

Sustainable Trade Preferences for the 21st Century



**Fine-tuning the EU's General System of Preferences to make it
a more effective tool for development**

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Sustainable Trade Preferences for the 21st Century:

**Fine-tuning the EU's General System of Preferences to make it
a more effective tool for development**

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List of Abbreviations

ACP	African, Caribbean and Pacific Group of States
AGOA	African Growth and Opportunity Act
CDP	United Nations Committee for Development Policy
CN	Combined Nomenclature
DG DEVCO	Directorate-General for International Cooperation and Development
DG TAXUD	Directorate-General for Taxation and Customs Union
DG Trade	Directorate-General for Trade
EBA	Everything But Arms scheme
EGA	Environmental Goods Agreement
EPA	Economic Partnership Agreement
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GNI	Gross National Income
GSP	Generalized System of Preferences
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
HS	Harmonized System
ILO	International Labour Organization
INTA	European Parliament Committee on International Trade
iEPA	Interim Economic Partnership Agreement
LDC	Least Developed Countries
Mid-Term Report	Mid-Term Evaluation of the EU's Generalized Scheme of Preferences
MFN	Most Favoured Nation
NCP	National Contact Points
NPR-PPM	Non-product related processes and production methods
OECD	Organization for Economic Cooperation and Development
PTA	Preferential Trade Agreement
ROO	Rules of Origin
TBT	Technical Barriers to Trade
EEAS	European External Action Service
UN	United Nations
UNGPs	United Nations Guiding Principles on Business and Human Rights
VSS	Voluntary Sustainability Standards
WTO	World Trade Organization

Executive Summary

A. Introduction

In 2023, the current Generalized System of Preferences (“GSP”) scheme in the European Union (“EU”) will expire, creating a window of opportunity for GSP reform. Specifically, the Commission aims to present a draft GSP regulation by 2021. In anticipation of this upcoming reform, this study examines the current GSP scheme and recommends concrete ways in which the functioning of the scheme could be improved.

For each GSP regime— Standard GSP, GSP+, and EBA – this study has analyzed a number of reform options and provide recommendations on the basis of the anticipated benefits of the reform, negative externalities with respect to other GSP regimes, as well as the technical, legal and political feasibility.

B. Background

Regulation (EU) No. 978/2012, which entered into force on 1 January 2014 – introduced major changes to the EU’s GSP scheme. The objectives of the 2012 GSP reform were six fold¹:

- To increase benefits for those countries most in need: LDCs and other low and lower-middle income countries;
- To remove disincentives towards diversification for the countries in most need;
- To enhance consistency with overall trade objectives, whether bilateral or multilateral;
- To strengthen the support for sustainable development and good governance;
- To improve the efficiency of safeguard mechanisms; and
- To enhance legal certainty, stability and predictability.

To deliver on these objectives, the 2012 reform introduced key changes to the EU’s GSP regime, including:

- A reduction in country coverage from 177 to 88 countries due to stricter eligibility requirements;
- A relaxation of the product graduation threshold (to offset the impact caused by the reduction in GSP beneficiaries);
- The creation of more homogenous product sections, strengthening the link between product graduation and competitiveness;
- A slight expansion in product coverage;
- A simplified preference withdrawal procedure;
- With respect to the GSP+ regime, simplified entry and eligibility requirements and increased independence of the Commission to monitor compliance.
- In 2011, the Rules of Origin (“ROO”) were relaxed for EBA beneficiaries. This, however, was not done as part of the 2012 GSP reform.

¹ Commission Staff Working Document, Midterm Evaluation of the Generalised Scheme of Preferences, 4 October 2018.
Available at: http://trade.ec.europa.eu/doclib/docs/2018/october/tradoc_157439.PDF.

In its Midterm Evaluation of the GSP, the Commission concludes that the scheme is “largely delivering on its objectives”.² It further notes that there are remaining challenges in areas related to the environmental impact, the GSP+ monitoring process, and raising awareness of the scheme.³

This study examines these remaining issues highlighted by the Commission, in addition to other areas in which the scheme’s functioning could be improved. For instance, other areas in which the scheme could be enhanced relates to enhancing export diversification, increasing utilization rates, and improving the link between trade preferences and sustainability indicators and the human rights situation in the beneficiary countries.

C. Reform Options

In examining different reform options, this study explains why the option warrants to be examined, the anticipated benefits, and the political, technical and legal feasibility of the proposed reform. The feasibility analysis comprises a number of elements, with the weight given to each element varying, depending on the specific reform idea on the table.

1. Country Coverage

The 2012 reforms introduced significant changes to country coverage, resulting in the reduction of GSP beneficiaries from 177 to 88. There are currently 17 beneficiaries of the Standard GSP arrangement; 9 beneficiaries of the GSP+ arrangement; and 49 beneficiaries of EBA arrangement. Despite overall satisfaction with the 2012 reforms, there are a number of trends in country classification that the upcoming GSP reform must anticipate. This includes the diminishing importance of Standard GSP and the upcoming waive of countries that will lose LDC status.

In light of these upcoming changes, this study recommends introducing a suitable transition system – both with respect to time and resources – to prepare LDCs qualify for the GSP+ scheme. Moreover, as a result of the large number of Standard GSP countries that exited in the 2012 reform, this study notes that one of the vulnerability criteria countries must meet in order to qualify for GSP+ has become inaccurate, as this criterion is expressed as a percentage of import share of the EU’s GSP imports. This study therefore recommends to change the denominator of this calculation from share of EU’s GSP imports to share of total EU imports. Indeed, when thinking about making changes to country coverage, it is imperative to look at the implications of beneficiary removal across the GSP scheme.

2. Product Coverage

The EBA scheme covers all products but arms, whereas beneficiaries under the Standard GSP regime and the GSP+ regime are eligible to receive preferences for 66% of all products. 25% of the products that are no covered have an MFN tariff of zero, which means that there is a remaining 9% of products that are excluded from the Standard GSP and GSP+ regimes.

However, with respect to product coverage, this study does not provide any recommendations, mostly because of limited anticipated benefits, externalities on the EBA beneficiaries, and complicated politics.

Nevertheless, on the basis of the External Consultant’s and the Commission’s emphasis on supply-side constraints (below), capacity building to remove domestic supply-side constraints would be one area to focus on to enhance the GSP scheme’s impact.

² Commission Staff Working Document, “Midterm Evaluation of the Generalised Scheme of Preferences”, 4 October 2018 [Online], p. 40. Available at: http://trade.ec.europa.eu/doclib/docs/2018/october/tradoc_157439.PDF.

³ Ibid, p. 41.

3. Product Graduation

With the exit of numerous GSP beneficiaries, the existing product graduation threshold is no longer an accurate reflection of the competitiveness of a product. Accordingly, this study recommends that product graduation, which is measured as a percentage of GSP imports, could be rendered a more accurate reflection of a products' competitiveness through amending the scheme in two ways: first, a different graduation threshold could be proposed, which would comprise of the beneficiary's imports as a share of total EU imports, coupled with a country-specific indicator (such as a cap on the value of exports from the country). Second, there is scope to create even more homogenous product categories, in order to further enhance accuracy in determining product competitiveness, and consequently, product graduation.

While the Commission does not make any explicit recommendations on product graduation, it notes in its Midterm Evaluation the importance of not making product sections too broad or too narrow (i.e., product specific). This study's recommendation would seem to fall within these two extremes.

4. Rules of Origin (ROO)

ROO is not part of the GSP regulation. This means that the upcoming 2023 expiry of the GSP regime does not automatically involve a reform of the applicable ROO. Indeed, unlike the GSP regulation, there is no timeline or process that requires the ROO regulation to be amended at regular intervals. Thus, it is unsurprising that the External Consultant's and Commission's Midterm Evaluation are silent on this issue.

Nevertheless, given the importance of ROO for the functioning of the GSP scheme, this study sets forth two recommendations, both of which are a direct result of the exodus of Standard GSP countries in the 2012 regulatory reform: introduce regional cumulation with eligible GSP countries (that are not GSP beneficiaries), and simplifying extended cumulation provisions which are currently not used due to their procedural complexity. Moreover, this study also recommends looking into the idea of introducing blockchain to remove the possibility for fraud in the context of the REX system. While this will not happen in the immediate future, it would be a good idea to, at a minimum, begin the discussion.

5. Enhance inclusiveness and transparency of GSP+ monitoring

This study has looked into ways in which the link between trade preferences, sustainability, human rights and good governance can be strengthened. One way to do so, which is also a key issue highlighted by the Commission's and External Consultant's Midterm Evaluation, would be to render the monitoring process more inclusive, in particular vis-à-vis civil society groups, as well as through enhancing transparency. The challenge, however, is identifying concrete ways to enhance transparency and inclusiveness without compromising the Commission's ability to resort to diplomacy in situations where shortcomings are present but the withdrawal conditions are not fully met.

On the basis of the above analysis, this paper recommends less formal ways to enhance transparency and inclusiveness, such as through organizing regular civil society meetings after visits to GSP+ beneficiaries; through providing clearer guidance on (i) the timelines for scorecards; (ii) country visits; and (iii) deadlines given to GSP+ beneficiaries to respond to the scorecards, as well as on (iv) how and when civil society actors could feed into this process; and (v) how the evidence submitted by civil society will be used. This recommendation could be facilitated through the establishment of a key civil society actor that could serve as intermediary between the Commission and the civil society similar to the role currently played by the Centre for Civil and Political Rights. Finally, another avenue to explore would be to enhance the use of shadow reporting.

6. Update list of Annex VIII Conventions

This study further recommends to update the list of conventions set out in Annex VIII. Specifically, it recommends to add the Paris Agreement, and to look into the implications of adding guidelines such as the UNGPs. Adding the Paris Agreement aligns with a recommendation made by the External Consultant, and, implicitly, the Commission – although they are both silent on the UNGPs.

7. Preference withdrawal

Another area that could be improved is preference withdrawal. Whether preference withdrawal is an effective way to induce compliance with key human rights obligations is heavily debated. Some consider it to be effective and recommend more stringent enforcement of withdrawal, whereas others note that it would generate great uncertainty and disrupt supply chains, thereby undermining the purpose of the preference schemes themselves.

In this context, I recommend the introduction of partial withdrawal of preferences, on a sector-specific basis. This would remove some of the negative effects associated with withdrawal by avoiding punishing the entire country on the basis of wrongdoings in a specific sector. At the same time, it sends the message that evidence of human rights violations is taken seriously, thus creating incentives for GSP beneficiaries to prevent such violations from happening. Partial withdrawal on a sector-specific basis would not require regulatory reform as this is already provided for under the current EU GSP scheme.

While the Commission's Midterm evaluation has highlighted the importance of using preference withdrawal only as a last resort, it appears that it could be open for sector-specific withdrawal in situations where withdrawal is appropriate.

8. VSS and the GSP scheme

In order to enhance the link between sustainability and trade preferences, I analyze whether trade preferences could be linked to complying with voluntary sustainability standards. The rationale behind doing so is that many Voluntary Sustainability Standards ("VSS") products rely on the same conventions as those that are included in the GSP scheme.

There are three different ways I have analyzed introducing product-specific sustainability requirements into the GSP Scheme: the mandatory approach, and the voluntary approach. Under the mandatory approach, market access is made conditional upon VSS. The voluntary approach would involve maintaining the current GSP scheme but providing additional tariff reductions for products that are VSS certified. I have also looked into introducing tariff differentiations on the basis of VSS. From all three approaches analyzed, the tariff line approach would have most potential, although it would not link GSP preferences to VSS, but rather across-the-board tariff lines. So GSP reform may not be the right platform to further explore this.

Moreover, I recommend against it as there would be very little political support for such an undertaking. Moreover, it would also constitute an operational and administrative nightmare.

9. Services and the VSS scheme

This study does not recommend pursuing this avenue as it would generate practical, conceptual, and legal difficulties, while the benefits of introducing such a change are unclear. However, it recommends studying the existing services waiver for LDCs to get a better understanding as to whether this waiver is actually being used. This recommendation is aligned with the recommendation provided by External Consultant's Midterm evaluation.

10. Enhance Promotional Efforts

Another area in which the EU GSP scheme could be improved concerns promotion of the scheme. Due to insufficient promotional efforts, the EU GSP scheme is not well known in many beneficiary countries, resulting in lower utilization rates. Thus, the EU would do well to invest more resources in generating higher awareness. This is aligned with the Commission's Midterm Evaluation. Enhancing awareness is also one of the recommendations provided by the Commission to the Parliament and the Council.

I. Introduction

In 2023, the current Generalized System of Preferences (“GSP”) scheme of the European Union (“EU”) will expire, creating a window of opportunity for GSP reform. Specifically, the Commission aims to present a draft regulation by 2021. In anticipation of the upcoming reform, this study has examined the current GSP scheme and recommends concrete ways in which the functioning of the scheme could be improved. Specifically, as the Commission aims to have a draft regulation ready by 2021, between now and 2020 would be the right time to propose various reform options. The main objective of this study is to recommend concrete reform options for the upcoming GSP reform to improve the scheme’s effectiveness and with a particular focus to strengthen the link between sustainability, human rights, and trade preferences.

The EU’s GSP scheme is and remains complex – despite the simplifications that were introduced by the 2012 reforms. To begin with, the current GSP scheme encompasses three different regimes: the Standard GSP regime for low and lower-middle-income developing countries; the GSP+ regime for vulnerable developing countries that have ratified and effectively implemented 27 conventions, and the Everything But Arms (“EBA”) Scheme for least-developed countries (“LDCs”). Moreover, there are complicated requirements that set out when a product is too competitive and graduates, or when preferences are withdrawn. Finally, a separate regulation sets out the Rules of Origin (“ROO”) that determine whether a product can be considered to originate in a beneficiary country or not.

As reflected in past GSP reforms, the scheme’s complexity invites endless tinkering at the margins of the scheme – relaxing certain categories and criteria and tightening others. Some of these options are less viable or realistic than others, due to political considerations, available resources, and legal constraints. In this study, I have analyzed more than one reform option for each area of potential reform – even when I conclude that the option may not be feasible or should not be pursued. I have done this to give a broader overview of the reform options available – as well as the limitations.

This study was conducted prior to the October 2018, when the Commission published its midterm evaluation of the current EU GSP scheme.⁴ The benefit of doing this was that the recommendations and findings were made independent of the Commission’s recommendations and findings. However, to ensure completion, this study has been updated to incorporate the Commission’s midterm evaluation, the midterm report conducted by the External Consultant, and the Report from the Commission to the European Parliament and the Council. Throughout this study, grey boxes set out the findings and recommendations by the Commission and/or External Consultants, which enables easy comparisons. Annex A also contains a table setting out the key recommendations provided in the different reports. It is important to keep in mind that just because the Commission has not made any recommendations or findings on a particular issue does not mean there is not political will to engage in such reform. Indeed, the Commission’s midterm evaluation focuses on changes within the current 2012 regulation; any changes that to the scheme after 2023 can be expected to be addressed closer to the expiry date.⁵

⁴ Commission Staff Working Document, Midterm Evaluation of the Generalised Scheme of Preferences”, 4 October 2018, SWD(2018)430 final.

⁵ Indeed, the Commission’s midterm evaluation addresses all the short-term recommendations provided for in the report of the External Consultant.

Prior to delving into specific reform options, there are a few general issues/trends that have caught my attention in this study. These include:

- Due to the large GSP overhaul in 2012, there is little appetite to engage in significant GSP reform in the next period of review. This is in part informed by the observation from the Commission that the 2012 reforms have achieved their intended purpose and that the scheme is working very well. Indeed, according to the Commission's midterm evaluation, the reformed GSP system is on track in delivering on its objectives: as a result of the major 2012 reforms, the GSP increased preference utilization, contributed to poverty eradication and has had an overall positive impact on social development and human rights in beneficiary countries.⁶ Thus, the next set of GSP reforms will likely involve mostly fine-tuning as opposed to significant overhaul.
- In the upcoming decade, numerous countries will be exiting their respective GSP scheme: many LDCs will be graduating, and a handful of Standard GSP countries will exit the scheme as they are joining a Free Trade Agreement ("FTA") with the EU, or because they no longer meet the Standard GSP criteria. This has direct repercussions on country coverage, but also on product graduation and cumulation. Indeed, with less GSP beneficiaries, product graduation, which is measured as a percentage of overall GSP imports, will lose accuracy as a proxy of competitiveness. It also means that less countries will be available to use for cumulation to meet the Rules of Origin (ROO) requirements.
- There is a general trend in the EU, which is reflected in policy initiatives and debates at the Commission, to establish sustainability initiatives not only at the level of government but not also to business activities. There are various ways through which to incorporate business into the GSP scheme – both direct and indirect – which are analyzed in this study.
- Given the dynamic nature of the GSP scheme, almost every proposed reform has a number of unintended effects on other GSP regimes. Moving one part of the puzzle often requires compensating by moving another part to ensure the scheme as a whole remains stable.
- Some of the avenues of reform concern implementation – and not regulatory and/or legislative reforms. This could significantly facilitate bringing about these reforms.
- ROO are not part of the GSP scheme. This means that there is no guarantee that it will be reformed in 2023. Indeed, DG TAXUD suggested that no ROO reform was on the horizon for the immediate future.

The structure of this study is as follows: the first part (Section II) provides relevant background to the analysis: it briefly highlights salient aspects of the 2012 reform, and summarizes, on the basis of the Mid-term Evaluation Report, the effectiveness of these reforms. The second part (Section III) analyzes various GSP reform options and provides recommendations for the most feasible ones. Specifically, it focuses on key elements of the GSP scheme: country coverage, product coverage, product graduation, and ROO – even though it will not be part of the upcoming reform. Within the context of strengthening the link between trade preferences and sustainability, good governance, and human rights considerations, this study also explored the benefits and feasibility of reform options that would (i) enhance monitoring of non-GSP+ beneficiaries; (ii) update the list of conventions set out in Annex VIII; (iii) enhance transparency and inclusiveness of the GSP+ monitoring scheme; (iv) improve the use of withdrawal; and (v) link VSS to the GSP scheme. Section IV explores whether services should be included in the GSP scheme, and ways in which the EU could enhance awareness of the scheme in beneficiary countries.

⁶ Commission, Report from the Commission to the European Parliament and the Council, 4 October 2018, COM(2018) 655 final.

II. Background

This section contains three parts: (i) a brief overview of the evolution of the EU's preferential trade regime; (ii) an overview of the key reforms that were introduced by Regulation EU No. 978/2012; and (iii) an overview of the EU GSP reforms' effectiveness.

A. Evolution of the EU's preferences schemes

The EU's GSP scheme was designed with the objective of supporting developing countries' exports to the European Union (EU) and to facilitate these countries' integration into international markets. The EU first introduced a GSP scheme in 1971, when a waiver to the Most Favoured Nations (MFN) Principle Article 1 of the General Agreement on Tariffs and Trade (GATT) was adopted, enabling developed countries to provide preferential market access to developing countries.

Over the last decades, the scheme has undergone numerous reforms. The first GSP scheme was in place for an initial 10-year period, and subsequently renewed until 1991.⁷ The initial GSP scheme involved yearly revisions on product coverage and quantitative restrictions like quotas and ceilings. The scheme was revised again after the negotiations for the Uruguay Round were concluded in 1994, and in 2001 by Council Regulation (EC) No. 2820/98, introducing five different arrangements:⁸ general arrangements; special incentive arrangements for the protection of labour rights; special incentive arrangements for the protection of the environment; special arrangements to combat drug production and trafficking; and the Everything But Arms Initiative (EBA), a special arrangements for Least-developed countries (LDCs).

In 2002, India challenged the WTO-consistency of the EU's special arrangement to combat drug production, arguing that it was (i) inconsistent with the MFN clause (ii) not justified under the Enabling Clause.⁹ As set in more detail in Section III.A.2 below, the panel found, and the Appellate Body confirmed – albeit on different grounds – that the special drugs arrangement was discriminatory and hence, did not meet the requirements of the Enabling Clause. Accordingly, the EU repealed this arrangement, and introduced Regulation (EC) No. 980/2005, which established the basic structure for the three GSP regimes that are in place today: a general arrangement (Standard GSP), a special incentive arrangement for sustainable development and good governance (GSP+), and the EBA regime for LDCs. This scheme was extended until December 2013, after which Regulation (EU) No. 978/2012 (the 2012 Regulation) was adopted.

B. Key reforms introduced by Regulation (EU) No. 978/2012

Regulation (EU) No. 978/2012, which was adopted on 25 October 2012 and entered into force on 1 January 2014, introduced major changes to the scheme. The objectives of the 2012 GSP reform were six fold: (i) to increase benefits for those countries most in need: LDCs and other low and lower-middle income countries; (ii) to remove disincentives towards diversification for the countries in most need; (iii) to enhance consistency with overall trade objectives, whether bilateral or multilateral; (iv) to strengthen support for sustainable development and good governance; (v) to improve the efficiency

⁷ UNCTAD (2015). "Generalized System of Preferences: Handbook on the Scheme of the European Union" [online] p. 2. Available at: http://unctad.org/en/PublicationsLibrary/itcdtsbmisc25rev4_en.pdf.

⁸ Ibid.

⁹ Appellate Body Report, (2004). EC – Tariff Preferences, WT/DS246/AB/R, DSR 2004:III, 951, para.6.

of safeguard mechanism; and (vi) to enhance legal certainty, predictability and stability.¹⁰ As noted in the introduction, the reforms introduced in 2012 were quite significant on many fronts. This Section highlights a few salient elements of the reforms.

a. Reduction in number of beneficiaries

The 2012 reforms reduced the GSP beneficiary list through significantly tightening the beneficiary criteria. Previously, beneficiary countries listed in Annex I to the Regulation were removed from the GSP preference scheme if (i) they were classified as high-income countries by the World Bank for three consecutive years; and (ii) if the value of imports for the five largest sections of a country's EU GSP imports represented less than 75% of that country's total GSP-covered imports into the EU. Moreover, the scheme required that a country that benefits from another preferential trade agreement with the EU would be removed from the list.

The 2012 reforms changed this in two key ways: (i) developing countries are no longer eligible if they are classified by the World Bank as a high-income or upper middle-income country for three consecutive years; and (ii) the additional requirement that the five largest imports covered by GSP represent less than 75% has been removed. As a result of this change in criteria, the 2012 reforms reduced GSP beneficiaries from 177 to 88 countries (as of 2012). As explained below, the 2012 reform also changed the vulnerability criteria that must be met to qualify for GSP+ status.

Country coverage for the EBA scheme was not affected by the 2012 reforms. Unlike Standard GSP and GSP+ beneficiaries, EBA beneficiaries would not be excluded from the scheme, even if they benefit from other preferential arrangements with the EU.¹¹ Thus, a country can simultaneously be an EBA beneficiary and member of an EPA.

b. Significant reforms for product graduation

When a product from a GSP beneficiary becomes too competitive, the product graduates. The 2012 reform adjusted three elements of the product graduation scheme:

- **Expansions of product sections:** To make graduation more objective, the 2012 reforms expanded the number of product sections from 21 to 32, by dividing existing sections to create more homogenous categories.¹² This made graduation more targeted, avoiding the removal of preferences from products that are in a section that includes other competitive products, but which are not actually competitive. For instance, the 2012 reforms created a separate section for fish, crustaceans, and live, ornamental salt water fish, which were previously grouped together with different types of live animals and animal products, including milk and meat. Similarly, a separate section has been created covering rubber and conveyor and transmission belts of rubber, which were previously grouped in the section with plastics and polymers.

¹⁰ European Commission, (2013). "Revised EU trade scheme to help developing countries applies on 1 January 2014", 19 December 2013. [online] Brussels. Available at: http://trade.ec.europa.eu/doclib/docs/2013/december/tradoc_152015.pdf.

¹¹ European Commission, (2018) "Report from the Commission to the European Parliament and the Council", COM(2018) 36, p. 1, available at: http://trade.ec.europa.eu/doclib/docs/2018/january/tradoc_156536.pdf.

¹² Development Solutions (2018). "Mid- Term Evaluation of the EU's Generalised Scheme of Preferences (GSP)". Final Report. p. 34 ; [online]. Available at: http://trade.ec.europa.eu/doclib/docs/2018/october/tradoc_157434.pdf; Official Journal of the European Union (2012). "Commission Implementing Regulation (EU) No. 1213/2012 of 17 December 2012". [online] Available at: http://trade.ec.europa.eu/doclib/docs/2012/december/tradoc_150166.pdf, p. 20.

- **Increase of graduation thresholds:** If the average value of the imports of a product over three consecutive years exceeds the relevant thresholds set out in Annex VI, such products are suspended. To offset the reduced number of GSP beneficiaries, the 2012 reform increased this threshold – which is calculated as a percentage of the total value of the EU's GSP imports of the same product – from 15 to 17.5 percent (generally), and from 12.5 percent to 14.5 percent for textiles.¹³ The 2012 reform also removed the exception to graduation for countries of which the specific product section represents more than 50 percent in value of all GSP covered imports from that country.

