

Amsterdam, 27 February 2023

CSW and FIDH (International Federation for Human Rights) have requested a legal opinion regarding the lawfulness, under the rules of the World Trade Organisation (WTO), of proposals to include migration-related conditionalities in the Generalised System of Preferences (GSP) of the European Union (EU), currently under review.

The request comes in the context of proposals, currently being negotiated among the Council of the European Union, the European Parliament, and the European Commission, to review, for the years 2024 to 2034, the EU GSP, a scheme designed to provide favourable treatment to the trade of developing and least-developed countries. My conclusions are as follows:

1. WTO rules authorise GSP schemes on the understanding that they can help ‘developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development’. GSP schemes must be ‘designed to facilitate and promote the trade of developing countries’. They cannot be used to punish developing and least-developed countries or demand from them action that is in the domestic interest of the WTO Member applying the GSP scheme. To ensure these objectives are met, the WTO Enabling Clause imposes requirements on GSP schemes.
2. GSP schemes may include conditionalities. Each conditionality must be ‘designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries’. The current EU GSP, for example, includes conditionalities relating to enforcement of labour standards, human rights, environmental conservation, and good governance, all of which fit under the rubric of development needs.
3. The proposal of conditioning trade preferences on beneficiary countries facilitating the return and readmission of migrants, currently in Article 19.1(c) of the Proposed GSP Regulation, does not respond, let alone respond positively, to the development, financial and trade needs of developing countries. It is designed to fulfil an objective found desirable by some political coalitions within the EU and its Member states. As a result, it is incompatible with the conditions for a WTO-

compatible GSP scheme. A GSP scheme can neither condition participation on, nor draw distinctions between GSP beneficiaries depending upon, how far a developing or least-developed country pursues policies that the EU finds domestically desirable in the area of return and readmission of migrants.

The EU has been a stalwart for the maintenance of the rules-based international trade order. The WTO Agreements were ratified by the EU and all of its Member States. The interpretation offered in the attached opinion reflects legal conclusions developed by WTO panels and the Appellate Body, endorsed by all WTO Members gathered in the WTO Dispute Settlement Body. Given the clarity with which they apply to the present Article 19.1(c) of the European Commission's proposed GSP Regulation, this element of proposed Article 19 should be withdrawn if the EU is to comply with its international commitments and avoid further straining the multilateral trading system.



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Legal Opinion

Re: GSP Review – Migrant Returns and Readmissions Conditionality – Compatibility with WTO Law

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I. QUESTION

1. **CSW** and **FIDH (International Federation for Human Rights)** have requested a Legal Opinion on the compatibility with the obligations of the European Union (EU) under the Agreements of the World Trade Organization (WTO) of proposals to introduce into the EU's Generalised System of Preferences (GSP) conditionalities relating to migration policy of beneficiary countries, including requirements to accept the returns of and to readmit a country's own nationals following their migration to the European Union.

2. The question they pose is formulated as follows:

“What is your opinion on the legality – under WTO law – of the European Commission’s proposal to condition its Generalised Scheme of Preferences (2024-2034) on migrant returns and readmissions?”

3. The proposals to be examined are conveyed in a legislative proposal put forward by the European Commission (Commission Proposal),¹ as well as in amendment proposals in the report adopted by the European Parliament² and in relevant modification proposals included by the Council of the European Union in its Mandate for Negotiations on the matter.³ The proposals have been made in the context of

* Research for this opinion has been carried out in full compliance with the Dutch Code of Scientific Integrity (2018) and was approved by the Ethics Committee of the Amsterdam Law School.

¹ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on Applying a Generalised Scheme of Tariff Preferences and Repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council*, Brussels, 22.9.2021, COM(2021) 579 final, 2021/0297 (COD).

² European Parliament, *Report on the proposal for a regulation of the European Parliament and of the Council on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council*, 17.5.2022, A9-0147/2022 (adopting a Draft European Parliament Legislative Resolution).

³ Council of the European Union, *Regulation on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council (GSP) – Mandate for negotiations with the European Parliament*, Brussels, 16270/22, 20 December 2022.

reviewing the current EU GSP Regulation, adopted in 2012 (GSP Regulation 2012),⁴ with a view to adopting a new GSP regulation, for the years 2024 to 2034 (GSP 2024-2034; New GSP Regulation).

