A Critical Analysis of Conditionalities in the Generalized System of Preferences

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Une analyse critique des conditionnalités dans le système généralisé de préférences

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Abstract

This article examines conditionalities in the Generalized System of Preferences (GSP) in light of the *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (*EC – Tariff Preferences*) case at the World Trade Organization (WTO). The article largely undertakes this examination from the point of view of developing countries. It mainly examines the issue of discrimination in conditionalities since this was the principal question raised in the *EC – Tariff Preferences* case and makes suggestions regarding the regulation of conditionalities. In doing so, the article follows two trajectories: first, it makes suggestions for the WTO panels and Appellate Body, and, second, it makes suggestions for GSP donors, by analyzing the new European GSP + Scheme and by drawing inspiration from conditionalities in the loans granted by the World Bank.

Keywords: International trade law; *General Agreement on Tariffs and Trade*; *Enabling Clause*; Generalized System of Preferences (GSP); developing countries; conditionalities; non-discrimination.

Résumé

Cet article traite les conditionnalités dans le système généralisé de préférences (SPG) à la lumière de l'affaire *Communautés européennes – Conditions d'octroi de préférences tarifaires aux pays en développement (CE – Préférences tarifaires)* devant l'Organisation mondiale du commerce (OMC). L'article entreprend cet examen largement du point de vue des pays en voie de développement. Il se penche principalement sur la question de la discrimination dans les conditionnalités, car il s'agit de la question principale soulevée dans l'affaire *CE – Préférences tarifaires*; et fait des propositions concernant la réglementation des conditionnalités. Ce faisant, l'article suit deux trajectoires. En premier lieu, il offre des suggestions pour les Groupes spéciaux et l'Organe d'appel de l'OMC. En second lieu, il offre des conseils aux donateurs SGP, en analysant le nouveau schéma européen GSP + et en s'inspirant des conditionnalités dans les prêts accordés par la Banque mondiale.

Mots-clés: Droit du commerce international; *Accord général sur les tarifs douaniers et le commerce*; *Clause d'habilitation*; système généralisé de préférences (SGP); pays en voie de développement; conditionnalités; non-discrimination.

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Introduction

The *General Agreement on Tariffs and Trade 1947* (*GATT*) was predicated on the principle of reciprocity[1] and did not recognize any form of differentiation even if it was based on an objective need. This was legalised in the most-favoured-nation (MFN) treatment principle in Article I.1.[2] Thus, the *GATT* did not recognize any form of affirmative action. However, developing countries expressed dissatisfaction with the functioning of the *GATT*, and calls to make it more development friendly grew louder. Their argument was that unequal countries could not be treated equally, as required by the MFN treatment principle. Various decisions and declarations favouring developing countries came about, but they did not have much impact. The developing countries decided to meet in a separate forum called the United Nations Conference on Trade and Development (UNCTAD). Consequently, the *GATT* finally accorded a measure of recognition to the demands of developing countries in the form of Part IV of the *GATT*, entitled "Trade and Development," which came into effect on 27 June 1966. This part encouraged developed countries to open their markets to products of developing countries. It also laid down the principle of non-reciprocity.[3] Of course, this part was hortatory in nature, which meant that the developing countries were still dissatisfied.

This feeling led to more intense work at UNCTAD, culminating in the Generalized System of Preferences (GSP). Its history deserves closer

[1] See *General Agreement on Tariffs and Trade 1947*, 1 January 1948, 55 UNTS 194, recital 3 (*GATT*), which states: "Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements."

[2] *Ibid*, art I.1 states: "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, … any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." Despite this article, the *GATT* contains exceptions in the form of art XXIV, which allows customs unions and free trade areas.

[3] *Ibid*, art XXXVI.8, which states that developed countries will reduce or remove obstacles to the trade of developing countries without expectation of reciprocity. The note to art XXXVI.8 in Annex I entitled Notes and Supplementary Provisions states: "[T]he phrase do not expect reciprocity means, in accordance with the objectives set forth in this Article, that the less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments."

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attention since it is the subject of this article. In 1962, the Economic and Social Council of the United Nations decided to convene a conference on trade and development on the basis of a proposal made by several developing countries.[4] As a consequence, UNCTAD held its first meeting in 1964 where a resolution on the GSP was passed, but it did not have binding effect.[5] The GSP is based on the idea of preferential market access. This means that the products of developing countries exported to developed countries are subject to tariffs that are lower than those applied to imports from developed countries.[6] This idea emanated from the Argentinian economist Raúl Prebisch, the founding secretary-general of UNCTAD. Of course, it was not easy to implement and had to face a lot of opposition. Therefore, the developing countries withdrew their recommendation for the establishment of the GSP.[7] UNCTAD held its second meeting in 1968 in New Delhi, where *Resolution 21(II) on "Preferential or Free Entry of Exports of Manufactures and Semi-Manufactures of Developing Countries to the Developed Countries"* (*Resolution 21(II)*) was adopted unanimously.[8] It recognized "the unanimous agreement in favour of the early establishment of a mutually acceptable system of generalized non-reciprocal and non-discriminatory preferences which would be beneficial to the developing countries"[9] and agreed "that the objectives of the generalized non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least advanced among the developing countries, should be:

(a) [t]o increase their export earnings;
(b) [t]o promote their industrialization;
(c) [t]o accelerate their rates of economic growth.[10]

[4] Anthony N Cole, "Labor Standards and the Generalized System of Preferences: The European Labor Incentives" (2003) 25 Michigan J Intl L 186.

[5] *Ibid* at 187–88.

[6] Norma Breda dos Santos et al, "Generalized System of Preferences in General Agreement on Tariffs and Trade/World Trade Organization: History and Current Issues" (2005) 39:4 J World Trade 638.

[7] Cole, *supra* note 4 at 190.

[8] *Resolution 21(II) on Preferential or Free Entry of Exports of Manufactures and Semi-Manufactures of Developing Countries to the Developed Countries in Annex I A of the Proceedings of the UNCTAD Second Session, New Delhi, 1 February—29 March 1968*, Report and Annexes TD/97, vol 1 (1968) at 38, n 25 [*Resolution 21(II)*].

[9] *Ibid* at 38, recital 4.

[10] *Ibid* at 38, para 1.

Thus, the objectives of the GSP were entirely economic in nature, unfettered by the imposition of any conditions.[11]

The GSP could not be established at the international level. Thus, individual developed countries set up their own GSP schemes.[12] This was despite the fact that the benefits of the GSP were contested.[13] Preferential market access, however, violates the MFN treatment principle. In 1971, the Contracting Parties of the *GATT* granted a *Waiver to the Generalized System of Preferences* (*GSP Waiver*) for a period of ten years.[14] The reason for this temporal limitation was that Raúl Prebisch had advocated the idea of preferences for ten years. The Contracting Parties of the *GATT* chose to make this waiver permanent in the Tokyo Round. Therefore, they adopted the *Enabling Clause* on 28 November 1979.[15] There is no temporal limitation in this clause. Its paragraph 1 states that "[n]otwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, … without according such treatment to other contracting parties." The usage of the word "may" indicates that developed countries are not obliged to grant preferences.[16] However, they have to fulfil certain requirements laid down in the *Enabling Clause* if they decide to grant preferences.[17] *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (*EC – Tariff Preferences*) throws light on the legal status of these requirements.[18] Overall,

[11] In this article, condition and conditionality in the singular and the plural have been used interchangeably.

[12] Cole, *supra* note 4 at 192; James Harrison, "Incentives for Development: The EC's Generalized System of Preferences, India's WTO Challenge and Reform" (2005) 42 Common Market L Rev 1664.

[13] Gene M Grossman & Alan O Sykes, "A Preference for Development: The Law and Economics of GSP" (2005) 4:1 World Trade Rev 41 at 60–63 [Grossman & Sykes, "A Preference for Development"].

[14] See *Waiver to the Generalized System of Preferences*, Decision BISD18S/24, Doc L/3545 (25 June 1971), para a [*GSP Waiver*].

[15] *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, Doc L/4903 (28 November 1979) [*Enabling Clause*].

[16] See also *GSP Waiver*, *supra* note 14, recital 5, which states: "Noting the statement of developed contracting parties that the grant of tariff preferences does not constitute a binding commitment."

[17] James Harrison, "GSP Conditionality and Non-Discrimination" (2003) 9(6) Intl Trade Law & Regulation 160.

[18] *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/R (Panel Report, 1 December 2003) and Doc WT/DS246/AB/R (Appellate Body, 7 April 2004) [*EC – Tariff Preferences*]. Harrison, *supra* note 12 at 1665.

the *Enabling Clause* has wider jurisdiction than the 1971 *GSP Waiver* and includes the notions of non-reciprocity[19] as well as of graduation.[20] It is now part of the *GATT 1994*[21] and is justiciable.[22]

The *EC – Tariff Preferences* Case

The *EC – Tariff Preferences* case dealt with conditionalities in the European Union's (EU)[23] GSP. It was the first case in the WTO in which the *Enabling Clause* was adjudicated.[24] It interpreted the meaning of non-discrimination and proved that the principle of non-discrimination, being the cornerstone of the multilateral trading system, must be complied with even in the exceptions, which in this case was the *Enabling Clause*. This means that there is really no exception to the principle of non-discrimination. In this case, India challenged *Council Regulation (EC) 2501/2001 Applying a Scheme of Generalised Tariff Preferences* (*Regulation 2501/2001*), which laid down the following five schemes of preferences:

1. general arrangements;
2. special incentive arrangements for the protection of labour rights;

[19] *Enabling Clause*, *supra* note 15, para 5.

[20] *Ibid*, para 7.

[21] *General Agreement on Tariffs and Trade 1994*, 15 April 1994, 1867 UNTS 187 [*GATT 1994*]. Lorand Bartels, "The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program" (2003) 6:2 J Intl Econ L 516 [Bartels, "WTO Enabling Clause"]. See also *EC – Tariff Preferences*, *supra* note 18, Appellate Body, n 192, which states that "the Enabling Clause is one of the 'other decisions of the CONTRACTING PARTIES' within the meaning of paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement*."

[22] Robert Howse, "India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for 'Political' Conditionality in US Trade Policy" (2003) 4:2 Chicago J Intl L 388.

