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# THE US'S AND THE EU'S GENERALISED SYSTEM OF PREFERENCES: A COMPARISON IN THE CONTEXT OF WORKERS' RIGHTS*

Abstract

In the context of recent GSP changes, especially the Trump Administration's steps relating to certain beneficiary countries, it is timely to assess the effectiveness of this unilateral mechanism. In particular, the academic question connected to the impact of the GSP on social development and human rights in the beneficiary countries is the key issue. It is also interesting to what extent the threat of blocking imports or the withdrawal from the scheme can give rise to policy change regarding labour standards. This article aims to analyse the legal basis, and compare the EU's and the US's GSP labour provisions. The author applies critical reasoning and comparative analysis with a view to showing the differences between both countries. She focuses her attention on advantages and disadvantages of the GSP schemes—not only those currently in effect in the US and the EU, but also from a historical perspective.

**Słowa kluczowe:** standardy pracy, prawa pracownicze, ogólny system preferencji taryfowych, handel międzynarodowy

**Keywords:** labour standards, workers' rights, scheme of generalised tariff preferences, international trade

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## 1. Introduction

On October 25, 2019, the United States Trade Representative (USTR) announced that the US suspends duty-free treatment of certain Thai products for failure to "adequately provide internationally-recognized worker rights." As a consequence, as from April 25, 2020, 573 US Harmonized Tariff Schedule line items from Thailand, including all seafood, will no longer be subject to duty-free treatment under the Generalised System

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of Preferences (GSP). According to data presented by USTR, the removal of these benefits affects about one-third of Thailand's GSP trade, which totaled $4.4 billion in 2018 (Ringel 2019). The example illustrates pressure that is exerted by one country on another with the use of GSP. Interestingly, sometimes such a solution is perceived to have better effectiveness than multilateral social clause (Bronstein 2009, p. 108). In fact, the topic is particularly important from the point of view of the trade-labour debate given that the opponents of the trade-labour linkage often support the concept of GSP as a means of the improvement of standards (Razavi 2010, p. 888).

The objective of the paper is to critically examine and compare the US and the EU GSP schemes. To meet this purpose, the article has been divided into four parts, including introduction. Part 2 explores the discourse and debate over the US GSP. It focuses on the legal basis, and presents advantages and disadvantages of the examined unilateral instrument. Part 3 outlines the EU GSP, also emphasising its legal basis, pros and cons. Part 4 includes concluding remarks concerning the comparison between the EU's and the US's GSP scheme.

## 2. The US Generalised System of Preferences

### 2.1. Legal basis

The US GSP program was implemented on January 1, 1976, and authorised under the Trade Act of 1974 (19 United States Code Sec. 2461 *et seq*.), according to which the GSP beneficiary status could not be accorded to any country that, *inter alia*, was communist, was uncooperative in international drug control efforts, or was terrorist-abetting. But as it soon turned out, these grounds were not enough. Frightening events in the 1970s and 1980s, including Pinochet's military dictatorship in Chile (1973–1990), the civil war in El Salvador (1979–1992), banana plantations in Honduras, and trade union suppression in the *maquiladora* factories in Guatemala, led to the establisment of a coalition of trade unions and civil society organisations. It was aimed at finding a trade-related solution on how to hold companies and governments accountable for human and labour rights violations (Church Albertson, Compa 2015, p. 475). Thus, under the GSP Renewal Act of 1984 other relevant grounds for exclusion from the program were added. One of the most important prohibited the President from designating as a GSP's privileged trading partner any country that "has not taken or is not taking steps to afford internationally recognized worker rights" to its own workers (Alston 1996, p. 72). "Internationally recognized worker rights"—as defined by the statute—meant that the US GSP scheme required privileged countries to uphold the right of association, the right to organise and bargain collectively, a prohibition on forced labour, a minimum age for employed children, and acceptable conditions relating to minimum wages, work hours and safety and health.

Congressional authorisation of the GSP program expired end of December 2017. Further, on March 23, 2018, the President signed into law H.R. 1625 (Public Law, 115–141),

the "Consolidated Appropriations Act, 2018,"[1] which provided full-year federal appropriations through September 30, 2018, and included the renewal for the GSP through December 31, 2020.

