

**THE COST OF BYPASSING MFN OBLIGATIONS THROUGH GSP
SCHEMES: EU-INDIA GSP CASE AND ITS IMPLICATIONS FOR
DEVELOPING COUNTRIES.**

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Appellate Body (AB)

Dispute Settlement Body (DSB)



ABSTRACT

THE COST OF BYPASSING MFN OBLIGATIONS THROUGH GSP SCHEMES: EU-INDIA GSP CASE AND ITS IMPLICATIONS FOR DEVELOPING COUNTRIES.

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India and other developing countries across the world celebrated a 'victory' when a WTO Panel in December 2003, promoting the economic rationale of GSP schemes as negotiated under UNCTAD, held that the EU GSP Scheme on Drug Arrangements was discriminatory and thus against the principles laid down in the Enabling Clause. Given the negotiating history of GSP schemes, this decision must have left developed countries holding their breath as it meant that they could no longer give preferential treatment to chosen/preferred developing countries. However, with the issuance of the Appellate Body (AB) decision in April 2004, developed countries seem to have relaxed their breath and the question is whether the decision was not at the expense of developing countries. The AB decision is to the effect that developed countries may discriminate among developing countries as long as they do so upon an objective criterion.

The thesis explains the AB's reluctance to overturn the status quo in the implementation of GSP schemes that has existed for almost as long as GSP schemes have and explains why; nevertheless, the decision is positive and important as it acts as a wake-up call for developing countries. The thesis raises the question of whether GSP schemes are still a viable option for developing countries in light of the AB decision. It analyses the AB decision and points out the possible implications it may have for developing countries. It argues that despite the decision, GSP schemes are still an important means for developing countries to get integrated in the world economy but also suggests other valid options such as a comprehensive agreement on S&D, an effective definition of "developing countries", continued multilateral policy reform and regional integration. A further factor is that DSB decisions are not binding as precedent; each decision is reached on the merits of each case, something that offers some hope for those opposed to the decision reached in this case.

May 2005

DECLARATION

I declare that ***The cost of bypassing MFN Obligations through GSP Schemes: EU-INDIA GSP Case and its implications for Developing Countries*** is my own work, that it has not been submitted before for any degree or examination in any other University, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Julian Kabajulizi

May 2005

Signed



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LIST OF ACRONYMS AND GLOSSARY

AB	Appellate Body; An independent seven person body that considers appeals in WTO disputes, When one or more parties to the dispute appeals, the Appellate Body reviews the findings in the panel reports
ACP	African Caribbean Pacific countries; Group of countries with preferential trading relations with the EU under the former Lome Treaty and now called the Cotonou Agreement.
DSU	Dispute Settlement Understanding; The WTO Agreement that covers dispute settlement, in full, Understanding on Rules and Procedures Governing the Settlement of Disputes
EPAs	Economic Partnership Agreements
EU	European Union (maybe used interchangeably with EC in this research paper)
EC	European Communities; Official name of the European Union under the WTO
EBA	Everything But Arms; one of the trade preference arrangements of the EU with Least Developed countries where they can import everything into the EU duty free except for arms
GSP	Generalised System of Preferences; Programmes by developed countries granting preferential tariff treatment to imports from developing countries.
GATT1994	General Agreement on Tariffs and Trade; It is the official legal term for the new version of the General Agreement incorporated into the WTO Agreement and including the GATT 1947, which is the pre-1994 version of General Agreement Tariffs and Trade.
GATS	General Agreement on Trade in Services
ICTSD	International Centre for Trade and Sustainable Development
ITO	International Trade Organisation
LDC's	Least Developed Countries

MFN	Most Favoured Nation Principle; A principle of not discriminating between one's trading partners, GATT 1994 Article 1, GATS Article II and TRIPS Article 4.
OPEC	Organisation of Petroleum Exporting Countries
S&D	Special and Differential treatment provisions for developing countries contained in WTO Agreements
TRIPS	Trade Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
Waiver	Permission granted by the WTO members allowing a WTO member not to comply with the normal commitments, Waivers have got time limits under the WTO and extensions have to be justified.
WTO	World Trade Organisation



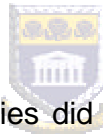
CHAPTER ONE

INTRODUCTION AND HISTORICAL BACKGROUND TO THE STUDY

1.0 INTRODUCTION

The Generalised System of Preferences (GSP) is a form of special and differential treatment allowed under the Enabling Clause¹. It is whereby developed countries accord preferential treatment to “eligible” products imported from developing countries with the main objective of making the exports from the developing countries competitive in the developed country markets. The preferential treatment is granted without a reciprocal obligation on the part of the developing countries.² These non-reciprocal schemes confer preferential market access in the form of duty free entry (a zero tariff) or a duty substantially lower than the normal MFN rate to products originating from the developing countries.

1.1 ORIGIN OF GSP SCHEMES



Historically, most developing countries did not actively participate in the earlier Multilateral Trade Negotiation rounds in which tariff concessions were exchanged on the basis of the Most Favoured Nation Treatment (MFN) contained in Article 1 of GATT³. This is primarily because little incentive existed for them to do so as agricultural products and textiles which were important to many developing countries had been effectively excluded from the GATT scheme,⁴ and thus making it practically impossible for them to participate in International Trade. This kept their export earnings at minimal levels and their industries remained undeveloped. This state of affairs became a springboard for the struggle by developing countries for the introduction of special and differential treatment for

¹ The Enabling Clause is the Decision of 28 November 1979 of the Contracting Parties on Differential and More Favourable treatment, Reciprocity and Fuller Participation of Developing Countries, BISD 23S/203 and it has its roots in UNCTAD in the 1960's.(It is explained and referred to later in the discussion)

² The Generalised System of Preferences, available at< <http://www.miti.gov.my/gsp.htm>> accessed on 9th October 2004.

³ This Article prohibits discrimination among trading partners with respect to tariffs and other border charges as well as certain domestic taxes.

⁴ Carl M. Beverly (1990) 101

developing countries, as a way of increasing their exports, promoting their industries as well as increasing their economic growth.

The debate over whether developing countries should receive special and differential treatment in the GATT had however been at-hand since the negotiations on the International Trade Organisation (ITO) in 1947, as developing countries tried to obtain rules more favourable to them⁵. The GATT was initially a temporary interim product of efforts to create a much more ambitious ITO. Throughout the two years (1946-47), in which the ITO negotiations took place, developing countries, who constituted the majority of the 56 participating countries, sought ways and means to ease the burden of demanding trade rules. Criticism of the special provisions in favour of developing countries, particularly chapter three on Economic Development and reconstruction, featured prominently in public debate about the fate of the Havana Charter, especially in the United States.⁶ In the event, the Havana Charter establishing the ITO was ratified by only one country (Liberia) out of the 53 countries that had signed it and it remained a mere marginal note in history.⁷ Although they were largely unsuccessful in their earlier efforts, developing countries continued to press their case. Renewed efforts to include special and differential provisions in the GATT began in earnest in 1955 with the adoption of a revised version of Article XVIII, largely inspired by chapter three of the Havana Charter.⁸ At the twelfth session of the GATT in 1957, the Contracting Parties noted that agricultural protectionism, fluctuating commodity prices and the failure of export earnings to keep pace with import demand in developing countries were undesirable features of the international trading environment.⁹ A Panel of Experts chaired by Professor Gottfried Haberler was established to examine trends in international trade in light of these concerns. The 1958 Haberler Report confirmed the view that developing country export earnings were insufficient to meet development needs

⁵ William J. Davey and John H. Jackson (1986) 1140

⁶ Hart Micheal and Dymond Bill (2003) 397

⁷ Das L. Bhagirath, (1998) 3

⁸ Opcit, Hart Micheal and Dymond Bill (2003) 400

⁹ Alexander Keck and Patrick Low (2004) 3

and focused primarily on developed country trade barriers as a significant part of the problem¹⁰. In response to Haberler, GATT Contracting Parties established three committees to develop a co-ordinated Programme of Action directed towards an Expansion of International Trade. The Programme of Action became part of the Kennedy Round (1964-1967)¹¹. In 1961, the GATT had adopted a declaration on the “Promotion of Trade of less developed countries” which *inter alia* called for preferences in market access for developing countries. This was the first mention in GATT of what would later become the (GSP) Generalised System of Preferences for developing countries¹².

At the institutional level (outside the GATT), the idea of the GSP as a form of special and differential treatment for developing countries was first introduced and negotiated under the auspices of the first United Nations Conference on Trade and Development (UNCTAD). **Raul Prebisch**, the first secretary general of UNCTAD in 1964, at that conference shepherded through the adoption of a report designed to focus international attention on the need for special rules for the trade of developing countries with the main objective of increasing their export earnings, promoting their industrialisation and accelerating their economic growth¹³. He observed that, **“However valid the MFN principle maybe in regulating trade relations among equals, it is not a suitable concept for trade involving countries of vastly unequal economic strength”**¹⁴ His thesis prevailed with acceptance of the concept of preferential treatment for developing countries. It was recognised at that conference that developing countries, which did not have much production and trading capacity needed some special consideration within the framework of GATT.

¹⁰ GATT, Trends in International Trade, A Report by a Panel of Experts (Geneva: GATT 1958)

¹¹ Alexander Keck and Patrick Low (2004) 3-4

¹² Michalopoulos C. (2000) 5

¹³ John H. Jackson, (1998) 322

¹⁴ “ Toward a new Trade Policy for Economic Development, Report by the Secretary General of UNCTAD (New York, 1964) p. 66 As cited in O. Long, Law and its limitations in the GATT Multilateral Trading system (Dordrecht 1987) p. 90 at 170.

During the second session of UNCTAD in New Delhi, in 1968, a resolution was adopted on "Expansion and Diversification of Exports of Manufactures and Semi-manufactures of Developing Countries"¹⁵ In this resolution, UNCTAD members agreed to the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences which would be beneficial to the developing countries and established a Special Committee whose mandate was to settle the details of the trade preference arrangements.

Under GATT 1947, granting those trade preferences without doing more would have contravened the MFN principle in Article I thereof, and yet amending it would have involved a lengthy and complex process. Article XXX of GATT¹⁶ establishes the basic amending procedure requiring two-thirds acceptance of amendments for most of GATT but unanimous acceptance for amendment of Part 1, which includes Article 1 MFN clause. This stringent vote and procedural requirement coupled with a wide divergence of interests among the enlarged GATT Membership at the time made it practically impossible to amend the GATT. The members therefore resorted to Article XXV (5) (a), which provides for circumstances when the Contracting Parties may waive their contractual obligations. The relevant provision reads,

"In exceptional circumstances not else where provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a Contracting Party by this Agreement; provided that any such Agreement shall be approved by a two-thirds majority of votes cast and that such majority shall comprise more than half of the Contracting Parties..."¹⁷

The phrase "not else where provided for" could not have been intended to exclude those provisions that can only be amended by unanimity. And any such interpretation of the phrase would necessarily exclude as well the provisions of

¹⁵ Resolution 21(II) a referred to in "About GSP" available at < www.unctad.org/templates/page.asp?intItemID=2309&lang=1 > accessed on 20th May 2005.

¹⁶ General Agreement on Tariffs and Trade (GATT 1947) now part of GATT 1994) available at < www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm > accessed on 20th May 2005.

¹⁷ Ibid, Article XXV(5) (a) of GATT 1947

the Agreement that are subject to amendment by a two-thirds vote and the waiver provision would for practical purposes be inoperative¹⁸. Perhaps, an amendment would have been better but the difficulties of amending GATT led to the rejection of that option and a waiver was utilised. It is against this background that the GATT members adopted the 25 May 1971 Waiver¹⁹ by virtue of Article XXV (5) (a) GATT.