[23] The European Union (EU) was known as European Communities (EC) in the World Trade Organization (WTO) until 30 November 2009. See *Member Information: The European Union and the WTO*, online: <https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm>. The *EC – Tariff Preferences* case arose before 30 November 2009. In this article, the abbreviation EC will be used while referring to the aforementioned case and the abbreviation EU will be used in the remaining situations.

[24] Mitsuo Matsushita et al, *The World Trade Organization Law, Practice and Policy*, 2nd ed, (New York: Oxford University Press, 2006) at 775; Ravindra Pratap, "WTO and Tariff Preferences India Wins Case, EC the Law," *Economic and Political Weekly* 39:18 (1–7 May 2004) at 1788. The EU Generalized System of Preferences (GSP) had been challenged in the past in the following cases in the WTO, but they did not result in the adjudication of the *Enabling Clause*: *European Communities – Measures Affecting Differential and Favourable Treatment of Coffee*, WTO Doc WT/DS154; *European Communities – Measures Affecting Soluble Coffee*, WTO Doc WT/DS209; *European Communities – Generalized System of Preferences*, WTO Doc WT/DS242.

3. special incentive arrangements for the protection of the environment;
4. special arrangements for least developed countries; and
5. special arrangements to combat drug production and trafficking.[25]

The preferences under the general arrangements were granted to all developing countries, whereas the fulfilment of certain conditions was required to benefit from additional preferences under the special arrangements. The special incentive arrangements for the protection of labour rights and the environment were so stringent that most developing countries did not even apply for them, and only two succeeded in fulfilling the conditions.[26] The advantages under the last category — that is, the drug arrangements — were granted to eleven countries whose products benefited from zero tariffs,[27] whereas the products of other developing countries benefited from reduced tariffs or had to pay the entire tariff.[28] The EU felt that the eleven beneficiaries needed these preferences to stimulate their economic growth and improve their commercial possibilities so that the citizens of these countries would abandon the manufacture of illicit drugs and take up the manufacture of licit products instead.[29]

In 2001, the EU added Pakistan as the beneficiary of its additional preferences under the drug arrangements. The European Commission acknowledged that the EU granted additional preferential market access to Pakistani textiles and clothing to reward Pakistan for its position against

[25] *Council Regulation (EC) 2501/2001 Applying a Scheme of Generalised Tariff Preferences for the Period from 1 January 2002 to 31 December 2004* [2001] OJ L346, art 1.2 [*Regulation 2501/2001*].

[26] Gregory Shaffer & Yvonne Apea, "Institutional Choice in the Generalized System of Preferences Case: Who Decides the Conditions for Trade Preferences? The Law and Politics of Rights" (2005) 39(6) J World Trade 982.

[27] These countries were Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Peru, and Venezuela.

[28] See *EC – Tariff Preferences*, *supra* note 18, Panel, paras 2.7–2.8. The drug arrangements were laid down in art 10 of *Regulation 2501/2001*, *supra* note 25, which stated: "1. Common Customs Tariff *ad valorem* duties on products which, according to Annex IV, are included in the special arrangements to combat drug production and trafficking referred to in Title IV and which originate in a country that according to Column I of Annex I benefits from those arrangements, shall be entirely suspended. For products of CN code 0306 13, the duty shall be reduced to a rate of 3,6 %; 2. Common Customs Tariff specific duties on products referred to in paragraph 1 shall be entirely suspended, except for products for which Common Customs Tariff duties also include *ad valorem* duties. For products of CN codes 1704 10 91 and 1704 10 99, the specific duty shall be limited to 16 % of the customs value."

[29] *Request for a WTO Waiver, New EC Special Tariff Arrangements to Combat Drug Production and Trafficking*, Doc G/C/W/328 (24 October 2001) para 3 [*Request for a WTO Waiver*].

the Taliban and also to gain access to the Pakistani market.[30] The grant of additional preferences to Pakistani textiles and clothing led to a distortion of the conditions of competition between India and Pakistan. Thus, it had a negative impact on India's exports since India and Pakistan were competitors in the export of textiles and clothing to the EU.[31] In addition, developing countries that lost market access such as India paid for the increased market access for other developing countries such as Pakistan.[32] Therefore, greater trade preferences can benefit a country at the cost of its competitor. In other words, increased market access can eradicate the problem of drugs in a country, but reduced market access can increase the same problem in another country. Obviously, the aim of the *Enabling Clause* is not to transfer the problems of one country to another, but this is exactly what the drug arrangements led to.[33]

India challenged the drug arrangements, arguing that they violated the MFN treatment principle and were not justified by the *Enabling Clause* because footnote 3[34] prevented the GSP donors from granting non-identical preferences to their beneficiaries. Moreover, paragraphs 2(a)[35] and 3(c)[36] referred to all developing countries. Since paragraph 2(a) did not allow donors to select their beneficiaries, preferences could not vary due to the needs of developing countries. So India's argument was that developing countries had not given up on the MFN treatment principle, which applied even when preferences were granted and, thus,

[30] *EU Response to the 11 September: European Commission Action, Brussels*, Doc MEMO/02/53 (12 March 2002), online: <http://europa.eu/rapid/press-release_MEMO-02-53_en.htm>; *EU Response to the 11 September: European Commission Action, Brussels*, Doc MEMO/02/122 (3 June 2002), online: <http://europa.eu/rapid/press-release_MEMO-02-122_en.htm>.

[31] Biswajit Dhar & Abhik Majumdar, *The India-EC GSP Dispute: The Issues and the Process* (25–26 January 2006) at 3–7, online: <http://www.ictsd.org/downloads/2008/06/dhar.pdf>.

[32] Pratap, *supra* note 24 at 1788.

[33] Dhar & Majumdar, *supra* note 31 at 19.

[34] *Enabling Clause, supra* note 15, n 3, states: "As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of 'generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries' (BISD 18S/24)."

[35] *Ibid* para 2(a) states: "The provisions of paragraph 1 apply to the following: … *(a)* Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences."

[36] *Ibid* para 3(c) states: "Any differential and more favourable treatment provided under this clause: … *(c)* shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries."

prevented donors from distinguishing between beneficiaries. In other words, India was arguing that the principle of non-discrimination applies even in the exceptions. Normally, the word "discrimination" carries a negative connotation and means unjustified distinction. However, India was arguing that any distinction, even if justified, amounted to discrimination and that GSP schemes must benefit all developing countries, without differentiation, to be protected by the *Enabling Clause*.

The EU argued that the *Enabling Clause* excluded the application of the MFN treatment principle. It stated that the drug arrangements were covered by paragraph 2(a) of the *Enabling Clause* instead of by the MFN treatment principle. It also argued that "non discriminatory" in footnote 3 of the *Enabling Clause* did not require identical preferences to be granted and allowed distinctions based on objective criteria such as developing countries' needs. Moreover, paragraph 2(a) did not mention "all" developing countries, and this was confirmed by paragraph 3(c), which allowed preferences suited to the needs of developing countries.

Despite the important stakes India had in this case, Pascal Lamy, who was the European trade commissioner at that time, remarked that India did not need preferences, suggesting that India would not benefit from the case.[37] However, India chose to bring the case not only due to economic reasons but also because it raised a systemic question regarding the conditionalities in the GSP.[38] Conditionality can be defined as granting benefits subject to the beneficiary meeting certain conditions. However, it carries a stronger meaning, as a mechanism to bring about policy reform in the beneficiaries or to impose policies that the beneficiary would not choose voluntarily.[39] In the World Bank, it implies a provision of financial support to beneficiaries in return for the implementation of structural changes.[40]

[37] Gregory Shaffer & Yvonne Apea, "GSP Programmes and Their Historical-Political-Institutional Context" in Thomas Cottier et al (eds), *Human Rights and International Trade* (Oxford: Oxford University Press, 2005) 488 at 501, n 51.

[38] The issue of conditionalities is also important in view of the *Agreement on Trade Facilitation*, wherein least-developed and developing countries' implementation of certain provisions is conditional on the receipt of assistance and support for capacity building. See the entire section II and, in particular, arts 16(1)(c), 16(2)(d), 17(1)(b), 17(4), 19(1), 19(2)(b) and (c), and 21 of the Annex to the *Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization Agreement on Trade Facilitation*, Decision of 27 November 2014, Doc WT/L/940 (28 November 2014).

[39] Oliver Morrissey, "Alternatives to Conditionality in Policy-Based Lending" in Stefan Koeberle *et al.* (eds), *Conditionality Revisited: Concepts, Experiences, and Lessons* (Washington, DC: World Bank, 2005) at 237.

[40] Stefan G Koeberle, "Should Policy-Based Lending Still Involve Conditionality?" (2003) 18:2 World Bank Observer 251 [Koeberle, "Policy-Based Lending"].

In other words, conditionality is related to power since the balance of power between the donor and the beneficiaries is important.[41]

The EU provides additional trade preferences to countries that comply with certain conditions. The EU's rationale behind this is that "economic benefits are privileges to be granted to developing countries that comply with democratic principles and human rights, and to be withdrawn from those that do not."[42] However, the EU does not include human rights and democracy conditionalities in its relations with developed countries.[43] Of course, these relations exclude the GSP. But the EU's difference in treatment of developing and developed countries shows that conditionalities are related to power.

India's complaint raised two related questions. The first question related to the type of differentiation authorized — preferences granted to beneficiaries must be identical or is it possible to distinguish between them on the basis of different criteria?[44] The second question related to the status of footnote 3 in the *Enabling Clause* — was it binding and how to interpret it?[45] The panel found that the drug arrangements violated the MFN treatment principle and were not justified under paragraph 2(a) of the *Enabling Clause*. It also found that the term "non discriminatory" in footnote 3 of the *Enabling Clause* required identical preferences to be granted, without differentiation, to all developing countries; however, it allowed *a priori* limitations.[46] Additionally, it found that the term "developing countries" in paragraph 2(a) of the *Enabling Clause* referred to all developing countries, but allowed *a priori* limitations.[47] The panel referred to *UNCTAD Resolution 21(II)* to support its finding that the term "non discriminatory" meant a complete absence of distinction including on the basis of objective criteria.

