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Generalized System of Preferences in General Agreement on Tariffs and Trade/World Trade Organization: History and Current Issues

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The present study investigates the history of the General System of Preferences within the General Agreement on Tariffs and Trade (GATT) and World Trade Organization (WTO) systems with a particular view to define how developed and developing countries adapted their market policies to the demands of the multilateral trading system (MTS). It analyses the role of the most-favoured-nation (MFN) clause and its consequences to developing countries' interests, within its parameters of differential market access. The study tries to explain the treatment of preferences in an objective light, presenting two current case studies: the formulation of the American GSP scheme and the dispute of India and the European Union in the WTO about the European Union's GSP scheme. In addition to this, the study focuses on the conflict among developing countries on the issue of special and differential treatment. This focus will lead to a renewed reading of the history of MTS that takes into consideration the frailty of developing countries' unity and that tries to understand why and to what extent this unity shattered along the way.

I. INTRODUCTION

Ever since the most-favoured-nation (MFN) clause became the cornerstone of the multilateral trading system (MTS), how to implement special and differential market access for developing countries has been a major pending issue in international trade negotiations.

Apart from very few exceptions, MFN disallows discriminatory practices such as allocating a more or less favourable treatment to products originating from one country compared to similar products from another. Nonetheless, since the creation of the GATT, in 1947, and of the WTO, in 1995, the MTS has witnessed several attempts to make this rule more flexible and encourage developing countries' participation. One of the basic instruments for this change was to give "preferences" for developing countries' exports. John Jackson most precisely and succinctly defined the concept of preferences. To him:

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> "... 'preference' generally refers to tariff preferences. The basic idea is that products from less developed countries that are to be imported into an industrialized nation would be subject to a tariff rate by the industrialized nation that would be less than the rate applied to products from a source other than a less developed country".[2]

Developing countries' historical effort in advancing the idea of preferences to boost economic growth culminated in the creation of a generalized system of preferences (GSP) in the 1970s. This new system would fulfil the demands of developing countries and, at the same time, preserve the existing multilateral trading system principles. Granting preferential access to certain products from developing countries without reciprocal liberalization, the GSP was to be a positive step towards a more balanced and integrated global trade partnership.

More than three decades since its advent, non-reciprocal market access still remains one of the basic tenets of the quest for special and differential treatment in developing countries' agenda. Nevertheless, non-reciprocal preferences under GSP have been very controversial, and have engendered highly contentious legal (e.g., their relationship with Article I of the GATT most-favoured-nation principle), political (e.g., their use as political leverage against developing countries) and economic debates (e.g., whether they have been efficient in boosting developing country export-led growth). These are but a few examples of the problems the GSP has been facing, which should be dealt with in upcoming WTO negotiations.

Many studies have been published about different GSP related aspects. This study aims to formulate the main issues surfacing since the GSP's inception. Hence, it will review the history of GSP, keeping in mind the challenges it faces at present. This study thus proposes to:

(1) Review the historical background of GSP and the nature and evolution of the development issue in the MTS, focusing on the existing contending theories;
(2) Expand on how "special and differential treatment in market access" became the premise for development for poorer countries and illustrate the diverging perceptions among exponents of the developed and developing world;
(3) Evaluate the two major GSP programmes involving the United States and the European Communities.

The following topics summarize the key ideas and premises underlying the work:

(1) Demand for preferential market access is one of the basic tenets that guide developing countries in their quest for development.
(2) Preferential market access did not occur the way developing countries intended.
(3) Preferential market access is a device that can ultimately be used by developed countries as a source of leverage towards developing countries. Lately, for

[2] Jackson (1969), p. 661.

instance, the granting of preferential market access to developing countries has been used by the EC and the United States based on actions related to, *inter alia*, illegal drug trade, environmental protection or the safeguard of certain labour standards.

(4) Since the advent of GATT, there has been an increasing differentiation among developing countries. This has brought increased concern about how to adapt preferential market access to this situation.

(5) Since the advent of the WTO, several panels have been installed to monitor the preferential market access developed countries have. This points to existing concerns over how harmoniously the GSP can coexist with the MTS.

II. Historical Background

The concept of preferences finds its roots in post-war trade relations. It was first discussed in the negotiations that led to the Havana Charter, originating as an issue between Europe and those countries that had been its colonies. At that time, the United States and Latin American countries opposed the preferences issue on the basis that it allowed preferences from former colonies towards their colonial powers—called ''reversed preferences''—while discriminating other developing countries. Throughout the 1950s, developing countries tried several formulas to adapt the GATT to their specific demands, many of which led to modifications and additions to the legal text.

In the 1960s, developing countries started to look into other forums and instruments to accomplish their objectives. They introduced and discussed preferences in the first and second United Nations Conference on Trade and Development (UNCTAD). After years of negotiations, developing countries adopted a framework for each developed country to devise its own GSP programme, within the limitations of some general rules. Most negotiations in this phase occurred within the scope of United Nations Conference on Trade and Development (UNCTAD), United Nations (UN), Organization for Economic Cooperation and Development (OECD) and the Group of 77.

The idea of preferences was evidently incompatible with the MFN embodied in GATT. In order to make GSP programmes compatible with GATT rules, the 1971 negotiation introduced a waiver to the MFN clause that would permit GSP for ten years, or until 1981. After this decision was reached, both developed and developing countries felt a growing need to harmonize GSP with GATT obligations. Following the end of the Tokyo Round in 1979, GATT contracting parties therefore agreed to perpetuate the GSP authority given by the 1971 Waiver.

The historical background on negotiations and implementation of GSP schemes underscores many important issues within the current international trade relations system. First, it demonstrates how specific topics in the system's agenda can divide developing countries among themselves as well as interfere in their relations to the

developed ones. Second, it is a living example on how policies demanded by developing countries can sometimes have deleterious effects to their own economic development.

A. THE HAVANA CHARTER AND THE ADVENT OF GATT

The Havana Charter was the product of three preparatory conferences and culminated in the historical "United Nations Conference on Trade and Employment", held in Havana between November 1947 and March 1948.[3] The segmentation of interests between developed and developing countries first appeared in these preparatory conferences: developed countries were trying to implement embedded liberalism—a combination of liberalization abroad with domestic state activism and welfarism—while developing countries were worried about the implications of the proposed Charter. For instance, in the preparatory conference of 1946, several "non-industrialized countries protested the absence of any provisions dealing with their problems",[4] the forbiddance of using any kind of quantitative restriction being the central issue for them.

The cleavage between developed and developing countries was primarily shaped by the conflict of two contending approaches of political economy. The first approach is based on the non-discriminatory and liberal ideas that reflect David Ricardo's theory of comparative advantage. The second approach opposes the notion of comparative advantage to the idea that developing countries experience detrimental terms of trade in relation to developed countries, and that they should therefore boost changes in their trade patterns by restricting the amount of imported industrialized products, diversifying their national production and promoting export of industrialized products. One of the main proponents of this last strand is the Argentinian economist Raúl Prebisch.[5] The Havana negotiations can thus be said to coincide with the onset of this clash of economic views in international negotiations.[6]

Developing countries contributed more than 800[7] amendments in Havana reflecting the demands of commodity price controls, quantitative restrictions for balance of payments and longer deadlines for commitments, among other exceptions. Several of them were accepted and, as a result, the Havana Charter, which would lead to the creation of an International Trade Organization (ITO), included a chapter on

[3] India, Cuba, Brazil, China, Lebanon, Argentina and Chile were the prominent developing countries in the conferences, but it was Australia, considered a developing country at that time, that led the groups' discontent. Cf. Capling (2001), p. 15, and Jackson (1969), pp. 625–671.

[4] Jackson (1969), p. 628.

[5] He exposed his theory of development in a popular article, published in 1949, that would highly influence the works of Economic Commission for Latin America (ECLA). Prebisch (1949).

[6] In 1949, Clair Wilcox comments that "from all of the less developed countries of the world, moreover, there comes an insistent demand for rapid industrialization and for freedom to promote industrialization by restricting trade". Wilcox (1949), p. 486.

[7] "... Nearly a quarter of which would have destroyed the very foundations of the enterprise", as Capling stated. Capling (2001), p. 32.