The waiver was granted for a period of ten years. Under this waiver, an industrialised nation could offer a lower duty to a developing nation and other GATT Contracting Parties had to refrain from invoking their Article 1 MFN right to the same reduced tariff. This waiver provided a legal basis for the GSP systems, which were subsequently adopted by the industrialised nations.²⁰ Given the fact that the waiver was granted for a limited period of 10 years, it was bound to expire in 1981. Therefore, at the 35th GATT session in 1979, the Contracting Parties adopted as a result of the Tokyo Round of negotiations, the framework Agreement on “Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing countries (Decision of 28 November 1979), more commonly referred to as Enabling Clause²¹. It allows developed Country members to accord differential and more favourable treatment to developing countries without according such treatment to other members, and to this extent, it is a relaxation of the MFN clause. The treatment covered by the Enabling Clause includes the Generalised system of preferences (GSP schemes) in Paragraph 2(a) thereof which is to the effect that the differential and more favourable treatment may be in the form of “preferential tariff treatment accorded by developed countries to products originating from developing countries in accordance with the Generalised System of Preferences”. Therefore, the Enabling Clause transformed the ten year waiver for the GSP into a permanent waiver.

¹⁸ William J. Davey and John H. Jackson (1986) 314

¹⁹ This waiver is annexed hereto as Annex I

²⁰ *Op cit*, Carl M. Beverly (1990) 106

²¹ William J. Davey & Joost Pauwelyn, (2002) 24

The Enabling Clause is now part of the GATT1994 through its incorporation in the definition of GATT 1994 and part of the WTO as well since both the GATT 1947 and 1994 are now part of the WTO Agreement. It should be noted from the outset that the Enabling Clause does not legally obligate the developed country members to grant preferences; rather, it merely enables or allows them to extend such preferences. The preference giving countries under the GSP scheme include United States of America, European Union, Australia, Canada, Japan, New Zealand, Norway, Switzerland, Republic of Czech and Slovak, Hungary, Bulgaria, Belarus and the Russian Federation. The first GSP scheme was introduced by the European Economic Community (EEC) in July 1971. Most other developed nations introduced similar schemes in 1972 with the exception of Canada and the USA whose schemes were introduced in 1974 and 1976 respectively²².

Using the Enabling clause as the legal basis and as part of its GSP scheme, the EU in 1996 established the special “Drug Arrangements GSP regime” to help the Andean Group (Bolivia, Colombia, Ecuador, Peru and Venezuela) and Central American Common Market countries (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama) to replace drugs cultivation with alternative products.²³ On December 11, 2002, the EU announced the admittance of Pakistan into the special drug arrangements GSP regime that grants tariff concessions to countries fighting the illegal drug trade. India’s concern arose with the fact that EU’s preferences for Pakistan’s textile products under this special drugs GSP scheme adversely affected \$250 million worth of textile exports from India and thus resulted in them bringing a complaint before the WTO²⁴, which is the subject of this study.

²² Kathryn Morton and Peter Tulloch, (1977) 59

²³ “The Generalised System of Preferences” available at <
http://www.europa.eu.int/comm/trade/issues/global/gsp/index_en.htm> accessed on the 22nd January 2005

²⁴ Parashar K (2003) 11

1.2 STATEMENT OF THE PROBLEM

The Generalised system of preferences was put in place to increase developing countries' exports, promote their industries and enhance their economic growth and has done a lot to achieve the said objectives. However, over the years, the economic inequalities between the developed and developing nations have continued to widen as the economies of the developing countries continue to decline despite the existence of the GSP schemes. Nevertheless, a few developing countries have greatly benefited from preferential trade terms. Up to the mid-1980's three economies-Hong Kong (China), the Republic of Korea and Taiwan (China) accounted for about 45 percent of the total GSP gains. This nature of GSP benefits remained unchanged through the early 1990's as 6-12 of the largest beneficiaries claimed 71 to 80 percent of the total.²⁵ This situation has not changed much. A complex question has been whether developed countries can condition the receipt of preferential tariff treatment through GSP schemes on developing countries meeting certain non-trade goals or conditions. In light of the above, the problem to be investigated is whether developing countries should continue to place much faith in GSP schemes, given the Appellate Body decision in the EU-India GSP case.

1.3 RESEARCH HYPOTHESIS

The assumption to be investigated is that GSP schemes that "claim" to take into account the "special circumstances and development objectives of developing countries" lead to a further decline and differentiated development of these countries' economies and that rather than focussing on GSP schemes, developing countries might be better off pushing for non-preferential, generalised barrier reductions on products of importance to them through continued multilateral policy reforms and a more comprehensive agreement on Special and Differential Treatment. The issue at hand is therefore whether GSP schemes are still a viable option for developing countries in light of the EU-India GSP Case.

²⁵ T. Ademola Oyejide (2002) 506

1.4 OBJECTIVES OF THE STUDY

The principal objective of this research is a critical examination of the GSP schemes as a form of special and differential treatment under the Enabling Clause with specific reference to the complaint brought against the EU by India regarding the EU's granting of tariff preferences to developing countries with illegal drug trafficking problem, and thereby, aiming at:

1. Analysing the current position of GSP schemes under the Enabling Clause.
2. Examining and critiquing the Appellate decision in the EU-India GSP case.
3. Evaluating the implications of the above decision on developing countries and on GSP schemes in general.
4. Assessing the way forward for developing countries, which seem to be locked up in GSP schemes



1.5 SIGNIFICANCE OF RESEARCH

The Generalised System of Preferences is one of the key instruments put in place to assist developing countries in reducing poverty through increasing their exports and promoting their industries through international trade.²⁶ This would in turn generate revenue as well as increase economic growth. The significance of this research therefore is to inform both academics and those directly working with GSP schemes in both the developed and the developing countries of the possible implications of the outcome of the EU-India GSP case which must be kept in mind. It will also be a contribution to the trade preference negotiations and debates between the developed and developing countries especially the forthcoming Economic Partnership Agreements (EPA's) between the EU and ACP countries as well as the Doha Round negotiations in the WTO.

²⁶ John H. Jackson, (1998) 322

1.6 RESEARCH METHODOLOGY

Due to limited time and space, the main research method to be used will be Library research through analysis and reference to text books, Trade and Development Reports, Articles, working papers, papers presented at conferences, workshops and forums, news and press releases. The work of Researchers will be used to examine the present position of GSP systems as a form of Special and Differential treatment and specifically the EU India GSP case. The Internet will also be used to access websites for recent discussions and debates on this subject. It is anticipated that a critical examination of the above documentary and internet research will suffice to produce rational conclusions and recommendations to this research.

1.7 SCOPE OF THE STUDY

There has been a lot of criticism and discussion about the impact and effectiveness of special and differential treatment on developing countries in general; this study is specifically confined to GSP schemes with particular reference to the EU-India GSP case and its implications for developing countries.

1.8 CHAPTER OUTLINE

Chapter one is an introduction to the study and it gives a historical background to the problem question, outlines the aims and objectives of the research, and raises the hypothesis as well as the methodology to be used.

Chapter two will briefly explain the MFN principle and then examine the negotiating history of GSP schemes as an exception to the MFN principle in International trade. It will also attempt to determine what the draftsman had in mind (scope and rationale) while drafting the Enabling Clause and how this has impacted on the implementation of the GSP schemes.

Chapter three will give a brief overview of GSP schemes granted by the EU, analyse the factual background of the dispute and discuss the measure at issue in the proceedings, arguments of parties, findings of the panel plus the Appellate body decision

Chapter four will give a critical analysis of the appellate Body decision and the possible implications of the above case for developing countries.

Chapter five will cover the findings of the research as well as the conclusions. It will put forward recommendations or viable options for developing countries in light of the outcome of the EU-India GSP case.

1.9 CONCLUSION

This chapter has basically given an introduction and a historical background to the Generalised System of preferences under the Enabling Clause, outlined the objectives of the research as well as laying down the hypothesis and methodology that will be used in this research in order to respond to the hypothesis. It has also laid down the proposed chapter outline of the research.

CHAPTER TWO

GSP SCHEMES AS AN EXCEPTION TO THE MFN PRINCIPLE

2.0 INTRODUCTION

This chapter explains the concept of Most Favoured Nation (MFN) treatment by giving a brief history thereof and an explanation of how it works under the GATT 1994. It goes ahead to explain GSP schemes as an exception to the MFN treatment, its ultimate goal being an examination of how the negotiating history of GSP schemes has impacted on its implementation and how this in turn impacts on the root causes of the complaint brought by India against the EU.

2.1 HISTORY OF MFN

The MFN principle has been a central pillar of trade policy for centuries. The concept embodied in the MFN clause has been traced to the 12th century when a town of Mantua in Italy had obtained in its Charter from the Holy Roman Emperor, Henry III, the guarantee that it would benefit from all privileges granted to whatsoever other nation although the phrase “most favoured nation” did not appear till the end of the 17th century.²⁷ The emergence of the MFN clause is largely attributable to the growth of world commerce in the 15th and 16th centuries. At that time England and Holland were competing with Spain and Portugal, the French and the Scandinavians were challenging the Hanseatic League and the Italian Republics. The United States included an MFN clause in its first treaty in 1778 with France.²⁸

By the 18th and 19th centuries, the MFN clause was included frequently in a variety of treaties particularly in the friendship, commerce and navigation treaties²⁹ as a standard of equal treatment or non-discrimination for third parties.

²⁷ William J. Davey and Jackson H. John (1986) 430

²⁸ John H. Jackson (1998) Chapter 11, Section 11.1

²⁹ See for example “A convention to regulate the commerce between the territories of the United States and of his Britannick Majesty” 3 July 1815.

An MFN clause in a treaty between two states typically required each state to accord to the other state any advantage of the type covered by the treaty that the state accorded to a third state. Each country seeking maximum advantage for its trade found itself compelled to grant concessions in return. The role of the MFN clause was to link commercial treaties between states. At first, the MFN clause applied to concessions granted only to specified states and was thus a form of discrimination but gradually the clause became generalised to apply to concessions granted to all countries particularly as a result of GATT.³⁰

At the time the GATT was signed in 1947, the MFN Clause and the equality of treatment which it embodied was in time with the need to prevent the type of “beggar my neighbour” policies that had proved disastrous to world trade and economy during the inter-war period.³¹ The inclusion of the MFN clause in the Havana Charter as well as in the Multilateral Trade Agreement (GATT) was contemplated by the major powers from the beginning of their post war II initiatives³². The Atlantic Charter of 1941 contained clauses stating that the US and Great Britain “will endeavour with due respect for their existing obligations, to further the enjoyment of all states, great and small, victor or vanquished, of access on equal terms, to the trade in raw materials of the world which are needed for economic prosperity.³³ Likewise, the Economic and financial Committee of the League of Nations in reporting on “commercial policy in the post world war world” anticipated that wide spread discrimination, if permitted, would undermine the basis of political cooperation and world peace.³⁴ And in fact, the generalised MFN clause as it appears in Article 1:1 GATT 1994 is modelled on the one recommended by the League of Nations in 1936³⁵.

³⁰ Abdulqawi Yusuf (1982) 3

³¹ Ibid, Abdulqawi Yusuf (1982) 4

³² Ibid, Abdulqawi Yusuf (1982) 5

³³ Gardner R (1956) 47

³⁴ League of Nations, Report on Commercial policy in the inter war period, international proposals and national policies, 1942, 47-51.

³⁵ Abdulqawi Yusuf (1982) 6

2.2 THE MOST FAVOURED NATION (MFN) TREATMENT UNDER GATT

This is contained in Article 1.1 of GATT 1947 and it states as follows:³⁶

“ 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 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 or privilege or immunity granted by any member 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 territory of all other members.”

The MFN treatment is a basic principle that runs through all WTO Agreements relating to goods but is however not applicable by itself to the areas of services and Intellectual Property Rights except in so far as it has been explicitly stipulated in the Agreements relating to these areas.³⁷ It is applicable except where there are specific exceptions or decisions of members to relax the principle. It means non-discriminatory treatment among the WTO members and not any special favour to any country. That is, any benefit in relation to importation or exportation given to a product of a most favoured nation (whether a member or not) has to be given to a like product of all members without discrimination³⁸. A member is not bound to give MFN treatment to a country which is not a member of the WTO. The treatment given to non-member countries depends on the member's bilateral or regional agreements with them. However if a member gives a certain trade benefit to a non-member, that benefit has to be extended to all members in accordance with the principle of MFN treatment.³⁹

³⁶ General Agreement on Tariffs and Trade (GATT 1947) now part of GATT 1994) available at < www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm > accessed on 20th May 2005.