In August 2015, the Commission adopted Regulation (EU) 2015/1978 to amend the graduation threshold by taking into account the removal of China, Ecuador, the Maldives, and Thailand from the beneficiary list. Specifically, it increased the overall graduation threshold from 17.5 to 57 percent, kept the graduation threshold for vegetable products and oils at 17.5 and increased the graduation threshold for textiles from 14.5 to 47.2 percent.¹⁴

- **Graduation no longer applies to GSP+ countries:** Under the 2012 reforms, product graduation no longer applied to GSP+; rather, it is only relevant for the Standard GSP arrangement.¹⁵

c. Slight expansion in product coverage and increase in preference margins for Standard GSP and GSP+ beneficiaries

The 2012 reforms included slight changes in product coverage and preference margins for Standard GSP and GSP+ beneficiaries. Specifically, the changes included: (i) the addition of 15 new CN tariff lines to Standard GSP as “non-sensitive” products, for which countries receive duty free access; (ii) 4 CN tariff lines under Standard GSP which were listed as “sensitive” were listed as “non-sensitive”, removing the reduced tariff that Standard GSP beneficiaries were required to pay under the previous scheme; and (iii) the addition of 4 new CN tariff lines to the GSP+ scheme. The product coverage expansion is marginal out of concern that further expansion would erode preferential market access for LDCs, which receive duty free access on all products but arms.¹⁶

d. Simplification of withdrawal procedure

With respect to temporary withdrawal applicable to all three GSP schemes, the timeline for withdrawal has been amended, making it more expedient. Moreover, in contrast to the 2008 regulation and similar to the GSP+ withdrawal provision, the Commission may rely on information from organizations other than the International Labor Organisation (ILO) and United Nations (UN) monitoring bodies in deciding to commence an investigation. Moreover, the reform enhanced the discretion of the Commission to initiate withdrawal. See also section e.ii below.¹⁷

¹³ Official Journal of the European Union (2015). “Commission Delegated Regulation (EU) No. 2015/1978 of 28 August 2015”. [online] Available at: <https://publications.europa.eu/en/publication-detail/-/publication/dc0c4a64-8385-11e5-b8b7-01aa75ed71a1/language-en>; Development Solutions (2018). “Mid-Term Evaluation of EU's Generalised Scheme of Preferences (GSP)”. Final Report. p. 34; Official Journal of the European Union (2012). “Commission Implementing Regulation (EU) No. 1213/2012 of 17 December 2012”.

¹⁴ Official Journal of the European Union (2015). “Commission Delegated Regulation (EU) No. 2015/1978 of 28 August 2015”; “European Commission (2012). “The EU's New Generalised Scheme of Preferences, (GSP)”. [online] p. 10. Available at: http://trade.ec.europa.eu/doclib/docs/2012/december/tradoc_150164.pdf.

¹⁵ European Commission, (2012). “The EU's New Generalised Scheme of Preferences”, (GSP). p. 11.

¹⁶ European Commission, “The EU's Generalised System of Preferences”, p. 11.

¹⁷ Development Solutions (2018). “Mid-Term Evaluation of the EU's Generalised Scheme of Preferences (GSP)”, p. 35; Official Journal of the European Union (2012). “Commission Implementing Regulation (EU) No. 1213/2012 of 17 December 2012” p. 25.

e. GSP+ reforms

i. Increased access to GSP+

The 2012 reforms of the GSP+ scheme aimed to increase incentives for countries to join the GSP+ arrangement.¹⁸ It did so in part by easing the vulnerability criterion countries must meet to be GSP+ eligible. Under the 2008 regulation, a country had to demonstrate that its share in the overall EU GSP imports constituted less than 1 percent. The 2012 regulation changed this to 2 percent, thus making it easier for countries to qualify.¹⁹ Specifically, this change made Pakistan and the Philippines eligible to apply for the scheme. In February 2015, the vulnerability threshold was further amended to 6.5 percent of the total GSP-covered imports to the EU. Moreover, the 2012 reform enabled year-round GSP+ applications – as opposed to only every 1.5 years as was the case under previous regulations.

ii. GSP+ monitoring mechanism

The 2012 reforms strengthened the GSP+ monitoring mechanisms and the responsibilities for the beneficiary country. Specifically, it requires that GSP+ beneficiaries give a “binding undertaking to participate in and cooperate with the monitoring procedure”.²⁰ Moreover, the 2012 reform expanded the scope of what is under review by the Commission: it now includes not only *reviewing* the status of ratification and effective implementation, but also *monitoring*, as well as a requirement on the beneficiary country to cooperate with the relevant monitoring bodies.

Moreover, the 2012 reforms have made the Commission’s monitoring mechanism more independent. Prior to 2012, the Commission’s monitoring was done on the basis of other monitoring bodies’ conclusions. However, the 2012 reforms enabled the Commission to also include its own conclusions on whether a beneficiary country has complied with reporting and cooperation. In addition to reports from the ILO and UN monitoring bodies, the Commission may consider information submitted by third parties such as civil society, social partners, the European Parliament and the Council.²¹ On the basis of this regulation, the Commission, together with the European External Action Service (“EEAS”) has set up a monitoring process, consisting of a scorecard and an ongoing GSP+ dialogue between the EU and the beneficiary country. The 2012 reforms thus aimed to make temporary withdrawal of preferences more objective. The burden of proof has also been reversed: where there is evidence of problems with implementation, the beneficiary country must demonstrate a positive record.²² Finally, the 2012 reforms reduced the three-year reporting cycle to two.

¹⁸ European Commission, (2012). “The EU’s new Generalised Scheme of Preferences”, (GSP). p. 11.

¹⁹ Development Solutions (2018). “Mid-Term Evaluation of the EU’s Generalised Scheme of Preferences (GSP)”. p. 30; Official Journal of the European Union (2012). “Commission Implementing Regulation (EU) No. 1213/2012 of 17 December 2012”, p. 20.

²⁰ Regulation EU No. 978/2012, Article 13. Regulation EU No. 978/2012, Article 13. Official Journal of the European Union (2012). “Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012”. [online] Article 13. Available at: http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc_150025.pdf.

²¹ Development Solutions (2018). “Mid-Term Evaluation of the EU’s Generalised Scheme of Preferences, (GSP)”, p. 96.

²² Official Journal of the European Union (2012). “Regulation (EU) No. 978/2012, of the European Parliament and of the Council of 25 October 2012”. p.24.

f. ROO

The currently applicable ROO under the GSP entered into force in January 2011. They were introduced separate from the 2012 GSP reforms. The 2011 ROO reforms have been credited with simplifying the ROO. In a departure from the previous regulation, there are now different rules for Standard GSP and GSP+ beneficiaries, on the one hand, and EBA beneficiaries, on the other hand. Specifically, EBA beneficiaries receive a lower value addition threshold for several products.²³ For more details about the 2011 reforms, please see Section III.E.2 below.

C. Overview of the 2012 reforms impact on beneficiary's economic growth

This Section briefly assesses the effects of the 2012 reforms on economic growth and export volumes from beneficiaries into the EU. Specifically, this Section focuses on economic impact on the basis of export volumes into the EU, preference utilization, and export diversification. It does not, however, focus on the impact the EU'S GSP scheme has had on economic transformation in beneficiary countries. Indeed, an increase in export volumes does not automatically lead to value chain upgrading or increasing linkages between Foreign Direct Investment (FDI) and local suppliers in a beneficiary country. However, examining this in depth would be beyond the scope of this paper.²⁴

On the basis of the 2018 Mid-Term Evaluation Report, it is evident that the 2012 GSP Regulation has had a positive economic impact on GSP beneficiaries. However, due to the large number of beneficiaries, the different arrangements and the heterogeneity of beneficiary countries, it is almost meaningless to talk about the scheme "as a whole".

²³ Official Journal of the European Union (2015). "Commission Delegated Regulation (EU) No. 2015/2446, of 28 July 2015".[online] Available at: <https://publications.europa.eu/en/publication-detail/-/publication/c73754bc-ae35-11e5-b528-01aa75ed71a1/language-en>.

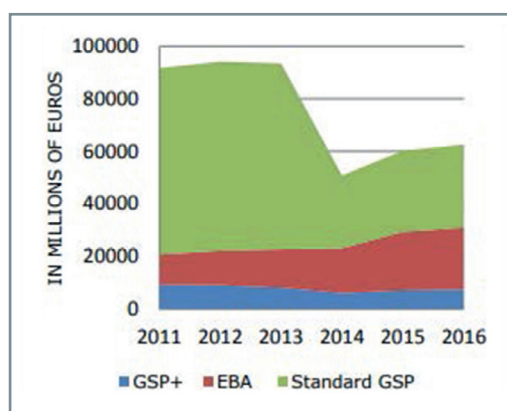
²⁴ There are a number of considerations that go into whether a beneficiary has been able to use GSP preferences not only to increase exports into the EU, but to generate long-standing, structured economic growth. For more information on structural transformation, see, e.g., C. Van der Ven, C. (2015) "Where Trade and Industrial Policy Converge: How developing countries can utilize trade preferences to generate sustainable, local growth in the garment sector", *The International Lawyer*, 49:(1).

a. Export volumes

On a preliminary note, it must be highlighted that the economic importance of preferences to the EU market as a share of the EU's overall imports is relatively low. Indeed, products imported under GSP arrangements accounted for only around 5 percent of total EU imports per year.²⁵

As illustrated in Figure 1 below, in absolute numbers, due to the graduation of a large number of beneficiary countries following the 2012 reforms, the value of imports under the Standard GSP arrangement has declined significantly.

Figure 1: Usage of GSP preferences by eligible countries²⁶



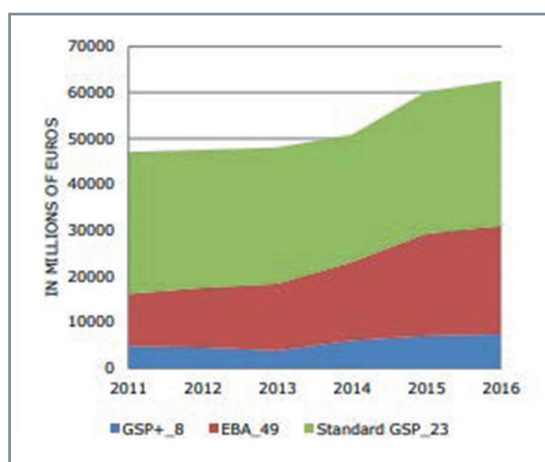
However, as illustrated in Figure 2 below, with respect to only the current beneficiaries (post-2012), imports have increased under all three GSP schemes, and in particular, there has been an increase in the share of GSP+ and EBA imports in total EU imports. The most substantial increase in exports came from the 49 countries under the EBA scheme, which increased from EUR 11.3 billion in 2011 to EUR 23.5 billion in 2016.²⁷ Exports from the 8 countries under the GSP+ scheme increased from EUR 4.9 billion in 2011 to EUR 7.4 billion in 2016 and in the case of the 23 countries under the Standard GSP scheme, exports increased from EUR 30.8 billion in 2011 to 31.6 billion in 2016.²⁸

²⁵ Development Solutions (2018), "Mid-Term Evaluation of the EU's Generalised Scheme of Preferences (GSP)", p.45. Available at: http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155771.pdf.

²⁶ Ibid., p. 47.

²⁷ Ibid.

²⁸ Ibid.

Figure 2: Usage of GSP preferences by GSP beneficiaries²⁹

In sum, without counting the graduation of a significant number of GSP beneficiaries post-GSP reform, the 80 GSP beneficiaries post 2012 reform collectively increased their exports, with the biggest effects for EBA and GSP+ beneficiaries, and a marginal increase post 2014 for Standard GSP beneficiaries.³⁰

b. Utilization Rate

Utilization rates show the share of actual exports that are eligible for preferences and request them.³¹ In the post-regulation period, utilization rates have both increased and decreased compared to the pre-2012 regulation rates, depending on the GSP regime. The average³² pre-reform utilization rate for Standard GSP beneficiaries was around 80 percent, similar to the pre-reform utilization rate of EBA beneficiaries. This declined to 73 percent post-regulation – mostly due to the fact that GSP preferential and eligible export declined significantly. Conversely, the average utilization rates for both EBA and GSP+ beneficiaries increased in the post-2012 GSP reform period. Specifically, the average utilization rates of GSP+ beneficiaries saw an increase with 9 percentage points to 88 percent, whereas the utilization rate of EBA beneficiaries increased in the post-regulation period by around ten percentage points, from around 80 to 90 percent.³³

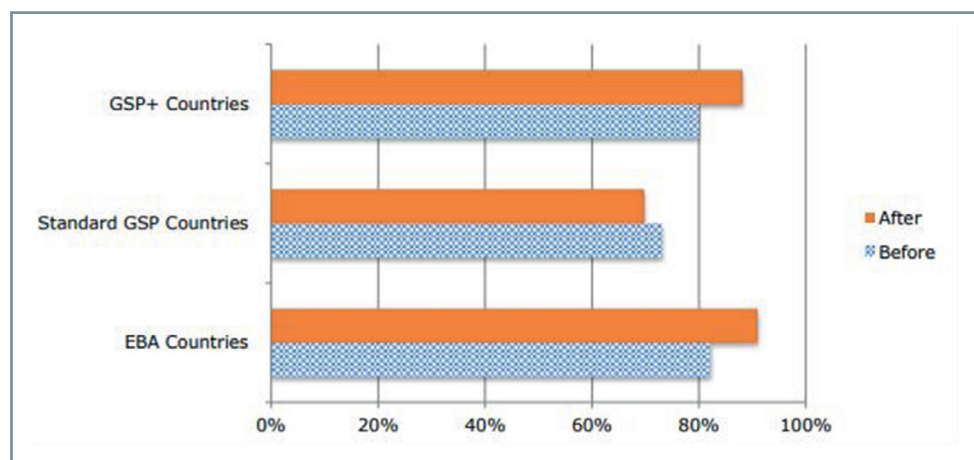
²⁹ Ibid., p. 47.

³⁰ Ibid.

³¹ Brenton, Paul, "Enhancing Trade Preferences for LDCs: Reducing the Restrictiveness of Rules of Origin", p. 283.

³² This is an average for all Standard GSP countries and for all products comparing 2011–2013 data to 2014–2016.

³³ Development Solutions (2018), "Mid-Term Evaluation of the EU's Generalised Scheme of Preferences (GSP)", p. 60.

Figure 2: Utilization rate per GSP arrangement³⁴

These rates represent averages for all countries and all products in the different regimes. However, they do not reflect the variation of specific beneficiaries' utilization rates. For instance, a few Standard GSP countries actually increased the utilization rate. Likewise, changes in utilization rates for EBA and GSP beneficiaries were not homogenous. GSP+ beneficiaries reported both declines and increases in utilization rates. Likewise, for EBA beneficiaries, country-specific utilization rates fluctuated between a 4 percent decline to an increase of 70 percent.³⁵ Thus, caution is warranted when drawing conclusions on the basis of the average utilization rates for each of the different schemes.

That said, there are several explanations as to why some beneficiaries may not export under the GSP regime where they are entitled to trade preferences. This includes, for instance, the lack of awareness about the existence of the preferences.³⁶ Another hurdle lies in the difficulties some producers have to meet stringent ROO. Moreover, where the difference between the GSP tariff reductions and the MFN tariff is relatively low, producers are even less incentivized to go through the various bureaucratic hurdles to proof origin. This would be the case, for instance, for a textile and clothing for sensitive products where the margin for Standard GSP beneficiaries can be extremely low, or for non-sensitive products for which the MFN tariff is extremely low.³⁷

c. Export diversification

Export diversification is measured by the number of CN tariff lines that a country exports. This is important for developing countries given that many of them are highly dependent on relatively few primary commodities, which leads to economic dependency and exposure to external shocks.³⁸

The literature suggests that the EU GSP reforms had had a positive impact on export diversification. This is explained by the infant industry assumption, as well as the heterogeneous firm trade theory. These theories suggest that through the reduction of trade barriers, more firms and producers are encouraged to export.³⁹

³⁴ Ibid., p. 61.

³⁵ Ibid.

³⁶ Ibid., p. 132.

³⁷ Ibid.

³⁸ Ibid., p. 65.

³⁹ Ibid., p. 43.

Specifically, the 2018 GSP Mid-Term Evaluation Report has shown that EBA beneficiaries had the most significant export diversification. However, the EBA beneficiaries had the least diversified export portfolios at product and sectoral level.⁴⁰ These general trends mask EBA country-specific developments. For instance, 11 beneficiaries did not increase export diversification, and countries like Bangladesh, Cambodia, Madagascar, Nepal, and Timor-Leste increased the number of tariff lines traded by 200 or more in the post-regulation phase.⁴¹

Overall, Standard GSP beneficiaries have shown a considerable decrease at all sector levels. This can be explained by a higher degree of diversification among the countries exiting the GSP compared to the remaining ones and/or the fact that the remaining beneficiary countries were not able to fill the market gap left by the exiting or graduating beneficiaries in 2014.⁴² However, with respect to the post-2012 GSP beneficiaries, only 3 countries, Syria, the Cook Islands, and Tajikistan changed reduced export diversification.⁴³ Countries such as Indonesia, Iraq and Uzbekistan utilize over 4000 tariff lines in both periods.

No significant changes on export diversification took place for GSP+ beneficiaries, with the exception of Mongolia which indicated an increase of 26.2 percent.

In sum, the 2012 reforms correlate with an increase in export diversification, with the most significant results for EBA beneficiaries.

⁴⁰ Ibid., p. 8.

⁴¹ Ibid, p. 69.

⁴² Ibid., p. 65.

⁴³ Ibid., p. 68.

d. Overview of the 2012 reforms impact on human rights, good governance and sustainability

This Section briefly assesses the extent to which the 2012 reforms have been effective in promoting sustainable development in beneficiaries. Sustainability provisions are an increasingly prominent feature of the EU's trade agreements. GSP is no exception. Indeed, it is one of the EU's primary tools to promote sustainable development in vulnerable developing countries.

Overall the literature is not conclusive about the impact of the EU's GSP on labour and human rights.⁴⁴ While a number of studies conclude that trade preferences have had a positive effect on poverty reduction, no direct link can be drawn. Moreover, some studies also suggest that in some instances, the link between trade liberalization and economic growth is negative.

The Mid-Term Evaluation Report has concluded that there has been a positive *de jure* impact. It notes that the carrot and stick approach of the GSP Scheme – through the withdrawal mechanism and on the GSP+ scheme's positive conditionality – has incentivized countries to adhere to fundamental labor and human rights.⁴⁵ In particular, for Standard GSP+ beneficiaries, the Mid-Term Evaluation Report found some positive developments. For instance, it highlights that Ecuador and Pakistan had ratified conventions on human rights leading up to their GSP+ admission. Specifically, Pakistan withdrew a number of reservations it had formulated to the International Covenant on Civil and Political Rights and the Convention Against Torture.⁴⁶ That said, the positive impact of GSP+ on labour and human rights has also been limited as the majority of the new GSP+ beneficiaries had already ratified fundamental international conventions before becoming GSP+ members.⁴⁷

Moreover, while individual case studies in the report have shown some level of progress on a number of social and human rights indicators, in several cases, economic growth and export opportunities did not go hand-in-hand with compliance to the fundamental labour and human rights. Indeed, in various case studies, instances of land grabbing and the violation of fundamental labour rights were reported.⁴⁸ Similarly, a recent report by the European Parliament showed many instances of non-compliance on the ground with several International Labor Organization (ILO) conventions in export processing zones in selected GSP+ countries.⁴⁹

In this regard, the Mid-Term Evaluation Report noted that:



[w]hile the increased exports and resulting economic growth could contribute to social development and poverty reduction, the positive impact depends on whether the beneficiary countries have policies in place to effectively channel the extra resources to social and distribution-improving policies as well as adaptation and mitigation measures to limit the potential detrimental effects of increased production on the environment.⁵⁰

⁴⁴ Ibid., p. 93.

⁴⁵ Ibid., p. 8.

⁴⁶ Ibid., p. 99.

⁴⁷ Ibid.

⁴⁸ Ibid., p. 8.

⁴⁹ Leuven Centre for Global Governance Studies Marx. A. et al. (2018), "What role can Voluntary Sustainability Standards play in the European Union's GSP scheme?" Leuven Centre for Global Governance Studies. p. 20. Available at: https://ghum.kuleuven.be/ggs/publications/research_reports/report-vvs-and-gsp.pdf.

⁵⁰ Development Solutions (2018), "Mid-Term Evaluation of the EU's Generalised Scheme of Preferences (GSP)", p. 9.

In other words, while the GSP scheme, to the extent it facilitates exports, can contribute to social development, it's ultimately the beneficiary country that must go the extra mile to ensure maximum poverty reduction.

With respect to environmental impact, the Mid-Term Evaluation Report notes that the GSP scheme has contributed to both negative and positive developments in beneficiary countries. Specifically, it found that the legal conditionality in the GSP+ scheme to ratify certain conventions on environmental protection has had a positive impact on countries' adherence to environmental protection.⁵¹ However, the four case studies of GSP beneficiaries all suggest that they experienced negative environmental impact as a result of increased trade and economic growth.⁵²

The Mid-Term Evaluation Report also highlighted the limitations in evaluating progress in both social and human rights impact indicators as well as environmental ones. Given that the reformed GSP had, at the time of the Mid-Term Report, only been in force for three years, the available data was limited. Moreover, it would be unrealistic for the data to show a real improvement in social, human rights and environmental indicators, given that the impact of the GSP reform with respect to these indicators would take much longer to materialize.⁵³

The compliance gap between ratification of international conventions and the effective implementation of these conventions has long been highlighted by critics of the GSP, and particularly, the GSP+ regime. The existing gap calls for further development of the enforcement part of the GSP scheme, as well as for better linking sustainability and good governance with trade preferences.

e. Conclusion

The significant 2012 GSP reforms have had an overall positive impact on the functioning of the EU scheme, with a special success rate for the most vulnerable countries – in line with the scheme's design to target those most in need. There are, however, remaining challenges, including with export diversification, utilization rates, and the link between trade preferences and sustainability indicators and the human rights situation in the beneficiary countries. These issues should be addressed in the upcoming 2023 reform.

51 Ibid.

52 Ibid.

53 Ibid., p. 39.

III. GSP reform options

A. Background

1. Introduction

Having briefly examined a few salient elements of the 2012 reforms and taking into account the findings of effectiveness of the reforms as set out in the Mid-Term Evaluation Report, this Section examines concrete reform options with respect to a number of key elements of all three EU GSP regimes (Standard GSP, GSP+, EBA) that could maximize the scheme's impact on sustainable development in beneficiary countries. Specifically, the first part of this section examines reform options with respect to (i) country coverage; (ii) product coverage; (iii) product graduation; and (iv) ROO. The second part focuses on how to enhance the link between trade preferences and human rights and sustainability factors.

The reform options analyzed in this paper are taken from ideas that have been proposed in the literature, or that came up in conversations with relevant stakeholders. In particular, I have included almost all the preliminary recommendations set out in the Mid-Term Evaluation Report, given that many of these can be expected to be areas of discussion as the Commission prepares its midterm evaluation report.

In examining different reform options, I have looked at the rationale of the proposed reform, explaining why it warrants to be examined, the anticipated benefits the reform could bring, and the political, technical and legal feasibility of the proposed reform. The feasibility analysis comprises a number of elements, with the weight given to each element varying, depending on the reform idea on the table.

The elements examined are:

- Legal feasibility: is the proposed reform option consistent with the relevant provisions of the WTO – or other relevant legal agreements?
- Technical feasibility: would the Commission be able to carry out the proposed reform given the available resources?
- Political feasibility: would there be a political appetite to carry out the proposed reform? This includes looking at the Commission's interest in the idea, but also anticipated opposition or support by business associations and industry, as well as civil society.
- Externalities: what would the impact of the proposed reform be on beneficiaries in the other GSP regimes? For instance, if the reform proposes to remove Standard GSP, how would this impact other beneficiaries? Relatedly, how would a proposed reform option benefit other elements in the scheme? For instance, shuffling with the country coverage will have a direct impact on cumulation for ROO purposes.

In addition to these categories, the analysis of various reform options will also take into account, where relevant, the level of innovation presented by the idea.

After examining various reform options, this study will recommend one or two as options in each GSP "category" to be advocated for in the upcoming reform. The recommendation is based on a combination of the feasibility analysis, as well as the anticipated benefits that would come from the proposed reform.

2. Legal basis of GSP

Prior to delving into the analysis of different reform options, this paper provides a quick overview of the overall WTO legal framework which governs the provision of trade preferences. This will reduce repetition, as it permeates many of the sections below.

