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**Between Political Goodwill and WTO-Law:  
Human Rights Conditionality in the  
Community's New Scheme of Generalised  
Tariff Preferences (GSP)**

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## **IMPRESSUM**

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# Contents

I. Introduction.....	1
II. The legal and historical context of the GSP .....	2
1. A brief introduction to the GSP .....	2
2. Implications of WTO law for the Human Rights and Good Governance Clause of the GSP .....	4
a) The general framework.....	4
b) The case European Community Tariff Preferences.....	5
III. Human Rights conditionality in the special incentive arrangement (GSP+).....	8
1. How does GSP+ function? .....	8
a) The conditions for the eligibility for GSP+ .....	8
i) Technical criteria.....	8
ii) Relevant international conventions.....	9
iii) Requirements of implementation .....	13
b) The admission procedure and legal effects.....	14
c) Legal protection against the admission decision .....	18
d) Application in practice.....	21
i) The current situation.....	21
ii) The attitude of the Commission and first reactions .....	25
2. Does GSP+ comply with WTO-law? .....	27
a) The legality of the substantial admission criteria of GSP+ .....	27
i) International Conventions as an admission condition for GSP+ .....	28
ii) The condition of economic “vulnerability” .....	31
b) The admission procedure.....	31
c) Application in practice.....	32
d) The special case of the Republic of Moldova.....	34
IV. Human rights conditionality in the withdrawal clause .....	35
a) The conditions for withdrawing the preferences .....	35
b) The withdrawal procedure .....	36
i) The investigation procedure.....	36
ii) The evaluation period and adoption of the withdrawal decision .....	38
iii) The margin of discretion of the Commission and the Council .....	39
c) Application in practice.....	40
i) Coherence with the findings of international organisations .....	40
ii) Length of procedure .....	43
2. Does the human rights withdrawal clause comply with WTO-law?.....	45
a) Content and scope of the withdrawal clause.....	45

b) Procedural aspects	46
c) The application of the withdrawal clause .....	46
V. Conclusion .....	47
References .....	50

## I. Introduction

For a long time there has been a debate on how human rights can be enforced through international trade instruments. While political attempts to insert a human rights clause into the WTO agreements have not been successful so far,<sup>1</sup> such clauses have been included into free trade agreements and unilateral trade instruments, such as the system of generalised preferences.<sup>2</sup>

The present paper focuses on the European Community's Scheme of Generalised Tariff Preferences (GSP). It examines the recently adopted Regulation 732/2008, which sets out the regulatory framework governing the GSP from 1 January 2009 to 31 December 2011.<sup>3</sup> The paper essentially asks whether this system of human rights conditionality is more than just a window dressing on the part of the Community. It argues that despite various changes made to the GSP regulation, a number of problems remain with the credibility of this arrangement. Some of these also create problems in terms of the Community's WTO-law obligations.

The paper is structured as follows. After placing the human rights clause in the context of the Generalised System of Preferences, it analyses the WTO-law

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- 1 Especially the US and France had pushed for the insertion of such a social clause which has up to now however been prevented by the resistance of the developing countries, see Lopez-Hurtado, C. J., *The WTO Legal System and International Human Rights*, Graduate Institute of International and Development Studies (Geneva) 2006, pp. 114-116. For an attempt to construct WTO law in a way so as to allow for trade sanctions in case of egregious human rights violations see Howse, R./Mutua, M., *Protecting Human Rights in a Global Economy. Challenges for the World Trade Organization Rights & Democracy*, International Centre for Human Rights and Democratic Development) (Montreal) 2000, pp. 11-13.
  - 2 Examples are the Partnership Agreement between the African, Caribbean and Pacific States and the European Community and its Member States or the North American Free Trade Agreement (NAFTA). For an excellent overview see Doumbia-Henry C./Gravel, E., Free trade agreements and labour rights: Recent developments, *International Labour Review*, Vol. 145 (2006), No. 3, pp. 186-206 and Bartels, L., *Human Rights Conditionality in the EU's International Agreements*, OUP (Oxford) 2005, p. 241 et seq. For an overview about labour clauses in the United States regulations, see Compa, L./Vogt, J. S., Labor Rights in the General System of Preferences: A 20-Year Review, *Comparative Labor Law and Policy Journal*, 2001, pp. 199-238.
  - 3 Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007, OJ L 211, 6.8.2008, pp. 1-39 (hereafter: Regulation 732/2008).

framework and relevant case law of the WTO-Appellate Body. Subsequently, the rules and procedures of the GSP human rights clause are described in detail. Thereby some specific problems regarding its efficiency are analysed, and its compatibility with WTO-law is examined. The paper concludes by summarizing the main points of criticism and suggesting ways to improve the GSP's human rights conditionality.

## II. The legal and historical context of the GSP

### 1. *A brief introduction to the GSP*

The GSP of the Community is a legal instrument providing for unilateral tariff preferences for developing countries. It is governed by regulations adopted by the Council of Ministers.<sup>4</sup> Although it forms part of the foreign trade policy and the development policy,<sup>5</sup> it is currently based on Article 133 EC, namely on the common commercial policy.<sup>6</sup> According to the Regulation, its aim is to contribute to “the eradication of poverty and the promotion of sustainable development and good governance”.<sup>7</sup>

As follows from the above statement, the GSP pursues various objectives. First of all, it aims to contribute to the development of developing countries' economies by facilitating access to the European markets of goods produced in developing countries. To this end, it accords tariff preferences to countries which fulfil certain economic criteria in terms of poverty and non-diversification of exports.<sup>8</sup> It also includes a special arrangement granting additional preferences to those countries which the United Nations has qualified as “least developed”.<sup>9</sup>

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4 See further Herkommer, V., *Die Europäische Sozialklausel. Zollpräferenzen zur Förderung von Kernarbeitsnormen in Entwicklungsländern*, Nomos (Baden-Baden) 2004, p. 145.

5 See in this regard Béguin, J./Menjucq, M., *Droit du Commerce International*, Litec/Lexis Nexis (Paris 2005), p. 147.

6 By contrast, a regulation that was based on Article 308 EC was declared null and void by the ECJ, see Judgment of 26 March 1987, case 45/86, *Commission of the European Communities v Council of the European Communities*, ECR 1987, p. 1493.

7 2<sup>nd</sup> Recital of Regulation 732/2008.

8 See Article 3 (1) of Regulation 732/2008. Also the countries may not benefit from more favorable trade arrangements such as preferential trade agreements, see Article 3 (2) of Regulation 732/2008.

9 See Article 11 of Regulation 732/2008. For an excellent overview on the development of this arrangement under the Regulation of 2005 see Lopez-Jurado, C., El

The GSP's second objective refers to the political and social reality of developing countries. For this purpose, the GSP contains a specific arrangement with a two-fold effect. First, countries that sign, ratify and implement certain international conventions on human rights and good governance are granted additional tariff preferences. Second, countries that commit serious and systematic violations of certain human rights conventions may lose their entire preferential status under the GSP, which would result in the withdrawal of all tariff preferences.

When the Community introduced its GSP in 1971,<sup>10</sup> only the first of the two objectives played a role. It was only in 1990 that more politically-oriented considerations were added to the GSP. The tool for this was a special incentive arrangement that provided additional preferences for countries which engaged in the fight against drug trafficking.<sup>11</sup> In 1999, two other special incentive arrangements were added, one referring to certain international labour standards,<sup>12</sup> and the other one referring to the protection of rainforests. In 2005, these three arrangements were combined in the form of a "Human Rights and Good Governance Clause" (GSP+).

Furthermore, in 1994 the Council introduced a withdrawal clause into the GSP as a reaction to the pressure from the European Parliament for the inclusion of a social component to the GSP. This allowed for the withdrawal of preferences if a country violated the international conventions against slavery or forced labour.<sup>13</sup> Later, the withdrawal clause was extended to a number of

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nuevo Sistema de Preferencias Arancelarias Generalizadas Comunitario a la luz de los informes de la Organización Mundial del Comercio, *Revista de Derecho Comunitario Europeo* 2005, pp. 447-484 at 454 et seq.

10 Lopez-Hurtado, op. cit., p. 268.

11 Article 1 of Council Regulation (EEC) No 3835/90 of 20 December 1990 amending Regulations (EEC) No 3831/90, (EEC) No 3832/90 and (EEC) No 3833/90, in respect of the system of generalized tariff preferences applied to certain products originating in Bolivia, Colombia, Ecuador and Peru, OJ L 370, 31.12.1990, pp. 126-132. See further Valette, M.-F., Le nouveau schéma européen de préférences tarifaires généralisées: Sous le signe du développement durable et de la bonne gouvernance, *Revue du marché commun et de l'Union Européenne* 2007, pp. 163-171 at 167.

12 See Article 8 of Council Regulation (EC) No 2820/98 of 21 December 1998 applying a multiannual scheme of generalised tariff preferences for the period 1 July 1999 to 31 December 2001, OJ L 357, 30.12.1998, pp. 1-112 (hereafter Regulation 2820/98). See further Waer, P./Driessen, B., The new European Union Generalised System of Preferences. A Workable Compromise in the EU – but a Better Deal for Developing Countries?, *Journal of World Trade* 1995, pp. 97-124 at 104.

13 The Conventions referred at that stage were the Geneva Conventions of 25 September 1926 and 7 September 1956 as well as ILO Conventions No. 29 and No. 105

additional human rights conventions.

These different arrangements pursue a number of different objectives. While the basic goal of the GSP remains the promotion for developing countries' trade opportunities, several other policy objectives have been added, namely fostering human rights and good governance. The provisions of the GSP regulation can therefore be seen as a combination between different and sometimes opposing interests which had to be balanced against each other.

## 2. *Implications of WTO law for the Human Rights and Good Governance Clause of the GSP*

### a) *The general framework*

One of the most controversial aspects of the GSP relates to its compatibility with WTO-law. The legal point of departure in this regard is Article I:1 of the General Agreement on Tariffs and Trade (GATT). This Article provides that all WTO-members have to be treated in the same manner in terms of market access (Most-Favoured-Nation clause).<sup>14</sup> Following this provision, any GSP would be in outright breach of WTO-law, since a GSP necessarily puts some countries in a better position than others.

However, around the sixties and seventies, WTO members considered that access of developing countries to markets of industrialised countries should be facilitated in order to take into account their structural disadvantage in the world trade system.<sup>15</sup> Therefore, in 1971 Member States adopted a waiver,<sup>16</sup> which was replaced by an unlimited decision in 1979, known as the Enabling Clause.<sup>17</sup> Both legal instruments provide that Article I:1 GATT does not apply

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prohibiting forced labour, see Article 9 of 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.

14 For a succinct overview see Carreau, D./Juillard, P., *Droit international économique* (2<sup>nd</sup> edition), Dalloz (Paris) 2005, pp. 175-181.

15 See Michalopoulos, C., *Developing Countries in the WTO*, Palgrave (London 2001), pp. 2-5.

16 WTO Waiver on the Generalized System of Preferences Decision of 25 June 1971, BISD 18S/24.

17 Decision of 28 November 1979, (L/4903), Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries. For an overview of the genesis of the WTO Enabling Clause see Santos, N.B./Farias, R./Cunha, R., Generalized System of Preferences in General Agreement on Tariffs and Tra-

to generalised tariff preferences that are granted to developing countries. However, any GSP arrangement has to fulfil a number of conditions in order to be protected by the Enabling Clause. These conditions are contained in Article 2 (a) footnote 3 of the Enabling Clause, which itself refers to the Waiver of 1971.<sup>18</sup> It provides that “only generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries” are admissible.<sup>19</sup> Each criterion raises a number of questions. This paper focuses on the criterion of non-discrimination, as this seems to be the most controversial criterion. Furthermore, it is the only criterion that has so far been subject to interpretation by the Appellate Body.<sup>20</sup>

b) *The case European Community Tariff Preferences*

Until now the compatibility of systems of generalised trade preferences has only once been subject to review by a WTO dispute settlement body; namely, in the case “European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries”.<sup>21</sup> This case concerned a dispute be-

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de/World Trade Organization: History and Current Issues, *Journal of World Trade* 2005, pp. 637-670 at 651.

18 WTO Waiver on the Generalized System of Preferences Decision of 25 June 1971, BISD 18S/24.

19 This is particularly true for the term “non-reciprocal” prohibiting the linking of trade preferences to certain return favours. Bartels assumes that the term „non-reciprocal“ only refers to the market-access and therefore does not prohibit the linking of trade preferences to certain political conditions, see Bartels, L., The WTO Enabling Clause and Positive Conditionality in the European Community’s GSP Program, *Journal of International Economics* 2003, pp. 507-532 at 526-527. Other interpret this criterion widely so as to comprise even conditions concerning environmental and labour standards, see Grossmann, G. M./Skyes, A. O., A preference for development: the law and economics of GSP, *World Trade Journal* 2005, pp. 41-67 at 56.

20 Another problem that can not be addressed in this paper is the question as to whether a system of generalised preferences breaching the Enabling Clause and Article I:1 of the GATT could be justified by the general exceptions of Article XX (a) of the GATT allowing for exceptions “necessary to protect public morals”. It is however, worth mentioning that Article XX of the GATT itself requires that the measure concerned does not constitute an “arbitrary or unjustifiable discrimination between countries where the same conditions prevail”. It seems therefore improbable that the Article XX of the GATT will apply in case of a breach of the non-discrimination requirement of the Enabling Clause.