## 2.2. Pros and cons

The GSP supporters point out its great positive effect on research connected to social labelling programs, corporate codes of conduct, child labour, and many other forms of international standard setting, monitoring and enforcement of labour regulation. They also put emphasis on the fact that the GSP review mechanism has given rise to, *inter alia*, a number of lobbying groups, a global network of unions, human rights organisations, labour think-tanks, networking organisations, NGOs, and development agencies. In this way the scope of international labour solidarity was augmented through GSP petitions (Tsogas 2000, p. 360).

In the historical context, in many cases the only threat of blocking imports to the US was enough to reform legislation in a country that violated fundamental employment rights. For example, the eventuality of having GSP privileges withdrawn contributed to changing labour laws in many countries, such as: Indonesia, Guatemala, El Salvador, Dominican Republic (Douglas, Ferguson, Klett 2004, pp. 277–284, 288–291), Costa Rica, India, Pakistan, Sri Lanka. The authorites of these countries significantly improved labour legislation and increased inspection according to the American recommendations (Ojeda-Avilés 2015, p. 111).

On the other hand, the example of the suspension of GSP for Bangladesh in June 2013 (after the collapse of the Rana Plaza complex in Dacca, which killed over 1,100 textile workers) is not so obvious in the context of elimination of violations of workers' rights. Contrary to the EU, Bangladesh's garment exports did not benefit much under the US GSP programme. For this reason, the suspension of the US GSP was neither turning point nor catalysts for change. Labour rights violations did not stop after the tragedy. If the EU's GSP had been suspended, the effect would have been more significant (Myant 2017, p. 48; The International Corporate Accountability Roundtable 2018).

What refers to further imperfections of the US GSP, including its effectiveness, the first doubts appear on the background of the formulation: "has not taken or is not taking steps to afford internationally recognized worker rights." There are some major ambiguities in this formulation, especially vague expressions, *i.e.* "taking steps," "afford" or unclear criteria for withdraw GSP benefits (Church Albertson, Compa 2015, p. 475). It would seem more reasonable to use the terminology developed by the ILO. The category of "international labour standards" or "labour rights" could be adopted with the aim of giving substance to the currently existing unclear expressions. Unfortunately, the US legislation effectively guards against any reference to the ILO standards (Alston 1996, p. 74).

[1] https://www.congress.gov/115/bills/hr1625/BILLS-115hr1625enr.pdf (access: 9 January 2020).

Furthermore, it should be noted that in principle strong political interference has always been a characteristic of the administration of the US GSP scheme (Hyde 2006, p. 166). The GSP political nature is firmly confirmed by the most recent studies which indicate that while the US's political friends are equally likely to be investigated, they are much less likely to have their benefits suspended (Gassebner, Gnutzmann-Mkrtchyan 2018, pp. 10–13).

A matter of enforcement of the labour rights eligibility criteria is another problem. A few implementation gaps for which the enforcement is so weak can be identified. Firstly, there is considerable discretion in deciding on the GSP eligibility without much taking into account, e.g. the national economic-interest waiver (according to the Trade Act) or the lack of minimum standards of compliance in the beneficiary country. Secondly, the review of country compliance petitions remains plagued by very poor transparency. Thirdly, there are neither clear standards nor timeline for determining non-compliance. Moreover, the abuse of the continuing review process makes itself felt. It comes down to placing countries on an indefinite probation while they continue to benefit from preferential treatment. Fourthly, the reinstatement criteria applied after the revocation of GSP eligibility may require to be emphasised as they are subject to political assessment and remain to a great extent ineffective (The International Corporate Accountability Roundtable 2018).

In this respect it should be noted that in October 2017, USTR Robert Lighthizer announced new enforcement priorities for GSP, *i.e.* a new effort to ensure beneficiary countries are meeting the eligibility criteria of the GSP trade preference program. However, it is still doubtful whether these reforms will really contribute to overcome all disadvantages.