4. Below, Section II examines the terms of the proposals for migration-related conditionalities. Section III analyses the requirements that WTO law imposes on preferential trade treatment to developing countries and Least-Developed Countries (LDCs). Section IV considers whether, under WTO law, the EU is permitted to include in the New GSP Regulation, among the conditions for the granting, continuation or deepening of trade preferences to developing countries and LDCs, the return and readmission of migrants. Section V offers a conclusion.

II. MIGRATION-RELATED CONDITIONALITY IN THE GSP REVIEW PROPOSAL

5. The EU GSP scheme is currently governed by the EU GSP Regulation of 2012. The proposal to add to a revised GSP Regulation migration-related conditionalities appears in Article 19 of the Commission Proposal. Article 19, which opens the chapter entitled ‘Temporary withdrawal provisions common to all [GSP] arrangements’, provides in relevant part (emphasis added):

Article 19

1. The preferential arrangements referred to in Article 1(2) may be withdrawn temporarily, in respect of all or of certain products originating in a beneficiary country, for any of the following reasons:

(...)

(c) serious shortcomings in customs controls on the export or transit of drugs (illicit substances or precursors), **or related to the obligation to readmit the beneficiary country’s own nationals** or serious failure to comply with international conventions on antiterrorism or anti-money laundering;

6. The Commission describes this provision as a ‘withdrawal procedure related to readmission of own nationals’.⁵ The Proposal contains two justificatory paragraphs (‘recitals’):

(26) Orderly international migration can bring important benefits to the countries of origin and destination of migrants and contribute to their sustainable

⁴ Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, OJEU L 303 (31.10.2012).

⁵ Commission Proposal, p. 12.

development needs. Increasing coherence between trade, development and migration policies is key to ensure that the benefits of migration accrue mutually to both the origin and destination countries. In this respect, it is essential for both origin and destination countries to address common challenges, such as, stepping up cooperation on readmission of own nationals and their sustainable reintegration in the country of origin, in particular in order to avoid a constant drain in active population in the countries of origin, with the ensuing long-term consequences on development, and to ensure that migrants are treated with dignity.

(27) Return, readmission and reintegration are a common challenge for the Union and its partners. In particular, every State has the obligation to readmit its own nationals under international customary law, and multilateral international conventions such as the Convention on International Civil Aviation signed in Chicago on 7 December 1944. Improving sustainable reintegration and capacity building would significantly strengthen the local development in the partner countries.

7. The relevant amendments adopted on first reading by the European Parliament involve, first, entirely removing from Article 19.1(c) the sentence 'or related to the obligation to readmit the beneficiary country's own nationals'.⁶ Second, amending recital 26 and deleting recital 27 to reflect this removal.⁷

8. The Council's Mandate for Negotiations does not propose altering Article 19.1(c), but proposes some changes to the recitals in the Commission's Proposal:

~~(26) Orderly international migration can bring important benefits to the countries of origin and destination of migrants and contribute to their sustainable development needs. Increasing coherence between trade, development and migration policies is key to ensure that the benefits of migration accrue mutually to both the origin and destination countries.~~

(26) The UN 2030 Agenda for Sustainable Development in Sustainable Development Goal 10, target 7 calls for facilitating orderly, safe, and responsible migration and mobility of people, including through implementation of planned and well-managed migration policies. In this respect, it is essential for both origin and destination countries to address common challenges, such as, stepping up cooperation on readmission of own nationals and their sustainable reintegration in the country of origin, in particular in order to avoid a constant

⁶ European Parliament, Report on the Commission's Proposal, Amendment 82.

⁷ European Parliament, Report on the Commission's Proposal, Amendments 30, 31, 32.