The concept of preferential treatment runs afoul of the most-favoured-nation (MFN) obligation set out in Article I of GATT 1994. In 1979, the Enabling Clause was adopted, authorizing GATT Contracting Parties to provide “differential and more favourable treatment to developing countries, without according such treatment to other [GATT] contracting parties”. It permits such differential treatment “notwithstanding” the provisions of Article I of the GATT. The clause continues to apply under WTO as part of the GATT 1994,⁵⁴ exempting unilateral preference programs offered by developed countries to developing countries from the MFN obligation, and setting out the rules applicable to GSP programs.⁵⁵ Paragraph 3 of the Enabling Clause provides that trade preferences must be (i) “designed to facilitate and promote the trade of developing countries and not to raise barriers to create undue difficulties for the trade of any other contracting parties”; (ii) “not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis”; and (iii) “respond positively to the development, financial and trade needs of developing countries”. Moreover, footnote 3 to paragraph 2(a) notes that trade preferences covered by the Enabling Clause must be “generalized, non-reciprocal and non-discriminatory preferences beneficial to the development countries”.⁵⁶

Interestingly, other than noting that unilateral preferences schemes are to benefit developing countries on a non-discriminatory basis, the Enabling Clause is silent regarding criteria for country eligibility, graduation, and product coverage.⁵⁷ There has only been one case that shed some light on the legal parameters of trade preference programs, although key issues remain unresolved.

In *EC – Tariff Preferences*, India claimed that the special incentive arrangement of the EU’s GSP program aimed at combating production and trafficking of drugs violated GATT Article I and was not consistent with the Enabling Clause. Specifically, the issue revolved around the interpretation of “non-discriminatory” under the Enabling Clause. India argued that “non-discriminatory” meant that no difference in treatment between developing countries is permitted.⁵⁸ The Appellate Body rejected this argument, finding that “non-discriminatory” does not require identical treatment of all developing countries, but rather that additional preferences must be made available to developing countries that share the same “development, financial or trade need”, based on an “objective standard”. It noted that broad-based recognition of a particular need as set out in the WTO or in other multilateral instruments adopted by international organizations, could serve as such standard.⁵⁹ Moreover, the Appellate Body found that “a sufficient nexus” must exist between the preferences accorded and “the likelihood of alleviating the relevant ‘development, financial [or] trade need’”.⁶⁰ Moreover, the relevant preferences must be made available to all countries with the relevant need, and present no “unjustifiable burdens

⁵⁴ Enabling Clause, also Appellate Body Report, *EC – Tariff Preferences*, para. 143.

⁵⁵ The Enabling Clause is now part of the GATT 1994.

⁵⁶ The Enabling Clause, footnote 3 to para. 2 (a).

⁵⁷ Kennedy, K. (2012). The Generalized System of Preferences After Four Decades: Conditionality and the Shrinking Margin of Preference. *Michigan State International Law Review*, [online] 20(3), p. 549. Available at: <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1094&context=ilr>.

⁵⁸ WTO Appellate Body report, *EC – Tariff Preferences*, para. 50; Bartels, L. “The WTO Legality of the EU’s GSP plus arrangement”, *Journal of International Economic Law*, 2007. p. 873.

⁵⁹ WTO Appellate Body Report, *EC – tariff Preferences*, para. 163.

⁶⁰ Appellate Body Report, *EC – Tariff Preferences*, para. 164.

on other Members”. Only where Members grant tariff preferences in favour of LDCs, they need not establish that differentiating between developing and least-developed countries is non-discriminatory, by virtue of the paragraph 2(d).⁶¹

EC – Tariff Preferences did not resolve what types of a *priori* limitations—such as import ceilings (quotas) or exclusion of certain trade-sensitive products—may permissibly be established as a basis on which to discriminate between products from different countries. The panel in *EC – Tariff Preferences* left this as an open question, noting that “[w]hether a particular a priori limitation measure in a GSP scheme complies with the terms of paragraph 3(c) is a matter that can only be decided in light of the particular factual setting of the measure...”.⁶² The Appellate Body declined to interpret this question.

⁶¹ Appellate Body Report, *EC – Tariff Preferences*, para. 172.

⁶² Panel report, *EC – Tariff Preferences*, para. 174, fn. 355.

B. Country coverage

1. Introduction

The 2012 reforms introduced significant changes in country coverage, resulting in the reduction of GSP beneficiaries from 177 to 88.⁶³ As illustrated in Figure 4 below, there are currently 17 beneficiaries of the Standard GSP⁶⁴ arrangement; nine beneficiaries of the GSP+⁶⁵ arrangement; and 49 beneficiaries of EBA arrangement.⁶⁶

Figure 4: List of GSP beneficiaries as at November 2018

	Standard GSP (17)	GSP+ (9)	EBA (49)
Africa	Congo (Republic of), Cote d'Ivoire, Ghana, Kenya, Nigeria, eSwatini	Cape Verde	Angola, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Comoros, Congo, Dem. Rep. of the, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, South Sudan, Sudan, Tanzania, Togo, Uganda, Zambia
Middle East	Syria		
Europe/Asia		Armenia, Kyrgyzstan, Mongolia	
South America		Bolivia, Paraguay	
Asia	India, Indonesia, Tajikistan, Uzbekistan, Vietnam	Pakistan, Philippines, Sri Lanka	Afghanistan, Bangladesh, Bhutan, Cambodia, Lao PDR, Myanmar/Burma, Nepal, Timor-Leste, Yemen
Australia and the Pacific	Cook Islands, Micronesia, Nauru, Niue, Tonga ⁶⁷		Kiribati, Samoa ⁶⁸ , Solomon Islands, Tuvalu, Vanuatu
Caribbean			Haiti

63 Development Solutions (2018), "Mid- Term Evaluation of the EU's Generalised Scheme of Preferences (GSP)". p. 32, available at: http://trade.ec.europa.eu/doclib/docs/2018/october/tradoc_157434.pdf. Between 2012 and July 2018, a number of additional countries were removed from the GSP scheme: Azerbaijan, Iran, China, Ecuador, the Maldives, Thailand, Turkmenistan, Fiji, Iraq, and the Marshall Islands (classified as upper-middle income country for three consecutive years); Peru, Colombia, Honduras, Nicaragua, Panama, Costa Rica, El Salvador and Guatemala, Georgia and Cameroon (because the countries have other preferential market access arrangements in place with the EU); Croatia (because it became Member of the EU); and Ukraine (because of the EU-Ukraine Deep and Comprehensive Free Trade Agreement). Some countries also got added to the scheme, including Myanmar/Burma and South Sudan.

64 List of Countries benefiting from the GSP arrangement, available at: http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155841.pdf.

65 Ibid.

66 Ibid.

67 Tonga was classified by the World Bank as upper middle-income country in 2013, 2014 and 2015, and removed from the GSP beneficiary list. However, it was reinstated in 2016, as it was classified by the World Bank as lower middle-income country.

68 Samoa will be removed from the list of EBA beneficiary countries as from 1 January 2019, See Commission

Given the significance of the 2012 reforms with respect to country coverage, there appears to be little political will to initiate another large overhaul for the upcoming expiry of the scheme. Moreover, there seems to be general satisfaction with the 2012 reforms regarding country eligibility and beneficiaries. Indeed, from the interviews I have conducted, there appears to be overall agreement among different stakeholders, including industry associations, civil society, and DG Trade, that the reforms have been positive, as the removal of middle and high-income countries from the GSP beneficiary list has resulted in the preferences being tailored to the countries that were most in need: LDCs and the economically vulnerable countries.

However, despite overall satisfaction, there are a number of trends in country classification that the GSP reform must anticipate. This includes the diminishing importance of Standard GSP and the upcoming waive of countries that will lose LDC status. Indeed, as predicted by the UN, in the next decade, around 12 countries, including Bangladesh, are expected to graduate from LDC status.⁶⁹

Taking into account these trends, this section explores options to (i) abolish Standard GSP; (ii) expand GSP+ beneficiaries through (a) relaxing the vulnerability criterion, or (b) introducing different, country-specific criteria to determine vulnerability; and (iii) establish a transitional scheme for graduating EBA beneficiaries.

2. Status quo

Standard GSP: Any developing country will benefit from Standard GSP, unless (i) it has another type of special trade arrangement with the EU, granting the same tariff preferences, or (ii) it has achieved high or upper-middle income status during three consecutive years on the basis of World Bank classification.

GSP+: To be eligible to receive GSP+ status, the country must submit an application and fulfill Standard GSP conditions, in addition to two criteria: one related to vulnerability and one related to sustainable development.

A country's level of vulnerability is, in turn, assessed on the basis of two criteria:

- **Diversification criterion:** this indicates how concentrated a country's main EU export industries are, and is met if a country's seven largest sections of the GSP-covered imports represent 75% or more of total GSP imports from that country over a three-year period.
- **Import share criterion:** the share of import value of a country compared to total GSP imports into the EU. This criterion is met where the three-year average share of GSP-covered imports of all GSP countries is lower than 6.5%.

To comply with the sustainable development criteria, a country must ratify the 27 GSP+ conventions on human rights, environmental protection and good governance. Moreover, the applicant cannot have formulated reservations which are prohibited by these conventions, and the monitoring bodies must not identify serious failures to effectively implement them.

EBA: Any country that is listed as an LDC by the UN Committee for Development Policy (CDP) is automatically included in the EBA scheme; countries do not need to apply for this scheme. Countries do not lose EBA status by entering into an FTA with the EU.

⁶⁹ Other countries that are predicted to graduate in the next decade include: Bhutan, Kiribati, Lao People's Democratic Republic, Myanmar, Sao Tome and Principe, Solomon Islands, Timor-Leste, and Tuvalu.

3. Remove Standard GSP

a. Rationale

The Mid-Term Evaluation Report found that since 2014, the share of imports under the Standard GSP arrangement in total EU imports has decreased. By contrast for EBA and GSP+, the shares of import of total EU imports increased.⁷⁰ With Standard GSP becoming less and less relevant, the Mid-Term Evaluation Report recommends to abolish Standard GSP post the regulation's 2023 expiry.⁷¹

The declining relevance of Standard GSP is caused by countries exiting from Standard GSP – a trend that continued after the 2012 reforms and after the writing of the Mid-Term Evaluation Report. Post the 2012 reforms, 34 Standard GSP beneficiaries remained. That is double the number of countries compared to the 17 countries that are currently beneficiaries of Standard GSP. And from these 17, Ghana, Cote d'Ivoire and Swaziland have ratified an interim Economic Partnership Agreement (iEPA) ⁷² or Economic Partnership Agreement (EPA) ⁷³ and are, accordingly, expected to exit the Standard GSP scheme on 31 December 2018.⁷⁴ This will further reduce the Standard GSP beneficiaries to 14.

Moreover, the diminishing value of the Standard GSP scheme is further manifested by the high concentration of the three largest beneficiaries i.e., India, Vietnam, and Indonesia, accounting for over 90 percent of all Standard GSP imports.⁷⁵ When these countries will be designated by the World Bank as upper-middle-income countries and leave the Standard GSP scheme, imports under the Standard GSP arrangement will become negligible.

At a first glance, and given its diminishing value, removing Standard GSP seems to make logical sense. It would furthermore simplify a very complicated regime by reducing the number of schemes from 3 to 2. More importantly, it would incentivize those countries that have not entered into an FTA with the EU or have not obtained upper-middle- or high-income status for three subsequent years to apply for GSP+ status, including through ratifying and effectively implementing the list of human rights and sustainability conventions. This, in turn, would strengthen the link between sustainability and human rights, on the one hand, and trade preferences on the other hand. The section below analyzes whether harmonizing the Standard GSP and GSP+ approaches would be feasible.

⁷⁰ Development Solutions (2018). "Mid-Term Evaluation of the EU's Generalised Scheme of Preferences (GSP)". p. 7.

⁷¹ Ibid., p. 11.

⁷² European Commission, (2018). "Overview of Economic Partnership Agreements". Available at: http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf.

⁷³ European Commission, (2018). "Trade –Countries and regions (Southern African Development Commission)". [online]. Available at: <http://ec.europa.eu/trade/policy/countries-and-regions/regions/sadc/>.

⁷⁴ Under Article 5(2)(b) of Regulation 978/2012, if a country started to apply a preferential market access arrangement with the EU, GSP preferences should continue to be granted for two years as from the date of application of that preferential market access arrangement. European Commission (2016) "Commission Delegated Regulation (EU) amending Annex II to Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalized tariff preferences". Available at: <https://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/C-2016-7809-F1-EN-MAIN.PDF>.

⁷⁵ UNCTAD, (2018). GSP Newsletter No.13. p. 4. Available at: http://unctad.org/en/PublicationsLibrary/ditctncdinf2018d1_en.pdf, p. 4.

b. Feasibility Analysis

DG Trade has expressed reluctance to engage in major overhauls of the existing GSP regulation 2023. In this context, abolishing Standard GSP would likely be too significant a change. Moreover, opposition to removing Standard GSP can be expected from EU Member States that are relying upon cheap imports on the basis of Standard GSP, but that would not be able to meet the vulnerability criteria to qualify for GSP+. Creating exceptions for those countries that would not be able to meet the GSP+ vulnerability criteria, as suggested in the Final Report of the Mid-Term Evaluation would go against the objectives of the 2012 GSP reform, i.e., to tailor the scheme better to those countries in need.⁷⁶

From a technical perspective, removing the Standard GSP would mean that only LDCs would be automatically entitled to receive preferences, whereas low-income and lower-middle income countries would only be entitled to receive preferences if they comply with the demanding conditions of GSP+. This would raise legal questions. One of the criteria for a GSP scheme to comply with the Enabling Clause is that the scheme be “generalized”. In *EC-Tariff Preferences*, the Appellate Body observed that this “requires that the GSP schemes of preference-granting countries remain generally applicable”.⁷⁷ It is an open question whether a preference scheme that is applicable only to countries that (i) meet certain vulnerability criteria; and (ii) have ratified a select number of human rights and environmental treaties can be considered a “generalized” system of preferences under the Enabling Clause.⁷⁸ Making GSP+ the only category for non-LDC preferences could also bring to the forefront unresolved issues related to the legality of the conditions that must be met to receive GSP+ preferences.⁷⁹

Moreover, doing so would have negative externalities vis-à-vis other parts of the GSP scheme. For instance, and as noted in Section I.D.4 below, removing Standard GSP would mean that these countries can no longer be used for regional cumulation. Likewise, if more countries were to enter the GSP+ scheme – even if they would not be able to meet the vulnerability criteria – it could erode the preferences currently enjoyed by GSP+ countries that do meet the vulnerability criteria. Conversely, if Standard GSP countries would refuse to sign-up to GSP+ for political or other reasons, it would mean that a number of low income and lower-middle income countries would not receive any preferences.

To conclude, the benefits that can be expected from removing Standard GSP will not outweigh the anticipated political opposition, as well as technical and, potentially, legal hurdles that would need to be overcome. Conversely, there is little harm in retaining the Standard GSP arrangement, even in light of its diminishing relevance. Thus, I do not recommend removing Standard GSP.

External Consultant's Mid-Term Recommendation on Standard GSP

The Mid-Term Evaluation's Final Report recommends abolishing Standard GSP, providing a transition period of about three years for Standard GSP countries to enable them to ratify the relevant conventions. For those countries that would not fulfill the vulnerability criteria, exceptions could be granted.

⁷⁶ It must also be noted that there are only two Standard GSP countries, Indonesia and India, that would exceed the vulnerability criteria.

⁷⁷ Appellate Body Report, *EC – Tariff Preferences*, para. 156

⁷⁸ *Ibid.*, para. 155.

⁷⁹ These are elaborated on in section III.B.4 below.

4. Increase the number GSP+ beneficiaries

As set out in Section II.D, the Mid-Term Evaluation Report found that the legal conditionality in the GSP+ has had a positive impact on countries' adherence to labour and human rights. While GSP+ beneficiaries have largely all ratified the Annex VIII conventions, many EBA beneficiaries have not yet ratified the core human rights, good governance and sustainability conventions set out in Annex VIII, and about half of Standard GSP beneficiaries eligible for GSP+ have not yet signed or ratified the fundamental conventions on climate change and environmental protection.⁸⁰ Thus, to strengthen the link between human rights, good governance and sustainability, on the one hand, and trade preferences on the other hand, it is worth looking into options to increase the group of GSP+ beneficiaries – which as at December 2018 includes 9 countries.⁸¹ This would be especially important in light of the anticipated wave of graduating LDCs.

This Section explores three different options for doing so: (a) relaxing the GSP+ import share criterion; (b) introducing more objective criteria to determine vulnerability; and (c) changing the denominator in the import share criterion.

a. Relax GSP+ import share criterion

A prerequisite to obtain GSP+ status is demonstrating that the percentage of GSP imports from a beneficiary country is less than 6.5% of all other GSP imports into the EU.⁸² One way to increase GSP+ beneficiaries would be by relaxing this criterion.

On the basis of a preliminary analysis, the benefits that would be derived from relaxing the 6.5 threshold would be small. The only two Standard GSP countries that would fail to meet the GSP+ vulnerability criteria are India and Indonesia.⁸³ However, India and Indonesia may soon cease to be Standard GSP beneficiaries, either because they will enter into FTAs with the EU⁸⁴, or because they receive upper-middle-income status. Moreover, all LDCs, except for Bangladesh, are expected to meet the 6.5 % threshold.⁸⁵ Thus, relaxing or changing the vulnerability criterion may not generate far-reaching benefits. Finally, even if they would be relaxed, countries like India would remain reluctant to apply for GSP+ status, due to the tutelage that comes from engaging in such a process.⁸⁶

The current import share criterion is the result of Britain pushing for the inclusion of Pakistan into GSP+. If it would be amended again with an eye to including India, Bangladesh or Indonesia, it would augment criticism that the GSP scheme is politically motivated. Moreover, it would create opposition from business associations such as EURATEX, which represents EU textile manufactures. They are concerned about increased competition in key EU industries such as textile, as a result of India or Bangladesh qualifying for GSP+.

⁸⁰ Development Solutions (2018), "Mid-Term Evaluation of the EU's Generalised Scheme of Preferences (GSP)", p. 115.

⁸¹ See Figure 4 above.

⁸² To receive GSP+ status, countries must also ratify and effectively implement a number of conventions set out in Annex VIII. Any changes to this list of conventions will be addressed in Section III.F.4 below.

⁸³ Marx, A. et al. (2018). "What Role can Voluntary Sustainability Standards play in the European Union's GSP Scheme?" Leuven Centre for Global Governance Studies, 2018, p. 15.

⁸⁴ European Commission on (2018). "Trade –Countries and regions (India)" [online] Available at: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/india/>; European Commission on (2018). "Trade –Countries and regions (Indonesia)". [online]. Available at: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/indonesia/>.

⁸⁵ Interview with DG Trade, 24 July 2018.

⁸⁶ Ibid.

Legally, it is unresolved whether the EU GSP+ current import share criterion – the current ones or a higher percentage – would be consistent with the Enabling Clause.⁸⁷ For instance, it has been argued that the requirement that a country's GSP exports may amount to no more than 6.5% of total EU imports cannot be an accurate reflection of a country's development needs as it "is not defined in terms of the country at issue, but in terms of EU imports" – a relative factor. Therefore, it "cannot be a relevant criterion for discriminating between developing countries"⁸⁸ – which must be made available to developing countries that share the same "developmental, financial or trade need".⁸⁹ However, as this has not been litigated under the WTO, it remains an open question whether a panel or the Appellate Body would indeed consider the EU's GSP+ scheme to be inconsistent with the Enabling Clause.⁹⁰

To conclude, I recommend against relaxing the import share criterion to ensure inclusion of countries that are currently unable to meet them.

b. Introduce more objective criterion to determine vulnerability for GSP+

The GSP+ vulnerability criteria have been criticized for not being sufficiently objective. Indeed, they do not reflect a country's development need. Rather, they are relative figures, which calculates the share of a beneficiary country's EU GSP imports as a share of all EU GSP imports. Therefore, it is difficult to establish a clear correlation between a country's percentage of overall EU GSP imports and the country's level of economic vulnerability. This problem is aggravated by a declining number of GSP beneficiaries, rendering the percentage of overall EU GSP imports as denominator an increasing meaningless indicator of vulnerability.

One way to remedy this would be by basing GSP+ on broader and more objective criteria, as has been suggested by various authors.⁹¹ The challenge, however, lies in basing vulnerability on a standard that is both internationally recognized as being objective, and is an accurate indicator of economic vulnerability. One standard that has been proposed is the UN categories such as small islands developing states or landlocked developing countries.⁹² Indeed, Norway has explored expanding its zero-tariff scheme to include lower-middle income countries with fewer than 75 million inhabitants.⁹³ While legally these standards should not face challenges, it would politically be almost impossible to introduce such a standard. Moreover, the benefits may be limited as they may not be more accurate indicators of vulnerability, compared to the existing threshold. For instance, there are countries with fewer than 75 million inhabitants that are extremely developed, and conversely, while there are many countries with more than 75 million inhabitants that experience low levels of development. Thus, introducing a completely different criteria on which to base vulnerability may create more problems than it solves.

87 See, e.g., Bartels, L. (2007). "The WTO Legality of the EU's GSP plus Arrangement". *Journal of International Economic Law*, 2007; Axel, M.10(4); Marx, A. et al. (2018). "What Role can Voluntary Sustainability Standards play in the European Union's GSP Scheme?" *Leuven Centre for Global Governance Studies*, 2018.

88 Bartels, L. (2007). "The WTO Legality of the EU's GSP plus arrangement", p. 882.

89 Appellate Body Report, EC – Tariff Preferences, para. 163.

90 This analysis is, to a certain degree, also applicable to options to change product graduation, set out in Section III.D below.

91 See, e.g., Bartels, L. (2007). "The WTO Legality of the EU's GSP plus Arrangement." p. 883; Bilal, S. and Ramdoo, I., (2011). "Reform of the GSP: A focus on those in need or a need to refocus?", *ICTSD Trade Negotiations Insights*, 10(5). [online] Available at: <https://www.ictsd.org/bridges-news/trade-negotiations-insights/news/reform-of-the-gsp-a-focus-on-those-in-need-or-a-need>.

92 Bartels, L. "The WTO Legality of the EU's GSP plus arrangement", pp. 884-885.

93 Norwegian Ministry of Foreign Affairs. (2010). "Review of Norway's Generalised System of Preferences (GSP) for import of goods from developing countries". p.8 [online] Available at: https://www.regjeringen.no/globalassets/upload/ud/vedlegg/handelspolitikk/121029_import_from_developing_countries_web_v2.pdf.

c. Change the denominator in the import share calculation

Another option would be to change the denominator in the import share calculation. Currently, vulnerability is calculated as a percentage of EU GSP imports. With a decline in GSP beneficiaries, such relative standard loses accuracy as a benchmark of a country's competitiveness. Indeed, it would be totally plausible that a country's imports to the EU would constitute more than 6.5% of EU's GSP imports yet would only comprise a negligible percentage of overall EU imports, suggesting the country's continued vulnerability.

Thus, one reform option would be to change the denominator from EU GSP imports to total EU imports. Indeed, this is the approach adopted by Japan, albeit in the context of product graduation.⁹⁴ The benefit of basing vulnerability in part on the share of overall EU imports as opposed to share of EU GSP imports is that it would be a more accurate proxy of vulnerability.

However, introducing this change would also mean that countries that do not meet the current vulnerability criterion as they are not vulnerable vis-à-vis other GSP imports could be considered vulnerable vis-à-vis total EU imports and thus, eligible to apply for GSP+. Similar to relaxing the GSP+ vulnerability threshold, this could reduce the preference margin enjoyed by GSP+ countries that meet the existing vulnerability criteria. Thus, whether or not this would constitute a suitable reform option would depend on how far one considers the GSP scheme should go to build competitiveness.

From a legal perspective, while this approach would not alleviate the potential WTO-inconsistency of the vulnerability standard as discussed above, it would be easier to introduce compared to a totally different, objective criteria that would measure vulnerability, such as a country's population.

d. Conclusion

This section examined three possible ways to increase GSP+ country coverage: relaxing the GSP vulnerability criteria; introducing objective GSP+ vulnerability criteria; and changing the denominator in the GSP+ import share calculation. While the benefits of the first option would be limited and the second option would be challenging to accomplish from a legal, political and practical point of view, the third option, i.e., changing the denominator of the import share equation from a percentage of total EU GSP imports to a percentage of total EU imports would be a potential option to consider. However, the extent to which this option should be considered depends on how far one considers the scheme should go to build competitiveness.

⁹⁴ UNCTAD. (2011). "Generalized System of Preferences: Handbook on the Scheme of Japan", [online], Available at: http://unctad.org/en/Docs/icdtsbmisc42rev4_en.pdf.

5. Establish a suitable transition period for graduating LDCs

a. Rationale

Another option to explore in the context of GSP country coverage would be to introduce a more suitable transition period for LDCs that are expected to graduate from the LDC category, and thereby will lose EBA status.

Graduating from EBA status – the most generous of the three EU GSP regimes – could have serious consequences, especially when a beneficiary's exports are highly concentrated.⁹⁵ The consequences would be more severe if graduating LDCs would become Standard GSP beneficiaries. One way to continue a more preferential set of preferences would be if exiting EBA beneficiaries would qualify for GSP+.

For many current EBA beneficiaries that will graduate in the next decade, it will be very challenging to qualify for GSP+. While, as highlighted in above, meeting the vulnerability criteria will not – with the exception of Bangladesh – constitute a problem, challenges are expected to arise with respect to countries' ability (and willingness) to ratify and effectively implement the list of conventions. Indeed, many LDCs have not ratified core conventions. Bhutan is not even a member of the ILO. A lot of work thus lies ahead to improve the human rights, governance and sustainability situation in exiting EBA beneficiaries.