21 World Trade Organization, Report of the Panel of 1 December 2003, European Community – Conditions for the Granting of Tariff Preferences to Developing

tween India and the Community, and dealt with the admissibility of a special incentive arrangement within the Community's GSP promoting the fight against drug trafficking.<sup>22</sup>

According to India, the drug arrangement contravened Article I:1 GATT and could not be justified under the Enabling Clause. India argued that the Community's drug arrangement distinguished in an arbitrary way between different developing countries, and therefore violated the non-discrimination requirement of the Enabling Clause.<sup>23</sup> By contrast, the Community was of the view that the drug arrangement did not have any discriminatory effect,<sup>24</sup> and that, in any event, it would be justified by Article XX (b) of the GATT allowing for exceptions "necessary to protect human, animal or plant life or health".<sup>25</sup> The decision of the WTO Dispute Panel ("Panel") was handed down on 1 December 2003. Put briefly, the Panel endorsed the position that had been put forward by India, and took the view that Article 2 (a) and Article 3 (c) of the Enabling Clause did not allow for a different treatment of developing countries.<sup>26</sup> The Panel consequently found that the drug arrangement was not protected by the Enabling Clause<sup>27</sup> and could also not be justified under Article XX (b) of the GATT.<sup>28</sup> The drug arrangement was thus considered to contravene the Most-Favoured Nation Clause of Article I:1 GATT.

This report was then submitted to the WTO Appellate Body, which partly reversed the findings of the Panel's report. The Appellate Body took the view that distinctions between developing countries are, under certain conditions, admissible under the Enabling Clause.<sup>29</sup> This position was based on Article 3

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Countries, WT/DS246/R (in the following cited as "WTO Panel Report EC-Tariff Preferences").

22 See Article 10 of Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004 – Statements on a Council Regulation applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004, OJ L 346, 31.12.2001, pp. 1-60 (hereafter Regulation 2501/2001).

23 WTO Panel Report EC-Tariff Preferences, paras. 4.31 and 4.33.

24 Ibid., paras. 4.63 ss, in particular, para. 4.75.

25 Ibid., para. 4.91.

26 The only exception applied to distinctions in favour of Least Developed Countries, as stipulated by Article 2 (d) of the WTO Enabling Clause, *ibid.*, para. 7.102.

27 Ibid., para. 7.177.

28 Ibid., para. 7.236.

29 World Trade Organization, Report of the Appellate Body of 7 April 2004, European Community – Conditions for the Granting of Tariff Preferences to Developing

(c) of the Enabling Clause, according to which the system of generalised trade preferences shall “respond positively to the development, financial and trade needs of developing countries”. The Appellate Body clarified that the term “needs of developing countries” did not only comprise development needs common to all developing countries, but also development needs which are only shared by some of those countries. As a consequence, different development needs of certain countries may constitute a valid reason for differential treatment of developing countries.<sup>30</sup>

However, the Appellate Body made it clear that certain conditions have to be met.<sup>31</sup> First, the needs of the developing countries have to be determined “according to an objective standard” which may be recognized in the WTO agreement or in “multilateral instruments adopted by international organizations”.<sup>32</sup> Next, the measure in question must be a positive response to the developing countries’ need. In this context, the Appellate Body required a “sufficient nexus” between the preferential treatment and “the likelihood of alleviating the relevant ‘development, financial [or] trade need’”.<sup>33</sup> In other words, the preferential treatment must be appropriate to meet the development need concerned. The tariff preferences must also be “made available to all beneficiaries that share that need”. Finally, the positive response must not inflict “unjustifi-

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Countries, WT/DS246/AB/R, AB-2004-1 (in the following cited as “WTO Appellate Body Report EC-Tariff Preferences”), para. 165.

30 WTO Appellate Body Report EC-Tariff Preferences, para. 162. For a critical review of this finding see McKenzie, M., Case Note: European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, *Melbourne Journal of International Law* 2005, Vol. 6, No. 1, available under: <<http://www.austlii.edu.au/au/journals/MelbJIL/2005/>>.

31 WTO Appellate Body Report EC – Tariff Preferences, para. 163. With regard to this point different opinions have been expressed. According to Howse any differentiation between developing countries was admissible, Howse, R., India’s WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for “Political” Conditionality in US Trade Policy, *Chicago Journal of International Law* 2003, pp. 385-405 at 387 et seq. Others submitted that the Enabling clause did not allow for any differentiation between developing countries, see Haan, E., Integrating development concerns into trade relations: The European Union’s revised General System of Preferences, in: Denter, E. et al. (eds.): *International economic with a human face*, Kluwer International Law (Den Haag/Cambridge, Massachusetts) 1998, pp. 307-325 at 319.

32 WTO Appellate Body Report EC – Tariff Preferences, para. 163.

33 Ibid., para. 164.

able burdens on other Members”.<sup>34</sup>

In the case at hand, the Appellate Body came, just as the Panel, to the conclusion that the Community’s GSP arrangement did not meet these requirements. The Appellate Body did not deal with each requirement in detail. Rather, it simply noted that the GSP Regulation did not set out the conditions for admission of countries to the drug arrangement, and did not provide for a possibility to add other countries fulfilling the relevant requirements.<sup>35</sup> The drug arrangement could not therefore be justified by the Enabling Clause, and thus contravened Article I:1 of the GATT.<sup>36</sup> As will be seen later, the above criteria established by the Appellate Body are of crucial importance in the assessment of the GSP’s “Human Rights and Good Governance Clause”.

### **III. Human Rights conditionality in the special incentive arrangement (GSP+)**

#### *1. How does GSP+ function?*

##### *a) The conditions for the eligibility for GSP+*

##### *i) Technical criteria*

In order to benefit from the “special incentive arrangement for sustainable development and good governance”, several technical requirements must be fulfilled. The scope of application of the GSP+ covers, in principle, all countries listed in Annex I of the Regulation.<sup>37</sup> The special preferences apply to all goods which are listed in Annex II of the Regulation.<sup>38</sup> However, certain economic sectors of the beneficiary country may be excluded from the scope of GSP+ if they are considered to be particularly competitive.<sup>39</sup>

Since 2006 countries must fall under the category of “vulnerable countries”

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34 Ibid., para. 165.

35 Ibid., paras. 182 and 187.

36 See *ibid.*, para. 190 lit. d.

37 Articles 2 and 8 of Regulation 732/2008. However, as the least developed countries already benefit from a special arrangement under Article 11 of Regulation 732/2008 those countries will have no incentive to apply the arrangement under GSP+. Some authors consider that Least Developing Countries are a priori excluded from the scope of GSP, see Herkommer, *op cit.*, p. 175.

38 Article 4 of Regulation 732/2008.

39 Article 7 (3) and column C of Annex I of Regulation 732/2008.

in order to be eligible for the GSP+ arrangement.<sup>40</sup> The purpose of this prerequisite is to limit the GSP+ to those countries that have special difficulties complying with the international conventions due to their economic situation.<sup>41</sup> Three conditions have to be fulfilled in this regard, of which the first two are mere repetitions of the criteria for eligibility to the general GSP arrangement. First, a country must not have been classified by the World Bank as a high income country during the last three years. Second, the five largest sections of the country's GSP-covered imports must represent "more than 75 % in value of its total GSP-covered imports".<sup>42</sup>

A new requirement is introduced by the third condition, stipulating that the country's GSP-covered imports must "represent less than 1 % in value of total GSP-covered imports to the Community".<sup>43</sup> This results, however, in the exclusion of stronger exporting countries like China, Brazil and Pakistan. From a human rights perspective this limitation, in the GSP+'s scope, seems unfortunate. The mere fact that a country has decent economic performance does not imply that it has no problems with regards to human rights, as is evident from the examples of Pakistan and China.<sup>44</sup>

ii) *Relevant international conventions*

The core of the "Human Rights and Good Governance Clause" consists of 27 international conventions that potential beneficiary countries have to imple-

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40 See Article 8 (2) of Regulation 732/2008 and Article 9 (3) of Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences, OJ L 169, 30.6.2005, pp. 1-43 (hereafter: Regulation 980/2005). The former GSP+ arrangements did not contain such a condition; see for example Article 14 of Regulation 2501/2001. For an assessment of the new conditions see Valette, *op cit.*, p. 169.

41 See 7<sup>th</sup> Recital of Regulation 980/2005. Other countries are presumed not to need special support for the observance of the relevant international standards, Proposal for a Council Regulation applying a scheme of generalised tariff preferences, COM(2004) 699 final of 20 October 2004, p. 4.

42 Article 8 (2) (a) of Regulation 732/2008. The aim of this criterion is to ensure that only countries depending on a few export goods benefit from the additional preferences as these countries are highly susceptible to price fluctuations at the world market.

43 Article 8 (2) (b) of Regulation 732/2008.

44 See for example the human rights reports of Amnesty International available at <<http://web.amnesty.org/library/eng-chn/index>>, last checked on 5 March 2009. Schöppenthau also draws attention to the fact that the scope of GSP+ is very limited, anyhow, as also the least developed countries are exempted from its scope, Schöppenthau, P. v., *Social Clause: Effective Tool or Fig Leaf?*, *European Retail Digest* 1998, pp. 44-45 at 44.

ment.<sup>45</sup> The GSP Regulation distinguishes “Core human and labour rights UN/ILO Conventions” (Part A) from “Conventions related to the environment and governance principles” (Part B).<sup>46</sup> Part A comprises the eight ILO Conventions on core labour standards, namely on freedom of association and collective bargaining<sup>47</sup>, on the abolition of forced labour<sup>48</sup>, on child labour<sup>49</sup> and on non-discrimination<sup>50</sup>. Since 2005, it also includes certain “core” UN-human rights conventions, including the two UN Covenants, the Conventions against racial and gender discrimination, the Convention against torture, the Convention on the Rights of the Child and the conventions against Apartheid and Genocide, respectively.<sup>51</sup> Part B of Annex III makes reference to certain key

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45 Article 8 (1) (a) of Regulation 732/2008 referring to Annex III of this regulation.

46 The designation of art A of the Annex is in two ways misleading: First of all, the distinction between human rights and labour rights as suggested by title is, to say the least, disputable, as core labour rights also have human rights character and some human rights clearly have a social or labour dimension, see Sepúlveda, M. et al.: *Human Rights Reference Handbook* (3rd edition), University for Peace (Costa Rica) 2004, p. 260 et seq. Secondly, Annex III does not comprise all of the treaties referred to as “Core International Human Rights Treaties” by the UN High Commissioner for Human Rights, i.e. the International Convention for the Protection of All Persons from Enforced Disappearance, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Convention on the Rights of Persons with Disabilities, see Bartels, L., The WTO-Legality of the EU’s GSP Agreement, *Journal of International Economic Law* 2007, 869-886 at 878.

47 Convention concerning Freedom of Association and Protection of the Right to Organise (No 87), Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (No 98).

48 Convention concerning Forced or Compulsory Labour (No 29), Convention concerning the Abolition of Forced Labour (No 105).

49 Convention concerning Minimum Age for Admission to Employment (No 138), Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No 182).

50 Convention concerning Equal Remuneration of Men and Women Workers for Work of Equal Value (No 100) and Convention concerning Discrimination in Respect of Employment and Occupation (No 111).

51 More specifically, Part A of Annex III of Regulation 732/2008 the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the Convention on the Prevention and Punishment of the Crime of Geno-

conventions on climate protection<sup>52</sup>, the protection of the biosphere<sup>53</sup>, the treatment of dangerous waste and pollutants<sup>54</sup>, the fight against drug production and trafficking<sup>55</sup> and the fight against corruption<sup>56</sup>. The comprehensive nature of this system seems remarkable considering that the GSP+ started from a very narrow social clause in 1998, which referred only to six labour standards, excluding those banning forced labour.<sup>57</sup>

Some questions remain regarding the choice of the conventions covered in the Human Rights and Good Governance Clause. In the view of the European Commission, the human and labour rights conventions “incorporate universal standards and reflect rules of customary international law and they form the core basis of the concept of sustainable development”.<sup>58</sup> Yet, as Bartels points out, not all EU Member States have ratified the Genocide Convention. Similarly, the Apartheid Convention has not even been ratified by half of the Member States.<sup>59</sup> A similar point can be made with respect to some of the conventions on good governance and environmental protection that are said to reflect

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cide and the International Convention on the Suppression and Punishment of the Crime of Apartheid.

52 Montreal Protocol on Substances that Deplete the Ozone Layer, Kyoto Protocol to the United Nations Framework Convention on Climate Change.

53 Convention on International Trade in Endangered Species of Wild Fauna and Flora, Convention on Biological Diversity and the Cartagena Protocol on Biosafety.

54 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Stockholm Convention on Persistent Organic Pollutants.

55 United Nations Single Convention on Narcotic Drugs (1961), United Nations Convention on Psychotropic Substances (1971), United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).

