The EC had of course obligations towards the beneficiaries of the previous Drug Arrangements and had to make sure they were not disadvantaged by the new scheme. However, it is questionable whether anti-drugs measures contain such a large part of the governance principles.
189 Bartels, supra note 179, 878
190 See discussion by Shaffer, supra note 7, 996.
191 COM (461) p10.
192 Gracia Marín Durán, Development-based differentiation in the European Community’s external trade policy. Selected issues under Community and international trade law, (European University Institute, 2007) 236-237.
3.2 Non-discrimination

The Appellate Body has made very clear that distinguishing among similarly-situated beneficiaries is discriminatory. Nevertheless, we can find a violation of this requirement in the scheme of the EC. This was pointed out already in the above, since some territories due to their lack of international legal personality can not ratify conventions even though they might have similar needs.

Strongly related to similarly-situated, is the second requirement which entails that all countries which have the same special needs must be offered the same (greater) preferences. The non-discrimination requirement is met “when the relevant tariff preferences are addressed to a particular ‘development, financial or trade need’ and are made available to all beneficiaries that share that need.” However, it is questionable whether ratifying conventions is a good measure of ‘needs’. Especially countries with the needs might not be able to ratify and implement a convention. Here the third non-discrimination requirement comes in as well.

Ratifying and implementation can impose an extra burden on developing countries. Countries need capital and capabilities to work on these processes and this imposes costs on them which they might not be able to afford or divert assets from more pressing needs. The AB was strict in requiring that no ‘unjustifiable burden’ may be imposed upon other GSP beneficiaries by the conditions attached to the ‘special incentive arrangements.’ Asking for the ratification and implementation of conventions before being applicable to benefit can, however, involve a burden.

In addition, the extra preferences are meant as a compensation for the costs involved with ratifying and implementing the selected conventions. Nevertheless, it is important to realize that the country only receives this compensation after having made the accompanying costs of ratification. This sequencing gap has clear potential of discrimination since countries which are not able to meet these immediate costs are harmed and face an unjustifiable burden. As pointed out by Bartels, this EC criterion might turn out to be de facto discrimination.

The European Parliament has recognized this problem and asked for an amendment of the regulation in which the EU should offer assistance for capacity

193 AB report para 165.
195 Charnovitz, supra note 114, 248.
building and help countries to become entitled for the special incentive. The EP stressed the possibility of raising non-tariff trade barriers without this development assistance. Hence, this would counteract the whole incentive of the GSP and the objective of the EU to address the countries most in need.

On the other hand, however, it might be necessary to take into account the starting positions of countries while assessing their implementation standing. Otherwise reverse discrimination will become an issue. An extremely ‘underdeveloped’ country might be deemed to face an ‘unjustifiable burden’ compared to a more advanced developing country. It is however important that countries which have taken efforts to implement conventions are not punished for their hard work.

The ratification requirement has accordingly a different impact on each of the possible beneficiaries. It is important to be aware of this since the purpose of the GSP is to help developing countries and not cause any form of damage. Switzer calls for that reason for the EC to assess the impact of the ratification and implementation condition. This fits also in the amendment request of the European Parliament for a general impact assessment of the effects of the GSP. It is yet questionable whether this amendment will be accepted and accomplished by the European Commission.

**Vulnerability criterion**

In the new GSP+ of the EC, a novel concept is introduced as well which can be identified as an undermining of the request of the Appellate Body to assists countries with similarly assumed ‘special burdens and responsibilities’. This concept was already described in the first chapter and is called the ‘vulnerability’ criterion.

The criterion entails that only beneficiaries with very low shares (1%) of GSP-covered exports are eligible for the additional tariff preferences. Consequently, the

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197 Compare COM (461) paragraph 6.5, p9.
198 Harrison, supra note 11, 1682.
199 Switzer, supra note 48, 147. Compare Switzer 137, were she explains that the spread of the ratification burden is unequally spread.
GSP+ scheme is not open to all beneficiaries that have ratified or implemented the 27 conventions but only to the extremely vulnerable one. This has an impact on at least 21 countries which are not eligible for the special incentive since they do not meet the vulnerability criterion, even though they might have the similar needs.\textsuperscript{201}

We can find a justification of this element in the preamble of the GSP regulation.\textsuperscript{202} However, while there might be some truth in the vulnerability of less integrated and less trade diverse countries, the problem with this concept is that the EC has defined this requirement without convincing reasons or scientific evidence. The criterion is not based upon internationally recognised criteria for differentiation of developing countries but labelled by the EC.\textsuperscript{203} Consequently, we recognize a violation of the AB’s objectiveness requirement.

