

The EU's GSP+ arrangement as an alternative to the EPA process

Dr Lorand Bartels*

12 November 2007

I. Introduction

1. This advice discusses the European Union's 'GSP+' arrangement of special preferences for developing countries that commit to ratifying and implementing a set of human rights and good governance conventions, and in particular the question whether this is legally available to ACP countries as an alternative to concluding an EPA.

2. The term 'GSP+ arrangement' is frequently used as shorthand for the 'special incentive arrangement for sustainable development and good governance', one of three systems of tariff preferences in the EU's GSP Regulation.¹ The others are the normal GSP system of preferences for all developing countries and the 'Everything But Arms' system of preferences for least developed countries.

3. Part II of this advice will describe the GSP+ arrangement, Part III will set out its conditions, and Part IV concludes with a summary and an outline of the legal steps which need to be taken for an ACP country to benefit from the GSP+ arrangement.

II. The GSP+ arrangement

A. WTO rules

4. The WTO rules applicable to GSP programs, and to the GSP+ arrangement, are set out in the 1979 Enabling Clause² (now part of the GATT 1994). The Enabling Clause states that the most-favoured-nation obligation in Article I GATT is not applicable to the grant of preferences by developed WTO Members to developing countries in accordance with the Generalized System of Preferences as described in the 1971 GSP Decision of the GATT Contracting Parties.³ As a result, preferences under the Enabling Clause must be 'generalized, non-reciprocal and non-discriminatory'.

5. According to the WTO Appellate Body ruling in *EC – Tariff Preferences*, a developed country will not be in violation of the non-discrimination condition if it grants additional preferences to developing countries that share a special 'development need'. It is on this basis that the substantive conditions set out in the EU's GSP+ arrangement are justified.⁴

6. However, the Appellate Body also said that it was discriminatory for a preferential arrangement not to have an open application procedure for all developing countries. As further explained below, this means that the GSP+ arrangement, which is at present closed to new applicants, fails to meet the EU's WTO obligations. To comply with these obligations, the EU would either have to abolish the GSP+ arrangement (which is unlikely) or open it up to new applicants.

* University of Cambridge (lab53@cam.ac.uk).

¹ Arts 8-11 of Council Regulation 980/2005 of 27 June 2005 [2005] OJ L169/1 (the 'GSP Regulation'). All further references to Articles are to this regulation unless specified otherwise.

² Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries ('Enabling Clause'), Decision of 28 November 1979, GATT Doc L/4903.

³ Generalized System of Preferences, Decision of 25 June 1971, GATT Doc L/3545.

⁴ WTO Appellate Body Report, *EC – Tariff Preferences*, WT/DS246/AB/R, adopted 20 April 2004.

B. Beneficiaries

7. The GSP+ arrangement currently applies to fifteen countries. These comprise five South American countries (Bolivia, Colombia, Ecuador, Peru, and Venezuela), six Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama), as well as Sri Lanka, Moldova, Georgia and Mongolia.⁵

C. Coverage

8. The GSP+ arrangement provides for duty-free treatment of all products falling under the normal GSP arrangement. However for products on which both ad valorem and specific tariffs are applied, the ad valorem but not specific tariffs are eliminated. Also, specific duties on certain confectionary products (CN codes 1704 10 91 and 1704 10 99) are limited to 16 per cent of their value.

9. Major exceptions from the coverage of the GSP+ arrangement include bananas (except for dried bananas), sugar and rice.

D. Comparison with other preferential arrangements

10. The GSP+ arrangement is superior to the normal GSP arrangement as far as tariff preferences are concerned, but it is inferior to the EU's system of preferences for least developed countries, which provides for duty-free quota-free preferences for all products (though rice and sugar are still subject to staged liberalization until 2009).⁶

11. In two main respects the GSP+ arrangement is inferior to the preferences granted under both the Cotonou Agreement and the European Commission's (even better) duty-free quota-free market access offer for countries concluding an EPA. The first is in the limited coverage of the GSP+ arrangement, especially on bananas, sugar and rice. The second is in its rules of origin, which are inferior to those applicable in the Cotonou Agreement (and, most likely, the EPAs)⁷ on matters including the degree of tolerance afforded to non-originating inputs and cumulation. On the other hand, the EU's GSP rules of origin are currently being reformed, and it is likely that they will be improved in these respects.