~~drain in active population in the countries of origin, with the ensuing long-term consequences on development, and to ensure that migrants are treated with dignity.~~ **full respect of international human rights standards. Improving sustainable reintegration and capacity building would also significantly strengthen the local development in the partner countries.**

(27) Return, readmission and reintegration are a common challenge for the Union and its partners. In particular, every State has the obligation ~~to readmit its own nationals under international customary law, and multilateral~~ **to readmit its own nationals illegally staying in the territory of another country. Multilateral international conventions such as the Convention on International Civil Aviation signed in Chicago on 7 December 1944. Improving sustainable reintegration and capacity building would significantly strengthen the local development in the partner countries.** **refer also to States' obligation to admit into its territory its nationals who have been deported from another State's territory.**

(27a) To assess the existence of a serious shortcomings related to the obligation to readmit the beneficiary country's national, the Commission should rely on relevant and objective elements. These may include elements stemming from the assessment carried under Article 25a of the Visa code and the assessment carried under Article 8 of Visa Regulation (EU) 2018/1806 as well as information notified by a Member State on practical problems on cooperation with a beneficiary country on readmission of irregular migrants.⁸

9. Within the boundaries of the proposals as currently formulated, therefore, the question concerns the compatibility with WTO rules of Article 19.1(c) of the Commission's proposed New GSP Regulation and accompanying justification. The proposal is endorsed, under different justifications, by the Council. Specifically, the question concerns the compatibility with WTO rules of the sentence providing that a beneficiary country's GSP preferences may be withdrawn temporarily in case the EU determines that there have been 'serious shortcomings ... related to the obligation to readmit the beneficiary country's own nationals'.

III. GSP PROGRAMMES - REQUIREMENTS UNDER WTO LAW

A. *Relevant WTO Rules*

10. Since the General Agreement on Tariffs and Trade (GATT) was signed in 1947,⁹ a number of decisions have been adopted to adjust two of its pillars - reciprocity and non-

⁸ Council of the European Union, Mandate for Negotiations, pp. 12-13.

⁹ General Agreement on Tariffs and Trade (1947), signed 30 October 1947, 64 UNTS 187.

discrimination – to the asymmetries between GATT Contracting Parties (since 1995, WTO Members). Following a process at the United Nations Conference for Trade and Development (UNCTAD), in 1971 a GATT waiver permitted preferential treatment to favour developing countries in the multilateral trading system. In particular, the 1971 Waiver permitted the creation of ‘generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries’.¹⁰

11. The 1979 Enabling Clause,¹¹ which succeeds and refers to the 1971 Waiver, currently provides the rules and conditions for GSP and other preferential treatment. Paragraph 1 of the Enabling Clause provides that WTO Members ‘may accord differential and more favourable treatment to developing countries’,¹² while Paragraph 2(a) specifically authorises ‘[p]referential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences’.

12. To conform with WTO rules, a GSP scheme must therefore accord with the requirements set out in the Enabling Clause. In this regard, Paragraph 3(c) provides:

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.** (emphasis added)

B. Interpretation by Panels and the Appellate Body

13. In 2004, the WTO Dispute Settlement Body adopted reports of the panel and the Appellate Body in the *EC – Tariff Preferences* dispute, clarifying important aspects of the Enabling Clause. The panel found that ‘[t]he requirement that the differential and more favourable treatment of developing countries be designed to respond positively to their needs is phrased as an obligation (“shall”) that developed countries must observe when

¹⁰ GATT Contracting Parties, *Generalized System of Preferences*, Decision of 25 June 1971 (L/3545).

¹¹ GATT Contracting Parties, *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries* (‘Enabling Clause’), Decision of 28 November 1979 (L/4903).

¹² *Ibid*, para. 1. The Enabling Clause has become part of WTO law as a result of GATT 1994, para. 1(b)(iv).

applying the preference schemes authorized under paragraph 2(a), that is GSP schemes'.¹³ This finding was upheld by the Appellate Body, which noted that 'the use of the word "shall" in paragraph 3(c) suggests that paragraph 3(c) sets out an obligation for developed-country Members'.¹⁴

14. The obligation in Paragraph 3(c) contains two elements. First, preferential treatment under a GSP – as any preferential treatment under the Enabling Clause – must be designed and, if necessary, modified, to respond to the development, financial and trade needs of developing countries. Second, this treatment must respond *positively* to these needs of developing countries.