This means that, to ensure a smooth transition, both time and technical support should be introduced, beginning at the moment an LDC is slated to graduate.

b. Feasibility

From a technical point of view, creating such a transition period could perhaps be a low hanging fruit as it may not require regulatory reform. Indeed, under the LDC graduation process at the UN and the 2012 GSP regulation, LDCs currently have 6 years from the time they first meet the LDC graduation threshold and the time they must exit the EBA regime.

LDC status is determined by the UN on the basis of three criteria: GNI per capita, economic vulnerability, and education and health targets. Countries must meet two of the three criteria at two consecutive triennial CDP reviews to be considered for graduation. Subsequently, the country a "grace period" of typically three years before graduation actually takes place.⁹⁶ In addition, Article 17.2 of the 2012 GSP Regulation provides graduating LDCs with a transitional period of an additional three years from the moment the country is no longer qualified as an LDC by the UN. Thus, within the current regulatory framework, LDCs have 9 years from the time they first meet the graduation threshold to the time they will lose EBA status. This should be sufficient time to serve as suitable transition period and prepare graduating LDCs to meet the eligibility conditions of the GSP+ scheme.

⁹⁵ For instance, when Cape Verde, graduated from the EBA program, the EU extended the transition time with another year, noting that Cape Verde had not overcome over-reliance on one key export sector.
<https://www.un.org/ldcportal/preferential-market-access-european-union-everything-but-arms-initiative/>.

⁹⁶ UN DESA (2018). "Making progress on sustainable development, four least developed countries tapped to graduate from ranks of poorest". [online] United Nations Department of Economic and Social Affairs. Available at: <https://www.un.org/development/desa/en/news/policy/4-countries-suggested-for-ldc-graduation.html>.

However, ensuring optimal usage of this 9-year window would require systemic engagement with EBA beneficiaries, starting at the time they are considered for graduation at the UN (six years before they actually graduate), and continued during the additional 3-year transitional phase. It will likely require significant resources in the upcoming decade, in light of the expected number of countries that will graduate. Politically, there is great interest in facilitating the transition period for graduating LDCs. Indeed, DG Trade brought this up as an area of reform to explore. It is also supported at the international level, with the UN CDP noting that “there is an opportunity for the international development community to develop a package of incentives aimed at furthering the development progress of countries graduating from the least developed country category.”⁹⁷

Legally, it would not present any issues. Any additional support would be provided only to graduating LDCs. As noted in Section A.2, paragraph 2(d) of the Enabling Clause suggests that, where Members grant tariff preferences in favour of LDCs, they need not establish that differentiating between developing and least-developed countries is non-discriminatory, by virtue of the paragraph 2(d).⁹⁸

To conclude, advocating for a suitable transition period would be a good area to focus on in light of the upcoming 2023 expiry of the current system.

6. Recommendation

On the basis of the preceding analysis, I recommend two reform options in the context of country coverage that could be further pursued. These are (i) changing the denominator in the calculation of the GSP+ import share criterion from a percentage of GSP imports into the EU to a percentage of all EU imports; and (ii) the introduction of a suitable transition system for graduating LDCs to help them qualify for GSP+ status.

Commission's and External Consultants' Mid-Term Recommendations on country coverage

The Commission's 2018 Mid-Term Evaluation does not make any recommendations regarding country coverage under the GSP scheme. Indeed, it is silent on the trend of countries exiting the LDC category and any implications this may have for the GSP regime. Likewise, it does not highlight the issue related to the vulnerability criteria, and in particular, the import share criterion that may no longer be an accurate reflection of that country's actual competitiveness in the EU market.

As noted above, the Mid-Term Evaluation Report by the independent consultants makes two recommendations in the context of country coverage: (i) remove Standard GSP; (ii) impose a transition period for graduating LDCs to qualify for GSP+ preferences. These recommendations are made for reforms after expiry of the GSP regulation. It is plausible that the Commission did not take up these recommendations in its Mid-term evaluation but will consider these with respect to changes to the GSP scheme after the expiry on December 2023.

⁹⁷ United Nations, Committee for Development Policy, (2018). “E/2018/33 Report on the Twentieth Session (12–16 March 2018), Supplement No.13”. p. 4. [online]. Available at: <http://undocs.org/en/E/2018/33>.

⁹⁸ Appellate Body Report, EC – Tariff Preferences, para. 172.

C. Product Coverage

1. Introduction

Given that many key products for developing countries are currently excluded from the Standard GSP and GSP+ regimes, expanding product coverage in key commodities could significantly enhance export volumes under the Standard and GSP+ regimes. Moreover, enabling more products to be competitively exported could increase export diversification for beneficiaries under Standard GSP and GSP+.

However, the Mid-Term Evaluation Report did not establish a clear link between the GSP regulation and product diversification. This tells us that the relationship between trade preferences, product coverage, and export diversification is complex and may be influenced by supply-side issues more than the scope of product coverage. This conclusion is also supported by much of the literature on trade preferences and export diversification.⁹⁹ Indeed, supply-side constraint and domestic policies in beneficiary countries are highlighted in the Commission's Midterm Evaluation to explain export diversification results.

Keeping this limitation in mind, this section explores the feasibility and rationale of extending product coverage. Any change in product coverage would concern only Standard GSP and GSP+ beneficiaries, given that the EBA program already covers all products – except arms.

2. Status quo

Standard GSP and GSP+ beneficiaries are entitled to receive preferential tariff rates on 66% of all products. From the non-covered products, 25% already benefit from zero MFN tariff rates. 9% of all products have an MFN tariff larger than zero and are not covered under the Standard GSP and GSP+ schemes. EBA beneficiaries, by contrast, enjoy preferential access on all products, but arms.

In 2012, no major reforms were made in the area of product coverage and tariff reduction percentages. However, a handful of products were added to Standard GSP and GSP+, and various products were moved from the “sensitive” category to “non-sensitive”. As a result of these reforms, the GSP and GSP+ product coverage now includes a number of agricultural and fishery products listed in HS chapters 1-24, and almost all processed and semiprocessed industrial products, including ferroalloys, that are listed in HS chapters 25-97, except for chapter 93 on arms and ammunition.¹⁰⁰

As explained in Section C.2 below, product sections were also made more homogenous.

⁹⁹ See, e.g., Persson, M. and Wilhelmsson, F. (2013). “EU Trade Preferences and Export Diversification”, 2013. Lund University, p. 25; [online] Working Paper 2013(32). Available at: https://project.nek.lu.se/publications/workpap/papers/WP13_32.pdf; Siles-Brügge, Gabriel, G. (2014) “EU trade and development policy beyond the ACP: subordinating developmental to commercial imperatives in the reform of GSP” *Contemporary Politics*, 20 (1), pp. 49-62 ; The CARIS scheme found that there is little evidence that the EU's preference regimes have led to a diversification of exports into new products” (Gasiorek et al. 2010, p. 8); Gasiorek, M. et al. (2010). “Mid-term Evaluation of the EU's Generalised System of Preferences”. [online] Centre for the Analysis of Regional Integration at Sussex (CARIS), p.8. Available at: http://trade.ec.europa.eu/doclib/docs/2010/may/tradoc_146196.pdf; Gamberoni, E. (2007). “Do unilateral trade preferences help export diversification?” Graduate Institute of International Studies, HEI Working Paper No. 17/2007. [online] Available at: <https://core.ac.uk/download/pdf/6513451.pdf?repositoryId=153>.

¹⁰⁰ Development Solutions (2018) “Mid-term Evaluation of the Generalized Scheme of Preferences”, p. 33.

3. Expand product coverage

a. Rationale

Since no major reforms took place in the area of product coverage during the 2012 reforms, there may be scope for reforms in this area. Indeed, expanding product coverage to include key products from GSP beneficiaries, such as many agricultural products like rice, bananas, sugar etc. has been proposed by numerous studies.¹⁰¹ Including these key products could give a significant boost to many developing countries, many of which have a comparative advantage in agricultural products. On the other hand, expanding product coverage for Standard GSP and GSP+ beneficiaries to include mostly unprocessed agricultural products could disincentivize developing countries from diversifying their exports in manufactured goods.¹⁰²

b. Feasibility

The area of product coverage in the EU is very obscure. It is unclear exactly why certain products are included and others are not. As a result, none of the stakeholders I spoke with suggested reform options relevant to product coverage. Indeed, in response to questions about product coverage, none of the stakeholders suggested to expand GSP coverage with a specific product. Without narrowing down the product coverage question to more specific products, it is difficult to be precise in the feasibility analysis.

However, a few general observations hold: product coverage and exclusion under GSP reflects political interests. This includes preventing undue competition with EU's own industry, as well as the (former) interest to provide more preferential benefits to African, Caribbean and Pacific countries ("ACP") compared to other developing countries.

The first political factor, i.e., limiting competition with the EU's production and economic interest, cannot be easily changed or influenced. This is mainly the result of lobbying of the various players, and in the end, the Commission decides to either respond to industries' concerns or not.

The second political factor would suggest that currently, there is some leeway to expand product coverage. Indeed, with most ACP countries now covered by either an EPA or by the GSP scheme, the interest to provide more favorable product coverage to ACP countries compared to GSP countries no longer holds. In fact, it may suggest that there is some room to expand the current scope of product coverage to include products that were included under the Cotonou regime but excluded under the GSP scheme. Such products include, *inter alia*, boneless meat from bovine animals, bananas, citrus fruit, wheat or meslin, rice, sugar, sheep and goat skin etc.¹⁰³ However, while there may be such scope in theory, in reality, most Cotonou countries that are receiving GSP preferences are EBA beneficiaries – suggesting that the push for expanding Standard GSP and GSP+ coverage may not be strong.

¹⁰¹ Bilal, S. and Ramdoo, I. (2011). "Reform of the GSP: A focus on those in need or a need to refocus?" ICTSD Trade Negotiations Insights, 10(5); Adami, A., McGarry, B. and Ugaz, P. (2016). "A Comparative Analysis of Generalised Systems of Preferences: Challenges, Constraints and Opportunities for Improvement". IHEID Trade Law Clinic. p.8. [online] Available at: <https://georgetown.app.box.com/s/8s1n0h0tnbdf9v4ketrao3upnbsvaa7s>.

¹⁰² Adami, A., McGarry, B., Ugaz, P. "A Comparative analysis of generalized systems of preferences: challenges, constraints and opportunities for improvement", p. 36. Stevens, C. and Kennan, J. (2005). "GSP Reform: a longer-term strategy (with special reference to the ACP)". [online] Institute of Development Studies. Available at: https://www.ids.ac.uk/ids/global/pdfs/CS_GSPs05.pdf.

¹⁰³ Stevens, C., and Kennan, J. "GSP Reform: A longer-term strategy with a special reference to the ACP", 2005. International Centre for Trade and Sustainable Development (ICTSD) (2018). "Trade Negotiations Insights".10(5). p. 2. [online] Available at: https://www.ictsd.org/sites/default/files/downloads/tni/tni_en_10-5.pdf.

Moreover, expanding product coverage for Standard GSP and GSP+ beneficiaries may result in preference erosion vis-à-vis EBA beneficiaries, who are entitled to duty-free access on all products but arms. Indeed, this is at least the official reason used by the Commission to explain why product coverage was not significantly expanded in 2012, with De Gucht noting that “widening product coverage or increasing preferences would only result in more competitive pressure on the poorest, since it would improve the relative position of non LDCs as compared to LDCs”.¹⁰⁴ While this statement excludes the political considerations set out above, preference erosion vis-à-vis EBA beneficiaries is an important factor that would need to be considered for any proposal involving the expansion of product coverage for Standard GSP and GSP+ beneficiaries.

4. Recommendation

At present, there appears to be little interest and scope to expand product coverage for Standard and GSP+ beneficiaries. The benefits of doing so are also heavily debated, both with regards to export diversification, and also in light of preference erosion that may occur vis-à-vis EBA beneficiaries. Moreover, given that product coverage is heavily politicized, this may not be an area that is worth focusing on influencing with technical observations.

However, on the basis of the External Consultant’s and the Commission’s emphasis on supply-side constraints (below), capacity building to remove domestic supply-side constraints would be one area to focus on to enhance the GSP scheme’s impact.

Commission and External Consultant’s Mid-Term Recommendation on product coverage

The Commission’s 2018 Mid-Term Evaluation and the Final Report likewise do not include recommendations to expand product coverage. The Commission’s 2018 Mid-Term Evaluation instead highlights the link between the lack of export diversification and domestic policy and supply-side constraints, such as technical barriers to trade, SPS measures, limited production and transport capacity, low industrial development, and lack of awareness of the GSP scheme among businesses. While this predominantly refers to preference utilization – as opposed to product coverage – it suggests that focusing on supply-side constraints will bring about more benefits to enhance export diversification and exports under the GSP scheme in general, compared to focusing on the politically-charged undertaking of further expanding covered products for Standard GSP and GSP+ beneficiaries.

¹⁰⁴ ICTSD, “Trade Negotiations Insights”, available at: https://www.ictsd.org/sites/default/files/downloads/tni/tni-en_10-5.pdf, p. 2.

D. Product Graduation

1. Introduction

When a product reaches a certain level of competitiveness, it “graduates” from the Standard GSP scheme, i.e., for that product, the beneficiary will no longer receive preferential tariff rates. Product graduation is currently applicable only to Standard GSP countries.

While the 2012 reforms increased the relevant threshold values – expressed in terms of a percentage of the overall imported product – that must be reached for a product to graduate, product graduation has become easier due to two key factors: the creation of more homogenous product categories, and the exit of numerous GSP beneficiaries.¹⁰⁵

This section explores options to further improve product graduation in order to more accurately link graduation to a product’s competitiveness.

2. Status quo

At present, a product from a Standard GSP beneficiary graduates when it has reached 57 percent of all EU GSP imports for that product (and 47.2 percent for textiles). This list is revised every three years. Moreover, the threshold gets adjusted regularly to account for GSP beneficiaries that are exiting the scheme. The current product sections that have graduated are set out in the Figure 5 below:

Figure 5: Overview of products that have graduated¹⁰⁶

Column A: name of country

Column B: GSP section (Article 2(j) of GSP Regulation)

Column C: description

A	B	C
India	S-5	Mineral products
	S-6a	Inorganic and organic chemicals
	S-11a	Textiles
	S-14	Pearls and precious metals
	S-15a	Iron, steel and articles of iron and steel
	S-15b	Base metals (excl. iron and steel), articles of base metals (excl. articles of iron and steel)
	S-17b	Motor vehicles, bicycles, aircraft and spacecraft, ships and boats
Indonesia	S-1a	Live animals and animal products excluding fish
	S-3	Animal or vegetable oils, fats and waxes
Kenya	S-2a	Live plants and floricultural products
Ukraine	S-17a	Railway and tramway vehicles and products
	S-3	Animal or vegetable oils, fats and waxes

¹⁰⁵ Siles-Brugge, G., “EU Trade and Development Policy Beyond the ACP: subordinating developmental to commercial imperatives in the reform of GSP”, in Carbone, M. and Orbie, J., “The Trade-Development Nexus in the European Union”, p. 52.

¹⁰⁶ Official Journal of the European Union (2016). “Commission Implementing Regulation (EU) 2016/330, 8 March 2016”. [online] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0330&qid=1482248502820&from=EN>.

3. Change the denominator in the graduation threshold and introduce a country-specific value threshold

a. Rationale

When a product becomes too competitive, it will graduate from the Standard GSP scheme. Currently, and similar to the GSP+ vulnerability criteria discussed in Section I.A.2.c above, the graduation threshold is expressed as a percentage of GSP imports into the EU. However, given that GSP beneficiaries have been reduced from 177 to 88, this standard is no longer an accurate reflection of the actual competitiveness of the beneficiary's export in a certain sector. Indeed, a GSP beneficiary's exports in a certain sector could be competitive vis-à-vis other GSP imports but may not be competitive at all compared to the non-GSP beneficiaries' exports in the same sector into the EU. In such a situation, graduating a product from GSP+ would be premature. Moreover, the fact that the threshold for graduation is contingent on other beneficiaries' exports could create transparency issues – not because the data are not available, but because it would require calculating and anticipating other GSP beneficiaries' growth in the market to know whether your country risks meeting the graduation threshold for a product.

Ideally, the current threshold should be replaced with an objective threshold that would be truly reflective of the competitiveness of a product sector in the beneficiary country. However, the challenge is identifying such standard. While GNI per capita, or the vulnerability index are useful (yet limited) indicators to understand the overall development of a country, they are country-based and do not reflect product sector competitiveness. One measuring tool that does look at product competitiveness, including product complexity and revealed comparative advantage is the Atlas of Economic Complexity, a joint Harvard and MIT initiative.¹⁰⁷ Yet, determining product graduation on the basis of a standard developed at a university that has not been scrutinized and endorsed by relevant countries will raise its own set of issues.

Thus, it may be more realistic to look at ways in which the current criterion can be improved without introducing completely new ones. One reform option would be to change the product graduation threshold from being expressed as a percentage of all EU imports of that product under GSP to a percentage of all EU imports of that product. To nevertheless capture the actual imports from the beneficiary country in question, such threshold could also be coupled with an absolute threshold reflecting the actual imports of the country itself. For instance, under Japan's GSP scheme, a product is excluded from GSP coverage if (i) the average value of imports for the past three years exceeds 1.5 billion yen; (ii) comprises 50% of the total value of Japan's imports of the product.¹⁰⁸ Thus, it captures both the actual volume of exports, as well as the competitiveness vis-à-vis total Japan inputs.

¹⁰⁷ Center for International Development at Harvard University, " (2018). "The Atlas of Economic Complexity", [online] Atlas.cid.harvard.edu. Available at: <http://atlas.cid.harvard.edu/explore/?country=83&partner=undefined&product=undefined&productClass=HS&startYear=undefined&target=Product&year=2016>.

¹⁰⁸ Japan Customs, available (2018). "Graduation /Exclusion from the GSP scheme". [online] Available at: http://www.customs.go.jp/english/c-answer_e/imtsukan/1506_e.htm.

b. Feasibility

Introducing a methodology that calculates graduation on the basis of all EU imports as opposed to all imports under GSP appears to be an area of reform for which there would be political support at the Commission level. Depending on whether it would relax or tighten the graduation threshold, it could engender opposition from associations representing manufacturers. In any event, tinkering with the graduation threshold could be expected to generate input and participation from industries that are particularly concerned with continuing the current exclusion of certain products, such as EURATEX that is concerned about India in the area of textiles. From a technical perspective, it would require resources to calculate the new graduation threshold as a percentage of GSP imports to the EU to total imports, and optionally add an absolute threshold to it, but such resources appear to be available.

Legally, the principle of graduation is memorialized in the Enabling Clause, which notes that if the condition of the beneficiary improves, countries would be expected to participate more fully in the GATT.¹⁰⁹ However, the focus is on countries, and it is not clear whether, and to what extent, this would apply to products. Moreover, as noted in the context of the legality of the GSP+ criterion above, there may be continued uncertainty about whether the product graduation requirement as expressed as a function of EU imports meets the non-discrimination requirements.

In sum, changing the denominator of the product graduation threshold from a percentage of the EU's GSP imports in a product to a percentage in overall GSP imports – coupled with an accompanying value threshold would be a feasible option to advocate that would also be consistent with the objective of strengthening the sustainable development/trade preferences link. While there exist some legal uncertainties, these are no different from the legal uncertainties presented by the current EU GSP regime.

4. Create more homogenous product sectors

a. Rationale

Currently, whether a beneficiary has exceeded the graduation threshold is calculated on the basis of product sections, as set out in Annex V of the 2012 GSP regulation. This also means that all products in the section at issue will be suspended if the beneficiary countries exceed the threshold, measured as a percentage of EU GSP imports in that same product section.

The 2012 reforms created more homogenous product sections, expanding the number of categories from 21 to 32 sections. The reforms reduced the occurrence where products from an uncompetitive industry have graduated simply because they were lumped together in one single section with goods from highly competitive industries.¹¹⁰ As a result, only an individual product section can graduate from the GSP, if it has become highly competitive.¹¹¹

¹⁰⁹ Kennedy, K. (2012). "The Generalized System of Preferences After Four Decades: Conditionality and the shrinking Margin of preference". *Michigan State International Law Review*. p. 549.

¹¹⁰ ICTSD, International Centre for Trade and Sustainable Development (ICTSD) (2018). "Trade Negotiations Insights", available at: https://www.ictsd.org/sites/default/files/downloads/tni/tni_en_10-5.pdf. 10(5). p. 3.

¹¹¹ Development Solutions (2018). "Mid- Term Evaluation of the EU's Generalised Scheme of Preferences (GSP)". p. 34.

While this reform has thus ensured that product graduation more accurately reflects actual competitiveness, the reform may not have gone far enough. Indeed, in the current list of product sections, certain sections still group together numerous products that would not be relevant to calculate competitiveness of other products in the section. For instance, section 12(b) includes headgear and parts thereof, as well as umbrellas, and prepared feathers and articles of human hair. Section S-20 includes furniture, bedding and mattresses, lamps and lightening, toys, games and sports. This could lead to a situation where products that have not reached competitive levels are excluded just because they are grouped with other products that have reached competitive levels.

b. Feasibility

Further reducing grouped product sections seems to be a feasible reform option. The fact that a similar reform happened in 2012 would suggest that politically, it is possible to take this reform even further. However, depending on the anticipated effect of such re-grouping, opposition from certain industry groups could be expected. For instance, if regrouping would suddenly mean that the products that have exceeded the threshold – and thus are excluded from the scheme – would once again be covered under the scheme, such as textiles or pearls, opposition from certain industry associations could be fierce.

5. Recommendation

There are two ways in which product graduation could be rendered a more accurate reflection of the product's competitiveness. First, a different graduation threshold could be proposed, which would comprise of the beneficiary's imports as a share of total EU imports, coupled with a country-specific indicator (such as a cap on the value of exports from the country). Second, there is scope to create even more homogenous product categories, in order to further enhance accuracy in determining product competitiveness, and consequently, product graduation.

Commission's Mid-Term Recommendation on product graduation

The Commission does not provide any guidance or recommendations regarding changing the threshold to determine product graduation.

However, the Commission notes that there should be a balance to establish product graduation sections on the basis of which graduation is calculated that are “neither too wide nor too narrow provide a good balance between providing predictable trade preferences (imports under individual tariff lines are more likely to fluctuate than broader categories) and reasonably addressing the concerns of particular industries.”

It seems that rendering product sections even more homogenous, as this paper recommends, would be one way to strike such balance with an eye towards the 2023 reform.

E. Rules of Origin (ROO)

1. Introduction

ROO is a contentious and heavily debated component of trade preferences. ROO are required to prevent trade deflection, i.e., to ensure that GSP benefits go to businesses in GSP beneficiaries and not to businesses in non-GSP beneficiary countries. Prior to examining ways in which GSP ROO could possibly be reformed, it is important to highlight that they do not actually form part of the GSP regulation. Instead, they are set out in a separate regulation, i.e., Commission Delegated Regulation (EU) 2015/2446. Moreover, they fall within the purview of DG TAXUD, as opposed to DG Trade. This means that the upcoming 2023 expiry of the GSP regime does not automatically involve a reform of the applicable ROO. Indeed, unlike the GSP regulation, there is no timeline or process that requires the ROO regulation to be amended at regular intervals. Most likely, ROO amendments in the near future would be reactionary to relevant reforms made to the GSP regulation.

That being said, ROO are a crucial part of the functioning of the GSP regime. Indeed, complicated and restrictive ROO is often cited as a main bottleneck for developing countries to utilize trade preferences.¹¹² In 2010, in response to a 2005 study establishing the difficulties for LDCs to meet strict ROO, DG TAXUD reformed the ROO applicable to the GSP scheme. This reform created a differentiation between Standard GSP and GSP+ beneficiaries, on the one hand, and EBA beneficiaries, on the other hand, with the introduction of more lenient ROO for EBA beneficiaries only. Other relevant developments are set out in the section below.

This section explores further areas of improvement for ROO, with the aim of enhancing utilization of the GSP scheme. Specifically, this section examines options to (i) extent the more lenient rules of origin that are currently applicable to beneficiaries under the EBA scheme to beneficiaries of the GSP+ scheme; (ii) authorize regional cumulation with *eligible* GSP countries; (iii) simplify the process for extended cumulation; and (iv) explore the introduction of blockchain to alleviate fraud and liability concerns of the Registered Exporter (REX) system.

2. Status quo

ROO were reviewed and simplified in 2011. The ROO applicable to GSP are set out in Commission Delegated Regulation (EU) 2015/2446.

Important reforms that were introduced in 2011 include:

- The introduction of more lenient ROO for industrial products for EBA beneficiaries, compared to GSP+/Standard GSP beneficiaries, including:
 - single transformation for clothing, compared to the double-transformation requirement for GSP and GSP+ beneficiaries; and
 - a higher threshold of non-originating materials for LDCs (70% can be non-originating material, compared to 50% for Standard GSP/GSP+ beneficiaries).

