# The Generalised System of Preference of the European Union, the Temporary Withdrawal Mechanism and Myanmar: From Sacrificing to Achieving Human Rights?

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**April 2024**

**A thesis submitted to McGill University in partial fulfillment of the requirements of the degree of Master of Laws.**

**For my grandfather.**

**Wish him rest in peace.**

## Table of Contents

Acknowledgement ..... I
List of Abbreviations ..... II
List of Figures and Tables ..... III
Introduction ..... 3
I. Research Methodology ..... 7
II. Human Rights Considerations in Business Policies: The EU GSP Scheme ..... 10
III. Realizing Human Rights Objectives in the GSP?: The Example of Myanmar ..... 36
IV. To Do or Not to Do: The Risks of GSP Temporary Withdrawal Mechanism ..... 64
V. Better than the Next: Reviewing the Reform Proposal of EUGSP ..... 90
VI. Conclusion ..... 106
Bibliography ..... 108

## Acknowledgement

This paper builds on the help of many people. In the beginning of constructing and reflecting this paper, I would like to thank Tristan Bruce and Mahan Ashouri for their valuable questions and suggestions. In the writing process, Ashod Alemian from PGSS in McGill has helped me immensely in my research on French language materials.

Throughout the whole period, my supervisor Professor Frédéric Mégret shows his endless dedication and passion in supervising. This is without a doubt the most rigorous and detailed academic research I've ever experienced.

I would also express my gratitude to Professor Andrea Kay Bjorklund, who serves as the examiner of this paper. Her valuable opinions and corrections deeply contribute to the quality of this research.

## List of Abbreviations

**AB** Appellate Body

**CEACR** Committee of Experts on the Application of Conventions and Recommendations

**CFSP** Common Foreign and Security Policy

**CFREU** Charter of Fundamental Rights of The European Union

**CJEU** Court of Justice of the European Union

**EBA** Everything but arm

**EC** the European Community

**ECHR** European Convention on Human Rights

**ECOSOC** United Nations Economic and Social Council

**ECtHR** European Court of Human Rights

**ETUC** European Trade Union Confederation

**EU** the European Union

**FTA** Free Trade Agreement

**GATT** General Agreement on Tariffs and Trade

**GSP** Generalised System of Preference

**IASC** Inter-Agency Standing Committee

**ICC** International Criminal Court

**ICCPR** International Covenant on Civil and Political Rights

**ICESCR** International Covenant on Economic, Social and Cultural Rights

**ICFTU** International Confederation of Free Trade Unions

**ICJ** International Court of Justice

ILC International Labour Conference

**ILO** International Labour Organization

**IMF** International Monetary Fund

**LDCs** Least Developed Countries

**MDF** Myanmar Defense Forces

**OHCHR** Human Rights Office of the High Commissioner

**SDGs** Sustainable Development Goals

**TEU** Treaty of the European Union

**TFEU** Treaty on the Functioning of the European Union

**UDHR** Universal Declaration of Human Rights

**UN** the United Nations

**UNCTAD** United Nations Conference on Trade and Development

**UNGA** United Nations General Assembly

**UNHRC** United Nations Human Rights Council

**UNSC** United Nations Security Council

**WTO** World Trade Organization

## List of Figures and Tables

Figure 1. Export Value from Myanmar to European Union (1) ..... 46
Figure 2. GDP Increasing Percentage of Myanmar (1) ..... 47
Figure 3. GDP Amount of Myanmar (1) ..... 47
Figure 4. Footwear Export Value from Myanmar to the EU ..... 49
Figure 5. Export Value from Myanmar to European Union (2) ..... 56
Figure 6. GDP Amount of Myanmar (2) ..... 56
Figure 7. GDP Increasing Percentage of Myanmar (2) ..... 56

## Summary:

With the chaos in the country, the current Myanmar military junta has been subjected to many restrictions on coercive measures from the outside world. As an active actor in the international community, the European Union, while imposing sanctions, is also discussing the possibility of temporarily withdrawing the tariff preference for goods that Myanmar enjoys under the Generalised System of Preferences arrangement. Unlike the decision to suspend Myanmar's preferential treatment in 1997, the European Union's current cautious position reflects the potential normative risks and negative human rights impacts of the temporary withdrawal mechanism in preferential arrangement. This paper discusses the human rights risks of the European Union's suspension of the preferential treatment with the current regulatory arrangements, based on the European Union's international obligations, its official position and the economic coercive measures to which Myanmar was subjected in 1997. The Generalised System of Preference regulation is in the process of being updated. By reflecting on the practical effects of the withdrawal mechanism, the current regulation and legislative proposals, this paper offers ideas for further improving the Generalised System of Preference arrangements.

**Keywords:**

Generalised System of Preference, Human Right, International Law, International Trade, European Union,

## Résumé:

Avec le chaos dans le pays, la junte militaire actuelle du Myanmar a été soumise à de nombreuses restrictions sur les mesures coercitives de la part du monde extérieur. En tant qu'acteur actif au sein de la communauté internationale, l'Union européenne, tout en imposant des sanctions, discute également de la possibilité de retirer temporairement la préférence tarifaire dont bénéficie le Myanmar dans le cadre du système généralisé de préférences. Contrairement à la décision de suspendre le traitement préférentiel du Myanmar en 1997, la position actuelle prudente de l'Union européenne reflète les risques normatifs potentiels et les impacts négatifs sur les droits de l'homme du mécanisme de retrait temporaire dans le cadre de l'arrangement préférentiel. Cet article examine les risques pour les droits de l'homme liés à la suspension par l'Union européenne du traitement préférentiel avec les arrangements réglementaires actuels, en se basant sur les obligations internationales de l'Union européenne, sa position officielle et les mesures coercitives économiques auxquelles le Myanmar a été soumis en 1997. Le règlement du Système généralisé de préférences est en cours de mise à jour. En réfléchissant aux effets pratiques du mécanisme de retrait, à la réglementation actuelle et aux propositions législatives, cet article propose des idées pour améliorer davantage les arrangements du Système généralisé de préférences.

## Introduction

At the beginning of 2021, a *coup d'état* added to the already chaotic situation in Myanmar. The junta shows an apparent anti-democracy trend in its domestic policies. The anti-democratic practices of the junta, such as the censorship of speech, the detention of elected politicians and the use of force to suppress protests, have plunged Myanmar society into the rule of authoritarianism. After the *coup d'état* took place, the president of the Security Council made a statement which shows its "deep concern at restrictions on medical personnel, civil society, labour union members, journalists and media workers".[1] In the Security Council's resolution, the council reiterates the importance of "the need to uphold the rule of law and to fully respect human rights"[2] in Myanmar. This serious situation also gained attention worldwide. Washington regarded this as a direct threat to the political democracy reform in Myanmar.[3] Brussels, for its part, included social governance and human rights guarantees in its statement, accusing the junta of setting back Myanmar's society while undermining democracy.[4] Based on this consensus, while adopting a resolution condemning Myanmar, the European Parliament also called for substantial responses from the EU authorities and countries to pressure the junta in Myanmar.[5] Up to now, the Council of the EU imposed prohibitions on the exporting of military-related goods in Myanmar, freezing assets, and refusing admission to individuals associated with the junta in Myanmar.[6] It is worth noticing that the parliament also "urges the Commission to launch an investigation pursuant to Article 19(1)(a) of the GSP Regulation with a view to suspending the trade preferences that Myanmar…benefits from in specific sectors".[7] One year after the parliamentary resolution was passed, two members of the European

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1 UNSC, "Statement by the President of the Security Council", UN Doc. S/PRST/2021/5.

2 UNSC, "Resolution 2669 (2022)", UN Doc. S/RES/2669 (2022).

3 Joseph R. Biden, "Statement by President Joseph R. Biden, Jr. on the Situation in Burma"

4 Council of the European Union, "Myanmar: Declaration by the High Representative on behalf of the European Union"

5 European Parliament, "European Parliament resolution of 11 February 2021 on the situation in Myanmar (2021/2540(RSP))", OJ 2021/C 465/13 at para 16-20.

6 European Union," COUNCIL REGULATION (EU) No 401/2013 concerning restrictive measures in view of the situation in Myanmar/Burma and repealing Regulation (EC) No 194/2008", OJ L 121 3.5.2013.

7 Supra note 5 at para 16.

Parliament sent separate questions for written answers to the Commission, expressing their concern on whether the "Commission intend[s] to initiate the procedure for the temporary withdrawal of GSP preferences from Myanmar/Burma under the current GSP Regulation?"[8] In the written answer, Executive Vice-President Dombrovskis reaffirmed the possibility of starting the procedure of temporary withdrawal of the GSP for Myanmar. But he also explained one of the key objectives of EBA, which is to "contribute to the eradication of poverty in beneficiary countries"[9], so the Commission must avoid "any adverse impact on the livelihood of Myanmar's population".[10]

This explanation highlights the possible negative consequences that could further deteriorate the living conditions of Myanmar's people, serving as an excellent reason for not imposing temporary withdrawal on Myanmar. However, as Jordi Cañas mentioned in his question's footnote, temporary withdrawal had been applied to Myanmar once, and the "preferences have already been suspended on one occasion in the past."[11] Compared with the current massive and comprehensive violations of human rights, Myanmar was suspended from the EU's trade preferences only because of forced labour in 1997.[12] This precedent not only reflects decision-making considerations, but also conveys the negative socio-economic impact of economic penalties.

This comparison leads to two arguable questions. Firstly, social effects serve as a vital consideration in the EU's application of temporary withdrawal. This consideration implies that temporary withdrawal may erode the social welfare of people in suspended countries. In other words, temporary withdrawal is activated by state authority but "costs of preference cancellation were carried by society as a whole".[13] Sanctions

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[8] Jordi Cañas, "Withdrawal of tariff preferences from Myanmar/Burma as a beneficiary of the 'everything but arms' scheme", E-002926/2022 at para 5. See also Gabriel Mato, "Human rights violations in Myanmar", E-002905/2022 at para 5-6.

[9] European Commission, "Joint answer given by Executive Vice-President Dombrovskis on behalf of the European Commission", E-002905/2022(ASW) at para 3.

[10] *Ibid.*, at para 4.

[11] Supra note 8 at para 5.

[12] The Council of European Union, "COUNCIL REGULATION (EC) No 552/97 of 24 March 1997 temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar" OJ No L 85/8 at art 2.

[13] Clara Portela, "Trade preference suspensions as economic sanctions", in Bergeijk Peter A.G. Van & Gina Macatangay Ledda, *Research Handbook on Economic Sanctions.* Cheltenham UK: Edward Elgar Publishing; 2021. See also Madelaine Moore & Christoph Scherrer, "Conditional or promotional trade agreements-is enforcement possible?" Friedrich-Ebert-Stiftung, 2017.

imposed by economic means on specific countries for the purpose of safeguarding fundamental rights place the population of the sanctioned country in a difficult circumstance. This operational logic reflects the current dilemma of the temporary withdrawal mechanism of the EUGSP programme. Secondly, the comparison shows an ambiguity in the decision-making system influenced by factors besides human rights concern.[14] The EUGSP temporary withdrawal mechanism is initiated based on Commission considerations rather than judicial decisions, and its response to the situation in Myanmar in 2021 is less positive than the precedent set in 1997. The delay in implementing temporary withdrawal reveals "lack of transparency and legal certainty" in the EU's decision-making process.[15]

Human rights have a place in the EU's external policy, especially in "commercial policies."[16] The EU is promoting global human rights governance in its external relations in several ways. The implementation of GSP and restrictive measures take a significant importance in the EU's instruments.[17] According to the Treaty of Lisbon, the EU should "consolidate and support" human rights through its external actions and "respect for the principles of the UN Charter and international law."[18] These provisions not only provide a statutory basis for the implementation of human rights concerns in the EU's external policy, but also impose obligations on the EU's conduct in doing so from the perspective of international law. In examining the EUGSP's temporary withdrawal mechanism, however, this tool will likely undermine the rights of specific communities, even if it was originally intended to promote international human rights governance. Economic measures taken based on the GSP imply a philosophy of "sacrificing rights before protecting them". The inconsistency of the EU's decision to start a temporary withdrawal in the case of Myanmar also raises doubts about the

[14] Arlo Poletti & Daniela Sicurelli, "The political economy of the EU approach to the Rohingya crisis in Myanmar." (2022) 10:1 Politics and Governance 47 at 49.

[15] Laura Beke & Nicolas Hachez, "The EU GSP: a preference for human rights and good governance? The case of Myanmar", in Jan Wouters, *Global Governance through Trade: EU Policies and Approaches*. Cheltenham: Edward Elgar Publishing; 2015 at 195.

[16] Barbara Brandtner & Allan Rosas, "Human rights and the external relations of the European Community: an analysis of doctrine and practice." (1998) 9:3 Eur.J.Int'l *L* 468 at 489.

[17] EU, EU ACTION PLAN ON HUMAN RIGHTS AND DEMOCRACY 2020-2024, at 10.

[18] EU, *Treaty of Lisbon,* OJ C 306/1 at art 1a, 2.5, 10A.1, 10A.2(b).

arbitrariness of economic sanctions. The "sacrifice-protect" paradigm of the EUGSP and the inconsistency of its decision-making were the basic facts that motivated this study.

This study is based on an analysis of the EUGSP system and uses Myanmar as a case to further explain the current weaknesses of this tool that should be used to promote human rights. Based on the analysis, this study will examine the restrictive measures in EUGSP under international human rights laws, to provide recommendations for reform of the EUGSP and other similar unilateral human rights accountability mechanisms from the perspective of international and human rights law. The first part of the paper will describe the methodology applied in this study. Part II will briefly discuss the legal basis of human rights mechanisms in the EU's foreign trade policies and propose an overview of the EUGSP and its temporary withdrawal mechanism. Part III will describe the problems of the temporary withdrawal mechanism in practice, using Myanmar as a case study. Part IV will compare the restrictive measures with the existing international human rights protection mechanisms and point out the problems of the current EUGSP's restrictive measures that conflict with international human rights law. Part V will propose reforms to the EUGSP based on international human rights law and its accountability mechanisms. Part VI serves as a conclusion.

# I. Research Methodology

The granting of trade preferences by the EU to Myanmar falls within the realm of international trade. However, the human rights standards attached to this trade behaviour and the impact of penalties for breaching them make it relevant to human rights guarantees. Therefore, the basis of the study of this relationship should encompass both its trade law and human rights law sources. The study will analyse the GSP arrangement from the perspective of the EU, which is the main implementer of this trade practice.

This research will follow the basic methodology of qualitative and doctrinal research. As this study is mainly concerned with the compliance of the EU's behaviour with its legal obligations in the context of human rights, the main object of the research is this trade policy itself. The study is also textually and legally based, with doctrinal research as the main methodology.

1. Rationale of Research Design

The textual sources of information for this research are national and international organizations such as the EU, Myanmar, the UN, the WTO and the ILO. A descriptive interpretative and contradictory study of international law and EU policy is the core process.

1.1 Rationale for the research material

Due to the nature of the EUGSP arrangements in relation to international trade and human rights, the sources of the research material need to be expanded to cover these two branches of international law.

At the international level, the documents of the United Nations and its agencies, together with the international treaties deposited with it, can provide an important reference for the identification of international human rights and humanitarian norms. WTO agreements, judgments and documents, on the other hand, can reflect the character of GSP arrangements in the field of international trade. The documents of the ILO are collected in this study in relation to the labour situation in Myanmar, with a view to analyzing the criteria for triggering the GSP interruption mechanism.

From the EU level, documents and information collected include EU regulations, directives and other process documents. Legislative proposals from the European Commission and documents from the European Parliament will also be taken into account. These documents will be the main source for analyzing the human rights framework for EU external trade.

The above textual sources serve the centre of doctrinal studies and provide a more complete coverage of the sectors of international law covered by the GSP trade arrangements.

1.2 Rationale for the research process

This research will begin by exploring the human rights dimension of EU trade relations, analyzing the legal basis for this integration and its manifestations in EU policy. As background, the analysis will give a basic picture of the EU business human rights arrangements in relation to the specifics of the EUGSP arrangements. After discussing the basic components of the EUGSP, the study will focus on a case study to discuss a complete GSP suspension-reinstatement process that Myanmar has experienced from 1997 to the present. In reviewing this case, the human rights risks that accompany this arrangement will also be mentioned.

Having identified the human rights risks, the study will further introduce international human rights and humanitarian norms to critically analyse the temporary withdrawal mechanism and other accessory mechanisms of the EUGSP arrangement. Potential human rights risks arising from damage to the population of the sanctioned state will be compared to the EU GSP reforms of 2023-2024, thus demonstrating the changes and shortcomings of the proposed new GSP legislation in addressing these issues.

This research process is based on qualitative and doctrinal methodologies. For a international legal study, such methodologies are suitable for managing the scope and the materials coming from different subjects and arenas.

2. Defects in Methodology

This research relies excessively on a textual perspective. The central flaw of this research is the original attribute of the study of legal doctrine. While this deficiency can

be remedied by a combination of other research methods, this study is limited in scope and content.

The over-reliance on doctrinal studies ignores the negative impact of the suspension of preferential treatment on the beneficiary countries in a practical sense. The lack of quantitative research will impede the causal relationship between trade instruments and human rights risks. Although this study attempts to incorporate some of the official quantitative results into the discussion, it is not as convincing as it could be.

Over-reliance on the text has also led to less attention being paid to other non-legal areas, which creates an obstacle to synthetic judgement in the discussion of specific concepts. When applied and analysed in accordance with the legal text, the discrepancy between a specific act and a particular concept will challenge the definition of the act, thus questioning the legitimacy of the law applied in the research process.

These flaws will manifest themselves during the course of the study, but they will also be overcome to the best of our ability.

## II. Human Rights Considerations in Business Policies: The EU GSP Scheme

Compared to most sovereign States and international organizations, the European Union places greater emphasis on the importance of human rights protection in its internal and external policies. This status comes because of the operation of a series of EU policies and mechanisms for the protection of human rights, both internally and externally.[19] The EU's policy on the protection of human rights is self-evolving. At a time when the relationship between trade and human rights was on the rise in the international community, the EU established early on the "nexus between respect for human rights and external trade."[20] The establishment of this relation requires the EU finds a basis of legitimacy for it within the international rule of law and EU law. A legitimization analysis of the EU's trade-human rights policy would help to further the understanding of the EU's position on the promotion of rights through trade and provide a basis for the development of the discourse on the EUGSP.

The relationship between the EU's external trade policy and human rights has been discussed by some scholars before.[21] These studies categorize the EU's trade policies and actions into two types, those initiated unilaterally by the EU and those agreed upon by the EU with relevant international actors, e.g. FTA, Investment Agreements, etc.[22] On the basis of an analysis of the common legal foundations of the two types, this study will focus on the role and legitimacy of the Generalized System of Preference as a unilateral trade regime in human rights safeguards and sanctions.

1. Legal Basis for Human Rights Considerations in The EU's External Trade Relations

The European Union incorporates many human rights in its relations with other

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[19] Jan Wouters & Michal Ovádek, "The Emergence of the EU's Commitment to Human Rights", in Jan Wouters, Ovádek Michal & Katrien Martens, *The European Union and Human Rights: analysis Cases and Materials.* First ed. Oxford United Kingdom: Oxford University Press; 2021 at 1; See also Yumiko Nakanishi, "Mechanisms to Protect Human Rights in the EU's External Relations", in Yumiko Nakanishi, *Contemporary issues in human rights law: Europe and Asia*. Singapore: Springer Nature, 2017.

[20] Diego J. Linan Nogueras & Luis M. Hinojosa Martinez, "Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems" (2001) 7:3 Colum J Eur L 307 at 307.

[21] Samantha Velluti, "The Promotion and Integration of Human Rights in EU External Trade Relations" (2016) 32:83 Utrecht J Int'l & Eur L 41; See also Annabel Egan & Laurent Pech, "Respect for human rights as a general objective of the EU's external action." (2015) Working Paper No. 161 – June 2015, KU Leuven Centre for Global Governance Studies.

[22] *Ibid.* (Egan & Pech); See also Supra note 19 at 646.

countries or organizations and uses agreements and other measures as a means of protecting human rights.[23] This kind of efforts can be traced back to the Lomé IV Convention in 1989. Although some African scholars expressed the importance of the distinctiveness of non-European human rights concepts in the renewed Convention,[24] the EC was able to induce ACP countries to agree on the inclusion of human rights provisions in the Convention by means of economic pressure on them.[25]

This practice was quickly supported by a series of resolutions from parliament recommending that adding human rights clauses into the EC's external trade agreements should be regarded as a legal obligation in the founding treaties of the EC.[26] In 1995, the Commission followed up, by means of a resolution, the recommendation made by the Parliament in its documents to make human rights clauses a mandatory element in agreements between the Community and third countries.[27] However, the modification of the founding treaties was not finished until the signing of the Treaty of Lisbon in 2007.[28] Since this reform of the EU's founding treaties, human rights and social governance have come to the fore as a solid legal obligation of the EU in the conduct of its external policy. As an obligation which "has been allocated a central place in the constitutional framework and legal discourse of the EU" in implementing external policy, the study will begin with EU law, with the intention of exploring its scope. It will then look at international law to determine whether the obligation and the acts derived from it have a basis in international law.

1.1 External Trade with Human Rights Obligations in EU Law

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[23] European Commission, "Reply of the European Commission on a suggestion for improvement on the Strategic Initiative concerning how the European Commission ensures respect for human rights in the context of international trade agreements from the European Ombudsman", Ref.SI/5/2021/VS at 2. "... it is true that certain aspects of human rights protection are directly addressed by trade policy measures. In the case of trade agreements, this relates to labour rights where these are also human rights..."

[24] Claude Ake, "The African context of human rights." (1987) 34:1/2 Afr.Today 5 at 9.

[25] Alessandro Favilli, "Differing Views on Human Rights: The Lomé IV Debate (1988-1990)", at para 9. < https://www.jhiblog.org/2023/07/26/differing-views-on-human-rights-the-lome-iv-debate-1988-1990/>

[26] The European Parliament, "Resolution on the introduction of a social clause in the unilateral and multilateral trading system", OJ C 61 28.2.1994 p. 89; The European Parliament, "Resolution on the Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries", OJ C 320 , 28/10/1996 p.261.

[27] European Commission, Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries', COM(95) 216 23/05/1995.

[28] Supra note 18; See also Lorand Bartels, "Human Rights and Sustainable Development Obligations in EU Free Trade Agreements", (2013) 40:4 Legal Iss Econ Integ 297 at 311.

The EU has enshrined human rights as a fundamental principle of the EU in a declaratory provision in the TEU and has created a set of human rights accountability mechanisms for the members states of the Union.[29] As the Treaty also obliges the EU to accede to the ECHR, the substantive requirements of the Human Rights Convention can provide a standard to be followed for the abstract human rights obligations and accountability mechanisms proclaimed in the TEU.[30]

In the current TEU, there are also standards on human rights in the external relations of the EU. The first paragraph of Article 21 stipulates that all EU action at the international level should be guided by "the universality and indivisibility of human rights and fundamental freedoms".[31] Subsequently, the Treaty goes further by placing an operational requirement on the EU to "consolidate and support democracy, the rule of law, human rights and the principles of international law" in its diplomatic activities.[32] Together with Article 3(5) of the Lisbon Treaty, this article forms the guidance of the EU on the external implementation of its human rights policy.[33] In contrast to the Maastricht Treaty, which refers to the promotion of human rights in external cooperation under the CFSP provisions, considerations such as the rule of law, good governance and human rights have gradually gained prominence in the EU's external policy.

As a political and economic union that can use its market advantages to externalize its internal policies, the role of the European Union in promoting and safeguarding fundamental rights is evident in its external trade scheme.[34] Yet the TFEU, the other fundamental treaty regulating the day-to-day functioning of the EU, does not impose any social governance constraints on the negotiation or implementation of EU external trade agreements.[35] This contradiction leads to the need to examine other European

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[29] Supra note 18 at art 2, 7.

[30] Sionaidh Douglas-Scott, "The European Union and human rights after the Treaty of Lisbon." (2011) 11:4 H.R.L.Rev 645.

[31] Supra note 18 at art 21.1.

[32] *Ibid.*, at art 21.2.

[33] Supra note 19 (Nakanishi) at 9.

[34] Chad Damro, "Market power Europe", (2012) 19:5 J.E.P.P 682.

[35] EU, Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012 at part V.

human rights conventions, official documents in external trade arrangements.

### 1.1.1 External Human Rights Obligations in EU's Conventions

Except the founding treaties, the EU and its Member States are equally bound by other conventional documents. The ECHR, mentioned above, and the CFREU, which will be discussed below, are important conventions relating to human rights. Both for the EU and member states to obey.[36]

a) External human rights obligations in ECHR

The first article of the ECHR requires that the states and the post-Lisbon-Treaty EU are responsible for "everyone on their territory or on territory controlled by them"[37]. This formulation clearly demonstrates the jurisdictional scope covered by the ECHR, i.e., the populations in States Parties and the populations in the areas under those states' control. However, the subsequent jurisprudence of the Court of Human Rights extends it further and determines jurisdiction in "a more flexible, protective and purposed approach".[38] By introducing a judicial supervision, the expansion of jurisdiction under Article 1 of the ECHR not only requires a member to be held accountable for the extraterritorial effects of its own conduct, but also establishes a framework of human rights impact evaluation for the conducts before or after it is carried out.[39]

This expansion imposes implicit human rights requirements for the impact of the extraterritorial activities of the EU and its member States. The European Court of Human Rights "could therefore review acts or conduct in relation to external action of the European Union."[40] Yet the case law from the ECtHR (European Court of Human Rights) does not reveal responsibility as a result of ignoring or even violating these requirements in foreign trade policies. Currently, the ECtHR's criteria for judging extraterritorial acts that violate the obligations of the Convention are based on

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[36] Lorand Bartels, "The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects", (2014) 25:4 Eur.J.Int'l L 1071.