56 United Nations Convention against Corruption (Mexico).

57 See Article 11 (2) of Regulation 2820/98 which only contained ILO Convention No 87 on Freedom of Association and the Right to Organise, ILO Convention No 98 on the Right to Organise and Collective Bargaining and Convention No 138 concerning Minimum Age for Admission to Employment. This was perceived as an arbitrary distinction between important and less important core labour standards. In particular, Regulation 2820/98 was criticized for having ignored the Declaration of Fundamental Rights at Work 1998 which had been adopted six months before the adoption of Regulation 2820/98, see Campenhausen, A., *Sozialklauseln im internationalen Handel. Eine entwicklungsvölkerrechtliche Untersuchung insbesondere über Sozialklauseln im internationalen Handelsverkehr und ihre praktische Bedeutung*, TENEA Verlag (Bristol/Berlin) 2004, p. 143.

58 COM(2004) 699, op cit., p. 4.

59 Bartels, WTO Legality 2007, op cit., p. 878.

“basic global norms” for sustainable development.<sup>60</sup> Valette states, for example, that the UN Convention against Corruption had not entered into force when Regulation 980/2005 was adopted, nor was it ratified by all the Member States of the Community.<sup>61</sup> Such divergences cast doubts as to the universality of the aforementioned conventions.

Another aspect that raises a number of questions about the selection process is the fact that some of the Conventions are not completely applied by the Member States of the Community themselves.<sup>62</sup> Germany, for instance, has been breaching ILO Convention No. 87 on Freedom of Association by failing to grant civil servants the right to strike.<sup>63</sup> Similarly, the United Kingdom has been violating the same convention by prohibiting trade unions to exclude members of extremist parties, infringing their right to draw up their own constitutions and rules.<sup>64</sup> While it is true that even European trade unions and ILO officials do not view infringements committed by the EC Member States as comparable to those of many developing countries,<sup>65</sup> it seems that EU Member

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60 COM(2004) 699, op cit., p. 4.

61 Valette, op cit., p. 170. While Regulation 980/2005 was adopted on 27 May 2005, the Convention against Corruption only entered into force on 14 December 2005. For more information see <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.

62 See further Novitz, T., *The European Union and International Labour Standards: The Dynamics of Dialogue between the EU and the ILO*, in: Alston, P. (ed.): *Labour Rights as Human Rights*, OUP (Oxford) 2005, pp. 214-239 at 219. The position of the Commission that the „fundamental principles and rights at work identified by the International Labour Organization of course apply in their entirety to the countries of the EU“, therefore seems somewhat problematic, see Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, *Promoting core Labour Standards and Improving Social governance in the context of globalisation*, COM(2001) 416 final of 18 July 2001, p. 11.

63 Committee of Experts on the Application of Conventions and Recommendations (hereafter CEACR), Individual Observation Concerning Convention Nr. 87 (Germany) 1991, CEACR Individual Observation Concerning Convention Nr. 87 (Germany) 2003, CEACR Individual Observation Concerning Convention Nr. 87 (Germany) 2005 and 2006.

64 CEACR Individual Observation Concerning Convention Nr. 87 (United Kingdom) 2007.

65 This has been stated by Michel Hansenne, the former director general of the ILO. See the statement of the former director general of the ILO, and Patrick Itschert, the former director general of the ETUC-branch Textiles, Clothing and Leather; see Hansenne, M., *Le bureau International du travail et la clause sociale*, in: Horman, D. (ed.): *Mondialisation et Droits Sociaux. La clause sociale en débat*, GRESEA (Brussels) 1997, pp. 13-24 at 22 and Itschert, P., *Clause Sociale et Solidarités Nord-*

States do not attribute as much importance to international standards as they would expect from developing countries. This leads to a double standard which damages the credibility of the “Human Rights and Good Governance” clause.

iii) *Requirements of implementation*

Apart from defining the international conventions, the GSP Regulation sets out certain requirements regarding the implementation of these conventions. The GSP+ applies only to those countries which have “ratified and effectively implemented” the relevant conventions.<sup>66</sup> The term “effective” and the reference to “implementing legislation and measures” suggests that the GSP+ does not merely refer to an incorporation of the international provisions in national law, but it also requires the provisions to be applied and enforced into national practice.<sup>67</sup> This standard seems to be higher than the standard of the GSP regulation from 2001, which only stipulated that “the substance of the standards” of reference must be incorporated.<sup>68</sup> The question of when a country may be regarded as acting in compliance with the relevant treaties has to be answered separately for each treaty, taking into account the findings of the relevant supervisory bodies. Finally, the country has to commit itself “to maintain the ratification of the conventions”, advocate for their proper implementation and accept regular supervisory mechanisms.<sup>69</sup>

The innovative aspect of Regulation 732/2008 is that it does away with the

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Sud, in: Horman D.: *Mondialisation et Droits Sociaux. La clause sociale en débat*, GRESEA (Brussels) 1997, pp. 60-70 at 66.

66 Article 8 (1) (a) of Regulation 732/2008. By contrast, the former GSP regulation did not require ratification of the conventions concerned, see Article 14 (2) of Regulation 2501/2001.

67 Article 8 (1) (b) of Regulation 732/2008. Before the adoption of Regulation 980/2005 it had been speculated that the GSP+ would only contain a ratification requirement in order to render GSP+ more attractive for potential beneficiary countries, Dispersyn, M., *Un nouveau cadre pour la dimension sociale dans le Système de Préférences Généralisées (SPG) de la Communauté*, in: Daugareilh, I.: *Mondialisation, travail et droits fondamentaux*, Bruylant/ LGDL (Brussels/Paris) 2005, pp. 153-179 at 177. This presumption was already rebutted by the 1<sup>st</sup> proposal of the Commission, see COM (2004) 699, op. cit., p. 12.

68 Article 14 (2) of Regulation 2501/2001. See further, Ölz, M., *Die Kernarbeitsnormen der Internationalen Arbeitsorganisation im Licht der neuen handelspolitischen »Sozialklausel« der Europäischen Union*, *Zeitschrift für ausländisches Arbeits- und Sozialrecht*, 2002, pp. 319-359, at 354.

69 Article 8 (1) (b) of Regulation 732/2008.

various exceptions that the preceding regulation granted to the beneficiary countries. Under the old regulation, a country which had only ratified 14 out of the 16 human rights conventions of Annex III could be granted the additional preferences if it was prevented from ratifying the remaining two by “constitutional constraints”.<sup>70</sup> It had, however, to ratify the remaining conventions at a later stage. Regarding the “good governance” conventions, the countries had the possibility to postpone the ratification of four out of the eleven conventions until 31 August 2008.<sup>71</sup> These exceptions were meant to facilitate the use of the GSP+ during the first three years of the programme.<sup>72</sup> Countries requesting admission to the GSP+ arrangement under the new Regulation 732/2008 will, henceforth, have to ratify and to implement all 27 conventions referred to by the Annex.<sup>73</sup>

By and large, it seems that, compared to former GSP+ arrangements, the requirements of GSP+ have been raised considerably. One may ask whether the large number of conventions to which GSP+ refers may hamper the effective application and supervision of the social clause.<sup>74</sup> A high number of conventions means a larger workload for the Commission which examines whether a country conforms to the respective conventions. This gives rise to doubts whether the Commission will examine countries’ situations thoroughly in order to abide by its time schedule.

*b) The admission procedure and legal effects*

In order to be admitted to GSP+, a number of procedural steps have to be followed. First of all, a country that wishes to benefit from the additional prefer-

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70 Article 9 (2) of Regulation 980/2005.

71 Article 9 (1) I of Regulation 980/2005. During the legislative process European Parliament had argued for an alternative provision requiring that the country “actually begins procedures to ratify and effectively implement all the conventions listed in Annex III within 4 years after first being granted the special incentive arrangement”, European Parliament legislative resolution on the proposal for a Council regulation applying a scheme of generalised tariff preferences (COM(2004)0699 – COM(2005)0043 – C6-0001/2005 – 2004/0242(CNS)), P6\_TA(2005)0066, adopted 9 March 2005 (hereafter “European Parliament legislative resolution of 9 March 2005”), Amendment 19.

72 Proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, No 1933/2006 and Commission Regulations (EC) No 964/2007 and No 1100/2006, COM(2007) 857 final of 21 December 2007, p. 3.

73 See Article 8 (1) (a) of Regulation 732/2008.

74 Lopez-Jurado, op cit., p. 476.

ences is required to hand in a written request to the Commission.<sup>75</sup>

Countries may choose between two deadlines for the submission of their request, either 31 October 2008 or 30 April 2010.<sup>76</sup> The additional preferences may become effective from 1 January 2009 or from 1 July 2010, respectively. This is a divergence from the preceding 2005 Regulation, which only provided for one deadline at the very beginning, when the regulation takes effect.<sup>77</sup> The limitation was criticised for unnecessarily precluding countries from the special preferences and thereby reducing its potential influence on those countries' political situation.<sup>78</sup> The new regulation seems to represent a more suitable compromise between the interests of the potential beneficiary countries in having a flexible procedure and the Commission's interest in terms of administrative efficiency.

When submitting their request, countries have to provide detailed information concerning the ratification and implementation of relevant conventions. They also must state their willingness to accept the relevant supervisory mechanisms.<sup>79</sup> The Commission then examines the application in consultation with the GSP-Committee.<sup>80</sup> This committee consists of one representative for each Member State and is chaired by a representative of the Commission.<sup>81</sup> The Commission has to "take into account the findings of the relevant international organizations".<sup>82</sup> It follows from this that the Commission has to consider the findings of the international organisations, but is not bound by them.<sup>83</sup> Furthermore, the Commission may consider all "other relevant sources".

Unlike the old GSP Regulation from 2001, the new Regulation does not oblige the Commission to publish the requests by the developing countries.<sup>84</sup> Nor is the Commission required to invite all interested parties to provide their observations. This is regrettable as NGOs often possess comprehensive and valuable information about the human rights situation in a country. Such in-

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75 Article 9 (2) of Regulation 732/2008.

76 Article 8 (1) (a) of Regulation 732/2008.

77 Article 10 (1) (a) of Regulation 980/2005.

78 See European Parliament legislative resolution of 9 March 2005, Amendment 22.

79 Article 9 (2) of Regulation 732/2008.

80 Article 10 (2) and 27 (4) of Regulation 732/2008.

81 Article 3 and 7 of Decision 1999/468.

82 Article 10 (1) of Regulation 732/2008. The preceding Regulation 2501/2001 referred to the jurisprudence of international organisations only in its 29<sup>th</sup> Recital.

83 See also Herkommer, *op cit.*, p. 203 regarding Regulation 2501/2001.

84 See Article 16 (1) of Regulation 2501/2001.

formation may be particularly valuable in cases where the country has only recently ratified the Conventions since the concerned international organisations often do not yet have sufficient information to assess these cases. The fact that a provision on participation of civil society has been expressly removed also raises some doubts regarding the Community's attitude to transparency and openness to cooperation.<sup>85</sup> While it may be presumed that the Commission still maintains an informal dialogue with some of the major NGOs in that respect, it would have been desirable to publicise ongoing examinations. This would ensure that all interested parties could submit their views, which would be particularly important for smaller NGOs that may not be aware of the ongoing examination procedures.<sup>86</sup>

Once the Commission has taken a decision on the request, it shall inform the country concerned and publish a list of the countries benefiting from the GSP+.<sup>87</sup> In case the request has been refused, the Commission shall also publish the reasons for refusal.<sup>88</sup> However, the Commission is not obliged to give reasons in case it approves the request. As a consequence, the Commission does not provide any factual evidence to justify its decision and does not state to what extent it used the reports of international organisations. This is all the more problematic as the decisions of the Commission are, as will be shown below, not above suspicion. It would therefore be appropriate to give the public the possibility to understand how the decisions were taken. Calls on the Commission and the Council to increase transparency, in particular by the European Parliament have, up to now, been constantly ignored.<sup>89</sup>

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85 For an overview about the Commission's attitude towards transparency consider <[http://ec.europa.eu/commission\\_barroso/kallas/transparency\\_en.htm](http://ec.europa.eu/commission_barroso/kallas/transparency_en.htm)>, last checked on 5 March 2009.

86 The European Parliament therefore demanded that the Commission "shall verify the information received with the requesting country or with any other relevant sources including the European Parliament and representatives of civil society, including the social partners", see European Parliament, legislative resolution of 5 June 2008 on the proposal for a Council regulation applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, No 1933/2006 and Commission Regulations (EC) No 964/2007 and No 1100/2006 (COM(2007)0857 – C6-0051/2008 – 2007/0289(CNS)) (hereafter "European Parliament legislative resolution of 5 June 2008"), Amendment 20.

87 Article 10 (3) of Regulation 732/2008.

88 Article 10 (4) of Regulation 732/2008. The possibility to postpone a decision if the country needs more time to comply with a decision (see Article 16 (4) of Regulation 2501/2001) does not longer exist.

89 See European Parliament legislative resolution of 5 June 2008, Amendment 18, 20 and 22.

Also, the length of the examination period raises questions. According to the new Regulation, the examination should be completed within a period of one and a half months.<sup>90</sup> This period appears to be very short considering that normally more than a dozen countries can be expected to apply for admission or re-admission to the GSP+. Furthermore, in each case the Commission has to examine the application of no less than 27 conventions, many of which are of a quite complex character. This is somewhat surprising, given the fact that the GSP Regulation of 2001, which only referred to eight conventions, provided for a year-long examination period with the possibility of extension; in practice this resulted in an examination period ranging between one and three years.<sup>91</sup> One may ask how the Commission manages to cope with an increased workload without imperilling the quality of the examination process.<sup>92</sup>

If a country has finally been admitted to GSP+, it is entitled to additional tariff preferences beyond those of the general arrangement. More specifically, all *ad valorem* duties on products listed in Annex II of the Regulation are suspended.<sup>93</sup> The same is true for all specific duties except for those products that

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90 Article 9 (1) of Regulation 732/2008.