[41] Patrick Watt, "Partnerships in Policy-Based Learning" in Koeberle et al, *supra* note 39, 249.

[42] Lorand Bartels, *The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third Countries*, Directorate-General for External Policies of the Union, European Parliament, Doc EXPO-B-INTA-2008-57 PE 406.991 (2008) at 1 [Bartels, *Application of Human Rights*].

[43] *Ibid* at 3.

[44] Gene M Grossman & Alan O Sykes, "European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R)" in Henrik Horn & Petros C Mavroidis, eds, *The WTO Case Law of 2003*, American Law Institute Reporters' Studies (New York: Cambridge University Press, 2006) 221 [Grossman & Sykes, "European Communities"].

[45] Lorand Bartels, "The Appellate Body Report in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* and Its Implications for Conditionality in GSP Programmes" in Cottier et al, *supra* note 37, 465 [Bartels, "Appellate Body Report"].

[46] *EC – Tariff Preferences*, *supra* note 18, Panel, para 7.116.

[47] *Ibid*, Appellate Body, para 78.

In fact, it found no objective criteria to distinguish between different development needs such as drug trafficking, poverty or poor education, and so on.[48]

The EU appealed and argued that the term "non discriminatory" obliged members to grant objective preferences because paragraph 3(c) required a response to the needs of developing countries. Moreover, paragraph 2(a) did not refer to all developing countries since paragraph 3(c) allowed objective distinctions. The Appellate Body found that the term "non discriminatory" in footnote 3 of the *Enabling Clause* constituted an obligation and that GSP schemes would have to be non-discriminatory to be justified under paragraph 2(a) of the *Enabling Clause.*[49] However, the term "non discriminatory" did not require identical preferences to be granted.[50] Moreover, the term "developing countries" in paragraph 2(a) of the *Enabling Clause* did not refer to all developing countries.[51] The Appellate Body also stated that different developing countries could have different development needs susceptible of changing because development did not happen in a uniform manner in all developing countries.[52] It continued in the same vein by stating that developing countries could have different needs in accordance with their levels of development and particular circumstances.[53] The Appellate Body referred to the preamble to the *Agreement Establishing the World Trade Organization* (*WTO Agreement*), which refers to the needs of members at different levels of economic development, to support its finding.[54]

The Appellate Body used paragraph 3(c) of the *Enabling Clause* as context to interpret footnote 3[55] and stated that "we read paragraph 3(c) as authorizing preference-granting countries to 'respond positively' to 'needs' that are *not* necessarily common or shared by all developing countries. Responding to the 'needs of developing countries' may thus entail treating different developing country beneficiaries differently."[56] It continued:

> In granting such differential tariff treatment, however, preference-granting countries are required, by virtue of the term "non-discriminatory", to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP

[48] *EC – Tariff Preferences, supra* note 18, Panel, para 7.103.

[49] *Ibid*, Appellate Body, para 148.

[50] *Ibid*, para 156.

[51] *Ibid* paras 175–76.

[52] *Ibid* para 160.

[53] *Ibid* para 161.

[54] *Ibid. Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154.

[55] *EC – Tariff Preferences, supra* note 18, Appellate Body, para 130.

[56] *Ibid* para 162.

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beneficiaries that have the "development, financial and trade needs" to which the treatment in question is intended to respond.[57]

Applying this criterion to the drug arrangements, the Appellate Body found that they were not available to all the beneficiaries of the GSP that were facing the problem of drug production and trafficking. The drug arrangements were limited to twelve developing countries, and indicated neither the manner of selecting the beneficiaries nor the elements for determining the effect of the drug problem. There was no way to add other countries as beneficiaries of the arrangements. Furthermore, there were no criteria to distinguish beneficiaries of drug arrangements from other beneficiaries of the EU GSP. The drug arrangements did not lay down the criteria to remove beneficiaries. This meant that a beneficiary could continue to benefit from the drug arrangements irrespective of whether or not the arrangements resolved the drug problem in the country.[58] This would certainly not be very encouraging for the development of developing countries facing drug problems that could not benefit from the drug arrangements.

Moreover, *Regulation 2501/2001* did not state the method of evaluating the drug arrangements' response to the drug problems. This shows that the drug arrangements were opaque and were also applied in a discriminatory fashion. Additionally, the EU had asked for a waiver from the MFN treatment principle because the drug arrangements benefited the products of twelve countries only.[59] Therefore, the Appellate Body did not agree with the EU that all developing countries were potential beneficiaries of the drug arrangements. Consequently, the EU was unable to prove that the drug arrangements satisfied the requirement of "non discriminatory" in footnote 3 and that they were justified under paragraph 2(a) of the *Enabling Clause*.[60]

Evaluation of the *EC – Tariff Preferences* Case

This case not only raised a number of difficult questions but also left quite a few of them unanswered, thus leading to uncertainty regarding GSP schemes. The main reason for this lack of clarity is that the *Enabling Clause* is ambiguous, and this was acknowledged by the panel and the Appellate Body. In fact, it does not provide definitions for the terms "non discriminatory" and "developing countries." The *Enabling Clause* refers neither to all developing countries nor to particular developing countries.[61] Like any

[57] *Ibid* para 173.

[58] *Ibid* paras 180–83.

[59] *Request for a WTO Waiver*, *supra* note 29, para 2.

[60] *EC – Tariff Preferences*, *supra* note 18, Appellate Body, paras 186–90.

[61] Grossman & Sykes, "A Preference for Development," *supra* note 13 at 52–53.

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decision, this one also has its pros and cons. Consequently, there have been varied reactions to the case since it was important for GSP donors as well as for beneficiaries. Some developing countries felt that the Appellate Body's finding would fragment their unity, while others felt it reflected the diversity among developing countries.[62] The decision in this case can be perceived as disadvantageous for developing countries or as a compromise between different interests.[63]

Brazil felt that the Appellate Body legitimized the use of the GSP as a tool of foreign policy.[64] It can also be said that India won the case since the drug arrangements were struck down, but the interpretation of the law was in the EU's favour.[65] Both of the parties expressed their reactions to the decision. India expressed its dissatisfaction at the decision by stating that

> the Appellate Body in this case had disregarded the ordinary meaning of the term "non-discriminatory", as well as the relevant WTO jurisprudence, and [it] had also failed to conduct an analysis of this term in the context of Article I.1 of the GATT 1994. It had then gone on to interpret the term "non-discriminatory" solely on the basis of paragraph 3(c) [of] the Enabling Clause. India had expressed its concern about the lack of adequate legal basis in the Appellate Body's analysis for determining that developing countries could be treated differently by GSP donors, and the fear of a return to the era of special preferences that had prevailed before the GSP had been installed in the trading system.[66]

Meanwhile, the EU stated in a press release that the decision was a victory for GSP donors, including the EU, which wanted to respond positively to the particular needs of the sub-groups of similarly situated developing countries.[67]

It may be useful to examine the concept of discrimination since the entire case hinged on it. Non-discrimination in the WTO is not a linear concept. It varies from one legal provision to another.[68] Moreover, conditionalities can lead to discrimination, but they can also be non-discriminatory.

[62] Sonia E Rolland, *Development at the World Trade Organization* (Oxford: Oxford University Press, 2012) at 159.

[63] Dhar & Majumdar, *supra* note 31 at 22–23.

[64] Shaffer & Apea, *supra* note 26 at 1004.

[65] Pratap, *supra* note 24 at 1788.

[66] Dispute Settlement Body (DSB), *Minutes of Meeting Held on 20 July 2005*, Doc WT/DSB/M/194 (26 August 2005) para 32.

[67] *Inde / OMC – SPG: l'OMC confirme qu'il est possible d'opérer une différenciation entre les pays en développement, Brussels*, Doc IP/04/476 (7 April 2004), online: <http://europa.eu/rapid/press-release_IP-04-476_fr.pdf>.

[68] Howse, *supra* note 22 at 397.

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Thus, discrimination and conditionality are not synonymous. The condition can lead to discrimination when applied in a uniform manner to all beneficiaries. The requirement of fulfilling objective minimum conditions can be discriminatory since certain potential beneficiaries/developing countries that are not in a position to fulfil them may not benefit from the additional preferences. This means that the capacity of the potential beneficiaries to fulfil the conditions must be taken into account.[69] Thus, non-discrimination includes treating unequals unequally.[70] Lassa Oppenheim's *International Law: A Treatise* explains discrimination as treating differently those who are in the same situation or treating in the same way those who are in different situations.[71] Thus, countries situated differently can be treated differently. The Appellate Body also clarified this when it stated that similarly situated beneficiaries should be treated alike. This is also highlighted in Article XX of the *GATT*,[72] which allows non-discriminatory conditions, Article 2.3 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*,[73] and paragraph 2(d) of the *Enabling Clause*.[74]

The Appellate Body struck down the drug arrangements due to a lack of transparency, but it could be argued that the *Enabling Clause* does not require transparency in the administration of GSP schemes because a lack of transparency does not necessarily amount to discrimination even in the case of a closed list as long as the GSP donor has correctly evaluated the needs of the beneficiaries and the responses to those needs.[75] However, this argument ignores the fact that closed lists cannot exist in the case of proper evaluation of needs, and the responses to those needs, that can only be made by practising transparency. The element

[69] Bartels, "WTO Enabling Clause," *supra* note 21 at 524.

[70] Harrison, *supra* note 17 at 164.

[71] *EC – Tariff Preferences*, *supra* note 18, Appellate Body, n 318. L Oppenheim, *International Law: A Treatise* (New York: Longmans, Green and Company, 1905).

[72] *GATT 1994*, *supra* note 21, art XX states: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures."

[73] *WTO Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, 1867 UNTS 493, art 2.3, which states: "Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail."

[74] *Enabling Clause*, *supra* note 15, para 2(d) states: "The provisions of paragraph 1 apply to the following: … *(d)* Special treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries."

[75] Bartels, "Appellate Body Report," *supra* note 45 at 483–84.

of discrimination could have been removed by following this procedure. Since it was not followed, the drug arrangements were discriminatory because of a lack of transparency.