Economic Development and Reconstruction (Articles 8 to 15) and another on Inter-Governmental Commodity Agreements (Articles 55–70).

Due to its non-ratification, the ITO never came into being. Consequently, the GATT remained the primary framework of international trade for the greater part of the Western world up until 1995. Developing countries then devoted several GATT meetings in trying to reintroduce the "development dimension" in international trade relations.

The following pages outline the main demands of developing countries in early GATT sessions, explain their frustration with the measures taken until then and their reasons for choosing preferential market access to boost their development.

B. Developing countries pressuring to change GATT: the amendment of article XVIII

One of the greatest efforts of developing countries in GATT's incipient ten years was to introduce reforms that would grant exemptions for import substitution and protection of infant industry. Since quantitative restriction was generally prohibited under Article XI of GATT, developing countries started pressuring for modifications to Article XVIII, which deals with "escape clauses", calling for the introduction of quotas based on each country's balance-of-payments.[8]

In 1955, the Review Sessions of GATT made modifications to Article XVIII. According to the report then issued:

> "... the new text represents a new and more positive approach to the problem of economic development and to the ways and means of reconciling the requirements of economic developments with the obligations undertaken under the General Agreement regarding the conduct of commercial policy".[9]

The modified Article XVIII relevantly constitutes the only instance that gathered the contracting parties in an effort to amend the General Agreement. In addition, the new text implied the "incorporation within the terms of GATT itself of the infant industry protection view of economic development".[10]

In a nutshell, developing countries focused primarily in acting *within* the framework of GATT in their quest for development.[11]

C. From the Haberler report to the addition of part IV of GATT

Amendments to Article XVIII were perceived to be insufficient to solve the economic problems of developing countries. The GATT 1957 Annual Report stated

[8] In this session, the contracting parties added seven more paragraphs in Article XVIII.
[9] GATT (1955), p. 79.
[10] Howse and Trebilcock (1999), p. 369.
[11] "In 1956, Article XVIII was amended to increase the ease with which it could be used for economic development and to eliminate the possibility of its application to postwar reconstruction." Evans (1971), p. 119.

that, "the exports of the industrial areas rose much faster than those of the remaining parts of the world".[12] Besides, the high fluctuations of commodity products and the Treaty of Rome (1957)[13] introduced new constraints that corroded developing countries' confidence in the system. The Haberler Report published in October 1958 exposes this trend[14]:

> "We think that there is some substance in the feeling of disquiet among primary producing countries that the present rules and conventions about commercial policies are relatively unfavorable to them [and] it would be unwise to count upon any improvement in the terms of trade of the non-industrial countries to raise their ability to purchase imports."[15]

The Haberler Report was fundamental for the discussion of development policy within the GATT. In the same year, the contracting parties decided to establish an "action programme" in order to study the specific problems faced by developing countries in the international economy. In fact, it was a turning point as it meant that:

> "... the benefits they [developing countries] were to derive from their participation were no longer assumed to depend on what they were able to offer in return. Their wealthier partners had tacitly abandoned the expectation of reciprocity in favor of a sense of unilateral obligation".[16]

We have to bear in mind that while this report was aware of the problems challenging developing countries, it fell short of practical measures to overcome them. Notwithstanding its rhetorical nature, however, the Haberler Report gathered the necessary sources to implement changes within GATT. Therefore, beginning with the GATT Ministerial Meeting in autumn 1961, the contracting parties occupied themselves with setting new provisions that would formalize and institutionalize the effort to expand exports of less-developed countries.[17] This led to the creation of Part IV of the GATT Agreement in 1964.

Part IV of GATT institutionalized the notion that developing countries were entitled to "special and differential treatment" in the GATT system. It implied that deviations from GATT's principles that could enact most favourable terms for developing countries in the MTS would be accepted under certain circumstances. It also entailed a new perception of developing countries concerning the means through which they could achieve development. One of the most direct means was the developed countries' non-reciprocity of concessions for developing counterparts. Pushing for non-reciprocity would, in this sense, result in a new policy that would "set the scene for the granting of non-reciprocal trade preferences to developing countries

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[12] GATT, *International Trade, 1956–1957*, p. 8.

[13] See Brusse (1997) for European Economic Integration impact in the GATT. For a briefer evaluation see Bretherton and Vogler (1999), pp. 46–78.

[14] Two expert groups were formed by GATT during its existence to study the challenges the system faced and make suggestions enabling Contracting Parties to implement important modifications in the system. The first one resulted in the Haberler Report of 1958 and the second one resulted in the Leutwiler Report of 1985. About those groups, see Croome (1995).

[15] GATT, *Trends in International Trade* (Haberler Report 1958), pp. 11–12.

[16] Evans (1971), p. 120.

[17] Id.

through mechanisms outside the GATT",[18] accelerating the pace of growth in these economies. Since then, the belief that an asymmetry in international trade relations exists would shape the entire system of trade and tariff agreements.

The structure of Part IV of GATT differs slightly with the modifications of Article XVIII. While the latter had the purpose of relaxing GATT structures to "enable developing countries to pursue *inward-looking* growth policies based on protection and promotion of infant industries",[19] Part IV addresses the demand of developing countries to access developed country markets, and therefore appears, at least implicitly, to endorse an *outward-looking* strategy.

The new Part IV, however, set forth principles and objectives rather than legal obligations, as these objectives would not produce any concrete commitments for developed countries.[20] With the advent of Part IV, the development issue grew out of the confinement of GATT's agenda to reflect widespread perception of the need for the system to address legitimate demand for equal chance of development.

D. Prebisch and the "new" old idea

Both the insertion of Part IV and international economic developments in the 1960s summoned GATT contracting parties to address the problematic insertion of developing countries into world economy. But, as we have seen, those developing countries that were members of GATT were increasingly sceptical about its activities. Hence, these countries effectively use the "First United Nations Development Decade" as an opportunity to advance an alternative idea of international economic relations,[21] which would fulfil the institutional gap left by the ITO and deal with their specific demands.[22]

Among the suggestions offered, the most noteworthy was the call for a conference[23] that would "... consider ways of bridging the gap between what developing countries [would] need in foreign exchange to finance their import requirements for development and what they [were] likely to earn in foreign exchange from exports of goods and services".[24]

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[18] Howse and Trebilcock (1999), p. 373.

[19] Ibid., p. 371. Italics added.

[20] Jackson (1969), p. 649, and Howse and Trebilcock (1999), p. 371.

[21] "It was in the session of 1961 of the United Nations that the General Assembly in Resolution 1707 (XVI) asked the Secretary-General to consult with member governments about convening a global conference on trade." Weiss (1986), p. 25.

[22] According to Weiss (1986, p. 29), that would include "the preoccupation with reducing barriers among industrialized countries and then 'multilateralizing' agreements to developing countries; the provision for reciprocity that frequently penalized the weaker among unequal trade partners; the relative neglect of the particular problems of developing countries; and the exclusion of socialist countries."

[23] Developing countries had a primary role in pushing for the Conference under the Economic and Social Council of the United Nations. For precise details about the economic environment and the political circumstances of the early 1960s, see Metzger (1967).

[24] Gardner (1968), pp. 696–697.

The call for the UNCTAD I also drew attention to the consequences of "the 'drop in the prices of primary commodities' . . . and the worsening in the terms of trade of developing countries with developed countries", thus emphasizing that "measures to impart stability in international commodity markets at remunerative levels are vital to less developed countries".[25]

It was at that time that Raúl Prebisch, who had been the Secretary-General of the United Nations Economic Commission for Latin America (ECLA) and would also be the General Secretary of UNCTAD in its first years, formulated the ideas that since then have shaped the debate of development.

Just before the Conference, Prebisch wrote a report in which he acknowledged that the "concern that the long-term prospects for most of the basic commodities in which they [developing countries] specialize are not encouraging", besides that "they [developing countries' officials] believe[d] that they must increasingly become exporters of manufactured products, both because it would lead to more rapid export expansion and because of its 'linkage' effect in inducing investment in related sectors of the economy".[26]

For Prebisch, import substitution would take place at the regional level, while development of industrial exports would be boosted by preferential treatment in advanced foreign markets. Under the Secretariat of UNCTAD, he suggested that GATT's practice of equal treatment overlooked developed and developing countries' fundamental disparity in bargaining power. Thus, discriminatory preferences in favour of less developed countries were seen as a means for enabling them to come closer to "real equality treatment".