91 Article 16 (5) of Regulation 2501/2001. The Request of Russia was published 30 July 1999, see Notice regarding request submitted by the Russian Federation to take advantage of the special incentive arrangements concerning labour rights, OJ C 218 of 30.7.1999, p. 2; the examination procedure ended with a postponement of the final decision to give Russian government more time to conform to the relevant international conventions; this decision was published on 13 November 2002, see: Commission Decision 2002/902/EC of 13 November 2002 on postponing the decision on the request of the Russian Federation for the special incentive arrangements for the protection of labour rights, OJ L 312, 15.11.2002, p. 27. The request of Sri Lanka was published 19 April 2002, see Notice regarding the request submitted by the Democratic Socialist Republic of Sri Lanka in order to benefit from the special incentive arrangements concerning labour rights, OJ C 95, 19.4.2002, p. 14; the Commission published the decision on admission 29 December 2003, see Commission Regulation (EC) No 2342/2003 of 29 December 2003 granting the Democratic Socialist Republic of Sri Lanka the benefit of the special incentive arrangements for the protection of labour rights, OJ L 346, 31.12.2003, pp. 34-35. In the case of the Republic of Moldova the publication of the request took place 22 June 1999, see Notice regarding request submitted by the Republic of Moldova to take advantage of the special incentive arrangements concerning labour rights, OJ C 176, 22.6.1999, p. 13; the decision on admission was published 25 July 2000, see Commission Regulation (EC) No 1649/2000 of 25 July 2000 granting the Republic of Moldova the benefit of the special incentive arrangements concerning labour rights, see OJ L 189, 27.7.2000, p. 13.

92 It is hereby presumed that the personal resources of the Commission have not been significantly raised for the duration of the examination period.

93 Article 7 (1) of Regulation 732/2008.

are subject to both specific duties and *ad valorem* duties.<sup>94</sup> GSP+ thus provides for a considerable advantage in comparison to the general arrangement. Also the scope and the level of the preferences granted have been increased since 2001. This has, in the view of some, strongly increased the attractiveness of the GSP+.<sup>95</sup> However, it should be noted that the GSP+ is subject to a number of practical obstacles hampering the efficiency of the GSP system in general. A number of products, mainly in the agricultural sphere, are wholly or partly excluded from the GSP, many of which are of crucial importance for developing countries. Furthermore, the formalities that companies have to fulfil in order to prove that their products originate from a certain beneficiary country (rules of origin) are very complex and are likely to discourage importers from making use of the GSP.<sup>96</sup> Hence, the analysis of the benefits of GSP+ presents a mixed picture.

Even after granting the additional preferences, Commission is obliged to continue to review the status of the conventions' ratification and implementation. The additional preferences may be withdrawn if the beneficiary country ceases to fulfil the requirements of GSP+.<sup>97</sup>

### c) *Legal protection against the admission decision*

Given the economic importance of the tariff preferences for the developing countries, the question arises whether the countries concerned may bring legal action against a decision of the Commission to refuse admission. According to Article 230 (4) EC, "any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former".

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94 Article 7 (2) of Regulation 732/2008. Slightly less generous tariff reductions exist with regard to certain confectionery products not containing cocoa where the Common Customs Tariff is limited to a specific duty of 16 percent of the customs value.

95 For a more detailed assessment of this question see Grynberg, R./Qalo, V., Labour Standards in US and EU Preferential Trading Agreements, *Journal of World Trade* 2006, pp. 619-653 at 647.

96 See Vincent, Philippe, Le nouveau système communautaire des préférences généralisées, *Cahiers de droit européen*, 2005, pp. 683-704 at 702. For more information on the rules of origin see Communication of the Commission from 18 December 2003, Green Paper on the Future of Rules of Origin in Preferential Trade Arrangements, COM (2003) 787 final.

97 Article 8 (3) of Regulation 732/2008. The procedure tallies with the general withdrawal procedure described below.

Neither the European Court of Justice nor the Court of First Instance have dealt with the question as to whether a third country can be considered a “legal person” for the purpose of this article. Unlike Article 33 (2) of the Treaty Establishing the European Coal and Steel Community,<sup>98</sup> Article 230 EC uses a rather wide wording (“any person”). Academics have therefore constructed Article 230 (4) EC in a broad way so as to extend its application to different types of public entities.<sup>99</sup> One might argue that third countries may not be regarded as legal persons under national law.<sup>100</sup> However, the Court has already recognised that third states may submit third party observations.<sup>101</sup> It is, therefore, likely that the Court will also accept that a third state could act as a complainant under Article 230 (4) EC.<sup>102</sup>

As regards the admissibility requirements pertaining to the type of act targeted, the complaint has to be directed against a decision or a regulation of the Commission. In the latter case, the requirements are somewhat stricter since here the complainant must also prove that the regulation is “of direct and individual concern” to the individual. This is currently unproblematic since the admission decisions are taken in the form of a decision.<sup>103</sup> But even if the Commission used the legal form of a decision, as it used to do under one of the

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98 According to Article 33 (2) of the Treaty Establishing the European Coal and Steel Community undertakings and their associations the only entities being allowed to bring action against a decision of the Commission.

99 The Court has among others accepted the complaints of Belgian regions; see Judgment of Joined cases of 8 March 1988, 62/87 and 72/87, *Exécutif régional wallon and SA Glaverbel v Commission of the European Communities*, ECR 1988, p. 1573.

100 Gaitanides, C., Artikel 230 EGV, in: Groeben, H.v.d./Schwarze, J. (eds.): *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (6<sup>th</sup> edition), Nomos (Baden-Baden) 2004, para. 45.

101 Order of the Court of 23 February 1983, *Chris International Foods Ltd v Commission of the European Communities* ECR 1983/417 of February 23 1983.

102 Support for this view can be found in English, French and German literature, Lenaerts, K./Arts, D./Maselis, I., *Procedural Law of the European Union* (2<sup>nd</sup> edition), Sweet & Maxwell (London) 2006, para. 7.065, footnote 213; Simon, Denys, *Le système juridique communautaire* (3<sup>rd</sup> edition), Presses Universitaires de France (Paris) 2007, para. 423 and Geiger, R., *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft*, Artikel 230 EGV (4<sup>th</sup> edition), München (C.H. Beck 2004), para. 16.

103 Commission Decision 2008/938/EC of 9 December 2008 on the list of the beneficiary countries which qualify for the special incentive arrangement for sustainable development and good governance, provided for in Council Regulation (EC) No 732/2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011, OJ L 334, 12.12.2008, pp. 90-91.

GSP Regulation of 2001,<sup>104</sup> this would not bring about any significant changes in terms of admissibility. As the ECJ stated in its “Plaumann decision”, the term “direct and individual concern” means that the regulation affects the complainant in a similar way to that of an individual decision.<sup>105</sup> As for the Commission’s decisions on the grant of additional preferences, these legal acts always mention the names of the specific countries, providing clear evidence of the individual character of the decision.<sup>106</sup> The GSP+ decisions of the Commission therefore affect individuals directly and individually, regardless of whether they are formally adopted as a regulation or a decision.

The decision also affects foreign trade interests of the third countries as the decision has a direct impact on their opportunities to export their products to the Community. They concern, hence, a concrete interest of the third countries, which is a third criterion for legal admissibility under Article 230 (4) EC. It follows that decisions about the admission of a country to the GSP+ may in principle be legally contested. The competent court in this respect is the Court of First Instance (CFI).<sup>107</sup> Possible reasons for bringing an action of annulment may be the infringement of essential procedural requirements,<sup>108</sup> the violation of superior law,<sup>109</sup> or misuse of powers by the Commission.<sup>110</sup>

By contrast, the situation is different with respect to companies active in the developing countries concerned. They are not the addressees of the decisions or regulations. It is also impossible to consider them as individually concerned by a GSP+ decision, since it affects every undertaking in the country concerned.<sup>111</sup> It follows that such companies do not have the right to file a complaint under Article 230 (4) EC against GSP+ decisions.

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104 See Regulation 2342/2003 and Regulation No 1649/2000 of 25 July 2000.

105 ECJ Judgment of 15 July 1963, case 25/62, *Plaumann & Co. v Commission of the European Economic Community*, ECR, 1963, p. 95.

106 See Judgment of 17 June 1980, joint cases C-789 and 790/79, *Calpak SpA and Società Emiliana Lavorazione Frutta SpA v Commission of the European Communities*, ECR 1980, p. 1949, para 7.

107 Ehricke, Ulrich, Artikel 230 EGV, in: Streinz, Rudolph: *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft*, C.H.Beck (Munich) 2003, para. 37 with further references.

108 Lenaerts/Arts/Maselis, op cit., para. 7.135 et seq.

109 Ibid., para. 7.150 et seq.

110 Ehricke, op cit., para. 79.

111 See further ibid., paras. 56-59.

d) *Application in practice*

i) *The current situation*

While the GSP+ was in its first years only sparsely used,<sup>112</sup> fifteen countries benefited from the additional preferences during the first period of the extended GSP+ from 1 January 2006 to 31 December 2008.<sup>113</sup> These countries were: Bolivia, Colombia, Costa Rica, Ecuador, Georgia, Guatemala, Honduras, Sri Lanka, Republic of Moldova, Mongolia, Nicaragua, Panama, Peru, El Salvador, and Venezuela.<sup>114</sup> During this period two countries were removed from this list. This also concerned Chile, which had concluded a bilateral agreement with the EC, providing for more generous market access than GSP+.<sup>115</sup> Furthermore, the Republic of Moldova was removed from GSP+ after the entry into force of an arrangement of more generous “autonomous tariff preferences” in early 2008.<sup>116</sup> The new arrangement for Moldova is subject to compliance with the conditions of the 27 international conventions referred to by the

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112 During 1998 and 2005 only two countries benefited from the GSP+ arrangement, i.e. Sri Lanka and Moldova. See Regulation 2342/2003 and Regulation 1649/2000. See further Dispersyn, M., *La dimension sociale dans le Système des préférences (SPG) de l’Union Européenne*, *Revue de droit de l’ULB* 2001, pp. 87-210.

113 It should be noted in this respect, that these countries were admitted to the GSP+ of 2005 even before the substantial examination by the Commission of the country’s situation had started. This was possible because of 7<sup>th</sup> Recital of Regulation 980/2005, which allowed for admitting countries on a provisional basis which already met its requirements. However, since there is no evidence that the countries concerned were obliged to hand in any preliminary information or other supporting documents, it is unclear how the Commission could know that these countries “fulfil already the criteria under the special arrangement for sustainable development and good governance”.

114 See Sole Article of Commission Decision 2005/924/EC of 21 December 2005 on the list of the beneficiary countries which qualify for the special incentive arrangement for sustainable development and good governance, provided for by Article 26(e) of Council Regulation (EC) No 980/2005 applying a scheme of generalised tariff preferences, OJ L 337, 22.12.2005, p. 50, (hereafter: Commission Decision 924/2005).

115 See Article 1 of Commission Regulation (EC) No 566/2007 of 24 May 2007 removing the Republic of Chile from the list of beneficiary countries in Annex I to Council Regulation (EC) No 980/2005 applying a scheme of generalised tariff preferences, OJ L 133, 25.5.2007, p. 12.

116 See Council Regulation (EC) No 55/2008 of 21 January 2008 introducing autonomous trade preferences for the Republic of Moldova and amending Regulation (EC) No 980/2005 and Commission Decision 2005/924/EC, OJ L 20, 24.1.2008, pp. 1-8 (hereafter Regulation 55/2008).

GSP+.<sup>117</sup>

On 9 December 2008, the Commission published the list of the countries that will benefit from the GSP from 1 January 2009 to 31 December 2011.<sup>118</sup> In addition to the 13 countries, which were covered by GSP+ until December 2008,<sup>119</sup> the new list included also Armenia, Azerbaijan and Paraguay. One may be surprised that so many countries have been admitted to the GSP+, despite the fact that GSP+ requires the implementation of 27 quite demanding conventions. Indeed, a closer look at the human rights situation in the countries concerned suggests that the high number of beneficiary countries is, at least partly, due to an inaccurate assessment by the Commission. In various cases the decisions of the Commission are not in line with the findings of the international supervisory bodies. This is illustrated, *inter alia*, by ILO Conventions No. 87 and 98 on the freedom of association and collective bargaining. These Conventions are subject to one of the most meticulous supervisory mechanisms currently in place, and allow for a comprehensive analysis of the Commission's admission decision in terms of international standards.<sup>120</sup>

A striking example for this inconsistency is the case of Colombia with regard to which ILO supervisory bodies have been criticizing the permanent state of insecurity and impunity<sup>121</sup> that gave rise to numerous politically motivated murders and other acts of violence against trade union members and leaders as “preventing the free exercise of trade union rights” guaranteed.<sup>122</sup>

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117 Article 2 (1) (f) of Regulation 55/2008.