12. In sum, notwithstanding certain respects in which the GSP+ arrangement is inferior to an EPA, at least for non-banana and non-rice exporting ACP countries⁸ it may represent an economically feasible alternative to the EPA process.⁹ It is also possible that the EU might expand the coverage of the GSP+ arrangement to other products of export interest to ACP countries. If so, however, the benefits of such action would need to be weighed against the possibility of increased competition

⁵ Commission Decision 924/2005 of 21 December 2005 [2005] OJ L337/50.

⁶ Art 12. There is presently a preference of 50 per cent on sugar and rice, and this will be increased to 80 per cent in July 2008 for sugar and in September 2008 for rice, and 100 per cent in July 2009 for sugar and July 2009 for rice.

⁷ Rules of origin for the EPAs are still under negotiation, but it may be presumed that they will still be superior to those granted under the GSP Regulation.

⁸ The future of the Sugar Protocol is beyond the scope of this advice; suffice it to note that the main issue concerns the guaranteed price of sugar under the Sugar Protocol, not market access, for which the EU is in any case entitled to a duty-free quota in its WTO schedule of concessions.

⁹ For this conclusion, based on a comparison of the product coverage under the GSP+ and Cotonou regimes, see TWN Africa/Oxfam, 'A Matter of Political Will How the European Union can maintain market access for African, Caribbean and Pacific countries in the absence of Economic Partnership Agreements', April 2007.

from other GSP+ beneficiaries in these product sectors. This would, for example, rule out any expansion of the GSP+ arrangement to cover bananas and rice.

13. A final point concerns the legal security of the GSP+ arrangement. At present, like the normal GSP arrangement and the EBA arrangement for least developed countries, the GSP+ arrangement exists as a unilateral EU Council Regulation subject only to the conditions set out in the WTO Enabling Clause. There is no obligation upon the EU to maintain a GSP or GSP+ arrangement, and the EU is therefore at liberty to amend or revoke these arrangements, so long as this does not discriminate between developing countries.

14. However, should it wish to, the EU also has the possibility of giving greater security to its GSP (and GSP+) arrangements by binding these preferences in its WTO Schedule of Goods under Article II of the GATT. It must be acknowledged that this has never been done for a GSP program, but there is no legal obstacle to such a course of action. It would be similar to binding tariff rate quotas, which is a common practice.

III. Conditions applicable to the GSP+ arrangement

15. The GSP+ arrangement contains a number of conditions, these being administrative, economic and political. In addition, as with the normal GSP arrangement, these preferences are not available to any developing country that is party to a free trade agreement with the EU that provides the same coverage and benefits (eg Chile).¹⁰

A. Administrative criteria: 31 October 2005 deadline for applications

16. The GSP+ arrangement was only available to countries that applied by 31 October 2005.¹¹ This means that there is no possibility of adding new beneficiaries to the GSP+ arrangement until 2009, when a revised GSP program comes into effect. For the following reasons, however, this condition violates the EU's WTO obligations.

17. In *EC – Tariff Preferences*, the WTO Appellate Body had to determine whether a predecessor to the GSP+ system (the so-called 'drugs arrangement') met the requirements of the Enabling Clause.¹² A central feature of the 'drugs arrangement' was that there was no application procedure for beneficiaries. This was considered to be discriminatory by the Appellate Body, which said this:

We find that the measure at issue fails to meet this requirement [non-discrimination] for the following reasons. First, as the European Communities itself acknowledges, according benefits under the Drug Arrangements to countries other than the 12 identified beneficiaries would require an amendment to the Regulation. ...¹³

18. Like the previous 'drugs arrangement', however, the EU's GSP+ arrangement lacks an application procedure for beneficiaries, and would 'require an amendment to the Regulation' in order for any other country to enjoy GSP+ benefits. There is no doubt that this aspect of the present arrangement violates the EU's WTO obligations.