However, if on one hand Prebisch was eager to advance a system of generalized preferences, on the other he was deeply concerned about the political opposition that his ideas would cause in developed countries. This preoccupation led him to limit his proposal for preferential market access for developing countries to a certain extent.[27] The main objectives of the generalized, non-reciprocal, non-discriminatory system of preferences in favour of the developing countries advanced at that time were to increase their export earnings, to promote their industrialization and to accelerate their rates of economic growth. Under GSP schemes of preference-giving countries, selected products originating in developing countries were granted reduced or zero tariff rates over the MFN rates.[28]

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[25] Metzger (1967), pp. 758–759.

[26] Id.

[27] First, he "emphasized that preferences need not be given to LDC [less developed countries] industries that already were competitive internationally". Second, that "preferences might be limited to manufactures and semi-manufactures, if a satisfactory definition of those terms could be found coupled with a time limit of no more than ten years to a particular less developed countries industry. In addition, he argued that developed countries would be protected against disruptive import competition by several safeguards provisions". Product coverage (limitation to some items that would be eligible for preferences) was another controversial issue for Prebisch. He was concerned that "internationally agreed limits on product coverage would sink such coverage to the most restrictive common denominator and thus preferred that all LDC exports be eligible in principle". Quotes from Graham (1978), p. 515

[28] Resolution 21(ii) taken at the UNCTAD II conference in New Delhi in 1968.

It must be noted that while relevant in its own terms, the existence of preference was not a complete novelty. Since the advent of post-war trade negotiations, there existed a special arrangement according to which "any preferential trade agreements already in place at the time of signing the Geneva Agreement in 1947 [GATT] were still accepted".[29] Therefore, since that time, reciprocal (and not unilateral as the Prebisch stance) agreements were allowed between Europe and the majority of Western European former colonies and overseas territories. But while Europeans prioritized sustaining ties with former colonies, American commercial officers tended to reject anything that could derogate MFN.[30] Latin American countries also attacked the preferences, as they potentially could lose their European markets for products traded under such arrangements.

A delicate compromise bridged the gap between both positions. Although European preferential associations were internalized in GATT, a "no-new-preference" rule would be created that would increasingly dismantle those preferences called "reversed preferences" as the former colonies and overseas territories had to give a preferential access for European products in their markets for their part.[31] As opposed to the "generalized" character of the arrangement advanced by Prebisch, the "colonial preferences" were selective and discriminatory among developing countries. Several analysts, therefore, considered the nature of associations between former colonies and Europe as separate free-trade areas between European Economic Communities (EEC) metropolitan countries and each of the 18 overseas territories as reciprocal.

E. Developing countries versus developing countries—the outset of a rivalry

Since the advent of GATT, the cleavage between the former colonies that had special market access and other developing countries grew in significance. With the advancement of the idea for the first UNCTAD, Latin Americans, led by Brazil, Argentina and Chile, devised a two-track strategy to cope with the challenge of the "colonial preferences" issue in the early 1960s. First, they criticized the "selective preferences" of EEC as they were harmful to their trade interests, and gave their support to Prebisch's proposal for a general plan of preferences that would include all developing countries and extend to agricultural products. Their stance in multilateral forums was highly influenced by this approach. Second, they tried to persuade American policy-makers to create a preferential trade bloc to compensate for the discriminatory treatment of Latin American goods in European markets.[32] This option

[29] Brusse (1997), p. 52.

[30] For a good assessment about the battle between American "purist" and European "Keynesians" in trade preferences in the early postwar trade negotiations, see Zeiler (1998).

[31] France was especially eager in demand full reciprocity in this kind of agreement. For instance, see negotiations between the European Economic Community and Nigeria in Zartman (1971). Cf. Rothstein (1977), p. 151, and Bhattacharya (1976), p. 79.

[32] "During the 1960s, the idea of a selective, hemispheric preferential scheme between the United States and Latin America received powerful support from important statesmen in Latin America, chief among whom were Roberto Campos . . .". Bhattacharya (1976), p. 82.

was soon abandoned, as Prebisch argued at UNCTAD that regional North–South trade blocs would signal the return of a ''new form of colonialism'', which would convince Latin Americans to work for a general arrangement on preferences.

The fear that developed countries would continue to favour one group of developing countries against another unleashed a dynamic of fragmentation within the notorious solidarity the developing countries customarily showed around the issue of ''preferences''.

Developed countries themselves were, at that time, divided among different approaches and reactions concerning the preferences issue. Some of them accepted the idea and put forward clear proposals for its implementation. Bhattacharya detected important diverging views among developed countries, which constitute Group-B in UNCTAD I[33]:

- The British proposal, supported by West Germany, Holland and Denmark, that favoured general preferences, subject to burden-sharing and abolition of selective preferences;
- The Brasseur Plan put forward by Belgium, France, and Italy, that advocated a selective scheme on a worldwide basis;
- The Australian plan for unilateral general preferences based on ''competitive need'' and quotas;
- The US position, supported by Japan, Switzerland, Austria and Norway, that opposed preferences and advocated non-discriminatory trade liberalization measures—especially within GATT mandate under the Kennedy Round.[34]

Although the discussions about preferences heated the debate at UNCTAD I, no substantial decision was reached. The main reason was the solid American stance that, as we had discussed earlier, preferences would create ''a defective basis for proceeding towards economic development'' and ''vested interests against multilateral tariff reductions''.[35] Nevertheless, as we will see in the following sessions, in the long run developed countries were able to accomplish something extremely important to strengthen their position—they agreed on a set of common objectives, while Latin American, African and Asian countries continued to disagree within the illusively unified G-77.

[33] The member states of UNCTAD are categorized according to membership in negotiations groups, combining geographic, economic and ideological considerations. Group-B comprised all developed countries. For more information about Group Negotiations in UNCTAD, see Weiss (1986).

[34] Bhattacharya (1976), p. 77.

[35] Ibid. For an excellent assessment of the American position in UNCTAD I and its impact in US public opinion see ''Mr. Ball's Geneva Homily'', New York Times, 26 March 1964, p. 34.

F. Advances and setbacks: UNCTAD II and the waiver in GATT

Although the UNCTAD meeting of 1964 was one of the major events in international multilateralism—more than 4,000 delegates from over 100 countries participated in the discussions—it reached no agreement concerning the preference issue.

One of the reasons was the fact that the United States refused any arrangement that could undermine the principles of the economic multilateralism embodied in GATT's MFN. From 1964 until an informal meeting session of the Chiefs of State in Punta del Este (Uruguay) held in April 1967, the Americans held the same position. But in Punta del Este, they reversed their position and announced their support for negotiating guidelines with developed countries to give temporary tariff advantages for all developing countries.

The following year, in the UNCTAD II meeting held in New Delhi, a remarkable shift took place. After years of discussion, the will to devise GSP programmes was finally recognized by all countries in the conference. This recognition is highly important as for the first time since the advent of GATT system the golden rule of western trade relations—the most-favoured-nation principle—, which had been abided several times was agreed to without substantial outcry either from developing or developed countries.

Despite the fact that GSP was the reward of more than seven years of pressure from developing countries, the results of the final configuration were not very clear at that time. The first thing to consider is what common stance was taken by the developed countries. The second is the more modest stance articulated by the developing countries.

In relation to the first aspect, the policy reversal of the American administration towards the issue of preference provided the impetus for negotiations within the developed countries group. Henceforth, several meetings were held under the auspices of the OECD to bridge the positions of developed countries. It was agreed that in any scheme they would reserve the right to:

(a) exclude certain less-developed countries from the scheme;
(b) determine the product coverage of the scheme;
(c) determine rules of origin;
(d) determine the duration of the scheme;
(e) reduce preferential margins by lowering or removing tariff on imports from each other;
(f) determine the size of the tariff cuts affecting the preferences;
(g) include safeguard mechanisms in escape clauses.[36]

[36] Wall (1971), p. 91.