15. With regard to the needs that a GSP must respond to, the Appellate Body noted in *EC – Tariff Preferences* that 'paragraph 3(c) does not authorize any kind of response to any claimed need of developing countries'.¹⁵ Instead, 'the types of needs to which a response is envisaged are limited to "development, financial and trade needs"'. As a result, the Appellate Body concluded, 'a "need" cannot be characterized as one of the specified "needs of developing countries" in the sense of paragraph 3(c) based merely on an assertion to that effect by, for instance, a preference-granting country or a beneficiary country'.¹⁶ There must be objective grounds for the assertion that the need the GSP responds to is among the development, financial and trade need of developing countries. The Appellate Body proposed, in this regard, that '[b]road-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations',¹⁷ could provide objective standards for assessing whether a need is a development, financial or trade need in the sense of Paragraph 3(c).

16. With regard to the requirement that the response given to these needs be positive, the Appellate Body concluded that 'the response of a preference-granting country must be taken with a view to improving the development, financial or trade situation of a beneficiary country, based on the particular need at issue'. This means that 'a sufficient nexus should exist between, on the one hand, the preferential treatment provided under the respective measure authorized by paragraph 2, and, on the other hand, the likelihood of alleviating the relevant "development, financial [or] trade need"'.¹⁸ In other words, the

¹³ Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (EC – Tariff Treatment)*, adopted 20 April 2004 (WT/DS246/R), para. 4.37.

¹⁴ Appellate Body Report, *EC – Tariff Treatment*, adopted 20 April 2004 (WT/DS246/AB/R), para. 157.

¹⁵ *Ibid*, para. 163.

¹⁶ *Ibid*, para. 163.

¹⁷ *Ibid*, para. 163.

¹⁸ *Ibid*, para. 164.

preferential treatment provided under a GSP must itself address a development, financial or trade need of a developing country.

IV. THE PROPOSED MIGRATION-RELATED REQUIREMENTS

17. The analysis above shows that the Enabling Clause permits developed country Members of the WTO to adopt GSP schemes to give, without reciprocity, preferential tariff treatment to developing country Members and least-developed country Members. To be WTO-compatible, GSP schemes must comply with two requirements. They must, first, respond to the needs of developing countries, and specifically to development, financial and trade needs widely recognised in the WTO Agreements or in broadly accepted documents. Second, they must respond positively to these needs, meaning that the preferences granted in the GSP must themselves address the relevant needs.

18. As a result, two legal questions are involved in an assessment of the WTO-compatibility of the change to the EU GSP scheme in proposed Article 19.1(c), allowing '[t]emporary withdrawal' of preferences to beneficiary countries due to 'serious shortcomings ... related to the obligation to readmit the beneficiary country's own nationals'. First, does this proposed provision respond to the development, financial and trade needs of *developing countries*? Second, is this proposed provision *designed to respond positively* to the relevant needs?

A. Readmitting Nationals of Developing Countries – Whose Needs?

19. The justification for Article 19.1(c) proposed by the Commission, as well as the Mandate for Negotiations published by the Council, suggest that readmitting nationals is a need of developing countries. In its proposed recitals, the Commission states that '[r]eturn, readmission and reintegration are a *common challenge* for the Union and its partners' and that '[i]mproving sustainable reintegration and capacity building would significantly *strengthen the local development* in the partner countries' (emphasis added).¹⁹

20. Two grounds are offered for this. Recital 26 affirms that '[o]rderly international migration can bring important benefits to the countries of origin and destination of migrants and contribute to their sustainable development needs', proposing that 'cooperation on readmission of own nationals and their sustainable reintegration in the country of origin' is essential to 'avoid a constant drain in active population in the countries of origin, with the ensuing long-term consequences on development, and to ensure that migrants are treated with dignity'. Recital 27 affirms the existence of legal undertakings, asserting that 'every State has the obligation to readmit its own nationals

¹⁹ Commission Proposal, Recital 27.

under international customary law, and multilateral international conventions such as the Convention on International Civil Aviation signed in Chicago on 7 December 1944’.