19. The result is that the EU is obliged under WTO law to open the GSP+ arrangement to new applicants. As the present GSP+ arrangement is set out in a Council Regulation, any amendment will require a new Council Regulation, which can take some time. However, this should be possible

¹⁰ Art 3(2).

¹¹ Art 10.

¹² WTO Appellate Body Report, *EC – Tariff Preferences*, WT/DS246/AB/R, adopted 20 April 2004.

¹³ *Ibid*, paras 187.

within a few months. A second question concerns the risk that opening up the GSP+ arrangement to new applicants will be counterproductive, in the sense that competitors will be able to access the same benefits (from which they are currently excluded). This will be addressed in the next section.

B. Economic criteria

20. The GSP+ arrangement is only available to a subset of ‘vulnerable’ developing countries.¹⁴ This criterion of vulnerability is assessed according to three cumulative conditions:

- * Poverty. A country must not have been classified by the World Bank as a high income country during three consecutive years.¹⁵
- * Non-diversification of exports. A country’s five largest sections must represent more than 75 per cent of its GSP-covered exports to the EU.
- * Low proportion of EU imports. A country’s GSP-covered exports to the EU must make up no more than 1 per cent of the EU’s GSP-covered imports.¹⁶

21. It is to be noted that the first two of these conditions are a repetition of those applicable to any developing country benefiting from the normal GSP arrangement.¹⁷ It is the third condition that is important in assessing the potential for a country to benefit from the GSP+ arrangement.

22. Applying this condition to existing GSP beneficiaries (see Annex 1), the following countries would be ineligible for GSP+ preferences:

<u>South Asia:</u>	India, Bangladesh, Pakistan, Sri Lanka*
<u>S-E Asia:</u>	China, Thailand, Vietnam, Indonesia, Malaysia, Philippines
<u>South America:</u>	Brazil, Argentina, Ecuador*, Peru*
<u>Eastern Europe:</u>	Ukraine, Russia
<u>Middle East:</u>	United Arab Emirates, Saudi Arabia
<u>Africa:</u>	South Africa

NB: Sri Lanka, Ecuador and Peru would be excluded on this basis but are GSP+ beneficiaries on the basis of earlier figures.

23. It is evident from this list that many ACP competitors would not be eligible for GSP+ preferences even if the GSP+ arrangement were to be opened to new applicants. Naturally, a precise conclusion on this point would depend on a more detailed analysis of the export interests of the respective ACP country and its competitors.

¹⁴ Art 9(1)(e).

¹⁵ For existing beneficiaries, the relevant years were 2002-4.

¹⁶ Art 9(3).

¹⁷ Art 3(2).

C. Political criteria

24. The GSP+ arrangement is designed to encourage countries to meet certain human rights and good governance standards. According to the GSP Regulation, the rationale is that the additional preferences are granted in order to compensate countries for the cost involved in meeting these standards.¹⁸

25. Accordingly, the GSP+ arrangement required that a country:

- Ratify and implement a list of sixteen human rights conventions by 31 October 2005,¹⁹ and give an undertaking that it would continue maintain ratification and accept regular monitoring and review of implementation.²⁰ Countries facing ‘specific constitutional constraints’ had until 31 December 2006 to ratify and implement a maximum of two conventions.²¹ This applied to El Salvador.²²
- Ratify and implement at least seven of eleven listed ‘good governance’ conventions by 31 October 2005,²³ and the remainder by 31 December 2008,²⁴ and give an undertaking to continue to maintain ratification and accept regular monitoring and review of implementation.²⁵

The list of conventions are set out in Parts A and B of Annex III to the GSP Regulation and annexed to this advice.