Thus, their agreement sabotaged the creation of significant GSP schemes, giving developed countries "loose commitments with strong escape provisions" rather than "strong commitments with loose escape provisions".

Meanwhile, developing countries tried to harmonize their stance. In 1968, some countries tried to "split the differences" among the group members. The Latin American group, for example, dropped its demand for immediate abolition of selective preferences.[37] The African countries group, most of them beneficiaries of selective preferences from their former colonial powers, agreed with an "effective beneficial participation" to a non-discriminatory system among developing countries—a true fully generalized system.[38]

Developing countries agreed that GSP would entitle them to a 20-year duty-free treatment for all exports, which would then only be subject to (internationally monitored) developed country domestic safeguards.[39]

Although developing countries considerably advanced in their coalition regarding preferences, developed countries achieved a much more unified coalition, or stance.

Another element that determines the success or failure of UNCTAD II is its extremely vague final document, in which all countries—including the United States—accept the need for a generalized scheme of preferences for developing countries. UNCTAD II resulted in the creation of a Special Committee on Preferences that was set up within the UNCTAD permanent institutional framework to provide a forum for discussion on the details of the System. This Committee worked through 1968 and 1969, serving to reduce the gap in political positions. One of the perils that developing countries feared was that developed countries would use "the scheme as an excuse for introducing an array of protective devices into their trade relations with less developed countries".[40] Many developed countries insisted that GSP scheme was a certain kind of "aid" and contended they could completely or partially remove the tariff preference on any item at any time without consulting their trading partners.

Developing countries' fear did not dissipate altogether, but an agreement was reached in autumn 1970 to finally secure the existence of GSP. Although considered a pact that introduced "a new era in international trade relations", no government had committed its signature to a binding document of any kind. It was, in fact, a "determination on the part of the so-called 'donor' nations to seek such approval [of the national government requirements] in order that the preferential tariff treatment" could take effect "as early as possible in 1971".[41]

The agreement reached in the Special Committee on Preferences marked the outset of the preferences for developing countries not as a theoretical issue like in the early 1960s or as a set of contending proposals typical of the late 1960s, but as a

[37] Like those offered by the European countries to their former colonies.
[38] Bhattacharya (1976), p. 89.
[39] Graham (1978), p. 518.
[40] Wall (1971), p. 95.
[41] Lusinchi (1970), p. 77.

framework that would provide the guidelines under which developed countries could create preferential market access for developing countries.

The agreement meant that all countries that designate themselves as "developing" were entitled to benefit from the new trade arrangement. Still, each of the industrialized countries had reserved the right to exclude any country it judged unacceptable from its tariff concessions. Another constraint was that preferential treatment was "subject to certain stringent quantitative limitations and was applicable only for a period of ten years from their institution by the preference granting countries".[42]

The EEC was the first entity to create a scheme, the United States the 23rd and most recent.[43] But its implementation brought on several problems for developing countries. The US scheme, for instance, excluded communist countries unless they were members of the International Monetary Fund (IMF) and contracting parties of the GATT. It also excluded members of the Organization of Petroleum Exporting Countries (OPEC) that participated in any action that could impair the trade of vital supplies and any country that appropriated US property without adequate compensation.

The Western European programme, for its part, had quotas for several products, including many of which developing countries were exporting competitively. Furthermore, the European Preferences embodied in the Lomé Convention (1975) contained a set of provisions that did not benefit all developing countries, which arguably "did not conform with the terms of the GATT"[44] provisions related to special and differential treatment.

Hence, as Iqbal states, the exclusion of countries for reasons other than economic development, associated with interrupted preferential treatment, interfered with the important objectives with which this programme was entitled.[45]

Therefore, although 1970 bore an agreement on GSP, it was soon recognized that the final legal authority for a GSP programme would have to be taken in GATT. In order for developing countries to get better terms for implementation of the issue, a temporary or definitive formula was needed, in which the most favoured nation would be abided in a waiver. As a consequence, any preferential access given by developed countries in GSP schemes would not be extended to other contracting parties.

In 1971, a ten-year waiver was negotiated within GATT that enabled the establishment of "generalized, non-reciprocal and non-discriminatory preferences

[42] Iqbal (1975), p. 34.

[43] The order of approval of the most important programmes is the following: European Economic Community (July 1971), Japan (August 1971), Norway (October 1971), Denmark Finland, Ireland New Zealand, Sweden, and the United Kingdom (January 1972), Switzerland (March 1972), Austria (April 1972), Canada (1 January 1974) and United States (1976). Denmark, Ireland and the UK upon joining the EEC, replaced their schemes with the EEC scheme on 1 January 1974. Several East European countries have also implemented GSP schemes. Cf. Iqbal (1975) and Graham (1978).

[44] Howse and Trebilcock (1999), p. 373.

[45] Iqbal (1975), p. 38.

beneficial to the developing countries".[46] The waiver authorized each developed country to establish its own GSP programme, provided that they would benefit all developing countries. It was left to the very developed countries' discretion to define what a developing country was to benefit from GSP programme.

Several developing countries that had previously benefited from special preferential arrangements were not pleased about GSP. Indeed, some countries in Africa, which enjoyed preferential trade treatment in the EEC, thought they might be worse off should they be obliged to share these on an equal basis with other developing countries. Here, therefore, the interests of developing countries still diverged.[47] For instance, the procedures in this year related to GSP were highly politicized in a way that "in the closed vote on GSP at GATT, many of the LDCs [least-developed countries] that enjoyed preferential arrangements voted against the GSP".[48]

After the acceptance of the waiver, there was a widespread desire among the contracting parties to continue negotiating the theme. In fact, developing countries already wanted "compensation for any erosion of GSP from general tariff reductions", "bind[ing of] the preferential GSP tariff rates" and "exempting products of interest to LDCs from exception lists of developed countries".[49]

G. International crisis and increased differentiation among developing countries

Events in the early 1970s created a set of forces both interesting and ephemeral. Interesting, because in no other period in history did developing countries have similar leverage in international bargaining. Ephemeral, because in the days of the debt crises of the 1980s, almost nothing was left.

The evolution of the special and differential treatment in market access cannot be understood outside the parameters of the decade's crisis. First, as a consequence of the monetary problems created by the breakdown of the Bretton Woods convertibility arrangement, the 1970s marked a vigorous deepening of protectionism. Second, a different kind of protectionism took place: "... by the early 1970s the world's major trading nations had rendered tariffs almost obsolete as an instrument of protectionism in their relations with one another".[50] This implied that the growing challenges to the liberal order that GATT activities embodied since 1947 would only be curbed with the contracting parties' willingness to penetrate the GATT system in the legal fabric of protectionism.

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[46] Decision of the contracting parties of 25 June 1971. Apud: WT/COMTD/W/77/Rev.1, 21 September 2001. There was some discussion about the status of the 1971 decision as it did not refer to GATT Article XXV:5, which authorized waivers of GATT obligations. For more details, see the whole document in Bartels (2003).

[47] Weintraub (1964), p. 46.

[48] Rothstein (1977), pp. 146–147.

[49] Nowzad (1978), p. 19.

[50] Grieco (1990), pp. 2–3.

Associated with these problems, the oil crisis revealed that some developing countries had a high degree of leverage in international politics, as they managed to control the main source of energy of productive activities. For the first time in history, they thus started to look potentially threatening to the basic tenets of the international system and, most importantly, to the cornerstone of developed countries' economic activities.

As a consequence of the oil shock, Third World countries were eager to accomplish the success of oil producers by creating associations aimed at achieving stable and remunerative prices for all commodities of export interest to them. Industrialized nations accepted some demands of developing countries within GATT limits aware this was the only way to achieve a successful trade round under the auspices of GATT and rollback the pressures on the liberal trading system. The Tokyo Round (1973–1979) was a major exercise in this aspect.