118 Article 1 of Decision 2008/938.

119 Panama has not been readmitted to GSP+ because it submitted its application after the deadline of 31 October 2008, see the Commission's Press Release of Brussels, 9 December 2008, “The EC Special Incentive Arrangement for Sustainable Development and Good Governance”, available at <[http://trade.ec.europa.eu/doclib/docs/2008/december/tradoc\\_141663.pdf](http://trade.ec.europa.eu/doclib/docs/2008/december/tradoc_141663.pdf)>, last checked 5 March 2009.

120 Compliance with the principles on freedom of association and collective bargaining is not only supervised by the ILO Committee of Experts but, additionally, by the Committee of Freedom of Association, a tripartite body consisting of employers, workers and government representatives which receives complaints from trade unions and employers, see on this Tajman, D./Kurtis, K., *Freedom of Association: A User's guide – Standards, Principles and Procedures of the International Labour Organisation*, International Labour Office (Geneva) 2000, p. 45 et seq.

121 ILCCR: Examination of individual case concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Colombia (ratification: 1976), published: 2005, Conclusions.

122 Case No. 1787 (Colombia), Report No. 343 (Vol. LXXXVIX, 2006, Series B, No. 3), para. 422. Even stronger wording was found by the ILO Conference Committee

Besides, also a number of elements of the Colombian labour legislation are in conflict with ILO Convention No. 87.<sup>123</sup> While the Colombian government has made certain progress in terms of remedying the situation, it is clear from the ILO Committee of Experts that the situation in Colombia cannot yet be considered in line with the ILO Conventions.<sup>124</sup> Similar problems exist with regard to Guatemala where the ILO supervisory bodies pointed to the permanent climate of violence and impunity coupled with inefficiency of the judiciary, and requested the government to “take the necessary measures to guarantee full respect for the human rights of trade unionists” under ILO Convention No 87.<sup>125</sup> Serious problems in this regard can also be identified in the case of Georgia where legislation on strikes, collective bargaining and trade unions was reproached for failing to conform to ILO Conventions No 87 and No 98.<sup>126</sup> Also,

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in 2003 which noted “with deep concern” “a serious obstacle to the free exercise of the freedom of association guaranteed by the Convention“ and “addressed an urgent call to the Government to immediately take the measures necessary to guarantee the full implementation of the Convention in both law and practice“. ILCCR: Examination of individual case concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Colombia (ratification: 1976), published: 2003, Conclusions.

- 123 See in particular CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Colombia (ratification: 1976), published: 2006.
- 124 See CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Colombia (ratification: 1976), published: 2008. Here, there Committee of Experts „again urges the Government to take the necessary steps to ensure the right to life and security of trade union leaders and members so that they may fully exercise the rights guaranteed by the Convention“.
- 125 See CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Guatemala (ratification: 1952), published: 2008. The Conference Committee on the Application of Standards used even stronger words by requesting the Government „to take the necessary measures to bring the legislation and practice into full conformity with the provisions of the Convention“, ILCCR: Examination of individual case concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Guatemala (ratification: 1952), published: 2005, Conclusions.
- 126 See for example CEACR: Individual Direct Request concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Georgia (ratification: 1999), submitted: 2007, CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Georgia (ratification: 1999), published: 2006. CEACR: Individual Direct Request concerning Convention No. 98, Right to Organise and Collective Bargaining, 1949 Georgia (ratification: 1993), submitted: 2005, CEACR: Individual Direct Request concerning Convention No. 98, Right to Organise and Collective Bargain-

a number of serious acts of intimidation against trade unions were committed by state authorities.<sup>127</sup>

In addition, the case of El Salvador is of particular interest as this country had been admitted without having ratified and implemented ILO Conventions No 87 and No 98, under one of the abovementioned exceptions. The preferences had, however, been granted under the precondition that El Salvador would make up for this within a specified period of time. Later, when El Salvador had ratified both Conventions, the Council granted unconditional admission to the GSP+ to El Salvador.<sup>128</sup> It seems that the Commission had overlooked the fact that national legislation in El Salvador did not provide any protection against anti-union discrimination required by ILO Convention No 98.<sup>129</sup> Also, the fact that the ILO Committee on the Freedom of Association found the refusal of the Salvadorian government to grant legal personality to certain types of workers to be “incompatible with the requirements of Convention No. 87”<sup>130</sup> apparently did not impact the Commission’s decision in 2005.

In all these cases, ILO supervisory bodies established serious deficits regarding trade union’s freedom of association and their right to organise, and held that the countries in question did not fully apply the relevant ILO Conventions. Bearing in mind that the GSP+ only applies to those countries which have already implemented the conventions, the admission decisions of the Commission seem to be at odds with the findings of the ILO bodies. It is true that there may be defensible political reasons to grant the preferences to these countries, for example where the country has made certain progress in terms of human rights improvement; however, such practice is incompatible with the criteria stipulated by the GSP Regulation. In light of this, it is suggested that its

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ing, 1949 Georgia (ratification: 1993), submitted: 2004. CEACR: Individual Direct Request concerning Right to Organise and Collective Bargaining Convention, 1949 (No. 98) Georgia (ratification: 1993), submitted: 2007.

127 CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Georgia (ratification: 1999), published: 2006, see also Committee of Freedom of Association (hereafter CFA), Georgia (Case No. 2387) Report No. 338, (Vol. LXXXVIII, 2005, Series B, No. 3), para. 858 et seq.

128 Council Decision 2006/978/EC of 19 December 2006 on the granting of the special incentive arrangement for sustainable development and good governance beyond 1 January 2007 to the Republic of El Salvador, OJ L 365, 21.12.2006, p. 86.

129 CFA , El Salvador (Case No. 2423), 344th Report, para. 938. See further CFA Case No. 2514 (El Salvador), Report No. 346, (Vol. LXXXVX, 2007, Series B, No. 2), para. 959.

130 CFA Case No. 2423 (El Salvador), Report No. 344 (Vol. LXXXVX, 2007, Series B, No. 1), paras. 929 f.

legality should be put under question. Any developing country that has not been admitted to GSP+ could, on this basis, bring an action against the Commission to annul the decision denying admission.

Also, from a political perspective, the Commission's practice seems dubious. As Orbie notes, almost all countries that were admitted to the new GSP+ in 2005, including El Salvador, Guatemala and Colombia, had already benefited from the special arrangement to combat drug production and trafficking under the old Regulation of 2001. It seems that after the WTO Appellate Body had declared this arrangement as incompatible with WTO-law, these countries were simply shifted from one arrangement to the other.<sup>131</sup> One cannot, therefore, help thinking that the Commission's decisions were driven by an interest to assure the continued granting of additional preferences to the countries included in the drug arrangement.<sup>132</sup>

ii) *The attitude of the Commission and first reactions*

The Commission's attitude towards this situation is not exactly clear. In a staff working document from 2007, the Commission admitted that "as far as effective implementation is concerned, the reports of UN and ILO monitoring bodies reveal a mixed picture".<sup>133</sup> By contrast, in a staff working document from

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131 See Annex I of Regulation 2501/2001. El Salvador and Guatemala have benefited from the predecessor of the drug arrangement since 1992. Many countries which had profited from the drug arrangement before had urged the Community to maintain their status as regards trade preferences, see for example the statements of the trade representatives of Honduras and El Salvador, see Trade Policy Review Body, Minutes of Meeting of 18 January 2005, WT/TPR/M/136, Trade Policy Review European Communities, paras. 109 and 111.

132 Orbie suggests that the new GSP+ of 2005 was nothing more than a face-lifted version of the old drug arrangement, see Orbie, J., *The Social Dimension of Globalization and European Union Development Policy*, Paper delivered on the occasion of the EUSA Tenth Biennial International Conference, Montreal, Canada, 17 to 19 May 2007, available under: <<http://www.unc.edu/euce/eusa2007/papers/orbie-j-07g.pdf>>, p. 8. Some also conjecture that the main consideration for the admission of Pakistan to the special arrangement to combat drug production and trafficking of Regulation 2501/2001 was to acknowledge Pakistan's efforts regarding the struggle against terrorism, Shaffer, G./Apea, Y., Institutional Choice in the Generalized System of Preferences Case: Who Decides the Conditions for Trade Preferences? *The Law and Politics of Rights, Journal of World Trade* 2005, pp. 977-1008 at 995.

133 See Commission staff working document – Accompanying document to the Council Regulation applying a scheme of generalised tariff preferences for the years 2009-2011 – Impact assessment report, SEC(2007) 1727 final, p. 12.

2008, the Commission states: “As far as effective implementation is concerned the recommendations of the ILO and UN monitoring bodies [...] reveal various shortcomings in the implementation process but in general demonstrate a satisfactory state of play.”<sup>134</sup>

Despite the “satisfactory state of play”, in 2008, the Commission initiated for the first time two investigations with a view to withdrawing the additional preferences. The first one concerns El Salvador’s compliance with ILO Convention No. 87. The reason for this inquiry was a recent judgment of the Salvadorian Supreme Court that declared a number of the provisions of this convention incompatible with the national constitution.<sup>135</sup> The second case deals with Sri Lanka. Here, the initiation of the investigation was due to doubts concerning the implementation of a number of UN human rights conventions, in particular the International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child.<sup>136</sup> Here, the Commission relied on “statements of the United Nations (UN), as well as information from other relevant publicly available sources, including non-governmental organisations”,<sup>137</sup> and concluded that there were “sufficient grounds for opening an investigation”.<sup>138</sup> Both cases are still under examination.

The initiation of these two investigations is encouraging from a human

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134 See GSP+-Report on the status of ratification and recommendations by monitoring bodies concerning conventions of annex III of the Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences (the GSP regulation) in the countries that were granted the Special incentive arrangement for sustainable development and good governance (GSP+) by Commission Decision of 21 December 2005, COM(2008) 656 final of 21.10.2008.

135 See Commission Decision 2008/316/EC of 31 March 2008 providing for the initiation of an investigation pursuant to Article 18(2) of Council Regulation (EC) No 980/2005 with respect to the protection of the freedom of association and the right to organise in El Salvador, OJ L 108, 18.4.2008, p. 29 (hereafter Decision 2008/316).

136 1<sup>st</sup> Recital of Commission Decision 2008/803/EC of 14 October 2008 providing for the initiation of an investigation pursuant to Article 18(2) of Council Regulation (EC) No 980/2005 with respect to the effective implementation of certain human rights conventions in Sri Lanka Official Journal L 277, 18.10.2008 pp. 34-35 (hereafter Decision 2008/316).

137 Notice pursuant to Article 19(1) of Council Regulation (EC) No 980/2005 of the initiation of an investigation with respect to the effective implementation of certain human rights conventions in Sri Lanka, Official Journal C 265, 18.10.2008, p. 1.

138 4<sup>th</sup> Recital of Decision 2008/803 and 4<sup>th</sup> Recital of Decision 2008/316.

rights perspective. However, it also gives rise to a number of questions. First, one may wonder why the violations committed by Colombia, Guatemala and Georgia have not received the same attention as other instances of breach.<sup>139</sup> Furthermore, it is not comprehensible why El Salvador and Sri Lanka have been re-admitted to GSP+ in the first place. The GSP Regulation makes it clear that only countries that have implemented these conventions may be granted additional preferences.<sup>140</sup> Therefore, it would have been reasonable not to admit these two countries to the GSP+ until such doubts concerning the implementation process are dispelled. The approach taken by the Commission does not therefore seem to be entirely consistent.

## 2. *Does GSP+ comply with WTO-law?*

### a) *The legality of the substantial admission criteria of GSP+*

The conditions for the substantial admission criteria to GSP+ give rise to a number of complex questions with respect to their compatibility with the Enabling Clause. In particular, it is unclear whether it is compatible with WTO-law to make additional preferences conditional on the compliance of international conventions with the Enabling Clause. In the aftermath of the WTO Report on the drug arrangement a number of academics considered that the new GSP+ meets the requirements of the Enabling Clause.<sup>141</sup> However, other scholars have recently adopted a more critical attitude in this respect.<sup>142</sup>

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139 In this regard, the European Parliament had suggested including a provision, which would have obliged the Commission to “regularly check that the commitments of beneficiary countries are being honoured and that none of the reasons set out in Article 15(1) and (2) and Article 16 (1) and (2) for the temporary withdrawal of preferential arrangements applies”. This could prevent countries from continuing to benefit from GSP+ if they no longer fulfil the relevant requirements; see European Parliament legislative resolution of 5 June 2008, Amendment 23.

140 Article 8 (1) of Regulation 732/2008.

141 This view is defended by Howse, R./Langlile, B./Burda, J., *The World Trade Organization and Labour Rights: Man Bites Dog*, in: Leary, V. A./Warner, D. (eds.): *Social Issues, Globalisation and International Institutions. Labour Rights and the EU, ILO, OECD and WTO*, Martinus Nijhoff Publishers (Leiden/Boston) 2006, pp. 157-221 at 217; Hepple, B., *Labour Law and Global Trade*, Hart Publishing (Oxford/Portland, Oregon) 2005, p 148.