The Appellate Body's decision allows more freedom to donors to distinguish between beneficiaries as long as these distinctions fulfil the requirements laid down in the *Enabling Clause*[76] as interpreted by the Appellate Body. The Appellate Body stated that these distinctions must be based on objective criteria such as those recognized in the *WTO Agreement* or in international instruments.[77] As a consequence, the Appellate Body enhanced the possibility for donor countries to add conditions, including non-economic ones. This is obviously not favourable from the point of view of the potential beneficiaries that cannot always fulfil these conditions.

The Appellate Body simply assumed that the criteria it referred to were objective and did not define the term "objective." It did not specify who bore the burden of proof to prove the objectivity of the criteria.[78] In addition, it did not specify the method of application of the objective criteria. Should they be applied to the entire economy of the potential beneficiary or to its sectors or to the international standards such as the UN Human Development Index?[79] This allows the GSP donor to select the method of application of the objective criteria. Moreover, the freedom to objectively distinguish may be misused to favour allies[80] or to pressure developing countries in multilateral or bilateral negotiations. Donors may include these conditions in bilateral agreements with developing countries,[81] and this would exclude recourse to WTO dispute settlement.

Moreover, one of the difficulties in implementing the criteria laid down by the Appellate Body will be to find out if potential beneficiaries are "similarly situated," since the Appellate Body did not provide a definition of the term. In addition, there may be a number of needs/problems that need to be resolved, such as health, education, and so on, and it may be discriminatory if the EU only grants preferences to resolve drug problems as opposed to other needs.[82] The unfettered discretion to choose the needs to be addressed may amount to *de facto* discrimination among

[76] Harrison, *supra* note 12 at 1674.

[77] *EC – Tariff Preferences, supra* note 18, Appellate Body, para 163.

[78] Rolland, *supra* note 62 at 162.

[79] *Ibid* at 161.

[80] Grossman & Sykes, "A Preference for Development," *supra* note 13 at 53–54.

[81] Stéphane de la Rosa, "Observations après le rapport du groupe spécial '*Communautés européennes – conditions d'octroi de préférence tarifaires aux pays en développement*': Vers une remise en cause du SPG communautaire 'à la carte'?" (2003) 15 L'Observateur des Nations Unies 23.

[82] Howse, *supra* note 22 at 400.

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beneficiaries, thus highlighting the weakness of the criteria laid down by the Appellate Body. The Appellate Body did not require a GSP donor to respond to all possible development, financial, and trade needs of the potential beneficiaries.[83] And this fact leads to the following questions:

- how is one to define a development, financial, or trade need;
- do GSP donors have absolute discretion to choose the problems that they resolve;
- how can the problem be quantified in order to be resolved;
- is exclusion of sensitive products from the benefits of GSP schemes not discriminatory; and
- do these conditions not amount to a requirement of reciprocity?[84]

Additionally, the economic interests of beneficiaries evolve. A broad GSP scheme covering many products (espoused by the panel[85]) allows the beneficiaries to shift to exporting newer products. A narrow GSP scheme tailored to similarly situated beneficiaries does not allow the beneficiaries to shift to exporting newer products because this shift is governed by the GSP donor who might have an interest in maintaining the beneficiaries in the existing position. Besides, it is possible that the beneficiaries that are unable to make the shift are actually inefficient producers of those products.[86]

Another consequence of the Appellate Body's ruling is that GSP donors will determine whether or not a country is a developing country, a determination that is normally made by the developing countries themselves. Potential beneficiaries will have to prove that they fulfil the conditions or that the conditions are unlawful. However, the Appellate Body has not clarified if the potential beneficiary has to prove that it fulfils the conditions or if the GSP donor has to prove that the potential beneficiary does not fulfil the conditions.[87] These issues can be avoided in a GSP scheme without conditions.

Furthermore, there is a contradiction between the decision of the Appellate Body that makes "non discriminatory" a requirement and the *Doha Decision on Implementation-Related Issues and Concerns* that states that preferences "should" be non-discriminatory.[88] Given the *de facto* rule of precedent

[83] Lorand Bartels, "The WTO Legality of the EU's GSP+ Arrangement" (2007) 10:4 J Intl Econ L 878 [Bartels, "WTO Legality"].

[84] Grossman & Sykes, "A Preference for Development," *supra* note 13 at 55–56.

[85] See *EC – Tariff Preferences*, *supra* note 18, Panel, para 7.175.

[86] Rolland, *supra* note 62 at 160.

[87] *Ibid* at 161–63.

[88] *Doha Decision on Implementation-Related Issues and Concerns adopted on 14 November 2001*, Doc WT/MIN(01)/17 (20 November 2001) para 12.2.

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that operates in WTO dispute settlement, it is possible that a future panel or Appellate Body would consider the decision in the present case. But the *Doha Decision on Implementation-Related Issues and Concerns* may also be relevant under Articles 31.3(a) and 31.3(b) of the 1969 *Vienna Convention on the Law of Treaties* (*VCLT*), which refer to subsequent agreement or practice of the parties regarding the interpretation of the treaty.[89]

Paragraph 3(a) of the *Enabling Clause* states that "[a]ny differential and more favourable treatment provided under this clause: (a) shall be designed to facilitate and promote the trade of developing countries." If the GSP donors are allowed to distinguish between potential beneficiaries on shaky objective grounds, would they not be contradicting this paragraph? So is the Appellate Body's interpretation in conformity with this paragraph?[90] The Appellate Body stated that differentiation was allowed to respond to the needs of developing countries. The drug arrangements were not based on any criteria and were thus discriminatory. India's argument that no distinction should be made between beneficiaries based on their needs would lead to discrimination because granting identical preferences to developing countries that have different needs would not allow for a response to these different needs, thus leading to discrimination. Nevertheless, responding differently to different needs requires more complex laws.[91] Therefore, the Appellate Body's approach is harder to implement compared with that of the panel.

Footnote 3 and paragraph 3(c) have always been present in the *Enabling Clause*, but their status has been ambiguous. By interpreting them as requirements, the Appellate Body has placed limits on the freedom of GSP donors to impose arbitrary conditions. These limits are necessary to avoid arbitrariness,[92] as was manifest in the *EC – Tariff Preferences* case. Theoretically, the Appellate Body's interpretation is more favourable to potential beneficiaries since it would allow the donors to respond to needs requiring additional preferences. In reality, it will depend on the beneficiaries' capacity to fulfil the conditions.

This case will have an impact on negative or positive conditionalities in GSP schemes that are difficult to fulfil and that distinguish between similarly situated beneficiaries. The Appellate Body stated that preferences should bring about a positive response to the needs of the beneficiary.[93] How would negative conditions bring about positive responses

[89] Howse, *supra* note 22 at 392, n 28. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

[90] Dhar & Majumdar, *supra* note 31 at 19.

[91] Steve Charnovitz et al, "Internet Roundtable The Appellate Body's GSP Decision" (2004) 3:2 World Trade Rev 264.

[92] *Ibid* at 247.

[93] *EC – Tariff Preferences*, *supra* note 18, Appellate Body, para 164.

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unless withdrawal of preferences is seen as contributing positively to the alleviation of a problem or need? So the Appellate Body's interpretation might push donors to change from negative to positive conditionalities and lead to a decrease in reasons that qualify as needs, justifying a distinction between the beneficiaries.[94]

Certain scholars argue that the GSP will lead to *de facto* discrimination among beneficiaries since it is supposed to promote industrialization through the export of manufactured goods. Other factors leading to discrimination include the fact that some beneficiaries are unfit to be recipients politically and that sensitive domestic sectors of donors need to be protected.[95] By way of example, the US GSP uses geopolitical considerations and the sensitivity of products to determine beneficiary status.[96] Moreover, GSP schemes introduced after the second meeting of UNCTAD had many conditions that were not outlawed by the *Enabling Clause*,[97] which means that the donors had never accepted that their freedom to impose conditions would be constrained.[98] However, these arguments ignore the fact that the *Enabling Clause* failed to explicitly allow conditions in the GSP. In fact, the Appellate Body only interpreted paragraph 3(c) because it was already present in the *Enabling Clause*.

Other scholars argue that no conditions were envisaged when the GSP came about because it aimed at enhancing growth in developing countries by means of exports.[99] Moreover, these conditions demonstrate the donors' desire to maintain unilateralism in granting preferences,[100] and amount to disguised protectionism.[101] Importantly, these GSP schemes containing conditionalities demonstrate an element of discrimination and reciprocity not envisaged by *UNCTAD Resolution 21(II)*.[102] Most of the discriminatory characteristics in GSP schemes are not meant to promote social values and may be open to scrutiny following this case.[103] In fact, the EU argued in this

[94] Bartels, "Appellate Body Report," *supra* note 45 at 484.

[95] Grossman & Sykes, "A Preference for Development," *supra* note 13 at 43.

[96] *Ibid* at 45.

[97] *Ibid* at 54.

[98] Howse, *supra* note 22 at 395.

[99] De la Rosa, *supra* note 81 at 4.

[100] *Ibid* at 16.

[101] *Ibid* at 23.

[102] Grossman & Sykes, "European Communities," *supra* note 44 at 227.

[103] Robert Howse, "Back to Court after *Shrimp/Turtle*? Almost but not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exceptions in the European Union's Generalized System of Preferences" (2003) 18:6 Am U Intl L Rev 1380. Outside of the GSP, the EU continued to make payments to coup-ridden Mauritania in exchange for fishing opportunities. This shows the EU's lack of faith in human rights issues. See Bartels, *Application of Human Rights*, *supra* note 42 at 4.

case that the drug arrangements were meant to protect European citizens from drugs, which proves that the conditions in GSP schemes may not necessarily be for the benefit of the beneficiaries.