Further, instead of in terms of the needs of the beneficiary country, the criterion is defined in terms of EU imports, which is an independent factor.\textsuperscript{204} Developing countries can not influence this aspect and it certainly does not take into account the situation of the beneficiary. We can wonder whether this meets the effectiveness criteria and whether there is sufficient nexus between the need of the country and the measure. Therefore, according to Bartels this criterion “cannot be a relevant criterion for discriminating between developing countries.”\textsuperscript{205}

\subsection*{3.3 Effective, ‘positive response’ to ‘special needs’?}

In the previous chapter was derived from the AB ruling that tariff preferences must be a positive response to development needs, which entails effective improvement of the development, financial and trade situation of a developing beneficiary. Three elements are integrated in this requirement. All of these aspects have implications for the GSP scheme of the EC.

First, it is necessary to recall how the Appellate Body stressed explicitly that the response was intended to \textit{improve} the development, financial or trade situation of

\begin{itemize}
\item \textsuperscript{201}C. Stevens, ‘The costs to the ACP of exporting to the EU under the GSP. Final Report’, Overseas Development Institute. (2007) 14. Marin Duran, however, points out that in practice only 14 countries are disadvantaged since the other 7 can profit from Free trade agreements with the EU. Marín Durán, supra note 192, 238: footnote 802.
\item \textsuperscript{202}Reg. 980/2005 Para 7 of the Preamble.
\item \textsuperscript{203}See for a discussion about this point Marín Durán, supra note 192, 230. She points out that the UN uses an ‘economic vulnerability criteria’ but this forms no basis of the EC criterion. Also Bartels points out the need for ‘a broader and more objective category of economic vulnerability’. Bartels, supra note 179, 883-884.
\item \textsuperscript{204}Bartels, supra note 179, 882.
\item \textsuperscript{205}Ibid.
\end{itemize}
a beneficiary country. Even with this obligation in mind it is hard to explain the imposition of immediate costs which beneficiary countries have to deal with when ratifying and implementing the selected conventions. Bartels wonders whether this burden is a ‘positive response’ towards developing countries. Even though the objective of the EC to require ratification of conventions as a condition is to improve the development situation of beneficiaries in the end, the immediate costs involved do not improve the financial situation of the country. The development consequences might even be worse when assets are diverted from more pressing needs.

In addition, the EC regulation allows for temporarily withdrawal of the preferential arrangements for several reasons. It is difficult to defend that this is a ‘positive response.’ Also because the AB stressed that ‘the need at issue must be such that it can be effectively addressed through tariff preferences’ and it is not easy to argue that violations of the principles of the selected conventions, or infringements of the objectives of regional fishery organizations are effectively addressed by the withdrawal of tariff preferences.

Charnovitz, however, believes that withdrawing GSP benefits could be a ‘positive response’ and a stimulus for the needs of the people living inside the beneficiary country. Probably since withdrawal will have an impact on the government which consequently needs to change its policies. Unfortunately, we need to be aware of the power imbalance in many developing countries which entails that especially the poor will become even worse off.

**Development needs**

The second element brings along an interpretative problem. It is not clear what exactly is meant by ‘development, financial and trade needs’. The AB has only said that these are subject to change and may differ across countries.

The context for the interpretation of these concepts can be found in the preceding documents of the Enabling Clause. But while the focus on ‘development’

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206 Appellate Body report, para 164.
207 Bartels, supra note 179, 881.
208 Reg 980/2005, Article 16.
209 Charnovitz, supra note 114, 245, Compare Marín Durán supra note 192, 330-331.
210 Charnovitz, supra note 114, 249.
211 AB report para 160.
used to be in terms of economic growth, the AB statement indicates the possibility of a broader interpretation.  

The difficulty is, however, whether donor countries can select the ‘needs’ that they will address through trade preferences.  