## 3. The EU Generalised System of Preferences

### 3.1. Legal basis

In the case of the EU, the GSP has been applied since 1971 and has entailed lower tariffs to developing countries on some or all the EU imports from them. Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 is currently in force for a period of ten years as from 1 January 2014. It consists of only three arrangements:

1. A general arrangement (Standard GSP) for developing countries that have not achieved high or upper middle income status (18 beneficiary countries have to comply with the principles set out in the eight ILO core conventions and seven UN conventions on human rights);

2. A special incentive arrangement for sustainable development and good governance (GSP+) for Standard GSP beneficiaries that are also considered vulnerable (8 beneficiaries

have to ratify and implement 27 international conventions on human and labour rights, environment and good governance);

3. A special arrangement for the least developed countries (LDCs) (Everything But Arms, EBA) (49 beneficiaries) (Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No 978/2012 applying a Scheme of Generalised Tariff Preferences and repealing Council Regulation (EC) No 732/2008, EUR-Lex 52018DC0665).

As regards sanctions in case of violations, all preferential arrangements mentioned above may be withdrawn temporarily, in respect of all or of certain products originating in a beneficiary country, for any of the reasons included in the Regulation (EU) No 978/2012, e.g.: serious and systematic violation of principles laid down in the core human and labour rights UN/ILO Conventions or export of goods made by prison labour. According to Art. 21 of the Regulation, a beneficiary country should provide administrative cooperation as required for the implementation and policing of the preferential arrangements. The lack of such a cooperation may also entail temporary withdrawal of the preferential arrangements provided for in the Regulation.

In regard to GSP+, the Regulation also stipulates that ". . . the Commission shall keep under review the status of ratification of the relevant conventions and shall monitor their effective implementation, as well as cooperation with the relevant monitoring bodies . . ." (Art. 13). It means that granting GSP+ benefits entails continuous monitoring of the GSP+ beneficiaries' obligations. Each GSP+ beneficiary receives a List of Issues—the so-called "scorecard"—prepared by the Commission in order to measure the compliance with their commitments. The document identifies serious weaknesses which should be purged. Above all, it contains deficiencies referred to by the Commission in its assessment of the GSP+ entry applications. Moreover, the irregularities detected by the monitoring bodies of the relevant core international conventions are also included in said document. And over time, other information can be added to the List of Issues, delivered not only by the European Parliament and the Council but also by stakeholders, e.g. business, civil society or social partners.[2]

The so-called "GSP+ dialogue" is another tool in the framework of the monitoring mechanism for GSP+. It consists quite simply in the fact that the Commission and the European External Action Service (EEAS) establish a dialogue on GSP+ compliance with the beneficiary countries, trying to bring to their notice the areas indicated in the List of Issues.[3] As pointed out by Manfred Weiss, the aim of the GSP+ dialogue is "to build a relationship based on trust and cooperation" (2018, p. 124).

[2] https://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155235.pdf (access: 9 January 2020).
[3] Ibidem.

### 3.2. Pros and cons

According to the above-mentioned Report from the Commission to the European Parliament and the Council on the application of Regulation (EU) No 978/2012 applying a Scheme of Generalised Tariff Preferences and repealing Council Regulation (EC) No 732/2008, an overall positive impact of the GSP on social development and human rights in the beneficiary countries is noticeable. It has been highlighted that the most recent version of GSP has contributed to the promotion of sustainable development and good governance, especially thanks to the EU's enhanced monitoring of the implementation of the international conventions relating to GSP+. Clear examples are given to illustrate these observations. First, in accordance with the commitment formulated in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Trade for all: Towards a more responsible trade and investment policy," the Commission and the High Representative have increased their involvement with certain EBA beneficiary countries with the aim of contributing to EU efforts to ensure respect of fundamental human and labour rights. Second, GSP has exerted a profound positive influence on the role of women in society. For instance, in the textile and clothing sectors (in Bangladesh and Pakistan) this could have been achieved by creating employment opportunities for women and by improving participation of women in the labour force in export industries trading with the EU. Third, it has been demonstrated that the EU's leverage in countries that benefit from GSP+ has been increased due to the close monitoring of them. More specifically, this refers to the power of pushing these countries towards the effective implementation of the 27 relevant international conventions. Besides, it has created the opportunities for truly constructive dialogue and has enabled the EU to engage with beneficiary countries on all areas which are marked by poor and ineffective implementation.