[37] Council of Europe, European Convention on Human Rights, at art 1.

[38] Karen Da Costa, The Extraterritorial Application of Selected Human Rights Treaties. Leiden: Martinus Nijhoff; 2013 at 248.

[39] Tobias Lock, "EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg", (2010) 35 Eur.L.Rev, 777 at 778.

[40] Jean Paul Jacque, "The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", (2011) 48:4 Comm.Mkt.L.Rev 995 at 1005.

substantial control over extraterritorial areas [41] and substantial control over extraterritorial persons.[42] But these two standards of judgment are difficult to reach in the field of trade. Due to the non-compulsory and non-territorial nature of trade relations, the EU's actions cannot have the effect of absolute control over extraterritorial territories or individuals. Even if the EU does not implement its human rights obligations under the ECHR, the influenced individuals are hardly to complain before the ECtHR.

In the light of today's trial practice in the ECtHR, the scope of application of the ECHR has indeed gone beyond the limitations of article 1 of the Convention to include within its jurisdiction persons and territories under the actual control of the contracting members.[43] At the same time, the practice implies an obligation to take human rights guarantees into account in the extraterritorial conduct of EU States. However, this extension does not regulate the EU's human rights obligations when conducting external relations by non-controlling measures such as economic coercion. Key consideration for the ECtHR in jurisdiction is effective control over a specific person.[44] Thus, the Convention only imposes requirements on part of the EU's external relations instead of covering all aspects of external actions.

b) External human rights obligations in the CFREU

As a charter within the EU, the CFREU acquired legal force after the entry into force of the Lisbon Treaty.[45] Unlike the ECHR, CFREU does not have a judicial body to deal with cases of violation of the contents of the Charter.[46] Some scholars have argued that CFREU did not add a jurisdiction clause because of article 51 of the Charter. The article states that the "institutions and bodies of the Union" shall abide by the Charter. Acts of

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41 See *Manitaras and Others v. Turkey*, app no. 54591/00 (ECtHR, 03/06/2008). The Court found that Turkey had *de facto* control over the area in which the victim was located, and therefore also had jurisdiction over the victim.

42 See *Pisari v. the Republic of Moldova and Russia*, app no. 42139/12 (ECtHR, 21/04/2015). The Court relied on the fact that the Russian Federation had control over the soldiers and found that it controlled the area where the soldiers were shooting civilians at the time by controlling individuals.

43 Hugh King, "The Extraterritorial Human Rights Obligations of States", (2009) 9:4 H.R.L.Rev, 521 at 530.

44 Michael Duttwiler, Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights, (2012) 30:2 N.Q.H.R. 137 at 162.

45 Supra note 18 at art 6.1.

46 Lorand Bartels, "A model human rights clause for the EU's international trade agreements." (2014) German Institute for Human Rights and Misereor at 19.

"Member States only when they are implementing Union law" are also included in the scope.[47] Thus, the Charter's tracking of EU behaviour can then cover "all EU activities, as well as Member State action when implementing EU law."[48]

Lots of EU institutions have similarly expressed their recognition of the authority of the Charter in external relations. According to a joint communication from European Parliament and the Council, "the EU external action has to comply with the rights contained in the Charter."[49] Yet the CJEU has taken a conservative position on the authority of this charter in foreign relations. In Case C-638/16 PPU, the applicants referred to article 3 of ECHR, article 4 and article 18 of CFREU to request the Belgian Government to grant them visas to meet their asylum needs. The Grand Chamber of CJEU found the visa procedure is a national legal action in the judgement of this case.[50] The Charter excludes the jurisdiction of the Court when a member State engages in an act of domestic law.[51] On this basis, the CJEU concludes that "*les dispositions de la Charte, en particulier celles de ses articles 4 et 18, visées par les questions de la juridiction de renvoi, ne lui sont pas applicables.*"[52] Although not directly related to the conduct of the European Union, the case reflects the CJEU's cautious approach to the expansion of the scope of application of the Charter.

Similar to the ECHR, the application of Charter creates a dilemma. Both the Convention and the Charter do not provide for their extraterritorial effects. From a policy point of view, the EU tends to use its legislation as a standard for its own and its Member States' external relations. On the other hand, from a jurisprudential point of view, the ECtHR has expanded its jurisdiction on the criterion of effective control, but that expansion is limited and subject to strict conditions such as military control, decisive influence and individually controlled by officers. The CJEU also shows a reluctant attitude of

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47 EU, Charter of Fundamental Rights of The European Union, OJ C 326, 26.10.2012 at art 51.1.

48 Violeta Moreno-Lax & Cathryn Costello, "The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model", in Steve Peers, Tamara Hervey, Jeff Kenner & Angela Ward, *Commentary on the EU Charter of Fundamental Rights*. Oxford: Hart Publishing; 2014 in 1658.

49 European Parliament & European Council, Joint Communication to The European Parliament and The Council, Human Rights and Democracy at The Heart of EU External Action – Towards a More Effective Approach, COM(2011) 886 at 7.

50 Case C-638/16 PPU, *X and X v État Belge*, ECLI:EU:C:2017:173 at para 44.

51 Supra note 47.

52 Supra note 50 at para 45.

applying the Charter in external relations.

### 1.1.2 External Trade with Human Rights Obligations in EU's Documents

The legal acts within the EU system impose detailed requirements on the specific aspects of external trade relations of the EU and its member States.[53] Some scholars categorize the obligations in these documents into two kinds. The positive obligations require the EU and the states to *do* something to improve human rights. The negative obligations require the EU and the states *not to do* something that may jeopardize human rights.[54] This dichotomy provides a basic structure to analyse the EU official documents.

a) Positive Obligation in EU Official Instruments

The EU now is using its multiple policy tools to "uphold and promote the Union's values, principles and fundamental interests worldwide".[55] The Neighbourhood, Development and International Cooperation Instrument shows the EU's efforts to promote the protection and advancement of human rights in other countries through financial instruments in its external relations. This instrument establishes a series of obligatory requirements for the EU. Despite providing economic supports for the countries in three plans[56], the Union also needs to "support, as appropriate…trade agreements, partnership agreements and triangular cooperation."[57] As Jutta Urpilainen said, external financing instruments will "better serve our political priorities."[58]

The Union also adopts a unilateral approach to granting trade preferences for qualified trade partners. According to the GSP arrangement, the EU has voluntarily renounced its right to impose tariffs on imports from eligible developing countries.[59] In return,

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53 Council of European Union, "EU Strategic Framework and Action Plan on Human Rights and Democracy", Doc No.11855/12 at 2.

54 Laurens Lavrysen, "Parliaments and the European Court of Human Rights", (2017) 42:4 Eur.L.Rev 605.

55 REGULATION (EU) 2021/947 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU and repealing Regulation (EU) 2017/1601 and Council Regulation (EC, Euratom) No 480/2009, OJ L 209/1 at para 1.

56 See European Parliament, "A new neighbourhood, development and international cooperation instrument – Global Europe", PE 628.251 – July 2021 at 5-6. "The proposed regulation would have three main components: a geographical, a thematic and a rapid response component, as well as a so-called 'flexibility reserve' or 'cushion'."

57 Supra note 55 at art 8.5.

58 European Commission, "EU external action budget: European Commission welcomes the final adoption of the EU's new long-term external action budget for 2021-2027", IP/21/2885 at 2.

59 EU, "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

the developing countries granted that status shall approve related international human rights covenants and accept the supervision from international accountability mechanisms and the EU.[60] This trade arrangement creates an obligation for the Union and its member states to promote human rights in beneficiary developing countries through trade concessions. Meanwhile, the Union also empowers itself to start the temporary withdrawal procedure for the beneficiary countries when they are violating their commitments in international covenants.[61]

Due to its high level of economic development, the EU can attract developing countries to participate in economic programs through the tariff concession and financial subsidies. Then the Union can make use of its positive obligation in economic concessions to demand from beneficiary countries a commitment to the rule of law, human rights, and good governance. This bargain is supposed to improve global human rights governance and fulfil EU's policy goals. The Union arguably "successfully exports to the rest of the world" its values and standards through this externalization.[62]

b) Negative Obligation in EU Official Documents

EU legal acts restrict trade practices that may have a negative impact on human rights. These restrictions impose negative obligations on the EU and its member States in the conduct of external trade. From a legislative point of view, the adoption by the European Union of internal legislation regulating trade practices that may affect human rights is a positive step taken by the Union to safeguard human rights in its external relations. The fundamental purpose behind the legislation, however, is to regulate the conduct of external trade between the Union and the member states by creating a negative duty not to act.

In January 2019, the EU issued a regulation on goods in foreign trade that may be used for the purpose of torture or cruel, inhuman and degrading treatment.[63] Based on the

732/2008", OJ L 303 31.10.2012, at art 7.

[60] *Ibid.*, at art 9, 19.1.

[61] *Ibid.*, at art 19-21.

[62] Anu Bradford, "Exporting standards: The externalization of the EU's regulatory power via markets", (2015) 42 *Int'l Rev L & Econ,* 158 at 170.

[63] EU, REGULATION (EU) 2019/125 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, OJ L 30/1.

consideration of the international human rights instruments and the EU human rights conventions[64], the EU Regulation contains restrictive provisions on governmental acts of the Union itself and the Member States[65], as well as on the individual acts of natural and legal persons[66]. The regulation requires the prohibition of the import and export of the above-mentioned goods[67] and provides for exceptions in special cases.[68] The use of trade restrictions to protect the basic right of third-country citizens not to be tortured is undoubtedly one of the ways in which the European Union tries to use its foreign trade policy to promote global good governance.

The practice of the Union presents an example of how to protect the external basic rights through domestic legislation. The Union attains its goals and principles of protecting human rights in founding treaties by exercising its legislative functions.

1.2 External Trade with Human Rights Obligations in International Law

The European Union is an inter-governmental organization. This role marks a difference in the status and the obligations of the EU in international law in relation to its member States. There is agreement that intergovernmental organizations should be subject to the international legal order.[69] In the case of the EU, however, there are differences in its functions and competences from those of the traditional subjects of international law. Although current EU legislation already enjoys a privileged position and provides for some internal affairs matters under the exclusive jurisdiction of the EU, the EU institutions are still unable to take over the rest of functions from its member States, which assume responsibilities and fulfill obligations in international law in their traditional capacity as sovereign States.

For the EU, the international legal basis for the incorporation of human rights obligations in its external trade arrangements derives from two branches of international law, namely international trade law and international human rights law. The former

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64 *Ibid.*, at para 3.

65 *Ibid.*, at para 51-3.

66 *Ibid.*, at art 2. (l)-(n).

67 *Ibid.*, at art 3-9.

68 *Ibid.*, at chapter III-V.

69 Tawhida Ahmed & Israel de Jesús Butler, "The European Union and Human Rights: An International Law Perspective", (2006) 17:4 Eur.J.Int'l L 771 at 776; See also Moshe Hirsch, *The Responsibility of International Organizations Toward Third Parties*. Leiden, The Netherlands: Brill | Nijhoff; 1995.

provides the EU with a basis in international law for the use of external trade instruments[70], while the latter imposes international obligations on the Union to protect human rights.[71] The analysis of the legal basis of the EU's human rights policy in its foreign trade relations will also start with these two branches.

### 1.2.1 International Trade Law

In the founding treaties, the Union has included external "common commercial policy" as its own exclusive competence in the TFEU.[72] The scope of the policy goes from tariff rates and goods to intellectual property regulations.[73] These articles demonstrate that the EU has achieved the status of a quasi-sovereign in international law in the field of regulating the external economic and trade relations of States. This is evident in the EU's accession to the WTO as a member which represents all its member states.

There are two main approaches in which the EU currently safeguards and promotes human rights through its external trade relations. One is protecting through clauses in bilateral or multilateral trade agreements that stipulate the human rights obligations of the parties in the context of trade activities.[74] The other is unilateral trade arrangements initiated unilaterally by the EU, whereby trade preferences are used as economic incentives for beneficiary countries to adopt and implement international human rights covenants.[75] These two approaches are rooted in the exceptions to WTO law. Given the tardiness of the WTO system in responding to non-trade issues such as human rights and environmental protection, trade agreements and unilateral trade arrangements can provide a more rapid reaction to emerging issues.[76]

#### a) External Trade Agreements

GATT 1947 gives parties the power to establish customs unions and free trade zones subject to MFN obligations.[77] This article, together with an Understanding that was

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70 Supra note 26 at para 6-7,11.

71 *Ibid.*, at preamble.

72 Supra note 35 at art 3.1.(e)

73 *Ibid.*, at art 206-7.1.

74 European Parliament, "Human rights in EU trade agreements the human rights clause and its application", PE 637.975 – July 2019.

75 European Parliament, "Human rights in EU trade policy Unilateral measures applied by the EU", PE621.905 – May 2018.

76 Supra note 19 at 652.

77 *GATT 1947* at art 1, 24.4-5

subsequently added to it, became an integral part of GATT 1994. The EC, in turn, replaced some of the European countries that had previously joined GATT and became a founding member of the WTO as the sole representative of EC member states in the WTO. The Community thus enjoys the power to enter into trade agreements with its trading partners. The EC and later EU have entered into numerous economic agreements with its trade partners.

Since WTO law only sets limitations on such agreements in view of treatment in trade[78], the Union has included human rights clauses or chapters in a significant portion of its foreign trade agreements without violating WTO trade law.[79] These bilateral or multilateral treaties function for the parties as international law in the field of international trade. The Vienna Convention on the Law of Treaties provides the basis for the validity of human rights clause in trade agreements. As a clause in an international treaty, the parties must follow the basic principle of "*Pacta sunt servanda*".[80] The EU has also adopted the human rights clause as an "essential element" in trade agreements.[81] In the Strategic Partnership Agreement between the EU and the Canada, they created a commitment that a serious and substantial violation of human rights can also lead to the termination of Comprehensive Economic and Trade Agreement between them.[82] This adaptation allows one party retaining the power to suspend its obligations in whole or in part in the event of a breach of human rights clauses by the other party[83], or *vice versa*.[84]

Although the relationship between human right and trade has gained more attention, the WTO do not integrate human rights consideration into its legal documents.[85] By

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78 *Ibid.*, at 24.5.

79 Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements*. Oxford: Oxford Academic, 2005. See also Meredith Kolsky Lewis, "Human Rights Provisions in Free Trade Agreements: Do the Ends Justify the Means" (2014) 12:1 Loy U Chi Int'l L Rev 1 at 4.

80 Vienne Convention on the Law of Treaties, at art 21.

81 *Ibid.*, at art 60.3.(b).

82 STRATEGIC PARTNERSHIP AGREEMENT between the European Union and its Member States, of the one part, and Canada, of the other part, OJ L 329/45 at art 28.7.

83 Supra note 80, at art 60.

84 Tobias Dolle, "Human Rights Clauses in EU Trade Agreements: The New European Strategy in Free Trade Agreement Negotiations Focuses on Human Rights—Advantages and Disadvantages", in Norman Weiss & Jean-Marc Thouvenin, eds. *The Influence of Human Rights on International Law.* Cham: Springer, 2015.

85 Ernst-Ulrich Petersmann, "Human rights and the law of the World Trade Organization." (2003) 37:2 J. World Trade 241 at 243.

using rights under the international trade law in conjunction with the provisions of customary international law, the EU has combined human rights and foreign trade in a roundabout way. This combination is presently not reflected in all EU external free trade agreements. The EU, however, has announced it will include human rights clause in all its external trade agreements in its following negotiations.[86]

b) Unilateral Trade Preference

The beginning of the non-reciprocal trade treatment in international trade can be traced back to the second UNCTAD in 1968.[87] An unanimously adopted resolution highlights the core of trade preference is to "be beneficial to the developing countries".[88] This consensus was accepted and formalized by the GATT at Tokyo round. A decision in 1979 empowered contracting parties to "accord differential and more favourable treatment to developing countries" despite the Most Favored Nation treatment in Article I of GATT, a practice that came to be known as the Generalized System of Preferences, or GSP.[89] This decision also gained validity under GATT 1994. GATT also imposes limitations on this special preferential treatment, such as not negatively affecting the trade treatment of third parties and not requiring developing countries to make commitments that are not in line with their own needs.[90] Up to now, the GSP scheme has been adopted voluntarily by some developed countries.[91]

A publication from OHCHR views GSP as a tool used by some developed countries to promote human rights.[92] UNCTAD has also identified several human rights standards required by granting countries in its handbooks to these countries' trade preference arrangements.[93] In the current implementation of the GSPs, the EUGSP scheme

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86 Supra note 63 at 15.

87 UNCTAD, *UNCTAD: A Brief Historical Overview*, UN Doc. UNCTAD/GDS/2006/1 at 14.

88 UNCTAD, "Preferential or free entry of exports of manufactures and semi-manufactures of developing countries to the developed countries", UN Doc. UNCTAD/TD/97, Vol. I, at 38.

89 GATT, "Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries" WTO Doc. L/4903 at para 1.

90 *Ibid.*, at para 3, 5-6.

91 UNCTAD, The Generalized System of Preferences How much does it matter for developing countries?, at vii.

92 OHCHR, Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights, UN Doc. HR/PUB/05/5, at 2.

93 UNCTAD, Generalized System of Preferences: Handbook on The Scheme of The European Union, UN Doc. UNCTAD/ITCD/TSB/Misc.25/Rev.5 at 15; See also UNCTAD, Generalized System of Preferences: Handbook on The Scheme of The United States, UN Doc. UNCTAD/ITCD/TSB/Misc.58/Rev.3 at 38.

attaches human rights obligations in addition to trade preferences, requiring beneficiary countries to fulfill certain obligations under their programs.[94]

Both the GSP and FTAs are under the boarder international trade law system and exist as exceptions to common trade principles such as MFN. International trade law does not integrate human rights clause into its regulations, but it provides sufficient space for policymakers to add clauses when they practice trade laws.

### 1.2.2 International Human Rights Law

In the preamble to the ECHR, the Contracting Parties have recognized their respect for the UDHR and have made it clear that the fundamental rights enshrined in the Convention are an inheritance from and a specification of the UDHR.[95] The EU officially committed acceding this convention after the entry into force of the Lisbon Treaty. However, apart from acceding to this regional human rights convention based on the UDHR, the EU has acceded to only two conventions in the field of international or regional human rights protection.[96] This is certainly related to the fact that human rights treaties were concluded at a time when intergovernmental organizations were still underdeveloped, and the traditional subjects of contracting were only sovereign states. Human rights responsibilities assumed by the EU mainly originate from the regional conventions to which it is a party.

Unlike the issues of external trade, the responsibility to respect human rights is not assigned to the Union institutions in the founding treaties of the EU. However, the Union has declared in its constitutional treaty that international treaties concluded by States prior to their accession to the Union are not affected by European Union law.[97] As international treaties, international human rights covenants are also guaranteed by the EU. The CFREU declares that the human rights it establishes must be interpreted and applied in a manner that does not adversely affect the international human rights obligations of party states.[98] As its member states still retain most of their sovereignty,

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[94] Supra note 91 at 9. See also Lorand Bartels, "The WTO Legality of the EU's GSP+ Arrangement." (2007) 10:4 J.Int'l Econ.L 869 at 870.

[95] Supra note 37 at preamble.

[96] Supra note 19 at 229. The two conventions are: Convention on the Rights of Persons with Disabilities (CRPD) and the Istanbul Convention on preventing and combating violence against women and domestic violence.

[97] Supra note 35 at art 351.

[98] Supra note 47 at art 53.

the obligations of the EU in the international human rights field derive mainly from its restrictive obligations towards itself not to negatively affect the fulfilment by its member States of their own international obligations.[99]

From a customary international law perspective, the EU must obey human rights obligations. In the Van Duyn case, the CJEU cited the principle of freedom of movement in international human rights law and included it as a reason in its judgment.[100] This is certainly a manifestation of the CJEU's recognition of customary international law. But this recognition remains an acceptance by the EU of negative human rights obligations, and this acceptance relies on the jurisprudence of the CJEU. The validity of some human rights principles in customary international law is verified by the judicial body of the EU, but an exhaustive list of the principles recognized by the CJEU would be impossible since the recognition of rules of customary law is a process that can continue indefinitely. This black-box approach to accommodating customary law does not provide a stable standard of judgment for the Union's international human rights obligations.[101]

So far, the EU's human rights obligations in the field of international law remain limited to the few international agreements to which it has acceded. Although some of the obligations are incorporated into the EU's basic principles as provisions of the ECHR and CFREU, the current EU approach to international human rights covenants is still dominated by respect for Member States' previous international treaty obligations. The Union itself has not personally taken on more positive obligations to promote human rights. In the first Kadi case, the CJEU declared in a forceful manner that "all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty"[102]. According to the jurisprudence, the principle of promoting the protection of fundamental rights, as

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[99] Israel de Jesus Butler & Olivier De Schutter, "Binding the EU to International Human Rights Law." (2008) 27 Y.B.Eur.L 277 at 280-1.

[100] CJEU, *Case 41/74* at para 22.

[101] Paul Gragl, "Customary International Law in the European Union Legal System: The Substantive Rules Invoked and Applied by the Court of Justice of the European Union", in Bordin, Fernando Lusa, Andreas Th. Müller & Francisco Pascual-Vives, *The European Union and Customary International Law.* ed. Cambridge: Cambridge UP, 2022.

[102] CJEU, Joined Cases C-402/05 P and C-415/05 P at para 285.

set out in the EU constitutional instruments, also takes precedence over the international obligations assumed by the Member States. EU jurisprudence provides the Union with the power to go beyond the international treaty obligations of its member States, opening up the possibility of adopting a "sacrifice-protection" paradigm in EU external trade relations.

At the level of international law, the EU's right to enter into free trade agreements and to establish a unilateral concessionary GSP regime are both granted by international trade law. Since the WTO laws have only limitations on fair trade among these exceptional trade arrangements, the EU's introduction of social governance clauses into trade agreements without jeopardising fair trade cannot constitute a clear violation of WTO rules. International human rights law, however, cannot impose overall obligations over the EU's external actions, nor supervise it through international accountability mechanisms due to EU's non-party status in international community.

2. Human Rights Considerations in EUGSP

As an example of the EU's integration of human rights standards into its external trade relations, the scope of human rights protection under the EUGSP is wider than that covered by the Union in its external trade agreements. The European Union has been using its economic position and market size as incentives to trade benefits to developing countries in a "benefits-for-human-rights" deal for some time now.[103]

This practice, however, has not always been welcomed. In the India-EC case, since the EC had not extended preferential treatment for drug control to all drug-exporting countries, the panel and the appellate body concluded the preferential treatment must follow the "non-discrimination" principle in enabling clause. This finding led to a realignment of the EC GSP arrangements in 2005.[104] In the appellate body's report, it also highlights the validity of "granting different tariffs to products originating in different GSP beneficiaries" as long as "identical treatment is available to all similarly-

[103] Laura Beke, David D'Hollander, Nicolas Hachez & Beatriz Pérez de las Heras, "Report on the integration of human rights in EU development and trade policies" (2014) Work Package No. 9 – Deliverable No. 1 at 32.
[104] European Commission, "GSP: The new EU preferential terms of trade for developing countries", EU Doc. MEMO/05/43, 10 February 2005.

situated GSP beneficiaries."[105] The appellate Body's restrictive application of the principle of non-discrimination in the final report provides the basis in international trade law for multiple tiers in EUGSP. The EU reset the three tiers of GSP treatment for developing countries as explained below.[106] This modification continues up to now.

The research on the EUGSP will firstly focus on the different human rights obligation requirements for developing countries in different preferential tiers. This will be followed by a study focusing on the role of the GSP's temporary withdrawal mechanism in the protection of human rights.

2.1 Human Rights Requirements in Three-Tier Trade Preference Arrangements

In the current EU GSP trade arrangement, there are three preferential tiers, namely GSP, which exists as basic preferential treatment, EBA for LDCs, and GSP+ for the further promotion of human rights. Compared to the basic GSP, EBA is distinguished by the level of economic development of the beneficiary, while GSP+ is distinguished by the international human rights treaties ratified by the beneficiaries and the obligations they are subject to. In analyzing their human rights obligations, we should have a separate discussion on GSP+ arrangements.

2.1.1 GSP & EBA

There is no direct human rights requirement on GSP or EBA beneficiaries in the Union's GSP regulation. In fact, the EU lists all developing countries that meet the conditions for GSP preferences in Annex I of the regulation in a fully exhaustive way and empowers the Commission to update the Annex[107]. A developing country's entitlement to GSP treatment is dependent on its listing in the Annex. The conditionality of EBA only require a country being identified by the UN as an LDC.[108] There is also an Annex for EBA beneficiaries in EUGSP regulation.

Although the eligibility shows no requirements demonstrating beneficiaries'

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[105] AB, "European Communities – Conditions for The Granting of Tariff Preferences to Developing Countries: Report of the Appellate Body" WTO Doc. WT/DS246/AB/R at para 175.

[106] Franz Christian Ebert, "Between Political Goodwill and WTO-Law: Human Rights Conditionality in the Community's New Scheme of Generalised Tariff Preferences (GSP)." (2009) ZERP Working Paper Series 8/2009.

[107] EU, "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", OJ L 303/1 at art 3-4, Annex I.