Additionally, donors question the validity of the regulation of conditionalities in unilateral GSP schemes and might withdraw from these schemes if restrictions are imposed on their freedom to impose conditions.[104] However, the lack of regulation of conditionalities might lead to discriminatory preferences, similar to those that existed before UNCTAD.[105] It has been argued that developing countries should have anticipated these conditions because they help donors buy political support for the GSP schemes in their territories.[106]

The *EC – Tariff Preferences* Case: An Alternative Approach

If the Appellate Body had been asked to decide on the WTO legality of conditionalities, it would have been in a position to say that conditions should not be attached to GSP schemes because conditions would necessarily be discriminatory. This would not have amounted to legislation because India had argued that all potential beneficiaries should be treated alike. There could be two responses to this argument. The first is that all potential beneficiaries should be required to fulfil the same conditions irrespective of their ability to do so (since similarly situated is not defined); this was the response given by the Appellate Body. The second is that no potential beneficiary should be required to fulfil any condition. In this second response, the Appellate Body could have compared paragraph 3(c) and footnote 3 of the *Enabling Clause* and could have concluded that modification of GSP schemes in accordance with paragraph 3(c) does not allow for conduct that would be considered discriminatory under footnote 3. Thus, conditions, which are discriminatory by nature, would have been outlawed. Conditions are discriminatory by nature because (1) they ignore the different situations of beneficiaries and (2) the power relationship between the donor and the beneficiary is asymmetrical. Thus, this response would confirm India's argument that all potential beneficiaries should be treated alike. In addition, the removal of non-economic conditions in trade schemes would be helpful in achieving the economic development goals that were the initial reason for establishing the GSP.

Interpretations can also be suggested by applying the *VCLT* to interpret paragraph 3(c) and footnote 3 of the *Enabling Clause*. Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (*DSU*)

[104] Grossman & Sykes, "A Preference for Development," *supra* note 13 at 42, 57, 63, 65.

[105] *Ibid* at 66.

[106] *Ibid* at 55.

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refers to the "customary rules of interpretation of public international law" to interpret WTO law.[107] These customary rules have been codified in Articles 31 to 33 of the *VCLT*. The WTO panels and Appellate Body have always relied on these articles to interpret WTO law. Of course, the use of these interpretative aids can lead to different findings.

Article 31.1 of the *VCLT* states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The WTO panels and Appellate Body have shown great enthusiasm for using dictionaries to determine the ordinary meaning of treaty terms.[108] But can any dictionary define "modified" in paragraph 3(c) and "non discriminatory" in footnote 3 of the *Enabling Clause* as allowing for conditionalities? The context of the terms of the treaty and the object and purpose of the treaty can be found in the preamble to the *WTO Agreement*, which states that

> [*r*]*ecognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

The Appellate Body did refer to developing countries at different levels of development, as mentioned in the preamble to the *WTO Agreement*, to interpret footnote 3 of the *Enabling Clause*.[109] Conditionalities can be viewed as creating obstacles to, or encouraging, the achievement of the aforementioned goals. Beneficiaries need to be able to fulfil the conditionalities to benefit from these goals. Thus, conditionalities themselves are conditional on the capacity of the beneficiaries. In such a situation, the ordinary meaning of the terms "modified" and "non discriminatory" in their context and the object and purpose of the treaty would not allow for conditionalities.

The chapeau of Article 31.2 of the *VCLT* states that the context of a treaty includes its preamble and, thus, supports the aforementioned interpretation.

[107] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, 1869 UNTS 401 (*DSU*).

[108] The Appellate Body used the *Oxford English Dictionary* even in the *EC – Tariff Preferences* case. See generally *EC – Tariff Preferences*, *supra* note 18, Appellate Body. See also Joost Pauwelyn, "Reply to Joshua Meltzer" (2003–04) 25 Michigan J Intl L 925.

[109] *EC – Tariff Preferences*, *supra* note 18, Appellate Body, para 161.

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Article 31.2(a) of the VCLT states that the context also includes "[a]ny agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty." The panel had ruled that *UNCTAD Resolution 21(II)* was such an agreement under Article 31.2(a) and that it was context for interpreting the *Enabling Clause*.[110] This resolution makes no mention of conditionalities. The *Enabling Clause*, when interpreted in the context of this resolution, would not allow for conditionalities. Article 31.2(b) of the *VCLT* states that this context also includes "[a]ny instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." *UNCTAD Resolution 21(II)* would be such an instrument, and it effectively disallows conditionalities under the *Enabling Clause*.

This interpretation is also supported by the Appellate Body's ruling in *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* (*EC – Chicken Cuts*), in which the Appellate Body stated that the concept of context under Article 31 is not limited to the treaty text as demonstrated by Articles 31.2(a) and 31.2(b).[111] Thus, the context for interpreting the *WTO Agreement* (to which the *GATT 1994*, along with the *Enabling Clause*, is annexed) can be found outside it as well. The Appellate Body made this observation while stating that the Harmonized Commodity Description and Coding System (Harmonized System), which is not part of WTO law, constituted context under Article 31.2(a) for the interpretation of the schedules of members,[112] which are WTO law as per Article II.7 of the *GATT*.[113] The Appellate Body arrived at this conclusion in view of the close connection between the Harmonized System and WTO law.[114] Applying this logic, there is a close connection between *UNCTAD Resolution 21(II)* and the 1971 *GSP Waiver*, which is also referred to in footnote 3 of the *Enabling Clause*. Thus, this resolution can be context for the interpretation of the *Enabling Clause*, as stated by the panel.

Article 32 of the *VCLT* states that the supplementary means of interpretation include "the preparatory work of the treaty and the circumstances of its conclusion." The panel ruled that *UNCTAD Resolution 21(II)* was

[110] See *Ibid*, Panel, paras 7.86–7.87. See also Jane Bradley, "The Enabling Clause and the Applied Rules of Interpretation" in Cottier et al, *supra* note 37, 505.

[111] *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WTO Doc WT/DS269/AB/R (Appellate Body, 12 September 2005) para 195 [*EC – Chicken Cuts*].

[112] *Ibid* para 199.

[113] *GATT 1994*, *supra* note 21, art II.7 states: "The Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement."

[114] *EC – Chicken Cuts*, *supra* note 111, paras 194–99.

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preparatory work to interpret the *Enabling Clause*.[115] This would disallow conditionalities. In any case, Article 32 provides a non-exhaustive list of the supplementary means of interpretation, as highlighted by the Appellate Body in *EC – Chicken Cuts*.[116] Therefore, the panel was only doing what was allowed in the *VCLT*. As stated earlier, these articles can lead to different findings, and it is possible to argue that the preamble to the *WTO Agreement* would allow conditionalities. Moreover, it can also be argued that *UNCTAD Resolution 21(II)* does not outlaw conditionalities and, therefore, that the *Enabling Clause* can be interpreted to allow them. However, the aim of the UNCTAD negotiations on GSP was to reduce discrimination in the existing preferences, which was incorporated in the 1971 *GSP Waiver* and the *Enabling Clause*. Yet the *Enabling Clause* did not outlaw conditions that can lead to discrimination.[117] But it did not allow conditions either, and this should be taken into account in a judicial proceeding.

Apart from these articles, the preamble of the *VCLT* mentions certain principles that have not been used by the WTO panels and Appellate Body in interpreting WTO law. These principles include the following:

> Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law … Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all.

The question is whether these principles can be used by the WTO panels and Appellate Body to interpret the *Enabling Clause*. WTO law is part of public international law even in the absence of Article 3.2 of the *DSU*[118] and "is not to be read in clinical isolation from public international law."[119] In addition, Article 31.3(c) of the *VCLT* states that "[a]ny relevant rules

[115] See *EC – Tariff Preferences*, *supra* note 18, Panel, para 7.88. See also Jane Bradley, "The Enabling Clause and the Applied Rules of Interpretation" in Cottier et al, *supra* note 37, 505.

[116] *EC – Chicken Cuts*, *supra* note 111, para 283.

[117] Grossman & Sykes, "A Preference for Development," *supra* note 13 at 55.

[118] Joost Pauwelyn, "How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits" (2003) 37:6 J World Trade 1001.

[119] *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R (Appellate Body, 29 April 1996) para 17.

of international law applicable in the relations between the parties" must be taken into account. Of course, WTO law would prevail over public international law in case of conflict between the two.[120] It has been argued that the principles mentioned in the preamble of the *VCLT* are constitutional principles and have been enshrined in many instruments of the United Nations (UN), thus making them customary law requirements for the members of the UN and for the interpretation of treaties, including in WTO judicial proceedings.[121] Article 31.3(c) of the *VCLT* reflects the acceptance of these principles by all members of the UN.[122] In view of the fact that most members of the WTO are also members of the UN, this would imply that WTO law can be interpreted in light of the principles mentioned in the preamble of the *VCLT*.

In any case, the Appellate Body has inherent powers to administer justice, but it has not exercised these powers.[123] And how would justice be defined? It could mean that conditions in GSP schemes should be imposed to benefit citizens of beneficiary countries. It could also mean that imposing conditions would impose unjust burdens on the beneficiary countries. In addition, not giving additional preferences or taking away preferences when conditions are not fulfilled means that the citizens of beneficiary countries are being deprived of employment opportunities. Moreover, a balance will have to be struck between the rights of states (sovereign equality, independence, and non-interference) and the human rights of citizens. This is because many developing countries may not be parties to many international instruments.[124] Even if the rights of states can be ignored, the *Enabling Clause* should be interpreted to allow conditionalities only if they promote human rights and other associated rights. This would also take into account the meaning of the term "justice." Furthermore, top-down approaches are not very effective in achieving their goals, and bottom-up approaches pushed by citizens are preferable.[125] This would mean that conditionalities may not achieve their goals even if they are well intentioned unless the citizens of beneficiary countries push for change.

[120] *Korea – Measures Affecting Government Procurement*, WTO Doc WT/DS163/R (Panel, 1 May 2000) para 7.96.

[121] Ernst-Ulrich Petersmann, "Need for a New Philosophy of International Economic Law and Adjudication" (2014) 17:3 J Intl Econ L 639 at 640, 659.

[122] *Ibid* at 641.

[123] *Ibid* at 659.

[124] Asif Qureshi, "Interpreting WTO Agreements for the Development Objective" in Victor Mosoti, ed, *Towards a Development-Supportive Dispute Settlement System in the WTO,* Sustainable Development and Trade Issues, ICTSD Resource Paper no 5 (Geneva: International Centre for Trade and Sustainable Development, March 2003) at 103.

[125] Petersmann, *supra* note 121 at 654, 667–68.