The main focus of the EC concerning governance is on drugs and corruption for example. What if a country has other problems which pose greater obstacles to development? Besides, each state will have a better conception of its own needs. This is contrary to the GSP practice which is a ‘unilateral’ instrument and gives the donor country the autonomy to choose needs. As Switzer points out, this practice is inconsistent to the findings of the Panel in the case Brazil-Aircraft in which developing countries are determined as right holders of assessing their own development needs.  

Besides being a ‘positive response’ and address ‘development, financial or trade needs’, preferential treatment must also effectively improve the need. It is however not straightforward how to assess the effectiveness requirement.  

The Commission is convinced about the appropriateness of addressing special development needs through additional preferences. Internationally there is recognition of the connection between development and human rights, labour and environmental standards. Consequently, failure to comply with these standards entails a problem for development. By encouraging ratification of international conventions the special needs of developing countries are effectively addressed.  

However, while there might be consent regarding the connection between international human rights and labour standards and sustainable development, it is not possible to draw the conclusion that it is appropriate to address these standards by trade preferences. Only some of the environmental conventions do include trade measures as an implementation tool. In addition, according to Bartels it appears that preferences are granted by the EC to countries to compensate development needs that they do not have. He points out that while countries might have interests in, for

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212 Marín Durán, supra note 192, 317: footnote 1065.  
213 See Grossman, supra note 140, 56, for a discussion about the discretion of donor countries to select the needs they like to address.  
214 Switzer, supra note 48, 143.  
215 COM 461, p10.  
216 Compare discussion by Marín Durán, supra note 192, 327.  
217 Ibid.  
218 Bartels, supra note 179, 880.
example preventing genocide; this interest is not the same as having a ‘need’ like meant by the Enabling Clause.

As explained before, there are several discussions about the effectiveness of trade conditionality for encouraging human rights and labour rights. The EC GSP scheme operates through positive conditionality, by offering incentives rather than sanctions. Compared to the US system, this might be better suited to target the development needs of developing countries. Besides, the EC has adopted a more “comprehensive approach” to trade conditionality. Accordingly, not only the export sector is affected but throughout the country international standard are implemented.

Nevertheless, there exists little empirical evidence of the effectiveness. As described above, the European Parliament has requested for impact assessments of the GSP. This would consequently present very valuable information. However, at the moment it is questionable whether the EC scheme can meet the Appellate Body request of the existence of a sufficient nexus between the trade preferences and the effectiveness of alleviating the identified ‘special need’ Some verification of a causal link between trade preferences and improvement of the special needs is necessary. Unfortunately this is not available. Moreover, it is stressed by the World Trade Organization that long term advantages of the GSP’s are doubtful because of the burdens of conditionality for developing countries.

3.4 Objectiveness and transparency
The Appellate Body has made clear that ‘distinguishing among similarly situated beneficiaries is discriminatory’. Consequently, there was a need for a transparent set of objective criteria that would allow all similarly situated countries to be added to the list of beneficiaries.

To meet the requirement of the AB, the new GSP regulation had to contain criteria or standards to provide a basis for determining whether a developing country was eligible for trade preferences. The EC regulation fulfilled this requirement first of

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219 See above p. 29. Compare Harrison, supra note 11, 1683-1684.
220 Harrison, supra note 11, 1685.
221 Ibid.
223 AB report para. 164.
224 This is also stressed by the AB in para. 164.
226 AB report para. 153.
all by offering a transparent procedure concerning eligibility which necessitated two conditions would-be beneficiaries had to meet. Developing countries had to be indicated as ‘vulnerable’ and had to ratify 27 conventions. While controversial, these were clear criteria for all possible beneficiaries.

Secondly, Article 10 of the GSP Regulation provides a clear procedural design for the submission of requests by developing countries seeking to benefit from the special incentive arrangements. This is accompanied by an understandable list of steps in Article 11 which will be followed by the European Commission during the examination of a preferential treatment request. An extra element of objectiveness is added to the procedure by including the monitoring and review mechanisms of the relevant conventions. The practical significance of this measure however, depends upon actual availability of assessments and the existence of monitoring mechanisms in the selected conventions.

An aspect which undermines the transparency of the scheme is that requests for inclusion into the GSP do not need to be published in the Official Journal of the EC. Consequently the decision-making process is more difficult to follow and less transparent. The discretion lies in the hands of the Commission. Also, only Article 10 provides guidance for would-be beneficiaries, most power is assigned to the EC, which means that the Commission and the ‘GSP Committee’ take the final decision.