26. The preferences may be withdrawn if the relevant conventions are no longer incorporated into domestic legislation or being effectively implemented.²⁶ The preferences may also be withdrawn for reasons common to the other GSP arrangements.²⁷

27. It is beyond the scope of this advice to detail the full ratification and implementation status of these conventions vis-à-vis the ACP countries. Suffice it to note that Seychelles and Ghana have ratified all required conventions and many other ACP countries have at least signed most of these.²⁸

28. Regardless of the state of ratification, it is strongly arguable that the GSP+ arrangement can be provisionally applied to countries in advance of ratification and implementation. This is for two reasons. First, one country (El Salvador) was granted 14 months to ratify and implement the required conventions on the basis of ‘specific constitutional constraints’ (which were not specified). There is therefore a precedent for a 14 month grace period for ratification and implementation during which preferences can be provisionally applied.

29. Second, this follows from the rationale of the GSP+ arrangement itself (that the additional preferences are granted in order to compensate countries for the burden of ratifying and implementing the required conventions). It is not only illogical to require that these conditions be met before the

¹⁸ Recital 7, GSP Regulation.

¹⁹ Art 9(1)(a).

²⁰ Art 9(1)(d).

²¹ Art 9(2).

²² Council Decision 978/2006 of 19 December 2006 [2006] OJ 365/86.

²³ Art 9(1)(b).

²⁴ Art 9(1)(c).

²⁵ Art 9(1)(d).

²⁶ Art 16(2). The Commission is also required to keep the ratification and effective implementation status under review and report to the Council in time for the next Regulation: Art 9(4).

²⁷ Arts 16 and 17.

²⁸ See Oxfam, ‘Why GSP+ CAN Be Used From January 1st 2008’, Background Note, 23 October 2007, Annex.

preferences are granted; it is also discriminatory, in that only applicants with the ability to fund ratification and implementation out of their own resources will be able to meet these conditions. Those who have no such resources are therefore ineligible for such preferences. Such discrimination also violates the EU's WTO obligations.

IV. Conclusions

30. The above discussion leads to the following summary conclusions:

* The EU's GSP+ arrangement is available for ACP countries as a matter of law. That is to say, the 2005 application deadline is inconsistent with the EU's WTO obligations, for reasons stated by the WTO Appellate Body in *EC – Tariff Preferences*. If the EU cannot be persuaded of this during informal consultations, it may be desirable to invoke WTO consultation and dispute settlement procedures.

* The EU's GSP+ arrangement is in principle economically attractive to ACP countries with the exception of banana and rice exporting ACP countries.

* Opening up the GSP+ arrangement implies the possibility that non-ACP competitors will gain the same benefits as any ACP GSP+ beneficiary. However, the 'vulnerability' condition operates to exclude most major ACP competitors.

* Some ACP countries (Seychelles, Ghana) have already ratified and implemented the necessary conventions, thereby meeting the substantive political conditions applicable to the GSP+ arrangement. For others, it is arguable that, according to the EU's rationale for the GSP+ arrangement and in order to avoid discrimination in violation of WTO rules, these additional preferences must be granted provisionally so that GSP+ beneficiaries are able to draw on the economic benefits thereby provided in order to support ratification and implementation of the conventions.

* While this is not mandatory, GSP+ preferences can be given legal security if the EU chooses to make a tariff binding of these preferences in its WTO schedule of goods under Article II GATT.

Lorand Bartels
12 November 2007

Annex 1: GSP Statistics for 2006 (Source: European Commission)