However, as they are developed and applied unilaterally, GSP labour clauses—also in the case of the EU—may entail a danger of having double standard practices. A country which has introduced a GSP labour clause is the only decision-maker on which country and when would be subject to a GSP investigation and may eventually be excluded from trade benefits (Bronstein 2009, p. 110). Thus, unequal treatment is used in comparable circumstances. It has been pointed out that we are dealing here with a "dichotomy between norms and interests," which means that in determining whether to enforce norms, the EU is motivated by its own interest (Beke, Hachez 2015, p. 193). In fact, many observers claim that the EU uses the GSP scheme discretionally and instrumentally with the purpose of pursuing foreign policy goals rather than for safeguarding labour rights (Velluti 2015, p. 50). We must realise that general safeguards common to all arrangements are indeed a manifestation of protectionism and they are designed to protect "EU producers of like or directly competing products."[4] It is thereby evident

[4] The general safeguards are regulated under Art. 22–28 of the Regulation (EU) No 978/2012. By the letter of the law, where a product originating in a beneficiary country is imported in volumes and/or at

that the confines of this arrangement should be sought in purely economic calculations (Weiss 2018, p. 127).

The EU's GSP labour provisions has already been used in Myanmar's case (withdrawal from the whole scheme). It was deprived of trade privileges because of the widespread use of forced labour by the government (Novitz 2018, pp. 126–127). A similar method was deployed in case of trade union rights infringements in Belarus. However, this did not give rise to any significant policy change regarding labour standards (Zhou, Cuyvers 2011, pp. 64, 77–78). Benefits have been also withdrawn in 2010 against Sri Lanka (withdrawal from GSP+) (Beke, Hachez 2015, p. 192; Yap 2015, pp. 224–227), which failed to implement human right conventions. Of course, there have been many more occasions to suspend GSP preferences, e.g. decision-makers have debated such a step in regard to China, Russia, Pakistan and India (Portela, Orbie 2014, p. 64). However, it has never materialised. The rare enforcement of conditionality provisions has become an impulse for further criticism, which is focused on imbalance between positive and negative conditionality (the former used widely, and the latter only to a minor extent) (Beke, Hachez 2015, p. 192). In this type of argument, it is worth remembering that supporters of EU sanctions highlight their positive consequences, which even go further beyond the sanctioned country. Weifeng Zhou and Ludo Cuyvers emphasise that sanctions can be perceived as contributing to "the international definition, promulgation, recognition, and domestic internalization of human rights norms." They believe in the sanction's deterrent potential, *i.e.* that other countries refrain from violating human rights. Moreover, sanctions are seen by the authors as an institutionalised expression of the EU's commitment to core labour standards (2011, p. 78). This apotheosis, however, cannot obscure the fact that trade measures can cause a lot of harm and, as a general rule, should be used with particular caution. Sometimes postulates are developed for impact assessment before imposing sanctions. Negative conditionality and sanctions can only be considered as the final solution because "it hurts populations more than it does the government that violate human rights" (Beke, Hachez 2015, pp. 192–193).

It should be noted that the idea behind the Regulation (EU) No 978/2012 was to solve many of these problems. In particular, the latest reforms have reduced the number of eligible beneficiary countries to 75. Consequently, the Commission will be able to focus only on those that are most in need of help and, what is important, deserve it (Yap 2015, p. 217). Next, the rules of the Regulation are devised so as to contribute to allaying the criticism connected to the lack of legal security, objectivity, stability, predictability and transparecy in the GSP scheme. Procedural simplification and enhanced monitoring can help to level out these defects (Beke, Hachez 2015, p. 196). As rightly stated by Clara Portela and Jan Orbie, the Regulation (EU) No 978/2012 places

prices which cause, or threaten to cause, serious difficulties to EU producers of like or directly competing products, normal Common Customs Tariff duties on that product may be reintroduced (Art. 22 § 1).

a stronger focus on guaranteeing compliance in comparison to the previous regulation, which concentrated on the ratification requirement leaving behind the implementation of the conventions (2014, p. 66).