21. The Mandate for Negotiations of the Council, while retaining the text of Article 19.1(c) in full, proposes significant changes to these grounds of justification. Its Recital 26 begins by recalling that ‘[t]he UN 2030 Agenda for Sustainable Development in Sustainable Development Goal 10, target 7 calls for facilitating orderly, safe, and responsible migration and mobility of people, including through implementation of planned and well-managed migration policies’. It also asserts an obligation, under customary international law, for each state ‘to readmit its own nationals illegally staying in the territory of another country’, referring to the obligation of a state ‘to admit into its territory its nationals who have been deported from another State’s territory’.²⁰ Rather than referring to ‘a constant drain in active population in the countries of origin’, the Council proposes that ‘sustainable reintegration and capacity building would also significantly strengthen the local development in the partner countries’.²¹ The Council adds that, in evaluating ‘shortcomings related to the obligation to readmit the beneficiary country’s national, the Commission should rely on relevant and objective elements’.²²

22. Both the Commission and the Council make efforts to portray a beneficiary state’s cooperation to admit, or readmit, nationals deported by other countries as being among that states’ own development, financial and trade needs. In this regard, asserting a legal obligation under customary international law to readmit such nationals – a view that the literature suggests emanates largely from the European Union²³ and which has been disavowed by the Legal Service of the Council²⁴ – is in itself insufficient to establish development, financial or trade needs of developing countries.

23. There are limited grounds on which discrimination in GSP treatment can be based. By implication, a GSP cannot be a means to enforce every international obligation, customary or conventional, applicable between the administering country and a

²⁰ Council Mandate for Negotiations, Recital 27.

²¹ Council Mandate for Negotiations, Recital 26.

²² Council Mandate for Negotiations, Recital 27(a).

²³ Nils Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (Brill 2009), 27. For a broad overview of the various opinions, see Mariagiulia Giuffrè, ‘Obligation to readmit? The relationship between interstate and EU readmission agreements’, in Francesca Ippolito and Seline Trevisanut, *Migration in the Mediterranean: Mechanisms of International Cooperation* (CUP 2016), 263-287.

²⁴ Council of the European Union – Legal Service Opinion, *Standard Readmission Agreement between the Member States of the European Union, of the one part, and a third country, of the other part – Impact of the entry into force of the Treaty of Amsterdam*, 10 March 99 (Doc No. 6658/99), para 6 (‘It is doubtful whether, in the absence of a specific agreement [to readmit] between the concerned States, a general principle of international law exists, whereby these States would be obliged to readmit their own nationals when the latter do not wish to return to their State of origin’).

beneficiary country. Imposing compliance with international obligations, other than those that address the development, financial and trade needs of developing countries, as a condition for GSP participation or for receiving certain GSP benefits, is incompatible with Paragraph 3(c) of the Enabling Clause. Thus, even assuming that there is an ‘obligation to readmit’, this would not make withdrawal of GSP preferences a lawful means, under WTO law and the Enabling Clause, to enforce such an obligation.

24. Additionally, the Commission and the Council seek to portray ‘orderly’ migration as being a ‘common challenge’ of the EU and origin countries. The Council refers in this regard to Goal 10, Target 7 (Target 10.7) of the United Nation’s Sustainable Development Goals (SDGs), possibly seeking to follow the criterion for identifying development, financial and trade needs of developing countries set out by the Appellate Body in *EC – Tariff Preferences*, that is, ‘[b]road-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations’.²⁵

25. SGD Target 10.7 is to ‘[f]acilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies’. Indeed, failing to facilitate orderly, safe, regular and responsible migration and mobility of people might hamper the development, financial, and trade needs of developing countries. At the same time, it is far from clear that facilitating the *return*, possibly forced, of migrants to their countries of origin fulfils the objectives of Target 10.7.

26. Goal 10, under which Target 10.7 appears, is entitled ‘Reduce inequality within and among countries’. The intended beneficiaries of its fulfilment appear to be, first, with a view to reducing inequality ‘within’ countries, migrants themselves, especially the most vulnerable among them, and their ability to generate income; second, their families in their countries of origin, and their ability to receive income;²⁶ third, the least advantaged between the country of origin and the country of destination, so as to reduce inequality ‘among countries’. This understanding of the beneficiaries of Target 10.7 is confirmed by an assessment of the indicators of its fulfilment. They are as follows:

10.7.1 Recruitment cost borne by employee as a proportion of monthly income earned in country of destination

²⁵ Appellate Body Report, *EC – Tariff Preferences*, para. 163.