[108] *Ibid.*, at art 17.1-2.

fundamental rights protection, the GSP regulation regards a "serious and systematic violation of principles"[109] in listed conventions will lead to temporary suspension in GSP or EBA treatment. These conventions in Annex VIII cover basic UN human rights conventions and the labour conventions of the ILO. In addition, using prison labour, mismanagement of drugs or "failure to comply with international convention on anti-terrorism and money laundering" will also cause the suspension.[110] The EU describes these requirements as "core human and labour rights UN/ILO conventions"[111].

a) Requirements from UN Human Right Conventions

The EU has included in the annex only the basic conventions, which have been widely ratified by States, and has not included any additional protocols. Limited numbers of conventions lower the threshold for developing countries to enjoy the EUGSP treatment. These fundamental human rights conventions provide the basic principles for the State to participate in an appropriate manner in internal and global governance.

ICCPR and ICESCR are both included in the EUGSP as covenants shaping international human rights after the UDHR. These two covenants, while conferring a wide range of rights on persons, also impose obligations on States to respect, protect and fulfil human rights. The incorporation of these two conventions into the human rights instruments to which the GSP and the EBA are subject allows the EUGSP to reaffirm to developing countries the importance of respecting the International Bill of Human Rights.

Regarding the obligation to guarantee human rights for vulnerable groups, the EUGSP incorporated the Convention on Crime of Genocide, International Convention on the Elimination of All Forms of Racial Discrimination and Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment as part of core human rights conventions. These treaties aim to protect unspecified groups of people in extreme situations from violations of their basic rights. It is necessary for EUGSP to include these treaties in its core conventions as some developing countries are still

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[109] *Ibid.*, at art 19.1.(a).

[110] *Ibid.*, at art 19.1.(b)-(c).

[111] *Ibid.*, at Annex VIII.

likely to face such extreme situations.

In a view of specific groups such as women and children, the EUGSP added the Convention on the Elimination of All Forms of Discrimination Against Women and Convention on the Rights of the Child in core conventions to strengthen the protection from beneficial countries to weak groups in their societies.

These core conventions reflect the EU's strategy in setting up the GSP, i.e., using these international conventions as a negative conditionality for developing countries when applying GSP arrangement to improve fundamental rights protection in beneficiary countries.

b) Requirements from ILO Labour Conventions

Compared with human rights conventions, labour rights conventions in the EUGSP are more closely aligned with the protection of labour rights in exporting industrial enterprises in beneficiary countries. Developing countries tend to have larger labour force populations with lower labour costs. Whether out of a need to protect labour rights or to safeguard the competitive environment for labour in member states, the European Union, in its GSP program, requires developing countries to accept and implement a greater number of labour rights standards from the ILO.

Among the ILO conventions to which beneficiary countries are subject in GSP or EBA project, there are four conventions on the prohibition of forced and child labour. There are also four conventions dealing with anti-discrimination and workers' freedom of association. The two anti-discrimination conventions emphasize the right of men and women to equal pay for work of equal value and remedies for discrimination in employment, respectively. The other two conventions raise the obligations for country to protect right for workers to organize.

These two kinds of conventions establish a comprehensive but basic right protection guidance for beneficiaries to follow.

### 2.1.2 GSP+

In the GSP+ arrangement, in addition to ratifying core conventions, beneficiary countries need to ratify 12 other conventions related to environmental and social governance. All these international conventions constitute the preconditions for GSP+

countries to obtain additional tariff concessions offered by the EU. Different from the general arrangement, beneficiaries in GSP+ scheme must ratify instead of just fail from violating the principles in these conventions. This arrangement needs qualified developing countries fulfilling positive conditionality such as acceptance of inspections by monitoring bodies, fulfillment of treaty obligations in accordance with the provisions, and other proactive behaviour to access more trade preference.[112] The Union also requires GSP+ beneficiaries to give commitments in monitoring mechanisms which allow convention bodies and the EU Commission to supervise them. Within the EU, the Commission should submit regular reports to the Parliament and the Council on the fulfillment of beneficiary countries' international obligations. To realize the accountability of the GSP+ program, the EU has specifically included in the GSP+ framework a temporary withdrawal mechanism for beneficiary countries under the program only.[113]

For GSP+ beneficiaries, their entry thresholds are linked to their human rights responsibilities, except for one requirement relating to their economic condition.[114] In order to ensure that this arrangement protects and promotes human rights and good governance in developing countries, the EU has put in place a mechanism for the suspension of preferential treatment under the GSP+. This mechanism will operate and produce the decision of temporary withdrawal all additional preference in GSP+ standard when GSP+ countries are confirmed as breaching any of their commitments under 27 conventions[115].

The obligations of GSP+ beneficiaries under the regulation can be divided into two categories. First, the obligations that beneficiary states are expected to fulfil proactively under the GSP+ arrangement include ratifying all human rights treaties listed in the regulation and actively taking measures to give effect to the purpose of the treaty. The EU also requires for ratification that the beneficiary states must not make any

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112 *Ibid.*, at art 9.1.(b)-(f).

113 *Ibid.*, at art 15. See also Bruce Wardhaugh, "GSP+ and Human Rights: Is the EU's Approach the Right One?", (2013) 16:4, Journal of International Economic Law 827.

114 *Ibid.*, at art 9.1.(a).

115 *Ibid.*, at.art 15.

reservations to the treaty that are contrary to the object of the treaty or declare that they are not subject to the treaty monitoring procedure. To ensure that the relevant human rights and good governance obligations are fully implemented by beneficiary countries, the GSP+ emphasizes the integrity of the conventional obligations and the accountability for their implementation. To achieve complete scrutiny and oversight of beneficiary countries, the EU will also review the fulfillment reports issued by the conventions' monitoring bodies for countries receiving GSP+ treatment. This requirement creates a negative obligation for the beneficiary countries to accept periodic reviews by the Convention monitoring bodies and the monitoring procedures established by the EU in the GSP regulation.[116]

The regulation establishes a flexible withdrawal mechanism for GSP+. The European Commission has the power to remove a beneficiary country from the list of GSP+ beneficiaries when it no longer fulfills the conditions. This procedure is initiated by the Commission based on a report of its monitoring procedure or other evidence and places the burden of proof on the country concerned. After the temporary withdrawal procedure determines that GSP+ treatment should be withdrawn, the Commission can likewise amend the list of beneficiaries through regulatory authorization to reinstate tariff preferences for the original beneficiary country, subject to that country's renewed compliance with its obligations.

2.2 Temporary Withdrawal Scheme

In the GSP regulation, besides the temporary withdrawal provision under GSP+, the EU also creates a temporary withdrawal provision for all countries with GSP treatment. This generally applicable withdrawal mechanism incorporates additional triggering reasons. The EU has included non-human rights factors, such as unfair trade and violations of fisheries conventions, among the reasons for initiating a temporary withdrawal procedure.[117] Given the focus of this dissertation and the practical utility of the mechanism, the discussion will be limited to the human rights dimension.[118]

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[116] *Ibid.*, at art 13.1.

[117] *Ibid.*, at art 19.1.(a)-(e)

[118] Clara Portela & Jan Orbie, "Sanctions under the EU's Generalised System of Preferences (GSP): Coherence by Accident?". (2014) 20:1 Contemporary Politics 63.

### 2.2.1 Human Rights Concern in GSP Temporary Withdrawal Provision

The human rights reasons for triggering the temporary withdrawal regime are divided into three parts: first, the beneficiary country's export of commodities produced by the labour of prisoners; second, the beneficiary country's lack of customs control over the export shipment of drugs or the country's failure to meet its international obligations on counter-terrorism and money-laundering; and, third, the serious and systematic violation of the fundamental international human rights and labour conventions listed in the GSP regulations. [119]

The EU regards the export of goods produced by prisoners' labour as a prohibited norm in its regulations. It is interesting to note that the ILO has adopted a differentiated strategy in dealing with the issue of prisoners' labour, i.e. separating voluntary prisoner labour from involuntary prisoner labour.[120] The former is considered as normal labour. The latter is so called “forced labour”, and countries that have forced prisoner labour should outlaw this phenomenon if they are party to ILO Conventions No. 29, No. 105 and the Additional Protocol to Convention No. 29. In its GSP regulation, the EU has abandoned the categorization approach and considers all "prison labour" to be unacceptable labour policies. While this shows the importance that the EU attaches to the protection of labour rights and fundamental rights of prisoners, this obligation also raises concerns about the protection of prisoners' economic rights and the training of their reintegration skills.[121]

The EU has also imposed obligations on beneficiary countries in all three projects in drugs, counter-terrorism, and anti-money-laundering.[122] Preferential treatment could also be temporarily withdrawn when beneficiary countries fail to meet these obligations. On the one hand, the regulations do not require the beneficiary State to follow any international convention related to drug control, but rather require that the state must

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[119] Supra note 107.

[120] ILO, Combating Forced Labour: A Handbook for Employers & Business 2: Employers’ Frequently Asked Questions, Geneva: ILO (2015) at 9-10. (Prison labour is not normally considered forced labour...However, involuntary work performed by prisoners...is considered forced labour.)

[121] Andrea Sitzia & Benoît Lopez, "Prison labour, customs preference schemes and decent work: Critical analysis and outlook." (2023) 162:2 Int'l Lab.Rev 305.

[122] Supra note 107 at art 19.1.(c).

not have "serious" deficiencies in the management of drug exports. This ambiguity leaves it up to the European Commission to decide on a case-by-case basis whether a state is fulfilling its obligations to control drugs, and there is no unified standard of fulfillment. On the other hand, in the case of counter-terrorism and anti-money-laundering obligations, the regulations require that beneficiary States must not have a "failure to comply with international conventions". While this statement refers to international conventions as the source of the obligation, it does not list specific conventions. Since the entry into force of the EU GSP program, Myanmar, Belarus, Venezuela, Sri Lanka, and Cambodia have all had their tariffs under the GSP arrangements suspended for failure to comply with international human rights or ILO conventions. But none of these countries have been suspended for failing to fulfil their drug control or counter-terrorism and anti-money-laundering obligations. Therefore, analyses of these obligations are limited to doctrinal studies.

In Part A of Annex VIII of the regulation, the EU lists the international treaties that require all EUGSP beneficiaries to comply with their principles. The general meaning and scope of protection of these treaties has been discussed above.

### 2.2.2 Procedural Requirements

In the temporary withdrawal mechanism, the procedures can be broadly classified into three categories by distinguishing between the different actors involved. The European Commission as the initiator and adjudicator of the procedure, the beneficiary country under investigation as the respondent to the procedure, and a wide range of organizations and groups participating in the procedure as third parties.

The European Commission has been given broad procedural powers by the regulation.[123] As the main implementing body of the GSP program, the Commission can initiate a temporary withdrawal investigation of a beneficiary country when it has gathered sufficient evidence about a possibility of violating principles in core conventions. Subject to its notification obligations to the European Parliament, the Council and the country concerned, it may conduct a six-month monitoring and

[123] *Ibid.*, at art 19-21.

assessment of the beneficiary country to determine whether it is in breach of its obligations under the GSP scheme. Following the monitoring and assessment, the Commission is required to issue a report to the country presenting its findings and conclusions. Regardless of whether the country comments on the report, the Commission may decide whether to temporarily withdraw GSP treatment from the beneficiary country.[124] Similarly, the decision to reinstate the GSP status of a beneficiary country is also taken by the Commission.[125]

The beneficiary state under investigation is given a negative status in the procedure. It cannot join the procedure at the beginning of the initiation by the Commission but can only participate in the monitoring and evaluation phase with "every opportunity to cooperate" provided by the Commission.[126] After the Committee has issued its report, the beneficiary State can only provide feedback on the report and has no further influence on the report and subsequent Committee decisions.[127]

Although third parties in the proceedings are referred to in the regulation only as the "relevant monitoring bodies", the regulation also include in the Commission's decision-making process a requirement for the Commission to seek all information it deems necessary, the provision of which depends on several specialized organizations.[128] In addition, the Commission is also dependent on third party organizations to provide it with 'sufficient grounds' before it can initiate proceedings.

In summary, the temporary withdrawal procedure is a unilateral procedure led and decided by the European Commission, and its process and decision-making procedures reflect the dominant position of the EU institutions in the procedure. Third-party organizations have the main function of providing information and evidence, while the beneficiary country under investigation is more passive.

### 2.2.3 Results as Sanctions?

There are only two types of decisions in the temporary withdrawal mechanism,

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124 Supra note 107 at art 19.3-10.
125 *Ibid.*, at art 20.
126 *Ibid.*, at art 19.5.
127 *Ibid.*, at art 19.7.
128 *Ibid.*, at art 19.6.

withdrawal of treatment or suspension of the investigation procedure. If and once the European Commission finally decides to withdraw the treatment of the investigated beneficiary country under the GSP program, the tariff preferences enjoyed by the beneficiary country will be suspended completely or partly.[129] Countries whose treatment has been withdrawn will be subject to the EU's tariff conditions under the WTO regime for other economies without special trade arrangements.

This outcome can certainly be interpreted as the EU's use of trade benefits to stimulate policymakers and civil society in developing countries, thereby inducing the countries concerned to protect human rights and strengthen social governance. However, when compared to the GSP beneficiaries, which are also developing countries, there is no doubt that they will lose competitiveness in the EU market because of the withdrawal of preferential tariff treatment by the EU.[130] These differentiated treatments in trade do not arise from commercial considerations, but because of differences in the way developing countries fulfil their international obligations. Such a negative economic measure shares similar characteristics with unilateral sanction.

According to the EU definition, the temporary withdrawal provision cannot be considered a sanction or a restrictive measure. For the EU, restrictive measures can only be decided by the Council of the EU and complied with by the member states in the framework of its CFSP.[131] In CFSP, the economic or financial restrictive measures should be proposed jointly by High Representative of CFSP and EU Commission.[132] In the Council's document on guiding principles for the implementation of restrictive measures, those involving trade bans in goods are outright embargoes on some products and restrictions on the exports and imports from the target country, but raising tariffs is not one of the restrictive economic measures as defined by the EU.[133] In practice, the temporary withdrawal of tariff preferences can hardly be interpreted as a measure

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[129] *Ibid.*, at art 19.1.

[130] Jan Vandenberghe, "On Carrots and Sticks: The Social Dimension of EU Trade Policy" (2008) 13:4 Eur. Foreign Aff. Rev. 561.

[131] EU, Consolidated Version Of The Treaty On European Union, OJ C 326/13 at art 29.

[132] Supra note 35 at art 215.1.

[133] Council of the European Union, "Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy", 5664/18, 4 May 2018 at 8.

restricting the exports of the target country, as explicitly mentioned by the Council. This measure makes it more difficult for products originating from the target country to enter the EU market due to higher tariff, but it is not a total ban and does not deprive the target country of its right to export to the EU.

On the other hand, the temporary withdrawal is inconsistent with the implementing requirements of EU restrictive measures. In the case of CFSP restrictive measures, the Council declared that all restrictive measures adopted by the Council should be targeted sanctions to minimize the adverse effects and negative externalities of sanctions.[134] In the case of the withdrawal mechanism of the pre-2020 GSP, however, the Commission does not differentiate between industries and enterprises in the beneficiary countries when it suspends tariff preferences in the beneficiary countries. In other words, once the EU recognizes that a beneficiary country should be temporarily withdrawn from GSP treatment, all trade preferences for that country are suspended. Temporary withdrawal provisions also empower the EU to suspend the preferences for certain products in the target country, but such situations have never occurred because the regulation did not prepare for this in its implementing procedure.[135] This difference is also recognized in the European Parliament's policy research document, which makes it more difficult to classify the temporary withdrawal mechanism of the GSP as an externally restrictive measure in the framework of the EU's external policy.[136]

Many features of the temporary withdrawal mechanism, however, make it inextricably linked to sanctions. In terms of the reasons that lead to the suspension of trade treatment, the status of fulfillment in the necessary international obligations of the beneficiary country under the GSP regulation and the procedural considerations of the European Commission are the central factors. In other words, the reasons for the suspension of treatment are non-trade related political factors. These are also the conditions for the

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[134] Council of the European Union, "Basic Principles on the Use of Restrictive Measures (Sanctions)", 10198/1/04 REV 1, 7 June 2004 at 3.

[135] The second part of Annex II in GSP regulation before 2020 requires commission list beneficiary countries which have been temporarily withdrawn from the arrangement. But the list only provides two columns, one for the countries alphabetical code and the other for countries' name. With the decision against Cambodia, the commission adjusted this format by adding a new column for the code of products which have been temporarily withdrawn.

[136] Guillaume Van Der Loo, The Commission proposal on reforming the Generalised Scheme of Tariff Preferences: analysis of human rights incentives and conditionalities, PE 653.661, Jan 2022 at 19. (This is not so in the case of sanctions adopted under the Common Foreign and Security Policy (CFSP).)

initiation of restrictive measures in the framework of the CFSP, as specified by the EU.[137] In addition, the consequence of the suspension of trade treatment is undoubtedly a reduction in the trade competitiveness of the original beneficiary country, which indirectly leads to an adverse impact at the economic level on the original beneficiary country. The function and political aim of temporary withdrawal are also very similar to that of trade-related sanctions under the CFSP framework. More importantly, due to the unilateral character of the procedure, the EU in fact holds the final decision-making power. A country under investigation can only express its standing once after the EU draws its conclusion. Beneficiary countries can not apply for relief to regain its preference when the withdrawal decision has been made. The role played by the investigated beneficiary country in the procedure is not significant.[138]

In summary, this section briefly discusses the EU's human rights obligations and practical actions in the context of its foreign policy. It also focuses on analyzing the EU's policy framework of using commercial tools especially the GSP arrangement as a tool to induce developing countries to focus on human rights safeguards and social governance with trade preferences. The temporary withdrawal provision in the GSP arrangement uses economic sanction as a mean of guaranteeing the good functioning of this trade tool. While sharing some of the characteristics of unilateral coercive measures, this mechanism is also prone to negative human rights impacts on target beneficiary countries.

[137] Supra note 134 at 2.
[138] Supra note 136.

## III. Realizing Human Rights Objectives in the GSP?: The Example of Myanmar

Currently, there are five countries which have been deprived of trade preferences by the final decisions of the GSP temporary withdrawal provision implemented by the EU.[139] Myanmar, Venezuela, and Sri Lanka have had their trade preferences reinstated after being withdrawn. To fully analyse the GSP temporary withdrawal provision, it is necessary to analyse the case of a country that has gone through the whole procedure. After the restoration of trade preference, Myanmar's human rights concerns following the refugee crisis of Rohingya in 2016 and the military coup in 2021 have brought the EBA trade preferences it now enjoys under the EUGSP to the forefront of discussions within the EU.[140] The analysis of the mechanism will therefore use the suspension of Myanmar's treatment in 1997 as a case study and extend to the current discussions within the EU on whether to reopen the investigation of the temporary withdrawal procedure for Myanmar.

### 1. Myanmar in 1997

Myanmar ratified ILO Convention No. 29 on Forced Labour on 4 March 1955 and has never acceded to Convention No. 105 on the Abolition of Forced Labour, and the ILO has cited only Convention No. 29 as evidence of Myanmar's violation of its international obligations in making its decision to impose sanctions on Myanmar.[141] However, when the EC Commission initiated its investigation into Myanmar in 1996, the then 1994 GSP Regulation required that beneficiary countries under the GSP should not have any forced labour as indicated in the two international conventions.[142] Any form of forced labour would result in the loss of trade preferences for the country. Citing violation of labour rights, the EC decided to suspend Myanmar's GSP treatment in 1997.

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[139] These countries are Myanmar (1997), Belarus (2006), Venezuela (2009), Sri Lanka (2010), and Cambodia (2020).

[140] Supra note 5,8.

[141] International Labour Conference, "Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar", June 2000 at Preamble.

[142] EU, "COUNCIL REGULATION (EC) No 3281/94 of 19 December 1994 applying a four-year scheme of generalized tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries", OJ L 348/1, 31 December 1994 at art 9.1.

## 1.1 Labour Rights in Myanmar

When Myanmar ratified the No.29 Convention in 1955, this country had not yet been seized by a military government. Seven years after ratification to the Forced Labour Convention, the junta's *coup d'état* blocked the agenda for labour rights protection in Myanmar.

### 1.1.1 Forced Labour

According to article 22 of the ILO Charter, ILO member states shall report annually to ILO office about the efforts they make to reach the standards in Conventions for which they are parties.[143] In its 1960 report, the Myanmar government asserted that "Since forced labour is non-existent in this country, no recourse to forced or compulsory labour in any form is authorized in this country."[144] This statement was challenged by members of the ILO Group of Experts over the next few years and the Government was asked to explain the necessity of its existence, as two Acts known as the Village Act and the Town Act had always existed in Myanmar at that time. These Acts imposed obligations on residents of village and township areas to assist local officials and the police, including, but not limited to, acting as guides, providing food, and securing transport. The members of the Group would like the Government of Myanmar to explain its compatibility with Convention No. 29.[145]

The Government of Myanmar claimed that both Acts were remnants of the colonial era and promised that they would be replaced by new laws in line with the No.29 Convention in its 1967 response. Over the next twenty years, however, the military government merely repeated the limitations and problems of the two Acts in its reports and failed to fulfil its commitment to reform the laws by applying its domestic legislation power. Even after the end of the quasi-socialist regime and the introduction of a multi-party parliamentary system in 1988, the government's report to the ILO still only declared that "every salient point raised by the Committee of Experts shall be taken

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[143] ILO, ILO Charter at art 22. (Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party.)

[144] ILO, Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), Official Bulletin Vol. LXXXI 1998 Series B, 2 July 1998 at para 121.

[145] *Ibid.*, at para 122.

into serious consideration in the process of reviewing the progress of the Bill".[146] Inevitably, this delay in domestic legal reform has provided room for widespread forced labour in Myanmar.

In a 1996 complaint to the ILO, State representatives from the International Labour Conference gave a detailed list of the large-scale forced labour that exists in Myanmar. From a public perspective, the Myanmar army forces the population to perform compulsory labour in portering, combat, mine clearance and sexual services. Local governments also require people to provide voluntary labour for infrastructure projects that do not have a positive impact on their real lives. From a private perspective, the government uses forced labour to create private benefits for joint energy and mineral ventures. The Government also forces people to provide labour for industries such as tourism development and for members of the military to promote the private interests of the owners of these industries and the military.[147]

Following the requirements of Convention No. 29, member States should undertake to eliminate all forced labour in their countries in the shortest possible time. The Convention defines forced labour as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[148] In Myanmar, the Village Act and Town Act, both of which had not been repealed at that time, empowered the judiciary to impose penalties on citizens who refuse to comply with government labour demands. The behaviour of the Myanmar conflicts with its obligations under the Convention. The Convention fully enumerates the exceptions to the Convention in the case of forced labour, such as compulsory military service, civic duties, court-ordered obligations, obligations in times of emergency, and the duty of altruistic service to the people within the village and township administrations.[149] These exceptions to forced labour, however, did not exist in the context of the forced labour phenomenon in Myanmar, particularly in the context

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146 *Ibid.*, at para 123-9.
147 *Ibid.*, at appendix.
148 ILO, Forced Labour Convention, 1930 (No. 29), at art 2.1.
149 *Ibid.*, at art 2.2.

of forced acts under the two Acts.[150]

As early as 1993, the ICFTU made a representation to the International Labour Office on the use of forced labour by the Government of Myanmar under article 24 of the ILO Charter.[151] In its 1994 response to the ICFTU statement, the ILO Committee found that "the exaction of labour and services, in particular portage service, under the Village Act and the Towns Act is contrary to the Forced Labour Convention."[152] However, the Government of Myanmar did not respond to the requests and recommendations of the international organizations in its actions.

### 1.1.2 Inquiry and Sanctions from ILO

In 1996, a joint complaint was launched under article 26 of the ILO Charter against Myanmar. Unlike the representations under Article 24, the Commission of Inquiry established under Article 26 of the Charter was required to make a substantive resolution on the allegations.[153] After the ILO Council notified the Government of Myanmar, Myanmar also submitted its own observations on the allegations of forced labour. Due to the large discrepancy between the two opinions, the Council decided to initiate an inquiry procedure before the discussion about the legality of Myanmar's action.[154] In the absence of specific principles in the Charter that should guide the inquiry process, the Council instructed the Committee to initiate an inquiry "in accordance with the provisions of the Constitution and the practice followed by previous commissions of inquiry".[155]

The procedure which the committee of inquiry set up can be broadly divided into three parts. The first part is the communications section. In this part, in addition to requesting the complainants and Myanmar to continue providing evidence, the committee also opened a call for communications to the international community, including but not limited to Southeast Asian countries with which Myanmar has economic dealings, as

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150 Supra note 143 at para 471.

151 ILO, "Report of the Committee set up to consider the representation made by the International Confederation of Free Trade Unions under article 24 of the ILO Constitution alleging non-observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)" GB.255/12/8, 1994 at para 1.

152 *Ibid.*, at para 53.

153 Supra note 143 at art 26.

154 Supra note 144 at para 8.

155 *Ibid.*, at para 12.

well as international organizations and NGOs working in the field of labour rights protection.[156] In dealing with the parties' communications, the Commission always kept them open to the parties and ensured their rights in this quasi-international judicial procedure. The second section relates to evidence. The evidence-taking part was led by the Commission, subject to the rules on witnesses developed in this case. In this part, as the Government of Myanmar refused the commission's request for access to the investigation to take evidence, the commission's main approach to collect evidence in this investigation is to hear the testimony of witnesses. The commission heard 14 witnesses provided by the complainant in Geneva, as well as eyewitness accounts of forced labour from Myanmar in countries in South and South-East Asia.[157] Finally, there is a concluding section. Since there is no appeal mechanism for ILO investigations, the Commission's report will be the ultimate outcome available to the ILO Council. The above procedure provides a complete framework for the participation of both the complainant and the defendant under the ILO inquiry.