³⁷ Article 1:1 GATT 1994, Article II GATS, Article 4 TRIPS

³⁸ Das L. Bhagirath, (1998) P.15

³⁹ Das L. Bhagirath, (1998)P.16

The scope of Article 1.1 when dissected is clearly stated to cover duties and charges levied on goods or related payment transfers, the methods of levying such duties and charges, all rules related to importation and exportation, internal regulations and internal taxation. It therefore applies to both imports and exports, i.e. when a member imports like products originating in the territories of other members or exports like products destined for the territories of other members. The concept of “a like product” has not been specifically defined in the GATT. Some of the broad points which have been considered in determining whether two products are “like products” include listing of products in the tariff schedule, duties applied to the products, process of production, composition and content, chemical and synthetic origin⁴⁰.

The forms of benefits covered by the MFN treatment may be in the form of advantages, favours, privileges or immunities granted by a member in respect of a given product. The obligation of a member is to give these benefits immediately and unconditionally to the like products of all members once these have been given to a product of another country as clearly indicated in the wording of Article 1:1 GATT, 1947⁴¹.

The above unconditional obligation means that the MFN tariff policy is indifferent to whether any particular country gets what it deserves or not. The true nature of the MFN tariffs is simply their ability to make the world's productive resources respond efficiently to whatever protective measures governments devise. It is that price mechanism itself that is wanted not any particular outcome⁴² and this has got far reaching effects in a global trading system where the players are at different stages of development. It is for this reason that the developing countries felt out performed because of the MFN tariff rates at the time and started to negotiate for preferential treatment resulting partly into the GSP schemes.

⁴⁰ Opcit, Das L. Bhagirath, (1998)P.19

⁴¹ General Agreement on Tariffs and Trade (GATT 1947) now part of GATT 1994) available at < www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm > accessed on 20th May 2005.

⁴² Hudec E. Robert, (1999) 324

2.3 GSP SCHEMES AS AN EXCEPTION TO MFN

Of particular importance to Article 1.1 GATT which embodies the MFN principle is the Enabling Clause⁴³, which states in part as follows;

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.
2. The provisions of paragraph 1 apply to the following:⁴⁴
 - (a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,⁴⁵

The Enabling clause is formally known as the Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing countries and is contained in the decision of the CONTRACTING PARTIES of November 28 1979, flowing directly from the GATT waiver of May 1971 which first provided a legal basis for GSP schemes.⁴⁶ Under the above Clause in Paragraph 2(a) thereof, preferential tariff treatment may be accorded to developing countries under GSP schemes. The term "Notwithstanding the provisions of Article 1 of the General Agreement..." in Paragraph 1 allows a developed country member to derogate from the obligation to grant MFN treatment to products originating from developed countries. Therefore, in as far as the Enabling Clause allows for preferential treatment to be accorded to products originating from developing

⁴³ The Enabling Clause is annexed hereto as Annex II

⁴⁴ It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action on any proposals for differential and more favourable treatment not falling within the scope of this paragraph.

⁴⁵ 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).

⁴⁶ William J. Davey & Joost Pauwelyn, (2002) 24

countries without the same treatment being extended to those originating from developed countries, it's a departure from the MFN principle.

2.4 NEGOTIATING HISTORY OF GSP SCHEMES

The appeal for tariff preferences in favour of developing countries by Raul Prebisch at the first UNCTAD conference emphasized dynamic effects such as the infant industry argument⁴⁷. The markets of developing countries would be too small to allow infant industry protection to work at national level. Tariff preferences offered by the developed countries would enlarge the market and strengthen the competitive edge of products from developing countries.⁴⁸

The GSP proposal envisioned the extension of duty free treatment to developing countries within a managed-trade framework. With regard to primary commodities and industrial goods produced by the developing countries', it was advocated that quantitative targets should be set for their entry into the developed countries' markets, to be reached within a specified number of years.⁴⁹ Within the aforesaid global value, the developed countries could establish a quota for admitting manufactured goods from the developing countries free of duty but they would exclude from these preferences a schedule of items constituting a reasonable percentage of the total goods they import. This exclusion could take effect from the outset or during the operation of the system, in accordance with criteria to be laid down. The manufactures from developing countries thus excluded from the scope of preferences would thus be admitted by the developed countries on the usual MFN basis. All developing countries irrespective of their level of development would be eligible to avail themselves of the preferential system up to the amount of the relevant quota. But there would have to be a periodic review of the flow of exports, and if exports from one or

⁴⁷ John H. Jackson, (1998) 322

⁴⁸ Opcit, John H. Jackson, (1998) 323

⁴⁹ The Development and Dimensions of Trade, OECD Report, 2001, p.108

more countries increased so much that they did not leave sufficient room for those from others, equitable solutions would be sought⁵⁰.

To some extent, the calls for trading preferences were also initially calls to preserve the market access for former colonies. Virtually all the former colonial powers had set up a system of imperial preferences. The US, being the main architect of the GATT 1947 and defender of an open, non-discriminatory trading system, was not in favour of these special trading arrangements that conflicted with the GATT requirements and possibly also because the US did not want to forego trading opportunities in the newly independent states⁵¹ as it did not have former colonies to ally with. Whereas the European states, partly because of their post colonial linkages, were relatively quick to accept some of the demands of the developing countries, the United States maintained its objections much longer. The European countries agreed to the principle of setting up a system of preferences for developing countries as early as the first UNCTAD conference in Geneva in 1964.⁵² The US became isolated from both the developing and other developed countries on this issue and changed its position at the second UNCTAD conference in New Delhi in 1968. At this latter conference, the principle of setting up a Generalised System of Preferences was unanimously accepted.⁵³

Seven years passed between the original proposal in 1964 at the first UNCTAD and the implementation of the first GSP programs in 1971. It was argued by the developed countries that it was necessary to build political support for the idea and translate the basic principles and commitments into actual trade preference agreements and programs. There was also a need to devise a legal solution to the incompatibility between trade preferences and the MFN principle under GATT 1947. This was done through the 1971 Waiver which was later transformed into the 1979 Decision, namely the Enabling Clause which is now part of GATT 1994.

⁵⁰ The Development and Dimensions of Trade, OECD Report, 2001, p.108

⁵¹ Walter Kennes (2000) 82

⁵² Ibid, Walter Kennes (2000) 83

⁵³ Ibid, Walter Kennes (2000) 83

Therefore, it is clear that while the GSP schemes were negotiated under UNCTAD, they were given legal existence under the GATT.

From the initiation of the GSP, developed countries were not willing to provide preferential treatment that applied to all developing countries and to all products. According to **Juan Carlos Sanchez Amau**⁵⁴, from the inception of the GSP, “it was tacitly agreed that any donor country would have the powers to extend the preferential treatment to any other country or to withdraw this treatment if there was any valid reason for this in the opinion of the preference giving country, despite the fact that developing countries’ stance was that preferential treatment should be given to all countries coming under this category, whatever their political system...” Under the developing countries’ view, as observed by **Robert Howse**, the GSP would never have taken off as developed countries would have been prevented from offering preferences on terms that were acceptable to them and thus the use of the language “mutually acceptable” in the preamble to the 1971 Waiver decision. That is, mutually acceptable to both developing and developed countries⁵⁵. The description in the 1971 decision is “...*a mutually acceptable system of generalised, non-reciprocal and non-discriminatory preferences beneficial to the developing countries in order to increase the export earnings, promote industrialisation and to accelerate the rates of growth of these countries.*”⁵⁶, and is restated in footnote three of the Enabling Clause.

However, neither the 1971 Waiver decision nor the Enabling Clause provided further specification of what was meant by a mutually acceptable system of generalised, non-reciprocal and non-discriminatory preferences. The logic of the GATT was that in negotiations, each member is sovereign to determine for itself whether a proposed agreement is to its advantage. The GATT’s tradition of making decisions by consensus reinforces the idea that an agreement is an

⁵⁴ Juan C. S. Amau (2002) 146 (the author is the former chair of the committee on Trade and Environment of the WTO)

⁵⁵ Robert Howse (2003) 393

⁵⁶ Generalised System of Preference, June 25, 1971 GATT BISD (18th Supp) 24(1972).

outcome that each member considers to be to its benefit. And that if anyone member does not find the outcome advantageous, the proposed agreement does not go into effect.⁵⁷ Therefore since there was no proper specification of what that 'statement' in the Framework Agreement meant, there remained the practical political-economy question of what it meant in practice or actual implementation of the GSP schemes and which has resulted partly in the dispute brought by India against the EU regarding its GSP scheme on Drug arrangements arguing that it is discriminatory and out of line with what was agreed under the Enabling Clause.

UNCTAD played an important role not only in the negotiation but also the implementation of the GSP and this largely forms part of the context of the Enabling Clause and its provisions. A special committee within UNCTAD⁵⁸ was established to review annually the implementation of the GSP with more in-depth studies to be conducted on a less frequent basis and they issued numerous detailed reports on the functioning of the GSP with detailed recommendations. An examination of the relevant UNCTAD documents⁵⁹ further shows that the developed countries wanted to grant their preferences following the principle of self election whereas the developing countries expressed the view that no developing country member should be excluded from the GSP. As early as 1979, eight years after the first GSP scheme had been put in place; the UNCTAD secretariat noted that⁶⁰,

For various reasons, some preference giving countries have not recognised as beneficiaries all those developing countries which claim developing status. Furthermore, in the administration of their schemes, certain preference giving

⁵⁷ Finger J. Micheal & Winter L. Alan (2002) 51

⁵⁸ The Committee was established by virtue of Trade and Development Board Resolution 75(S-IV) of October 12, 1970, Terms of reference of the special committee on preferences (October 12, 1972) <available at <http://r0.unctad.org/en/subsites/archiv/leg29.htm>> accessed on the December 11, 2004.

⁵⁹ See Agreed Conclusions of the Special Committee on Preferences 12/Oct/1970, 75 S-IV respectively in section IV on beneficiaries and Appendix 1 " Statement on behalf of the Group of 77

⁶⁰ Comprehensive Review of the Generalized System of Preferences, Report by the UNCTAD Secretariat, 39 153-54, UN Doc No.TD/B/C5/63 (April 9 1979) in UN TDBOR, Operation and effects of the Generalized System of Preferences, 19, UN Doc No.TD/b/C5/71 (1981).

countries differentiate among beneficiaries...Strictly speaking; such differentiation and selectivity contravenes the principle of non-discrimination...

The principles on which generalised, non-reciprocal and non-discriminatory preferences should be based need to be re-affirmed and the preference giving countries should agree to take appropriate measures for the full observation of these principles. To this effect they should extend generalised tariff preferences to all developing countries without discrimination, reciprocity and any other conditions.

This language indicates an attempt to recognize the need for a delicate balance to be drawn between the interests and objectives of the preference givers and those of the receivers and to do so in a way that would not antagonise the preference givers. It is a humble reminder to the preference givers to stick to the original principles of generalised, non-reciprocal and non-discriminatory preferences. It's thus clear that from the start, the principles which seemed to have been agreed upon were never implemented by the developed countries while setting up their GSP schemes.