²⁶ SGT Target 10.c proposes to, ‘[b]y 2030, reduce to less than 3 per cent the transaction costs of migrant remittances and eliminate remittance corridors with costs higher than 5 per cent’. Its Indicator is ‘Remittance costs as a proportion of the amount remitted’.

10.7.2 Number of countries with migration policies that facilitate orderly, safe, regular and responsible migration and mobility of people

10.7.3 Number of people who died or disappeared in the process of migration towards an international destination

10.7.4 Proportion of the population who are refugees, by country of origin

27. In light of this interpretation, threatening the withdrawal of tariff preferences, as a means of inducing countries of origin to accept deportation and repatriation of their nationals, is the opposite of facilitating migration as a means of reducing inequality within and among countries, as envisaged by SDG 10. Interpreting Target 10.7 as imposing a facilitation of forced return of migrants appears to turn the objective pursued by SDG 10 on its head, proposing that it be attained by preventing and discouraging, rather than facilitating, migration.

28. Similar difficulties beset the objectives of ‘avoid[ing] a constant drain in active population in the countries of origin’,²⁷ proposed as a justification by the Commission, or of ‘[i]mproving sustainable reintegration and capacity building’, which the Council suggests is a means to ‘significantly strengthen the local development in the partner countries’.²⁸ To the extent that migration issues are addressed in international fora, developing countries that are beneficiaries of EU GSP consistently propose, support and encourage fewer barriers to international migration and more rights for transnational migrants to live, work and have their choices and efforts respected in their countries of destination. To imply that, by encouraging policies that promote exactly the opposite goals, a GSP scheme is responding to the development, financial and trade needs of developing countries, would be to void completely this requirement under Paragraph 3(c) of the Enabling Clause.

B. Readmitting Nationals and Tariff Treatment – Positive Response?

29. The second requirement imposed by Paragraph 3(c) of the Enabling Clause is that a GSP scheme – and any other preferential treatment granted under the Enabling Clause – must ‘be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries’ (emphasis added). In *EC – Tariff Preferences*, the Appellate Body interpreted the obligation to ‘respond positively’ as requiring a ‘nexus’, a relationship of means and ends, between the tariff preferences granted and a development, financial or trade need pursued by the GSP scheme.²⁹ This

²⁷ Commission Proposal, Recital 27.

²⁸ Council Mandate for Negotiations, Recital 26.

²⁹ Appellate Body Report, *EC – Tariff Preferences*, para. 164.

would mean, on the one hand, that ‘the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences’, and, on the other hand, that the preferential treatment provided can be shown to influence ‘the likelihood of alleviating the relevant “development, financial [or] trade need”’.³⁰

30. The most logical reading of the requirement of a nexus between preferences and the needs of developing countries is that preferential arrangements, to the extent that they include conditionalities for beneficiary countries, must be structured so as to reward efforts, by developing countries, to address widely-recognized development, financial or trade needs of developing countries.³¹ The current EU GSP Regulation, for example, provides for two ‘special arrangements’ to address particular needs.³² Developing countries may benefit from a ‘special incentive arrangement for sustainable development and good governance’ (GSP+). For this, they must ratify a set of conventions promoting human and labour rights, environmental conservation, and good governance; undertake to implement these conventions; and accept the activities of monitoring bodies under these conventions.³³ Least-developed countries may benefit from the ‘Everything but Arms’ (EBA) arrangement and export to the EU, tariff-free, all products excepts those classified as arms and ammunition.³⁴

31. Within this framework, current Article 19, in the 2012 GSP Regulation, would also seem to be essentially permissible. Article 19.1 permits the temporary withdrawal of preferential treatment, for all or certain products, in case of failure by a beneficiary country to fulfil conditions that, by and large, credibly address ‘development, financial and trade needs’ of developing countries, as affirmed by widely recognised conventions

³⁰ *Ibid*, para. 164.