¹¹² See, e.g., Brenton, P., and Ozden, C. (2006). World Bank International Trade and Development Research Group, "Trade Preferences for Apparel and the Role of Rules of Origin: the case of Africa", available at: http://siteresources.worldbank.org/INTKNOWLEDGEFORCHANGE/Resources/491519-1199818447826/Brenton_apparelprefs.pdf; Brenton, P. (2001) "Preferential Rules of Origin" in Chauffour, J.P. and Maur J.C. Origin, Preferential Trade Agreement Policies for Development: a Handbook.

- Other changes that were made to ROO in 2011 include:
 - An increase in the general tolerance rule from 10% to 15%, for the ex-works of the price (but this does not apply for textile products).
 - Regional cumulation for Mercosur countries, in addition to regional cumulation that already existed for South and Central America, and Asia.¹¹³ Regional cumulation for African countries under the EU GSP scheme is not possible.
 - The introduction of extended cumulation between GSP beneficiaries and countries that have concluded an FTA with the EU (but this does not cover agricultural products of chapters 1-24 and is subject to numerous other limitations).¹¹⁴
 - The removal of eligible GSP countries that ceased to be GSP beneficiaries from regional cumulation.

We will now examine whether these reforms have had the desired effect and whether there are areas for additional reform.

3. Extend the lenient ROO for EBA beneficiaries to GSP+ beneficiaries

This proposal examines extending the more lenient ROO for EBA beneficiaries to GSP+ beneficiaries. This would include, *inter alia*: (i) single transformation to GSP+ beneficiaries; and (ii) increasing the threshold of non-originating materials from 50% to 70%.

a. Rationale

Restrictive ROO have been associated with underutilization of trade preferences, thus limiting the scope of the nominal preferential treatment to which the beneficiary is entitled. Conversely, more lenient ROO have been associated with increased utilization of preferences. For instance, the Mid-term Evaluation found that the year following the introduction of the 2011 ROO relaxations for EBA beneficiaries, textile and clothing imports to the EU increased by 55 percent.¹¹⁵ Specifically, the Mid-term Evaluation Report noted that Bangladesh's high utilization rate for exports during the review period is in part the result of the relaxed ROO.¹¹⁶ More lenient ROO were introduced only for EBA beneficiaries; GSP+ and Standard GSP beneficiaries did not benefit from similar flexibilities.

Applying the more lenient ROO to products originating in GSP+ beneficiaries could be expected to increase preference utilization for GSP+ beneficiaries. Moreover, it would provide an additional incentive for Standard GSP countries to apply for GSP+ status, as Standard GSP countries would continue to be subject to the currently applicable, more restrictive ROO.

¹¹³ Naumann, E., (2011). "The revised Rules of Origins for the GSP: What has changed?", 15 July 2011. ICTSD Trade Negotiations Insights, [online] 10(5). Available at: <https://www.ictsd.org/bridges-news/trade-negotiations-insights/news/the-revised-rules-of-origins-for-the-gsp-what-has>.

¹¹⁴ Ibid.

¹¹⁵ Development Solutions (2018), "Mid- Term Evaluation of the EU's Generalised Scheme of Preferences (GSP)", p. 136.

¹¹⁶ Ibid., p. 164.

b. Feasibility Assessment

Politically, it will be difficult to extend the more flexible ROO to GSP+ beneficiaries. Indeed, DG TAXUD explained that the 2011 reforms were precipitated by a 2003 study highlighting LDCs difficulties in meeting the ROOs of pre-2011.¹¹⁷ Yet, there does not exist a similar rationale that would justify extending the lenient ROO to which EBA beneficiaries are entitled to GSP+ beneficiaries as there is less need. Indeed, the Mid-Term Evaluation noted that both EBA and GSP+ beneficiaries had increased utilization rates since the 2012 reforms¹¹⁸ – despite the fact that the latter did not benefit from the more flexible ROO.

Moreover, extending the lenient ROO to GSP+ beneficiaries would generate a divisive response from industry associations. On the one hand, it would generate fierce opposition from associations like EURATEX. In fact, EURATEX highlighted the critical importance of maintaining the current ROO in the GSP+ regime, especially the double transformation requirement for textiles. They are concerned that, in the event that GSP+ beneficiaries would also be able to use single transformation for textiles, imports from Pakistan would skyrocket, thus creating serious competition for its manufacturers. Nevertheless, the textile manufacturing industry also depends, in part, on the availability of cheap inputs, so even an association like EURATEX would have to tone down its opposition to the expansion of the EBA's ROO to GSP+ beneficiaries. Moreover, industry associations such as Amfori and EuroCommerce, which represent importers, in principle support a larger supply of imported products under GSP and can be expected to support extending the more lenient ROO to GSP+.

Expanding the flexible ROO to GSP+ beneficiaries would continue to ensure that there is differentiation between Standard GSP and GSP+ countries – as the flexible ROO would not be applicable to Standard GSP beneficiaries. That said, it could potentially have a negative impact on LDCs, as GSP+ beneficiaries would become more competitive in certain products.

There would be no WTO issues to contend with. Indeed, the WTO does not have binding ROO. Moreover, while the WTO aims to harmonize ROO, this does not apply to ROO in the context of preferential trade agreements.¹¹⁹ In addition, the 2016 Ministerial Decision on preferential rules of origin for LDCs sets out an agreement between WTO Members to simplify and relax ROO applied to LDCs, but it does not prevent WTO Members from extending the more lenient ROO to non-LDCs.

In sum, it would not be a reasonable reform to advocate for.

¹¹⁷ European Commission, Green Paper, "Directorate-General Taxation and Customs Union Customs Policy" (2004). The Future of Rules of Origin in Preferential Trade Arrangements. Green Paper. COM(2003)787. [online] Available at: https://ec.europa.eu/taxation-customs/sites/taxation/files/resources/documents/origin_consultation_final.pdf.

¹¹⁸ Development Solutions (2018), "Mid-Term Evaluation of the EU's Generalised Scheme of Preferences (GSP)", p. 60; See also Section II.C.b above.

¹¹⁹ Naumann, E. (2011). "UN LDC IV: Reforming Rules of Origin in Preference-Giving Countries". ICTSD Policy Brief Number 2. P.2 [online] Available at: <https://www.ictsd.org/sites/default/files/research/2011/12/un-ldc-iv-reforming-rules-of-origin-in-preference-giving-countries.pdf>.

4. Allow for cumulation within regional groups

a. Rationale

The ROO for GSP preferences allow countries to engage in regional cumulation. Simply put, a GSP beneficiary can list materials imported from a subset of other regional beneficiaries as originating materials. However, for beneficiaries to engage in regional cumulation under the currently applicable ROO, the countries must be (i) part of the same regional group; and (ii) be GSP beneficiaries – as opposed to GSP eligible countries – at the time of exportation.¹²⁰

Due to the large number of GSP beneficiaries that have exited the GSP scheme since the 2012 reforms, regional cumulation is increasingly difficult to achieve. Specifically, there remain only two regional groups that contain more than one GSP beneficiary, and thus allow for regional cumulation. These are Group I, allowing for cumulation between Cambodia, Indonesia, Laos, Myanmar/Burma, the Philippines, and Vietnam; and Group III allowing for cumulation between Bangladesh, Bhutan, India, Nepal, Pakistan and Sri Lanka.¹²¹ Group II now only contains Bolivia as a GSP beneficiary; and Group IV Paraguay, which means cumulation is not possible in these groups. Regional cumulation for African countries has never been a possibility.¹²²

The limited ability to engage in regional cumulation, coupled with relatively high value-added thresholds, especially for GSP+ countries, could significantly disrupt existing supply chains. For instance, Cambodia's bicycle industry, heavily reliant on input from Malaysia, faced serious challenges after Malaysia ceased being a GSP beneficiary in 2012.¹²³ Moreover, regional trade is often higher in value-added, thus creating incentives for export diversification. For instance, in the context of Africa, manufactured goods in 2014 accounted for 41.9 percent of intra-African exports, compared with only 14.8 percent of Africa's exports outside the continent.¹²⁴ Regional cumulation would create an incentive to engage in such intra-regional trade, and subsequently export the product to the EU, whereas the lack thereof could severely disrupt supply chains.

I explore two options that could be introduced to continue the ability of GSP beneficiaries to engage in regional cumulation: (i) simplify the process to apply for extended cumulation; and (ii) authorize regional cumulation with GSP eligible countries for EBA beneficiaries. To minimize preference erosion and political opposition, I am exploring these options solely in the context of the EBA program.

¹²⁰ European Commission Trade Helpdesk. (2018). "Rules of origin – Generalised Scheme of Preferences".. [online] Available at: <http://trade.ec.europa.eu/tradehelp/rules-origin-generalised-scheme-preferences>

¹²¹ European Commission, "Generalised System of Preference", available at: https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/arrangements-list/generalised-system-preferences_en. European Commission Taxation and Customs Union. (2018). Generalised System of Preferences. [online] Available at: https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/arrangements-list/generalised-system-preferences_en; Regional cumulation is also possible for between Group I and Group III.

¹²² I was told that the reason for this was that African countries themselves were unable to agree amongst themselves on what type of regional cumulation they wanted. Moreover, in order to operationalize regional cumulation, countries need to have customs systems in place that are able to implement such cumulation. This is lacking within Africa, and is the key constraint to cumulation.

¹²³ Cambodia received a derogation, which enabled it to continue to count Malaysian inputs for another three years towards their GSP.

¹²⁴ United Nations Economic Commission for Africa (UNECA). (2017). "Transforming African economies through smart trade and industrial policy". p. 13. [online] Available at: https://www.uneca.org/sites/default/files/PublicationFiles/transforming-african-economies-smart-trade-industrial-policy_eng.pdf.

b. Simplify the process for extended cumulation for EBA beneficiaries

To minimize economic harm in situations where a supplier country that was used for regional cumulation graduates from the scheme, there are two options currently available under the applicable ROO: (i) beneficiaries can request a temporary derogation from the newly applicable rules; and (ii) in situations where a beneficiary becomes part of an FTA with the EU, a continuing GSP beneficiary can, under certain circumstances, request to engage in “extended cumulation” with the country that is part of the FTA. As more and more GSP beneficiaries are exiting the GSP scheme and enter into an FTA with the EU, extended cumulation is key to prevent disruption of existing supply chains.

Under the current ROO, extended cumulation is not automatic. Rather, GSP beneficiaries must submit a request to the Commission, and demonstrate that (i) the countries involved in cumulation are engaged in the necessary administrative cooperation; and (ii) that the beneficiary country has notified the undertaking to the Commission. Moreover, products that fall within Chapters 1-24 of the Harmonized System (HS)– which comprises mostly agricultural products – are excluded from extended cumulation; extended cumulation is available only for industrial and processed agricultural products.

Curiously, this extended cumulation provision, which was introduced in the 2011 reforms, has been invoked only once, by Cambodia. While DG TAXUD was unable to explain the reason behind the lack of utilization of this provision, they suspected it was due in part to a lack of understanding about the benefits of triggering extended cumulation, and the scope and procedural limitations of the provision.

In light of an increasing number of GSP graduating members in the next decade, making extended cumulation a workable provision becomes even more important.¹²⁵ This would call for an amendment to the extended cumulation provision for EBA beneficiaries to (i) make it applicable to all products covered under EBA; and (ii) streamline the procedural hurdles that must be engaged in. For instance, DG TAXUD could install a simple online application for GSP beneficiaries to request for extended cumulation, including a timeline according to which they would grant the request. Currently, the provision is silent with respect to the process and timing. Another idea to explore, which has been suggested by UNCTAD, is enable cumulation vis-à-vis EU FTAs, and also mega regionals, such as ASEAN.¹²⁶

Simplifying extended cumulation and increasing the product scope was an idea that DG TAXUD officials seemed open to. However, they had not given it much thought yet, and the specifics would not to be worked out for this to really work. Legally, this would be in line with the spirit of the Nairobi Decision on Preferential Rules of Origin for LDCs, which notes that “[p]reference-granting Members are encouraged to expand cumulation to facilitate compliance with origin requirements by LDC producers...”.¹²⁷ Moreover, if the more lenient ROO currently applicable to EBA beneficiaries would be extended to GSP+ beneficiaries, relaxed extended cumulation for LDCs would ensure continued differentiation between LDC and GSP+ beneficiaries. In sum, improving extended cumulation for EBA beneficiaries would be an option to further explore.

¹²⁵ Simplifying extended cumulation would be particularly important if Standard GSP were to be removed from the scheme.

¹²⁶ World Trade Organization Least Developed Countries Group (2017). Committee on Rules of Origin: Cumulation. [online] Available at: http://unctad.org/meetings/en/Presentation/aldc2015_05-agenda5_wto_en.pdf.

¹²⁷ World Trade Organization (2015). “Ministerial Decision of 19 December 2015 : WT/MIN(15)/47 – WT/L/917: Preferential Rules of Origin for Least Developed Countries”, available. [online] Available at: https://www.wto.org/english/thewto_e/minist_e/mc10_e/l917_e.htm.

c. Authorize regional cumulation with GSP eligible countries for EBA beneficiaries

Another way to prevent disruption of the supply chain on the basis of the restricted cumulation rules is through advocating for the introduction of more flexible cumulation rules, at a minimum for LDCs. Specifically, I propose a reform option that would enable EBA beneficiaries to engage in regional cumulation with *eligible* countries. This is the situation under Canada's GSP scheme, where inputs from countries that have been graduated remain eligible for cumulation.¹²⁸

It is not clear whether proposing for regional cumulation to be allowed between EBA beneficiaries and eligible countries will be politically feasible. The 2012 GSP reforms introduced the concept of eligible GSP countries. Subsequently, the ROO amendments clarified that only GSP beneficiaries could be used for regional cumulation. Assuming there was a clear reason not to extend regional cumulation to eligible GSP countries, it may suggest that opening up the scheme for enhanced regional cumulation may not be in line with the politics. That said, as this reform was carried out by DG TAXUD, it is also not entirely implausible that little thought was given to the effect reduced GSP beneficiaries would have on overall regulation. Thus, it is difficult to assess the political feasibility of this reform option. However, as long as it would be limited to EBA beneficiaries, opposition will be minimized.

Moreover, this reform option would be in line with the Nairobi Decision on Preferential Rules of Origin for Least Developed Countries, which encourages preference-granting Members to allow for the possibility of "cumulation with developing countries forming part of a regional group to which the LDC is a party, as defined by the preference-granting Member".¹²⁹

d. Conclusion

Both reform options (allowing for regional cumulation with GSP beneficiaries and simplifying extended cumulation for EBA beneficiaries) could be advocated for. Given the complexity of the ROO reform, it may be worth pursuing them simultaneously.

¹²⁸ World Trade Organization Least Developed Countries Group (2017). "Committee on Rules of Origin: Cumulation". Available at: http://unctad.org/meetings/en/Presentation/aldc2015_05-agenda5_wto_en.pdf.

¹²⁹ WTO, Preferential Rules of Origin for LDCs, available at: https://www.wto.org/english/thewto_e/minist_e/mc10_e/l917_e.htm. World Trade Organization (2015). "Ministerial Decision of 19 December 2015".

5. Introduce Blockchain as complement to REX

a. Rationale

In 2010, the EU introduced the Registered Exporter system (REX), a system of certification of origin of goods.¹³⁰ The REX system is based on the principle of self-certification, allowing registered businesses to declare its own statements of origin.¹³¹ For a business to be entitled to make out a statement on origin, it has to be registered in the REX database by the competent authorities.¹³²

The REX system will¹³³ replace the current system of origin certification, which was based on certificates of origin (From A) issued by governmental authorities. In contrast to the previous system of origin certification system, the REX system leaves it up to the importer to verify validity of the registrations of the registered exporter. Another feature of the REX system is that after the exporter has registered, there is no more communication between the registered exporter and the importer. The fact that under the REX system the importer has responsibility for incorrect origin declarations, coupled with the fact that the REX system is more vulnerable to fraud, leaves some EU importers, especially small businesses concerned with purchasing from importers under GSP scheme. Indeed, this concern was voiced by industry associations such as EuroCommerce, Amfori, and the European Automobile Manufacturers Association (“ACEA”).¹³⁴

One possible solution for this would be to introduce a system that would allow importers to verify the validity of the origin statements made by REX-registered exporters. The introduction of blockchain – a distributed ledger technology – might be able to serve this purpose. Indeed, using blockchain to verify origin as a concept is not new. For instance, a joint ICTSD/IADB study on ROO concluded that “[f]or certification, blockchain technology holds the potential for providing secure information on the origin of goods and materials, without disintermediating suppliers and distributors.”¹³⁵ Likewise, Kenya is already using certificates of origin on blockchain.¹³⁶

Specifically, blockchain processes and verifies transactions, and creates a secure and permanent record of these transactions.¹³⁷ In the context of verifying declarations of origin, blockchain could produce a record that would enable the importer to verify the origin declaration – and not just whether the exporter’s number corresponds to the registered number in REX – and thus make it easier for the importer to spot fraud. This, in turn, would ensure that the introduction of the REX system will not result in hesitation on the side of importers to purchase under the GSP system.

¹³⁰ The application was deferred to 2017 to give countries sufficient time to implement it.

¹³¹ European Commission (2017). “The Registered Exporter System”, available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/rex-registered-exporter-system_en.pdf.

¹³² European Commission, the Registered Export System (the REX system), available at: https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/arrangements-list/generalised-system-preferences/the_register_exporter_system_en. European Commission Taxation and Customs Union. (2018). Generalised System of Preferences.

¹³³ There are different transition periods applicable for different countries.

¹³⁴ European Automobile Manufacturers Association (ACEA) (2010). European Commission Public Consultation on a Future Trade Policy, “ACEA Position” [online] Available at: http://trade.ec.europa.eu/doclib/docs/2010/september/tradoc_146546.pdf; Moreover, graduating from EBA status could have serious consequence were a beneficiary’s exports have been highly concentrated. Interview with EuroCommerce, July 24, 2018; Interview with DG TAXUD, 24 July 2018.

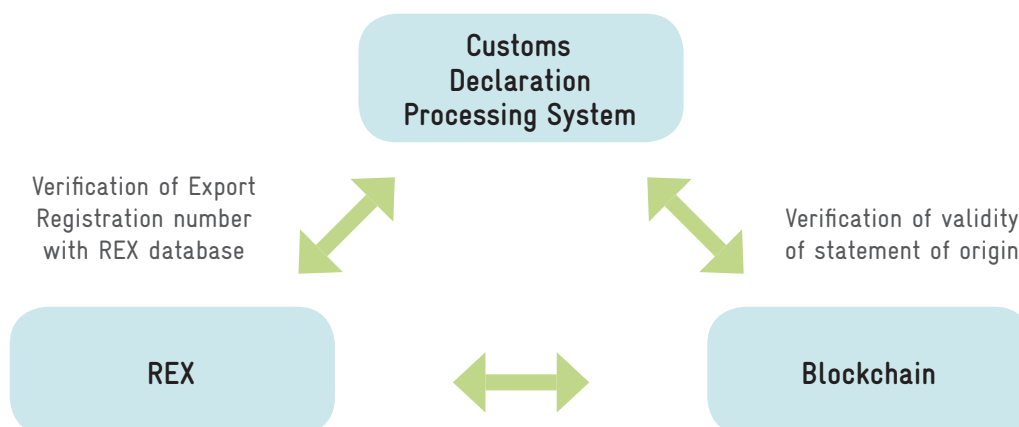
¹³⁵ Harris, J. (2017). “Building Inclusive Rules of Origin in the 21st Century”. RTA Exchange. [online] International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB). Available at: <http://e15initiative.org/wp-content/uploads/2015/09/RTA-Exchange-Rules-of-Origin-Jeremy-Harris-Final.pdf>.

¹³⁶ Global Trade Review, (2018). “Blockchain-based certificates of origin come to Kenya”, 20 June 2018. [online] Available at: <https://www.gtreview.com/news/africa/blockchain-based-certificates-of-origin-come-to-kenya/>.

¹³⁷ Esharp (2018). “The implications of blockchain for trade and Brexit”. [online] Available at: <https://esharp.eu/debates/the-uk-and-europe/the-implications-of-blockchain-for-trade-and-brexite>.

Figure 6 below illustrates one way for such a system to work:

Figure 6: An illustration of blockchain in the REX system¹³⁸



b. Feasibility

There appears to be general interest in DG TAXUD, and also with the relevant stakeholders in Brussels, in exploring how new technological concepts like blockchain can be used to verify product origin. Indeed, using blockchain to facilitate the verification of origin statements in the context of the REX system was an idea that DG TAXUD proposed. This idea, however, is still in its infancy, i.e., it is a concept that TAXUD officials are discussing around the coffee machine. Indeed, Brussels moves slowly, and for a new concept like blockchain to be introduced to verify statements of origin would, at a minimum, take a number of years. Moreover, it would require significant resources on the operational side. Indeed, the REX system is only a database; it does not record transactional information. Thus, a new system would need to be established to make this operational. It may also raise a number of legal issues, but this would be related to privacy rather than trade-related.¹³⁹

6. Recommendation

Since ROO is not part of the GSP regulation, it will not be part of the changes that will be made to the GSP regulation after its expiry in 2023. Nevertheless, given the importance of ROO for the functioning of the GSP scheme, it may be useful to utilize the GSP reform as a platform for ROO reform. In that case, this paper recommends ensuring that GSP graduating countries can continue to be used for cumulation purposes – either through simplified extended cumulation for LDCs, or through allowing the continuation of regional cumulation vis-à-vis eligible GSP countries. Moreover, this would also be a good opportunity to start the conversation on how to alleviate importers' concerns that the REX system has raised through, for, instance, using novel technologies such blockchain. Finally, any reform on GSP ROO should also take into account minimizing the burden of different ROO regimes for GSP exiting countries.

¹³⁸ I asked DG TAXUD to comment on this graph, but they declined, noting that the blockchain idea was not sufficiently mature yet to translate it into graphs. Thus, this graph should not be interpreted as a technical way in which blockchain could be introduced, but rather just as an illustration of how it could work, conceptually.

¹³⁹ It is beyond the scope of this study to explore this further.

Commission and External Consultant's Mid-Term Recommendations on ROO

Neither the Commission's, nor the Mid-Term Evaluation Report contains recommendations on ROO. This is unsurprising, given that ROO is not part of the GSP regulation. Indeed, any possible changes that will be made to ROO relevant to GSP would be done through a separate regulation prepared by DG TAXUD.

F. Strengthening the link between trade preferences, sustainability, human rights and good governance

1. Introduction

This section explores reform options to increase the relevance and impact of the GSP scheme on compliance with sustainability and human rights standards in GSP beneficiary countries. In doing so, it is important to note that while the scheme has induced human rights and good governance, as set out in more detail in Section II.C. above, in some instances, the link between trade liberalization and economic growth can also be negative.¹⁴⁰ Strengthening the link between trade and sustainability aims to minimize the negative effects induced by trade liberalization, while promoting fundamental norms and values to which the EU attaches great importance.

This section explores various different options to increase the link between trade preferences and sustainability indicators, both directly and indirectly. The first few options will explore how this can be done within the context of the existing system, focusing on (i) options to expand GSP+ conditionality to EBA and Standard GSP; (ii) options to update the list of conventions currently set out in Annex VIII; (iii) options to improve monitoring of compliance, and options to reform withdrawal of preferences in case of non-compliance; and (iv) options to improve the functioning of the withdrawal mechanism. Finally, I look into reform options that focus on ways in which product-specific sustainability criteria could be linked to the GSP trade preferences scheme. Given the specificity of the current regulations, each specific reform option will be preceded by a brief summary of the currently applicable regulation in these areas.

¹⁴⁰ Development Solutions (2018). "Mid-Term Evaluation of the EU's Generalised Scheme of Preferences (GSP)", p. 93; Gasiorek, M. et al. (2010). "Mid-term Evaluation of the EU's Generalised System of Preferences". Centre for the Analysis of Regional Integration at Sussex (CARIS); Beke, L., D'Hollander, D., Hachez, N. and Pérez de las Heras, B. et al. (2014). "The integration of human rights in EU development and trade policies". Large-Scale FP7 Collaborative Project. Work Package No.9. [online] Available at: <http://www.fp7-frame.eu/wp-content/uploads/2016/08/07-Deliverable-9.1.pdf>.