In its report of 2 July 1998, the committee agreed with the complainant's allegations and noted that Myanmar had not complied with its obligations under article 25 of Convention No. 29. The Committee requested the Government to implement, by May 1999, its commitment to amend the Village Act and the Towns Act, which had been delayed for more than 30 years, and to punish by law those who use forced labour.[158] These recommendations were once again ignored.

The ILC issued a resolution suspending Myanmar's membership in June 1999. In the resolution, the conference considered Myanmar's disregard for the recommendations of the Commission of Inquiry to be a "flagrant and persistent failure" and suspended Myanmar's right to participate in the ILO's technical cooperation and assistance programs.[159] In May 2000, at the 88th Session of the International Labour Conference, member states voted by a majority in favour of a proposal by the ILO Governing Body to invoke Article 33 of the ILO Charter to impose coercive measures on countries that

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156 *Ibid.*, at para 28.

157 *Ibid.*, at para 55-8, 78.

158 *Ibid.*, at para 539-40.

159 ILC, "Resolution on the widespread use of forced labour in Myanmar", June 1999 at preamble.

fail to implement the reports of commissions of inquiry.[160] This was the first time this Article had been invoked since its inception. The resolution's coercive measures against Myanmar can be divided into procedural restrictions and substantive restrictions. In terms of procedural measures, the issue of forced labour in Myanmar would not only be discussed at every meeting of the ILO but would also be passed on to other international organizations to increase international pressure on Myanmar.[161] In terms of substantive measures, the Council recommended that all ILO Members "take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labour."[162] The introduction of this coercive measure created an international legal basis for other ILO member states to impose substantive restrictions on Myanmar.

### 1.2 Temporary Withdrawal of EUGSP

The ILO investigation was accompanied by an EC investigation into forced labour in Myanmar within the framework of its GSP arrangement. The EC received allegations from ICFTU and the ETUC in 1994.[163]

#### 1.2.1 Temporary Withdrawal Procedure in EUGSP

In the 1994 GSP Regulation, the EC granted its member States and any natural or legal person or unincorporated organization with an interest in the decision on temporary withdrawal the right to lodge a complaint with the EC Commission.[164] This provision broadens the group of stakeholders entitled to complain to the organization about a breach of an international obligation by the state compared to Article 26 of the ILO Charter. Under the ILO system, the formal investigation of Myanmar began in 1996. The ICFTU and ETUC, which had already filed a complaint before the EC against Myanmar two years earlier, could only initiate a non-binding representation procedure due to constitutional constraints in ILO since they were "not endowed with legal

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160 Supra note 141.

161 *Ibid.*, at para 1. (a), (c)-(d).

162 *Ibid.*, at para 1. (b).

163 European Community, "Notice of initiation of an investigation of forced labour practices being carried out in Myanmar in view of a temporary withdrawal of benefits from the European Union's Generalized Scheme of Preferences", OJ No C 15/3, 20 January 1996.

164 Supra note 142 at art 10.1.

personality".[165] The EC's expansion of the size of the initiator of complaints has allowed for the early initiation of genuinely binding procedures against States.

The EC Commission and the GSP Committee, which was specifically created under the GSP arrangement, considered this joint complaint against Myanmar by the ICFTU and the ETUC in 1995. As the issue of forced labour in Myanmar had become a matter of international concern and the ILO Committee had concluded in its 1994 report that Myanmar's domestic legislation and practice were in breach of its obligations under the Convention[166], the EC found that the evidence submitted by the complainants sufficiently substantiated their claims and that the complaint was admissible under the GSP's Temporary Withdrawal Mechanism.[167]

According to the GSP's 1994 temporary withdrawal provision, the EC Committee still plays a central role in the process. It is required to work with EC member States and the GSP committee to investigate the phenomenon of forced labour in Myanmar with a time limit of at least one year after the determination of admissibility of the complaint.[168] The EC should proactively seek evidence to ascertain the allegations of the complainant, such as the Commission's taking of 42 eyewitness testimonies with the help of international experts, as well as the field mission that it intended to send, but which was rejected by the Myanmar government.[169] The role of the Government of Myanmar in this process was that of a completely passive participant who was given "every opportunity to cooperate as necessary in the conduct of these enquiries" in relation to its areas of concern.[170] In the 1994 EUGSP temporary withdrawal provision, it was not even given the right to comment on the commission's final report. For the related third parties, the EC, while announcing that it would open an inquiry into Myanmar, also set a 60-day time limit for submission by those parties who wished to

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165 Supra note 143 at art 24, 26.1.

166 Supra note 151 at art 48.

167 Supra note 163.

168 Supra note 142 at art 11.1.(b).

169 European Parliament, Verbatim report of proceedings-11. Withdrawal of GSP from Myanmar, 13 March 1997. (MP Ford “Within a few days of our meeting the Burmese junta peremptorily refused permission for the Commission to visit.” And MP Marín “...proceeded with the task of verification and the analysis of 42 witness statements...”)

170 Supra note 142 at art 11.2.

provide valuable information to the Commission. But the EC Commission only "may" seek information from interested parties, not obliged to do so in 1994 GSP.[171] In its announcement of the Myanmar investigation, the Commission required third parties who wanted to join and provide information to demonstrate "that they can show that they have a particular interest in being heard."[172] Legislation and practice of the EC provide it with full dominance in the receiving of third-party opinions. The Community may decide not only whether a third party is eligible to express an opinion, but also whether to receive the opinion of an eligible third party. . Finally, whether to impose the suspension of trade preference was to be decided by the Council of the EC though vote.

The procedure for temporary withdrawal was more unilateral in nature in the 1994 regulation than in the current one. From initiation to final decision, its operation was dominated by the EC institutions. Naturally, considering the authoritative investigations and the report of results by the ILO on the phenomenon of forced labour in Myanmar, the results of the EC's unilateral procedure can be justified.

### 1.2.2 Decision

On 24 March 1997, the Council of the EC took a decision declaring that the tariff preferences enjoyed by Myanmar under the GSP arrangement and the tariff preferences under the arrangement for specific agricultural products of developing countries would be suspended until the Commission submits a report to the Council indicating that the phenomenon of forced labour in Myanmar has been eliminated.[173]

The current three-tier treatment model did not exist in the 1994 GSP Regulation, except for a special incentive arrangement for beneficiary countries that accept additional ILO conventions. According to the text of the regulation under which the temporary withdrawal decision was taken, the Council suspended all treatment of Myanmar under the GSP regime. The statement in the preamble, on the other hand, makes it clear that Myanmar's trade preferences arising from Article 2 and 3 of the 1994 GSP Regulations

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171 *Ibid.*, at art 11.4.

172 Supra note 163.

173 EC, COUNCIL REGULATION (EC) No 552/97 of 24 March 1997 temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar, OJ L 85/8, 27 March 1997.

will be suspended.[174] As then-Member of the European Parliament Maij-Weggen noted, the temporary suspension of Myanmar's GSP treatment was "the first time the clause has been invoked."[175] The decision was not only the EC's political stance, but also the beginning of the EC's and later the EU's exploration of using non-CFSP measures to put pressure on foreign economies. According to MEP Thomas Mann, the consideration in 1994 when granting preferential trade treatment to Myanmar was the hope that "improvements in the social situation could be achieved" in Myanmar through increased trade.[176] The widespread violations of human rights, particularly labour rights, in Myanmar compelled the EC to resort to political and economic pressure to influence the situation in the country.

During the investigation, domestic pro-democracy forces in Myanmar, including Aung San Suu Kyi, and many anti-junta figures, had also expressed their support to the Commission for the use of economic pressure measures.[177] For the junta's opponents, cutting off external investment and exports is an effective economic tool to hasten the junta's collapse. The EC clearly supports this view.

### 1.3 Influence in Myanmar

After losing the trade preferences provided by the EC, Myanmar's exports to the EC became subject to higher tariffs. According to economic logic, this decision will lead to higher prices and less competitiveness of Myanmar's goods within the EC, which will be replaced by goods imported from other countries. The impact on Myanmar's exports to the EC will have a negative impact on the Myanmar economy. Therefore, the impact of the temporary withdrawal of the GSP should be analysed mainly with reference to the indicators of Myanmar's merchandise exports to the EC (EU) and the economic development of the country.

#### 1.3.1 Influence on the Government

According to Eurostat, the amount of Myanmar's exports to the EU had fluctuated over

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174 *Ibid.*, at art 1

175 Supra note 169. (MP Maij-Weggen)

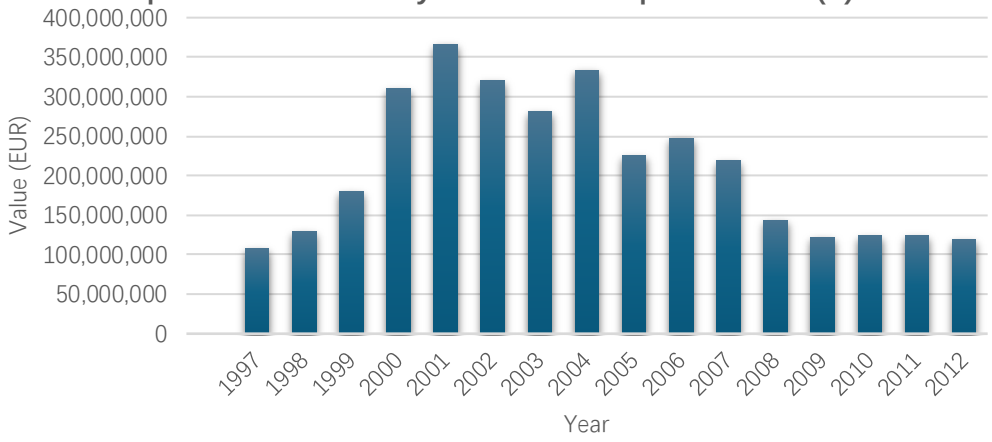
176 *Ibid.*. (MP Thomas Mann)

177 *Ibid.*. (MP André-Léonard "Also, this measure would enable us to endorse Mrs. Suu Kyi, the Nobel Peace Prize winner and leader of the Burmese opposition, who tirelessly advocates the imposition of sanctions against her country's military")

a 16-year period, starting from 1997, when the EC decided to temporarily withdraw trade preferences, to 2013, when the EU decided to reinstate Myanmar's EBA treatment. The amount even tended to increase for the first five years at the beginning of the withdrawal. This result is on the opposite of what the EC intended when it temporarily terminated the preferential treatment.[178] As Collignon predicted in 1997, this temporary withdrawal will have "a very limited effect" on exports of Myanmar.[179]

The development of Myanmar's national economy had also been at variance with EC's expectation. According to the International Monetary Fund (IMF), Myanmar's total GDP showed an overall upward trend between 1998 and 2013. During the first four years of the temporary withdrawal of preference, GDP growth was sustained in this country. In terms of real GDP growth rates, the only major slowdown in the 16 years of the withdrawal was in 2008-2010, which was also attributed to the financial crisis of 2008 rather than economic pressure from the EU.

Figure 1.
Export Value from Myanmar to European Union (1)




[178] Weifeng Zhou & Ludo Cuyvers, "Linking International Trade and Labour Standards: The Effectiveness of Sanctions under the European Union's GSP", 45:1 (2011) J. World Trade 63 at 76.

[179] Stefan Collignon, The Burmese Economy and The Withdrawal of European Trade Preferences, (1997) EIAS Briefing Paper n°97/02 April.

Macroeconomic indicators did not show the obvious negative impact of the EC's decision to temporarily withdraw Myanmar's GSP preference. The economic development of Myanmar had not been seriously affected by the suspension of preference. As a direct target of the EC's economic measure, the indicators of Myanmar's main export industries can more directly reflect the negative effects of the temporary withdrawal on Myanmar.

Figure 2.
GDP Increasing Percentage of Myanmar (1)

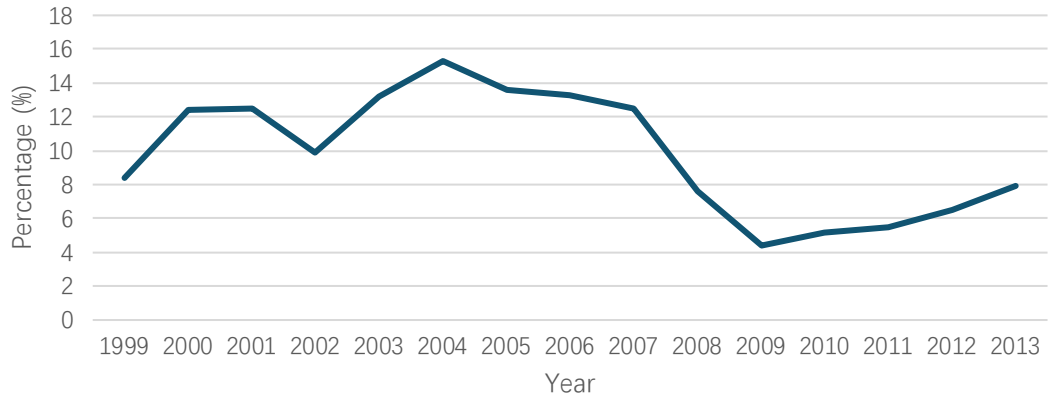
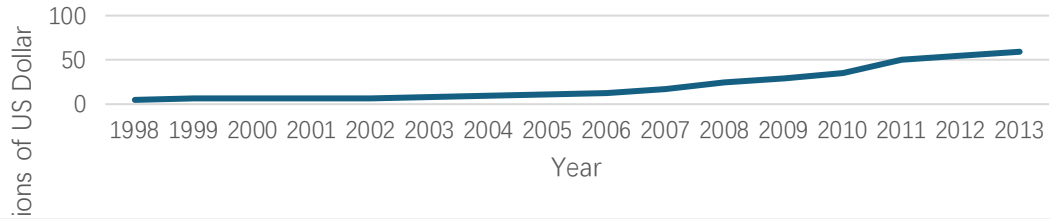


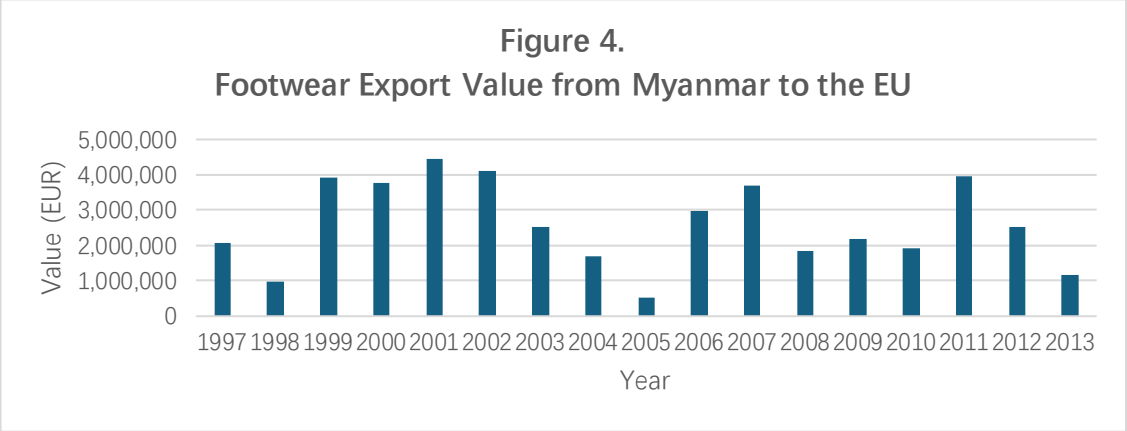

Figure 3.
GDP Amount of Myanmar (1)




From the perspective of product-specific trade, Myanmar's main exports to the EU include textiles, manufactured goods, footwear, and agricultural products. Among these products, the footwear was accepted by the 1994 GSP regulation as a product with higher tariff waiver rate for listed countries to export to the Community. Eurostat data shows that Myanmar's exports of footwear to the EC did show a downward trend in the first two years of the suspension of Myanmar's trade preferences. However, this trend did not last, but quickly rebounded and reached higher export values. Such a changing

pattern could also be found in the apparel export from Myanmar to the EC.[180]

In summary, the decision taken by the EC to temporarily withdraw Myanmar's GSP preference did have negative impact on Myanmar's microeconomic performance, but as the suspension was not a trade ban, Myanmar was still able to export goods to the EU under non-preferential trade treatment. According to Kudo, the development of Myanmar's export industry has lost the possibility of rapid development in the early 21st century due to the suspension of GSP treatment.[181] The limitation of some industries, however, does not necessarily impact the economy as a whole. Myanmar can still develop its national economy through other industries and other trading




partners. Therefore, the economic measures adopted by the European Community had a negative impact on some of the industries in Myanmar, but they did not caused a serious impact on the Myanmar economy.

### 1.3.2 Influence on the Society

As mentioned above, the national economy of Myanmar survived from economic pressure, but the suspended trade preference by the EU is bound to have a direct negative impact on exporting commercial actors. Higher tariffs will lead to higher transaction costs, making Myanmar's goods uncompetitive and worsening business conditions. The economic measures will worsen the situation of export companies, but also further lead to the labour environment in Myanmar. Redundancies, labor squeeze and deteriorating living conditions due to declining competitiveness threaten the

[180] Atsuko Mizuno, "Labour Migration and Relocation of Apparel Production between Thailand and Myanmar", 37:2 (2020) Journal of Southeast Asian Economies 181 at 184.

[181] Toshihiro Kudo, Myanmar's Apparel Industry in the New International Environment: Prospects and Challenges, (2013) IDE Discussion Paper No. 430.

Burmese people. During the debate in the European Parliament, MEP Ford acknowledged that the resolution "would not be without impact on the Burmese people...",[182] but while the resolution had not had an impact on the government, the negative impact on the Burmese people is clearly disproportionate.

The temporary suspension of the GSP treatment has exacerbated the burden on Myanmar society. According to Khine Khine New, the former secretary-general of the Myanmar Garment Association, the EU and US sanctions against Myanmar in the 1990s shut down two-thirds of the country's garment companies, leaving 240,000 of the 300,000 garment workers without jobs. The EU's suspension of the GSP was one of the reasons for the "badly eroded the garment sector".[183] Because of the overall influence of the GSP suspension in Myanmar, industries other than the garment sector will also be affected. Because the decision suspended all preferences of Myanmar in GSP arrangement, the EU had not been able to control the scope of the suspension or to put pressure on the Myanmar military junta as accurately as it did with the sanctions imposed under the CFSP at the same time.

The short-term negative impact of the temporary suspension of GSP treatment had failed to lead to changes in Myanmar's domestic policy. A year after the EC suspended Myanmar's trade preferences, the ILO report described the current state of forced labour in Myanmar as "forced labour is being used systematically, on an ever-larger scale, and in an increasing number of areas of activity..." since January 1993.[184] In fact, in all of the ILO's reports on Myanmar's non-compliance with Convention No. 29, it was only in 2012, the same year that it resolved to lift the sanctions imposed on Myanmar under Article 33 of the ILO Charter, that the ILO's report for the first time used a positive language to assess the situation in Myanmar.[185] This change is attributed to Myanmar's democratization campaign between 2011 and 2012. For a decade and half, Myanmar's

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[182] Supra note 169. (MP Ford)

[183] Khine Khine New, “Misplaced calls for Myanmar sanctions threaten wrong people”, 22 November 2019, <https://asia.nikkei.com/Opinion/Misplaced-calls-for-Myanmar-sanctions-threaten-wrong-people> at para 11.

[184] Supra note 144 at para 1.

[185] CEACR, “Follow-up to the recommendations made by the Commission of Inquiry (complaint made under article 26 of the Constitution of the ILO)” 2012 at para 1.

industry had been negatively affected by the lack of GSP treatment. This coercive economic measure, however, has not significantly improved the protection of human rights in Myanmar as expected by the EU.

2. The Return after 16 Years

On 12 June 2013, the EU adopted a regulation restoring Myanmar's EBA treatment under the new GSP arrangement.[186] This return formally restored the opportunity for Myanmar to make full use of the EU markets again. It will undoubtedly encourage the development of Myanmar's exporting industry, thus promoting the progress of Myanmar's national economy.

2.1 Changes in Myanmar

The parliament elections held in Myanmar in 2010 formally laid the foundations for democracy in the country. While the election was still heavily influenced by the military, a series of measures taken by the post-2010 civilian government set the stage for by-elections in 2012. Among these democratization reforms, the government accepted ILO's long-standing recommendations and provided an initial response to the issue of forced labour, which has received much international attention.

Myanmar has included the elimination of forced labour as a propaganda in its domestic political reforms. Two months before the by-elections, the Parliament passed the Ward or Village Tract Administration Law, which ended the application of the Village Act and the Towns Act in Myanmar.[187] This was the first item in the ILO's report that called for measures to be taken by Myanmar. Myanmar is also committed to working with the ILO on a collaborative project to eliminate forced labour. This project was set up to address the second requirement of the report, which is to effectively punish the perpetrators of forced labour.[188]

Along with domestic policy changes, Myanmar has also taken several initiatives at the

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[186] EU, REGULATION (EU) No 607/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 June 2013 repealing Council Regulation (EC) No 552/97 temporarily withdrawing access to generalised tariff preferences from Myanmar/Burma, OJ L 181/13, 12 June 2013.

[187] Supra note 185 at para 12-3.

[188] This strategy is called the Joint Government of the Republic of Union of Myanmar/International Labour Organization Strategy for the Elimination of Forced Labour. This strategy aims to strengthen the effectiveness of judicial system on preventing and punishing the users of forced labour and providing remedies for the victims in Myanmar.

international level to safeguard the rights of labour. As early as 2002, Myanmar allowed the ILO to send liaison officers to Myanmar to monitor the situation in the country.[189] In 2007, it allowed ILO liaison officers to receive allegations of forced labour in the country, thus making the situation in the country more transparent and enabling the ILO to gain access to the situation in the country more quickly.[190]

The fight against forced labour in Myanmar is widespread, but currently insufficient. The Myanmar military has announced that it will stop forced labour and child soldiers within the military and has imposed judicial sanctions on officers who use forced labour. Domestic complaints mechanisms for forced labour are also being established.[191] However, forced labour continues to be practiced, particularly in the ethnic divisions of Myanmar's border areas. Article 359 of Myanmar's 2008 Constitution expressly prohibits forced labour but excludes sentences of hard labour imposed on account of criminal responsibility and labour assigned in the public interest of Myanmar. An expansive interpretation of the latter would challenge the exception provided for in article 2 of ILO Convention No. 29.[192]

2.2 Resolution by ILO

It is undeniable that Myanmar has made many changes under the supervision and guidance of the ILO. In its 2012 Observation, the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) expressed satisfaction with the actions taken by Myanmar, such as changes to domestic legislation. Although it also expressed concern about the constitutional exception for forced labour, it concluded that the issue would be resolved by a democratized Myanmar legislature.[193] At the International Labour Conference on the same day, the Conference concluded that Myanmar was already meeting the requirements of the Committee of Inquiry and that "maintaining the existing measures would no longer help in attaining the desired result

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189 International Labour Office, "Understanding between the Government of the Union of Myanmar and the International Labour Office concerning the appointment of an ILO Liaison Officer in Myanmar", 19 March 2002.

190 International Labour Office, "Supplementary Understanding between the Government of Myanmar and the International Labour Office, and other associated documents", 15 February 2007.

191 Supra note 185 at para 17-8.

192 *Ibid.*, at para 20-1.

193 *Ibid.*

of compliance".[194]

Thus, the ILC's resolution on forced labour issue in Myanmar put an end to the anomaly that had long existed in Myanmar under the ILO system. In terms of negative sanctions, the resolution lifted the ILO's participation and technical assistance sanctions against Myanmar and declared that other sanctions established by the ILO Council in 2000 under Article 33 of the Charter would also cease to apply.[195] These sanctions include authorizing ILO member states to take economic action to prevent Myanmar from profiting from violations of its obligations under the Convention. In addition to ending negative sanctions, the resolution calls on the ILO and ILO member States to assist Myanmar in areas where technical and financial resources are currently lacking, calls on international organizations to participate in the process of safeguarding Myanmar's labour rights and authorizes the ILO to draw up a priority list of technical assistance in urgent labour matters.

Besides restoring Myanmar's interest, the resolution also requested the ILO Governing Body to continue consideration of the issue at the next year's conference, while maintaining the presence of ILO inspectors in Myanmar.[196] Since Myanmar was only in the process of fulfilling the requirements of the 1998 report, the conference's resolution would request the ILO to continue to maintain its monitoring of the labour situation in Myanmar to ensure that the issue is finally resolved.

The EU also participated in the 2012 ILC as one of the international organizations. In informing the ILC of the policies to be adopted towards Myanmar, the EU representatives expressed the policy principles of lifting sanctions, strengthening engagement, and encouraging investment in Myanmar. The Council of the European Union has also made the GSP a core policy in trade, announcing that it would consider the reintroduction of preferential trade treatment for Myanmar, if Myanmar meets the requirements of Convention No. 29.[197]

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[194] ILC, "Resolution concerning the measures on the subject of Myanmar adopted under article 33 of the ILO Constitution", 13 June 2012 ,101 session at preamble.

[195] *Ibid.*, at para 1-4.

[196] *Ibid.*, at para 10.