## 4. Concluding remarks: A comparison between the EU's and the US's GSP scheme

The presented characteristics of the US and the EU systems reveal some important differences between them. The issue at the forefront of the discussion is connected to their motivation. The operation of the US GSP scheme, relying much on a sanction-based strategy, is often referred to as "aggressive unilateralism" and is in contrast to the EU approach called "soft unilateralism" (Church Albertson, Compa 2015, p. 476). The latter is mainly motivated by the will to ensure that poor countries have preferential access to the EU market. The linking of trade liberalisation with, *inter alia*, protection of workers' rights plays an important role in the whole concept. Clearly, even if protectionism is not the central part of the EU's approach, economic calculations are also taken into consideration. This is explicitly reflected in the provisions related to general safeguards common to all arrangements.

The EU's GSP scheme has been applied since 1971 and has been governed by a number of regulations. By way of comparison, the US GSP program was implemented in 1976, and must be periodically renewed by the Congress. What is important, only the US GSP program is designed to give organisations the possibility to file petitions with the office of the USTR in the framework of the GSP petition process. Thus, organisations can ask the US government to verify the state of compliance with labour rights in a given country in order to decide about the possibility of the suspension of its GSP privileges. In the case of the EU, stakeholders can deliver information which can only be added to the List of Issues.

Making further comparisons, it is important that the US GSP legislation has adopted the concept of "internationally recognized worker rights," and the EU GSP scheme has adopted the ILO core labour standards. The first four of "internationally recognized worker rights" practically coincide with those of the ILO Declaration. However, it should be noted that the elimination of discrimination in employment and occupation, which is present in the ILO Declaration, has not been included in the US's law. On the other hand, the US has included acceptable conditions of work with respect to wages, hours of work, and occupational health and safety. Layna Mosley and Lindsay Tello suggest that it can be interpreted softly as "a difference in emphasis," or more acutely as "an indication of the contestation that surrounds the specifics of labour rights" (2015, p. 65). It finds confirmation in the fact that the US withdrew from the ILO in November 1977 because of selective concern for human rights, the erosion of tripartitism, disregard of due process, and because the ILO was becoming too "politicized," and allowing political campaigning against the US and Western nations generally (Peel 1979, p. 46). Naturally,

during the 1980s, the US was not willing to make references to ILO conventions in its labour legislation.

It must be also observed here, that the EU requires developing countries to comply only with conventions which have been ratified by EU Member States. Obviously, in the case of the US the situation is quite different. The US has ratified only 14 of 190 ILO Conventions including only two of the ILO's core labour standards—Convention No. 105 (on forced labour) and Convention No. 182 (on the worst forms of child labour). Conventions concerning wages, hours of work or occupational safety and health (except Convention No. 176 on safety and health in mines) have not been ratified.

As Weiss rightly points out, the US and the EU differ also in their approach with regard to the functioning of the monitoring system. The EU GSP scheme, in contrast to the US, has introduced in its system a clear link between the EU monitoring procedure and the "case law" of the ILO's and the UN's monitoring bodies. Besides, refusal or withdrawal of preferences must be preceded, in the case of the EU, by transparent and fair procedures (2018, p. 127). It has been also demonstrated that due to the EU's enhanced monitoring of the implementation of the international conventions relating to GSP+, the most recent version of GSP has contributed to the promotion of sustainable development and good governance.

Taking into consideration, *inter alia*, the use of aggressive unilateralism, the term "internationally recognized worker rights," the monitoring system functioning, the approach towards ratification of ILO's core labour conventions, the desirable effectiveness, the Trump Administration's recent steps relating to certain beneficiary countries, it seems clear that the EU system pretends to be far better organised. However, it is doubtful if the US would ever take a cue from the EU.

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