2. Expand positive conditionality, including monitoring, to Standard GSP and EBA beneficiaries

a. Rationale

Currently, to become a GSP+ beneficiary, a country is required to ratify and effectively implement 27 human rights, sustainability, and good governance conventions. Once a country has received GSP+ status, failure to comply with the conventions could result in withdrawal. By contrast, no human rights and good governance-related conditions must be ratified to receive Standard GSP benefits, and EBA beneficiaries. In these two schemes, human rights compliance matters as failure to adhere to the conventions set out in Annex VIII could lead to the withdrawal of preferences. In situations where a country has not yet ratified the list of conventions set out in Annex VIII, the “positive” conditionality of the GSP+ scheme provides a particularly effective incentive to ratify these conventions, compared to the “negative” incentive structure set out in the EBA and Standard GSP scheme.¹⁴¹

With an eye to strengthening the link between trade preferences and sustainability and human rights, one option that has been suggested is to extend positive conditionality to GSP and EBA beneficiary countries.¹⁴² For instance, Act Alliance proposes to “extend Part B on conventions related to the environment and to governance principles ... to GSP and EBA beneficiaries”.¹⁴³ In other words, the option that is being proposed is to remove the automatic granting of preferences Standard GSP and EBA beneficiaries, and provide the preferences only upon ratification, and possibly the effective implementation, of some key conventions related to the environment and government principles.

b. Feasibility

Expanding positive conditionality to Standard GSP and EBA beneficiaries would not be feasible. To begin with, it would go against the spirit of the multilateral framework. Indeed, in the 2013 Ministerial Decision on Duty-Free Quota-Free Market Access for Least-Developed Countries, WTO Members agreed to provide duty-free quota-free market access for at least 97% of products originating in LDCs, on a *lasting basis*.¹⁴⁴ If market access for EBA beneficiaries were to be made conditional on ratifying a number of conventions, the duty-free quota free access would have to be taken away and higher tariffs would have to be imposed on imports from LDC countries, which would only be re-issued upon an LDC demonstrating compliance with the conditions. This would go against the spirit of the Ministerial Decision, and the multilateral system.¹⁴⁵

A similar issue presents itself for Standard GSP beneficiaries. However, making Standard GSP preferences contingent on ratification of various conventions would reduce the differentiation between Standard GSP and GSP+. This would make applying for Standard GSP less attractive compared to GSP+, given that it (i) would require ratification of certain conventions, which would come with the necessarily scrutiny by the EU into a beneficiary’s government system, and (ii) the tariff preferences would be limited compared to what countries could get under GSP+. So presumably, if positive conditionality were to be extended to Standard GSP, countries would either apply for GSP+, or not apply at all.

¹⁴¹ See Section II.D above.

¹⁴² The GSP Reform Platform. (2017). Statement on Reform the GSP Regulation. Available at: https://actalliance.eu/wp-content/uploads/2017/12/20171124_GSP-Platform-Statement_FINAL.pdf

¹⁴³ Ibid.

¹⁴⁴ World Trade Organization. (2013). “Bali Ministerial Declaration, Ministerial Decision of 7 December 2013”. WT/MIN(13)/DEC. Available at: https://www.wto.org/english/thewto_e/minist_e/mc9_e/desci44_e.htm

¹⁴⁵ Note that the legal status of a Ministerial Decision is disputed. It is a common understanding that in most situations, it cannot be enforced under the WTO Dispute Settlement system.

There would also be a question of resources: if positive conditionality were to be extended, the Commission would need to monitor compliance in all its GSP beneficiaries. Not only would that place a significant strain on existing resources; it would also turn the Commission into the world's "police", carrying out functions that fall within the purview of the United Nations. That said, in line with the Trade for All Strategy launched in 2015, the Commission and the EEAS have stepped up monitoring and dialogue with the two biggest EBA beneficiaries, Bangladesh and Cambodia regarding human rights breaches.¹⁴⁶ Entering into these dialogues on a case-by-case basis may be a better way to strengthen the link between human rights/sustainability and trade preferences.

c. Recommendation

Expanding positive conditionality to Standard GSP and/or EBA beneficiaries would not be feasible nor significantly improve the functioning of the system. However, enhanced case-by-case country monitoring would be a way to improve monitoring of those countries that are not GSP+ beneficiaries.

3. Enhance monitoring

In their Mid-Term evaluation, the Commission and Consultants included more detailed analysis and recommendations on ways in which to enhance the current monitoring scheme – both as it exists vis-à-vis GSP+ beneficiaries, as well as with respect to Standard GSP and EBA beneficiaries. This section incorporates the main recommendations.

a. Expand GSP+ monitoring to Standard GSP and EBA countries

The External Consultants recommend ...

that the EU should expand its monitoring beyond the present GSP+ arrangement. It acknowledges, however, given the resource implications this will have, that the feasibility of this recommendation must be reviewed both in terms of effectiveness, efficiency, and financial expenditure.

Reacting to this recommendation, the Commission notes in its Mid-term review that expanding the GSP+ monitoring function to non-GSP+ beneficiaries would not be feasible. Specifically, it notes the vast human resource implications that this will have, especially in the context of budgetary cuts in the EU institutions, as well as implications related to consistency with the WTO Enabling Clause and regarding the role of multilateral supervisory systems that are currently carried out by the UN and the ILO.

At the same time, and as also noted in Section III.F.2.b above, the Commission is carrying out targeted enhanced monitoring where concerns have surfaced related to the implementation of human rights, such as in the case of Bangladesh and Cambodia. While not saying so explicitly, the Commission appears to suggest that this approach is more feasible.

The Commission's not to expand monitoring to Standard GSP and EBA countries, but rather to continue to engage in targeted enhanced monitoring is consistent with the analysis put forth in Section III.F.2.b above.

¹⁴⁶ European Commission Directorate-General for Trade, 19 January 2018, p. 2.

b. Extent the GSP+ monitoring cycle from 2 to 3 years

The External Consultant noted ...

that the two-year monitoring cycle (to the European Parliament and the Council) was too short for beneficiary countries to make meaningful changes to the human rights situation in the country. It further noted the administrative burden of the frequency of the monitoring, both on the Commission and the beneficiary countries. It thus suggests to increase the reporting cycle from 2 to 3 or 4 years. The Commission notes that this proposal “should be considered in view of simplifying the GSP Regulation”.

This study does not make suggestions on the length of the monitoring cycle for GSP+ beneficiaries. Increasing the monitoring cycle from 2 to 3 or 4 years does seem to be an amendment to the implementation of the GSP regulation that would make monitoring more meaningful. Moreover, it would free up Commission resources, which would be able to be used for case-by-case monitoring for EBA or Standard GSP countries. Thus, on the basis of the Commission’s midterm report, this study adds the recommendation to increase the time intervals in the GSP+ monitoring.

4. Update the list of conventions that must be ratified to receive GSP+ status

a. Rationale

Under the GSP+ arrangement, there exists conditionality for beneficiary countries to comply with 27 conventions on labor and human rights, good governance, and sustainability.

Specifically, the relevant conventions, which are set out in Annex VIII, are as follows:

- 7 conventions on human rights, including the prohibition of genocide and torture, protection of the rights of children, elimination of discrimination against women and minorities, protection of freedom of expression and association, the right to a fair trial and judicial independence, as well as economic, social and cultural rights;
- 8 fundamental conventions of the ILO, including conventions prohibiting forced and child labour, ensuring workers’ rights to freedom of association and collective bargaining; and two conventions that protect workers against discrimination at work and ensure equal remuneration for at work for men and women;
- 8 conventions on environmental protection and climate change, including monitoring of hazardous waste and harmful pollutants, safeguarding of biodiversity and endangered species, as well as UN commitments to tackle climate change;
- 4 conventions on good governance: the UN Convention against Corruption and three conventions seeking to control illegal drugs.

Through making GSP+ status dependent on ratification of these conventions, the EU has leverage to directly contribute to sustainable development and human rights, through the adherence to these

international conventions by GSP+ beneficiaries.¹⁴⁷ For instance, the Armenian Government adopted a new National Human Rights Action Plan for the period 2017-2019, and Sri Lanka took important steps to improve governance and respect for human rights.¹⁴⁸ That said, it must also be noted that GSP+ beneficiary challenges are often underpinned by long-term, structural challenges, which require major reforms over a long period of time to be alleviated.¹⁴⁹ Thus, the fact that a convention must be ratified and effectively implemented as precondition to receive GSP+ status can induce positive sustainability effects, but over the long-run.

There exists a consensus among various stakeholders, including the Commission, that the list is outdated and requires upgrading. Indeed, this was one of the preliminary conclusions presented by the Mid-Term Evaluation, which notes that “the list of conventions that GSP+ countries are required to ratify and effectively implement has been found to be incomplete and outdated”.¹⁵⁰ Expanding the list of conventions provides an opportunity for the Commission to ensure ratification and compliance of GSP beneficiaries with additional areas of human rights, sustainability and good governance that it considers important. This would also be a good area to reflect the Sustainable Development Goals – which came into force after the 2012 reforms.

b. Feasibility

Updating the list of conventions that must be ratified to receive GSP+ status is an area of reform most stakeholders are in favor of. The difficulty in doing so lies in what conventions to add. In doing so, it would be important that the added list of conventions does not strengthen the criticism that the current list of conventions is surrounded by a certain degree of arbitrariness.¹⁵¹ Practically, this means that the conventions to be added should, at a minimum, be (i) conventions ratified by all EU Member States; and (ii) encompass core human rights conventions. This would mean, for instance, looking into including the UN Migration Convention.

One potentially drawback to updating the existing list of conventions with additional conventions would be that it makes it more difficult for eligible countries to qualify for GSP+ benefits. Indeed, as discussed in Sections I.A.2 and I.A.3, the biggest hurdle for graduating EBA beneficiaries to qualify for GSP+ is the fact that many have not ratified the core human rights, good governance and sustainability conventions currently set out in Annex VIII. Adding additional conventions to the list of 27 would further increase the difficulty of these countries to qualify for GSP+ status. On the other hand, it could also be argued that one or two additional conventions will not make or break a country’s willingness to seek GSP+ status. Indeed, what matters is a country’s willingness to subject itself to the tutelage that comes from going through the GSP+ process; not whether a country must ratify 27 or 29 conventions.

¹⁴⁷ Development Solutions (2018). “Mid-Term Evaluation of the EU’s Generalised Scheme of Preferences (GSP)”. p. 247.

¹⁴⁸ European Commission Directorate-General for Trade, 19 January 2018, p. 3.

¹⁴⁹ Ibid.

¹⁵⁰ Development Solutions (2018). “Mid-Term Evaluation of the EU’s Generalised Scheme of Preferences (GSP)”. p. 10.

¹⁵¹ Beke. L and Hachez. N. (2015). “The EU GSP: A Preference for Human Rights and Good Governance? The Case of Myanmar”. Leuven Centre for Global Governance Studies. [online] Available at: <https://ghum.kuleuven.be/ggs/publications/working-papers/2015/155bekehachez>

Legally, it is unresolved whether the conditionality inherent to the EU GSP+ scheme would meet the criteria in the Enabling Clause.¹⁵² Those authors that are critical argue that the requirement to ratify certain treaties does not systematically correspond to the needs of developing countries concerned.¹⁵³ Moreover, even assuming the “development need” could be established, GSP+ could not be considered a “positive response” thereto, given that the preferences are only provided once the developing countries have ratified the conventions, and thus, no longer have the “development need”. However, the legal ambiguity surrounding GSP+ conditionality will not be any different if the list of conventions were updated.

That said, for each of the conventions proposed to be added to the list, it would be important to assess whether the need identified can be expressed through an objective standard, and whether there exists a sufficient nexus between the need and the trade preferences to alleviate that need.

The sub-sections below provide a preliminary analysis of the feasibility and legality of introducing some of the conventions that may be added to the list of conventions, either because they represent a core human rights convention (UN Migration Convention), because the issue pertains to a priority issue for the EU (Paris Agreement), or because they would incorporate responsibilities on business into the scheme, such as the United Nations Guiding Principles on Business and Human Rights (UNGPs), and the OECD Guidelines.

i. The Paris Agreement

The Paris Agreement would be an obvious addition to the current list of conventions that must be ratified and effectively implemented. Politically, the French President Macron has made it clear that France will not sign an amended version of GSP if it does not include the Paris Agreement. The Paris Agreement, which builds on the UNFCCC, aims to strengthen the global response to the threat of climate change by keeping a global temperature rise below 2 degrees Celsius. It requires those who have ratified it to undertake ambitious efforts to combat climate change and adapt to its effects, with enhanced support to assist developing countries to do so.¹⁵⁴ Adding this to the list of conventions could thus strengthen the link between GSP preferences and environmental sustainability in GSP beneficiaries.

As noted above, for the Paris Agreement to fall within the WTO framework, it must correspond to a legitimate developing financial or trade needs, expressed through an objective standard. The underlying UNFCCC could be used as the required “objective standard” to establish the existence of the need.¹⁵⁵ To establish a sufficient nexus between trade preferences and ratification of the Paris Agreement, it could be argued that there is a cost involved in ratifying and implementing the Paris Agreement, and trade preferences would improve the economic development of GSP beneficiaries by enabling them to adopt measures to address climate change.¹⁵⁶ However, this line of reasoning may suffer from the sequencing issue highlighted in Section I.E.4.b above. Nevertheless, this would be no different from the sequencing issues that currently exist with the conventions that must be ratified to obtain GSP+ status. In sum, adding the Paris Agreement to the list of conventions that GSP+ countries must ratify would be feasible.

¹⁵² See, e.g., Bartels, Wardhaugh (cited by Marx et al. (2018), p. 45).

¹⁵³ Marx, A. et al. (2018). “What role can Voluntary Sustainability Standards play in the European Union’s GSP Scheme?” Leuven Centre for Global Governance Studies. p. 45.

¹⁵⁴ United Nations Framework Convention on Climate Change (UNFCCC). “What is the Paris Agreement?”. available at: <https://unfccc.int/process/the-paris-agreement/what-is-the-paris-agreement-0>.

¹⁵⁵ Monkelbaan, J.(2011). “Trade Preferences for Environmentally Friendly Goods and Services”. ICTSD Working Paper. p. 17. Available at: http://forumue.de/wpcontent/uploads/2015/04/Trade_Preferences_paper.pdf

¹⁵⁶ Ibid.

ii. UN Guiding Principles on Business and Human Rights

A second option would be to look into including the United Nations Guiding Principles on Business and Human Rights (“UNGPs”) to the list of conventions – even though it is not a convention.

The UNGPs, which were unanimously endorsed by the Human Rights Council in 2011, includes three pillars: (i) a state’s duty to protect against human rights violations; (ii) the introduction of the phenomenon of corporate social responsibility to prevent human rights violations at company level; and (iii) the need of victims to access both judicial and non-judicial remedies. In other words, the UNGPs requires states to ensure that businesses operating in their territory act responsibly and comply with human rights principles. In doing so, the UNGP reflects the complementary but differentiated roles of states and companies with regards to human rights. This means that adding the UNGPs to Annex VIII would, albeit indirectly, bring businesses’ obligations to respect human rights into the GSP scheme. This would be desirable in light of the objective of enhancing the link between sustainability and trade preferences.

However, to incorporate the UNGPs into the GSP Scheme, there are a few practical challenges that must be addressed. The UNGPs is not a convention, but rather sets out a number of principles. This means that states do not ratify or sign the UNGPs. It also means that there is no ongoing monitoring process to check whether states are effectively implementing the UNGPs. Rather, all the UNGPs does is encourage states and businesses to follow the UNGPs principles, *inter alia* through reflecting them into a National Action Plans, i.e., a policy document which contains a state’s actions to implement its business and human rights obligations.¹⁵⁷ This means that the UNGPs cannot be added to Annex VIII as a convention that must be ratified and “effectively implemented” in order for an eligible country to receive GSP+ preferences.

However, that would not per se preclude the UNGPs from being added to Annex VIII. For instance, GSP+ eligibility could be made contingent on implementing the principles set out in the UNGPs, or on putting in place a National Action Plan. GSP+ candidates would carry the burden of demonstrating how they have implemented the UNGPs.

Legally, the UNGPs could be used as the objective standard identifying the existence of a need. To establish a sufficient nexus between trade preferences and the need, it could be argued that there is a cost involved in ratifying the UNGPs, and that trade preferences would improve the economic climate that would enable them to do so – even though this argument would also suffer from a sequencing problem as explained in Section I.E.2.b above.

In sum, it would be worth exploring how the UNGPs could best be incorporated into the GSP scheme as a condition for GSP+ eligibility.

iii. OECD Guidelines for Multinational Enterprises

The Guidelines for Multinational Enterprises (“the OECD Guidelines”) developed by the OECD comprise a set of recommendations addressed by participating governments to multilateral enterprises operating in the country.¹⁵⁸ They address business conduct related to labor rights, environmental protection, and human rights. All countries that have signed the OECD Guidelines must establish a National Contact Point, which handles enquiries related to businesses’ failure to enforce the guidelines.

¹⁵⁷ Marx, A. et al. (2018). “What role can Voluntary Sustainability Standards play in the European Union’s GSP Scheme?” Leuven Centre for Global Governance Studies. p. 60.

¹⁵⁸ OECD. (2011). “OECD Guidelines for Multinational Enterprises. OECD Publishing”. Available at: <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

Adding these guidelines to the list of conventions would, similar to the UNGPs, be one way to incorporate sustainable practices for businesses into the GSP preferences scheme. However, doing so will likely bring a few challenges. First, and similar to the UNGPs, the OECD Guidelines are a set of “guidelines” and not a convention. This would create problems similar to adding the UNGPs the Annex VIII, as GSP+ eligibility cannot be made contingent on ratification of the OECD Guidelines. Second, and unlike the UNGPs, the OECD Guidelines have not been endorsed by the UN. This means that if the EU were to add the OECD Guidelines to the list of conventions set out in Annex VIII, it would be imposing a set of guidelines that have been developed and agreed upon only by a sub-set of countries. As a result, they may not meet the objectivity standard required for any discriminatory treatment among developing countries to fall under the Enabling Clause. Third, and related, not all EU Member States are part of the OECD and have signed the Guidelines. Absent by-in from all EU Members, it would not be possible to add the instrument in question to Annex VIII. Fourth, some authors have cautioned that even if the OECD Guidelines were to be included in the GSP+ conventions, they may not have much of an impact given the real impact of the OECD Guidelines depends on the effectiveness of the NCPs.¹⁵⁹ In sum, adding the OECD Guidelines to the list of conventions in Annex VI may not be feasible.

iv. UN Migration Convention

As mentioned above, a peculiar exclusion from the list of conventions is the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families – a core human rights convention.¹⁶⁰ This convention aims at guaranteeing equality of treatment, and the same working conditions, for migrants. One of the issues, however, with including this convention into the list that must be ratified to receive GSP+ preferences is that except for a handful of Baltic states, no EU Member State has ratified this convention.

In this context, it would be hypocritical, to say the least, as well as politically unfeasible to add the UN Migration Convention to Annex VIII. Thus, rather than advocating for its inclusion in the list of GSP conventions, a first step would be for EU Member States to ratify the UN Migration convention themselves.

c. Recommendation

In sum, the list of conventions in Annex VIII will most likely be updated in the upcoming GSP reform. It would thus be a good area to focus on. Specifically, the Paris Agreement is almost certain to be added to the list of conventions, which is further confirmed by the Commission’s midterm observations. The UNGPs would also make a good addition to Annex VIII, although, since it is not a convention, it would require exploring creative ways in which it can be linked to obtaining GSP+ status.

While adding conventions/guidelines to Annex VIII could make it more difficult for graduating EBA countries to fulfill eligibility conditions, it is unlikely to present a make or break situation. Nevertheless, any potential enhanced compliance burden on graduating EBAs and Standard GSP countries aspiring to become GSP+ beneficiaries should be taken into account when suggesting new additions to Annex VIII.

¹⁵⁹ Marx, A. et al. (2018). “What role can Voluntary Sustainability Standards play in the European Union’s GSP Scheme?” Leuven Centre for Global Governance Studies, 2018, p. 59.

¹⁶⁰ Beke, L and Hachez, N. (2015). “The EU GSP: A Preference for Human Rights and Good Governance? The Case of Myanmar”. Leuven Centre for Global Governance Studies, p. 13.

Commission and External Consultants Mid-Term Recommendations on updating the list of Conventions

The External Consultants considered the list of conventions that GSP+ countries are required to ratify and effectively implement to be incomplete and outdated. Specifically, they recommend that a detailed review be undertaken towards a possible update. Specifically, it highlights the Paris Agreement as a candidate for inclusion, but cautious that this should be done only after the expiry of the 2012 regulation (Final Report, p. 265).

The Commission likewise highlights the need to further examine improving environmental protection and climate change conventions under GSP+, including through the implementation of the environment protection and climate change conventions under the GSP+.

Including the Paris Agreement in the list of Conventions is in line with the recommendation set out in this paper.

Neither the Commission's Staff Working Document nor the Mid-Term Report suggest possibly including the UNGPs. This discussion will likely pick up as the expiry of the scheme will approach.

5. Enhance civil society's role in the GSP+ monitoring process

a. Status quo

Prior to the 2012 reforms, the Commission relied exclusively on conclusions drawn by international monitoring bodies like the UN and the ILO to determine whether a beneficiary had complied with its GSP+ obligations. The 2012 reforms enabled the Commission to draw its own conclusions, on the basis of both monitoring conducted by international monitoring bodies, but also on the basis of "information submitted by third parties, including civil society, social partners, the European Parliament and the Council."¹⁶¹

Similarly, paragraph 15 of the preamble notes that:



[f]or the purposes of the monitoring and the withdrawal of preferences, reports from relevant monitoring bodies are essential. However, such reports may be supplemented by other sources of information, provided that they are accurate and reliable.¹⁶²

¹⁶¹ "Regulation (EU) No 978/2012, of the European Parliament and of the Council of 25 October 2012". Article 14.3.

¹⁶² Ibid. Article 15. Emphasis added. .

Other changes that the 2012 reform introduced to strengthen the link between core human rights and other principles of sustainable development and good governance, included:¹⁶³

- Shortening the reporting cycle from 3 to 2 years;
- Requiring GSP+ beneficiaries to sign a binding undertaking to, inter alia, maintain ratification of the GSP+ Conventions, respect the reporting obligations under the convention and fully cooperative with the Commissions' GSP+ monitoring;
- Reversing the burden of proof (GSP+ beneficiaries must now demonstrate compliance with the binding undertakings set out in Article 9(1) of the GSP Regulation.

As briefly noted in Section II.B.e.ii. above, on the basis of these new provisions, the Commission developed a GSP+ monitoring practice consisting of two interrelated tools: (i) a scorecard (a list of issues) covering shortcomings in implementation of the international conventions that the beneficiary must respond to; and (ii) the GSP+ dialogue, whereby the EU engages with beneficiary countries and discusses how identified shortcomings can be addressed.¹⁶⁴

Since the 2012 reforms, the Commission has organized regular and broad stakeholder consultations to give civil society an opportunity to engage in the process. It also meets with civil society actors during visits to beneficiary countries.

While the 2012 reforms have put in place new measures to enhance transparency and inclusiveness in the GSP+ monitoring process, there exists a broad consensus that there is scope to make the GSP+ monitoring system more transparent and inclusive vis-à-vis civil society actors. Indeed, this was one of two elements highlighted in the Commission's Report to the Parliament and the Council that could be improved.

Commission's Mid-Term Recommendation to the EU Parliament and Council

In its Report to the EU Parliament and Council, the Commission recommends as follows:

"Improving transparency in GSP+ monitoring and better involving civil society both in the EU and in the beneficiary countries: In line with its commitments in the Trade for All Communication, the Commission is committed to transparency. In this respect, a number of measures are already in place to ensure transparency and inclusiveness in the GSP+ monitoring process. Regular and broad stakeholder consultations are held in order to allow civil society actors, including local civil society, to engage in the process. Additionally, the biennial reports on the implementation of the GSP are a major source of information and are made public immediately upon their transmission to the European Parliament and the Council. It should also be noted that the public UN and ILO reports are the primary source of information for GSP+ monitoring. The Commission will explore practical ways of improving transparency of GSP+ monitoring and to further civil society involvement."

Source: Report from the Commission to the European Parliament and the Council, p.7.

¹⁶³ European Commission, "The EU's Generalized System of Preferences", available at: http://trade.ec.europa.eu/doclib/docs/2015/august/tradoc_153732.pdf; the 2012 regulation; Commission Staff Working Document, "Midterm Evaluation of the Generalised Scheme of Preferences", p. 21.

¹⁶⁴ Commission Staff Working Document, "Midterm Evaluation of the Generalised Scheme of Preferences", p. 21.

While there seems to be a political will to enhance inclusiveness and transparency of the GSP+ scheme, the Commission falls short of highlighting specific ways in which this can be done.

b. Improve Transparency of EU GSP+ monitoring¹⁶⁵

Commission and External Consultant's Mid-Term Recommendations on enhancing transparency

In its Mid-Term Evaluation, the External Consultant notes that despite improvements in the GSP+ monitoring and compliance reviews, the monitoring undertaken by the EU could be made more transparent. Specifically, the External Consultant's recommend that there would be greater transparency with respect to the list of issues that are on the scorecards and are discussed with the beneficiary countries. Moreover, they suggest that the agenda for dialogues could be published, as well as a summary report of these dialogues which could be placed on the websites. The external consultant's report also recommends that information exchanges and stakeholder sensitization programmes are promoted.

In its Staff Commission Working Document, the Commission notes the necessity to preserve a certain degree of confidentiality in conducting its relationships with GSP beneficiaries. It highlights the importance of trust building to securing the effectiveness of the GSP monitoring scheme. However, it stresses that it is open to examining practical ways in which transparency and inclusiveness of the GSP+ monitoring process can be enhanced without undermining trust.