142 See in particular Bartels, *WTO Legality 2007*, op cit.; Gruszczynski, L., *The EC General System of Preferences and International Obligations in the Area of Trade – The Never-Ending Story*, (August 3, 2008). Available at SSRN: <<http://ssrn.com/abstract=1199502>>, last checked 5 March 2009.

In order to assess the conditions stipulated by the “Human Rights and Good Governance Clause”, two criteria seem to be important. First, there must be a presence of “development, financial and trade needs of developing Countries” which has to be established according to an objective standard.<sup>143</sup> Second, the presence of a “sufficient nexus” between the GSP preferential arrangement and the developing need is required.<sup>144</sup>

i) *International Conventions as an admission condition for GSP+*

Many issues are controversial in this respect. Some scholars argue that the term “development need” should be understood in a purely economic manner, since the preamble of the Enabling Clause only refers to economic aims.<sup>145</sup> However, the Appellate Body made clear that the preamble of the WTO Agreement refers to “sustainable development”, which is a much wider concept.<sup>146</sup> As the WTO Appellate Body stated, attention should also be paid to other international legal instruments which, as Bartels points out,<sup>147</sup> would lead us to the 1986 UN Declaration on the Right to Development, which has a much wider approach, encompassing the political and social dimension of development.<sup>148</sup> It seems therefore quite probable that the Appellate Body will accept political considerations as development aims under the Enabling

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143 WTO Appellate Body Report EC-Tariff Preferences, para. 163. See further Jessen, H., *WTO-Recht und „Entwicklungsländer“*. „Special and Differential Treatment for Developing Countries“ im multidimensionalen Wandel des Wirtschaftsvölkerrechts, Berliner Wissenschafts-Verlag (Berlin) 2006, p. 577.

144 WTO Appellate Body Report EC-Tariff Preferences, para. 164. As regards the conditions set out by a social clause, it is implied that the standards of reference have to correspond to the capacities of the countries so that developing countries have at least the possibility to fulfil them. See further Clapham, A./ Martignioni, J. B., “Are We There Yet?” In Search of a Coherent EU Strategy on Labour Rights and External Trade, in: *Leary, V. A./Warner, D. (eds.): Social Issues, Globalisation and International Institutions. Labour Rights and the EU, ILO, OECD and WTO*, Martinus Nijhoff Publishers (Leiden/Boston) 2006, pp. 233-309 at 291 and Bartels, L., in: Charnovitz, S. et al., Internet Roundtable. The Appellate Body’s GSP Decision, in: *World Trade Review* 2004, pp. 239-265 at 248.

145 Gruszczynski, op cit., p. 12.

146 WTO Appellate Body Report, United States – Import Prohibition on certain Shrimp and Shrimp Products, WT/DS58/AB/R vom 6. November 1998, para. 129.

147 Bartels, WTO Legality 2007, op cit., p. 875.

148 UN Declaration on the Right to Development, Adopted by General Assembly resolution 41/128 of 4 December 1986.

Clause.<sup>149</sup>

As the GSP+ refers directly to the standards set by international organizations, in principle a good case could be made for its objectivity.<sup>150</sup> This seems all the more relevant since the UN and the ILO with their near universal membership is more representative of the international community of states than other, more exclusive organisations such as the OECD.<sup>151</sup> However, the fact that the GSP+ requires developing countries to ratify and implement these conventions may be problematic.<sup>152</sup> In Bartel's view, "a country that has not ratified a convention may have precisely the same development needs as one that has".<sup>153</sup> He therefore argues that the ratification and implementation of a convention is not an appropriate criterion to distinguish between countries that have, and countries that do not have a certain development need.<sup>154</sup>

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149 Bartels, *WTO Legality* 2007, op cit., p. 876.

150 The Appellate Body explicitly mentions the multilateral instruments created by international organisations as a possible reference for such a standard, WTO Appellate Body Report EC – Tariff Preferences, para. 163. The conventions on human and labour rights seek to improve the political and social situation of the population of a given country which may arguably be regarded as an element of sustainable development. See Article 1 and 8 of the UN Declaration on the Right to Development of 1986, Article 2 and 5 of the Rio Declaration on Environment and Development of 1992, paras. 5, 9 and 25 of the Millennium Declaration of 2000 with regard to human rights in general and para. 28 of the Johannesburg Declaration on Sustainable Development of 2002. The remaining conventions refer to goals that are mentioned in the international declarations on development objectives, i.e. the protection of the environment. See principle 4 of the Rio Declaration on Environment and Development of 1992, paras. 21-23 of the Millennium Declaration of 2000; paras. 5 and 13 of the Johannesburg Declaration on Sustainable Development of 2002 and para. 23 of the Millennium Declaration concerning human rights mentions the Kyoto Protocol and the Convention on Biological Diversity. The aim of assuring biodiversity is further expressly mentioned in para. 18 of the Johannesburg Declaration on Sustainable Development of 2002.

151 See Mason, A. M., *The Degeneralization of the Generalized System of Preferences (GSP): Questioning the Legitimacy of the U.S. GSP*, *Duke Law Journal* 2004, pp. 513-547, 541 et seq.

152 It may be a question of perception whether one considers this a problem under the "objectivity criterion", as Bartels does, or the "positive response" criterion.

153 Bartels, *WTO Legality* 2007, op cit., p. 877.

154 *Ibid.* In addition to this, Bartels identifies problems with regard to the causal link between the preferences granted and the development needs addressed. One example would be the Genocide Convention as not all developing countries are in a concrete and current need to take action against genocides. Also, the fact that developing countries have to ratify and implement Conventions immediately and will be granted

This argument is a strong one and certainly shows that the framers of the Enabling Clause did not have in mind a Human Rights and Good Governance Clause as it is applied by the Community today.<sup>155</sup> However, also a different perspective on this matter is possible. The idea of the Community's GSP+ is to grant additional preferences to countries that have satisfied a certain development need addressed by international conventions.<sup>156</sup> Instead of providing economic assistance to enable a country to address a given development need, it provides an incentive to developing countries that have yet to meet the development needs or take the required measures to meet this need.<sup>157</sup> This approach is very different from traditional development assistance, which does, however, not mean that it is less efficient. From the Community's perspective, one could argue that certain development problems, in particular those in the social or political sphere often depend rather on political will than on financial means. Indeed, the development need for freedom of assembly without government persecution will be promoted more efficiently by giving the country a financial incentive not to do so, than by providing financial assistance to countries that violate this human right.

From this perspective the GSP+ seems to address these development needs in a quite efficient manner. It is therefore not impossible to make the case that the Community's current GSP+ complies with the Enabling Clause. It should also be born in mind that a crucial feature of the current GSP is at stake and that declaring this element incompatible might mean the end for any additional

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the preferences later contributes to the fact it, according to Bartels, unlikely that the preferences can be considered a positive response, *ibid.*, p. 880 et seq.

155 Also McKenzie expresses doubts regarding Bartels' view. Unfortunately, he only states that the ratification requirement is in line with the criterion that the additional preferences are available to all developing countries, which does not take into account the argument made by Bartels, see McKenzie, M., *Climate Change and the Generalized System of Preferences*, *Journal of International Economic Law* 2008, pp. 679-695 at 693.

156 See also Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee of 7 July 2004, *Developing countries, international trade and sustainable development: the function of the Community's generalised system of preferences (GSP) for the ten-year period from 2006 to 2015*, COM(2004) 461 final, p. 10.

157 Problems may arise in respect of the ratification criterion as ratification does not necessarily say much about the situation in a country. However, ratification is necessary to enable an international organization to examine the status of implementation of a convention by the countries concerned. It seems therefore reasonable to maintain this criterion. An exception should be made in the case of Macao which, as a special territory of China, does not have the international legal capacity to ratify legal conventions Bartels, *WTO Legality* 2007, op cit., p. 877.

preferences under GSP. In this light, it seems likely the Appellate Body will adopt a rather careful approach to this question. On the other hand, the above analysis also shows that, legally speaking, the GSP+ stands on relatively shaky grounds, even with regard to its most fundamental elements.

*ii) The condition of economic “vulnerability”*

Specific problems arise with regard to the condition of economic vulnerability. In general, a developing country with a weaker economy has stronger financial and trade needs than a country with a more efficient economy. Therefore, an objective criterion which relates to the economic situation of the country seems to be compatible with the Enabling Clause. An example of this would be the first condition of vulnerability, which is that the country must not be a high income country, as defined by the World Bank standards.

However, the two other criteria do not seem to provide for objective standards. This is particularly true for third criterion according to which the amount of imported goods from the beneficiary country to the EC must be less than 1 %. Although this criterion says something about the country’s export capacity regarding the European Union, it disregards that the country’s export capacity may be completely different concerning other import countries, such as the United States. The same applies to the diversity criterion, as it only focuses on exports to the Community. These criteria are thus not necessarily illustrative of the objective development situation of the country and are, hence, not in line with the Enabling Clause.<sup>158</sup>

*b) The admission procedure*

The admission procedure has been subject to political and legal criticism by the European Parliament<sup>159</sup> and by academics.<sup>160</sup> More specifically, it was ar-

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158 The doubts concerning the vulnerability condition, in particular, with regard to the third condition, are shared by McKenzie, *Climate Change 2008*, op cit., p. 693 and Bartels, *WTO Legality 2007*, op cit., p. 882.

159 See Draft Opinion of the Committee on Development of the European Parliament on the proposal for a Council regulation applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) n° 552/97, N° 1933/2006 and Commission Regulations (EC) N° 964/2007 and N° 1100/2006 (COM(2007)0857 – C6-0051/2008 – 2007/0289(CNS)), Amendment 4. This proposal was taken up in a slightly modified version by the European Parliament, see European Parliament legislative resolution of 5 June 2008 on the proposal for a Council regulation applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011

gued that the short application period of only three months was not in line with the Enabling Clause. The main point of the argument was that, in restricting the window for submitting applications, certain countries are precluded from benefiting from the GSP+, despite fulfilling its substantive criteria. As pointed out above, the WTO Enabling Clause requires that all countries fulfilling the development criteria referred to by the special incentive arrangement may benefit from the respective additional preferences.<sup>161</sup> Indeed, the Appellate Body had explicitly held that a special incentive arrangement, which does not allow for the admission of new beneficiary countries, is not compatible with the Enabling Clause.<sup>162</sup> This would be the case if a country is excluded from the additional preferences for several years only because it submitted its application some months after the assigned deadline.

It is not exactly clear whether the new Regulation, which adds a second application deadline in the mid-life of the GSP+ arrangement, is in line with the WTO-law requirements. While it seems that the reason for this amendment was precisely to avoid incompatibilities with WTO-law, it still implies waiting periods for potential beneficiary countries as high as 18 months. It therefore seems that the WTO dispute settlement bodies would find good reasons to find the provision not to be in conformity with the Enabling Clause.

### *c) Application in practice*

Given the inconsistency of the decisions of the Commission, and its partial ignorance towards the findings of the ILO, the question arises whether the Commission's application of the GSP+ is compatible with WTO-law.

Before addressing this question, it may be useful to set out certain basic principles. As has been mentioned above, the Enabling Clause authorises the granting of trade preferences to developing countries only if these preferences are available to all countries that are in a comparable situation.<sup>163</sup> This means for a special incentive arrangement that the trade preferences have to be granted to all countries that fulfil the relevant criteria. By contrast, admitting countries which do not fulfil the relevant criteria to this arrangement would

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and amending Regulations (EC) No 552/97, No 1933/2006 and Commission Regulations (EC) No 964/2007 and No 1100/2006 (COM(2007)0857 – C6-0051/2008 – 2007/0289(CNS), Amendment 19.

160 Bartels, *WTO Legality 2007*, op cit., p. 882; Gruszczynski, op cit., p. 20.

161 WTO Appellate Body Report EC – Tariff Preferences, para. 165.

162 Ibid., para. 187.

163 Ibid., para. 165.

constitute discrimination in two ways:

**1) Discrimination against developing countries that benefit from the special incentive arrangement:** If a country is admitted to the GSP+ despite failing to meet the substantive conditions (“bad country”), it is treated equally as those countries that have been admitted for succeeding to fulfil the conditions of the GSP+ (“good country”). In this case the “good country” suffers from a disadvantage because it has made a political, and sometimes also financial, effort to comply with the relevant international conventions, while the “bad country” has not made this effort, and nonetheless benefits from the same preferential treatment. This leads to an equal treatment of different situations which may, according to the case law of the WTO Appellate Body, be considered as discriminatory.<sup>164</sup>

**2) Discrimination against developing countries that do not comply with the requirements of GSP+:** Discrimination arises also between those countries that do not fulfil the GSP+ criteria but are nonetheless admitted to GSP+ (“lucky countries”), and those that do not fulfil the criteria and are not admitted to GSP+ (“unlucky countries”). There is no legitimate reason for distinguishing between these countries. Still, one country benefits from additional preferences which may mean a considerable economic advantage – possibly even to the detriment of the “unlucky country”. This boils down to a different treatment of equal situations, in other words discrimination.

In order to avoid breaches of WTO-law, it is therefore crucial that the Commission takes its decisions consistently in strict accordance with the criteria set out in the Human Rights and Good Governance Clause. A simple way to assure this is to rely on the relevant findings of the supervisory bodies of the relevant international organisations. These organisations have the necessary knowledge and experience, and are normally in a position to assess the situation in countries concerned free from extraneous economic or political considerations. It can therefore be presumed that the Commission applies the Human Rights and Good Governance Clause in a non-discriminatory way, if the decision is in conformity with the findings of the international supervisory bodies.