In addition, the WTO panels and Appellate Body can come up with a set of rules to examine legitimate conditions in GSP schemes and resolve any disputes about them. This allows GSP donors to determine conditions unilaterally, subject to the justification of differential treatment of the beneficiaries and judicial review. However, the GSP donors may design schemes that fulfil their policy goals and comply with the Appellate Body's requirements. Or they might have many conditions in their GSP schemes, thus shifting benefits from one beneficiary to another. The beneficiaries may not challenge these conditions for the usual reasons of resource insufficiency or the political weight of the GSP donors as well as because they would be unsure of the result of the challenge due to the uncertainty created by the Appellate Body's decision.[126]

These were suggested interpretations. In view of the existing interpretation given by the Appellate Body, the EU replaced the defaulting regulation with another one.

Evaluation of the New European GSP + Scheme

The EU came up with *Council Regulation (EC) 980/2005 Applying a Scheme of Generalised Tariff Preferences*[127] to replace the previous *Regulation 2501/2001*. This was followed by *Council Regulation (EC) 732/2008 Applying a Scheme of Generalised Tariff Preferences*.[128] Article 1.2 of the two regulations laid down the following three schemes:

- a general arrangement;
- a special incentive arrangement for sustainable development and good governance; and
- a special arrangement for least developed countries.

Article 1.2 of the currently applicable *Regulation (EU) 978/2012 Applying a Scheme of Generalised Tariff Preferences* (*Regulation 978/2012*) provides for the following schemes:

- a general arrangement;
- a special incentive arrangement for sustainable development and good governance (GSP +); and

[126] Shaffer & Apea, *supra* note 26 at 1001–04.

[127] *Council Regulation (EC) 980/2005 Applying a Scheme of Generalised Tariff Preferences* [2005] OJ L169 [*Regulation 980/2005*].

[128] *Council Regulation (EC) 732/2008 Applying a Scheme of Generalised Tariff Preferences for the Period from 1 January 2009 to 31 December 2011* and amending Regulations (EC) 552/97, (EC) 1933/2006 and Commission Regulations (EC) 1100/2006 and (EC) No 964/2007 [2008] OJ L211 [*Regulation 732/2008*].

- a special arrangement for the least-developed countries (everything but arms (EBA)).[129]

The European Economic and Social Committee (EESC) has stated that the special incentive arrangements in *Regulation 2501/2001* for the protection of labour rights and of the environment have not been effective and should be withdrawn. It has also stated that conditionalities will not be useful in achieving their aim unless sufficient preferences are granted.[130] Despite this statement, the EU came up with the aforementioned three regulations containing a special incentive arrangement for sustainable development and good governance because the EU felt that it had absolute discretion to impose conditions on preferential trade.[131] In fact, the EU stated that it was clear that it should promote human rights, labour rights, the environment, and good governance standards by means of the GSP +.[132] Apart from the GSP +, *Regulation 978/2012* also lays down the following vulnerability criteria:

- the seven largest GSP sections of a beneficiary's exports to the EU must exceed 75 percent of its total exports to the EU during the last three consecutive years and
- a beneficiary's exports of particular products to the EU must not exceed 2 percent of the EU's imports of those products during the last three consecutive years.[133]

This does not fulfil the Appellate Body's criteria of differentiating between beneficiaries on the basis of development, finance, and trade needs.[134] Thus, it is obvious that there is a lack of coherence and a contradiction in the trade and development policy of the EU.[135]

Despite various regulations coming and going, the special incentive arrangement for sustainable development and good governance known

[129] *Regulation (EU) 978/2012* of the European Parliament and of the Council *Applying a Scheme of Generalised Tariff Preferences* and Repealing Council Regulation (EC) No 732/2008 [2012] OJ L303 [*Regulation 978/2012*].

[130] *Opinion of the European Economic and Social Committee on the "Generalised System of Preferences (GSP)"*, Doc 2004/C 110/10 (30 April 2004) paras 3.3, 3.3.3, 6.6.2, 7.4 [*Opinion on GSP*].

[131] *Ibid*, paras 6.6.2.3, 6.6.5.1.

[132] *Revised EU Trade Scheme to Help Developing Countries Applies on 1 January 2014*, European Commission Memo, Brussels (19 December 2013) at 3, online: <http://trade.ec.europa.eu/doclib/docs/2013/december/tradoc_152015.pdf>.

[133] *Regulation 978/2012*, *supra* note 129, art 9.1(a); Annex VII, para 1.

[134] Bartels, *Application of Human Rights*, *supra* note 42 at 16.

[135] *Opinion on GSP*, *supra* note 130, para 4.9.

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as the GSP + has remained the same.[136] It aims to help countries most in need.[137] Developing countries wanting to benefit from it must fulfil the vulnerability criteria as well as ratify and effectively implement twenty-seven international conventions on human rights, labour, environmental protection, the fight against drugs, and corruption.[138] *Regulation 2501/2001* only referred to conventions on labour and the sustainable management of tropical forests.[139] Thus, the potential beneficiaries could choose from any of the three arrangements devoted to labour, environment, and drugs and fulfil only the requirements pertaining to that particular arrangement. In the GSP +, a beneficiary has to fulfil all of the criteria. So the GSP +, which was introduced after the *EC – Tariff Preferences* case, requires the fulfilment of more conditions. Therefore, the GSP + is more restrictive and could even be called protectionist.[140] It is doubtful that many developing countries can fulfil these conditions.[141] In addition, the list of conventions to be ratified and effectively implemented is a unilateral decision taken by the EU. How does the Appellate Body propose to regulate the objectivity or subjectivity in this decision? It is possible that the conventions are chosen to benefit certain countries. This shows that the Appellate Body's dependence on international instruments is not all that helpful in eliminating discrimination.

On the face of it, this scheme is not discriminatory and opaque since all developing countries are eligible for preferences if they fulfil the criteria that are laid down. But all developing countries may not be in a position to fulfil all of the criteria. Even the EESC has recognized that the fulfilment of conditions entails a high cost that is not necessarily offset by preferential treatment.[142] So a *de jure* non-discriminatory scheme may lead to *de facto* discrimination. Countries may have the same needs irrespective of their capacity to ratify and implement these conventions. Or countries may have different needs but are required to ratify and implement the same conventions. Thus, it is arguable if the GSP + entitles similarly situated beneficiaries to similar preferences.

[136] The only differences are the following: (1) *Regulations 980/2005* and *732/2008* refer to the *International Convention on the Suppression and Punishment of the Crime of Apartheid* whereas Regulation 978/2012 does not refer to it; (2) *Regulation 978/2012* refers to the *UN Framework Convention on Climate Change*, whereas *Regulations 980/2005* and *732/2008* do not refer to it. See Annex VIII of *Regulation 978/2012*, *supra* note 129; Annex III of *Regulation 980/2005, supra* note 127; *Regulation 732/2008*, *supra* note 128.

[137] *Opinion on GSP*, *supra* note 130 at 1.

[138] *Regulation 978/2012*, *supra* note 129, art 9(1).

[139] *Regulation 2501/2001*, *supra* note 25, arts 14.2, 21.2.

[140] Bartels, *Application of Human Rights*, *supra* note 42 at 19.

[141] Shaffer & Apea, *supra* note 26 at 1006.

[142] *Opinion on GSP*, *supra* note 130, para 3.3.2.

In any case, beneficiaries are not necessarily similarly situated because they ratify and implement the same conventions.[143] Each developing country may have different needs that are not necessarily reflected in multilateral instruments, especially those included in the GSP +. Thus, the GSP + may not respond to the Appellate Body's criterion that the preferences alleviate a need. This means that the Appellate Body's and EU's standard of defining a need in terms of ratification and implementation of conventions does not necessarily fulfil the aim of addressing the need through preferences, thus defeating their very purpose. According to the European Commission, granting additional preferences depends on an objective identification of the development needs of developing countries.[144] Are conditionalities requiring the ratification and implementation of international conventions an objective method of identifying a development, financial, or trade need?

According to the European Parliament, these requirements can create barriers to the trade of developing countries, thus excluding them from potential preferences.[145] Therefore, discrimination is still possible if the standards used to determine the eligibility of the beneficiaries are not objective or are unjustifiably burdensome.[146] As much as a single arrangement might seem simpler, it requires the fulfilment of extensive criteria defined in terms of international conventions and agencies, which might make it onerous[147] for potential beneficiaries. Furthermore, a really backward country would find the fulfilment of these criteria unjustifiably burdensome compared with a more advanced country.[148] This shows that standardized conditionality for beneficiaries at different levels of development can lead to discrimination, against which the criteria laid down by the Appellate Body in the *EC – Tariff Preferences* case does not provide a guarantee.

[143] DSB, *supra* note 66, para 33.

[144] *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee Developing Countries, International Trade and Sustainable Development: The Function of the Community's Generalised System of Preferences (GSP) for the Ten-Year Period from 2006 to 2015*, Doc COM(2004) 461 final (7 July 2004) para 5 [*Communication from the Commission to the Council*].

[145] See *Generalized System of Preferences European Parliament Resolution on the Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee "Developing Countries, International Trade and Sustainable Development: The Function of the Community's Generalised System of Preferences (GSP) for the Ten-Year Period from 2006 to 2015"* (Doc COM(2004)0461), P6_TA(2004)0024 (14 October 2004) para 12 [*European Parliament Resolution*].

[146] Harrison, *supra* note 12 at 1678.

[147] *Ibid* at 1681.

[148] *Ibid* at 1682.

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In *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, the Appellate Body stated that "[w]e believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries."[149] In other words, discrimination will result since the GSP + requires potential beneficiaries to fulfil identical conditions irrespective of their different situations/capabilities. Furthermore, WTO law itself shows the way forward insofar as Article XVII.3 of the *General Agreement on Trade in Services* on national treatment states that "[f]ormally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member."[150] Thus, there is a recognition that formally identical treatment can lead to discrimination. In this sense, the complete absence of conditions from GSP schemes is identical treatment, but it is less problematic than having conditions.