³¹ The alternative interpretation would seem to impose even stricter conditions on GSP providers, rendering unlawful all use of preferences to fulfil needs, including development, financial and trade needs, that are not fulfilled by the very granting of the relevant tariff preference. This view would preclude, for example, all offering of further preferences to developing countries that agree to adopt and enforce multilaterally adopted or widely recognised labour or environmental standards, except to the extent that each preference can be shown to contribute, specifically and in itself, to furthering the relevant objective. In *EC – Tariff Preferences*, India initially challenged the WTO-compatibility of these additional preferences, but withdrew its challenge before arguing the matter before the panel (see Robert Howse, ‘Back to Court After Shrimp-Turtle? Almost but not Quite Yet: India’s Short Lived Challenge to Labor and Environmental Exceptions to the European Union’s Generalized System of Preferences’, 18 *American University International Law Review* (2003) 1333).

³² Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (GSP Regulation 2012), Recital 8.

³³ *Ibid*, Articles 9-16.

³⁴ *Ibid*, Articles 17-18. Further preferential treatment to LDCs, as compared to other developing countries, is explicitly permitted by Paragraph 2(d) of the Enabling Clause.

and instruments.³⁵ Although Article 19 operates by allowing the EU to withdraw preferences rather than granting them,³⁶ to the extent that one accepts that development, financial and trade needs of a country can be defined objectively, it is conceivable that the objective fulfilment of certain development, financial and trade needs can be bolstered by externally imposed conditions, evaluations and deterrents to non-fulfilment.³⁷ This is the premise, for example, of the various reciprocal and institution verification mechanisms in treaties that promote higher standards for labour and basic human rights and for environmental conservation, which are objectives currently widely considered part of a country's path to development.³⁸

32. By contrast, the ability to temporarily withdraw from a beneficiary country its GSP benefits, including GSP+ and EBA treatment, in response to 'shortcomings ... related to the obligation to readmit the beneficiary country's own nationals', seems to pursue an agenda that is unrelated to the development, financial or trade needs of developing countries and least-developed countries. A recent publication by the Organisation for Economic Co-operation and Development, for example, paints a complex picture, finding that '[e]migration can relieve underemployment, provide an incentive for skills upgrading and increase women's economic and social autonomy in the countries of origin' and '[r]emittances can help build financial and human capital in origin countries'.³⁹ Although the publication also explores the benefits of 'return migrants', these are defined as 'international migrants [who] decide to go back and settle - temporarily or permanently - in their countries of origin'.⁴⁰ The gains from return migration for a country of origin are likely to be higher for 'returning professionals with technological,

³⁵ Ibid, Article 19.1. Article 19.1(d) provides for the withdrawal of preferences in case of 'serious and systematic unfair trading practices including those affecting the supply of raw materials'. The compatibility of this provision with the Enabling Clause is beyond the scope of this consultation.

³⁶ Note that, in *EC – Tariff Preferences*, the Appellate Body found to be WTO-consistent solely 'the possibility of *additional preferences* for developing countries with particular needs, provided that such additional preferences are not inconsistent with other provisions of the Enabling Clause, including the requirements that such preferences be "generalized" and "non-reciprocal"' (Appellate Body Report, *EC – Tariff Preferences*, para. 168 (emphasis added)).

³⁷ See Lorand Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program', 6 *Journal of International Economic Law* (2003) 507. The challenge with this interpretation is that it makes the countries granting preferential treatment the arbiters, in principle, of what conditions to impose and how and when to respond to non-fulfilment. See Gregory Shaffer and Yvonne Apea, 'Law and Politics of Rights: Who Decides the Conditions for Trade Preferences?: Institutional Choice in the General System of Preferences Case' 39 *Journal of World Trade* (2005) 977.

³⁸ See Jutta Brunée, 'Compliance control', in Geir Ulfstein, Thilo Marauhn and Andreas Zimmermann (eds), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge University Press 2007), 373-390.

³⁹ OECD (2017), *Interrelations between Public Policies, Migration and Development*, (OECD Publishing, <https://doi.org/10.1787/9789264265615-en>), 18.