The declaration that launched the Tokyo Round acknowledged the "importance of maintaining and improving the Generalized System of Preferences".[51] The inclusion of GSP in the Declaration clearly stated, for the first time in GATT, that the developing countries' group was not homogeneous, and that special measures would be necessary to cope with this new reality.[52] From that point onward, a specific group of "least developed countries" would exceptionally receive special attention within developing country measures. The more advanced countries within the group were nevertheless reluctant to accept this condition, as, like special preferential agreements, it would subsidize their poorer neighbours in detriment to their own economic interests. The reasoning behind this resistance was the fact that if on one hand they were more capable of exporting manufactures to industrial countries, on the other, they did not want to see more competition arising from within the bloc.[53]

III. The Tokyo Round Negotiations and the Enabling Clause

Although internalized in GATT in 1971, GSP had a weak legal condition as it had been accepted as a waiver for only ten years. The Tokyo Round brought about a framework allowing GSP schemes to become a standing rule. Upon demands of developing countries, led by Brazil, and only after the third year of negotiations of the Tokyo Round, discussions started—a series of revisions to GATT articles, known as the "Framework" Group negotiations. The Brazilian proposal was far-reaching and suggested that, "GATT should provide a standing legal basis for GSP, that is, that GSP

[51] The Tokyo Declaration. Apud: Winham (1986), p. 414.

[52] "Ministers recognize that the particular situation and problems of the least developed among the developing countries shall be given special attention, and stress the need to ensure that these countries receive special treatment in the context of any general or specific measures taken in favor of the developing countries during the negotiations." The Tokyo Declaration. Apud: Winham (1986), p. 415.

[53] Rothstein (1977), p. 49.

should be integrated into the General Agreement on a permanent basis and backed by sanctions to assure its effectiveness".

The proposal further sought to make preferential treatment irrevocable, or subject to compensation if withdrawn, and non-discriminatory, which would immediately disqualify the US practice of withholding preferential treatment from certain developing countries on the basis of political criteria. The Brazilian proposal did not ensure that preferences would be given; clearly, these would have to be negotiated the way individual tariff concessions are negotiated. What the proposal attained was to put preferences on roughly the same legal footing as tariff concessions within the GATT, namely to "remove their provisional status and the need to obtain waivers to apply them".[54]

Although they offered a certain rhetorical support for other broader measures, developed countries did not agree with the Brazilian suggestions, feeling that these would severely undermine the use of the MFN principle in international trade relations. Several delegations, like the European Communities, emphasized that such measures would not be feasible in the GATT system in the long run, as they would not subsist unless they indicated a proper balance in obligations and rights among contracting parties.[55] As stated earlier, developed countries were also eager to push forward the "graduation" issue—the stage in which a developing country is no longer considered such for the purpose of the preferential market access.

The negotiations that led to a final agreement on the issue, the "Enabling Clause"—the "Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries"—therefore constituted the acceptance of a form of graduation. What underlies the idea of graduation in the Enabling Clause is the expectation that improvements in developing countries' economic status would enable developed countries to phase out non-reciprocal preferential market access measures to contracting parties which, over time, were deemed to have attained a sufficient degree of progress.[56] Developing countries could have no legal recourse in the GATT against such action.[57]

In terms of concrete measures in favour of developing countries, the Enabling Clause transformed the ten-year waivers for GSP and trade preferences among developing countries into permanent arrangements. In this regard, the clause did not create any new legally binding obligations for developed countries: it merely made the legal introduction of preferential and non-reciprocal market access schemes less problematic. The clause also handed the extent of preferences and the level of reciprocity to the discretion of each country. In bringing together the key elements of preferential market access, non-reciprocity flexibility in the implementation of rules and commitments, the Enabling Clause was a summation, rather than an extension, of

[54] Winham (1986), pp. 144–145.
[55] MTN, FR/W/4, 8 March 1977, p. 1; Apud: Winham (1986), p. 145.
[56] GATT (1980), p. 205.
[57] Cf. Michalopoulos (2000), p. 8.

the efforts made since 1954 to address the concerns of developing countries within the multilateral trading system.[58]

IV. The Road to the Uruguay Round

In the 1980s, the progressive erosion of the economic model adopted by developing countries is extensibly noticeable. But developing countries' rhetorical support for policies based on this economic model, which consisted in challenging GATT basic tenets as we saw, did not disappear as fast as the deterioration of their economy.

In fact, economic downturn also affected developed countries fostering a protectionism tide. All the while, the liberal governments in the US and British administrations started to work towards new trade negotiations.

This need for further negotiations in tariffs and disciplines concerning trade relations was recognized at the end of the Tokyo Round, and since then some contracting parties of GATT worked on an agenda for launching a new round of trade negotiations. By then, the United States initiated attempts to shape GATT's agenda in order to include new themes such as services and intellectual property rights. Developing countries were highly sceptical about these new inclusions, one of the reasons being that the Tokyo Round yielded few tangible benefits for them. The implementation of GSP was among the issues that generated most dissatisfaction among the group, as the schemes were by then falling short in their intended benefits. Aware of that, in 1982 developing countries manifested the intention to block "... some pernicious ideas promoted by industrialized countries, like 'graduation', 'selectivity', 'North–South round' to wind down GSP schemes, trade-related performance requirements and such others".[59] At that time, they considered reform leading to important shifts in international trade relations, rather than another round to include new issues, as the only acceptable position.

Developed countries reacted with a strategy to cave in developing countries' hard stance. One of the stratagems adopted was to link domestic reforms and accept a new trade round to better access GSP programmes,[60] which would prove highly successful in some cases. One example was how Americans enacted a legislation that authorized a creation of an annual list of countries that had unfair trade practices related to intellectual property rights. Several countries were investigated, and those that failed to introduce modifications were subjected to US provisions that restricted GSP status.[61]

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[58] Id.

[59] Raghavan (1982).

[60] "The US ... threatened to withdraw its tariff preferences to LDCs if they continued to block the inclusion of services in the new Round". Caldas (1995), p. 18.

[61] The inaugural list included Korea, Brazil, India, Mexico, China, Saudi Arabia, Taiwan, and Thailand. Thailand lost GSP benefits after entering in the list. For more details, see Singh (2003).

Equally relevant, the Group of 77 complained in April 1985 in the UNCTAD Special Committee on Preferences that most features of GSP programmes were changed in a way that made them "almost unrecognizable". According to the spokesman of the group, Ahmed Saker of Syria, the changes and modifications in GSP schemes made them "non-generalized", since many Third World countries had been "arbitrarily excluded for political and other criteria from the start".[62] This resulted in a discriminatory effect within the preferential treatment among Third World countries. The most striking characteristic was the fact that some schemes demanded reciprocity, as Saker noted.[63]

Indeed, another important problem faced by developing countries while beneficiaries of GSP programmes was that the benefits of the system were hindered by the non-tariff measures (NTM) imposed by developed countries. Studying the same effects of non-tariff measures in GSP schemes in the current state of affairs, we can see that this particular matter has not changed, as Love Mtesa, the Permanent Representative of Zambia to the UN and WTO, attested recently:

> "Several studies, particularly by UNCTAD, have shown little real and additional benefits to least developed countries from various existing market preferential initiatives. These studies have pointed out other factors like technical and sanitary and phytosanitary standards, rules of origin, tariff escalation and peaks, lack of supply capacities, lack of transfer of technology etc., as hindering better market access and entry of developing country exports in developed country markets."[64]

In addition to these problems, in 1982 we have the debt crisis. Many Latin American and African countries needed the cooperation of developed countries for financing their credit through loan programmes of international institutions such as the IMF. The fragilized economies of developing countries gave developed countries new instruments of persuasion that would contribute to help developing countries accept a new trade round in the year that followed the crisis.

Another fact influenced many developing countries' policy reversal towards a new round: in the beginning of the 1980s all available data indicated that strategies used until then to improve development conditions had yielded meager results. That perception was based on numbers showing that "the shares of developing countries in world exports stood at 31 percent in 1950 but had declined to 23.8 percent by 1985".[65] That share, however, did not count the highly successful East Asian countries that were bringing unprecedented development and welfare gains to their societies through an export-oriented growth economic model. Together with other factors, the impact of these successful experiences in the rethinking of underlying development strategies explains why several developing countries changed their conduct, transforming the diplomatic disarray of 1982 in the commitment to launch a new trade round in 1986.

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[62] Raghavan (1985).
[63] Id.
[64] 73 South Bulletin (15 February 2004), p. 15.
[65] Narlikar (2003), p. 40.