Another problematic issue is that the potential beneficiaries are required to fulfil the conditions before benefiting from the preferences.[151] This discriminates in favour of those potential beneficiaries that can incur the cost of fulfilling the conditions. This shortcoming may be removed by (1) granting preferences before requiring fulfilment of the conditions and by (2) introducing a time gap between granting the preferences and fulfilling the conditions. Of course, this issue is not problematic if the conditions reflect customary international law.[152] Additionally, the GSP + uses the conclusions of the monitoring bodies under the relevant conventions to determine if potential beneficiaries have effectively implemented the conventions and if they are eligible to receive preferences under the GSP +.[153] However, the Appellate Body's criteria did not account for the lack of clarity in the donors' standard of review applicable to the conclusions of the monitoring bodies under the relevant conventions to determine if potential beneficiaries have effectively implemented the conventions. For example, under the GSP +, the type of infraction of the convention(s) leading to ineligibility of preferences is not known.[154]

[149] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (Appellate Body, 12 October 1998) para 165.

[150] *General Agreement on Trade in Services*, 15 April 1994, 1869 UNTS 183.

[151] *Regulation 978/2012*, *supra* note 129, recital 13.

[152] Bartels, "WTO Legality," *supra* note 83 at 881–82.

[153] *Regulation 978/2012*, *supra* note 129, arts 9.1(b), 9.1(e), 9.1(f), 13, 14.3, 15.6. The previous regulations laying down the GSP + also depended on the review and monitoring mechanisms of the relevant conventions.

[154] Bartels, *Application of Human Rights*, *supra* note 42 at 8.

So is defining conditionalities in a way that does not allow all potential beneficiaries to fulfil them not a form of discrimination? This method of defining conditionalities is legal because it fulfils the criteria laid down by the Appellate Body. But the Appellate Body's criteria are flawed and could lead to a return of the discriminatory preferences that existed before UNCTAD.[155] The other question is whether preferential trade based on conditionalities actually responds to a development need that is not entirely economic in nature. For example, can preferential trade prevent genocide, in view of the requirement in the current GSP + to ratify and implement the requisite convention?[156] Thus, the GSP + may be open to challenge if it does not alleviate the needs for which it was enacted.[157]

According to the European Commission, there is a link between development and human rights, labour rights, environmental protection, and good governance. Additional preferences can respond positively to these specific needs.[158] However, the EESC has stated that "there is no evidence that the special incentive arrangements for combating the production and trafficking of drugs, from which twelve countries have benefited, has had any impact whatsoever on the drug trade."[159] It has also stated that the GSP aims to develop the economies of beneficiaries instead of resolving all of their problems.[160] This lack of consensus within the EU supports the argument of beneficiaries that these conditions are foreign to the preferences devoted entirely to trade policy.[161] In addition, granting additional preferences on the fulfilment of conditions implies granting preferences to countries that may not necessarily be in need of help and depriving those countries that cannot fulfil these conditions but that may really be in need of help.[162] These countries may then question how these conditionalities respond to development needs. In any case, the success of the GSP + depends on the meaningful selection of beneficiaries, contingent on the use of relevant international conventions and their monitoring and review mechanisms.[163] In addition, potential beneficiaries' acceptance

[155] Bartels, "WTO Legality," *supra* note 83 at 879.

[156] Bartels, *Application of Human Rights*, *supra* note 42 at 16.

[157] Bartels, "WTO Legality," *supra* note 83 at 881.

[158] *Communication from the Commission to the Council*, *supra* note 144, para 6.5.

[159] *Opinion on GSP*, *supra* note 130, para 6.6.2.

[160] *Ibid*, para 6.5.

[161] DSB, *supra* note 66, para 35; Dhar & Majumdar, *supra* note 31 at 21.

[162] Bartels, "WTO Legality," *supra* note 83 at 877.

[163] Harrison, *supra* note 12 at 1680–81.

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of conventions does not necessarily imply the acceptance of the use of the conventions as conditionalities leading to discriminatory trade treatment.[164] Moreover, an important aspect of the GSP + is that it does not benefit countries that have implemented the content of these international conventions without ratifying them.

The debate between the donors and the beneficiaries can go on endlessly, but there is some merit in the argument that the norms enshrined in international conventions can lead to development. The real question is whether or not conditions are the appropriate means of achieving this aim. Regarding the conditionalities of labour standards, certain scholars argue that trade liberalization will lead to an improvement in the condition of labour, whereas other scholars argue that explicit linkages between trade policy and labour standards are required.[165] Others feel that the imposition of higher standards will lead to higher costs of hiring labour, thus leading to the employment of fewer workers. Consequently, higher standards will only benefit the fewer workers employed and not the large number of unemployed persons.[166]

Therefore, despite the benefits of labour standards, the linkages between trade policy and labour standards should be approached cautiously, keeping in mind the situation of employed and unemployed persons.[167] A lot has been written on the issue, but there is no consensus on the utility of trade conditionality in promoting human and labour rights.[168] There are concerns that labour conditionalities are a result of protectionist interests in the developed world.[169] The withdrawal of such preferences will certainly have a negative effect on the populations of beneficiaries working in the export sectors,[170] which means that conditionalities have been imposed without proper research on their efficacy. However, such research will only help in devising more effective conditionalities, which will be helpful for donors and beneficiaries.

[164] *Ibid* at 1687, n 88.

[165] Philip Alston, "'Core Labour Standards' and the Transformation of the International Labour Rights Regime" (2004) 15:3 EJIL 457 at 471–472.

[166] Drusilla K Brown et al, *Pros and Cons of Linking Trade and Labour Standards*, Discussion Paper no 477, Research Seminar in International Economics, School of Public Policy, University of Michigan (6 May 2002) at 20.

[167] *Ibid* at 21.

[168] Harrison, *supra* note 12 at 1683.

[169] Jagdish N Bhagwati, *Third World Intellectuals and NGOs Statement against Linkage (TWINSAL)* (1999) at 1–2, online: Columbia University Academic Commons <https://doi.org/10.7916/D8KD24KG>; Brown et al, *supra* note 166 at 22–23; *Opinion on GSP*, *supra* note 130, para 4.4; Shaffer & Apea, *supra* note 26 at 990–91.

[170] Bartels, *Application of Human Rights*, *supra* note 42 at 17.

What Can GSP Donors Learn from the Discourse on Conditionalities in the Loans Granted by the World Bank?

Conditionalities are not unique to the GSP.[171] They are used in various international transactions. For example, conditionalities are also part of the loans granted by the World Bank. The issues that arise in the case of the GSP + have also arisen in the case of the World Bank. Suggestions have been made to resolve the problems that arise in the case of conditionalities imposed by the World Bank. These suggestions may provide some guidance in resolving the problems that arise in the case of conditionalities imposed in the GSP +.

In the World Bank, the impact of conditionalities on the performance of the recipient country has been mixed, tending towards the negative.[172] Moreover, the number of conditions imposed has been very high.[173] This is also the case with the EU GSP +, which requires the ratification and effective implementation of twenty-seven conventions. Therefore, donors should limit the lending conditions, which would actually help recipient governments focus on the limited conditions they can fulfil rather than trying to fulfil unimportant ones. Recipient countries have limited resources, and the imposition of too many conditions is burdensome.

Questions have also been raised on the imposition of conditions by donors, thus undermining the idea of recipient countries having ownership over their agenda on good governance. In fact, the major criticism of conditionality is its dictatorial or coercive element in imposing policies that makes for a weak partnership between donors and recipients because it deprives the latter of ownership over their choice of policies.[174] In addition, there is no one single policy reform appropriate for all recipients. Thus, conditionality should differ according to the country context[175] since standardized conditionality does not take into account the situation prevailing in different countries and may lead to recipient countries losing ownership of the process. Moreover, studies prove that standardized conditionality in countries at different levels of development does not work. Recipient countries may not be able to fulfil the conditions, and, thus, they would lose the aid. However, it is possible to work with donors to reduce the number of conditionalities and to make them more specific. It is also

[171] This section of the article draws on Koeberle et al, *supra* note 39; Koeberle, "Policy-Based Lending," *supra* note 40 at 249–73.

[172] Harold Bedoya, "Conditionality and Country Performance" in Koeberle et al, *supra* note 39 at 192. See also Koeberle, "Policy-Based Lending," *supra* note 40 at 252.

[173] Koeberle, "Policy-Based Lending," *supra* note 40 at 252, 255.

[174] Morrissey, *supra* note 39 at 238.

[175] Koeberle, "Policy-Based Lending," *supra* note 40 at 249, 256.

possible to moderate the conditionalities according to the situation — for example, conditionalities could be different in a crisis situation.[176] Additionally, the recipient country's institutional capacity should be taken into account since it determines the success of the conditionalities.[177] The generality of these issues was reflected in a specific study on Vietnam, which concluded that externally imposed conditionalities are not helpful. Therefore, an open dialogue between the donor and the recipient country is required, which should lead to the recipient country taking full ownership of the design and implementation of its commitments.[178] Such an open or policy dialogue is like a partnership in which donors persuade or convince recipient countries instead of coercing them to adopt certain policies. Such a dialogue is more likely to be successful, and conditions can be used to support this dialogue.[179] These suggestions could be helpful for conditionalities in GSP schemes since they allow for a dialogue between the GSP donor and the potential beneficiaries. However, the dialogue should not degenerate into a mechanism to pressure the potential beneficiaries to comply with the conditions or to benefit the donors' allies.

The fact remains that conditions may not be entirely effective, whether used independently or with dialogue. This is because governments are reluctant to implement policy reforms if the conditions are too restrictive, and conditions are obviously inappropriate in cases where governments are keen on policy reform.[180] Furthermore, reform is a slow process, and conditionalities try to impose a quick reform, while ignoring the local conditions, thus leading to failure. Consequently, donors should support policy reform instead of imposing it.[181] They can influence the policy reform in recipient countries by providing analytical research on the effects of alternative policies. Donor influence undermines the ownership of policy reform, but it is acceptable as long as the choice of policy reform, with the belief that it is the best choice, originates in the recipient country's government. Thus, donors can provide information on policies, but the choice should be left with the recipient country's government. Additionally, donors should not provide standardized advice to all recipient governments unless it is the correct advice for that country. This allows recipient governments to experiment with policies and does away with the coercive

[176] "Part 4 Discussion Summary" in Koeberle et al, *supra* note 39, 225 at 225–26.

[177] Koeberle, "Policy-Based Lending," *supra* note 40 at 266.

[178] Duong Duc Ung, "Policy-Based Lending and Conditionality: The Experience of Vietnam" in Koeberle et al, *supra* note 39, 233 at 235.