This is, however, not the case. As illustrated above, the decisions of the Commission deviate, at least partly, from the opinions of the international supervisory bodies. The Commission is, of course, not formally bound by these findings. It has, however, to be borne in mind that the party making use of the

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164 See WTO Appellate Body Report, United States – Import Prohibition on certain Shrimp and Shrimp Products, WT/DS58/AB/R vom 6. November 1998, para. 165. Though this reasoning referred to Article XX GATT, it can, arguably, also be applied to the Enabling Clause, as this is a general statement on the concept of discrimination; see, in this regard, Bartels, GSP Positive Conditionality 2003, op cit., p. 524.

“Enabling Clause” has to prove that the legal requirements of the “Enabling Clause” have been fulfilled.<sup>165</sup> This means that the Community would have to demonstrate that the GSP+ system is non-discriminatory. Given the presence of international organisation statements that directly contradict its decisions, the Community would have to put forward strong arguments in order to show that its admission decisions were taken in a non-discriminatory manner. The Commission does, however, not give any explanation justifying its decision. It appears therefore quite unlikely that the Commission would be able to defend its decisions if challenged before the WTO Appellate Body.

*d) The special case of the Republic of Moldova*

Additional questions are raised by the “autonomous preferences” granted to Moldova which constitute an exception to the GSP. It appears from the 6<sup>th</sup> Recital of Regulation 55/2008 that the preferences granted to Moldova regarding industrial and agricultural products are more advantageous than those provided for by the GSP+. As its name implies, this arrangement is not open to any developing country fulfilling a certain set of neutral conditions, but is specifically designed for one country. It seems obvious that this is at odds with the reasoning of the Appellate Body, according to which a Generalised System of Preferences may not constitute “a closed list of beneficiary countries”.<sup>166</sup>

There are serious doubts as to whether the preferences accorded to Moldova could at all be considered to be “generalised” preferences in the sense of the “Enabling Clause”. This “autonomous” arrangement seems to undermine the logic of the GSP, which seeks to provide equal export conditions for developing countries. It is thus more than questionable whether the arrangement establishing autonomous preferences for Moldova is compatible with WTO law. An illustrative fact in this regard is that neither the Commission Proposal nor the Regulation itself makes any mention of the WTO-law implications of this arrangement.

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165 The other party only has to “make written submissions in support of this allegation”, WTO Appellate Body Report EC-Tariff Preferences, para. 118.

166 Ibid., paras. 182 and 187.

## **IV. Human rights conditionality in the withdrawal clause**

1. *How does the human rights withdrawal clause function?*

a) *The conditions for withdrawing the preferences*

Regulation 732/2008 contains two different withdrawal clauses. First of all, the additional tariff preferences may be withdrawn if the country in question no longer incorporates or effectively implements the international conventions mentioned above.<sup>167</sup> Secondly, also the preferences under the general arrangement and the special arrangement for the least developed countries may be withdrawn.<sup>168</sup> This chapter will mainly refer to the latter withdrawal clause; the procedure is, however, the same for all arrangements.

The general withdrawal clause applies regardless of whether a country had ratified the relevant conventions or not. It comprises only the human rights conventions listed in Annex III of the Regulation. The application of the withdrawal clause is furthermore limited to violations of the “principles” of the conventions. It would therefore appear that only acts infringing a main provision in a convention can lead to a withdrawal, while the contravention of marginal provisions is not taken into account, a distinction which is, however, not always easy to draw.

Moreover, only “serious and systematic violations” may lead to a withdrawal of the preferences under the general arrangement. While the term “serious” implies a certain gravity of the infringement, the term “systematic” requires that the infringements are not caused by a coincidence, but are the product of a institutionalised action or omission of the state. It seems to be clear that a normal infringement of a provision of the relevant conventions is not sufficient for the withdrawal. The precise threshold for such a violation must be determined for each convention independently leaving considerable room for interpretation.

Similarly to the Human Rights and Good Governance Clause under GSP+, the general withdrawal clause has evolved significantly over the years. Introduced in 1994, its scope was fairly limited, comprised only the conventions on forced labour<sup>169</sup> which has been criticised as an unjustified “hierarchisation” of core labour standard, which was at odds with the ILO policy in this regard.<sup>170</sup>

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167 Article 15 (2) of Regulation 732/2008.

168 Article 15 (1) of Regulation 732/2008.

169 See Article 9 (1) of Regulation 3281/94.

170 This distinction has been criticised because it seemed to suggest that the exploitation of children and the assassination of trade unionists through death squads is less seri-

This problem was solved in 2001 when the remaining six conventions on core labour standards were added to the general withdrawal clause.<sup>171</sup> In 2005, the scope of the withdrawal clause was further extended to the nine human rights conventions mentioned above.<sup>172</sup> This enlargement implies that the chances of a country to have its general preferences revoked because of the application of the withdrawal clause increases considerably. Just as in the case of the Human Rights and Good Governance Clause, it remains to be seen whether the Commission will react to the increased “burden” of the beneficiary countries by interpreting the open terms of the withdrawal clause in a more restrictive manner than before.<sup>173</sup>

b) *The withdrawal procedure*

i) *The investigation procedure*

The investigation procedure consists of two main parts, namely a consultation phase and the examination phase.<sup>174</sup> The procedure may be triggered either by the Commission or a Member State.<sup>175</sup> If either receives information “that may justify” temporary withdrawal of the general preferences, and constitute “sufficient ground for an investigation”, they shall call for confidential consultations. These consultations should take place within one month. After the consultations, the Commission may decide, within one month and in consultation with the GSP-Committee, whether or not to commence an investigation.<sup>176</sup> The examination phase in the strict sense of the term begins with the Commis-

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ous human rights violations than forced labour camps, see Tsogas, G., Labour Standards in the Generalized System of Preferences of the European Union and the United States, *European Journal of Industrial Relations* 2000, pp. 351-370 at 363.

171 Article 26 (a) and (b) of Regulation 2501/2001.

172 Article 16 (1) of Regulation 980/2005.

173 See further Vandaele, A., *International Labour Rights and the Social Clause: Friends or Foes*, Cameron May (London) 2005, p. 286.

174 For more information on the logic of the withdrawal procedure see Dispersyn, M., Régulation et dimension sociale dans le système des préférences généralisées (SPG) de l'Union Européenne, in: *Mondialisation et régulation sociale: XXIIIèmes Journées de l'Association d'Economie Sociale*, Paris et al 2003, pp. 449-458 at 455.

175 Article 17 (1) of Regulation 732/2008.

176 See Article 18 (2) in conjunction with Article 28 (5) VO and Article 3 and 7 of Decision 1999/468. According to these provisions, the Commission shall submit a proposal to the GSP-Committee on which the latter may comment. The Commission is not bound by the comments of the GSP-Committee (see Article 3 (4) of Decision 1999/468).

sion informing the beneficiary country concerned of the investigation, and publishing an announcement thereof in the Official Journal of the European Union. The notice would contain a summary of the relevant information on the case, inviting interested parties to send their observations to the Commission within a four-month period.<sup>177</sup> The period of investigation should not exceed one year.<sup>178</sup> The Commission may, however, extend the period after consulting the GSP-Committee.

The Commission then examines the relevant information. Among other things, the Commission shall consider the available reports and findings of the competent international organisations. These documents shall constitute the point of departure of the investigation.<sup>179</sup> The Commission may verify that information by consulting economic operators and the beneficiary country concerned.<sup>180</sup> The Regulation attaches thus considerable importance to the findings of international organisations when determining whether there is a “systematic and serious” violation. The beneficiary country shall have “every opportunity to cooperate in the investigation”.<sup>181</sup> However, if the country does not submit information within the period of four months, or if it impedes the investigation “significantly”, the Commission may limit itself to other available information.<sup>182</sup>

Unfortunately, the European Parliament still does not have a role in the procedure, despite several requests to allow for its participation in the consul-

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177 Article 18 (1) of Regulation 732/2008.

178 Article 18 (6) of Regulation 732/2008.

179 Article 18 (3) of Regulation 732/2008.

180 Although the term “economic operator” does not refer to NGOs, the Commission held also consultations with several representatives of civil society, see Proposal for a Council Regulation temporarily withdrawing access to the generalised tariff preferences from the Republic of Belarus, COM(2006) 764 final of 30 November 2006, para. 4 of the justification. See also European Parliament legislative resolution of 5 June 2008, Amendment 26, according to which the Commission should have the explicit right to consult “representatives of civil society, (including the social partners)”.

181 Article 18 (2) of Regulation 732/2008.

182 Article 19 (5) of Regulation 732/2008. This has been the case in the investigation regarding Myanmar in 1996 where the country refused to cooperate with the Commission and refused, in particular, to let an independent commission of inquiry enter the country, see 8<sup>th</sup> Recital of 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, 27.3.1997, pp. 8–9 (hereafter: Regulation 552/97).

tations.<sup>183</sup>

*ii) The evaluation period and adoption of the withdrawal decision*

Once the investigation is completed the Commission shall report its findings to the GSP-Committee.<sup>184</sup> At this stage, two options are open to the Commission. Where it has been established that temporary withdrawal is not justified, the Commission shall, after having consulted the GSP-Committee, terminate the investigation and publish the decision and the main reasons thereof in the Official Journal.<sup>185</sup> If the Commission comes to the conclusion that the situation within the country justifies withdrawal of the preferences, the Commission will, again in consultation with the GSP-Committee, monitor and evaluate the situation for a period of six months. The Commission will inform the country concerned of the decision. At the same time the Commission will publish a notice in the Official Journal, announcing that it will propose to the Council to withdraw the preferences unless the country makes a commitment to make the situation conform to the Conventions referred to by the withdrawal clause “in a reasonable period of time”.<sup>186</sup>

If the Commission deems the withdrawal necessary after the six months period, it will submit a proposal to the Council. The latter shall decide on the proposal by a qualified majority.<sup>187</sup> The decision shall be taken within a two month period, which is twice as long as the period provided for by the GSP Regulation from 2005.<sup>188</sup> If the Council decides to temporarily withdraw the preferences, the decision enters into force six months after its adoption, unless the Council decides prior to this, that the reasons leading to this decision are no longer relevant.<sup>189</sup>

The entry into force of the Council decision results directly in the tempo-

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183 See Amendments 35 and 37 of European Parliament legislative resolution of 9 March 2005 and, most recently, European Parliament legislative resolution of 5 June 2008, Amendments 24 and 26.

184 Article 19 (1) of Regulation 732/2008.

185 Article 19 (2) of Regulation 732/2008.

186 Article 19 (3) of Regulation 732/2008.

187 Article 19 (4) of Regulation 732/2008.

188 See *ibid.* and Article 20 (4) of Regulation 980/2005.

189 Article 19 (5) of Regulation 732/2008. According to the wording of this provision, the form in which the legal act is to be adopted is a decision. However, both in the Myanmar and the Belarus case the temporary withdrawal was given effect by a Regulation which may be explained by the political importance of these measures.

rary withdrawal of both the general preferences and any special preferences that have possibly been granted. As a consequence the general EC provisions on standards customs will become applicable to the country concerned. The withdrawal may affect either all or certain specific products exported by the country<sup>190</sup> and will be revoked once the infringements of the relevant principles of the aforementioned conventions cease to apply.<sup>191</sup> Similar to the decision on admission to GSP+, the developing countries concerned by a withdrawal decision may bring legal action against that decision before the Court of First Instance (see above).

iii) *The margin of discretion of the Commission and the Council*

In the context of the withdrawal procedure, a special problem can be identified relating to the vast discretion of the Community institutions. Not only is the Commission granted a considerable margin of interpretation with regard to certain general terms like a “serious and systematic violation”, but it has also received much latitude as for the ability to initiate an investigation procedure. Indeed, the Commission is at complete liberty to refrain from opening an investigation even if there is sufficient information documenting human rights violations, which could justify a withdrawal.<sup>192</sup>

A similar problem exists regarding the final adoption of the withdrawal decision. The Council decides upon the proposal of the Commission without having to consider any factual or normative criterion. This implies that it may decide not to withdraw the preferences even in the case of compelling evidence of the most flagrant violations of the relevant conventions.<sup>193</sup> This latitude makes the entire application of the withdrawal clause subject to the political will of the Commission and the Council. It thereby severely obstructs both the efficiency and the legitimacy of the withdrawal clause and should be discarded

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190 Article 15 (1) of Regulation 732/2008.

191 See Article 2 of Council Regulation (EC) No 1933/2006 of 21 December 2006 temporarily withdrawing access to the generalised tariff preferences from the Republic of Belarus, OJ L 405, 30.12.2006, pp. 35-40 (hereafter Regulation 1933/2006).

192 The Commission has made use of its discretion, for example, in the case of Pakistan in 1997. Here, trade union federations lodged a complaint with the Commission because of the massive evidence of child labour in Pakistan, see further Brandtner, B./Rosas, A., Trade Preferences and Human Rights, In: Alston, Philip (ed.): *The EU and Human Rights*, Oxford University Press (Oxford) 1999, pp. 699-722.