Therefore in the process of building political support and translating the idea of trade preferences into trade policy, it became increasingly apparent that it would be very difficult to create one unified system under which identical concessions would be granted across the board by all developed countries firstly because of the differences in these countries' economic structures and system of tariff protection and secondly because the schemes had to be politically palatable in the developed country governments which have varied political interests. Each developed country then established its own GSP program provided that each of those programs benefited all developing countries.⁶¹ The GSP thus came to be understood as a system composed of individual national schemes each based on common goals and principles aiming to provide developing countries with broadly equivalent opportunities for expanded export growth. However it was left to each developed country to define what a developing country was for purposes of

⁶¹ Walter Kennes (2000) 83

benefiting from the GSP program. Thus although the GATT waiver established the GSP framework, a great deal of individual discretion was left to each of the sovereign developed country implementing it. There was no international law requirement to grant GSP and no particularly detailed requirements as to what should be the shape and frame work of GSP⁶². This is possibly why developed countries have over the years used GSP schemes to achieve other goals instead of the anticipated export promotion for developing countries and thus a reflection of the difficulty in implementing the GSP schemes for the purposes and intentions they were originally designed for, not to mention the inherent problems encountered in negotiating and developing the system.

Consequently, developed country governments have had difficulty confining their GSP schemes to remedying just the one kind of injustice for which they were designed, which is, enhancing market access and remedying the economic imbalance between the developed and developing nations through promotion of developing country exports. Contrary to what developing countries had expected, the developed countries did not create a unified GSP scheme. Rather each country or regional grouping such as the EC set up its own scheme, characterised by specific beneficiary countries, commodity coverage and exclusions, depth of preference margin, safeguard mechanism and rules of origin.⁶³ United States Law for example now uses the grant and denial of GSP preferences to punish improper expropriation of foreign investor's property, combat drug traffic, and promotion of worker's rights⁶⁴. In the wake of the attacks on September 11, the 2002 Trade Act extended the anti terrorism criteria so as to deny GSP preferences to any country that 'has not taken steps to support the efforts of the US to combat terrorism'⁶⁵. The EU's GSP scheme is aimed at social and environmental rights, fighting terrorism and reduction of illegal drug

⁶² John H. Jackson (1998) 323

⁶³ *Opcit*, Walter Kennes (2000) 83

⁶⁴ Hudec E. Robert, (1999) 318

⁶⁵ Trade Act of 2002, S 4102(a), Pub L No 107-210, 116 Stat 993, codified at 19 USCA S 2462 (b) (f) (West Supp 2003)

production and trafficking⁶⁶. As a result, the benefits from GSP schemes have been limited by typically narrow product coverage, restrictive rules of origin and by application of safeguard measures and non-trade conditions by the preference granting countries⁶⁷. Thus the economic objectives of the GSP schemes seem to have been lost along the way.

The experience with GSP provides a convincing demonstration that Special and Differential treatment for good purposes tends to proliferate until it makes the solution worse than the problem it was meant to solve. Could this be a problem of a “political GSP” rather than a “legal and economic GSP”? The attractiveness of the idea that GSP schemes should be used to help correct injustice by rearranging the distribution of economic welfare in the world has proved to be a source of weakness⁶⁸. The basis that GSP schemes should be used to remedy economic injustice is a premise that leads to virtually inexhaustible demand as developed countries have a quite vigorous agenda of their own running from unfair trade to drug trafficking⁶⁹ and deviating from the original goals of the GSP. Therefore the potential economic gains from the GSP schemes turn out to be rather limited as the preference givers and the receivers have different interests and objectives.

The GATT legal scholar, **John Jackson** once characterised the GATT rules affecting developing countries as “aspirational”⁷⁰. According to him, from the beginning, developing countries insisted on special and deferential treatment in International economic arrangements and as a result, developed countries assumed obligations while developing countries gained rights. The failure of developing countries to accept the GATT disciplines as they were and their insistence on special status gave developed countries the excuse to practice real

⁶⁶ Communication from the Commission to the Council, European Parliament and European Economic and Social Committee on Developing countries, International Trade and Sustainable Development dated 7th July 2004.

⁶⁷ T. Ademola Oyejide (2002)505

⁶⁸ Hudec E. Robert, (1999) 318

⁶⁹ Hudec E. Robert, (1999) 319

⁷⁰ John H. Jackson (1998) 275

discrimination even where this was inconsistent with the GATT rules. And that by insisting that they had rights but no obligations, developing countries surrendered their capacity to pursue those rights with any significant results. The various non-economic conditions attached to beneficiary status under GSP schemes are a clear example of Jackson's theory. But the question is, were the alternatives of unilateralism and trade sanctions more in line with developing country aspirations? Was the MFN tariff policy realistically practical for the developing countries in the global economy? Do the developed countries have "proper justification" for denying such rights that were so created in favour of developing countries' economic development by placing non-economic conditions to GSP beneficiary status?

From the foregoing discussion, although the named objective of GSP schemes is economic development, it seems that the ideology that cemented the GSP programs in place is political rather than economic. This can be explained by the fact that it was negotiated under the auspices of UNCTAD rather than in the GATT, the European Countries which had colonial ties with most developing countries easily accepted the trade preferences and so on. The GSP program seems to be one of the largest and most tangible accomplishments of the Group of 77 and giving it up, despite its weaknesses, would in a sense have been to give up on this underlying bloc solidarity⁷¹. However the political value of GSP does not depend on its economic value. One important aspect of GSP is that it was something important to developing countries' development that developed countries did not really want. **William J. Davey** and **Joost Pauwelyn**⁷² were of the view that this was unlikely to be resolved by means of dispute settlement procedures. According to them, in the event of a discriminated developing country lodging a complaint, the developed country granting the preference could simply withdraw it all together. It is in this respect however, that the study seeks to evaluate the EU-India GSP case, invoking *inter alia* the Enabling Clause and to

⁷¹ Hudec E. Robert, (1999) 326

⁷² William J. Davey and Joost Pauwelyn (2002) 25

find out the effects of trying to remedy the long existing tension through dispute settlement means.

2.5 CONCLUSION

Both the form and substance of the GSP under the Enabling Clause reflects its negotiating history. The negotiating history of the GSP schemes provides an understanding of the object and purpose of the Enabling Clause and its relationship with the MFN principle. The 1971 GATT Waiver and later the Enabling Clause were designed to enhance market access conditions facing the developing countries through GSP schemes. Enhanced market access through GSP schemes was one major component of Special and Differential treatment that was expected by the developing countries to produce concrete results. However, the degree to which GSP schemes have provided actual economic benefits to developing countries is somewhat controversial in light of the dispute to be discussed in chapter three where India argues discriminatory treatment under the EU GSP scheme on drug arrangements. This is hinged on their negotiating history as one can safely say, there was never 'real agreement', and the flowery wording of the Enabling Clause in favour of fuller participation of the developing countries only remained on paper and was not implemented by the developed countries. Nevertheless, these schemes are still accepted among developing countries which view them as an important part of the evolving trading system. The investigation is; to what extent can these GSP schemes be considered as part of the developing countries' strategy for integration into the world economy? Are they still viable options for the developing countries?

CHAPTER THREE

THE EU-INDIA GSP CASE

3.0 INTRODUCTION

This chapter begins with a brief overview of the GSP schemes granted by the EU and then goes on to the EU-India GSP case putting forward the arguments of both India and the EU and how the Panel and the Appellate Body handled the case. The negotiating history of GSP schemes under the Enabling Clause inevitably comes into play as the DSB decides the case. The outcome of this case will be the basis for analysing whether the developing countries should still place much faith in GSP schemes and thus responding to the hypothesis of whether GSP schemes are still a viable option for developing countries in the global trading system.

3.1 A BRIEF OVERVIEW OF GSP SCHEMES GRANTED BY THE EC

The idea of generalised preferences found acceptance in the EC, though it had already established association agreements with developing countries in Africa granting them specific preferences⁷³. In 1971, the Council introduced a GSP scheme, taking the interests of the associated countries into account and in taking this step, the EC was the first group of developed economies to offer generalised preferences. Article 3(b) of the Treaty establishing the EC⁷⁴ recognises the establishment of a common commercial policy towards third countries as one of the fundamental objectives of the community. The basic provision dealing with common commercial policy is Article 113 of the Treaty which provides the legal basis for the community's trade protection Instruments. The Article does not define the term "common commercial policy" but simply offers a non-exhaustive list of activities covered by the common commercial policy including changes in tariff rates, conclusion of tariff and trade agreements,

⁷³ Kapteyn P.J.G and Verloren Van Themaat (1998) 1287

⁷⁴ The EEC Treaty, signed on the 25th March 1957

uniformity in measures of liberalisation, export policy etc and it is under this head that the EC introduced the Generalised system of preferences.⁷⁵ In practice, the GSP is implemented through regulations following cycles of ten years for which general guidelines are drawn. The present cycle began in 1995 and will expire this year, 2005 and new guidelines for the period 2006-2015 are currently being prepared.⁷⁶ This system is revised annually in Regulations and has gradually been extended and improved.

The EC's GSP covers 178 independent countries and territories and is in five arrangements. The basic GSP covering 7000 sensitive and non-sensitive products, the EBA (Everything But Arms) arrangement for LDC's, the two special Social and Environmental ones that grant additional preference to sensitive products from eligible countries (Moldova and Sri Lanka) and the arrangements aimed at reducing illegal drug production and trafficking with 12 beneficiaries⁷⁷ and which is the subject in the dispute to be discussed. Under this arrangement, the GSP scheme extends existing tariff concessions on industrial and agricultural products to middle-income Andean and Latin American economies suffering from chronic drug production and domestic corruption. Namely these are Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Peru and Venezuela⁷⁸. In 2001, the EC added Pakistan to the list of countries receiving these additional preferences to make them twelve. The purpose was to encourage economic diversification away from drug production and inflows of European foreign direct investment.⁷⁹ This resulted in tariff reductions accorded under the Drug arrangements to the 12 beneficiary countries being greater than the tariff reductions granted under the general

⁷⁵ Jean-Francois Bellis (1994) 107

⁷⁶ "The Generalised System of Preferences" available at <
http://europa.eu.int/comm/trade/issues/global/gsp/index_en.htm> accessed on the 22nd January 2005

⁷⁷ Communication from the Commission to the Council, European Parliament and European Economic and Social Committee on Developing countries, International Trade and Sustainable Development dated 7th July 2004.

⁷⁸ See EC's "Proposal for Council Regulation applying a scheme of tariff preferences for the period 1 January 2002-31 December 2004" available at
<http://europa.eu.int/comm/trade/pdf/com2001_293_en.pdf> accessed on 4th October 2004.

⁷⁹ Ibid, EC's Proposal for Council Regulation

arrangements to other developing countries. It is important to note however that there was a political aspect to the EC's decision to admit Pakistan as it is said to have been in recognition of Pakistan's changed position on the Taliban regime and its determination to return to a democratic rule in 2002 and that this was to be supported given the difficulties Pakistan would face while a massive influx of refugees arrive from Afghanistan; it was tailored to target clothing and textiles accounting for three quarters of Pakistan's exports to the EU,⁸⁰ and for which they compete for the EU market with India.

3.2 THE EU-GSP CASE AND THE PANEL DECISION

3.2.1 India's Claim

On the 5th March 2002, India requested consultations with the EC concerning the conditions upon which the EC accords tariff preferences to developing countries under its GSP scheme formulated under the Council regulation (EC No. 250/2001) pursuant to Article 4 of the DSU, Article XXIII: 1 of GATT, 1994 and Para 2(b) of the Enabling Clause. Upon failure of the consultations which were held on 25th March 2002, India on the 16th January 2003, requested the DSB to establish a panel which it did at its meeting of 27th January 2003⁸¹.

India's complaint was hinged on Article 1:1 of GATT 1994 which provides for the MFN principle and the Enabling clause which allows countries to depart from the MFN obligation. The complaint originally attacked conditions relating to environment, labour rights and drug arrangements but later was limited to the issue of drug arrangements⁸². According to India, a given preference must be extended to all developing countries except for LDC's which can receive greater preferences under the Enabling Clause. India thus contended that the EC's Drug related preferences to the Andean Community and Pakistan not covering only

⁸⁰ EU Commission, "Briefing on 12th March 2002" available at <http://europa.eu.int/comm/11090/memo120302en.htm> accessed on 12th March 2005.