Thus, the Commission's suggests the importance of striking a delicate balance between, on the one hand, enhancing transparency, and, on the other hand, not jeopardizing the trust relationship with the GSP+ beneficiaries, that is essential for any type of monitoring to be effective. Thus, the challenge for the upcoming 2023 reform is to propose practical measures that would strike this balance. One idea would be to organize regular civil society meetings after visits to GSP+ beneficiaries and share key elements of these meetings. Indeed, this is already done in the context of human rights dialogues and could be emulated.¹⁶⁶

Another element where transparency can be improved is in sharing the basis of what evidence and information decisions to withdraw or not to withdraw preferences are made. This will be assessed in more detail in Section I.E.6 below.

¹⁶⁵ Note that this analysis has been included in response to the Commission and External Consultant's Mid-term Evaluation, but that it was not part of the original report. However, given the importance of this element in the GSP+ reform, it seemed important to provide some analysis on this issue.

¹⁶⁶ Justice and Peace, "Scrutinizing the new GSP+ mechanism after two years: will it deliver on human and labour rights"? Available at: <https://www.justiceandpeace.nl/wp-content/uploads/2018/05/Factsheet-GSP-after-two-years.pdf>.

c. Enhance inclusiveness

Currently, civil society's engagement takes place mostly through dialogues, both formal and informal, in Brussels and in beneficiary countries.¹⁶⁷ However, these dialogues alone fall short of enabling systemic involvement of civil society in the monitoring and evaluations process. Indeed, there is no *formal structure* through which civil society members can bring relevant information and evidence regarding a GSP+ beneficiary's human rights, good governance and sustainability commitments to the Commission's attention.

Would it make sense to create a more formal avenue for civil society engagement, and if so, what should that look like? The section below elaborates briefly on three different possible ways in which this can be done.

i. Establish an independent GSP+ monitoring body

One way that has been proposed by civil society groups in Brussels to enhance inclusiveness would be through establishing an independent GSP+ monitoring body. For instance, Act Alliance, a network of various Brussels-based civil society organizations, explains that “[i]deally, monitoring should be dealt with by an independent EU agency for human rights. The mechanism of monitoring should be inviting input from Trade Unions and CSOs in a structured manner.”¹⁶⁸ An independent GSP+ monitoring body could have more independence compared to the current monitoring that falls fully within the purview of DG Trade. This secretariat would establish a process for civil society to submit complaints and for the secretariat to respond to these complaints. Creating such an entity and process would make the GSP monitoring process more participatory, and more effective.

Notwithstanding the benefits such process could create, it would likely not be a feasible option to pursue. Indeed, DG Trade has expressed reluctance to establish yet an additional layer of bureaucracy that will consume valuable resources. Moreover, the question of establishing an independent GSP+ monitoring body is intrinsically related to the Commission's approach to preference withdrawal. As long as the Commission puts a premium on resolving shortcomings in human rights compliance through diplomacy and exerting political pressure – as opposed to withdrawing preferences – more systemic engagement of the civil society, which would likely lead to the exposure of more wrongdoings, would limit the Commission's discretion regarding preference withdrawal. See also Section I.E.6 below. Thus, an independent GSP+ monitoring body will be politically very difficult to accomplish.

ii. Establishing advisory groups for GSP+ monitoring

Since 2011, EU Free Trade Agreements provide for the involvement of civil society in the implementation of Trade and Sustainable Development Chapters through establishing Domestic Advisory Groups (DAGs). For instance, DAGs have been established for trade agreements with South Korea, Colombia/Ecuador/Peru, Central America, Moldova, Georgia, and Ukraine.¹⁶⁹ The DAGs, which are country-specific and meet twice a year, discuss elements related to the country's implementation of the sustainability chapter in the FTA, and make recommendations, where necessary, on these issues.¹⁷⁰

¹⁶⁷ European Commission, (2018). “Report from the Commission to the European Parliament and the Council”, available. Available at: http://trade.ec.europa.eu/doclib/docs/2018/january/tradoc_156536.pdf.

¹⁶⁸ Act Alliance, “GSP Platform”, available at: https://actalliance.eu/wp-content/uploads/2017/12/20171124_GSP-Platform-Statement_FINAL.pdf. The GSP Reform Platform. (2017).

¹⁶⁹ European Commission Directorate-General for Trade. (2018). “Call for Expressions of Interest in participation in EU Domestic Advisory Groups”. Available at: http://trade.ec.europa.eu/doclib/docs/2018/march/tradoc_156653.pdf.

¹⁷⁰ See, e.g., <https://www.eesc.europa.eu/en/sections-other-bodies/other/eu-korea-domestic-advisory-group>

One option presented by civil society to make the GSP+ monitoring scheme more inclusive would be to compose DAGs for all GSP+ countries. The advantages of doing so would be that (i) it would allow civil society to participate in a GSP+ monitoring in a more structured manner; and (ii) it would tap into existing expertise vis-à-vis GSP+ countries, thus ensuring quality control. The idea would be that any findings and recommendations made by the members of the DAG would be presented to the Commission.

Compared to establishing a secretariat, the benefit of setting up a DAG would be that civil society inclusiveness would be promoted within a relatively close structure, which would respond to the Commission's concerns to maintain trust with the beneficiary countries.

It must be noted, however, that the experience with DAGs in the context of FTAs has delivered disappointing results. For instance, DAGs have been criticized for poor organization (too improvised, too little meetings, lack of coordinating secretariat etc.); composition and selection procedures (not transparent, too much government influence); and government accountability (it is not clear how governments follow-up on the outcomes presented by DAGs).¹⁷¹ This would caution against replicating DAGs into the GSP scheme.

Moreover, establishing DAGs for GSP+ beneficiaries would require significant resources, and would be confronted with challenges similar to the ones described in Section I.E.5.c.i above.

iii. Less formal ways to enhance inclusiveness

A less ambitious approach to enhance the participation of civil society groups in the GSP+ monitoring process would be through providing clearer guidance on (i) the timelines for scorecards; (ii) country visits; and (iii) deadlines given to GSP+ beneficiaries to respond to the scorecards. Moreover, the Commission could more clearly identify how and when civil society actors could feed into this process, such as during the preparation of a GSP+ mission; as well as in the follow-up to the recommendation.¹⁷² In this context, the Commission should clearly indicate how they intend to use the information provided for by civil society actors.

An alternative way to enhance the role of civil society groups in the GSP+ monitoring process would be through giving more emphasis to shadow reporting.¹⁷³ Rather than influencing the Commission's official report, this would involve supplementing and/or contesting Commission accounts with alternative evidence.¹⁷⁴

Another way in which civil society actors can be engaged in the reporting process would be through the use of an intermediary to provide and publish such guidance and promote NGO involvement.¹⁷⁵ For instance, the UN Human Rights Committee uses the Centre for Civil and Political Rights (CCPR) to ensure civil society engagement.¹⁷⁶ Specifically, the CCPR works to promote the participation of NGOs in the work of the Human Rights Committee through: (i) building capacity and support NGOs in their reporting activities; (ii) promoting the role and participation of NGOs in the

¹⁷¹ Orbie, J., et al., (2016): "Promoting Sustainable Development or Legitimising Free Trade? Civil Society mechanisms in EU trade agreements". *Third World Thematics: A TWQ Journal*. Available at: pp. 528-529.

¹⁷² Directorate-General for External Policies, "Labour Rights in Export Processing Zones with a focus on GSP+ Beneficiary Countries". Available at: http://www.tepsa.eu/download/studies_for_the_european_parliament/droi_report_on_labour_rights_in_epzs/Labour-Rights-In-Export-Processing-Zones.pdf, p. 48.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid., p. 49.

¹⁷⁶ Centre for Civil and Political Rights [online]. Available at: <http://ccprcentre.org/about-ccpr>.

Human Rights Committee's reporting procedure; (iii) reinforcing the involvement of NGOs in following-up to the recommendations; and (iv) in building NGO capacity to engage in the individual complaints procedure.¹⁷⁷ One idea would be for the civil society organizations¹⁷⁸ that came together to draft the GSP Platform Statement to taking their collaboration to fill that role.

The advantage of creating avenues for enhanced civil society engagement through less formal mechanisms would be that it would encounter less political resistance and will require fewer Commission resources, but can nevertheless be an effective way to enhance the visibility of civil society in the GSP+ monitoring process.

d. Recommendation

To recall, enhancing transparency and inclusiveness in the GSP+ monitoring process is one of two recommendations that the Commission has provided to the Parliament and the Council as a result of its Mid-term evaluation. Thus, there exists political will to introduce changes to the current system – which will likely not require regulatory reform, but only changes in implementation.

The challenge, however, is identifying concrete ways to enhance transparency and inclusiveness without compromising the Commission's ability to resort to diplomacy in situations where shortcomings are present but the withdrawal conditions are not fully met.

On the basis of the above analysis, this paper recommends less formal ways to enhance transparency and inclusiveness, such as through organizing regular civil society meetings after visits to GSP+ beneficiaries; through providing clearer guidance on (i) the timelines for scorecards; (ii) country visits; and (iii) deadlines given to GSP+ beneficiaries to respond to the scorecards, as well as on (iv) how and when civil society actors could feed into this process; and (v) how the evidence submitted by civil society will be used. This recommendation could be facilitated through the establishment of a key civil society actor that could serve as intermediary between the Commission and the civil society similar to the role currently played by the Centre for Civil and Political Rights. Finally, another avenue to explore would be to enhance the use of shadow reporting.

¹⁷⁷ Ibid.

¹⁷⁸ These civil society groups are: Clean Clothes Campaign, Act Alliance EU, Syndicate European Trade Union, FIDH, and ITUC.

6. Improve the withdrawal mechanism

a. Status quo

The 2012 GSP regulation contains 2 relevant withdrawal provisions: Article 15 sets out when preferences for GSP+ beneficiaries can be withdrawn, and Article 19 sets out in what situation preferences can be withdrawn for EBA and Standard GSP beneficiaries:

- For GSP+ beneficiaries “shall be withdrawn temporarily”¹⁷⁹ in situations where a GSP+ beneficiary has failed to (i) ratify and effectively implement the 27 conventions; (ii) comply with the reporting requirements, including monitoring; or (iii) cooperate with the Commission with its monitoring efforts;
- For Standard GSP and EBA beneficiaries, Article 19 provides that trade preferences “may be withdrawn temporarily”¹⁸⁰ in situations including (i) serious and systematic violation of principles laid down in conventions listed in Part A of Annex VIII; (ii) export of goods made by prison labour; or (iii) serious shortcomings in custom controls on the export or transit of drugs; serious and systematic unfair trading practices.

As can be surmised from the above, the standard to trigger withdrawal for a GSP+ beneficiary compared to a Standard GSP or EBA beneficiary is much lower. Moreover, the wording of Articles 15 and 19 suggests that, in contrast to Standard GSP/EBA beneficiaries, the temporary withdrawal of preferences for GSP+ beneficiaries is *mandatory* in situations where withdrawal conditions are met, whereas it is *optional* in the context of Standard GSP and EBA.

The 2012 reforms amended withdrawal in a few ways. First, it increased the independence of the Commission to initiate an investigation. In the 2008 Regulation, a Member State could request consultations to initiate a withdrawal process, which would subsequently have to be approved by the Council. By contrast, the 2012 reform gave authority to the Commission to adopt an implementation act to initiate a temporary withdrawal procedure. Second, it reduced the procedural length, from a period that took more than a year to a period of only six months.¹⁸¹

In contrast to the United States, trade preferences in the EU are withdrawn only rarely: against Myanmar and Belarus (which involved withdrawal from the entire scheme); and Sri Lanka (which involved withdrawal from the GSP+ scheme).¹⁸² In October 2018, the Commission launched procedures to initiate preference withdrawal from Cambodia, and a potential preference withdrawal of Myanmar, from the EBA scheme.¹⁸³ The rare instances of preference withdrawal reflects the EU’s reluctance to suspend beneficiary countries from its GSP scheme, which is why the EU’s approach is generally referred to as “soft unilateralism”.¹⁸⁴

¹⁷⁹ Emphasis added.

¹⁸⁰ Emphasis added.

¹⁸¹ Development Solutions (2018). “Mid- Term Evaluation, of the EU’s Generalised Scheme of Preferences (GSP)”p. 35.

¹⁸² Beke, L., and Hachez, N., (2015). “The EU GSP: A Preference for Human Rights and Good Governance? The Case of Myanmar”, March 2015. Available at: https://ghum.kuleuven.be/ggs/publications/working_papers/2015/155bekehachez
Leuven Centre for Global Governance Studies.

¹⁸³ Cecilia Malmstrom, “On Myanmar and Cambodia”, European Commission Blog, 5 October 2018. Available at: https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/myanmar-and-cambodia_en.

¹⁸⁴ Velluti, S., (2016). “The Promotion and Integration of Human Rights in EU External Trade Relations”. Utrecht Journal of International and European Law, [online] 32(83). p. 16. (Sussex research online). Available at: <https://www.utrechtjournal.org/articles/10.5334/ujel.342/>.

b. Introduce partial withdrawal

i. Rationale

Whether withdrawal is an effectively tool to induce compliance is a heavily debated topic. On the one hand, monitoring and dialogue can only go so far.¹⁸⁵ Indeed, especially in the context of GSP+, trade unions and civil society have suggested that the EU is too reluctant to use the withdrawal mechanism.¹⁸⁶ For instance, both in Pakistan and the Philippines, the threat of GSP+ withdrawal was not sufficient for the political leadership to refrain from using capital punishment, which is prohibited under the GSP+ scheme.¹⁸⁷

On the other hand, industry associations and civil society have also expressed reluctance for withdrawal to be implemented as it would create uncertainty and could disrupt supply chains. For instance, Business Europe and Amfori have noted that harsh withdrawal does not work. EuroCommerce stressed the importance of predictability and consistency in the application of the GSP scheme. Depending on the level of export market concentration in a country, the temporal removal of trade preferences can have a significant impact on an economy.¹⁸⁸ DG Trade expressed a clear view that withdrawal should be a last resort, and that, as much as possible, cases should be resolved through the use of incentives and persuasion. Indeed, they noted that once the preferences are withdrawn, the Commission loses all leverage over the beneficiary country. This view is also shared by Christofer Fjellner, the European Parliament Trade Rapporteur on GSP, who has been quoted to say at a Parliamentary hearing that “withdrawal of GSP+ would mean failure of GSP+”.¹⁸⁹ In addition, many have questioned the effectiveness of withdrawal, noting that it is often no guarantee to improve the situation on the ground.

In light of the above, it may be beneficial to explore if there is a middle ground. Indeed, as noted by Richardson et al. “finding a middle ground between ‘soft’ inter-state dialogue and ‘hard’ nation-wide sanctions is crucial to enhancing the EU’s role in realizing labour rights in GSP+ beneficiaries.”¹⁹⁰ One “middle of the road” approach that has been suggested would be to implement partial withdrawal in the face of non-compliance. In other words, sanctions should be targeted to non-compliant sectors only. Similarly, they could also be introduced on a company-specific basis. Practically, this could be done through reinstating MFN tariffs for those products that are tied to the violations.¹⁹¹ Conversely, in situations where tariff preferences have been temporarily withdrawn, sector or company-specific, demonstrated improvements could result in partial re-installment of the preferences. As one study notes, however, “[t]he important point, however, is that by making sanctions easier to deploy and rescind, they become more meaningful as a deterrent.”¹⁹²

¹⁸⁵ European Parliament, “ Directorate-General for External Policies. (2017). “Labour rights in Export Processing Zones with a focus on GSP+ beneficiary countries”, 2017. p.53. Available at: http://www.tepsa.eu/download/studies_for_the_european_parliament/droi_report_on_labour_rights_in_epzs/Labour-Rights-In-Export-Processing-Zones.pdf, p. 53.

¹⁸⁶ Ibid., p. 45.

¹⁸⁷ Ibid.

¹⁸⁸ Van der Ven, C. (2015). “Where trade and industrial policy converge: How developing countries can utilize trade preferences to generate sustainable, local growth in the garment sector”. *The International Lawyer*, 49(1).

¹⁸⁹ European Parliament, Directorate-General for External Policies. (2017). “Labour rights in Export Processing Zones with a focus on GSP+ beneficiary countries”, 2017, p. 45.

¹⁹⁰ European Parliament, Directorate-General for External Policies. (2017). “Labour rights in Export Processing Zones with a focus on GSP+ beneficiary countries”, 2017, p. 7.

¹⁹¹ Ibid., p. 45.

¹⁹² Ibid.

ii. Feasibility

Partial withdrawal has been endorsed by numerous stakeholders, including INTA, the Commission, and the Clean Clothes Campaign. Likewise, the Commission Staff Working Report notes that some stakeholders from civil society organizations proposed sector-specific withdrawal.¹⁹³ It thus appears to have support across the board. In the context of the EU framework, the regulatory basis to engage in partial withdrawal on a sector-by-sector basis already exists under the current regulation. Indeed, Article 19 notes that preferences may be withdrawn “in respect of *all or of certain* products originating in a beneficiary country”; and Article 15 includes similar language. The challenge, however, to introduce partial withdrawal for different sectors would be to link the human rights violations, or failure to effectively implement certain conventions, to these sectors. For instance, it would be difficult to link a country’s failure to abolish the death penalty to certain sectors. Thus, sector-specific withdrawal will likely feature more prominently in human rights obligations that are operationalized at a company level, such as the labor rights obligations. Accordingly, sector-specific compliance may be beneficial only in situations involving specific types of violations.

Compared to sector-specific withdrawal, introducing partial withdrawal on a company level would be much more challenging and would bound to spur heavy debate. To begin, it is unclear as to whether this would be covered under the current regulation, which provides that “all or certain products” could be withdrawn. Arguably, certain products encompasses products from certain companies as well as from certain sectors, but arguments could also be made against this interpretation. Moreover, in my conversations with stakeholders – albeit in the context of introduction product-specific requirements to GSP – many highlighted that the focus of the GSP scheme is on the governments, not companies. Starting to enforce withdrawal on a company-specific basis will also require large amount of resources, as it would require monitoring to be extended to company-level. In its Staff Working Level Report, the Commission noted that focusing on compliance reviews at the company level “would not only be resource-inefficient, but more importantly could be seen as duplicating or even prejudicing the enforcement responsibilities of the ratifying State party”.¹⁹⁴

More generally, while targeted sanctions would ensure better functioning of the GSP scheme’s stick, increased ease of deploying and rescinding sanctions could also induce increased uncertainty, which could lead to its own negative impact on development and sustainability. This must be taken into account when making recommendations with an eye to the 2023 reforms.

¹⁹³ Commission Staff Working document, Midterm Evaluation of the Generalised Scheme of Preferences, p. 23.

¹⁹⁴ Ibid., pp. 22–23.

c. Introduce an objective triggering mechanism

i. Rationale

The interim Mid-Term Evaluation temporary recommendations include “recommendations focusing on implementation would need to focus on (i) trigger mechanism for temporary withdrawal”.¹⁹⁵ This recommendation follows the observation in the literature that the EU has not always applied the withdrawal mechanism in a consistent and transparent matter.¹⁹⁶ In this context, critics have asserted that “the impact and credibility of the EU’s approach to human rights in its external trade policy has been called into question because of the selective and uneven application of these human rights instruments”.¹⁹⁷ Others have suggested that the scheme seems to work along the lines that “[i]f outcomes of trade conditionality of labour standards are in agreement with other policy objectives (as in the cases of Burma for the EU...), so much the better; if not (as with Pakistan for the EU ...) then labour standards are simply ignored.”¹⁹⁸

For instance, cases involving alleged violations of core labour standards and human rights in Uzbekistan and Turkmenistan, Pakistan, El Salvador and Bolivia did not lead to a withdrawal of preferences, whereas withdrawal was initiated after violations were found in Myanmar and Belarus and Sri Lanka (which involved withdrawal from the GSP+ scheme).¹⁹⁹ Thus, political considerations play a role in determining how to respond to a particular situation.

One option that has been proposed to reduce the politicization of the withdrawal mechanism would be to narrow the Commission’s discretion. This could be done through instituting additional “guidelines” or “thresholds” which, when triggered, will be required to result in withdrawal— either in full or partial depending on the threshold.

ii. Feasibility

Introducing an objective standard that sets out when the line is crossed and when withdrawal is initiated would politically be difficult to achieve. The Commission is unlikely to agree to a scheme that would limit its discretion to engage in political maneuvering. Moreover, it would be technically complex and challenging to establish the objective standards to determine when sanctions are required and when they are not – in addition to the guidance that already exist under Articles 15 and 19. It is also unclear if an additional objective criterion would really be effective, given that it could be prone to “manipulation” – but at different levels of the monitoring and evaluations process.

¹⁹⁵ This recommendation seemed to have been removed in the Final Report.

¹⁹⁶ Development Solutions (2018). “Mid – Term Evaluation of the EU’s Generalised Scheme of Preferences (GSP)”. p. 94. See also: Velluti, S. (2016). “The Promotion and Integration of Human Rights in EU External Trade Relations”; Beke, L., D’Hollander, D., Hachez, N. and Pérez de las Heras, B. (2014). “Report on the integration of human rights in EU development and trade policies”. Utrecht Journal of International and European Law; Beke, L. and Hachez, N. (2015). “The EU GSP: A Preference for Human Rights and Good Governance? The Case of Myanmar” Leuven Centre for Global Governance Studies.

¹⁹⁷ Velluti, S. (2016). “The Promotion and Integration of Human Rights in EU External Trade Relations”. Utrecht Journal of International and European Law. p. 41; Development Solutions (2018). “Mid – Term Evaluation of the EU’s Generalised Scheme of Preferences (GSP)”, p. 94.

¹⁹⁸ Tsogas (2000), “Labour Standards in the Generalized System of Preferences of the European Union and the United States”, cited in Beke, L., and Hachez, N., (2015). “The EU GSP: A Preference for Human Rights and Good Governance? The Case of Myanmar”, Leuven Centre for Global Governance Studies. p. 24.

¹⁹⁹ Ibid.

d. Recommendation

On the basis of the above analysis, I recommend targeted, sector-specific withdrawal in situations of where serious human rights violations can be tied to specific sectors. This would avoid punishing the entire country on the basis of wrongdoings in a specific sector. At the same time, it would send the message that evidence of human rights violations is taken seriously, thus creating incentives for GSP beneficiaries to prevent such violations from happening.

Commission's and External Consultant's recommendations on withdrawal

In its Mid-Term Evaluation, the External Consultant recommends that whenever severe and systematic violation is reported by relevant monitoring bodies, the Commission should take immediate steps to initiate the relevant procedures and initiate the relevant withdrawal procedures. It notes that since the implementation of the GSP Regulation in 2014, the EU did not withdraw tariff preferences.

In its Staff Working Report, the Commission takes note of that “not every problem in implementation, even if sometimes serious, should lead to the withdrawal of GSP, as long as there is a concrete commitment and actions from the country to improve the situation. It is for the Commission to conduct a case-by-case analysis and it is at the discretion of the Commission to assess whether the conditions for withdrawal are met. If the dialogue and enhanced engagement fail to produce results, the EU is ready to launch the GSP withdrawal procedure with due consideration for the economic impact”.

This is largely in line with the issues outlined in this paper. It suggests that there is room to discuss introducing particular withdrawal, but that the Commission would only resort to preference withdrawal – even if partial – as a last resort.

7. Linking voluntary sustainability standards with GSP

a. Introduction

In order to enhance the link between sustainability and trade preferences, recent studies have explored whether trade preferences could be linked to complying with voluntary sustainability standards (VSS).²⁰⁰ VSS are private standards, generated by retailers, companies, or NGOs, which certify producers and production processes if they comply with the package of sustainability criteria described in the standard.²⁰¹ They relate to a wide range of sustainability metrics, including respect for basic human rights, worker health and safety, the environmental impacts of production, land use, etc.²⁰² The rationale behind linking trade preferences to products that are VSS certified is that VSS to a degree rely on the same conventions as those that are included in the GSP scheme.²⁰³

In other words, while conventions are adopted by states, the references to some of these conventions in VSS translates these standards to economic actors.²⁰⁴

Stakeholders have expressed strong opposition to idea of introducing VSS into the GSP. Many noted that it would go against the spirit of the GSP scheme, which focuses on governments and not companies or products. Others highlighted the governing challenges that would necessarily arise if VSS were to be introduced into the scheme? Business associations expressed particular concern about how to select the relevant standards. DG Trade strongly disliked the idea, highlighting that the sustainability conditions in the scheme focus on governments and not businesses. Thus, in order to introduce trade preferences for VSS certified products in the GSP scheme, many practical challenges would need to be resolved.

Nevertheless, using the 2023 GSP reforms as a platform to introduce novel ideas, this section analyzes various legal ways in which trade preferences could be tied to VSS, and examines their feasibility.

Specifically, this Section focuses on three different options: (i) the mandatory option, which would make access to the EU market conditional on being certified; (ii) the voluntary option, which explores keeping the GSP scheme as is, but creating an additional scheme to provide GSP preferences for VSS certified products; and (iii) the tariff-line option, which would tie tariff reductions to certified products across the board – as opposed to only in the context of GSP.

²⁰⁰ See, e.g., Marx. A. et al, (2018). "What role can Voluntary Sustainability Standards play in the European Union's GSP Scheme?" Leuven Centre for Global Governance Studies, 2018, p. 3; Schukat, P. and Rust, J. (2012). "Tariff Preferences for Sustainable Products: An Examination of the Potential Role of Sustainability Standards in Generalised Preference Systems Based on the European Union Model (GSP)". Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ).