A. THE URUGUAY ROUND

Beginning with several meetings within the Preparatory Committee, most developing countries that were part of GATT started to build new coalitions with a positive approach towards a new round—such as the G-20[66] and the *Café au Lait* Group. They inaugurated a new pattern of coalition diplomacy with an issue-based focus, crossover links, flexibility of agenda and simplicity of coalition structure in an effort of joining developing countries with some developed ones to advance a bargained solution to international trade cooperation within GATT—and subsequently the WTO.

The emergence of this alliance—that would be responsible for the launching of the Uruguay Round—was induced by the issue of introducing trade in services in the agenda of negotiations. Although opposed by many countries in the preparatory work, the issue was progressively internalized in the agenda of the round.

The launch of the Uruguay Round in September 1986 underscored the total exhaustion of the old principles that guided the "Third World" in the last decades. For the purpose of our work, this indicates an abrupt collapse in the quest for special and differential market access as the basic tenet of international economic relations. Although still part of the rhetoric of speeches, now several developing countries bargained to obtain a stable and advantageous market access.

One important matter that helped shape this stance was the growing number of studies that demonstrated that "GSP has delayed the bind of tariffs of interest of developing countries".[67] Consequently, developing countries since the mid-1980s started relying more on negotiations based on "semi-reciprocal" concessions rather than trusting in the exasperated demand for unilateral compromises of developed countries.

However, this new perception did not emerge out of nowhere, nor did it come without its own series of consequences. To start, the Uruguay Round definitely marked a new state of affairs in the taxonomy of international trade relations. This meant that now we had the formal recognition of a new group of countries—the least developed among the developing countries.[68] In the negotiations, it was clear that developed countries devised two strategies.

The first one was related to least-developed countries, as well as other countries with very low per capita incomes, as developed countries would not demand from concessions and total obedience to GATT disciplines in result of their concessions. The second one was related to the more advanced developing countries. It was expected that the "more advanced [developing] countries . . . should not escape the disciplines of the

[66] The G-20 is the one that came from the Jaramillo Group in the beginning of the Uruguay Round—do not confound with the G-20 of the Cancun Ministerial Meeting of the WTO. For more details about the group, see Croome (1995), Ch. II: Launching the Uruguay Round.

[67] Howse and Trebilcock (1999), p. 119.

[68] The Punta del Este Ministerial Declaration attested in its first part that "special attention shall be given to the particular situation and problems of the least-developed countries".

normal GATT rules, even if they would have to be given some extra time to bring their practices into line".[69]

In terms of preferential market access, it is clear that internal pressures in developed countries led to hard strategies to decrease market access to certain advanced countries. That gave rise to the same question that arose during the Tokyo Round: must all developing countries be treated in the same way within the GATT? The answer then, as today in WTO, was no. Several studies consequently tried to devise criteria to indicate if any of the beneficent countries had already reached a level of development when preferential market access was not needed.

One example is the group that comprises Hong Kong, Singapore and South Korea, which had lost their GSP status in the American market under the justification that they had made "remarkable advancements in economic development and recent improvements in competitiveness".[70]

But in general terms, the improvement of the "graduation principle" in GSP schemes also brought another constraint, as negotiations between the more advanced developing countries and the developed ones entailed the erosion of the margins of preferences of the least-developed countries.[71] Considering that on one hand developing countries such as Brazil, Argentina and Indonesia had to offer concessions in return for better binding tariffs for their products, most of these products were the same in which least-developed countries enjoyed benefits under GSP programmes such as the Lomé Convention.

Therefore, the results of the Uruguay Round initiated a conflict between those developing countries that wanted the end of preferential market access and those (least developed among them) that did not want any reduction in MFN tariffs, as decreasing their preference margins would cause losses in their market access.

Another way to make GSP more acceptable for developed countries at the end of the Uruguay Round was to link policy reforms in labour and environmental standards in developing countries with better preferential programmes.[72]

V. Current Issues in GSP Programmes

Having gone through the historical evolvement of the development question within the world trading system and its central issue of preferential tariff treatment for developing countries, we shall now look at the current configuration of major GSP schemes and focus on the problems they have entailed. Due to its multidimensional nature, our discussion about GSP shall encompass legal, political, as well as economic issues.

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[69] Croome (1995), p. 204.
[70] Raghavan (1988).
[71] Raghavan (1994).
[72] Id.

Two major GSP schemes—the United States' and the European Communities'—are briefly examined below, with special attention given to the European Communities' Programme. The American programme raises issues such as the discretionary nature of GSP and its *de facto* requirements of reciprocity. In the case of the European one, we look at its particularities, such as the "Everything But Arms" initiative and the Special Incentive Arrangements. Along with the ACP (Africa, Caribbean and Pacific) preferences given by the EU to its ex-colonies, the EU GSP constitutes a more problematic system of preferences, as India proved by challenging it under the WTO Dispute Settlement Body. We will dedicate one section to the treatment of the Indian panel and its results, besides dealing with the EU's system of preferences.

At last, we shall present the terms of the debate that questions the legal status of GSP before the multilateral trade rules; the justiciability of the Enabling Clause within the WTO legal system, and the nature of the "requirements" of GSP as stated by the Enabling Clause.

A. THE UNITED STATES' GSP[73]

The US GSP programme provides preferential duty-free entry for about 5,000 products from some 140 countries.[74] Under the US GSP, all eligible items are duty-free; however, there may be limits, as GSP operates under a tariff quota system. In relation to LDCs, since GSP treatment in the United States is duty-free, it also involves providing additional product coverage. Besides, certain articles, mostly deemed to be "import sensitive articles", are prohibited from receiving GSP treatment.

Not all countries that refer to themselves as "developing countries" in the WTO are actually eligible for GSP, since, by the time of its creation, "it was left to each industrial country to define what was a developing country for purposes of benefiting from GSP program".[75] Therefore, a great margin of discretion was left to preference givers, allowing non-economic criteria to define who should benefit from each programme. Moreover, a policy of graduation was introduced in the US scheme in 1984 as a way of focusing preferences on low-income countries. The rationale behind the principle of graduation was that "by removing GSP privileges from the more advanced industries of the third world, the lesser-developing countries would be able to better take advantage of the program".[76] However, a high concentration of imports still comes from few GSP beneficiaries.[77]

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[73] See UNCTAD, *GSP-Handbook on the Scheme of The United States of America 2000*, UNCTAD/ITCD/TSB/Misc.58, 1 June 2000.

[74] See USTR, *US Generalized System of Preferences—Guidebook*, available at <www.ustr.gov/reports/gsp> (last visited 28 February 2004).

[75] Jackson (2002), p. 323.

[76] Ibid., p. 325

[77] See WTO, *The Generalized System of Preferences: A Preliminary Analysis of the GSP Schemes in the Quad*, WT/COMTD/W/93, pp. 22–24, Table 5: GSP Top 20. Beneficiaries.

Initially, the scheme was non-contractual and autonomous, with the preference giver having the right to withdraw or modify benefits at any time. However, with the Trade and Tariff Act of 1984, a number of criteria were established for potential beneficiaries, so that the US GSP did not exactly become a non-reciprocal treatment. Through such Act, for example, the US Congress could prohibit GSP benefits to countries that expropriated US property without compensation or cancelled contracts with American citizens. The main conditions established relate to protection of intellectual property, the respect of labour rights, and the resolution of investment disputes. There are also ''competitive needs limitations'', which are intended to prevent the extension of preferential treatment to countries that are considered to be competitive in a certain item. Hence it has been questioned if the US GSP programme—as well as the others—has provided actual benefits to developing countries.

B. THE EUROPEAN COMMUNITIES

The European Union (EU)'s system of preferential agreements is extended to practically all its trading partners. Among these agreements, there are two systems of non-reciprocal trade preferences concerning the LDCs, namely, the ACP preferences and the GSP scheme.