The second element requested by the AB which had to contribute to the objectiveness and transparency was a mechanism under which the list of beneficiaries receiving additional preferences could be modified. This would be in contrast to the Drug Arrangement which provided no possibility to add or remove beneficiaries. Surprisingly, though, the Regulation provides a deadline for applying to the GSP+. There is also a deadline set for the decision-making procedure by the Commission. These deadlines entail that there is no possibility of adding new beneficiaries to the GSP special incentive arrangement until the new 2009-2011 GSP comes into effect.

It is remarkable that the EC decided to incorporate these conditions into the new regulation. These are in contrast to the procedures applied in the previous Labour

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227 Reg 980/2005, art. 10.2 and art. 11.1.
228 See discussion by Marín Durán, supra note 192, about the effective implementation at 236-237.
229 Reg 980/2005, Article 11.2.
230 Ibid. art. 10.1 (a) states that a request has to be made by 31 October 2005.
231 Ibid, art. 11.2. The Commission shall decide whether to grant the special arrangement by 1 January 2006.
and Environmental Arrangements which were mentioned by the AB as being examples of objective and transparent criteria.\textsuperscript{232} Also, it is incompatible with the Appellate Body’s critique on the necessity to amend the Regulation before being able to add a beneficiary to the Drug Arrangement.\textsuperscript{233} In addition, the European Parliament recommended as well that the incentive “should not be limited to the countries that are sufficiently developed when this Regulation enters into force, but should remain an incentive in the years to come.”\textsuperscript{234}

When taking into account that the regulation applied since 1 July 2005, interested would-be beneficiaries had only four months to comply with all the criteria and apply for inclusion into the arrangement. Besides, the objectiveness of the acceptance of the fourteen for the GSP+ qualified countries can be questioned. Research has show that these beneficiaries were provisional listed before the Commission had concluded about their achievement of the established criteria.\textsuperscript{235}

‘Closed list’
The ‘closed list’ phenomenon was a major issue in EC-tariff preferences. The Appellate Body was clear in determining this occurrence as discriminatory and therefore WTO-inconsistent, consequently the fulfilment of the other requirements was not examined. However, two aspects of the new arrangement seem to reproduce the closed list of the Drug Arrangements.\textsuperscript{236}

First of all, restricts the vulnerability criterion the eligibility to the GSP+ to countries with only a small share in EU imports. Consequently, 21 would-be beneficiaries are excluded. Secondly, because of the introduction of deadlines into the GSP scheme, it is not possible to add or remove additional beneficiaries to the GSP+ arrangement.

It is striking that the EC makes this mistake while it tries “to conform with the WTO ruling on the special arrangements”\textsuperscript{237} and the Appellate Body has stressed the problematic nature of such a measure.\textsuperscript{238}

\begin{footnotesize}
\textsuperscript{232} AB report para. 182.
\textsuperscript{233} Ibid, para. 187.
\textsuperscript{235} Marín Durán, supra note 192, 232-237, plus tables 3-8 in Annex II.
\textsuperscript{236} Compare Marín Durán, supra note 192, 326 and Bartels, supra note 179, 882.
\textsuperscript{237} Reg. 980/2005 para. 7 preamble.
\end{footnotesize}
3.5 Conclusion
In this chapter an analysis is made whether the EU 2006-2015 GSP+ meets the requirements obtained in the previous chapter and is, consequently, WTO compatible. While we have seen some improvements concerning the objectivity and transparency due to a clear procedural design for the submission of requests and a transparent procedure concerning eligibility, there are also some controversial elements recognizable. For instance, the latter enhancement provided two apparent conditions would-be beneficiaries had to meet before being qualified for the GSP. However, these ‘vulnerability’ and ‘ratification’ criteria are not without problems.

The request of the EC for ratification and implementation of 27 international conventions has important implications for countries which have not ratified the necessary conventions but which have the same development needs. This, consequently, can infringe with the AB requirements of not distinguishing among similarly-situated beneficiaries and the necessity of providing the same preferences to countries which have the same special needs. Besides, ratifying and implementation can impose an extra burden on developing countries and compensation is given only after having made the costs of ratification. It is, therefore, hard to argue that this imposition of costs improves the development, financial or trade situation of a beneficiary country.