⁸¹ Panel Report, P. 1: 1.2

⁸² Panel Report, P. 1: 1.5

least developed countries failed the requirement of non-discrimination under the Enabling clause and in turn violated Article 1 GATT 1994. India thus requested the panel to find that the drug related preferences set out in Article 10 of the Council Regulation No. 2501/2001 are inconsistent with Article 1:1 of GATT 1994 and are not justified by the Enabling Clause.⁸³ India argued that the tariff preferences granted under these special Drug arrangements created undue difficulties for India's exports and nullified or impaired the benefits accruing to India under the MFN provisions⁸⁴. India argued that countries excluded from the scheme experienced adverse impacts on certain exports to the EC. In particular India pointed out that Pakistan's entry to the scheme had affected Indian textile exports, which faced higher tariffs than their Pakistani equivalents on the EC market. That India's textiles and clothing exporters started feeling the adverse effects of the Drug Arrangements in the year 2002, when Pakistan was included in these arrangements but were not yet fully reflected in the trade statistics because only 16 months have lapsed since the inclusion of Pakistan. However, in India's view, the WTO legal system focuses on the conditions of competition for WTO Members, not trade results⁸⁵.

3.2.2 EC's Response to the Claim

Before the Panel, the EC's first response was a mere technicality that the Enabling Clause did not create an exception to Article 1:1 GATT and that India's complaint alleged violation of Article 1 and not the Enabling clause⁸⁶. What was in dispute here was whether the Enabling Clause should be characterised as an exception to Article 1:1 GATT or not. This would be essential in determining whether the complainant (India) or the respondent (EC) bore the burden of proof in demonstrating whether the conditions in the Enabling Clause had been met in the EU's Drug arrangements GSP scheme. To this the panel made a quick ruling that the Enabling Clause was indeed an exception to Article 1:1 GATT and that

⁸³ Panel Report P.4 : 3.1 and First written submission of India at Para 67

⁸⁴ Panel Report, P. 4 : 3.2

⁸⁵ Panel Report, p.36 : 4.111

⁸⁶ Panel Report, P. 14 : 4.42

India had put up a prima facie case of violation.⁸⁷ The EC then had to put up an affirmative defence and had the burden of proving that its preferences fall within the exceptions to MFN that are allowed under the Enabling clause⁸⁸. In its defence, the EC put up three arguments;

First, EC argued that Para 2(a) of the Enabling Clause which authorises preferential tariff treatment accorded by developed contracting parties to products originating from developing countries does not require preference giving countries to afford preferences to all developing countries. That had the drafters intended that preferences be extended to all, EC suggested that the drafters could have inserted the word “all” into the text.⁸⁹

Secondly, using Para 3(c) of the Enabling Clause which provides that differential treatment shall be designed and if necessary modified to respond positively to the development, financial and trade needs of developing countries, it argued that different developing countries have different “development, financial and trade needs” and that preferences may thus be modified to respond to those needs and inevitably produce differences in the preferences across various beneficiaries⁹⁰.

Thirdly, EC argued that India misinterpreted the requirement in footnote 3 that preferences should be non-discriminatory. According to the EC, discrimination involved arbitrary differences in the treatment of similarly situated entities and as long as differences in treatment could be justified by a legitimate objective and the differences were reasonable in pursuit of that objective, no discrimination should be found.⁹¹

⁸⁷ Panel Report P.110: 7.39

⁸⁸ For affirmative defences such as Article 1:1 GATT, the burden of establishing the defence rests on the party asserting it. The panel here made reference to the Appellate Body Report “United States-Measures affecting imports of woven wool shirts and blouses from India, WT/DS33/AB/R adopted on 23rd May 1997 at P.20

⁸⁹ Panel Report P. 14: 4.45, 4.47

⁹⁰ Panel Report P.17: 4.64, 4.66

⁹¹ Panel Report P. 17: 4.63, 4.64

The EC's final line of defence was an effort to invoke Article XX (b) which allows measures "necessary to protect human...health"⁹² claiming that the drug arrangements are necessary for the protection of human life and health as the drugs pose a risk to human life and health.

3.2.3 India's Response to EC's defence

India's response to the first and third arguments was that the term developing countries in paragraphs 2(a) and 3(c) should be read as all developing countries and that preferences should respond to the development, financial and trade needs of those countries as a group and that Para 2(a) provides no authority for picking and choosing among developing countries.⁹³

India's response to Article XX (b) was that an examination of the design, structure and architecture of the Drug arrangements shows that there is no express relationship between the objectives stated by the EC and the Drug arrangements. That there was no stated objective in the Council Regulation relating to the protection of life and health of the EC population, not even in the explanatory memorandum leading to the Regulation⁹⁴.

3.2.4 The Panel Decision

The panel found that the relevant portions of the text of the Enabling Clause are ambiguous. In the circumstances, it considered it necessary to have recourse to the context of paragraph 3(c) and other relevant means of interpretation, in line with Article 31 and 32 of the Vienna Convention on the Law of Treaties.⁹⁵ It turned to the context of the treaty text, its object and purpose and other aids to interpretation. This is because what would be decisive in the presence of

⁹² Panel Report P.23: 4.91

⁹³ Panel Report P.40: 4.185,4.186

⁹⁴ Panel Report P.44: 4.204,4.206

⁹⁵ Panel Report P.120, 7.79

ambiguity is the purpose and object of the Enabling Clause. The Panel noted that GSP schemes were initially drawn up in UNCTAD and transferred into the GATT through the 1971 Waiver decision and thus considered it helpful to review the drafting history in UNCTAD⁹⁶. The Panel noted that the Enabling Clause referred back to the 1971 Waiver, which in turn made reference to “mutually acceptable” preferences. The mutually acceptable preferences being those negotiated under the auspices of UNCTAD and embodied in the “Agreed Conclusions” that emerged from the UNCTAD negotiations. The Panel stated that the Enabling Clause should be interpreted to permit the sort of preferential system contemplated by the UNCTAD negotiators and memorised in the Agreed conclusions which were incorporated into the 1971 Waiver Decision.⁹⁷

The Panel then reviewed the Agreed Conclusions and found that they anticipated some limitations on product coverage; most manufactured goods would be covered with limited exceptions, with only case by case basis for Agriculture. But nothing in the drafting and negotiating history seemed to contemplate discrimination among developing countries on the basis of their development needs except for the special needs of the least developed countries. The other potential limitation covered by the UNCTAD negotiations concerned measures to withdraw preferences or to set quantitative ceilings when exporters achieve a certain competitive level along with safeguard measures to address import surges.⁹⁸

On the basis of these findings, the panel accepted India’s suggestion that the phrase “developing countries” in Para 2(a) refers to all developing countries⁹⁹ with the exception that where developed countries are implementing a priori

⁹⁶ Panel Report P. 121: 7.80

⁹⁷ Panel Report P.122: 7.86

⁹⁸ Panel Report P.127:7.116

⁹⁹ Panel Report P. 138: 7.174

limitations¹⁰⁰, developing countries may mean less than all developing countries. According to the Panel, Para 3(c) does not authorise differences in preferences except those contemplated by the UNCTAD negotiators.¹⁰¹ The panel also found that footnote 3 requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation except the differential treatment contemplated in the Agreed conclusions.¹⁰²

With regard to the EC's defence under Article XX (b) GATT, the panel was of the view that it needed to be assessed through a weighing and balancing of the level of contribution of such a measure in achieving the health objectives and the level of damage of the measure to the multilateral negotiating framework.¹⁰³ The panel was not persuaded, questioning whether drug related preferences were genuinely aimed at the protection of human life in Europe. That the policy reflected in the drug arrangements is not one designed for the purpose of protecting human life and health in the EC¹⁰⁴, questioning their "necessity" and whether they did not amount to an arbitrary discrimination among beneficiary nations where similar conditions prevail in violation of the chapeau to Article XX.¹⁰⁵

In summary, the Panel held that; India had demonstrated that the tariff preferences under the special arrangements to combat drug production and trafficking provided in the EU-GSP scheme were inconsistent with Article 1.1 of GATT 1994, the EC had failed to demonstrate that the Drug Arrangements were justified under Para 2(a) of the Enabling Clause which requires that the GSP benefits be provided on a non-discriminatory basis and had also failed to demonstrate that the Drug Arrangements were justified under Article XX (b) of

¹⁰⁰ The a priori limitations are measures that set import ceilings so as to exclude certain imports originating in individual developing countries where the products concerned reach a certain competitive level in the market of the preference giving countries.

¹⁰¹ Panel Report P. 7.116

¹⁰² Panel Report P. 7.161

¹⁰³ Panel Report P.144 -145: 7.209

¹⁰⁴ Panel Report P.144: 7.210

¹⁰⁵ Panel Report P. 149: 7.236

GATT 1994 since the measure was not necessary for the protection of human life or health in the EC nor was it in conformity with the chapeau of Article XX.¹⁰⁶

3.3 THE APPELLATE BODY DECISION

On the 08 /01/04, the EC notified the DSB of its decision to appeal the Panel decision and filed a notice of Appeal with the Appellate Body.¹⁰⁷ The EC did not appeal the panel's interpretation of Para 3(c) of the Enabling Clause as the panel had not made any explicit findings regarding the consistency of the EC's drug preferences with Para 3(c). The appeal was thus confined to the question whether the EU GSP on Drug Arrangements was consistent with Para 2(a) and with footnote 3 requiring non-discriminatory preferences.

On the latter issue the Appellate body found that the ordinary meaning of the term "non-discriminatory did not permit it to chose between the competing views of the meaning of discrimination put forth by India and the EC. According to India,¹⁰⁸ "The ordinary meaning of the verb 'discriminate' is "to make or constitute a difference in or between; distinguish; differentiate" and "to make a distinction in the treatment of different categories of people" and that non-discriminatory treatment of developing countries means treatment that does not make a distinction between different categories of developing countries and by making the EU GSP on drug arrangements available to only the 12 preferred members, the EC discriminated among developing countries. The EC on the other hand was of the view that the verb discriminate has a neutral and a negative meaning, the latter the most common when used in a legal context. Discrimination only occurs if equal situations are treated unequally or if unequal situations are treated equally,¹⁰⁹ and that treating differently the developing countries that are particularly affected by the drug problem is not discriminatory. Both parties

¹⁰⁶ Panel Report P. 149: 7.236

¹⁰⁷ Appellate Body Report P.6: 7

¹⁰⁸ Panel Report P.11:4.33

¹⁰⁹ Panel Report P.17:4.65

agreed that discrimination entails disparate treatment of those “similarly situated” but disagreed on what it means to be similarly situated.

The Appellate Body turned to paragraph 3(c) of the Enabling Clause to provide further context for the interpretation of the non-discriminatory obligation and accepted EC’s argument that the absence of the word “all” before “developing countries” implies that the text imposes no obligation to treat all developing countries alike.¹¹⁰ The Appellate Body concluded, contrary to the Panel, that footnote 3 and paragraph 3(c) do *not* preclude the granting of differential tariffs to different sub-categories of GSP beneficiaries, subject to compliance with the remaining conditions of the Enabling Clause and found therefore that the term developing countries in paragraph 2(a) should not be read to mean “all” developing countries and accordingly that paragraph 2(a) does not prohibit preference giving countries from according different tariff preferences to different sub-categories of GSP beneficiaries.¹¹¹

Further, both parties conceded that the development needs of various countries may differ. Accordingly, the Appellate Body was of the view that by requiring developed countries to respond positively to the needs of developing countries, which are varied and not homogeneous, Para 3(c) indicates that a GSP scheme may be non-discriminatory even if identical tariff treatment is not accorded to all GSP beneficiaries.¹¹² It thus reversed the Panel’s finding. In the same manner, the Appellate Body reversed the Panel’s finding that the reference to developing countries in Para 2(a) was to all developing countries.¹¹³ It held that preference granting countries are permitted to treat beneficiaries differently when such differences respond positively to varying developmental, financial and trade needs. It further held “that identical tariff treatment must be available to all GSP beneficiaries with the ‘development, financial or trade need’ to which the differential treatment is intended to respond.”¹¹⁴

¹¹⁰ Appellate Body Report 159

¹¹¹ Appellate Body Report P.94 : 174

¹¹² Appellate Body Report P.92: 175

¹¹³ Appellate Body Report P.92: 176

¹¹⁴ Appellate Body Report P.93: 179

Since there was no specific finding by the panel regarding the consistency of the EC drug Arrangements with Paragraph 3(c), the Appellate Body was prepared to accept that the drug trafficking relates to ‘ a development need’. But even so, the preferences would not pass the ‘non-discrimination’ test unless the EC proved that at a minimum, the preferences granted under the Drug Arrangements are available to all GSP beneficiaries that are similarly affected by the drug problem.¹¹⁵ The EC having failed to do so, the Appellate Body held that since the drug arrangements were only available to a ‘closed list’ of twelve countries meant that it was discriminatory. The regulation creating the preferences did not set out any criteria for the selection of the countries and did not provide any mechanism for adding or deleting countries as their circumstances change.¹¹⁶ In that light, the Appellate Body contrasted the Labour and Environmental incentive arrangements in the EC GSP which India had abandoned, with the drug related preferences. Unlike the drug arrangements, the EC regulation creating the labour and environmental incentives provided detailed provisions setting out the procedure and substantive criteria that apply to a request to become a beneficiary under either of those special incentive arrangements¹¹⁷.