²⁰¹ Ibid., p. 21.

²⁰² United Nations Forum on Sustainability Standards (UNFSS) (2013). "Voluntary Sustainability Standards: today's landscape of issues and initiatives to achieve public policy objectives". Advance Consultation. [online] Available at: https://unfss.files.wordpress.com/2013/02/unfss_vss-flagshipreportpart1-issues-draft1.pdf.

²⁰³ Marx. A. et al. (2018). "What role can Voluntary Sustainability Standards play in the European Union's GSP Scheme?" Leuven Centre for Global Governance Studies, 2018, pp. 22-24.

²⁰⁴ Ibid., p. 24.

b. The mandatory approach

i. Overview

One option that has been proposed by Max et al. would be to integrate VSS into GSP through making access to the European market conditional upon VSS.²⁰⁵ In other words, only products that would be VSS certified would be able to be imported into the EU market.

Such an approach would have far-reaching consequences for the EU market, as it will greatly reduce the amount of products that will be imported. This, in turn, would hurt EU industry and importers which are dependent on the availability of these products. It would also undermine the very purpose of the GSP scheme, given that many products, especially those from LDCs, will not be able to comply with the VSS due to supply side constraints, and thus, never enter the EU market to begin with – let alone utilize trade preferences.²⁰⁶

ii. Legal compatibility

This arrangement would raise serious WTO compatibility issues. It would be akin to imposing a quantitative trade restriction for those products that are not certified, thus constituting a violation of GATT Article XI.²⁰⁷ It would also violate GATT Article III:4, which requires WTO Members not to discriminate between domestic and imported like products and, presumably, the same VSS standards would not be applied across the board for domestic products. Thus, the mandatory approach should not be pursued.

c. The voluntary approach

i. Overview

Another approach that has been analyzed by Max et al. is the voluntary approach, i.e., maintaining the current GSP scheme as is but providing additional tariff reductions for products that are VSS certified.

One obvious limitation to this approach is that it would only be applicable to those products that are not currently receiving 0% duty free access in the EU.

²⁰⁵ Ibid., p. 37.

²⁰⁶ J. Monkelbaan, J. (2011). "Trade Preferences for Environmentally Friendly Goods and Services", International Centre for Trade and Sustainable Development (ICTSD), [online] Working Paper. p. 17. Available at: http://forumue.de/wp-content/uploads/2015/04/Trade_Preferences_paper.pdf.

²⁰⁷ Ibid., p. 43.

As illustrated by Figure 7 below, this would mean that it would only be applicable to sensitive products for Standard GSP beneficiaries:

Figure 7: Overview of duty reductions for Standard GSP, GSP+ and EBA beneficiaries

	Standard GSP	GSP+	EBA (49)
Non-sensitive goods	Duty suspension for around 66% of EU Tariff lines	Duty suspension for around 66% of EU tariff lines	Duty suspension for all products but arms
Sensitive goods	Duty reduction: 30% (specific duty) 3.5% points (ad valorem)	Duty suspension	Duty suspension

In light of the diminishing role of Standard GSP beneficiaries, introducing additional tariff benefits in addition to the existing trade preferences scheme would only be relevant to a very small number of products from a limited number of beneficiaries.

However, if product coverage would be enhanced – which this study does not recommend as set out in Section I.B above – this would provide additional opportunities to differentiate VSS and non-VSS products within the context of the GSP Scheme. Another way to make this voluntary approach more meaningful would be by re-introducing tariffs. Concretely, this would mean extending the Standard GSP tariffs to GSP+ and EBA beneficiaries, and provide 0% tariffs for those products that are VSS certified.²⁰⁸ With respect to EBA beneficiaries, this would run counter to the multilateral spirit of providing unconditional duty-free quota-free access to LDCs as explained in Section I.E.2 above. With respect to GSP+ beneficiaries, it would run counter to the purpose of GSP+ and remove the differentiation that has been purposefully created between Standard GSP and GSP+. In doing so, it would disincentivize countries from ratifying the 27 conventions and applying for GSP+ status, as they would not be receiving additional tariff reductions. Thus, this would not be advisable.

On additional way to link VSS to GSP would be to exempt VSS compliant products to from any sanctions. This would ensure that businesses that are operating on the basis of strict sustainability standards – reflected in the VSS certification of its products – would not penalized for their government's non-compliant behavior. It could be another way of ensuring “partial withdrawal”, a reform option that is further explained in Section I.E.6.b above. However, this would involve such a serious overhaul of the scheme, and will have significant resource implications. It is thus unlikely that such a reform would happen, at least in the near future.

ii. Legal compatibility

As explained in more detail in Section III.A.2, the WTO compatibility of a scheme that provides preferential treatment for GSP beneficiaries is examined under the Enabling Clause. To recall, under the Enabling Clause, developed countries can provide preferential treatment to developing countries upon meeting a number of conditions. One of these conditions is that they must “respond positively to the development, financial and trade needs of developing countries”. Moreover, footnote 3 to paragraph 2(a) notes that trade preferences covered by the Enabling Clause must be “generalized, non-reciprocal and non-discriminatory preferences beneficial to the development countries”.²⁰⁹ The Appellate Body in

²⁰⁸ Marx. A. et al. (2018). “What role can Voluntary Sustainability Standards play in the European Union’s GSP Scheme?” Leuven Centre for Global Governance Studies. p. 41.

²⁰⁹ The Enabling Clause, footnote 3 to para. 2 (a).

EC – Tariff Preferences found that the need had to be objectively demonstrated, and that there must be a “sufficient nexus” between the need and the tariff preferences.

Introducing additional tariff preferences for VSS certified products under Standard GSP and/or GSP+ would not involve *de jure* discrimination. Indeed, it would apply to the same products from the same group of “similarly situated” countries – Standard GSP and/or GSP+. Thus, *de jure*, there would be no discrimination between countries. However, there could be a case of *de facto* discrimination if businesses in certain beneficiary countries would be unable to export VSS certified products and receive the preferential tariff rates in compliance with the criteria imposed by the EU, whereas businesses in other countries would. In such a situation, the EU could argue that the additional trade preferences provided to VSS certified products would correspond to a particular need, i.e., the cost of continuing compliance with VSS requirements. However, this argument could raise questions regarding the “objectivity” of the need.

Another unresolved legal issue concerns whether conduct covered by the Enabling Clause would exempt any type of GATT Article 1 violation, or whether the scope is more limited. While this issue was not directly addressed in *EC – Tariff Preferences*, the Appellate Body notes that “Paragraph 1 excepts Members from complying with the obligation contained in Article I:1 **for the purpose of providing differential and more favourable treatment to developing countries ...**”.²¹⁰ In other words, measures that concern a violation of the MFN principle on the basis of providing differential treatment to developing countries are exempt from the obligation set out in GATT Article I:1. However, the Enabling Clause does not appear to function as a blanket exemption from any type of discriminatory conduct that could violate GATT Article I:1. For instance, it may not automatically exempt GSP tariff differences on the basis of discrimination between “like products” within the GSP scheme – which could result in discrimination under Article I:1 of GATT. Even in that case, however, the exceptions to Article XX could be invoked. I have analyzed the legal implications of this in more detail in Section I.E.7.d.ii below.

It would require further study to understand what the legal implications would be related to exempting VSS compliant businesses from preference withdrawal.

iii. Conclusion

In sum, introducing a voluntary approach should not be pursued as the benefits would be extremely limited, and pertain mostly to Standard GSP beneficiaries and to sensitive goods. Moreover, doing so will likely create a number of legal problems at the WTO, in the context of discriminating between “like” products. That said, it would require additional study to understand the feasibility of enabling businesses to be exempt from sanctions if they can prove compliance with VSS.

²¹⁰ Appellate Body Report, *EC – Tariff Preferences*, para. 90. (emphasis added).

d. The tariff line approach²¹¹

i. Overview

Yet another approach to link tariffs to VSS would be to introduce tariff differentiations on the basis of VSS. This would be applied to all tariffs lines, and would not be limited to GSP preferences. While this may be slightly outside the scope of this paper, I am adding this option for completeness sake; it demonstrates additional ways to think about the relationship between trade and product-specific sustainability, as well as the legal implications this would have.

Operationally, this could be done through introducing new tariff lines for a subset of products which would enable differentiation on the basis of production methods and processes. For instance, there could be a tariff line for uncertified 70% cocoa chocolate, and one for 70% cocoa chocolate that has been VSS certified. The differentiation would probably take place within the final 4 or 2 digits of a product's tariff line. Since these are country-specific, the EU would have discretion to do this.

Linking VSS to tariff lines is somewhat reminiscent of the Environmental Goods Agreement ("EGA"). The EGA, which has been negotiated in the WTO as a plurilateral agreement, sought to eliminate tariffs on a number of important environment-related products. However, one key difference is that under the EGA, product selection was done on the basis of the product's end-use, and not on the basis of production methods.²¹²

ii. Legal Framework

An arrangement involving HS tariff lines that would be differentiated on the basis of differences in production methods would raise important legal questions. Under the MFN principle in under GATT Article I:1, Members must accord the same treatment to "like products" from different countries. VSS are considered non-product related processes and production methods ("NPR-PPM"), i.e., measures that prescribe processes and production methods that do not, or in a negligible way only, affect the characteristics of the products.²¹³ The jurisprudence suggests that, everything else equal, NPR-PPMs differences are insufficient to consider the products to not be "like".²¹⁴ One in situations where differences in NPR-PPMs change the final product, e.g., the application of fertilizer, would a product be considered "unlike" for purposes of GATT Article I.²¹⁵

²¹¹ Yet another option to strengthen the link between trade and sustainability is through sustainable sourcing through on the basis of signing and implementing a declaration. This approach is exemplified in the context of palm oil. Recently, the Commission called upon Member States who had not yet done to sign and implement the Amsterdam Declaration "Towards Eliminating Deforestation from Agricultural Commodity Chains with European Countries". Similarly, there are ongoing discussions in the context of the EU-Indonesia FTA to make tariff reductions for palm oil conditional on sustainability improvements in the palm oil sector.

²¹² European Commission. (2016). "Environmental Goods Agreement: Promoting EU environmental objectives through trade", available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1438>.

²¹³ Van den Bossche, P., Schrijver, N. and Faber, G. (2007) "Unilateral Measures addressing non-trade concerns", The Hague: the Ministry of Foreign Affairs of The Netherlands. Available at: <https://openaccess.leidenuniv.nl/bitstream/handle/1887/12563/Unilateral%20Measures%20Addressing%20Non%20Trade%20Concerns.pdf?sequence=1>, p. XXX.

²¹⁴ Marx, A. et al, "What role can Voluntary Sustainability Standards play in the European Union's GSP Scheme?", p. 43.

²¹⁵ Hestermeyer, 2011, quoted in Marx, A. et al, (2018). "What role can Voluntary Sustainability Standards play in the European Union's GSP Scheme?" Leuven Centre for Global Governance Studies.

As noted above, any inconsistency under the GATT could be justified if the measure falls within the general exceptions of Article XX. When measures relate to the protection of “public morals”, “human animal and plant life or health” or the “conservation of exhaustible natural resources”, they could be justified under Article XX, provided they also meet the necessity test and comply with the chapeau of Article XX which provides that relevant measures may “not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on trade”. The requirements of Article XX have been interpreted quite strictly, and respondents have rarely been successful in their Article XX claims. Thus, it will be an uphill battle to justify any inconsistency with Article XX.

Another unresolved legal question that would be relevant to understanding the legal nature of the proposed arrangement concerns the Technical Barriers to Trade (TBT) Agreement. Whether NPR-PPMs would be considered “technical regulations” under the TBT Agreement remains an open question. Moreover, if they are, there is an open question whether they would comply with Article 2.2 of the TBT Agreement, which notes, in relevant parts, that: “technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create”.

iii. Conclusion

Compared to the two mandatory and voluntary approach, the tariff line approach would perhaps be the best of all three options to consider in the context of linking VSS to tariffs, although it would not link VSS to GSP preferences.

e. Additional considerations

In addition to the analysis above, a few additional elements must be highlighted in the context of introducing product specific standards into the GSP scheme. One key issue relates to the selection of the standards. From the 400+ VSS standards out there, how will the Commission decide which standards to pick? Business Europe and Amfori expressed particular concern about the standard selection. Indeed, how could this be done without becoming extremely politicized? Another key challenge would be how this scheme would be administered. Will this be done by the Commission, or will it be outsourced, and if so, to whom?

Other issues that must be addressed concern the effect of this on the utilization rate of the preference schemes. Non-tariff barriers constitute one of the key barriers for SMEs from developing countries to export. These are the result of the EU’s stringent regulatory regime. Adding yet more stringent product requirements would make exporting to the EU market unattainable for many.

Finally, one needs to look at whether an increased number of certified products would actually advance sustainable development and human rights. Indeed, as noted by van der Bossche et al., “developing countries have good reason to fear forms of eco- or labour protectionism where regulatory systems of importing countries may be captured by rent-seeking groups pursuing other hidden objectives.”²¹⁶

²¹⁶ Van den Bossche, P. Schrijver, N. and Faber, G. (2007). “Unilateral Measures addressing Non-Trade Concerns”. The Hague: the Ministry of Foreign Affairs of The Netherlands. p.247.

f. Recommendation

There is very little political support to introduce VSS in the EU GSP scheme, as it is considered not be in line with the spirit of the GSP scheme. It would also constitute an administrative nightmare. From all three approaches analyzed, the tariff line approach would have most potential, although it falls outside the GSP reform process.

Commission's and External Consultant's Mid-Term Recommendations on linking VSS to the GSP

Unsurprisingly, both the Commission's Mid-Term evaluation and the External Consultant's report were silent on the issue of introducing VSS into the GSP.

IV. Other reforms

A. Include services in the GSP Scheme

The EU GSP Scheme covers goods, not services. Yet services are playing an increasingly important role in the growth of developing countries' economies. In this context, I have explored whether services could be included in the EU's trade preferences regime.

Everyone I spoke with was highly skeptical of this idea, on the basis of (i) conceptual difficulties; (ii) legal feasibility; and (iii) unproven benefits. I will briefly discuss these issues here.

First, including services into the EU's GSP scheme generates conceptual problems. The EU's GSP scheme provides tariff reductions to imported products from various developing countries. Unlike goods, however, the import of services is not regulated through tariffs. Rather, services can be subject to regulatory restrictions, in the form of market access restrictions or discrimination between foreign and national service providers. The question, then, would be what type of service preferences the GSP should provide. Should it come in the form of providing market access? And if this were to be the case, to what extent is the EU market currently restricting access to services from LDCs and developing countries?

Second, including services into the GSP scheme would be legally difficult to achieve. The EU already provides preferential treatment to services and service suppliers from LDCs.²¹⁷ Thus, the inclusion of services in the context of GSP would only benefit Standard GSP and GSP+ beneficiaries. However, unlike the GATT Agreement, the GATS Agreement, which covers services, does not have an Enabling Clause. This means that the EU would have to apply for a waiver at the WTO to include services in its GSP Scheme. Given the political deadlock that currently exists at the WTO and the political discussions regarding what types of countries should be considered developing countries, it will be very unlikely for such a waiver to be granted.

Third, there is a question related to the benefits such an arrangement would bring. Most services are provided under Mode 1 which covers cross border supply, i.e., services supplied from the territory of one WTO Member into the territory of another WTO Member. While this could generate problems in the context of data restrictions, such as the GDPR, or issues related to regulatory standards, these types of services do not trigger typical market access barriers that could be removed through preferences. Moreover, service provision is intrinsically linked to supply. It is unclear whether LDCs are actually benefiting from the existing LDCs services waiver, given supply-side issues in developing countries.

Thus, including services into the existing GSP Scheme would generate practical, conceptual, and legal difficulties, while the benefits of introducing such a change are unclear. It is thus not a recommended avenue to further pursue.

²¹⁷ Council for Trade in Services, Notification from the European Union, S/C/N/840, 18 November 2015.

That said, a more pressing issue is that there is very little information about the existing services waiver for LDCs, and whether this waiver is actually being used. It would thus be advisable to examine how the LDCs services waiver is being implemented, and any benefits that it has on LDCs, prior to thinking about whether to integrate services into the next GSP regulation.

External Consultant's Mid-Term Recommendation on services

In its Mid-Term Evaluation, the External Consultant recommends that a stock taking of the WTO's services waiver for LDCs be undertaken. It further notes that the feasibility for selected trade in services categories for GSP eligible countries will need to be identified.

This recommendation is fully aligned with the recommendation provided in this paper.

B. Enhance Promotional Efforts

Another issue that came up various times in my interviews with stakeholders concerns poor awareness of the EU's GSP scheme in businesses in beneficiary countries. Indeed, numerous times it was mentioned that not enough is done to promote awareness in developing countries, and that one of the key reasons to explain the lack of utilization is awareness. Indeed, in many countries, GSP was associated with the main export industry that used it (e.g., garments in Pakistan) and many businesses would not be aware that it could be used to export other goods too.

This issue is also noted in the Mid-Term Evaluation, which observes that in Ethiopia, the African Growth and Opportunity Act (AGOA) was often referred to as the preferred export scheme. This is in part due to the fact that the EBA did not get actively promoted, and many companies based in Ethiopia are not sufficiently aware of existence of the scheme.

Unlike EU GSP, the US' AGOA scheme is very well known due to extensive outreach efforts by the United States. For instance, it features a website which is easily accessible and provides all relevant information on AGOA. Moreover, the United States has established Trade and Investment Hubs all across Africa, a one-stop shop that provides business and governments with information on exporting to the US, including AGOA.²¹⁸

Thus, to increase awareness, and thus, utilization rates, the EU should spend more resources and efforts on promoting the EU's GSP scheme in beneficiary countries.

Commission and External Consultant's midterm recommendations on awareness

In its Mid-Term Evaluation, the External Consultant recommends that information exchange and stakeholder sensitization programmes are promoted in order to raise awareness about the GSP.

Similarly, promoting greater awareness in beneficiary countries is one of two recommendations that the Commission provides to the Parliament and the Council. Specifically, it notes that "the EU could do more to raise awareness not just for business, but also for civil society organizations."

²¹⁸ Development Solutions (2017). "Mid- Term Evaluation, of the EU's Generalised Scheme of Preferences (GSP)", p. 171.

V. Conclusion

This study explored concrete reform options that can be considered in light of the upcoming 2023 GSP expiry. From the conversations I have had with stakeholders, this study appears to be a bit ahead of the pack: many stakeholders had yet to start discussing the upcoming reforms with their members and explore a policy agenda. The fact that few organizations were able to offer concrete reform options was, in many ways, a benefit: it enabled me to explore a wide-ranging number of reform options, and assess their political, technical, and legal feasibility. It may also mean, however, that some of the reform options proposed here may not be feasible in light of future developments between now and 2021.

Specifically, this study explored reform options for key elements of the GSP scheme: country coverage, product coverage, product graduation, and ROO – even though it will not be part of the upcoming reform. This study also explored the benefits and feasibility of reform options that would strengthen the link between trade preferences and sustainability, good governance, and human rights, including looking into monitoring, withdrawal and VSS. Finally, it looked into issues such as services and promotion.

A key take away is that many of this study's recommendations for reform involve piecemeal as opposed to major overhauls. They propose the fine-tuning of a very complex system on the basis of changes that were introduced in the 2012 reforms (e.g., large reduction in GSP beneficiaries) and on the basis of anticipated future changes (e.g., wave of graduating LDCs). For instance, this study's recommendations to change the denominator used to calculate import share for GSP+ and product graduation, as well as reform options to enhance regional cumulation, are a direct result of the large wave of exiting GSP beneficiaries after the 2012 reforms.

Another observation is that many of the recommendations proposed in this study would not require regulatory reform, and thus, would not need require legislative approval. For instance, graduating EBA beneficiaries already benefit from 6 years of transition time, and all they may need to facilitate the transition to GSP+ status may be additional support in how to ratify and implement the list of conventions. Moreover, partial withdrawal on the basis of certain product sectors is already an option that is provided for within the existing 2012 GSP regulation. And enhancing inclusiveness and transparency of the monitoring regime is a change that could be made without regulatory changes. This same is true for enhancing awareness of the scheme. This would suggest that the scheme's effectiveness could be enhanced within the existing regulatory framework. Therefore, these reform options may be easier to accomplish.

Other potential GSP reform options highlighted in this study would require further research. This includes the question as to whether – and if so, how – the GSP scheme should be reformed to include services but also exploring creative ways in which non-conventions like the UNGPs could be added to the list of Annex XIII Conventions and researching ways in which blockchain may be introduced to prevent fraud in the REX. Finally, specific ways in which tariffs can be used to reward sustainably produced goods – whether within or outside the GSP scheme – is another area that could benefit from further, concrete and specific research.

On a final note, it would be important to prioritize reform options that will create the highest benefits. In light of the diminishing importance of Standard GSP, this would mean that reform options that concern the EBA and GSP+ regimes should be priority. Accordingly, recommendations concerning product coverage and product graduation, which concern only Standard GSP beneficiaries, should be less of a priority. By contrast, recommendations to enhance the GSP+ scheme, such as improving monitoring and withdrawal and updating the list of conventions should be awarded the highest priority. This is especially the case in light of the upcoming wave of graduating EBA beneficiaries, many of which may want to apply for GSP+.

Annex A:

Comparative Table of this study's recommendations and the midterm evaluation of the External Consultant and Commission

	This Study	External Consultant Midterm Evaluation Report	EU Commission Midterm Evaluation Report
Country Coverage	Standard GSP is losing relevance, but study does not suggest removing it	Standard GSP should be abolished. EU should consider harmonizing Standard GSP and GSP+ and establish a transition period of e.g., three years	N/A
	Make it easier for country to qualify as GSP+ through changing denominator of market share from GSP imports into the EU to total imports into the EU	Suggested possible exemptions for Standard GSP/EBA countries that do not meet GSP+ (in the context of abolishing Standard GSP)	N/A
	Introduce a more suitable transition period of graduating LDCs that will have to exit the EBA scheme	Provide a transition period of e.g., 3 years (similar to transition period that will be provided to Standard GSP countries)	N/A
Product Coverage	N/A	N/A	N/A
Product Graduation	Introduce a different graduation threshold which would consist of the beneficiary's imports as a share of total EU imports, coupled with a country-specific indicator (such as cap on value of exports from country)	N/A	N/A
	Create even more homogenous product categories	N/A	Notes importance of not making product sections too broad nor too narrow
Rules of Origin	Introduce regional cumulation with eligible GSP countries; simplify extended cumulation provisions; beginning the conversation on introducing blockchain to prevent fraud in the context of the REX system	N/A	N/A

	This Study	External Consultant Midterm Evaluation Report	EU Commission Midterm Evaluation Report
Enhance inclusiveness and transparency of GSP+ monitoring	Organize regular civil society meetings after visits to GSP+ beneficiaries; through providing clearer guidance on (i) the time-lines for scorecards; (ii) country visits; and (iii) deadlines given to GSP+ beneficiaries to respond to the scorecards, as well as on (iv) how and when civil society actors could feed into this process; and (v) how the evidence submitted by civil society will be used	Make scorecards publicly available; publish agenda for the dialogues and a summary report on the EU website	Commission is committed to transparency. The Commission will explore practical ways of improving transparency of GSP+ monitoring. However, the Commission also highlights importance of preserving a certain degree of confidentiality in conducting relationships with GSP+ beneficiaries.*
	N/A	Consider proposal to extent the monitoring cycle from 2 to 3 or 4 years	Consider proposal to extent the monitoring cycle from 2 to 3 or 4 years
Preference Withdrawal	Introduce partial withdrawal of preferences on a sector-specific basis	N/A	N/A
	Looked into introducing a clear standards that sets out when withdrawal will be triggered and when it will not. Recommends against it due to lack of political infeasibility	Recommends that whenever severe and systematic violation is reported by relevant monitoring bodies, Commission takes immediate steps to initiate the relevant procedures and establish relevant files.	Commission highlights importance of using preference withdrawal only as a last resort
Conventions	Update list of Article XIII Conventions, add Paris Agreement and look into adding UNGPs.	Update list of conventions: undertake a detailed review towards a possible update, including Paris Agreement.	Enhance environmental impact of GSP scheme, including through the implementation of environment protection and climate change conventions under GSP+ (not explicit, but implied room to update conventions with Paris Agreement)
Voluntary Sustainability Standards	Not feasible to incorporate VSS into the preference scheme	N/A	N/A
Services	Conduct a study to better understand the impact of the LDC services waiver in order to determine whether including services into the GSP scheme may be a good idea	Recommends that stock taking of the WTO's services waiver for LDCs should be undertaken.	N/A
Enhance promotional efforts	Enhance promotional efforts of GSP in beneficiary countries.	Recommends the promotion of information exchange and stakeholder sensitization programmes in order to raise awareness about the GSP	The EU could do more to raise awareness not just for businesses, but also for civil society organisations, who have an important role to play in the implementation of the international conventions.*

*Recommendations the Commission made to the EU Council and the Parliament

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