	<u>Total Imports</u>		<u>Eligible Imports</u>		<u>Preferential Imports</u>		<u>Utilisati</u>
	<u>X €1,000</u>		<u>X €1,000</u>		<u>X €1,000</u>		<u>on rate</u>
1 India	20.403.972,20	3,2%	11.678.638,08	11,0%	9.668.355,96	18,8%	82,8%
2 Brazil	23.412.144,12	3,7%	5.822.380,56	5,5%	4.522.398,81	8,8%	77,7%
3 Bangladesh	4.904.068,96	0,8%	5.145.896,12	4,8%	3.566.426,65	6,9%	69,3%
4 Thailand	13.088.039,91	2,1%	5.768.462,83	5,4%	3.107.573,63	6,0%	53,9%
5 Vietnam	6.197.372,21	1,0%	4.781.943,62	4,5%	3.009.954,18	5,9%	62,9%
6 Indonesia	11.001.895,69	1,8%	4.989.832,06	4,7%	2.881.934,82	5,6%	57,8%
7 Pakistan	3.011.456,23	0,5%	2.867.116,55	2,7%	2.298.079,86	4,5%	80,2%
8 Malaysia	15.822.638,34	2,5%	4.185.449,34	3,9%	2.102.764,01	4,1%	50,2%
9 Saudi Arabia	21.606.147,53	3,4%	3.009.114,08	2,8%	2.011.219,21	3,9%	66,8%
10 Ukraine	7.588.419,83	1,2%	2.389.627,89	2,3%	1.732.475,09	3,4%	72,5%
11 China (people's)	172.302.446,84	27,4%	2.677.083,16	2,5%	1.618.369,40	3,1%	60,5%
12 Argentina	6.539.830,21	1,0%	1.923.617,60	1,8%	1.536.933,70	3,0%	79,9%
13 Russia	104.114.256,05	16,6%	3.115.978,89	2,9%	1.391.302,62	2,7%	44,7%
14 South Africa	16.184.592,70	2,6%	5.012.226,50	4,7%	1.316.357,93	2,6%	26,3%
15 Sri Lanka	1.712.400,49	0,3%	1.454.641,77	1,4%	937.521,93	1,8%	64,5%
16 The Philippines	5.670.262,79	0,9%	1.464.232,19	1,4%	786.985,02	1,5%	53,7%
17 Ecuador	1.421.082,30	0,2%	824.848,19	0,8%	769.661,88	1,5%	93,3%
18 Peru	3.085.809,69	0,5%	712.931,83	0,7%	646.110,46	1,3%	90,6%
19 United Arab	5.135.087,20	0,8%	1.222.164,86	1,2%	615.165,02	1,2%	50,3%
20 Kazakhstan	11.620.868,71	1,8%	627.415,24	0,6%	494.225,98	1,0%	78,8%
Sub Total	454.822.792,00	72,4%	69.673.601,34	65,6%	45.013.816,14	87,5%	64,6%
Total	628.271.830,70		106.133.875,52		51.435.225,25		48,5%

Annex 2: Conventions referred to in Article 9 of the EU GSP Regulation

Core human and labour rights UN/ILO Conventions

1. International Covenant on Civil and Political Rights
2. International Covenant on Economic, Social and Cultural Rights
3. International Convention on the Elimination of All Forms of Racial Discrimination
4. Convention on the Elimination of All Forms of Discrimination Against Women
5. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
6. Convention on the Rights of the Child
7. Convention on the Prevention and Punishment of the Crime of Genocide
8. Convention concerning Minimum Age for Admission to Employment (No 138)
9. Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No 182)
10. Convention concerning the Abolition of Forced Labour (No 105)
11. Convention concerning Forced or Compulsory Labour (No 29)
12. Convention concerning Equal Remuneration of Men and Women Workers for Work of Equal Value (No 100)
13. Convention concerning Discrimination in Respect of Employment and Occupation (No 111)
14. Convention concerning Freedom of Association and Protection of the Right to Organise (No 87)
15. Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (No 98)
16. International Convention on the Suppression and Punishment of the Crime of Apartheid.

Conventions related to the environment and governance principles

17. Montreal Protocol on Substances that Deplete the Ozone Layer
18. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal
19. Stockholm Convention on Persistent Organic Pollutants
20. Convention on International Trade in Endangered Species of Wild Fauna and Flora
21. Convention on Biological Diversity
22. Cartagena Protocol on Biosafety
23. Kyoto Protocol to the United Nations Framework Convention on Climate Change
24. United Nations Single Convention on Narcotic Drugs (1961)
25. United Nations Convention on Psychotropic Substances (1971)
26. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)
27. United Nations Convention against Corruption (Mexico)