3.4 CONCLUSION

The EC-India GSP case is remarkable because it's the first case ever where the DSB examined the meaning of developing countries under the Enabling Clause and the legality of conditional GSP schemes. The outcome of the case is to the effect that developed countries may discriminate among developing countries as long as they do so upon an objective criterion. The implications of this decision, dealt with in the next chapter, lie in the way in which the AB has fleshed out and further clarified the disciplines of GSP schemes between developing and developed countries as trading partners.

¹¹⁵ Appellate Body Report P.99: 187

¹¹⁶ Appellate Body Report P.95 :181

¹¹⁷ Appellate Body Report P.95: 181-183

CHAPTER FOUR

CRITICAL APPRAISAL AND IMPLICATIONS OF THE EU-INDIA GSP CASE FOR DEVELOPING COUNTRIES

4.0 INTRODUCTION

This chapter gives a critical analysis of the Panel and Appellate Body decisions in the EU-India GSP case as well as the possible implications of the outcome of the case for developing countries and GSP schemes. The possible implications of this decision for developing countries are a pointer to the resolution of the issue; whether GSP schemes are still a viable option for developing countries.

4.1 CRITICAL APPRAISAL OF THE CASE

The Panel had interpreted the word non-discriminatory under the Enabling Clause to mean that identical tariff preferences under GSP schemes should be provided to all developing countries without differentiation.¹¹⁸ The Appellate Body, however disagreed with this interpretation and concluded that the word non-discriminatory does not prohibit developed countries from granting different tariffs to products originating from different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions of the Enabling Clause. Nevertheless, the Appellate Body cautioned that in granting such preferential tariff treatment, preference giving countries are required by virtue of the term non-discriminatory to ensure that identical treatment is available to all “similarly situated” GSP beneficiaries that have the development, financial and trade needs” that the treatment in question is intended to respond to.¹¹⁹

In the process of arriving at the above decisions it was acknowledged by both the Panel and the Appellate body that the language of the Enabling clause is ambiguous. For example, the two terms ‘non-discriminatory’ and ‘developing countries’ which bore a lot of influence to the way in which the case was to be

¹¹⁸ Panel Report P.122: 7.86

¹¹⁹ Appellate Body Report P.99: 187

decided were not defined with precision under the Enabling Clause. The term 'non-discrimination' under footnote 3 of the Enabling Clause is a flexible concept if it is not followed by clear terms of reference and the phrase 'developing countries' in Para 2(a) and 3(c) is also equally difficult to describe with precision, and moreover the WTO has never taken any initiative to define what a developing country is under the WTO. As the Appellate Body notes, agreeing with the EC, the drafters could have included 'all' or 'selected or preferred' before developing countries in order to give it a more precise meaning but did not.¹²⁰ Therefore the issue of whether the inferences and conclusions that were drawn by the panel and the Appellate Body are right or wrong is controversial given the ambiguous language of the Enabling Clause.

In light of such ambiguity, the panel relied mainly on the negotiating history of GSP schemes under UNCTAD to give footnote three and Paragraph 2(a) of the Enabling Clause decisive substance. The 1971 waiver referenced in footnote three contemplated 'mutually acceptable preferences' and the panel considered the Agreed Conclusions from the UNCTAD negotiations as a good indicator of what was 'mutually acceptable'. This approach taken by the panel of referring back to the UNCTAD negotiations can be viewed as upholding the economic rationale of GSP schemes as originally negotiated under UNCTAD where the developed countries agreed to trade preferences within agreed parameters with the main aim of increasing the developing countries export earnings, promoting their industrialisation and accelerating their economic growth. But as well, the developed countries committed themselves to restructure the negative consequences of these discriminatory preferences for developing countries, by agreeing to the 'Generalised, non-reciprocal and non-discriminatory preferences' contemplated by the 1971 waiver.¹²¹ However, the Panel also noted that the major drive for the UNCTAD negotiations was to back-away from the

¹²⁰ Appellate Body Report 159

¹²¹ The Proviso to Para (a) of the 1971 Waiver states that "Provided that any such preferential tariff arrangements shall be designed to facilitate trade from developing countries and territories and not to raise barriers to the trade of other contracting parties;" in essence, GSP schemes were to be drawn in such a way to avoid their negative consequences or not to raise barriers to other trading partners.

discriminatory preferences that were already in place at the time in favour of a Generalised System of Preferences and thus concluded that any discrimination had to be limited to what was expressly contemplated by the Agreed conclusions¹²².

The economic rationale stated in the UNCTAD negotiations therefore gives support to the finding of the panel. If developed countries were allowed the discretion to employ whatever degree of discrimination they wish without any limitation, the primary objective of the UNCTAD negotiations would clearly have been sabotaged. The panel decision tries to bring out the fact that if the developed countries were allowed to afford differential treatment according to their assessment of the individual 'developmental, financial and trade needs' of developing countries, they may have used such authority to justify discriminatory policies that benefit them rather than for the intended legitimate economic rationale. And that for these reasons, it was entirely plausible, that the UNCTAD negotiators wanted to prohibit discrimination and only limit it to fairly narrow considerations such as to LDC's.



However from the time of the UNCTAD negotiations, there was no real agreement between the developed and developing countries as to the structure of GSP schemes as observed from their negotiating history in chapter two. The possibility cant be ruled out that the developed countries were unwilling to give tariff preferences had they foreseen a tight prohibition on discrimination in implementation on the one hand and that the developing countries on the other hand were willing to take whatever they could get given the fact that they were doing so badly at the time and could not effectively participate in International Trade without the preferences. It can therefore be argued that the Panel was

¹²² The Agreed Conclusions resulted from negotiations mandated by Resolution 21(II) of the Second Session of UNCTAD, passed on 26th March 1968. It was in this resolution that UN member States agreed to "the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences which would be beneficial to developing countries.

upholding what had been negotiated under UNCTAD but had never been implemented in GSP schemes by the developed countries.

It is worth noting that the major GSP schemes which were put in place after UNCTAD II from the outset contained exemptions and restrictions that were not specifically contemplated in the Agreed Conclusions. These early practices of the developed countries were steadily in place at the time of the negotiations that resulted in the Enabling clause, that is, between 1971 when the first GSP was put in place and 1979 when Enabling Clause was enacted. Those discriminatory tendencies continued even after the Enabling Clause was in place.¹²³ It has been argued by **Robert Howse**¹²⁴ that since the Tokyo Round negotiators did not outlaw any sort of discriminatory restrictions in GSP schemes that had emerged within that time, more forcefully and explicitly than through a footnote whose legal effect is not clear, it cannot be said to have been their intention. However, it must be remembered that the Tokyo Round was a round of negotiations with so many other things of interest to developed countries that had to be wrapped. During that Round, while the developing countries concentrated their efforts on preferences, the developed countries efforts were reflected mainly through the establishment of non-tariff measure agreements known as the Tokyo Round Codes.¹²⁵ These Codes covered areas of subsidy, dumping, Government procurement, technical barriers to trade, customs valuation, import licensing, civil aircraft, dairy products and bovine meat and the developed countries preferred to save time for these rather than preferential treatment which was a controversial matter. This is a possible explanation of why the issue of non-discriminatory preferences was in a footnote referring back to what was agreed upon in the 1971 Waiver. The purpose of a footnote is to give a clearer explanation or

¹²³ Walter Kennes (2000) 83, he states that since the principle of setting up a Generalised system of preferences was unanimously accepted, industrialized nations have created GSP schemes that are characterized by specific beneficiary countries, commodity coverage and exclusions, depth of preference margin, safeguard mechanism and rules of origin.

¹²⁴ Robert Howse (2003) 388

¹²⁵ GATT members were not obliged to join these new Codes and as a result only developed countries with a few exceptions joined them as they considered the obligations there under to be too severe and that the benefits not realistically achievable by their less developed economies.

description of an expression or make further reference and thus the panel was right to give it weight in interpretation with reference to the Vienna convention rules of interpretation.

It is clear that the object and purpose of the UNCTAD negotiations was to promote the trade of developing countries through trade preferences with minimum discrimination subject to some enumerated exceptions and that both the 1971 Waiver and the Enabling Clause were drafted to incorporate this goal. The panel decision entirely promoted this objective. Therefore the significance of the panel's decision is that it provided reasonably clear guidance for the future as to what kind of discrimination is permitted by pointing out that apart from the differential treatment expressly anticipated by the Agreed Conclusions, no discrimination is permissible. However the reality must be borne in mind that developed countries view GSP schemes as 'trade aid', with the various conditions for receipt of the 'aid' acting as 'reciprocity' and may be unwilling to offer them if inhibited by strict rules on non-discrimination. In light of this, although basing the decision on the economic rationale of the Enabling Clause seems to have been irrefutable, it may not have resulted in a practicable resolution of the dispute.

With regard to the Appellate Body decision, one might wonder whether it did not meander in deciding that developed countries may differentiate among developing countries by proving that differential treatment is justified by reference to differences in their "development, financial and trade needs". This is because no reasonable explanation was given as to why there should be a distinction between development needs whether caused by drug trafficking, poverty, natural disasters, political turmoil etc and why some of these may be addressed through GSP and others not so addressed. But clearly, a compromise had to be drawn if only to save the GSP schemes from a 'natural death'. This is because the supporters of the 1971 Waiver and the Enabling Clause could have anticipated that GSP schemes would contain a wide range of other conditions and

restrictions in order to make them politically viable in the developed countries. The Appellate Body was thus reluctant to overturn the status quo that had existed since the inception of the GSP since almost all existing GSP schemes have had non-economic conditions attached to the GSP beneficiary status. There is a possibility that deciding otherwise could have led to the end of GSP schemes completely.

On the other hand, the Appellate body decision leaves a lot to be desired as it does not address certain fundamentally difficult questions and these have very serious possible implications for developing countries who are the beneficiaries in the GSP programs as discussed below.

4.2 IMPLICATIONS FOR DEVELOPING COUNTRIES

The Appellate Body found that since the preferences granted under the Drug arrangements were not available to all GSP beneficiaries that are similarly affected by the drug problem, they were not justified under the Enabling Clause. The Appellate Body highlighted the point that the EC Council Regulation under which the drug arrangements are administered provides no mechanism or objective criteria that would allow for other developing countries that are similarly affected by the Drug Problem to be added to the list of the existing beneficiaries or removed from the Drug arrangements on the basis that they are no longer “similarly affected by the Drug problem”.¹²⁶

The Appellate Body decision is also to the effect that footnote 3 of the Enabling Clause creates a binding legal obligation requiring ‘generalised, non-reciprocal and non-discriminatory preferences’ but that nevertheless, preference giving countries may afford differential treatment to beneficiary countries if it is based on differences in their ‘development, financial and trade needs’ i.e. objective criteria. This in itself gives developed countries considerable scope to differentiate among

¹²⁶ Appellate Body Report P. 105: 181,182

developing countries and leaves a lot of unanswered questions that could seriously hamper the relationship between the developed countries and developing countries as trading partners. It could also lead to the failure of the original purpose for GSP schemes as advocated for by Raul Prebisch in the UNCTAD negotiations as being increasing the developing countries export earnings, promoting their industrialisation and accelerating their economic growth.