The ACP preferences have been granted through the Lomé Conventions. The preferences established by the first Lomé Convention of 1975 were characterized by its non-reciprocal nature, under which the EU had permitted almost complete duty-free access for most of the products originating from ACP countries. However, the impacts of the ACP preferences have been moderate, and did not fulfil developing countries' expectations. Because exports from the ACP to the EU mainly consisted in raw material and agricultural products, the weak performance of the ACP preferences has been attributed to the restricted market access for key products.[78]

The unimpressive performance of Lomé Convention I has led to its redesign and the negotiation of Lomé Convention II, which, however, also failed to bring relevant development impacts. The latest Lomé Convention (Lomé IV) has been replaced by the Cotonou Agreement, its ambitious objectives such as poverty eradication and sustainable development, and the gradual integration of the ACP countries into the world economy.[79] Due to ACP's juvenility, however, the real impact on the economy of the affected countries cannot be measured yet.

The current EU GSP scheme is based on guidelines adopted in 1994 and implemented in 1995 for the period 1995–2004. Under the 1994 guidelines, several important changes were introduced into the EC scheme, among which are the two key features of tariff modulation and graduation.

[78] For a more detailed account, see Yu and Jensen (2003).
[79] Id.

Tariff modulation replaced the traditional approach of granting duty-free access for limited quantities of imports with a system of varying preference margins for groups of products with differing degrees of sensitivity. Thus the quantitative limits were removed, and GSP products were classified as sensitive, very sensitive, semi-sensitive or non-sensitive, each category having a different preference margin.

Since its introduction in 1995, graduation allowed the exclusion of certain countries from specific sectors or from the entire GSP scheme. The exclusion of countries is based on one of two criteria: the degree of export specialization, or a development indicator. The World Bank's classification of countries as "high-income" is used to determine their eligibility for graduation. In 2001, the European Commission adopted a proposal for a revision of the EC scheme, which puts forward a number of different arrangements, including the "Everything But Arms" (EBA) initiative for LDCs and the "Special Incentive Arrangements".[80]

Under the EBA, all restrictions on imports except arms from LDCs to the EU are to be removed on a non-reciprocal basis. It offers the LDCs a higher degree of market access for practically all products—this means quota and duty-free access. Under EBA, all LDCs are thus allotted equal preferential access to the EU market, while GSP schemes provide different treatment for each beneficiary country and its individual products. Moreover, unlike the GSP scheme, the EBA has no time limits. According to the UN,[81] all of the 50 LDC countries are included in the EBA.

The EC's GSP programme provides for the possibility of additional preferences, called Special Incentive Arrangements, introduced by the revision of the 2001 scheme. These additional preferences are intended to promote sustainable development, in particular for the protection of labour rights and the environment, and are designated to those countries that demonstrate that they are complying with certain specified environmental or labour standards.[82] The European Commission, however, considers that these arrangements have not encountered the success that had been hoped, whether because of the relatively small margin of preference or the complexity of the procedures. Furthermore, besides its low development performance, India's action against the EU's special arrangement in the WTO cast doubts on the validity of such arrangements *vis-à-vis* multilateral trade rules.

In 2002, India requested the WTO Dispute Settlement Body to establish a panel to examine the legality of the ECs' special incentive arrangements. This constituted the first panel regarding GSP ever established. India filed its complaint after the European Communities (ECs) decided to add Pakistan to its list of beneficiaries of its special incentive arrangements, allowing New Delhi's competitor to export textiles to the ECs at lower tariffs—due to its compliance to some environmental standards—than those

[80] See UNCTAD, *GSP-Handbook on the Scheme of the European Community 2003*, UNCTAD/ITCD/TSB/Misc.25/Rev.2, 27 June 2003.

[81] *List of Least-Developed Countries*, as of December 2003, at <www.un.org/special-rep/ohrlls/ldc/list.htm>.

[82] See *European Communities' GSP Regulation*, available at <http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_346/l_34620011231en00010059.pdf> (last visited 29 February 2004).

charged on Indian exports. India argued that the special tariff preferences conceded by the ECs were inconsistent with Article I:1 of the GATT94, which requires any advantage or privilege granted to the imports of one WTO Member to be automatically extended to all members—the MFN principle—and with the requirements set out in the Enabling Clause.[83]

At first, on 1 December 2003, the Panel Report[84] concluded that India had demonstrated that the ECs' Arrangements were inconsistent with Article I:1 of GATT94 and that the EC had failed to demonstrate that they were justified under the Enabling Clause. The ECs were deemed to have nullified or impaired benefits accruing to India.

On 7 April 2004, as the EC appealed, the WTO Appellate Body reversed some of the earlier Panel rulings by allowing preferences for a group of developing countries without extending the same to all other developing countries. Therefore, the Appellate Body rejected that the term "non-discriminatory" in the Enabling Clause requires identical tariff preferences under GSP schemes to be provided to all developing countries without differentiation.[85]

The WTO's legal rejection of India's core argument may engender noteworthy consequences for multilateral trade negotiations. It means that preference-granting countries, through their GSP programmes, can offer higher preference margins to a specific group of developing countries in exchange for concessions in other issue areas of the multilateral negotiations; that is, preferences may function as bargaining leverage. In practice, the political impact of such approach may fragment coalitions among developing countries, thereby weakening their bargaining power in relation to the most developed nations.

C. THE ENABLING CLAUSE AND ARTICLE I OF GATT

India's challenge to the EC GSP programme has instigated debate around the issue of the legality of preferences; although such debate existed before, it was India's legal contestation that narrowed and punctualized its terms. The main terms will hence be presented. The core of the debate is the relationship between the Enabling Clause and Article I:1 of the GATT.

Despite its importance, the legal status of the Enabling Clause is not completely clear, not even in the specialized literature. To put it simply, it is not a waiver from

[83] See *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, Request for the Establishment of a Panel by India*, WT/DS246/4 (9 December 2002), communicating India's view that EC tariff preferences to developing countries were inconsistent with the GATT 1994 and did not meet the requirements set out in the Enabling Clause.

[84] See Panel Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R (1 December 2003).

[85] See Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (7 April 2004).

Article I of the GATT in an exact sense, because it does not refer to GATT Article XXV:5, which constitutes the waiver provision.

In regards to waivers under WTO rules, members may only deviate from WTO obligations as long as their behaviour can be shown to comply with the waiver. If the Enabling Clause were a waiver, then one would presume that the "requirements" for granting preferential treatment[86] are strict and subject to close judicial monitoring. However, the Enabling Clause is not a waiver within the specific meaning of Article XXV of GATT or Article IX of the WTO Agreement. The Enabling Clause does not mention any exceptional circumstances, does not name any particular contracting party, and contains no waiver definition.

The Enabling Clause, nonetheless, "allows for what has become a basic tenet of the international economic legal order, namely the special and differential treatment of developing countries".[87] In sum, rather than an exception to the GATT, the Enabling Clause is an integral part of the international trade legal system, that is, an instrument within GATT94.

Since the language of the Enabling Clause[88] permits unilateral modification, extension or withdrawal of such preferences, moreover, GSP is commonly considered to lay beyond the objects of dispute settlement under the WTO Dispute Settlement Understanding. However, if the Enabling Clause were to be considered outside dispute settlement mechanisms, then WTO Members could escape legal obligation by stating the applicability of the Enabling Clause, such as the MFN with respect to trade in goods, even if the Member's measures were clearly not a GSP scheme. Thus, the voluntary nature of GSP preferences does not necessarily make them foreign to WTO rules. Hence, for the reason that trade preferences undermine WTO rights of third-party members, WTO Members are under no obligation to bind their trade preferences, and may not use this mechanism to violate other WTO obligations.[89] This provides good reasons not to exclude voluntary preferences offered under GSP programme from the WTO rules, and make the Enabling Clause subject justiciable. The nature and extent of the legal obligation created by individual provisions within the Enabling Clause is, however, another matter, which must be understood contextually.[90]

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[86] Those set in the Enabling Clause: generalized, non-reciprocal and non-discriminatory preferential tariff treatment, as described in the preamble of the 1971 Decision (see discussion below).

[87] Ibid., p. 1347.

[88] See GATT Secretariat, *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, 28 November 1979, GATT BISD (26th Supp.) (1980) [Enabling Clause], available at <http://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm#fntext1> (last visited 17 February 2004).

[89] See Bartels (2003), p. 514, on his legal reasoning about how concessions can undermine the rights of third-party members.

[90] See Howse (2003), p. 1345, for a clearer exposition of such issue.