Further, it can be questioned whether the convention selection of the EC is objective. Since, there is no international consensus about a list of major conventions the EC has the power to decide which conventions they consider most significant and consequently which ‘needs’ are subject. This leaves developing countries affected by decisions made by the EC without them having an impact on it.

In addition, it is questionable whether ratification of conventions is a good measure of ‘needs’. This is an uncertainty created by the Appellate Body as well, since it is unclear what exactly is meant by ‘development, financial and trade needs’. It is dubious whether the ‘selection power’ of the donor countries meets the objectivity requirement of the AB.

Moreover, the European Commission is convinced that by requesting ratification and implementation of international conventions the needs of beneficiary countries can be effectively improved. It is however, complicated to assess the

\[238\] AB report para 187.
effectiveness requirement. First of all, it is not possible to draw the conclusion right away that it is appropriate to address international standards by trade preferences. Besides, there is no straightforward evidence of the effectiveness of a Generalized System of Preferences, neither related to economic growth, nor to improvement of living standards.

Remarkable, last of all, is the fact that the EC seems to have ignored the Appellate Body critique about the ‘closed list’ phenomenon. This element is deeply contrasting the non-discrimination requirement, nevertheless the EC has introduced two new aspects into their regulation which construct a ‘closed list’. First of all, the introduction of the ‘vulnerability criterion’ restricts the eligibility of the GSP+ to countries with only a small share in EU imports. This has an impact on at least 21 countries which are not eligible for the special incentive since they do not meet the criterion, even though they might have the similar needs. Besides, the criterion is not based upon internationally recognised criteria for differentiation of developing countries but defined by the EC. Also, it is classified in terms of EU imports and does not take into account the needs situation of the beneficiary country. The second element which contributes to the ‘closed list’ is the inclusion of deadlines into the GSP scheme. Consequently, it is not possible to add or remove additional beneficiaries to the GSP+ arrangement during the term of the regulation.

To conclude this research we will consider in the next part whether the EC has made a WTO compatible GSP system and whether new complaints can be avoided.
4. Concluding remarks

This study started with the question what has happened to the EC Generalized System of Preferences after India challenged the system within the WTO and are the 2006-2015 EC GSP guidelines WTO consistent.

The conclusions of the AB concerning the EC-Tariff Preferences case in which India challenged the EC’s GSP, had as result that the European Communities had to change their GSP arrangements. The new GSP scheme had to be conform the Appellate Body’s interpretation of the term “non-discriminatory” which allows preference-granting countries to differentiate between countries. However, it is not allowed to treat beneficiaries in a similar situation with the same needs differently.

Since the EC could not prove that their Drug Arrangements could meet these requirements because of lack in objectiveness, transparency and a ‘closed list’ phenomenon it was ruled to be discriminatory. Consequently, the EC modified their three special incentive arrangements into one, integrated arrangement to promote sustainable development and good governance. When investigating more extensively the requested requirements of the Appellate Body, we discover, however, some flaws in the new GSP system.

The EC had to take into account quite some requirements following the AB interpretation. Eight, interrelated, requirements could be derived from the AB’s interpretation of non-discrimination. Besides the conclusions that beneficiaries in a similar situation with the same needs need to be treated equally, it is not allowed to impose an ‘unjustifiable burden’ upon other beneficiaries. Nevertheless, the EC imposed an eligibility criterion which entails ratification and implementation of international conventions. While trying to meet the demand that the existence of a ‘development, financial and trade need” must be assessed according to an ‘objective standard’, the EC, however, violates the non-discrimination request in several ways.

Ratification and implementation of conventions can be problematic for territories without international legal personality as, for example, Macau. Consequently, while they might be similar situated as other countries and have the same development needs they can not benefit from the GSP+ arrangement. Besides, some countries might not be able to ratify conventions while compared to other ratifying countries, they have a more pressing need. Related to this, very poor
countries might be confronted with an unjustifiable burden because of the ratification request.

