Passing Political Pressure for a Development Agenda? WTO Law Limits to the Trade-Migration Linkage in the Proposed EU GSP Regulation

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SERIES OF BLOG POSTS ON MIGRATION AND TRADE PUBLISHED UNDER THE SUPERVISION OF PROF. ELSPETH GUILD

NUMBER 1

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This series of blog posts on Trade & Migration is published upon the initiative of Prof. Elspeth Guild in relation with the controversial proposal for a regulation on the scheme of preferences for developing countries that the Commission links to the issue of readmission of irregular migrants.

The European Commission proposed in 2021 to link EU trade preferences for developing and Least-Developed Countries (LDCs) to return and readmission of migrants by these countries. Following article 19 §1 of this proposal, "The preferential arrangements referred to in Article 1(2) may be *withdrawn temporarily*, in respect of all or of certain products originating in a beneficiary country, for any of the following reasons: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.

If it were adopted, this proposal would violate the EU's obligations under the rules of the World Trade Organization (WTO). Under international trade rules, Generalised Scheme of Preferences (GSPs) are permitted as a derogation from one of the cardinal rules of the multilateral trading system: the Most-Favoured Nation (MFN) treatment. WTO Members must in principle extend any trade advantage they offer to any country to each and every WTO Member. The derogation that allows trade preferences for developing countries and LDCs, called the 'Enabling Clause', was obtained following years of efforts from these countries at the United Nations Conference for Trade and Development (UNCTAD).

This Enabling Clause allows WTO Members to modulate their trade policies to facilitate trade from developing countries, permitting countries to offer preferential trade treatment to products from developing countries, and to offer even further preferences to LDCs, without having to extend these preferences to more advanced economies. To prevent this derogation from being abused and used as an instrument to impose political pressure and grant political favors, the Enabling Clause sets a number of conditions for GSP preferences to be lawful. Most relevantly for the issue at hand, Paragraph 3 of the Enabling Clause 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)

In examining this provision in the context of *EC—Tariff Preferences*, a dispute brought by India against the EU, a WTO panel and the WTO Appellate Body agreed that this paragraph sets out obligations for developed-country Members. Paragraph 3(a) indicates that preferences and GSPs 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. As regards paragraph 3(c), the Appellate Body found that 'only if a preference-granting country acts in the "positive" manner suggested, in "response" to a widely recognised "development, financial [or] trade need", can such action satisfy the requirements of paragraph 3(c)'.

Thus, the lawfulness of proposed Article 19.1(c), which would allow temporary withdrawal of preferences to beneficiary countries due to 'serious shortcomings … related to the obligation to readmit the beneficiary country's own nationals', depends on two questions. 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?

With regard to the first issue, it is generally accepted that GSP schemes may include conditionalities. The fulfilment of certain development, financial and trade needs of a country can be bolstered by externally imposed conditions, evaluations and deterrents to non-fulfilment. 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. Although questions have arisen regarding the unilateral administration of these conditionalities, in principle they meet the conditions of Paragraph 3.

By contrast, the ability to temporarily withdraw GSP benefits from a beneficiary country 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 LDCs. Demanding compliance with international obligations is not a permissible rationale for granting and removing trade preferences – or they would quickly lose their core objective of facilitating the trade of developing countries. The sole modulations permitted must attend to these countries' own development, financial and trade needs.

As regards the link between returning migrants and these objectives, the United Nations Sustainable Development Goals – invoked by the Council in its Negotiating Position – pose as a goal not to limit but to 'facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies'. And, although research by the Organisation for Economic Co-operation and Development suggests that returning migrants may bring benefits for a country of origin, these benefits are tied to migrants returning with highly sought-after skills and capital, especially 'returning professionals with technological, managerial, marketing or scientific competencies', who 'often create new companies, transfer knowledge and increase the human capital stock in their country of origin'.

The threat of 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 European Agenda on Migration terms 'a serious problem': unsuccessful asylum claimants who try to avoid return, visa overstayers, and irregular migrants. Whichever opinions one might have regarding the prospects of these immigrants 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 responds to the development, financial and trade needs of developing countries', as required

by Paragraph 3(c) of the Enabling Clause. As a result, the text currently proposed for Article 19.1(c) of the New 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 of the EU and its Member states.

In conclusion, the proposal to condition trade preferences on beneficiary countries facilitating the return and readmission of migrants is incompatible with the conditions for a WTO-compatible GSP scheme. Such a 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.

There is no hiding that the WTO system is currently under serious strain, largely owing to the so-called geo-economic turn in the trade policy of large economic powers. The EU's stated position is that it aims to preserve and strengthen the rules and institutions that govern global economic relations, a goal tempered by the concern with not becoming what former Commission President Juncker once termed 'naïve free traders'. Violating the multilateral trade rules, established to ensure that GSPs remain a tool for the development of developing countries rather than an instrument to pressure them politically, does not seem to address this concern. Given the clarity with which WTO rules preclude the proposed amendment to Article 19(c) of the GSP Regulation, withdrawing this element from the text would seem necessary to ensure continued rules-based treatment of developing countries in EU trade policy.

See a more thorough analysis of these issues in this Legal Opinion, written at the request of CSW and FIDH (International Federation for Human Rights)