What is in question now is how broad or narrow this decision is and to what extent it can be subject to legal scrutiny against the “objective criteria” that is stated in the Appellate Body decision with regard to what amounts to a development, financial or trade need? What are the criteria for identifying such needs? The Appellate Body did not rule on the question of whether drug trafficking creates a development, financial or trade need because it was not necessary to address matters on which the panel had not made any finding. This unfortunately creates a loophole in the Appellate Body decision that can very easily be used by the developed countries to their advantage at the expense of the beneficiary developing countries. Yet it seems clear that the drug related preferences were not made for any development need for the beneficiary countries but rather for the benefit of Europe. The panel was convinced that the drug related preferences were to reward cooperation in efforts to reduce drug traffic in drugs towards Europe, rather than to assist the beneficiaries in addressing their perceived ‘development, financial or trade need.’¹²⁷

The Appellate Body decision means that developed countries may structure the GSP schemes imposed on developing countries according to their own desires and political ambitions as they come up with their own criteria of determining what would amount to a development, financial or trade need and this clearly conflicts with the original goals of the Enabling Clause to promote the trade of

¹²⁷ Panel Report P.144: 7.210

developing countries without raising barriers and creating undue difficulties. Allowing such freedom to the developed countries in structuring preferences could impose conditions that outweigh the benefits the developing countries would receive from the preferential system. Such a system therefore runs the danger of becoming a means for developed countries not only to impose their values on the developing countries but also to restrict those countries from developing at all especially if the conditions are prohibitive for them given their economic conditions.

Many of the other criteria for beneficiary status found in current GSP schemes such as failure to aid in efforts to combat international terrorism¹²⁸, failure to enforce arbitral awards, to punish improper expropriation of foreign investor's property, combat drug traffic, and promotion of worker's rights¹²⁹, are hardly connected to "development, financial and trade needs" of the beneficiary developing countries. The EU GSP incentive arrangements regarding labour rights and environmental protection maybe more in line with the issue of "development needs" but these may be prohibitive for certain poor countries who may not be in a position to meet the costs of ratifying the International Labour and Environmental Conventions let alone implement them in their countries. Therefore the question still lingers whether the Appellate Body decision really offers a solution to the concerns of India and other developing countries with regard to conditions for GSP beneficiary status.

In a report by the ICTSD on the question of who really won the case¹³⁰, India described the Appellate Body Decision as a "significant gain", as the EC drug arrangements as such had been deemed illegal due to the lack of clarity regarding their eligibility. The Indian Commerce Ministry noted that the ruling

¹²⁸ Trade Act of 2002, S 4102(a), Pub L No 107-210, 116 Stat 993, codified at 19 USCA S 2462 (b) (f) (West Supp 2003)

¹²⁹ Hudec E. Robert, (1999) 318 referring to the US Trade Act of 2002

¹³⁰ ICTSD Reporting: "WTO Appeals Body Reverses Panel," WTO REPORTER, 8 April 2004; "India wins WTO Case Against EU," THE HINDU, 8 April 2004; "WTO Judges Back Ruling Against EU Anti-Drug Plan," DAILY TIMES PAKISTAN, 21 April 2004.

would provide relief to Indian Exporters to the EC, who had been negatively affected by the duty concessions to Pakistan under the drug arrangements. On the other hand, the EC was of the view that as a result of the “new reasoning” on the issue of differentiation, the EC will be able to maintain the drug arrangements, with modifications. Reacting to the decision, the EC Trade Commissioner at the time, Pascal Lamy said,¹³¹ “...today’s decision makes it clear that we can continue to give trade preferences to developing countries according to their particular situation and needs, provided this is done in an objective, non-discriminatory and transparent manner”. It remains to be seen however if India’s complaint of discriminatory GSP schemes will be addressed by the developed countries as they use an objective criteria to select GSP beneficiaries.

In a communication from the EC Commission to the Council,¹³² issued after the Appellate Body Decision, and as a clear response to the decision, the EC stated that in light of the decision, when coming up with the legal framework of the GSP, a WTO member who intends to grant additional tariff preferences under its GSP scheme would have to identify on an objective basis, the special “development needs” of developing countries which can be effectively addressed through tariff preferences. In coming up with the new GSP Regulation to run from 2006 to 2015, there is a proposition to introduce a single arrangement in place of the three separate types of special incentives: to encourage the protection of Labour rights, to encourage the protection of the environment and to combat illegal drug production and trafficking. Thus in place of the current five, there would be three arrangements namely, the general arrangement, the EBA arrangement for LDC’s and an arrangement to encourage sustainable development.¹³³ The new sustainable development incentive will replace prior evaluations with a system that will encourage ratification and implementation of International Conventions.

¹³¹ Ibid, ICTSD Report

¹³² Communication from the Commission to the Council, European Parliament and European Economic and Social Committee on Developing countries, International Trade and Sustainable Development dated 7th July 2004, p. 5

¹³³ Ibid, Communication from the Commission, P. 7

The scheme is to be granted to beneficiaries who have taken on board the relevant international standards relating to sustainable development , including basic human rights conventions, labour rights conventions and certain conventions relating to environmental protection as well as the various conventions relating to the fight against illegal drugs production and trafficking.¹³⁴

These changes do not necessarily address India's issues and might even leave out several other developing countries as GSP beneficiaries who have not signed the conventions given the prohibitive cost as well as the lengthy processes of ratification of these Conventions on the part of several developing countries. The standards imposed by developed countries in International Conventions are too imposing on developing countries and thus prevent them from actively participating in the global market. And therefore, allowing such conditional preferences based on International conventions may cause a significant risk of ensuring that developing countries will never be permitted to become active partners in the international economy. Permitting developed countries to discriminate between developing countries by making the extension of tariff preferences subject to conditions with respect to the situation or conduct of those countries, introduces a concept that the drafters of the Enabling Clause never contemplated. In that case, it may be safely argued that the Enabling Clause can no longer be the legal basis for GSP schemes beneficial to all developing countries but for tariff preferences under which market access benefits are diverted from some to other developing countries to realize the foreign policy objectives of the developed countries concerned.

Sustainable development is also quite an elastic concept that may later cause similar definitional problems in case of any disputes arising as the ones faces by the DSB in defining 'non-discriminatory' and 'developing countries' in this case. One can argue that the developing countries may use this to their advantage by using anything that may lead to sustainable development as a basis for

¹³⁴ Ibid, Communication from the Commission P. 9

beneficiary status but unfortunately the power to pick and choose lies in the hands of the preference givers through unilateral decisions. It may be reasonable that some restraint exists on the extent of the differential treatment that is permissible to address heterogeneous development, financial and trade needs. But if the differential treatment is to be justified by different needs of the developing countries, do the developed countries have unfettered discretion to select the needs that they will address through differential treatment and ignore others? What would amount to an objective criterion in case of the different development needs? What then happened to 'mutual acceptance' between the developed and developing countries? Did it disappear in thin air?

Apart from the puzzle of what constitutes permitted discrimination through selection of beneficiary countries using an 'objective criteria', a further question is; what is the effect of the Appellate Body decision on GSP schemes generally? The GSP system envisioned by the UNCTAD negotiations was to provide broad coverage for manufactured and semi-manufactured goods limited only by quantitative ceilings or safeguard measures to address concerns about import surges. Is the complete exclusion of enumerated import sensitive manufactured products by the developed countries in compliance with the obligation to provide generalised preferences? Are the various conditions attached to GSP beneficiary status in most GSP systems compatible with the obligation to afford 'non-reciprocal' preferences? Those conditions essentially amount to reciprocity. Therefore the Appellate Body decision puts in issue many outstanding features of modern GSP schemes, some of which have been part of these schemes from when they were started. It may lead to future challenges by developing countries that suffer trade diversion because of such conditions as well as discrimination. The developed countries will thus have the difficult burden of proving that their GSP schemes are in compliance with the Enabling Clause by coming up with objective criteria for selecting and abandoning beneficiaries.

And yet if challenges against GSP schemes increase, it is possible that developed countries may choose to forego them altogether moreover some are structured to expire on given dates unless there is political will to renew them. This is because the Enabling Clause does not oblige the developed countries to give these preferences but only enables them to do so.

However, it is important to note that DSB decisions are not binding as precedent on future disputes between the same parties on other matters or different parties on the same matter, even though the same questions of WTO law might arise.¹³⁵ As in other areas of International law, there is no rule on *stare decisis* in WTO dispute settlement system according to which previous rulings bind Panels and the Appellate Body in subsequent cases. Therefore, if any arise to challenge GSP schemes under the Enabling Clause, they may be decided differently in light of the evidence and circumstances of the cases. However, if the reasoning developed in the previous reports in support of the interpretation given to a WTO rule is persuasive from the perspective of the Panel of the Appellate Body in the subsequent case, it is very likely that it will be repeated and followed. In the words of the Appellate Body, these GATT and WTO Panel Reports “create legitimate expectations among WTO members and therefore should be taken into account where they are relevant to any dispute.”¹³⁶ **Robert Howse**, was of the view that the Appellate Body had left itself considerable room to evaluate any future challenges to a particular aspect of a GSP scheme on the basis of the facts, and the values and interests that are at stake in that future case.¹³⁷ The other problem is that many of the developing countries that may wish to bring disputes to the WTO DSB cannot afford and most of the time just let the effects pass by.

¹³⁵ The WTO secretariat, (2004) 91

¹³⁶ Appellate Body Report, Japan Alcoholic beverages II, DSR 1996:1.97 at 107 to 108, also see Appellate Body Report, US -Shrimp (Article 21.5-Malaysia), Para 109

¹³⁷ Robert Howse, (2004) 6

4.3 CONCLUSION

Although, prima-facie, India seems to have won the war, it actually lost the battle and this has far reaching effects not only for India but also for all other developing countries that benefit from GSP schemes as observed above. The challenge faced by developed country governments in implementing the decision of the Appellate Body is to ensure that they have an objective criterion for carefully differentiating between the beneficiaries so that they can continue to make a positive contribution to ensuring that the trade regime and particularly the Enabling Clause contribute to the economic development of developing countries. The Appellate Body Decision therefore provides an opportunity to make a new beginning but this is dependent on whether it will be followed and whether the development interests of developing countries will be borne in mind when coming up with objective criteria for differentiating among the developing countries.



CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSIONS

5.0 INTRODUCTION

Having considered the possible implications of the case at hand, this chapter is basically going to summarise the salient points and conclusions derived from this research. It will also give recommendations as a way forward for the functioning of GSP schemes and the further integration and participation of developing countries and LDC's in the international Economy.

5.1 SUMMARY AND CONCLUSIONS

During the second session of UNCTAD in New Delhi, 1968, in Resolution 21(II), UNCTAD members agreed to the early establishment of a mutually acceptable system of generalised, non-reciprocal and non-discriminatory preferences which would be beneficial to the developing countries. This was given effect through the 1971 ten year Waiver and later transformed into a permanent waiver by the Enabling Clause.¹³⁸ Perhaps an amendment of the GATT would have been better but the difficulties of amending it led to the rejection of that option and a waiver was utilised. This made GSP schemes lay outside the realm of the binding GATT legal system with serious implications for developing countries because these GSP schemes can be unilaterally modified or cancelled by the developed countries at any time. Although referred to as non-reciprocal, it should not be forgotten that these non-reciprocal arrangements have not been completely free of charge in the past given the various conditions attached to becoming a GSP beneficiary, in which the developed countries can be said to give with one hand and take away with the other. In the future, these non-reciprocal preferences may even restrict the potential bargaining power of the beneficiaries not only in the GSP schemes but also in areas that tend to become

¹³⁸ The 1971 Waiver and the Enabling Clause are both annexed hereto as Annex I and Annex II respectively.

increasingly important in the multilateral trading system for example agriculture, services and Intellectual property and development issues.