Further, the convention selection made by the EC is problematic. This is not convincingly based upon international consensus. Consequently, it gives the EC the power to select the needs they will address through tariff preferences and indirectly this can be a selection of beneficiaries as well. Besides, it is questionable whether ratifying conventions is a good measure of ‘needs’. While the AB requires that tariff preferences must be a positive response to development needs, which entails effective improvement of the development, financial or trade situation of developing countries, it is unclear what exactly is meant by ‘development, financial and trade needs’.

In addition, it is not possible to draw the conclusion right away that it is appropriate to address international standards by trade preferences. It is, consequently, complicated to assess the effectiveness requirement. Also, there is no straightforward evidence of the effectiveness of a Generalized System of Preferences for developing countries.

The Appellate Body pointed out the significance of transparency and objectiveness regarding the new GSP regulation. Making it more concrete, it referred to standards which provide a basis for determining whether a developing country qualifies for preferences and the necessity of a mechanism under which the list of beneficiaries receiving additional preferences could be modified. The latter was imposed to prevent the ‘closed list’ phenomenon.

In the new GSP scheme some improvements concerning the objectivity and transparency can be perceived. Thanks to a clear procedural design for the submission of requests and a transparent procedure concerning eligibility more objectivity and transparency is incorporated. Though, the mechanism which had to assure the possibility to add additional beneficiaries or remove non-eligible beneficiaries is missing. This results from the imposition of deadlines into the regulation. Because of this provision, the list of beneficiaries can only be modified shortly before a new regulation comes into operation. Consequently, during the term of the regulation the list is closed.

Another element which closes the list is the imposed ‘vulnerability criterion’. Due to this criterion only countries with a very small share of EU imports can be qualified for the GSP+ arrangement. Countries with similar needs but which are not ‘vulnerable’ enough are consequently excluded. Of course it is arguable that these
countries are not in a ‘similar situation’ because of their larger share in EU imports. However, it is questionable whether the 1% import share is a fair boundary. 21 countries are ruled out. Also, since this criterion is shaped by the EC without taking into account any of the existing ‘vulnerability criteria’ of the UN like small islands or landlocked countries, the objectivity can be questioned.

Because of the described errors in the new GSP scheme we need to conclude that the new EC GSP is not WTO compatible. The EC above all needs to make sure that they open the ‘closed list’ or otherwise find a legal solution for this. In 2001, the EC already applied for a waiver from Article 1.1 GATT 1994, to make sure that their special arrangements, which were available only to the 12 beneficiaries, could effectively enter into force.239 It might be an option for the EC to request for a waiver again, for the reason that their special arrangements are only available to ‘vulnerable’ countries. The issue with the deadlines, however, will not be solved by a waiver like this and the list will still be closed. The only answer to this problem is to eliminate the deadlines, like proposed by the European Parliament as well.

Concerning the convention selection it is recommendable to consider an impact assessment of the effect on the applicable countries. It is important to find out whether things are improving in the countries which have ratified and implemented the conventions due to the EC GSP. In addition, it needs to be considered whether the selected conventions are based on an international consensus. The EC might be wise to lobby for a list of core international standards inside the UN. This will prevent a claim of subjective convention selection. Further, it is important that the ‘unjustifiable burden’ is taken into account. This should result in providing assistance and capacity building, making sure that all countries having difficulty with the same needs can benefit from the additional tariff preferences.

Related to this last point we can speculate whether new complaints can be expected. Because of the imposition of the ‘vulnerability criterion’ the major countries, like India, are not applicable to the GSP+ anyway. This might discourage their willingness to come up with a claim about the deadlines which result in a ‘closed list’ phenomenon. Consequently, only the weaker countries which do meet the

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239 Request for a WTO Waiver—New EC Special Tariff Arrangements to Combat Drug Production and Trafficking, 24 Oct 2001 (G/C/W/328), 2. The EC did not get the waiver but still put in place the regulation.
‘vulnerability criterion’ and can be qualified for the GSP will encounter the problems of the deadlines or the extra burden of ratification and implementation. However, because of their lack in legal and financial capacity they probably decide not to come up with a claim.

Nevertheless, India might view this issue as a matter of principle and can decide to come up with a new request to install a WTO Dispute Panel for which it can claim the inconsistency of the new EC GSP with the non-discrimination requirement of the Enabling Clause. Given that we have already past more three years since the implementation of the regulation, this is not so likely. The EC will probably be able to continue their 2006-2015 GSP scheme until another country considers it profitable to question its legality again.
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