[197] ILC, "Additional agenda item-Further information: Policy of other international organizations-European Union", 101 session No. 2-1(Add.2), 4 June 2012. (Moreover, the Council was willing to consider reinstating the

## 2.3 Resolution of Reinstating EUGSP

A year after making its position known to the ILC, the EU adopted a resolution restoring the EBA treatment available to Myanmar under the 2009 GSP arrangement. Since the GSP regime does not provide for a special procedure for the restoration of trade preferences, the EU adopted the resolution in the form of an Ordinary Legislative Procedure. The Commission, the European Parliament and the Council were all involved in the decision-making process.[198]

In the legislative proposal submitted by the European Commission, the Commission argues that the previous decision to temporarily withdraw the GSP from Myanmar was due to "widespread practice of forced labour, confirmed by the ILO".[199] Accordingly, the situation in Myanmar could no longer be considered a "serious and systemic" violation of the obligations under the GSP regulations after the ILO had determined that the labour situation in the country had improved and had lifted the restrictive measures against Myanmar. The Commission also noted that because of the "structural lack of production and trading capacity" of Myanmar's industry, the reinstatement of this treatment would not result in a significant reduction in EU customs revenue.[200] The proposal was passed on to both the Council and the Parliament.

Under the Ordinary Legislative Procedure, the European Parliament should first take a position on the proposal. The European Parliament assigned the Committee on International Trade with the task of explaining the proposal and adopted a Parliamentary Resolution on the proposal. In its resolution, the Parliament took a similar approach to the ILC, which recognized Myanmar's internal governance while warning of other risks of human rights abuses within the country.[201] After expressing concerns about Myanmar's use of child soldiers, forced land confiscation, and the fact

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generalized system of preferences (GSP) "if the required conditions are fulfilled, in particular those related with compliance of the Convention on Forced Labour".)

198 Supra note 186 at preamble.

199 European Commission, "Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL repealing Council Regulation (EC) No 552/97 temporarily withdrawing access to generalized tariff preferences from Myanmar/Burma", COM (2012) 524 final, 17 September 2012 at 2.

200 Ibid.

201 European Parliament, "Myanmar/Burma's access to generalised tariff preferences European Parliament resolution of 23 May 2013 on reinstatement of Myanmar/Burma's access to generalised tariff preferences (2012/2929(RSP))", OJ C 55/114, 12 February 2016, at para E-G.

that it has yet to fully co-operate with human rights monitoring bodies, the European Parliament recognized that democratic reforms were underway in Myanmar and that these reforms have created the conditions for it to regain GSP trade preferences. In the wording of the resolution, the European Parliament sees the GSP as an economic instrument that "encourages them to continue this process" and hopes that it will contribute to the promotion of democracy, the rule of law and fundamental human rights in general in Myanmar.[202] The Parliament agreed to the Commission's proposal and did not amend the resolution. In its communication to the Council, the Parliament considered that the Council "should therefore be in a position to approve the European Parliament's position." [203] Judging by the regulations that ultimately lifted the suspension, the Council complied with this recommendation and included the subsequent development of social governance in Myanmar as an important factor after the restoration of the GSP treatment.

The regulation lifting the suspension cites the European Commission's 2012 report on Myanmar and the ILC resolution, which in effect confirms Myanmar's compliance with the recommendations of the ILO report.[204] In terms of the wording of the regulation, the EU's main motivation for the resolution was the ILO's findings and the ILC's resolution lifting sanctions on forced labour in Myanmar.

2.4 Outcome of Reinstating

After the lifting of the temporary withdrawal by the EU, the preference that Myanmar enjoyed under the 2009 EU GSP programme was the special treatment provided by the EU to the LDCs, i.e. EBA treatment. In comparison with the general GSP arrangement, all exports from Myanmar to the EU will be quota-free and tariff-free, except for a few sensitive products. This treatment covers a wider range of products and provides a greater degree of tariff reduction than the GSP tariff preference of 1997. This has allowed Myanmar's goods exports to the EU to be scaled up.

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[202] *Ibid.*, at para 1.

[203] European Parliament, "Proposal for a Regulation of the European Parliament and of the Council repealing Council Regulation (EC) No 552/97 temporarily withdrawing access to generalized tariff preferences from Myanmar/Burma.-Outcome of the European Parliament's first reading", 2012/0251 (COD), 28 May 2013 at 2.

[204] Supra note 186 at para 5-7.

Exports from Myanmar to the EU have shown a clear upward trend since 2013, when treatment resumed, and the value of goods exported in 2014 nearly doubled compared to 2013. Until today, Myanmar's exports to the EU have been on an upward trend, except for the fall in imports due to the global economic shutdown triggered by the COVID-19 Pandemic. According to data provided by the European Commission in 2022, the proportion of all Myanmar's exports to the EU that are exempted from tariffs due to GSP treatment is 94 percent, 95.4 percent, and 95.5 percent of all exports to the EU from 2017 to 2019, respectively.[205] This shows that Myanmar's exports have gained tremendously after the restoration of GSP treatment. However, national economic data for the same period does not reflect the contribution of this trade benefit to economic growth. Myanmar's GNP has not risen significantly because of the surge in exports to the EU, and this trend has not changed since the restoration of trade preferences. This suggests that the importance of the EU in Myanmar's foreign trade relations is not significant relative to other trading partners. According to the World Bank, the main countries to which Myanmar exported goods from 2013 to 2021 include Thailand, China, Japan, and India. Though the EU's trade preferences have a positive effect on Myanmar, the small-scale export trade from Myanmar to the EU will also not provide a significant boost to Myanmar's national economy. The recovery from the long-term withdrawal of trade preferences did not bring Myanmar the market position and scale of exports that it had previously enjoyed. The reinstatement had limited impact on Myanmar's macroeconomic performance.

[205] European Commission, “GSP STATISTICS”, 1 December 2020 at 12.

Figure 5.
Export Value from Myanmar to European Union (2)

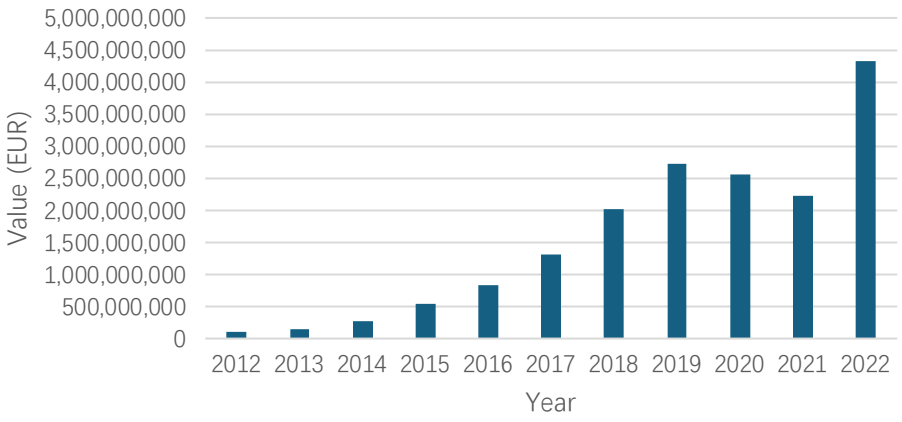



Figure 6.
GDP Amount of Myanmar (2)

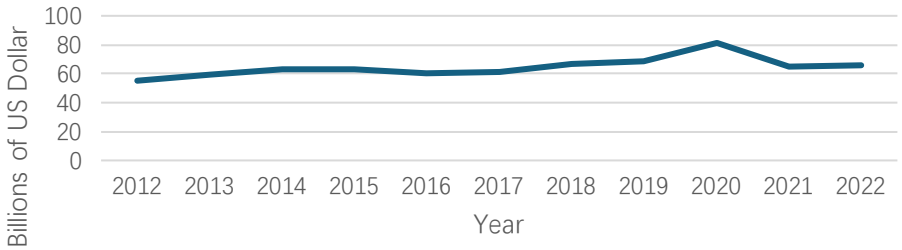
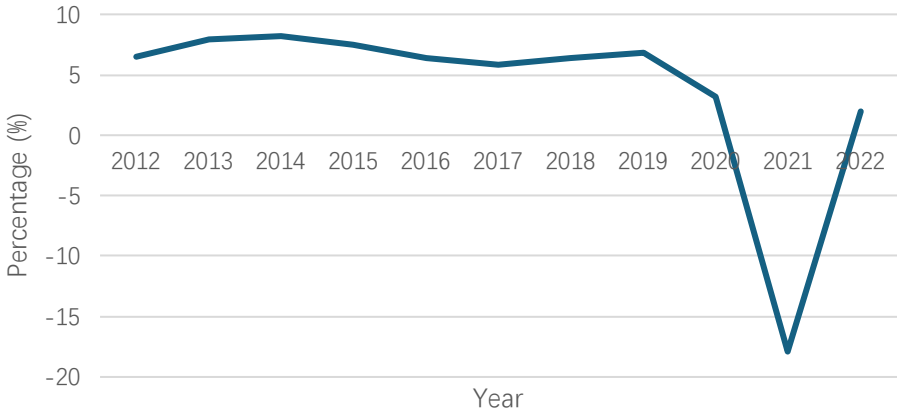



Figure 7.
GDP Increasing Percentage of Myanmar (2)




After the restoration of treatment, the situation of labour rights protection in Myanmar has initially improved. In accordance with the 2012 Joint Memorandum, Myanmar's national legislation, government measures and judicial investigations into forced labour were effectively implemented, and the ILO's 2015 Observatory Report found that the

overall number of forced labour incidents in Myanmar had declined. The people had gained sufficient confidence to file complaints with the authorities.[206] In addition to the original issue of forced labour, Myanmar's other human rights protection obligations under the EUGSP were also improving. Myanmar ratified the Worst Forms of Child Labour Convention No. 182 in 2013, which is one of the fundamental human rights conventions in Annex VIII of the EU GSP that developing countries with General GSP and EBA treatment are required not to violate their principles. The preferential treatment and rights protection standards in EUGSP paved the road for Myanmar authority to obey international conventions by encouraging the country to follow the basic principles in conventions.

Therefore, the GSP treatment has indeed led to changes in Myanmar's internal human rights governance, particularly regarding labour rights. Although this treatment has had a limited impact on Myanmar's economic development, Myanmar continues to value this trade preference and is willing to adjust its policies in line with the regulation's guidance.

3. Tripping over the Same Stone

The civilian government had played a positive role in improving governance in Myanmar. But as the UN concluded the speech of Special Rapporteur on human rights in Myanmar in 2012, while "the fast pace of reform in Myanmar was encouraging, bolder steps were needed to end persistent right to life violations".[207] Unfortunately, this warning would gradually become true within a decade.

3.1 Degradation in Human Rights

After the 2012 parliament election, Myanmar was still facing tremendous internal pressure and human rights risks due to the long-standing oppressive rule of the military government after its democratization reforms. This risk is not only due to Myanmar's incomplete legal reforms and weak national economic system, but also to the ethnic conflicts in Myanmar's border areas that have fueled the country's human rights

[206] CEACR, "Follow-up to the recommendations made by the Commission of Inquiry (complaint made under article 26 of the Constitution of the ILO)" 2015.

[207] UN Press, "Press Conference by Special Rapporteur on Human Rights in Myanmar", 25 October 2012, <https://press.un.org/en/2012/121025_myanmar.doc.htm> at para 1.

problems. These potential risks have already had a significant negative impact on the reality of governance.[208]

Concerning civil and political rights, Myanmar does not fully guarantee the rights of citizens in terms of expression and political participation. There are many laws in the Myanmar legal system that set standards of censorship and restrictions on the exercise of rights such as freedom of expression. Some of these laws, such as the Telecommunications Law, the Unlawful Associations Law, and the Media Law, also impose criminal liability for speech and behaviour that they deem illegal to combat dissent.[209] These laws, which keep dissidents such as journalists and human rights lawyers behind bars, are both a product of the colonial era and new laws passed after 2012. This suggests that the civilian government is still not making civil liberties a key issue for political reform. In terms of political participation, Myanmar's parliamentary elections did not complete the liquidation of the military junta, as the 2012 parliamentary elections saw only a few seats change, with most parliamentary seats remaining in the hands of the junta-backed Union Solidarity and Development Party, which was supposedly elected to the legislature in 2010. This situation did not end until the 2015 elections. Under the mandate of the 2008 Constitution, the MDF has not only been able to run its own affairs independently out of the government but has also been able to maintain a voice in the country's parliament.[210]

Myanmar's current level of economic and social development can not support a high level of protection of the economic and social rights for its citizens. Many reforms have been made around labour rights but forced labour and child labour have not been completely curbed.[211] There are also cases of forced expropriation of personal property, particularly land, with inadequate compensation.[212] There is also a lack of transparent

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[208] *Ibid.*, at para 6.

[209] UN, "Report of the Special Rapporteur on the situation of human rights in Myanmar", UN Doc. A/HRC/37/70, at para 7.

[210] Article 14 is "The Pyidaungsu Hluttaw, the Region Hluttaws and the State Hluttaws include the Defence Services personnel as Hluttaw representatives nominated by the Commander-in-Chief of the Defence Services in numbers stipulated by this Constitution." Article 20.b is "The Defence Services has the right to independently administer and adjudicate all affairs of the armed forces."

[211] Supra note 207 at para 21.

[212] *Ibid.*, at para 28-30

and effective mechanisms to protect citizens' environmental rights in the context of resource extraction and enterprise development.

Amidst these human rights issues, the most pressing and severe problem is related with Myanmar's ethnic minorities. The failure of Myanmar to grant full citizenship rights to its ethnic citizens has led to a growing conflict between the Kachin, Shan and Rakhine States and the central government of Myanmar.[213] The armed conflicts that have arisen from this conflict have led to humanitarian problems in Myanmar's border areas.[214] The problem of ethnic minorities is centred on the Rohingya refugee crisis. In 2016, the MDF conducted an armed operation against the Rohingya in Rakhine State. The Myanmar military's actions in this operation were seen as genocide by many countries, and the 2017 refugee crisis has severely undermined all human rights enjoyed by the Rohingya. The inaction of Myanmar's civilian government during this crisis had further encouraged the military's actions.[215]

The human rights situation in Myanmar continued to witness many achievements in the preliminary stages of democratization reforms, such as ensuring universal parliamentary elections and guaranteeing fundamental rights to citizens. However, this progress did not bear further fruit over time, but rather went in the opposite direction. Eventually, the democratic process was forcibly ended after a decade.

3.2 Military Coup in 2021

On 1 February 2021, the MDF announced that because of the injustices in the 2020 parliament elections, it would dissolve the government under a state of emergency in accordance with its constitutional powers, and that the commander-in-chief of the MDF, Min Aung Hlaing, would assume state power. The democratically elected parliament that emerged from Myanmar's 2020 election was also dissolved, and Myanmar's President Win Myint, ruling party leader Aung San Suu Kyi, and other dignitaries were taken into custody by the military. Myanmar's democratization reforms were forcibly terminated. The impact of the military coup did not stop at the political level but had a

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213 *Ibid.*, at para 53-5.

214 *Ibid.*, at Annex III para 35.

215 Supra note 209 at para 61.

knock-on effect that led to an overall deterioration in the protection of human rights in Myanmar society.

The political rights of Myanmar citizens are severely restricted. Since the *coup d'état*, the military junta has taken a series of measures to suppress opposition in the country. The number of political prisoners detained for anti-junta statements and behaviour has risen. Many of these prisoners have been subjected to unfair trials and penalties. The military junta has also resumed the application of the death penalty to some political prisoners. While in detention, many prisoners have suffered serious injuries because of coercive torture and ill-treatment.[216] Myanmar's democratic political space is being rapidly squeezed. Freedom of expression is being eroded by increasing censorship and repression, and the political rights of Myanmar citizens to participate in elections are effectively nullified by the military government's decisions.[217]

The economic and social rights of Myanmar's citizens, especially those of ethnic minorities, are in decline. After the *coup d'état*, the scale of homelessness in Myanmar, especially in the border areas, has increased because of the chaotic internal political situation and the activities of ethnic armed groups in the border areas.[218] As a result of displacement and armed conflict, the homeless have limited access to basic food and drinking water, and education and health care are scarce. The Rohingya refugees, who were already in danger in Rakhine State, have been under close surveillance since the military government came to power. The junta has even restricted the freedom of movement of Rohingya refugees to prevent their plight from gaining international attention.

The flagrant violations of Myanmar's international human rights obligations by the military junta are reflected in the armed conflict. Myanmar's ethnic local forces had reached a national ceasefire agreement with the civilian government of Myanmar in 2015. However, after the *coup d'état* by the military junta, the armed conflict between the local armed forces and the Myanmar military junta intensified as the national

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216 UN, "Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews", UN Doc. A/HRC/46/56 at para 53-5.

217 *Ibid.*, at para 61-87.

218 *Ibid.*, at para 55-6.

reconciliation process was terminated. As a result of ethnic tensions, the military action taken by the Myanmar army in ethnic areas has evolved into collective punishment of ethnic civilians.[219] Violence against political opponents and the repression of regional minority armed groups resisting the military junta's rule have led to extrajudicial violence and bloodshed in Myanmar.[220]

The obligation to guarantee human rights, which had been neglected under the civilian government, was completely trampled by military government. The systematic violation of human rights obligations has led to international responses to the military government in Myanmar.

3.3 Current Reactions from International Organizations

The one organization in the current international community that has the authority to conduct extensive human rights monitoring and investigations in all countries is the United Nations. In the case of Myanmar's plight, the ILO, which has long been concerned about the labour situation in Myanmar, also maintains a continuous presence and investigative work in Myanmar. Both international organizations have witnessed the deterioration of human rights in Myanmar and have responded to this phenomenon in their own way.

The United Nations Commission on Human Rights resolved to establish the Special Rapporteur on human rights in Myanmar as early as 1992 and mandated the officer to investigate the human rights situation in the country. In response to the deteriorating trend of human rights in Myanmar, the Special Rapporteur has so far been providing information on the human rights situation in Myanmar to the OHCHR and the UN General Assembly. In the immediate aftermath of the *coup d'état* in Myanmar in 2021, the President of the Security Council condemned the coup and called on all parties in Myanmar to engage in dialogue to "refrain from violence and fully respect human rights and fundamental freedoms".[221] The Human Rights Council adopted a resolution

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[219] European Parliament, “Human rights situation in Myanmar, including the situation of religious and ethnic groups European Parliament resolution of 7 October 2021 on the human rights situation in Myanmar, including the situation of religious and ethnic groups (2021/2905(RSP))”, P9_TA(2021)0417, at para H.

[220] *Ibid.*, at para 11.

[221] UNSC, “Security Council Press Statement on Situation in Myanmar”, SC/14430, 4 February 2021.

condemning the coup and calling for the restoration of democracy and the rule of law.[222] In 2022, the UN Security Council also adopted a resolution on the situation in Myanmar, calling on all parties to "respect human rights, fundamental freedoms and the rule of law".[223] However, the UN Security Council did not discuss the matter further and did not impose Security Council sanctions on the military junta in Myanmar.

The ILO has always been concerned about the labour situation in Myanmar. Since the outbreak of the Rohingya refugee crisis, the ILO CEACR has stopped making positive comments in its summary of observation reports on Myanmar.[224] CEACR also urges the government to actively implement its treaty obligations to combat forced labour, guarantee freedom of association and end child labour due to the labour issues that continue to accumulate in the country. Following the 2021 coup, the ILC also passed a resolution calling on the Myanmar military to stop inflicting violence and comply with the ILO Convention.[225] Unlike the UN, the ILO Governing Body initiated its own investigation into Myanmar's non-compliance with the convention's provisions, in accordance with the provisions of its charter. The investigation included an examination of Myanmar's violations of its obligations under Convention No. 29, in addition to its obligations under Freedom of Association and Protection of the Right to Organise Convention No. 87.[226] In October 2023, the ILO's investigation report stated that the junta's actions constituted "egregious violations" of both conventions and recommended that the junta cease its violations immediately.[227]

The behaviour of the Myanmar authorities has caused widespread concern in the international community. The condemnations and investigations by international organizations have proved that the threat to human rights posed by the military junta

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222 UNHRC, "Human rights implications of the crisis in Myanmar", UN Doc. A/HRC/S-29/L.1.

223 UNSC, "Resolution 2669 (2022)", UN Doc. S/RES/2669 (2022) at para 4.

224 CEACR, "Observation (CEACR) - adopted 2018".

225 ILC, "Resolution for a return to democracy and respect for fundamental rights in Myanmar", ILC.109/Resolution II.

226 Governing Body of ILC, "Follow-up to the resolutions concerning Myanmar adopted by the International Labour Conference at its 102nd (2013) and 109th (2021) Sessions: Report of the Director-General on developments in Myanmar, including information on potential follow-up action by the 110th Session of the International Labour Conference", GB.344/INS/12 and GB.344/INS/12(Add.1).

227 Commission of Inquiry, "Report of the Commission of Inquiry established in accordance with article 26 of the ILO Constitution concerning the non-observance by Myanmar of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Forced Labour Convention, 1930 (No. 29)", 4 August 2023 at para 643.

has shaken the current international order. However, constrained by the function of international organizations and their internal political differences, international organizations can only condemn the coup through non-binding position papers. It was difficult to impose substantial penalties on the perpetrators of the coup in Myanmar.

3.4 Current Reactions from other States & the European Union

The consensus among States on Myanmar is to call on all parties in the country to resolve the *coup d'état* in a peaceful manner. However, in terms of the specific ways to facilitate this process, the countries reflect a clear difference on whether to impose sanctions or not. Myanmar's regional neighbours have preferred a more moderate approach to facilitating a solution. Western countries, on the other hand, have taken a more proactive and aggressive approach to sanctions against the military government and its associates. European countries are mostly represented by the European Union, whose sanctions are determined under the CFSP framework.

Presently, EU sanctions against the military junta in Myanmar also cover a wide range of areas.[228] Targeted sanction under CFSP against Myanmar can be traced back to 2013, when EU delivered prohibitions on the arm trade between them.[229] In the economic field, asset freezes and trade bans targeting specific individuals and entities are common. This Targeted Sanction makes the people and businesses of Myanmar, who have no connection to the cause of the sanctions, less likely to be negatively affected by the sanctions. In the political arena, entry bans on specific individuals are a way of exerting targeted pressure on individuals responsible for coups and human rights abuses to change their decision-making. This approach also respects the human right to freedom of movement enjoyed by other innocent people. The ban on arms exports to Myanmar is aimed at avoiding the importation of arms that would further aggravate the situation in the country. The restrictive measures are intended by some States to accelerate the policy shift of the military government in Myanmar.[230]

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[228] EU Sanction Map, "Myanmar", <https://www.sanctionsmap.eu/#/main/details/8/?search=%7B%22value%22:%22%22,%22searchType%22:%7B%7D%7D>

[229] Council of European Union, "COUNCIL DECISION 2013/184/CFSP of 22 April 2013 concerning restrictive measures against Myanmar/Burma and repealing Decision 2010/232/CFSP", OJ L 111/75, 23 April 2013.

[230] Damian Lilly, "The UN's Response to the Human Rights Crisis after the Coup in Myanmar: Destined to Fail?"

Following the same considerations, and at the call of labour rights organizations in Myanmar, the European Parliament has opened a discussion on whether to suspend once again the trade preferences enjoyed by Myanmar under the GSP arrangement. The European Parliament considered that a temporary withdrawal investigation into Myanmar was justified now and asked the European Commission to organize such an investigation as soon as possible.[231] The European Commission, however, did not comply with this recommendation due to the potential criticism of measures that could undermine Myanmar's socio-economic base. Dombrowski offered to implement the GSP temporary withdrawal procedure under conditions that would avoid a negative impact on the lives of the people of Myanmar.[232] This statement shows that the EU executive is aware of the human rights risks that such a decision could entail.

International Peace Institute, June 2021, at 12-3.

[231] European Parliament, "European Parliament resolution of 10 March 2022 on Myanmar, one year after the coup (2022/2581(RSP))", P9_TA(2022)0079 at para W.

[232] Supra note 9.

## IV. To Do or Not to Do: The Risks of GSP Temporary Withdrawal Mechanism

The EU's cautious strategy towards the situation in Myanmar has not been consistent. When the GSP investigation into Cambodia was launched in 2019, the EU found that Cambodia had constituted a "serious and systemic violation" of the conventions listed in the GSP regulation, based on documents from the UN & ILO.[233] Eventually, in February 2020, the European Commission decided to temporarily withdraw Cambodia's GSP treatment. In its 2019 resolution, the European Parliament juxtaposed the situation in Cambodia with that in Myanmar and stated that it welcomed the European Commission's initiation of an investigative procedure against Cambodia.[234] Yet at a time when larger and more serious human rights concerns have emerged in Myanmar, the Commission has opted for a more conservative course of action.

This shift in strategy has been interpreted in different ways. Reflecting on the convergence between the EU's GSP withdrawal and CFSP sanctions noted by Portela and Orbie, Schmücking argues that the reason the EU has not withdrawn Myanmar's GSP treatment is that the EU has its own "commercial and strategic interests" in Myanmar.[235] Pennisi di Floristella notes the important role played by the EU's normative concern about "further deteriorating Myanmar's socio-economic conditions without altering the situation" in this process.[236] Based on these insights, it has become more necessary to analyse the normative basis for the EU's adoption of this strategy. According to the Vice-President of the European Commission's textual expression of respect for the 'livelihood of Myanmar's population', the normative value of this turn is

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[233] European Commission, "COMMISSION DELEGATED REGULATION (EU) 2020/550 of 12 February 2020 amending Annexes II and IV to Regulation (EU) No 978/2012 of the European Parliament and of the Council as regards the temporary withdrawal of the arrangements referred to in Article 1(2) of Regulation (EU) No 978/2012 in respect of certain products originating in the Kingdom of Cambodia", OJ L 127/1, 22 April 2020 at art 1.

[234] European Parliament, "Implementation of the Generalised Scheme Preferences (GSP) Regulation European Parliament resolution of 14 March 2019 on the implementation of the GSP Regulation (EU) No 978/2012 (2018/2107(INI))", P8_TA(2019)0207, at para N.