The ideology that cemented the GSP schemes in place is political rather than economic and this political influence has consequently had a negative effect on the economic returns that were expected from GSP schemes by developing countries. It came as no surprise therefore that the admission of Pakistan to the EU's GSP scheme on drug arrangements had a political aspect, with adverse economic effects to India's textile and clothing Industry which competes with Pakistan for the EU market. The granting of these GSP schemes to developing countries by developed countries on a unilateral basis has been a traditional mechanism for conducting trade relations between developed and developing countries. Developing countries have had to meet certain conditions, often non-economic so as to be designated as beneficiaries and to maintain that status. In light of the above dispute, the extent of the benefits from GSP schemes has been limited by these conditional ties. Nevertheless, this has not totally eliminated the need for meaningful preferences and until such time as their commercial value is totally eliminated, GSP schemes remain valid options for promoting trade and integration of developing countries in the international economy.

In view of the outcome of the EU-India GSP case, it can be argued that developing countries have been distracted by the idea of GSP schemes, seeing them as a means of offsetting handicaps created by trade restrictions and distortions in developed country markets and relied on them at the cost of overlooking their fundamental interest in a non-discriminatory trading system. This has made them vulnerable because on the other hand, developed countries have used preferences as an easy substitute for actions in more essential areas such as fighting terrorism, reduction of drug trafficking to their countries etc. As such, although preferences may have value as a form of encouragement for infant industries, developing countries should not depend on them for the

foreseeable future, or they should be redefined to include the interests of the developing countries.

The Appellate Body Decision was an attempt to reconcile the law and politics of the Enabling Clause as well as a compromise between the objectives and interests of the developed countries and those of the developing countries in light of the negotiating history of the Generalised system of Preferences. Despite the fact that what had been agreed upon in the Enabling Clause was a mutually acceptable system of generalised, non-reciprocal and non-discriminatory preferences, the practice of the developed countries was to set up discriminatory preferences on the basis on non-economic conditions. Therefore, the Appellate Body decision only maintained what the practice had been because it upheld conditional preferences as long as there is an objective criteria being used and based on the “development, financial and trade needs of the developing countries.



5.2 RECOMMENDATIONS

5.2.1 Comprehensive Agreement on Special and Differential treatment

The Generalised System of Preferences is a major form of Special and Differential treatment for developing countries in the WTO. The current WTO Doha Development Agenda (DDA), in order to succeed, has to go beyond simply reforming existing Special and Differential provisions. The Doha Ministerial Conference¹³⁹ mandated further work on S&D, specifically a review of existing provisions with a view to strengthening them and making them more precise, effective and operational. In this light, developing countries must refocus WTO trade and development policy around the twin goals of development and fairness. Developing countries need a comprehensive agreement on Special and Differential treatment clarifying that development not trade liberalisation is the

¹³⁹ In Paragraph 44 of the Ministerial Declaration, cross referenced to Paragraph 12(I-III) of the Ministerial decision on Implementation-related issues and concerns

number one economic policy goal for developing countries and that fairness and not charity, is the basis for development. Such an Agreement should incorporate precise and operational rules on the generalised system of preferences, creating binding and unconditional preferential market access for developing countries. Although the WTO was not founded with the main intention of helping developing countries, the decisions the organisation takes and has taken over time have a powerful effect on the growth and development of developing countries and therefore, preferential treatment under this new comprehensive Agreement would be an appropriate attitude towards developing countries.

5.2.2 Need for an effective definition of the term “developing countries”

One of the controversial issues in the EU-India GSP case was the definition of developing countries as used in the Enabling Clause and this is a clear pointer to the need for an effective definition of developing countries. The so called objective criteria advanced by the Appellate Body in the above case to differentiate and categorise the WTO member countries is clearly not conclusive. One of the big ambiguities under GSP schemes and the WTO system in general is the lack of a working definition for the term developing countries which always brings the question of which of the WTO members are developing countries. In the absence of a specific definition or an agreed set of criteria for identifying developing countries, the WTO as earlier noted operates under an implied self election arrangement which allows countries to describe themselves as developing countries say by belonging to the G77.¹⁴⁰ However the references in WTO discussions to the so called “more advanced developing countries” and the unilateral decisions of developed countries to graduate some developing countries out of the GSP schemes points to the contention of what was in dispute in the EU-India GSP case, raising the issue whether GSP schemes were meant for “all” developing countries. It’s therefore clear that the WTO can’t continue to dodge the issue of negotiating an appropriate set of criteria for categorising its

¹⁴⁰ Carl M. Beverly (1990) 107

member countries for the purpose of determining their eligibility for certain S&D concessions such as GSP schemes. The categorisation could be done in terms of per capita like it is in the Agreement on subsidies and countervailing measures¹⁴¹ or trade competitiveness in terms of total share of exports; these could be used singly or combined. The same could be used for categorising LDC's.

5.2.3 Maximum utilisation of Generalised Systems of Preferences

While the benefits from GSP schemes have been limited by restrictions and continued negotiated tariff reductions on MFN basis which erodes the preferential margin, its continued importance should not be underestimated. The GSP has an important economic impact on smaller developing countries and could provide an important boost to their exports without imposing a significant cost to the developed countries if the current limitations say on rules of origin, product coverage are eliminated. For the beneficiaries, the trick is to make good use of these GSP schemes as they possibly can and for as long as they last knowing that there is now a new rule for objective criteria to be followed by the developed countries which could be used to eliminate them. But at the same time, while they prepare for their phasing out, they should press for continued multilateral policy reform in the favour of their economic development as well as going in for regional integration where suitable.

5.2.4 Continued Multilateral Policy Reform

The fact that many developing countries have not been able to use GSP schemes as an engine for growth reflects a mix of domestic and international constraints. Developing countries receive preferential tariff treatment through GSP schemes but in light of the fore going discussion and the EU-India GSP case, such preferential treatment is of limited value because of the non-economic

¹⁴¹ Annex VII thereof defines developing country members as referred to in Para 2(a) of article 27 of that Agreement.

conditions attached to it. Therefore, greater emphasis should be placed on permitting and encouraging developed countries to take into account the “real needs” of the developing countries when coming up with GSP schemes and not necessarily what will be of benefit to the Developed countries. This will help the developing countries to take advantage of their competitive strength and get integrated more fully into the trading system with all the appropriate rights and responsibilities that this entails. This can be done through continued multilateral policy reform as well as country reforms. Multilateral trade policy and especially production and export subsidies in developed countries should further be prevented from hampering exports of primary commodities and other products from developing countries. A well developed and implemented trade policy can prove an important if not sufficient condition for economic development and international trade agreements in that way can contribute importantly to the development of developing countries. However, continued multilateral trade policy may not quickly produce the desired results because of the length on the multilateral negotiations and it is worthwhile to consider whether regional integration can play a role.



5.2.5 Regional integration

Developing countries should explore the possibilities of using regional arrangements to facilitate their integration into the world economy but prior to that, there is need for sound corporate governance which includes peace, stability, and prevalence of rule of law, accountability and transparency of governance in those countries. Regional integration for Southern countries could be an effective means for greater involvement in International trade rather than dependence on GSP schemes which are framed in the interest of the givers (developed countries) rather than the recipients (developing countries). Encouraging regional integration by building regional markets among developing countries would improve the conditions for regional growth so that investment could be enhanced. Strengthening regional integration and building up economic capacity would lead to increased competition and diversification in the developing

countries. Developing countries should critically evaluate the costs and benefits of membership to regional groupings as well as the appropriate level or depth of integration. Provided that developing countries combine their integration with gradual multilateral liberalisation there should not be fear of trade diversion. The multilateral approach towards tariff reduction relies on reciprocal concessions and the weight of these concessions is determined in a bargaining process. Small developing countries on their own do not carry significant weight and their interests can be disregarded unless they act in a coordinated way. Regional integration could thus provide an effective resolution to overdependence on GSP schemes as well as an effective way of integrating into the Global economy through negotiating concessions at the WTO through regional blocs.

5.3 CONCLUSION

The issues raised by India in the dispute discussed in this research is a clear example of how GSP benefits to developing countries is hampered by a selection of only 12 beneficiaries to a GSP scheme despite its detrimental effects to other countries exporting similar products to the EU. Despite the Appellate Body decision which requires developed countries to use objective criteria in selecting GSP beneficiaries, there is no guarantee that the developed countries will change their policies towards developing countries. Therefore while GSP schemes are still a viable option for developing countries to get integrated into the global economy, there is need for a more comprehensive agreement than the current GSP, incorporating precise and operational rules on the generalised system of preferences, creating binding and unconditional preferential market access for developing countries while taking into account the twin goals of development and fairness. If the rules negotiated are fair, the developing countries would then have a better chance of integrating in the global trading system and reaping the benefits thereof.

ANNEX I

GENERALIZED SYSTEM OF PREFERENCES

Decision of 25 June 1971 (BISD 18S/24)

The CONTRACTING PARTIES to the General Agreement on Tariffs and Trade,
Recognizing 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;

Recognizing further that individual and joint action is essential to further the development of the economies of developing countries;

Recalling that at the Second UNCTAD, unanimous agreement was reached in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries;

Considering that mutually acceptable arrangements have been drawn up in the UNCTAD concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries;

Noting the statement of developed contracting parties that the grant of tariff preferences does not constitute a binding commitment and that they are temporary in nature;

Recognizing fully that the proposed preferential arrangements do not constitute an

impediment to the reduction of tariffs on a most-favoured-nation basis,

Decide:

(a) That without prejudice to any other Article of the General Agreement, the provisions of Article I shall be waived for a period of ten years to the extent necessary to permit developed contracting parties, subject to the procedures set out hereunder, to accord preferential tariff treatment to products originating in developing countries and territories with a view to extending to such countries and territories generally the preferential tariff treatment referred to in the Preamble to this Decision, without according such treatment to like products of other contracting parties

Provided that any such preferential tariff arrangements shall be designed to facilitate trade from developing countries and territories and not to raise barriers to the trade of other contracting parties;



(b) That they will, without duplicating the work of other international organizations, keep under review the operation of this Decision and decide, before its expiry and in the light of the considerations outlined in the Preamble, whether the Decision should be renewed and if so, what its terms should be;

(c) That any contracting party which introduces a preferential tariff arrangement under the terms of the present Decision or later modifies such arrangement, shall notify the CONTRACTING PARTIES and furnish them with all useful information relating to the actions taken pursuant to the present Decision;

(d) That such contracting party shall afford adequate opportunity for consultations at the request of any other contracting party which considers that any benefit

accruing to it under the General Agreement may be or is being impaired unduly as a result of the preferential arrangement;

(e) That any contracting party which considers that the arrangement or its later extension is not consistent with the present Decision or that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the arrangement or its subsequent extension and that consultations have proved unsatisfactory, may bring the matter before the CONTRACTING PARTIES which will examine it promptly and will formulate any recommendations that they judge appropriate.



ANNEX II

DIFFERENTIAL AND MORE FAVOURABLE TREATMENT RECIPROCITY AND FULLER PARTICIPATION OF DEVELOPING COUNTRIES

*Decision of 28 November 1979
(L/4903)*

Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES *decide* as follows:

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries¹, without according such treatment to other contracting parties.
2. The provisions of paragraph 1 apply to the following:²
 - (a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,³
 - (b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;
 - (c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another
 - (d) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.
3. Any differential and more favourable treatment provided under this clause:

- (a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;
- (b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;
- (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.

4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:⁴

- (a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;
- (b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.

5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs.

6. Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall

not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

7. The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

8. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.

9. The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to meet the development needs of developing countries and the objectives of the General Agreement.

¹ The words "developing countries" as used in this text are to be understood to refer also to developing territories.

² It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.

³ 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).

⁴ Nothing in these provisions shall affect the rights of contracting parties under the General Agreement.

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