Moreover, panels do not have direct jurisdiction to hear claims of violations to the Enabling Clause.[91] The reason is that, under Article 1.1 of the Dispute Settlement Understanding, WTO Panels only have jurisdiction when a claim is raised according to the dispute settlement provisions of one or more of the covered agreements. The Enabling Clause does not contain any such provisions for dispute settlement. ''What is required is rather that a claim should state that the relevant measure has violated Article I of the GATT and does not fall within the exceptions set out in the Enabling Clause.''[92] In this particular sense, therefore, despite what has been stated above, the Enabling Clause functions more as an exception to the GATT than as an independent WTO instrument.

This approach to dispute settlement contrasts largely with that of the instrument that preceded the Enabling Clause, the GSP Decision of 1971. The GSP Decision contained detailed and explicit language concerning the availability of dispute settlement. Such a difference may derive from the fact that, unlike the Enabling Clause, the GSP Decision of 1971 is, in legal terms, a waiver.[93]

Such issue has been the object of academic debate and has produced divergent interpretations. However, it has never been the subject of a dispute settlement.

Paragraph 2(a) of the Enabling Clause states that, in order to override GATT's Article I, preferential tariff treatment for developing countries must be ''in accordance'' with the GSP, as ''described'' in the 1971 GSP Decision.[94] The Preamble of the 1971 Decision describes the preferential tariff treatment under the name of GSP as ''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 ...''.[95]

By comparing the two documents, it is thus possible to conclude that the Enabling Clause has had the effect of converting what was an aspiration in GSP Decision into a binding condition.[96] In other words, while the waiver contained in GSP Decision protected preferential tariff treatment in general, the Enabling Clause only protects the preferential treatment described in the Preamble to GSP Decision, that is, preferential treatment that is generalized, non-reciprocal and non-discriminatory.

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[91] It was claimed by developed countries that preferences granted under GSP schemes were exempt from GATT dispute settlement proceedings. In 1981, the US argued that the GSP was a unilateral, non-reciprocal and non-contractual scheme and that, as such, ''specific actions taken thereunder were not subject to review by the CONTRACTING PARTIES, the Council or any other GATT body.'' The European Community made a similar statement. See GATT Council, Minutes of Meeting held on 3 November 1981, C/M/152, 21 December 1981.

[92] See Bartels (2003), p. 516.

[93] See GATT Secretariat, *Waiver: Generalized System of Preferences*, 25 June 1971, GATT BISD (18th Supp.), at 24 (1972) [GSP Decision], available at <http://www.worldtradelaw.net/misc/gsp.pdf> (last visited 17 February 2004).

[94] See Enabling Clause, para. 2(a).

[95] See GSP Decision, Preamble.

[96] Bartels (2003), p. 519.

One should also look at WTO Member practice to assert such interpretation. It is interesting to perceive a certain degree of *opinio juris* indicating that the United States and the European Community have accepted that their GSP schemes must be in accordance with the conditions established in the Enabling Clause.

In 1988, when Chile objected that it had been wrongly removed from the US GSP programme for labour rights violations, the United States responded that "the US action was non-discriminatory; the same criterion applied to all countries and was implemented on a non-discriminatory basis".[97] Also, more recently, the European Community responded to complaints about the special incentive arrangements by saying that:

> "... with regard to the operation of GSP, the supplementary preferences provided by the EU to countries adopting labor or environmental standards were perfectly consistent with the Enabling Clause. No discrimination occurred, no reciprocity was required but a positive incentive obtained, available to all countries under GSP scheme".[98]

As Lorand Bartels[99] asserts, "at the very least, it should be possible to propose that the EC (and perhaps the United States) would be unlikely to deny before a Panel that the Enabling Clause requires preferences to be generalized, non-reciprocal and non-discriminatory".

The fact that GSP trade preferences must be generalized, non-reciprocal and non-discriminatory, therefore, is not only based on the text of the Enabling Clause and the 1971 GSP Decision, but it is also supported by the public statements of the European Community and the United States.

Notwithstanding such interpretation, a different reading of the subject is possible and, in fact, advanced by part of the academic community. It is clear from the UNCTAD instruments, which are part of the context for the interpretation of the Enabling Clause, that the notion of a generalized, non-discriminatory, and non-reciprocal system of preferences constitutes a desire to progressively realize such a system on the basis of arrangements that are mutually acceptable to both developed and developing countries.[100]

From the start, if the notion of preferences were to be interpreted as necessarily "generalized" and "non-discriminatory", requiring that every single element of a member's scheme of preferences completely conform to that description, GSP would never have been formally created. This interpretation would have prevented developed countries from offering preferences on conditions that were acceptable to them.

Besides, the ambitious nature[101] of the requirement that preferences be generalized, non-discriminatory, and non-reciprocal was reflected recently in the

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[97] GATT Council, *Minutes of Meeting held on 2 February 1988*, C/M/217, 8 March 1988.

[98] WTO Document, *Trade Policy Review—The European Union—Minutes of Meeting on 12 and 14 July 2000*, WT/TPR/M/72, 26 October 2000, para. 165.

[99] Bartels (2003), p. 522.

[100] Howse (2003), p. 1352.

[101] Id.

Doha Decision on Implementation in 2001. This Decision reaffirmed that preferences granted under the Enabling Clause should include these features.[102]

Indeed, no legal instrument has ever been approved to turn the elements of discrimination or non-reciprocity into a binding condition that would make the granting of preferences consistent with Article I of the GATT.

VI. Conclusion

Studies about how developing countries acted in the multilateral trading system usually highlight their historical unity in advancing an agenda for special and differential treatment in market access. This article sought to review the literature about the issue, but instead of considering the block position of developing countries, it emphasizes the conflict dynamics within the block since its inception.

This conflict runs deep in the evolution of the system, in the sense that although the majority of developing countries wanted special market access for their exports, the group comprised countries that had discrepant levels of development and therefore different interests in the issue.

The logic of fragmentation in developing countries is hard to acknowledge under the rhetoric of unity propelled in international politics. However, their conflict in the specific issue of discriminatory preferences indicates how this fragmentation is embedded in the specific system of multilateral trade relations.

The history of the GSP reveals opposing views on economic politics within the multiple matters it touches upon: on one hand we have the liberal ideas, on the other its opponents who believe that trade patterns must be changed through positive discrimination in favour of developing countries. Notwithstanding the current uncontested prevalence of liberal conceptions, and the trade liberalization developing countries have undertaken in the 1990s, the bickering within the multilateral trade system related to development questions in general, or to the right to preferences, in particular, is far from showing signs of waning. With fresh relevance and new components, these trade contentions show that countries' relative development is related to their more or less liberal ideals, at least within GSP, as well as their straightforward or less straightforward support and promotion for the differential treatment. One may also say that, in the long run, developed countries were able to agree on main common objectives among themselves, while developing countries are more and more divided among themselves.

While investigating the evolution of developing countries in the multilateral system, it is interesting to perceive how their action within the GATT system yielded fewer results than in other institutions such as the General Assembly of the United Nations. To address the specific point of this difference, we have to bear in mind that

[102] See the Decision on Implementation-related issues and concerns (point 12.2), 14 November 2001, the Doha Ministerial Conference (WT/MIN(01)/17).

developing countries lack the necessary resources to use the traditional instruments of power in international relations. Consequently, the use of diplomacy based on the leverage of the majority has been the main substitute for the lack of the necessary resources in advancing the agenda of the group. Consent mechanism, which is the habitual decision-making procedure in GATT and in the WTO, does not seem to have substantially ameliorated the state of the negotiations of highest interest to developing countries. Finally, although the discussion over the special preferential arrangements among developing countries lies beyond the scope of this work, the Global System of Trade Preferences (GSTP) must be mentioned. The GSTP was proposed in 1976, but the framework for negotiations was only agreed upon in 1985. It entered in force in 1989, and 41 countries have ratified it. The GSTP was treated at the recently held UNCTAD XI (United Nations Conference on Trade and Development), in São Paulo (13–18 July 2004) and could become an important post-liberal strategy of developing countries. As was said at the Conference, "a significant source of global growth is been generated in the South", creating "a new geography of world trade".[103] History, however, does not allow us to be "development optimistic".

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