[235] Schmücking, Daniel. "Why Cambodia? Factors in EU Incoherence in Withdrawal Decisions for Trade Preferences." (2021) 5 *Journal of Greater Mekong Studies* 79 at 94.

[236] Angela Pennisi di Floristella, "The Everything But Arms (EBA) scheme and the EU's normative dilemma: the case of Myanmar's garment sector." (2023) 44:11 Third World Quarterly 2404 at 2416.

primarily the protection of the fundamental rights of the people of Myanmar.[237] The GSP regulation that sets forth this norm in international action is embodied in the field of international human rights.

1. EUGSP with Human Rights Concern

Using economic factors as incentives to improve human rights governance in developing countries has been a central consideration in the EU's current GSP policy. Although the EU did not consider the temporary withdrawal of GSP treatment as a sanction in its 2003 Sanctions Resolution on Myanmar,[238] the effect of the temporary withdrawal of trade preferences in the GSP treatment of Myanmar has been regarded by the EU as economic pressure to compel the affected countries to change their domestic policies to implement their human rights protection obligations.[239] This is consistent with the logic and purpose of human rights sanctions.

Punitive measures against States that violate the relevant human rights standards of governance are likewise a form of exercising the national sovereignty of the member States at the disposal of the European Union. The *Lotus* Case jurisprudence of the Permanent Court of International Justice established the basis in international law for States to act within their sovereignty: that is, sovereign acts within States are not subject to international law in the absence of an explicit prohibition under international law.[240] The power currently held by the EU to determine the common commercial policy of its member States allows it to make adjustments to the common tariff. Whether it grants or temporarily suspends a country's GSP treatment, the EU exercises its power within the sovereignty of its member States. It is thus reasonable to refer to the attributes of EU's human rights sanctions to analyse the EUGSP.

The purpose of human rights sanctions is only the motivation for decision-making. Restrictive measures as a means of sanctioning are the way in which this strategy is

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[237] Supra note 9.

[238] Council of European Union, COUNCIL COMMON POSITION 2003/297/CFSP of 28 April 2003 on Burma/Myanmar, OJ L 106/36.

[239] Supra note 169 (MP Leperre-Verrier "the European Union is for the first time imposing sanctions on a country which is violating workers' rights, and we must welcome this decision to withdraw Burma's access to the generalized preference system.")

[240] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), at para 46.

implemented. This “sacrifice-protection” paradigm also deliver negative impacts when achieving its purpose. Examining the EU human rights sanctions system and identifying its human rights risks will help to deepen the understanding of this paradigm.

## 1.1 Sanctions with Human Rights

In the international community, some actors have recognized the legitimacy of sanctions for human rights violations and have internalized this policy in their laws and external strategies. The EU is one of these international actors. As an atypical international organization that enjoys partial sovereignty of its member states, there are peculiarities in its internal and external human rights strategies.

### 1.1.1 Patterns of Human Rights Sanctions

There are currently three forms of human rights sanctions imposed by different subjects in the international community, United Nations sanctions led by the Security Council, organizational sanctions decided by international organizations and unilateral sanctions imposed by sovereign states.

Despite being subjected to domestic implementations of member states, the UN sanctions are currently the most legally effective and widely applied human rights sanctions based on the article 25 of the Charter.[241] The source of the UN Security Council's authority to impose sanctions is Article 41 of the UN Charter. This Article gives the Security Council the power to use "measures not involving the use of armed force" to achieve the objectives intended by its resolutions.[242] This power includes the right to request United Nations Member States to impose a trade embargo, cut off means of communication and sever diplomatic relations, in whole or in part, against the sanctioned State. In current practice, the United Nations uses "smart sanctions" as the main implementation method, targeting the main responsible individuals in the sanctioned country, with the intention of reducing the negative impact of full or partial sanctions on innocent people. For example, in the Security Council's 2015 sanctions resolution against the Taliban, the Security Council, while recognizing reconciliation,

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[241] Vera Gowlland-Debbas, “Introduction: UN Sanctions and International Law: An Overview”, in Vera Gowlland-Debbas, Mariano Garcia Rubio & Hassiba Hadj-Sahraoui, eds, *United Nations Sanctions and International Law*, 1st ed, The Hague: Kluwer Law International, 2001 at 19.

[242] United Nations, *Charter of the United Nations*, 1 UNTS XVI, 24 October 1945 at art 41.

still found that the Taliban constituted a threat to international peace and that the United Nations should maintain sanctions against the Taliban in accordance with the requirements of international human rights law. [243] Sanctions against Taliban individuals and entities include asset freezes, travel bans and arms embargoes. By virtue of the authority conferred by Article 25 of the UN Charter, sanctions resolutions from the security council place obligations on UN member states to implement specific elements of the sanctions.

Sanctions imposed by international organizations are generally small in scope and the coercive means available to them rely on the provisions of the constitutional documents of the organization. The previously mentioned measures taken by the ILO against Myanmar under Article 33 of the ILO Charter to compel it to accept the recommendations of the report are precisely the type of sanctions that international organizations use against their member states. Their purpose is to force Myanmar to change its behaviour and to protect the human rights of labour in Myanmar. Since its jurisdiction derives from the recognition of its constitutional instruments by its member States, its scope of jurisdiction and the restrictive measures it can take are limited in comparison with those of the United Nations. Besides internal sanctions, international organizations that transcend the sovereignty of member states can achieve appropriate punishment for the acts of specific states through judicial power. Judicial bodies of these organizations can impose direct punitive measures on member states within the limits of their delegated powers. ECtHR under Council of Europe serves as an example. While adjudicating on human rights cases, the Court can also ask the Council of Europe to give effect to its findings by urging member States whose conduct has been found to have violated fundamental rights to compensate the victims and to change their behaviour.[244]

Unilateral sanctions adopted by sovereign States are currently the most used form of

[243] UNSC, "Resolution 2255 (2015) Adopted by the Security Council at its 7590th meeting, on 21 December 2015", UN Doc. S/RES/2255(2015) at preamble.

[244] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 at art 46.1-2.

human rights sanctions.[245] A sovereign state can impose sanctions on any organization or individual it determines to be committing human rights abuses in accordance with its domestic legislation and executive orders. The Global Magnitsky Human Rights Accountability Act, passed by the United States in 2016, gives the President of the United States the power to impose sanctions such as entry bans and asset freezes on any individual or entity that violates human rights globally.[246] This act is an example of unilateral sanctions by a sovereign state for human rights reasons. By virtue of advanced international status and economic powers, some countries can deliver a greater negative impact on the sanctioned individuals and force them to improve their internal governances. However, the legality of such sanctions has also been questioned in international law because of their unilateral nature.

1.1.2 Human Rights Sanctions Adopted by the EU

As the only current supranational organization, the different types of human rights sanctions adopted by the EU reflect the characteristics of both international organization sanctions and a sovereign state's unilateral sanctions.

a) External and Internal Sanctions in EU

The EU implements its external sanctions in patterns similar to those of sovereign states. Sanctions in the framework of the CFSP are the form of external human rights sanctions adopted by the EU,[247] and the 2020 Decision establishing the EU Human Rights Sanctions Regime gives the Council of the EU the power to amend the sanctions list and gives the EU Commissioner for Human Rights and the Member States the right to propose amendments to the sanctions list.[248] Although the sanctions are issued in the name of international organizations, the decision-making and implementation process is similar to that of unilateral sanctions imposed by sovereign states. Based on the internal legislation of the organization (country), any organization or individual found to be violating human rights is subjected to restrictions in the areas of finance, entry

[245] Michael Brzoska, "International sanctions before and beyond UN sanctions", (2015) 91:6 Int'l Aff. (UK) 1339 at 1341.

[246] Global Magnitsky Human Rights Accountability Act, 22 USC 108, (2016).

[247] Supra note 134 at ANNEX I, para 3.

[248] Council of the European Union, COUNCIL DECISION (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ L 410 I/13, at art 5.1.

into the country, etc., in accordance with the unilateral decision of the internal decision-making body.[249] Member States of EU have the obligations under Article 29 TEU to "ensure that their national policies conform to the Union positions". The human rights sanction in CFSP is decided by the Council of the EU, so the Member States shall carry out these restrictive measures. The Council of the EU is not required to consider the opinion of the sanctioned subject in its decision-making process. The EU as an international organization can therefore be characterised as a sovereign state in the field of external sanctions.

As for the internal sanctions, the EU implements them as if it were an international organization. In the EU legal framework, the CJEU is the supreme court for the implementation of EU law. Non-compliance with CJEU jurisprudence by a Member State can lead to the imposition of economic sanctions, i.e. fines, within the EU.[250] Although human rights litigation cases in the European region, including the EU, are dominated by the ECHR, the CJEU operates to safeguard the human rights of complainants whose rights have been impaired by EU actions. In the *Kadi* case, the CJEU sought judicial review of the human rights protection aspects of the UNSC sanctions implemented within the EU, based on the principle of effective judicial protection in the ECHR.[251] If a Member State does not comply with the General Court's judgement and continues to impose sanctions without the guarantee of a judicial remedy, it will be referred again by the Council to the CJEU, which will decide on the imposition of financial penalties.[252]

b) Temporary Withdrawal in EUGSP

The EU can impose economic measures externally by implementing temporary withdrawal within the framework of the GSP. This withdrawal of trade preferences targets a foreign country. The European Commission launches and finally decides the suspension. The application of this sanction relies on the common commercial policy

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[249] *Ibid.*, at art 5.

[250] Supra note 23 at art 260.

[251] *Kadi v. Council of the European Union and Commission of the European Communities*, C-402/05 P and C-415/05 P, European Union: Court of Justice of the European Union, 3 September 2008 at para 285.

[252] Supra note 23 at art 260.

between the EU and its Member States. This economic coercive measure shares characteristics with the unilateral sanction by a sovereign state, since it aims at modification of policies and practices in targeted countries and pursuing this aim with economic interests as bargaining. However, the EUGSP is more unique in the implementation of its economic sanctions.

The EUGSP withdrawal mechanism has a bilateral legal basis. In the GSP regulation, the chapter on temporary withdrawal lists in detail the violations of human rights obligations that lead to the suspension of preferential treatment, the procedures for implementation and the consequences of suspension.[253] This regulation belongs to EU law, but the rights and obligations it creates for other countries give rise to international relations. As stated by the EU, once a country is recognized as an eligible beneficiary country, its exports to the EU will automatically benefit from GSP preferences.[254] By accepting the favourable conditions, the beneficiary country also assumes the risk of the temporary withdrawal clause provided for in the GSP Regulation. As far as its function is concerned, the regulation can also serve as a bilateral treaty on the part of the EU for developing countries that qualify for preferences. Based on the right-obligation arrangement in the regulation, the suspension of preferential treatment imposed by the EU on Myanmar for breach of obligations is an act in the exercise of a right conferred on it by an international treaty, rather than a unilateral sanction.

The measures adopted in the EU GSP withdrawal mechanism also differ from unilateral sanctions. Temporary withdrawal of treatment leads to a full or partial increase in tariffs on exports from the beneficiary country to the EU, which has an indirectly negative impact on the affected industry. Unilateral sanctions, on the other hand, only impose asset, trade, and travel restrictions on the responsible parties or persons formally. In contrast, the temporary suspension of GSP has a wider impact range but less powerful restriction. Countries under suspension are not subjected to a ban, but to unfavourable

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[253] Supra note 74 at art 19-20.

[254] European Union, "Generalised Scheme of Preferences",< https://policy.trade.ec.europa.eu/development-and-sustainability/generalised-scheme-preferences_en>, ("Developing countries are automatically granted GSP...")

trade treatment *vis-à-vis* other countries. The countries which are suffering higher tariff due to temporary withdrawal can continue to export goods to the EU under normal EU customs tariff conditions after the removal of the preference.

The EUGSP temporary withdrawal provision also does not provide for a review or remedy mechanism. After the suspension, only the Commission has the power to decide when to reinstate GSP treatment in a beneficiary country. Neither the beneficiary country nor the individuals in the country have the right to apply to the Commission for reinstatement of treatment in the GSP Regulation. However, under the EU's current external unilateral sanctions, sanctioned persons or entities can challenge the Council's sanctions resolution through both administrative and judicial means. In the 2018 Sanctions Principles Document, the EU Council Secretariat provided sanctioned persons with the means to lift sanctions under administrative procedures.[255] Sanctioned persons may also rely on the right to judicial relief granted to specific persons or entities under Article 263 TFEU to sue directly at the CJEU for judicial review of specific restrictive measures imposed by the Council against an individual. Since the GSP temporary withdrawal procedure does not target the specific interests of individuals, individuals or undertakings in the affected beneficiary countries do not have the right to bring an action against the CJEU in this case either.

The temporary withdrawal provision of the EUGSP differs in many aspects from other existing EU unilateral sanctions. The human rights impact on the sanctioned party therefore also needs to be analysed from a different perspective.

### 1.2 Human Rights Risks in Temporary Withdrawal

The EU has been aware of the potential human rights threats that this comprehensive sanction may pose. In the decision to temporarily withdraw GSP treatment from Cambodia in 2020, the European Union abandoned the practice of comprehensive tariff suspension for the first time and conducted a pre-sanctions socio-economic impact

[255] Council of the European Union, Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy, 5664/18, 4 May 2018 at ANNEX, para 18-20.

assessment on Cambodia.[256] In response to the European Parliament's question about the delay in initiating an investigation into the withdrawal of GSP from Myanmar in 2022, the European Commission stated that this decision must avoid "any adverse impact on the lifestyle of Myanmar's population"[257]

1.2.1 Lack of Remedy

The GSP regulation does not provide sufficient avenues of participation and remedies for individuals in beneficiary countries who are adversely affected by economic sanctions in the temporary withdrawal procedure. This cuts off the possibility for the affected innocent people to express their views on whether to impose economic sanctions. It is difficult for individuals to remedy their fundamental rights that may have been eroded due to sanctions.

International human rights law calls on the sanctioning party to provide the sanctioned party with effective procedures for redressing its rights. At the fifty-fourth session of the Human Rights Council, the UN High Commissioner for Human Rights, Volker Türk, set out the requirements for the legitimacy of international sanctions. The core features of legitimacy he listed were the "fairness of process, and availability of effective review and remedy."[258] Article 8 of the UDHR declares that individuals whose constitutional or statutory fundamental rights have been violated will be entitled to "an effective remedy by the competent national tribunals", while article 10 declares that individuals will also be entitled to "a fair and public hearing by an independent and impartial tribunal" before their rights and obligations are adjudicated.[259] The ICCPR continues to expand on this formulation by requiring States to provide individuals whose rights and freedoms have been violated with the right to an effective judicial remedy.[260] In the context of international sanctions against individuals, and in line with the High

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256 Supra note 195.

257 Supra note 9.

258 Volker Türk, "Biennial panel discussion on unilateral coercive measures and human rights 'The impact of unilateral coercive measures and overcompliance on the right to development and the achievement of the Sustainable Development Goals'", 14 September 2023, <https://www.ohchr.org/en/statements-and-speeches/2023/09/impact-sanctions>

259 UNGA, *Universal Declaration of Human Rights*, 217 A (III), 10 December 1948 at art 7,10.

260 UNGA , *International Covenant on Civil and Political Rights*, 999 U.N.T.S 171, 16 December 1966 at art 2.3.(b).

Commissioner's opinion, a competent tribunal should be seen as a national judicial body with jurisdiction over the subject of the sanction and which can quickly achieve effective review and remedy.[261] There is still no international consensus on whether this formulation is customary international law, but some States have accepted and implemented this requirement in their internal justice systems.[262]

The EU meets the process requirements of human rights law in its ordinary targeted sanctions regime. As an international organization with all member states having ratified the ICCPR, the EU's legislation and administration are equally required to respect and comply with the obligations of its member states under previous international treaties. Article 47 of the CFREU likewise establishes the fundamental right of individuals to "the right to an effective remedy" when their legal rights have been infringed by EU institutions.[263] Under the current EU judicial system, "[a]ny natural or legal person" can deliver cases before the CJEU for specific restrictive legislation imposed on them by EU institutions, thereby subjecting sanctions adopted or enforced by the EU to judicial review by the CJEU.[264] In terms of enforcement, the sanctioned individual can refer the case back before the court when the EU institutions refuse compliance with the CJEU's judgment, and the CJEU will then realize the remedy for the sanctioned person in accordance with the powers granted to it under the EU's basic treaties.[265] The ICCPR only imposes a duty on the state to provide judicial remedies to individuals whose civil or political rights have been violated. The CJEU extends this protection in EU law to the right to a hearing, judicial remedies and property rights of citizens affected by EU sanctions under ECHR and CFREU. However, the general premise of this remedy model is that natural persons, legal persons, and other organizations must apply to the courts for a judicial remedy against acts that

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261 Supra note 258.

262 Kristina Daugirdas & Sachi Schuricht, "Breaking the Silence: Why International Organizations Should Acknowledge Customary International Law Obligations to Provide Effective Remedies." in Peter Quayle, *The Role of International Administrative Law at International Organizations: AIIB Yearbook of International Law 2020*, Leiden, Netherlands: Brill, (2021) at 64-5.

263 Supra note 47 at art 47.

264 Supra note 35 at art 263.

265 *Ibid.*, at art 265.

directly restrict them or have a direct impact on them.[266] The temporary withdrawal mechanism of the GSP does not aim at prohibiting individuals. All the withdrawal decisions made by the European Commission do not meet the criteria of jurisdiction before TFEU since individuals in beneficiaries are not the direct targets.

The European Union does not guarantee remedy rights and procedural rights in the temporary withdrawal mechanism in the GSP scheme. The only procedure in which natural persons or legal persons can participate in this mechanism is the submission of information to the European Commission before the final decision is taken.[267] Individuals or legal persons who are not directly affected by the decision to withdraw do not have the right to apply to the CJEU for judicial review after the decision has been taken. As noted by the OHCHR Special Rapporteur, this mechanism "guarantees only limited access to justice, and could not be qualified as providing full procedural and due process guarantees."[268] Having denied citizens or organizations of beneficiary countries affected by the suspension of preferences the right of judicial review to ask the CJEU to review the European Commission's decision, the EU has also failed to provide administrative avenues for review in the GSP regulation. The model of judicial review and remedies that has been well established under the EU's targeted sanction has not been extended to the EUGSP's temporary withdrawal mechanism. In the CJEU's jurisprudence on individual sanctions against Myanmar, the Grand Chamber found that EU restrictive measures against individuals must be based on "a sufficient link between the persons concerned and the third country targeted by the restrictive measures".[269] However, in the temporary withdrawal of the GSP, the negatively affected people of Myanmar are not allowed to access the judicial review even on the basis of the existence of such a "sufficient link".

Different from general targeted sanctions regimes, the EU has failed to provide adequate procedural access and remedies to the people of Myanmar affected by the

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266 *Ibid.*, at art 263.

267 *Ibid.*, 35 at art 3, 6.

268 UNGA, "Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan", UN Doc. A/HRC/48/59, 8 July 2021 at para 93.

269 Judgement of 19 May 2010, *Pye Phyo Tay Za v Council of the European Union*, Case T-181/08, EU:T:2010:209, at para 45-6.

temporary withdrawal mechanism of GSP. The failure to provide effective remedies puts the mechanism at risk of violating international and EU internal human rights law obligations.

### 1.2.2 Damages in Socio-Economic Rights

Negative effects of unilateral sanctions have been acknowledged by many countries. In the 2022 UN General Assembly Resolution, unilateral sanctions are recognized by most developing countries as an international act that creates "additional obstacles to the full enjoyment of all human rights by peoples and individuals under the jurisdiction of other States" by negatively affecting the economic and social development of developing countries.[270] The resolution also makes a point of noting the disproportionately destructive nature of this behaviour on vulnerable groups of society. EUGSP temporary withdrawal mechanisms that target national economies and use economic restrictions as a tool can similarly have an impact on substantive human rights conditions within the target country.

Suspension of tariff preferences is the core measure of the Temporary Withdrawal Mechanism. This measure is not a highly restrictive trade embargo, but the economic damage it generates is still direct and severe for export traders and industrial workers in the original beneficiary countries. Other social impacts resulting from the temporary withdrawal will further interfere with the enjoyment of human rights by the populations of the sanctioned beneficiary countries.

a) Substantial Rights

External sanctions may interfere with the right of peoples to self-determination. ICESCR is based on the right of peoples to self-determination in economic, social, and cultural endeavors and re-clarify the right to develop these endeavors freely for the peoples.[271] In 1970, a Declaration on Friendly Relations and Cooperation among States held that States could not "use or encourage the use of economic, political or any other type of measures to coerce another State" to obtain concessions on sovereignty or to

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[270] UNGA, "Resolution adopted by the General Assembly on 15 December 2022, Human rights and unilateral coercive measures", UN Doc. A/RES/77/214 at 3.

[271] UNGA, International Covenant on Economic, Social and Cultural Rights, 999 U.N.T.S 3, 16 December 1966 at art 1.

profit from the coerced State.[272] External economic sanctions are usually aimed at changing the domestic status quo of the sanctioned state, and their purpose is to force the sanctioned state to make concessions within the bounds of its sovereignty. In United Nations documents, developing countries criticize this act as a violation of the principle of non-intervention, while developed countries insist on opposing this formulation.[273] This impasse has prevented the existence of a consensus in the international community on the legality of unilateral coercive measures under customary international law. In the 1984 ICJ case, Nicaragua accused the United States of interfering in its internal affairs since the fact that the United States had "withdrawn its own aid" in the economic sphere and had "imposed a trade embargo".[274] However, the ICJ did not ultimately find that either withdrawal of aid or imposing an embargo constituted a violation of customary international law.[275] Thus, in the absence of laws and jurisprudence in the international community that explicitly prohibit unilateral sanctions, the number and frequency of unilateral sanctions continue to increase.

In ICESCR, the deprivation of a people's means of subsistence would also be considered a violation of the Covenant.[276] The subjects who may violate this obligation are not limited in a sovereign state. ECOSOC noted in 1997 that both UN economic sanctions and the increasing number of unilateral economic sanctions have an impact on a wide range of substantive rights of the populations of the sanctioned countries.[277] The negative consequences of these sanctions are even more serious in relation to the rights of the population to necessities, education, and work. ECOSOC therefore calls on the international community, while upholding civil and political rights in the context of sanctions, to provide the same level of protection to economic, social, and cultural

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[272] UNGA, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UN Doc. A/RES/2625(XXV), 24 October 1970 at annex.

[273] Supra note 270.

[274] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p.14 at para 22.

[275] *Ibid.*, at para 276.

[276] Supra note 271 at art 1.2.

[277] ECOSOC, "Implementation of The International Covenant on Economic, Social and Cultural Rights, General Comment No. 8 (1997), The relationship between economic sanctions and respect for economic, social and cultural rights", UN Doc. E/C.12/1997/8, 12 December 1997, at para 3.

rights, which are also fundamental rights.[278] The report of the Special Rapporteur on unilateral coercive measures concluded that the side effects of unilateral coercive measures about sanctions had already affected the groups associated with the subject of sanctions and could plunge the populations of the targeted countries into humanitarian crises.[279] Economic sanctions imposed on specific industrial sectors will also jeopardize the socio-economic rights of workers. On this basis, the Special Rapporteur believes that unilateral coercive measures causing loss of life have evolved into "a threat to international peace and security" and are increasingly becoming "a preamble for violent confrontation".[280] The GSP regime established by the EU is part of its external commercial policy. The temporary withdrawal procedure implements the objectives of the EU's business-human rights policy in this system by means of economic restrictions. To establish the human rights risks of the temporary withdrawal procedure, it is necessary to argue that the procedure has a sanctioning character for the beneficiary country.

Unilateral economic sanctions differ from foreign commercial policies. States always adopt economic policies in their foreign economic and trade activities, such as concluding more favourable trade and investment agreements and setting import restrictions under the general exceptions clause of the GATT. These policies cannot be equated with unilateral economic sanctions because "[a]ll states utilize their economic leverage to pursue foreign policy objectives".[281] Determining the boundary between sanctions and normal economic policies, i.e. characterizing unilateral sanctions themselves, is particularly important. In her report to the Human Rights Council in 2021, the Special Rapporteur argues that a uniform definition of the characteristics of unilateral sanctions does not currently exist,[282] but in her working paper she proposes

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[278] *Ibid.*, at para 7.

[279] UNGA, "Negative impact of unilateral coercive measures on the enjoyment of human rights Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights", UN Doc. A/HRC/42/46.

[280] *Ibid.*, at para 61.

[281] Saul Ben, David Kinley, and Jacqueline Mowbray, *The International Covenant on Economic Social and Cultural Rights: Commentary Cases and Materials*, First ed, Oxford United Kingdom: Oxford University Press, (2014) at 106.

[282] Supra note 268 at para 95.

a broad description of this international conduct[283]:

> *"The UCM are measures applied by states, groups of states or regional organizations without or beyond authorization of the UN Security Council to states, individuals or entities in order to change a policy or behaviour of a directly or indirectly targeted states, if these measures cannot undoubtedly be qualified as not violating any international obligation of the applying state or organization, or its wrongfulness is not excluded under general international law."*

The Special Rapporteur believes that one of the main characteristics of unilateral sanctions lies in the purpose of their acts. In contrast to national economic policies, unilateral sanctions seek to bring about a change in the policy or behaviour of the sanctioned State through the pressure of sanctions. This characteristic is reflected in the EU's definition of CFSP sanctions, which states that sanctions should "have maximum impact on those whose behaviour we want to influence."[284] The GSP temporary withdrawal provision also aims at this purpose. The EU temporarily excludes from trade preferences those beneficiary countries that have violated non-economic commitments. This tactic is the very embodiment of the use of economic sanctions to achieve political ends.