[179] Morrissey, *supra* note 39 at 237.

[180] *Ibid* at 238.

[181] *Ibid* at 239.

nature of conditionalities since influence is not equivalent to the imposition of policies.

The other option is for recipient governments to do their own research and come up with their choice of policy, which would truly amount to ownership of the policy reform process. However, this is not necessarily required for policy reform. In addition, recipient countries' governments may be willing, but unable, to implement the chosen policies. In such a situation, donors should help in the implementation of the policies by providing technical assistance.[182] In fact, the EU has been funding a project since 1 October 2015 in four of its GSP + beneficiaries to help them develop their capacity to comply with labour standards.[183] Going further, donors should grant benefits even if the policy reform does not materialize.[184] As opposed to conditionalities, such a dialogue would be slow in bringing about reform but would be adapted to the recipient country's environment.[185]

As stated earlier, conditions can be used to support dialogue. These conditions should be precise, clear, easy to monitor, and should reinforce or ensure that the recipient governments actually follow the policy choices they have made, instead of having policies imposed on them. Also, conditions should be defined in terms of policy choices and not in terms of the goal the policy choice aims to achieve because goals may not be achieved even if the policy reform has been properly implemented. In addition, conditions in various policy areas should be independent of each other to avoid conflict between them. However, conditionalities in the traditional sense are not the best means of policy reform since they do not bring about change in the beliefs of the recipient governments. Change in beliefs can be brought about by starting with simpler reforms, keeping in mind that the breadth of the reform program is directly proportional to the level of development in the recipient country. It is not possible to have a dialogue with failed states or authoritarian regimes. However, these are exceptions and do not reflect a shortcoming of the policy dialogue since traditional conditionalities would also be ineffective in such a situation.[186]

[182] *Ibid* at 241–42.

[183] These countries are: El Salvador, Guatemala, Mongolia, and Pakistan. See Generalised System of Preferences (GSP), *EU-Funded ILO Project on Labour Rights in GSP + Countries*, online: <http://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/>. It may be noted that the EESC is helping developing countries build their capacity to respond to questionnaires. See *Opinion on GSP*, *supra* note 130, para 5.1. It is these very countries that are expected to fulfil the conditionalities in the EU's GSP +.

[184] Morrissey, *supra* note 39 at 242.

[185] *Ibid* at 244.

[186] *Ibid* at 244–46.

Even though ownership is preferable to conditionalities, the issue of power remains unchanged. Thus, real partnerships should include shared objectives, mutual accountability, and the two-way exchange of knowledge. However, these may not materialize if the balance of power is tilted in favour of the donor. Since the donors provide the benefits, they expect accountability from the recipient countries. The governments of recipient countries should also be accountable to their populations.[187] This is a significant issue in terms of conditionalities, ownership, partnership, or any kind of benefit because, ultimately, it is the population of the recipient country that must benefit from this process. Moreover, the presumption that donors have the knowledge on policies means that the exchange of knowledge is not a two-way process.[188]

The same issue has been highlighted in the case of the GSP + conditionalities. The GSP donor makes an independent decision on the conditions to be fulfilled by the beneficiaries. These conditions may involve the ratification of various treaties and so on, but they certainly ignore the knowledge of the beneficiaries regarding their choices and needs,[189] despite the EESC suggesting that consultations should be held with stakeholders in developing countries before the introduction of a new GSP scheme.[190] Moreover, the ownership model is persuasion based and sees benefits as steps to inducing reforms in the recipient country. This shows that it is a paternalistic model as opposed to a partnership model.[191] The same problem arises in the case of conditionalities in the GSP + since they do not involve the concept of ownership, let alone the concept of partnership.

However, this paternalism may not necessarily encourage the desired reforms, as seen in the case of the drug arrangements. A real partnership would require that donors remove reform-inducing conditions and standardized conditionality, allowing for more diversity in the actual reforms. Donors should also be held accountable, especially to check if the benefits they are granting are being diluted in other sectors[192] and if the implementation of the reforms they are suggesting is leading to any problems in the recipient country.[193] The same issues arise in the case of conditionalities in the GSP + where the EU has decided on a list of conventions to be ratified irrespective of the country that applies for the additional preferences and

[187] Watt, *supra* note 41 at 249–50.

[188] *Ibid* at 250.

[189] Shaffer & Apea, *supra* note 26 at 998.

[190] *Opinion on GSP*, *supra* note 130, para 7.10.

[191] Watt, *supra* note 41 at 251.

[192] *Ibid* at 251–52.

[193] "Part 5 Discussion Summary" in Koeberle et al, *supra* note 39, 253 at 255.

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where there is no scrutiny to find out if the preferences granted are being weakened by other aspects of EU policy, including trade policy. This situation is happening despite the fact that civil society representatives have stated before the EESC that the benefits of the GSP are outweighed by non-tariff barriers.[194] This stance against conditionalities recognizes that donors would like to have some conditions regarding the use of the benefits provided to the beneficiaries, but it does not support conditionalities that impose policy reform.[195]

Conclusion

Developing countries are in a weaker bargaining position compared with developed countries and can be played off against one another.[196] Conditionalities are a useful tool for this purpose. As much as conditionalities are supposed to be helpful for the beneficiaries, they have been deemed to be a burden, advancing developed country agendas.[197] As such, developing countries are fulfilling the conditions only to benefit from the preferences.[198] These conditions can be beneficial if both the donors and the beneficiaries implement them seriously. For this to happen, though, developing countries should be convinced of the benefits of these policies. This will lead to ownership of a good governance agenda within their countries. Therefore, proper research into conditionalities should be conducted so that they are actually beneficial which will lead to their acceptance internationally.[199] A human rights impact assessment of conditionalities should be conducted, and any conditionalities should be terminated if they worsen the human rights situation in the beneficiary.[200]

Additionally, the 1971 *GSP Waiver* recognizes that "a principal aim of the CONTRACTING PARTIES is promotion of the trade and export earnings of developing countries for the furtherance of their economic development."[201] This shows that (1) economic development is the end

[194] *Opinion on GSP*, *supra* note 130, para 4.2.

[195] "Part 5 Discussion Summary," *supra* note 193 at 254.

[196] Shaffer & Apea, *supra* note 26 at 995.

[197] Peter Sutherland et al, *The Future of the WTO Addressing Institutional Challenges in the New Millennium*, Report by the Consultative Board to the Director-General Supachai Panitchpakdi (Geneva: WTO, 2004) at 24–25, para 94; Shaffer & Apea, *supra* note 26 at 993.

[198] See Koeberle, "Policy-Based Lending," *supra* note 40 at 252, making the same point in the case of the World Bank.

[199] Harrison, *supra* note 12 at 1688.

[200] Bartels, *Application of Human Rights*, *supra* note 42 at 20.

[201] See *GSP Waiver*, *supra* note 14, recital 1.

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and (2) trade is a means to achieve that end. The *Enabling Clause* and *UNCTAD Resolution 21(II)* do not mention conditions. How, then, can non-economic conditions be a part of the GSP schemes, especially when imposed by another country? Of course, economic development implies non-economic development but that is a domestic concern of the developing country or the GSP beneficiary and should not be regulated by the GSP donor. Moreover, the Appellate Body should not contribute to the regulation of the beneficiary's domestic non-economic development by the GSP donor. In the *EC – Tariff Preferences* case, the Appellate Body encouraged such regulation by stating that international instruments may be used to define conditions. Of course, its aim was to make these conditions more objective, transparent, and rule based. But it was also a way to give GSP donors the freedom to distinguish between beneficiaries.[202]

It is hoped that the consequence of judicial outlawing of conditionalities will be that GSP schemes will no longer contain conditions. The counter-argument to this is that developed countries — the EU in this case — would withdraw their GSP schemes, which would be harmful to developing countries. However, developed countries might only threaten withdrawal of GSP schemes because there might be domestic constituencies that do not actually want withdrawal of GSP schemes. This threat could then be used as leverage in negotiations with potential beneficiaries,[203] such that the outlawing of conditionalities might not be beneficial to developing countries.

The EU GSP scheme contains two levels of preferences. The first one does not require the fulfilment of any conditions. The second one — or the granting of additional preferences — requires the fulfilment of these conditions, which can be termed discriminatory. Therefore, the worst case scenario would be the withdrawal of the second level or additional preferences. Most potential beneficiaries are unable to fulfil these conditions and are thus unable to benefit from these additional preferences. The European Parliament has stated that the GSP utilization rate needs to be improved.[204] Perhaps, the utilization rate has not improved because beneficiaries are unable to fulfil the conditions? Thus, the GSP donors — or the EU in this case — could do away with conditions and grant more preferences at the first level. In addition, the absence of conditions means that potential beneficiaries can benefit from their comparative advantage on which international trade is predicated. In fact, the European Parliament has stated that the GSP schemes should grant preferences in accordance

[202] Charnovitz et al, *supra* note 91 at 256.

[203] Shaffer & Apea, *supra* note 26 at 1001.

[204] *European Parliament Resolution*, *supra* note 145, para E.

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with the comparative advantage of beneficiaries in order to improve their impact.[205] As a consequence, the benefits obtained through the GSP can be passed on to least-developed countries since developing countries have agreed to provide preferences to them.[206]

The development of developed countries was not subject to such obstacles, which have now been made into law. Only the Appellate Body can interpret this law favourably for developing countries. The fear of political reprisals in the form of withdrawal of GSP schemes should not prevent the Appellate Body from doing so. Much has been written on the subject and its political nature, but the Appellate Body has the legal means to override the political issues involved and should have already done so because such cases will not come before adjudication very frequently. The purpose of setting up the WTO was to reduce the power imbalance between countries, but its purpose will be defeated if this imbalance continues to exist within the organization. These issues cannot be resolved by 164 members due to a lack of consensus, but the Appellate Body only requires consensus between two of its members.

[205] *Ibid*, para 6(a).

[206] See *Decision on Waiver Preferential Tariff Treatment for Least-Developed Countries adopted on 15 June 1999*, Doc WT/L/304 (17 June 1999); *Decision on Extension of Waiver Preferential Tariff Treatment for Least-Developed Countries adopted on 27 May 2009*, Doc WT/L/759 (29 May 2009).

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