⁴⁰ Ibid, 57.

managerial, marketing or scientific competencies’, who ‘often create new companies, transfer knowledge and increase the human capital stock in their country of origin’.⁴¹

33. Immigration policies in the EU and its Member States focus on attracting and retaining so-called skilled migrants.⁴² Accordingly, the ability to threaten withdrawal of GSP treatment due to failure to readmit nationals is most likely to be applied in relation to a different group, those whom the 2015 *European Agenda on Migration* – which remains the guiding EU document in this field – terms ‘a serious problem’: ‘[u]nsuccessful asylum claimants who try to avoid return, visa overstayers, and migrants living in a permanent state of irregularity’.⁴³ Whichever opinions one might have about these immigrants, their prospects in their countries of origin and destination, and the policies that they are or should be subject to in these jurisdictions, it is difficult to imagine how enforcing their return through withdrawal of GSP treatment to their countries of origin ‘positively respond[s] to the development, financial and trade needs of developing countries’, as required by Paragraph 3(c) of the Enabling Clause.

V. CONCLUSION

34. The 1979 Enabling Clause, a component of WTO law, permits WTO Members to offer GSP programmes to developing and least-developed countries, derogating from the commitment under WTO law to offer all WTO Members most favourable treatment in trade relations. This permission is conditional upon the fulfilment by these programmes of requirements set out in the Enabling Clause. Among these requirements are those in Paragraph 3(c) of the Enabling Clause, which provides that differential treatment:

(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.

35. Paragraph 3(c) of the Enabling Clause thus requires GSP programmes to (a) respond to the development, financial and trade needs of developing countries; and (b) be designed and, if necessary, modified, to respond *positively* to these needs. In *EC – Tariff Preferences*, the Appellate Body found that ‘only if a preference-granting country acts in

⁴¹ Ibid, 33.

⁴² See, e.g., European Commission, *A European Agenda on Migration – Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, 13.5.2015 COM(2015) 240 final, 14 (‘Europe is competing with other economies to attract workers with the skills it needs’).

⁴³ Ibid, 7.

the “positive” manner suggested, in “respon[se]” to a widely-recognized “development, financial [or] trade need”, can such action satisfy the requirements of paragraph 3(c).⁴⁴

36. The proposed inclusion of Article 19.1(c) of the EU GSP Regulation would empower the EU to withdraw temporarily benefits under the GSP arrangement of a beneficiary country in case of ‘serious shortcomings ... related to the obligation to readmit the beneficiary country’s own nationals’. Whether or not the EU resorts to this temporary withdrawal, its mere presence in the GSP Regulation is incompatible with the overall objective of WTO rules of ensuring security and predictability in multilateral trade relations. As the WTO panel in *US – Section 301* noted, ‘[a] law reserving the right for unilateral measures to be taken contrary to [WTO] rules and procedures, may ... constitute an ongoing threat and produce a “chilling effect” causing serious damage in a variety of ways’.⁴⁵

37. The possibility of temporary withdrawal of preferences in response to failure to cooperate in migrant return and readmission does not satisfy either requirement imposed by Paragraph 3(c) of the Enabling Clause. It does not respond to the development, financial or trade needs of developing countries, as a whole or individually, but to a political objective of the European Union (or of political coalitions within it) in its relations with some of these countries. Additionally, and as a consequence, the proposed modification to the EU GSP scheme is not designed to respond positively to the needs of developing countries, either in the strict sense that ‘the particular need at issue ... can be effectively addressed through tariff preferences’⁴⁶ or in the broader sense of constituting an incentive for developing countries to act to address and fulfil widely recognised developing, financial and trade needs.

38. In sum, the current text of the proposed Article 19.1(c) of the EU GSP Regulation, which introduces the possible withdrawal of GSP, GSP+ and EBA benefits from beneficiary countries, following a finding by the European Union that there have been shortcomings in readmitting the beneficiary country’s own nationals, does not meet the conditions imposed on the design of GSP programmes by the Enabling Clause. As a consequence, this proposed provision is inconsistent with WTO law.

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⁴⁴ Appellate Body Report, *EC – Tariff Preferences*, para. 164.

⁴⁵ Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, adopted 22 December 2019 (WT/DS152/R), para. 7.88. The panel referred to the rules of the Dispute Settlement Understanding (DSU). The panel stated that ‘the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators’ (Ibid, para. 7.75).

⁴⁶ Appellate Body Report, *EC – Tariff Preferences*, para. 164.