The difference exists between the EU's GSP temporary withdrawal provision and targeted sanctions. EU targeted sanctions can aim at exact parts of activities in sanctioned countries, for example by imposing arms embargoes, prohibiting the supply of specific goods and services to the sanctioned country, etc. These sanctions may have a serious impact on specific industries and exports and imports of goods and services of the sanctioned country, but they do not target all exports of the sanctioned country. The temporary withdrawal is the opposite in both respects. By raising tariffs on goods from beneficiary countries, the EU has created tariff barriers for a specific country in the internal market. While this move causes the beneficiary country to lose its original

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[283] Alena Douhan, "Unilateral Coercive Measures: Criteria and Characteristics",<https://www.ohchr.org/Documents/Events/WCM/AlenaDouhan.doc>

[284] Supra note 134 at para 6.

trade preference status, the beneficiary country's right to export goods normally to the EU market remains. This leaves the temporary withdrawal mechanism under the GSP with the additional question of whether the economic instruments it employs satisfy the threshold for economic sanctions. To define this mechanism as an economic sanction, Portela proposes two criteria, namely that GSP withdrawals "entail the suspension of a benefit that would otherwise be granted" and that the political factor of "the grounds for their withdrawal are politically motivated."[285] This political concern is integrated into the behavioral purpose that the withdrawal mechanism is intended to achieve. The reference to the benefit that would otherwise be granted in the economic factor, on the other hand, calls for a careful analysis of the economic instruments of GSP trade preferences.

b) Development Rights

The benefits to be conferred derive from international economic law and the legal arrangements that led to the establishment of this legal arrangement were designed to guarantee the right to development of developing countries. As noted above, its legal basis can be traced back to the UNCTAD resolution and the Enabling Clause of the GATT. The Conference cited the Algiers Charter of the Group of 77 in the resolution of the Second Conference on Trade and Development in 1968 on the granting of trade preferences to developing countries.[286] In the Charter, the Group of 77 explicitly called for international support for developing countries to achieve economic and social development and human rights progress and requested UNCTAD II to make special trade arrangements to address the development needs of developing countries.[287] This thirst for development developed into a wave of calls for it to be recognized as a fundamental right in the international community, particularly in the group of developing countries.[288] In 1986, the UN General Assembly adopted the Declaration on the Right to Development, which defines the right to development as a human right,

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[285] Supra note 13.

[286] Supra note 88.

[287] Group 77, *Charter of Algiers*, 10-25 October 1967 at part 2.A.2.

[288] ECOSOC, "Commission on Human Rights Report on The Thirty-Fifth Session (12 February-16 March 1979), Economic and Social Council Official Records, 1979 Supplement No. 6" UN Doc. E/1979/36&E/CN.4/1347 at 108.

both collective and individual and states have "primary responsibility for the creation of national and individual human rights".[289] In its interpretation of the Declaration, OHCHR has identified this statement as creating an obligation on States to promote the right to development at both the national and international levels.[290]

Measures by developed countries to supply preferential trade arrangements to developing countries are a manifestation of the fulfillment of their international obligations under the right to development. The UNCTAD resolution recognizes the legitimacy of trade preferences for developing countries in international trade, and at the same time requests the General Assembly Committee to supply clarification to GATT to amend the trade principles of GATT to provide legitimacy for this treatment from the perspective of international economic law.[291] When the European Commission presented its legislative proposal for the current GSP regulation in 2011, it regarded this preferential treatment as "one of several enablers that sustain development through trade" and referred to the function of preferential treatment's in the UN's goal of eradicating poverty.[292] It cannot be ignored that the UNCTAD resolution only confirms the legitimacy of this preference in the field of international trade. Even in the GATT Enabling Clause, which gives legitimacy to the GSP in international trade law, the parties agree only on the condition that they "may accord differential and more favourable treatment to developing countries".[293] Under international economic law, developed countries have no legal obligation to provide preferential trade treatment to developing countries. Nor is it mandatory under international human rights law or customary international law for developed countries to fulfil their international obligations to promote the right to development in the form of economic preferences to developing countries. However, in current economic practice, most developed countries, together with the EU, have translated and implemented this system of trade preferential arrangements into the GSP regime. In

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289 UNGA, *Declaration on the Right to Development* UN Doc. A/RES/41/128, 4 December 1986,

290 OHCHR, "Frequently Asked Questions on the Right to Development", Fact Sheet No. 37, 2016 at 4.

291 Supra note 88 at para 4.

292 European Commission, "Proposal for a Regulation of The European Parliament and of The Council applying a scheme of generalised tariff preferences", COM (2011) 241 final, 10 May 2011 at 3.

293 WTO, "Decision of 28 November 1979", WTO Doc. L/4903 at para 1.

doing so, the European Union, as well as other developed countries, aids the developing countries voluntarily in the implementation of the right to development at the international level.

The temporary withdrawal of trade preferences under the EUGSP would result in the loss of benefits that would otherwise be granted to the beneficiary country and would further lead to the deterioration of the country's right to development. In the GSP treatment provided by the EU, trade beneficiaries are "all developing countries" listed in the schedule of the regulation. According to the EU criteria, there are only two economic requirements that need to be met for inclusion in the list of beneficiaries. The developing country should be below the upper-middle-income level of the World Bank's income classification and it should have no other preferential trade arrangements with the EU. By these two standards, it can be deduced that the EU offers the GSP programme as a backstop to all economically backward developing countries that do not have other trade preferences with the EU. For beneficiaries of the programme, they share the EU's trade preferences with other developing countries on similar terms. The essence of the temporary withdrawal mechanism is to differentiate the suspended beneficiaries from other developing countries under the same arrangement by derogating from their trade benefits. The EU GSP arrangement creates a group of developing countries that enjoy special treatment and provides discriminatory trade standards to specific countries within the group by removing the special treatment and restoring general terms of trade, thus achieving the purpose of exerting economic pressure from outside on the domestic policies and measures of the beneficiary countries. The Enabling Clause does not explicitly provide for non-trade considerations in GSP arrangements, but rather requires that countries offering such special trade preferences "do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial, economic, social and cultural needs".[294] The EUGSP, which is conditional on human rights safeguards and social governance, clearly helps developing countries

[294] *Ibid.*, at para 5.

to raise their level of domestic development. However, the EU's requirement that beneficiaries accept the temporary withdrawal mechanism as a punitive mechanism does not serve the developmental, financial and trade interests of the beneficiaries. As argued above, the relatively discriminatory treatment created by the mechanism would place the beneficiary country in a *de facto* sanctioned situation and have a negative impact on social development and the lives of citizens in the beneficiary country. Thus, following the arrangement of rights and obligations in the regulation, the economic sanction method adopted by the EUGSP's temporary withdrawal mechanism for beneficiary countries in violation of non-trade objectives deprives the targeted country of the trade benefits to which they would enjoy together with other developing countries. By dividing targeted country from beneficiary countries, differential treatments of trade constitute economic discrimination for the targeted country.

There is no source of international law that directly regulates unilateral sanctions. The EU's strategy of encouraging developing countries to upgrade their domestic human rights and governance conditions through economic incentives, such as the GSP+ arrangement and other economic policies, is an exercise of the EU's sovereignty in commercial activities. This does not violate its obligations under international economic and human rights law. However, when the EU suspends the preferential treatment of General GSP countries or EBA countries, which were already enjoying preferential treatment due to their economic status, this negative economic measure shocks the export industries of the targeted countries by raising the export transaction costs and forcing their economic actors to find alternative markets. The Declaration on the Right to Development places an obligation on States to "encourage the observance and realisation of human rights" and states that this obligation is to be realised through the creation of "national and international conditions favourable to the enjoyment of human rights".[295] The economic sanctions used by the European Union to achieve its aim of promoting human rights worsen the economic conditions in the beneficiary countries and their international treatment. Such sanctions not only have a negative

[295] Supra note 289 at art 3.

impact on the enjoyment of basic rights and the right to development of the population of the sanctioned countries, but also constitute a humanitarian crisis for the sanctioned population in serious cases.

c) Humanitarian Risks

Concerns about the humanitarian risks of economic sanctions persist. The consequences of trade embargoes and financial sanctions, which deprive targeted countries of the means to obtain necessary humanitarian supplies, may further deteriorate the living conditions of the population of the targeted countries, which are already in a precarious environment. The United Nations Office for the Coordination of Humanitarian Affairs has issued a guidebook that lists the negative impact of economic sanctions on the survival of the population of the targeted countries.[296] With this potential risk in mind, the UN Security Council adopted a resolution in 2022 stating that all sanctions imposed by the UN and its member states under Chapter VII of the Charter shall not impose restrictions on the provision of humanitarian goods and services to the populations of the sanctioned countries, including, but not limited to, restrictions on finance, assets and trade.[297] The principle of humanitarian exemption in the context of United Nations economic sanctions has been implemented through this resolution. In addition to international sanctions, the EU has accepted this principle and extended its application from UN sanctions to unilateral sanctions initiated by the EU.[298] Since the GSP Temporary Withdrawal Mechanism is not a restrictive measure within the framework of the CFSP, it naturally cannot be granted humanitarian exemption in the field of trade. The temporary withdrawal of trade preference also creates humanitarian risks. . The immediate consequence of the suspension of trade treatment is a negative impact on the export industry of the sanctioned State, which further endangers entities and workers within the industry. Even if the target country is able to reorient its trade, its economic performance will be negatively impacted by both the short-term decline in

[296] IASC, "Handbook for Assessing the Humanitarian Implications of Sanctions", October 2004.

[297] UNSC, "Resolution 2664 (2022) Adopted by the Security Council at its 9214th meeting, on 9 December 2022", UN Doc. S/RES/2664 (2022).

[298] Council of European Union, "COUNCIL REGULATION (EU) 2023/331 of 14 February 2023 amending certain Council regulations concerning restrictive measures in order to insert provisions on a humanitarian exemption", OJ L 47/1, 15 February 2023.

competitiveness and the additional costs of reorienting trade, which will deteriorate the situation of the ordinary employee. While the suspension of GSP treatment does not directly prohibit the import and export of humanitarian goods and services or block financial access to humanitarian aid in the beneficiary country, "higher economic costs act as an intermediate mechanism leading to the humanitarian costs of sanctions."[299] Affected workers will lose their means of livelihood, and the fact that unemployment and a deteriorating work environment caused by economic sanctions will limit the ability of people to access basic living materials.

2. Criminal Charges against Economic Coercion: The Case of Venezuela

There have not been many cases in international litigation brought by sanctioned States against acts of unilateral economic sanctions. The previously mentioned case of *Nicaragua v. United States* was the first case before the ICJ to deal directly with unilateral sanctions. Since the current international law does not guarantee the right of states to be free from economic coercion in the international community, and ICJ jurisprudence has found that states are not obligated by international law to maintain economic relations with another state on a permanent basis, the ICJ determines whether economic and trade relations between States should be maintained on the basis of commitments made in bilateral or multilateral agreements.[300] Unilateral economic sanctions may be charged as an international criminal offence and reviewed by the ICC even if there are no rights and obligations in relation to economic relations between two countries.

A small number of States adopted the national position of treating economic coercion as a criminal offence.[301] The only allegation brought before the ICC was initiated by Venezuela. So far, the ICC's prosecution office are still reviewing the charges of crimes against humanity involving economic sanctions. Documents from the Venezuelan prosecution and scholarly opinions related to the prosecution reflect some of the risks

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[299] Özgür Özdamar & Evgeniia Shahin, "Consequences of Economic Sanctions: The State of the Art and Paths Forward", (2021) 23:4 Int. Stu. Rev 1646 at 1657.

[300] Supra note 274 at para 276.

[301] UNGA, "Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan", UN Doc. A/HRC/48/59, 8 July 2021 at para 85.

and controversies of unilateral economic coercion at the level of international law.

2.1 Claims from Venezuela

In 2020, Venezuela filed a charge of crimes against humanity against the United States for economic sanctions with the Office of the Prosecutor of the ICC, linking unilateral economic sanctions against a State to an international crime. While still at the stage of preliminary examination, this prosecution also provides a potential approach of international judicial remedy for States undergoing sanctions.

From a ban on transactions with specific oil companies in 2017 to restrictions on the financial services of the Central Bank of Venezuela in 2019, Venezuela has endured multiple rounds of economic sanctions from the United States.[302] Targeted, financial and oil sector sanctions against Venezuela remain in place. According to the U.S., these sanctions were adopted because of Venezuela's tolerance of anti-democracy, human rights exploitation, and corruption, as well as its support for terrorism. While these sanctions have targeted some Venezuelan enterprises and specific industries, their consequences have had a more far-reaching negative impact.

Venezuela claims that these unilateral sanctions have caused serious harm to its population. In its supplementary submission to the Office of the Public Prosecutor, Venezuela maintains that the United States sanctions have led to violations of the rights of the population to food, health care and education, and to an increase in the mortality rate among children and adults.[303] It claimed that the sanctions imposed on its mainstay industries had led to a drastic reduction in its oil exports and that the sanctions imposed on the financial sector had increased the cost of its imports. The inflationary crisis it is currently experiencing is also being used as an economic weapon to confront and overthrow the current government in the face of a multitude of negative economic factors. Venezuela claims that these unilateral coercive measures "have impacted all aspects of the socio-economic life and have massively lessened a wide range of human

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[302] United States, *Venezuela Defense of Human Rights and Civil Society Act of 2014,* 50 U.S.C. 1701. Also see United States, Executive Order.13692, 13808, 13827, 13850, 13884.

[303] ICC, Referral submitted by the Government of Venezuela, < https://www.icc-cpi.int/itemsDocuments/200212-venezuela-referral.pdf >. ("*...a fin de remitir para su conocimlento les hechos que en su conjunto constituyen crimenes de lésa humanidad cometidos contra el pueblo venezolano...*")

rights."[304]

Venezuela complains that the unilateral sanctions imposed by the United States satisfy the elements of crimes against humanity. In its contribution, Venezuela acknowledged that there was no precedent for that allegation but argued that acts by which a State's policies caused harm to the people of another State should also be regarded as constituting crimes against humanity.[305] It cites prior jurisprudence to demonstrate that the phrase "widespread or systematic attack" in the list of crimes against humanity in article 7 of the Rome Statute does not refer only to an actual attack of a physical nature.[306] Based on this provision, Venezuela argues that the United States sanctions relate to acts of murder, extermination, forcible transfer, and persecution against a particular race. Since these facts and jurisprudence, Venezuela has brought substantive charges against the United States for the sanctions.

In the realm of procedural considerations, Venezuela posited that, despite the origination of the decision to impose sanctions within the United States, the tangible ramifications thereof transpired within the sovereign jurisdiction of a State party to the Rome Statute. Anchored in Article 12 of the Statute, which endows the International Criminal Court (ICC) with jurisdiction over offenses transpiring in a State acceding to the Statute, Venezuela contended that a segment of the criminal conduct transpired within its territorial confines. Consequently, Venezuela advanced the proposition that the ICC should wield jurisdiction over this international criminal act. In support of its stance, Venezuela referenced antecedent jurisdictional determinations by the ICC in cases such as “South Korea situation” and “Office of the Prosecutor v. Bangladesh/Myanmar”, positing that the ICC, consistent with precedent, possessed the authority to prosecute individuals culpable for criminal conduct occurring partially within the territory of a State party to the Rome Statute.[307]

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[304] ICC, Referral pursuant to Article 14 of the Rome Statute to the Prosecutor of the International Criminal Court by the Bolivarian Republic of Venezuela with respect to Unilateral Coercive Measures, < https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/20-4-AnxI > at para 12.

[305] *Ibid.*, at para 70.

[306] *Ibid.*, at para 71-3.

[307] The Office of the Prosecutor in ICC, “Situation in the Republic of Korea Article 5 Report”, June 2014 at para 39. (It is not possible to separate the conduct of firing from the conduct of hitting the targeted area...) See also ICC Pre-Trial Chamber III, “SITUATION IN THE PEOPLE’S REPUBLIC OF BANGLADESH/REPUBLIC OF THE

Turning to the matter of complementarity within the admissibility framework, Venezuela, guided by Article 17 of the Statute, contended that the United States' judicial apparatus was ineffectual in prosecuting individuals responsible for the imposition of sanctions. Concurrently, Venezuela maintained its inability to assert jurisdiction over the impugned individuals.[308] Consequently, Venezuela asserted the imperative for ICC intervention to ensure the efficacious adjudication of the US sanctions comportment.

With respect to gravity as a facet of admissibility, Venezuela posited that the economic sanctions levied by the United States amounted to an international criminal offense, wielding a deleterious impact on the economic, social, and cultural human rights of its nationals. Moreover, Venezuela contended that such sanctions flagrantly contravened sovereignty and the right of peoples to self-determination.[309] Therefore, Venezuela advocated for the initiation of a criminal investigation by the ICC into the imposition of sanctions and the individuals orchestrating them, underscoring its potential contribution to the preservation of the international order.

2.2 Objections

At present, Venezuela's allegations against the United States are at the initial stage of review by the Office of the Prosecutor. In its 2020 report on pre-trial activities, the Office of the Prosecutor had expected to conclude its jurisdictional review of the Venezuelan charges and enter admissibility proceedings in early 2021.[310] However, the case remains at the jurisdictional review stage to date. While the Office of the Prosecutor has not made any substantive judgement in this regard, academic objections to the charges have emerged.

Sanctions do not constitute internationally wrongful acts, and therefore do not constitute criminal acts, in terms of legality under international law.[311] As mentioned earlier, although United Nations resolutions and documents of States and regional

UNION OF MYANMAR", ICC-01/19, 14 November 2019 at para 43.

[308] Supra note 304 at para 116.

[309] *Ibid.*, at para 118.

[310] The Office of the Prosecutor in ICC, *Report on Preliminary Examination Activities 2020*, 14 December 2020 at para 104.

[311] Dapo Akande, Payam Akhavan & Eirik Bjorge, "Economic Sanctions, International Law, and Crimes Against Humanity: Venezuela's ICC Referral." (2021) 115:3 Am.J.Int'l.L 493.

organizations have a predominantly negative attitude towards unilateral sanctions, current and customary international law does not delegitimise the conduct of unilateral sanctions by States towards the outside world. In international criminal law, an internationally lawful act does not entail international criminal responsibility, and even an internationally wrongful act does not necessarily entail an international criminal act. International Criminal Tribunal for the Former Yugoslavia had recognized that principle in its decisions.[312] It is for this reason that the formulation of crimes against humanity in the Rome Statute deliberately excludes exceptions where the act in question is lawful at the level of international law. For example, in the case of persecution as a crime against humanity, systematic and severe persecution of a specific group of people constitutes a crime only if the conduct is "contrary to international law".[313] Consequently, in cases where sanctions are not internationally wrongful, the allegations of crimes against humanity made by Venezuela do not fulfil the prerequisites for constituting an international crime.

Unilateral economic sanctions do not constitute international crimes to the extent that they affect human rights, and the investigation, prosecution, and adjudication of international crimes by the ICC protects the fundamental rights enshrined in international human rights law and international humanitarian law. To constitute an international criminal act, the economic sanctions alleged by Venezuela would need to meet the requirements of elements for specific crimes in Rome Statute. The negative effects of economic policies adopted by one State against another cannot be compared to the sovereign acts of States.[314] The current International Bill of Human Rights limits the obligation of States to respect, protect and fulfil human rights to the territory of third parties under their jurisdiction and *de facto* control. Unilateral economic sanctions do not have direct obligations about the human rights situation in the State against which they are imposed. Therefore, their negative impact on human rights has not yet reached

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312 *Prosecutor v. Delalić*, et al. (Čelebići Camp Case), IT-96-21-T, Trial Chamber, Judgment, para. 406 (Int'l Crim. Trib. Former Yugo. Nov. 16, 1998), para 402-6.

313 UNGA, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998 at art 7.2.(g).

314 UNHRC, Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, UN Doc. A/HRC/25/CRP.1 at para 1121.

the level of admissibility before the ICC.

Unilateral economic sanctions do not directly target civilians.[315] Article 7(1) of the Rome Statute requires that the commission of a crime against humanity be "directed against any civilian population", and the ILC considers that the word "direct" here means that the criminal act is intended to be directed against a specific civilian population.[316] For example, economic sanctions taken directly against civilians with the intent to cause famine may satisfy the elements of a crime against humanity. However, in the case of the unilateral economic sanctions adopted by the United States, the ultimate intent was to put pressure on the Venezuelan government and policymakers, not to take economic revenge against the civilian population. Even if this behaviour caused harm to the population, these harms were the spillover effect of economic pressure, not the original intent of the sanctions' imposers. The charges brought by Venezuela therefore did not satisfy the conditions for the establishment of crimes against humanity.

Current objections to Venezuela's allegation have centred on substantive conditions. Some scholars believe that the unilateral sanctions adopted by the United States do not satisfy the prior jurisprudence of the ICC and international law at the level of the substantive adjudication of the case. They consider Venezuela's allegation to the ICC to be an act of politicization and weaponization of international judicial approach rather than an international act that makes reasonable use of international remedies.

315 Federico J Wynter, "Economic Crimes against Humanity" (2020) 53:3 Cornell Int'l LJ 497.

316 UNGA, Report of the International Law Commission - Seventy-first session, UN Doc. A/74/10 at 38.

## V. Better than the Next: Reviewing the Reform Proposal of EUGSP

The EU is in the process of reforming its GSP arrangements. The proposed legal text in the legislative proposal would adjust the human rights obligations of the current beneficiary countries and the temporary withdrawal provision. These adjustments reflect the EU's new ambition to use its economic policy to promote international human rights protection and good governance. Meanwhile, these modifications also reflect the importance the EU attaches to the temporary withdrawal provision as a GSP sanction, and the human rights risks it may pose. The current reform proposal and latest development for the temporary withdrawal provision also represent a partial convergence of this provision with other human rights accountability mechanisms. By comparison with other human rights accountability mechanisms, the EU also needs to further improve this *de facto* accountability mechanism in its GSP arrangement to achieve reasonable protection of human rights in beneficiary countries.

### 1. Proposed Legal Text of New GSP Arrangement

The existing GSP General and GSP+ arrangements in the EU will were supposed to expire 31 December 2023, as originally planned in the legislation. According to the original legislative schedule, a new GSP arrangement will replace the current one at the beginning of 2024. However, the EU has decided to extend the validity of the current GSP regulation until 31 December 2027, as the ordinary legislative process could not be completed within the expected time-frame.[317] Currently, a legislative proposal for a new GSP arrangement is already under discussion in the European Parliament. This proposal involves the new requirement of commitments on human rights and environmental governance obligations for the beneficiary countries as well as the reform of the temporary withdrawal mechanism.

After incorporating the midterm assessment report, stakeholders' comments, as well as practicing experience, the proposal's goal for reform of beneficiary States' human rights obligations is to "[u]pdate the list of international conventions in a targeted and

[317] European Parliament, "Position of the European Parliament adopted at first reading on 5 October 2023 with a view to the adoption of Regulation (EU) 2023/… of the European Parliament and of the Council amending Regulation (EU) No 978/2012 applying a scheme of generalised tariff preferences", P9_TC1-COD(2023)0252, at para 3.

manageable way, while not jeopardizing the monitoring process". The objective of the reform of the temporary withdrawal mechanism is to "[m]ake the preferences withdrawal process more responsive in urgent cases". The legislative text suggested in the proposal further refines the implications of these objectives for the new GSP arrangements. [318]

1.1 New Requirements in Conventions

The changes to the commitments in convention obligations of the GSP arrangement in relation to human rights, environment and governance in the legislative proposal can be categorized in two ways. Firstly, the range of the listed conventions has been expanded to include more conventional obligations. Secondly, beneficiary countries of different projects will no longer differ in their compliance with the conventions on good governance and human rights. Every country in EUGSP is required to respect the principles of all conventions, although GSP+ beneficiaries still need to ratify all the conventions while other countries under different arrangements do not.

The proposed GSP regulation abandons one convention and adds six new conventions to the convention list.[319] The six conventions cover areas such as protection of socially vulnerable groups, labour rights protection, climate change control and combating international crime. These conventions fill in gaps that were not covered by the previous GSP arrangement, such as the protection of persons with disabilities, and update obligations under pre-existing conventions, such as the removal of the Kyoto Protocol and the addition of the Paris Convention on Climate Change. The proposal states that these new changes will promote respect for the SDGs in beneficiary countries and ultimately contribute to their achievement. In using the GSP as an "only appropriate action" to provide non-reciprocal EU market access arrangements for developing countries,[320] these new additions to the GSP regulation, which involve additional

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[318] European Commission, "Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council", COM(2021) 579 final, 22 September 2021 at 2.

[319] These conventions include: *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (2000), *Convention on the Rights of Persons with Disabilities* (2007), *Convention on Labour Inspection No.81* (1947), *Convention on Tripartite Consultations No.144* (1976), *The Paris Agreement on climate change* (2015), *United Nations Convention against Transnational Organised Crime* (2000).

[320] Supra note 318 at 3.

obligations, reflect the EU's ambition to use its external commercial policy to further contribute to global human rights governance.

The proposed GSP provision removes the differentiated requirements for different types of conventions and requires all beneficiary countries to ensure that their behaviour does not constitute a "serious and systemic violation" of the principles of all the conventions listed in the GSP regulations. The current regulation requires all beneficiaries under the GSP to comply with the principles of the human and labour rights conventions listed in part A of annex VIII. The environmental and social governance conventions set out in Part B of the same Annex are special requirements for GSP+ countries, and GSP+ beneficiaries are required to ratify all the conventions and not to make any reservations to the conventions that are inconsistent with the regulations. The proposed new regulation completely removes this distinction and treat the regulations as equivalent. GSP+ beneficiaries need to further ratify the six new conventions as required by the proposed regulation. As before, GSP General and EBA beneficiaries do not need to ratify any convention, but they are required to comply with the principles of all 32 conventions instead of part of them. For beneficiaries of above two arrangements, the current proposed new regulations significantly expand the scope of the obligations they must obey to get trade preference from the GSP scheme. Expanding the range of obligations for beneficiary countries under international conventions is regarded in the proposed provision as a stimulus to extend negative conditionality to the area of environmental and social governance, thus “further reinforc[ing] GSP’s contribution to sustainable development by updating the list of international conventions”.[321]

Within the proposed GSP regulation, the scope of the Convention obligations on human rights protection and social governance, which exist as a negative conditionality for the trade preferences, has been further expanded. The dichotomy between fulfilling human rights obligations and fulfilling environmental and social governance obligations among beneficiary countries has been broken down. All the beneficiaries can share a unified human rights and good governance obligation standards in EUGSP scheme.

[321] *Ibid.*, at 7.

This expansion, while emphasizing the equality between human rights protection and good governance, also creates more responsibilities for the non-GSP+ beneficiary countries since they need to fulfil conditions that they did not previously need to fulfil to receive trade preferences. The risk of introducing more national responsibilities will increase the likelihood that some beneficiaries will have their trade preferences temporarily withdrawn.

1.2 New Temporary Withdrawal Provision

The temporary withdrawal provision in the current GSP arrangement is praised by the 2018 EU Mid-Term Evaluation of the GSP as an "efficient and credible" tool that has "increased the EU's leverage" in advancing human rights governance and social governance extraterritorially.[322] Adjustments to this sanction provision reflect the EU's concerns about potential problems in its implementation. Since the mid-term evaluation, reforms to the temporary withdrawal provision have centred on three areas. First, in the 2020 decision on temporary withdrawal for Cambodia, the European Commission adopted for the first time a sanction that suspends preferences for some products.[323] Second, the proposed regulation provides the Commission with a shorter and simplified sanctions procedure when applying the temporary withdrawal clause to a beneficiary country in the event of an emergency. Finally, in applying this economic sanction, the proposed regulation requires the Commission to give due consideration to the negative socio-economic impact of the sanction, among other issues, in the decision-making process.

For the current GSP regulation, the previous overall sanction, i.e. applying only a suspension of full trade preferences, has been changed. Article 36 of the current regulation gives the European Commission the power to amend the regulation when the temporary withdrawal provision is applied. Prior to Cambodia's temporary withdrawal, the list of countries suspended under the general arrangement in ANNEX II of the regulation included only the country code and the full name of the country. This

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322 European Commission, “COMMISSION STAFF WORKING DOCUMENT Midterm Evaluation of the Generalised Scheme of Preferences”, SWD(2018) 430 final, 4 October 2018 at 40.

323 Supra note 233 at art 1.

formatting requirement did not consider the possibility of partial suspension of tariff preferences by the EU. In the Commission's decision to temporarily withdraw Cambodia's trade preferences, the EU decided to remove tariff preferences for only some products from Cambodia. In its decision, the Commission said it had taken the negative impact of this sanction on Cambodia's development needs and on workers and industry into consideration, as well as Cambodia's own remedies for the relevant breaches of the Convention's principles. Meanwhile, the Commission also amended the format of the ANNEX II to list all the sanctioned products when confirm a temporary withdrawal.[324] In the EU GSP regulation, the temporary withdrawal clause originally provided for both full and partial cancellation of product tariff preferences to be implemented, but the sanction towards Cambodia is the first time that the EU has taken a partial suspension approach. This legislative adjustment shifted the GSP withdrawal provision from an overall sanction to a sanction targeting part of a specific industry, thus bringing it close to the targeted sanctions that are commonly adopted in today's international and unilateral sanctions.

The proposed GSP regulation provides the Commission with a simplified procedure in case of emergency. The proposal concludes that the Commission has a long lead time to make a final decision by invoking the existing temporary withdrawal provision. Compared to the previous process, the duration of the 2012 GSP regulations has been seen as a major innovation in authorizing "the Commission to act rapidly in urgent cases".[325] However, the legislative proposal comments that this *de facto* sanctioning action often fails to respond in a timely manner to emergencies that occur in beneficiary countries. Accordingly, in the new proposed regulations, the Commission's monitoring period for beneficiary countries in urgent cases is reduced from six months to two months, and the period for making a final decision is reduced from six months to five months. This simplified procedure provides a simpler and more expedient way for the EU to impose temporary withdrawal upon beneficiary countries.[326]

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[324] *Ibid.*

[325] Supra note 322 at 9.

[326] Supra note 318 at 19.

The proposed GSP regulation requires the Commission to consider the negative socio-economic impact of withdrawal on the populations of the beneficiary countries in its decisions. The proposal specifically cites the Commission's decision to suspend Cambodia's trade preferences in its discussion of the temporary withdrawal provision. The proposal states that "it is necessary to carefully assess the socio-economic impact of withdrawal of preferences" to avoid their adverse impact on the industrial sector and socially vulnerable groups. Both in the general temporary withdrawal provision and the temporary withdrawal provision for GSP+ beneficiaries, the Commission "may, when appropriate, consider the socio-economic effect" when deciding on the temporary suspension of a beneficiary country's treatment.[327] This additional socio-economic effect assessment addresses concerns about the human rights risks of the sanction. However, this assessment is not a mandatory process. The criteria for the assessment and the measurement of possible impacts are dependent on the European Commission, the decision-making body for the imposition of sanctions.

In summary, the reform of the temporary withdrawal provision in the legislative proposal is twofold. On the one hand, the new summary decision procedure allows the Commission to impose economic sanctions under the GSP arrangements in a timely manner on beneficiary countries to uphold the GSP's commitment to the promotion of human rights and good governance. On the other hand, the Commission has narrowed the scope of products in beneficiary countries that are adversely affected by a suspension by means of a decision, and the legislative proposal provides an option for the Commission to consider the assessment of the socio-economic impact of a suspension before suspending a beneficiary country. These two changes reflect the fact that the EU is limiting the negative impact of this economic sanction on the social development and rights of the population in the beneficiary countries.

2. Reshaping Temporary Withdrawal Provision

While this unilateral, non-reciprocal trade preference arrangement is no longer novel in this era with an inflation in FTAs, it remains the EU's trade instrument that most directly

[327] *Ibid.*, at 7.

imposes detailed human rights obligations on beneficiary countries in its commercial policy.[328] As noted above, the proposed legislative changes to the GSP arrangement in terms of negative conditionality and temporary withdrawal clauses also reaffirm and promote this business-human rights policy objective.

The amendments to the temporary withdrawal provision in the proposed regulation reflect the EU's value proposition for the only human rights accountability mechanism under the GSP arrangement. The policy objective of the proposed text to reduce the negative impact of sanctions on society is consistent with the current characterization of other human rights accountability mechanisms in the international community. However, this reform measure does not fully respond to the criticisms and its human rights risks have not been fundamentally ameliorated by this change.

2.1 Proposed Provision with Human Rights

2.1.1 Human Rights Impact Assessment

Calls for sanctions-imposing states to conduct human rights impact assessments of sanctions are not rare. In his 2017 report to the Human Rights Council, the Special Rapporteur in unilateral coercive measures called on states imposing sanctions to consider the human rights impact assessment of sanctions as an obligation that accompanies the imposition.[329] By implementing this obligation of assessment throughout the process, the sanction initiating states can safeguard, to the greatest extent possible, the human rights conditions in the sanctioned State. In the proposed GSP temporary withdrawal provision, the European Commission is requested to assess, if necessary, the socio-economic impact of the suspension of treatment in the beneficiary country in advance. This proposed new provision includes the protection of social and economic rights into the considerations when implementing a temporary withdrawal.

A pre-suspension socio-economic impact assessment can cover the economic and social rights that are negatively impacted by this sanction. While the proposed GSP regulation does not give specific requirements for such an assessment, in 2015 the EU gave a

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[328] Supra note 103 at 139.

[329] UNGA, "Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights", UN Doc. A/HRC/36/44, at para 50.

guideline on the way in which human rights assessments of trade policies should be carried out. In this guidance, the EU sets out the criteria for screening the scope of the assessment, namely trade measures that have "significant human rights impacts", the specific human rights or groups of people that are likely to be affected, and whether these rights are non-derogate and absolute.[330] Among the specific human rights criteria, the guidance specifically lists the rights that are vulnerable to trade measures, namely economic, social and core labour rights. As mentioned earlier, the human rights affected by temporary withdrawal as a trade sanction are also mainly the rights listed in the guidance. Therefore, according to the EU guidance, this assessment mechanism should cover socio-economic rights affected by the suspension of preferential tariff treatment as a trade instrument.

The EU requires that the assessment should be based on objective human rights conventions. In its guidance, the EU considers that the assessment "should be based on the normative framework of human rights".[331] These normative frameworks include the core UN human rights conventions, some of the ILO labour rights conventions, CFREU, regional human rights conventions and customary international law. The EU does not leave it up to the body conducting the assessment to decide on the baseline, but rather requires that all human rights assessments of trade practices in the EU should be based on the normative legal text. This guidance limits the scope for the European Commission to weigh the results of pre-sanctions human rights impact assessments and provides beneficiary countries with a neutral basis for objecting to sanctions in the international human rights law.

The new assessment provision limited to macro socio-economic impact assessments. As described in the regulations, the assessment is only of the negative socio-economic impact of the temporary withdrawal of this trade instrument. The right of individuals and entities within the sanctioned state to redress for economic sanctions that have a direct and serious negative impact on socio-economic rights is completely ignored by

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[330] European Commission, Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives, <https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/991d8e1d-dbaa-49d6-8582-bb3aab2cab48/details> at 6-7.

[331] *Ibid.*, at 5.

the assessment provision. This restriction at the legislative level is incomprehensible, especially as the scope of temporary withdrawal has shifted from overall to partial sanctions. Guaranteeing the individual right of remedy would facilitate the individual challenges to excessive sanctions and further reduce the negative externalizations. In Appendix II of the Guidance, the EU argues that the ICCPR's proposal to "give victims effective remedies" is also something that should be evaluated and reviewed.[332] However, in the proposed new provision, the review of this economic sanction is restricted to the economic and social rights dimension.

The new assessment provision is not mandatory, and it concerns only *ex ante* assessment. A socio-economic assessment of a beneficiary country is not mandatory prior to the suspension of its tariff preferences. The European Commission can carry out the assessment if it deems it necessary. The arbitrariness in the application of the assessment provision would make it less useful in practice, especially when the temporary withdrawal mechanism has been criticized for being unresponsive. The time and efficiency costs for the Commission of initiating such an assessment would discourage it from taking such an action.[333] In addition, this assessment is limited to being initiated during "[i]n adopting the delegated act". The regulations do not require the Commission to continue this evaluation process while sanctions are being imposed. In other words, the assessment is merely an evaluation of possible future rights violations, and issues after the actual sanction has been imposed are not considered by the Committee. This further undermines the practical significance of the assessment.

In conclusion, the creation of a human rights assessment article from scratch in the temporary withdrawal provision of the GSP is an institutional design. The EU values the protection in innocent individuals and intends to minimize its negative impact. However, the scope and application conditions of this assessment article are limited by the text of the regulation, and its practical significance is therefore greatly reduced.

### 2.1.2 Targeted Sanctions

Currently, "sanctions have evolved... to a more limited form wherein targets of

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[332] *Ibid.*, at ANNEX II.

[333] Supra note 322 at 11.

sanctions are often individuals and non-state entities."[334] This form of sanction is not only broadly applied in the form of sanctions adopted by the UN Security Council, but also in sanctions imposed by regional organizations and in unilateral actions. The central feature of targeted sanctions is the limitation of constraints to individuals or specific behaviours of states, the former one as in the case of individual sanctions and the latter as in the case of sectional sanctions.[335] The main purpose of introducing this form of sanction initially was to " minimize the negative impacts on ordinary citizens in the target country."[336] The 2018 EU Midterm Report on the GSP states that some stakeholders recommended that the suspension of trade preferences should be limited to industrial sectors that do not comply with regulatory obligations, rather than a blanket suspension of all preferential treatment.[337] The 2020 Commission decision on the suspension of Cambodia's preferential treatment adopted this recommendation.

There are two types of targeted sanctions under the GSP arrangement, the withdrawal of preferences for industry sectors where there are specific human rights violations, and the withdrawal of preferences for major export industries in countries that do not comply with the principles of human rights and good governance. In the case of the suspension of trade treatment for Cambodia, for example, the Commission suspended tariff preferences for the country's exports to the EU of sugarcane, leather products, some clothing products, and some footwear.[338] The targeted sanctions on the sugarcane industry were a response to the Cambodian sugar industry's violation of its citizens' land and housing rights. Sanctions imposed on other industries put economic pressure on Cambodia's main export industries to force Cambodian policymakers to change their behaviour that violates the political and labour rights of their citizens in the country. In contrast to previous cases of suspension of treatment, the impact of targeted sanctions

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[334] Francesco Giumelli, "The purposes of targeted sanctions", in Thomas J. Biersteker, Sue E. Eckert & Marcos Tourinho, eds. *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action*. Cambridge: Cambridge UP, 2016 at 38.

[335] Anton Moiseienko, "Due process and unilateral targeted sanctions" in Beaucillon, Charlotte, ed. *Research Handbook on Unilateral and Extraterritorial Sanctions*. Cheltenham: Edward Elgar Publishing, 2021 at 406.

[336] Kimberly Ann Elliott, "The impacts of United Nations targeted sanctions", in Thomas J. Biersteker, Sue E. Eckert & Marcos Tourinho, eds. *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action*. Cambridge: Cambridge UP, 2016 at 172.

[337] Supra note 322 at 28-9.

[338] Supra note 233.

on the economic development of the beneficiary country was limited to a few specific industries, thereby minimizing the negative impact on the beneficiary country's whole economy. Withdrawal of industry-specific trade preferences also allows for the targeting of negative economic impacts on specific subjects of human rights violations, increasing the effectiveness of the sanctions regime in remedying violations of regulatory commitments by beneficiary countries.

Targeted sanctions under the GSP regulations continue to have a negative impact on the economic and social development of beneficiary countries. The targeting of sanctions under the temporary withdrawal provisions remains broader than for other targeted sanctions. First, in the case of suspension of tariff preferences, the industry-based criterion for differentiating the scope of sanctions, even though it has now been narrowed, remains overly broad. While sanctions on Cambodia's sugarcane industry have spared other sugar industries from economic loss, not all firms within the sugarcane industry have been involved in violations of residents' land and housing rights. An industry-based approach to set up the scope of the suspension does not ensure that the trade interests of clean industry individuals are protected. Second, imposition of sanctions on unrelated but important domestic industries in beneficiary countries to safeguard human rights is not proportionate. This approach denies trade preferences to individual industries on grounds that are not attributable to them. The main export industries of developing countries are often labour-intensive and provide significant local labour and development opportunities. Imposing economic sanctions on them for unrelated reasons would further aggravate the domestic economic situation and the labour-employment environment in developing countries, leading to a negative cycle of sanctions-aggravation-sanctions.

In summary, while the GSP temporary withdrawal provision provides a framework for sectional sanctions, it does not follow the traditional way of targeted sanctions. This reform can better safeguard the socio-economic rights in the beneficiary country than the previous blanket suspension, but it does not protect innocent individuals in the targeted industry from the direct impact of sanctions.

### 2.1.3 Remedy without Individuals

The most significant change in the provisional withdrawal procedure under the proposed GSP regulation is the introduction of Single Entry Point as a channel for receiving individual complaints.[339] This channel exists only for complaints of breaches of GSP commitments and provides a new basis for the European Commission to apply the temporary withdrawal provisions. However, the new regulation still does not establish any means of redress for affected individuals against a withdrawal decision, following the shift in the sanction from a block sanction to a targeted sanction.

The proposed temporary withdrawal provision does not provide for the possibility of judicial remedies, nor does it create avenues for administrative remedies. The CJEU remains unable to provide judicial remedies in the case of GSP adoption of targeted sanctions. Even if the scope of sanctions has been narrowed down to target specific industries in the beneficiary country, the specific measures are still not individualized. Individual industries affected by the suspension are still unable to invoke Article 263 TFEU to request a review of the Commission's decision by the CJEU.[340] In terms of administrative review, compared to the current regulation, the proposed provision adds a partial adjustment mechanism, whereby the scope of the relevant sanction should change when the conditions leading to the suspension change.[341] This mechanism could be used to lift the corresponding tariff sanctions when the beneficiary country partially adjusts its behaviour. But the proposed provision still does not provide a channel of relief for individuals affected by sanctions, and all information related to the adjustment of sanctions has to be transmitted to the European Commission on behalf of the beneficiary country's state. Individuals remain unable to obtain relief when their trade preference is withdrawn by the EU.

Thus, even with the introduction of a targeted sanctions framework under the post-2020 temporary withdrawal provision and the inclusion of human rights assessment in the proposed regulation, the only restrictive instrument in the GSP arrangement still does not fully address its risk of exacerbating the domestic human rights situation in the

339 Supra note 322 at 7.
340 Supra note 35 at art 263.
341 Supra note 322 at 13.

affected beneficiary countries.

### 2.2 Suggestions for Further Amendment

#### 2.2.1 From Sector Sanction to Individual Sanction

The Commission's current restriction on the scope of application of the temporary withdrawal provision may reduce the negative impact of this measure, but it does not yet fully realize the effect of the targeted sanctions, and the way in which the sanctions are applied to a part of the industry still has the potential to impact on innocent individuals. Continuing the trend of narrowing the scope of application of the provision to the individual level of the industry would therefore be more helpful in addressing the human rights risks.

The new GSP regulations could build on the withdrawal of trade preferences for specific product categories and further include the imposition of additional tariffs on individuals in the industry as an optional form of sanctioning. The GSP regulations could mimic the CFSP sanction of withdrawing preferential treatment for individuals in the industry. For example, the regulations could recommend that the Commission list individuals in the industry that have violated the regulatory commitments of the beneficiary country in annex II and impose additional tariffs on their exports. This approach should be parallel to the partial withdrawal of treatment in the current regulations and should be applied when the Commission is able to identify the subject of the violation. This targeted sanction on individuals can reduce the economic impact of EU measures on other individuals in the same industry and safeguard the socio-economic rights of the industry and workers when the violations are concentrated in only a few enterprises. The sanctioning model of the retained existing regulation can then be applied when violations of commitments are spread across industries, or when economic pressure on important industries is needed to change policies in beneficiary countries. This two-tiered model would reduce the disruptive effects of GSP sanctions on the economic development of beneficiary countries and achieve the policy objective of GSP to promote human rights governance while respect the socio-economic rights of people in developing countries.

Setting the individuals in industry as targets can create the conditions for judicial

remedies for some of the individuals affected by the GSP temporary withdrawal provision. Individual industries directly targeted by the Commission's decision can meet the prerequisites set out in Article 263 of the TFEU for a legal person to sue the Commission for an act, i.e., the existence of "an act addressed to that person or which is of direct and individual concern to them".[342] Individual sanctions allow some individuals to fulfil the conditions for applying for judicial remedies before the CJEU, while at the same time subjecting some of the GSP's sanctioning decisions to judicial review. This is in line with the international community's recommendation to establish a judicial remedy for sanctioned parties in the context of unilateral coercive measures.[343] This form of sanction also allows for the EU's partial suspension decisions to share a judicial oversight framework with other EU sanctions, thereby guaranteeing the political rights of individuals affected by suspension decisions to obtain redress within the EU.

2.2.2 Emphasizing Assessment

The socio-economic impact assessment in the proposed regulation is the procedural innovation most directly relevant to the human rights protection in the beneficiary State against which sanctions are imposed. However, the conditions for its initiation are rather arbitrary, and the assessment period is limited to the period prior to the implementation of the sanctions. Inheriting and expanding this assessment mechanism would integrate socio-economic human rights concerns throughout the sanctions process.

The new GSP regulation should require the European Commission to assess each decision to suspend treatment and to integrate socio-economic impact assessments throughout the sanctions period. Mandatory assessments would fix the costs of implementation, eliminate the possibility of the Commission not implementing assessments based on cost considerations and serve as a means of safeguarding the domestic human rights enjoyment conditions in the sanctioned beneficiary State. It is even more important to assess the socio-economic impact of sanctions throughout the

342 Supra note 35 at art 263.
343 Supra note 329 at para 48.

process after the decision has been taken into effort. Post-implementation impact assessments could be modelled on the initiation of a temporary withdrawal of an investigation, with the Committee deciding whether to initiate an assessment, based on information from sources such as reports of international organizations and civil society opinions. Mandatory pre-sanctions assessments and full-process assessments would provide the EU with multiple opportunities for administrative review to avoid serious or long-term human rights violations in the sanctioned State.

The whole process of human rights assessment would also provide a channel for some individual complaints to use the partial adjustment mechanism. A process-wide assessment could be initiated with input from civil society. Individuals in the affected beneficiary State can use this as a channel of recourse to provide the Committee with reasons for stop applying parts of sanction, while providing feedback on the socio-economic impact of the sanction. Human rights assessments could serve as an informal recourse to activate the partial adjustment mechanism, the only administrative remedy, in cases where the proposed regulation does not provide any recourse.

2.2.3 Positive Conditionality

Even if we enumerate the possible improvements mentioned above, it is still contradictory to create negative conditionality to encourage human rights in the GSP, an arrangement that provides trade preferences to developing countries. While it is debatable whether the negative incentives of denial of treatment for failure to meet standards can respect and realize the right to development of developing countries, the disregard for the rights of natural persons in the EU GSP's temporary withdrawal clause and the reliance on the non-neutral European Commission for decision-making signals the natural weakness of this mechanism in safeguarding human rights. GSP+, which is also in the GSP arrangement, takes a parallel approach of positive and negative incentives, and this arrangement conveys a lesson that is also worth considering.

From negative to positive conditionality, the EU's GSP arrangement can also be used as a basis for building a new GSP arrangement. For example, under the premise of guaranteeing the basic conventions and providing basic concessions, several human rights and good governance conventions in the proposed regulation will be used as a

set of commitment conventions, and beneficiary countries that fulfil the economic conditions and comply with the basic conventions will choose the conventions to which they want to commit. Based on the significance of the commitments, the EU offers a specific level of tariff preferences to specific beneficiary countries. For those beneficiary countries that are temporarily unable to realize the principles of the conventions, the uncommitted beneficiary countries are not subject to sanctions as a result. For those beneficiaries that have committed but do not comply with the principles of the Convention, they are only sanctioned with a specific tariff restoration. In other words, the new system scales up the model of GSP+ arrangements to the full range of GSP arrangements and divides trade preferences according to different levels of beneficiary commitments.

By moving from full negative incentives to a mix of positive and negative incentives, the new EU GSP arrangement minimizes the possibility of triggering a full suspension of preferential treatment and limits partial suspensions to a specific scope, thus minimizing negative economic and social impacts on the internal economy and society of beneficiary developing countries and safeguarding the economic and social rights of domestic populations.

## VI. Conclusion

The European Union's GSP arrangement was initially conceived to promote economic and social progress in developing countries, predicated on the emphasis and implementation of human rights and good governance by these countries under the influence of the EU's business-human rights policy. While this non-reciprocal trade preference policy is not widely popular in contemporary international economic relations, the GSP stands as the EU's unique tool capable of directly imposing conditions related to human rights governance. However, the implementation of this instrument designed to promote human rights often entails risks of human rights violations.

The temporary withdrawal clause under the GSP, as manifested in the case of its application to Myanmar, exemplifies one such risk. The Myanmar military government, originally expected to face economic pressure through sanctions, managed to evade such measures. Instead, export barriers and discriminatory trade practices adversely impacted Myanmar's export industry and industrial workers, resulting in a compromise of Myanmar's development rights and the socioeconomic rights of its domestic population.

As an international organization and, effectively, a quasi-supranational entity, the EU must adhere to international human rights norms in its activities and policies, particularly when exercising the national power it collects from its member states. The EU possesses a universally binding power over its member states through its uniform external commercial policy. In implementing the GSP as an external trade tariff preference policy, the EU is also obligated to uphold principles of human rights protection. However, an analysis of the Myanmar case and regulatory texts reveals potential risks inherent in the temporary withdrawal mechanism under this arrangement concerning international human rights law and humanitarian law.

Although there is currently no precedent in international jurisprudence relying on human rights law to determine the illegality of unilateral sanctions under international law, instances of unilateral sanctions are increasingly being brought before international

courts. The EU, in practice, has identified potential risks associated with the GSP's temporary withdrawal mechanism and has made some modifications to this mechanism in the proposed new GSP regulations, introducing a novel assessment mechanism to address potential human rights harms. Nevertheless, these changes remain inadequate in mitigating the negative human rights impacts on the populations of beneficiary countries. Drawing on international human rights obligations, this thesis proposes several reforms to this mechanism, including further refining the sanctions' targets, expanding the human rights assessment mechanism, and reforming the current negative incentive structure.

The temporary withdrawal clause of the EU's GSP should not entail sacrificing the human rights conditions of most innocent civilians to exert pressure on decision-makers or specific individuals. This does not imply advocating for the complete abandonment of economic sanctions—a potent weapon in the current field of international human rights law. However, in applying this tool, especially in the context of unilateral sanctions, the harm inflicted on populations exacerbates an already dire human rights situation. Only by striving to limit the scope of sanctions and providing avenues for redress can the GSP's proclaimed objective of promoting human rights governance truly become a reality.

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