193 Similar criticism has been expressed by Novitz, op cit., p. 232 and Smith, K. E., *The Use of Political Conditionality in the EU's Relations with Third Countries. How effective?*, (1997) EUI Working Paper SPS No. 97/7.

as soon as possible.<sup>194</sup>

*c) Application in practice*

*i) Coherence with the findings of international organisations*

In the history of the withdrawal clause, starting from 1994, the preferences have been withdrawn only two times. The first case concerned Myanmar whose preferences were withdrawn in March 1997 on account of violations of the international forced labour conventions.<sup>195</sup> The second, more recent case concerned Belarus, where trade union confederations<sup>196</sup> filed a request with the Commission in 2003, alleging violations of freedom of association and the right to collective bargaining, and demanding that an investigation be initiated against the Belarusian government.<sup>197</sup> The preferences of Belarus were withdrawn in June 2007.<sup>198</sup>

An aspect of particular importance is the coherence between the decision of the Community institutions and the findings of the relevant international organisations. Important insights in the application of the withdrawal clause can be obtained by analysing the recent Belarus case. During this investigation, the Commission scrutinised the situation in Belarus in the light of the international labour standards. It thereby took into consideration the relevant reports of the ILO Committee of Freedom of Association and of the ILO Committee of Experts which it considered as “main reference on interpretation of international

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194 The European Parliament has already put forward a proposal to improve this problem. According to this proposal, the Commission shall open an investigation “in all cases in which the ILO Conference Committee on the Application of Standards has approved a ‘special Paragraph’ on labour practices in a beneficiary country with regard to the core labour standards”; see European Parliament legislative resolution of 5 June 2008, Amendment 25. This refers to cases where the aforementioned Committee has formally established that the situation in the country concerned is not in conformity with the relevant ILO Convention. Such an amendment would have the advantage that the discretion of the Commission would be restricted in coherence with the decisions of the ILO supervisory bodies. However, this would favour certain conventions over others as only ILO Conventions can be subject to such a special procedure.

195 Article 1 and 3 of Regulation 552/97.

196 The acting trade union confederations were International Confederation of Free Trade Unions (ICFTU), the European Trade Union Confederation (ETUC) and the World Labour Confederation (WLC), see 2<sup>nd</sup> Recital of Regulation 1933/2006.

197 This request was made under Article 27 of the preceding Regulation 2501/2001.

198 See Article 1 of Regulation 1933/2006.

labour law and rules of correlation between national and international standards.”<sup>199</sup> It also relied on the report of the ILO Commission of Inquiry.<sup>200</sup> This report found Belarus to be in breach of the ILO conventions on freedom of association and collective bargaining and set out 12 recommendations with which the Belarusian Government failed to comply within the prescribed period of time.<sup>201</sup> “Based on this information and its own review”, the Commission came to the conclusion that the temporary withdrawal of the preferences would be justified. During the monitoring and evaluation period, the Commission explicitly requested Belarus to conform to the twelve recommendations of the ILO Commission of Inquiry in order to prevent withdrawal of the general preferences<sup>202</sup>. It also considered the follow-up reports issued by the ILO Committee of Freedom of Association on the case.<sup>203</sup>

This analysis shows that the Commission seeks to cooperate closely with the relevant ILO bodies during the withdrawal procedure. While the Commission did not refrain from carrying out its own investigation, and apparently did not feel directly bound by the findings of the ILO supervisory bodies,<sup>204</sup> an increased self-commitment of the Commission to the views of the ILO bodies can be noticed. The level of cooperation seems to be considerably more intensive than in the earlier Myanmar case of 1997 where the general trade preferences had been withdrawn before the Commission of Inquiry had started its investigations.<sup>205</sup> This is quite striking considering that in the GSP+ admission

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199 COM(2006) 764 final, p. 2.

200 Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the Observance by the Government of the Republic of Belarus of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), submitted: 2003.

201 5<sup>th</sup> Recital of Regulation 1933/2006.

202 In the case of Belarus the Commission called on the government to conform with the 12 recommendations of the ILO Commission of Inquiry, see sole Article of Commission Decision 2005/616/EC of 17 August 2005 on the monitoring and evaluation of the labour rights situation in Belarus for temporary withdrawal of trade preferences, OJ L 213, 18.8.2005, pp. 16-17 and 5<sup>th</sup> Recital of Regulation 1933/2006.

203 8<sup>th</sup> Recital of Regulation 1933/2006.

204 As Orbie and Tortell put it, “EU keeps its options open“, see Orbie, J./ Tortell, L., *The EU and ILO Relationship: A Case Study of GSP Labour Standards Conditionality*, Conference Paper presented at the Conference „The EU and the Social Dimension of Globalisation“, Lissabon, 2 and 3 March 2007 (unpublished draft on file with the author), p. 11.

205 The regulation withdrawing the preferences of Myanmar, Regulation 552/97, was adopted 24 March 1997. However, the ILO Commission of Inquiry held its first ses-

procedure the Commission does, as shown above, frequently not follow the international organisations findings. It appears that the Commission is much more anxious to ensure international acceptance for its withdrawal decisions than for its decisions on admission to the GSP+, which illustrates the difference in political importance between the two case studies.

In spite of the Commission's efforts to apply the withdrawal clause in line with the findings of the international organisations, certain problems remain. Although the Commission seeks to comply with the international organisations' findings *once* it has started the investigation it does not seem to pay much attention to them concerning the question *whether* to start an investigation. This has some puzzling implications. Indeed, countries like the People's Republic of China, Sudan or Iran have never been subject to any withdrawal examination by the Commission.<sup>206</sup> In view of their egregious human rights record,<sup>207</sup> it is incomprehensible that these countries continue to benefit from the general preferences.<sup>208</sup> Some explanation for this may be seen in the fact that these countries have often not ratified the relevant conventions, which impedes the relevant international organisations from examining the human rights situations in these countries.<sup>209</sup> However, the explanatory force of this argu-

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sion only on 9 June 1997; see Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the Observance by the Government of the Republic of Belarus of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), submitted: 2003, para. 10. Orbie and Tortell, p. 10 call this „a total lack of coordination“, see Orbie/Tortell, op cit., p. 10.

206 Note, however, that North Korea does not benefit from the GSP although they, arguably, fulfil its conditions.

207 See for example the reports for 2008 by Amnesty International and Human Rights Watch, and the report for 2007 by the International Trade Union Confederation at <<http://www.amnesty.org/en/library>>, <<http://www.hrw.org/world-report-2009>>, and at <<http://survey07.ituc-csi.org/getcontinent.php?IDContinent=0&IDLang=EN>>.

208 Dispersyn points to the risk of an imbalanced application of the withdrawal clause with respect to economically or politically important countries, such as China, see Dispersyn, Regulation 2003, op cit., p. 457.

209 See Vandaele, op cit., p. 485. Only the ILO supervisory system provides for a limited review of the situation of countries which have not ratified the relevant conventions. Social partners may bring complaints before the Committee of Freedom of Association regardless of whether ratification has taken place. This applies, however, only to two of the conventions referred to by the GSP Regulation, namely ILO Conventions No. 87 and 98; see Swepston, L., Human Rights Law and Freedom of Association. Development through ILO Supervision, *International Labour Review* 1998, pp. 169-194 at 175.

ment is limited. There is an abundance of NGO reports, which should provide the Commission with sufficient information on the human rights situation in these countries in order to initiate an investigation. In this regard, it is worth underscoring the pivotal role of the European Parliament and representatives of civil society that may bring cases to the attention of the Commission or the Member States, and thus contribute to a higher degree of coherence in the application of the withdrawal clause.

*ii) Length of procedure*

Another problem relates to the length of the withdrawal procedure. It is conspicuous that the total duration of the withdrawal procedure has been lengthened from less than two years in the Myanmar case<sup>210</sup> to almost four years and six months in the Belarus case.<sup>211</sup>

There are various reasons for this discrepancy. First of all, Regulation 552/97, which applied to the Myanmar case, did not provide for a six-months monitoring and evaluation procedure or for a final six months deadline before the entry into force of the withdrawal decision. In addition to this, the deadlines provided for by Regulation 980/2005, which applied to the Belarus case, have on several occasions not been respected. The investigation procedure in the case of Belarus took almost 20 months<sup>212</sup> – almost twice as long as the investigation in the Myanmar case.<sup>213</sup> Furthermore, after the six months monitor-

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210 The procedure began 7 June 1995 with the request of the ICFTU and the ETUC to initiate an investigation of the situation in Myanmar, see 3<sup>rd</sup> Recital of Regulation 552/97. The procedure ended with the entry into force of the withdrawal decision on the 3 March 1997, the seventh day after the adoption of the Regulation; see Article 3 of Regulation 552/97.

211 On 29 January 2003 the request for an investigation of the situation in Belarus was filed with the Commission. The withdrawal decision entered into force 21 June 2007; see 2<sup>nd</sup> Recital and Article 3 VO 1933/2006.

212 The notice on the initiation of the investigation was published on 14 February 2004; see Notice of initiation of an investigation of violation of freedom of association in Belarus in view of temporary withdrawal of benefits under the Scheme of Generalised Tariff Preferences (GSP), Official Journal C 40, 14.02.2004, p. 4.

213 In the Myanmar case the investigative procedure was initiated 16 January 1996 (see 4<sup>th</sup> Recital of Regulation 552/97) and the publication of the draft decision on withdrawal of industrial goods by the Commission, issued on 19 December 1996 (COM (1996) 711 final), which was at that time the next procedural step. See, Article 12 (3) of Regulation 3281/1994 und Regulation 1256/1996 respectively. Some scholars have presumed that the Commission extended the investigation in order to wait until the expiry of the time limit that the ILO Commission of Inquiry had set for Belarus to comply with its 12 recommendations; see Orbie/Tortell, *op cit.*, p. 11.

ing and evaluation period the Commission did not immediately submit the proposal regarding the withdrawal of the preferences to the Council, but chose to further observe the situation, which led to an additional delay of eight months.<sup>214</sup>

While a longer examination period may be desirable for the purpose of promoting thoroughness of the examination process, the examination period in the Belarus was so lengthy that this in itself is arguably detrimental to the efficiency of the human rights clause. Certainly, it may in theory be functional to grant developing countries a sufficient period of time to remedy the violations of the relevant conventions. However, the withdrawal clause experiences collated so far raise doubts about the benefit of such an extended length of the proceedings. In the Belarus case, the government tried repeatedly to hinder the withdrawal by putting forward very vague reports on the situation regarding freedom of association, refusing to show any intention to redress the problems identified by the Commission.<sup>215</sup> In view of these experiences, a procedural timeframe of more than four years seems too long to ensure the efficiency of the withdrawal clause.<sup>216</sup>

There are, however, several possibilities to streamline the procedure. First, the monitoring and evaluation period or the six month period before the entry into force of the withdrawal decision could be reduced. In any event, the Commission should be obliged to submit the withdrawal proposal to the Council immediately after the monitoring and evaluation period has elapsed, so as to preclude further delays by the Commission. Regarding the investigative procedure, the Commission could be obliged to give reasons for any extension of the one-year period in the Official Journal of the Community. This would allow for a review of the reasons of the Commission leading to an extension, which would arguably reduce the risk of politically motivated delays.

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214 See COM(2006)764, p. 2.

215 On the very day of the expiry of the monitoring and evaluation period the Belarusian Government submitted a report to the Commission. However, this report only dealt with the general situation in terms of freedom of association in Belarus. It can be presumed that this report is partly responsible for the delay of the procedure. See in this regard 7<sup>th</sup>, 9<sup>th</sup> und 10<sup>th</sup> Recital of Regulation 1933/2006.

216 This view is also defended by Hepple, *op cit.*, p. 104.

## 2. *Does the human rights withdrawal clause comply with WTO-law?*

### a) *Content and scope of the withdrawal clause*

The lawfulness of such an arrangement is slightly more unclear than the legality of GSP+, as the Appellate Body has, up to now, not dealt with a withdrawal clause in the context of a GSP. However, some conclusions may be drawn by applying the principles established by the Appellate Body in the affair EC-GSP to this scenario.

Doubts have been expressed concerning the legality of a withdrawal clause under the Enabling Clause.<sup>217</sup> These objections mainly rely on the wording of Article 3 (a) of the Enabling Clause, requiring a “positive” response to developing needs,<sup>218</sup> asserting that the withdrawal clause could hypothetically deprive such countries of development assistance.<sup>219</sup> It seems, however, that the Appellate Body considers it to be necessary that a preferential treatment based on development criteria provide for the possibility of removing a country from the system if it no longer conforms to its requirements. This reasoning can, arguably, also be applied to the withdrawal clause. Most of the scholars, therefore, consider a withdrawal clause to be generally compatible with the Enabling Clause.<sup>220</sup>

However, similar problems arise under the Human Rights and Good Governance Clause. Although the withdrawal clause does not refer the ratification and implementation of international conventions, it does require countries to respect human rights standards that are set out in these legal instruments. The question as to the legality of the withdrawal clause would therefore be subject to the same arguments that apply to the Human Rights and Good Governance Clause in the context of GSP+ (see above).

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217 See Bartels, L., The Appellate Body Report in European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries and its Implications for Conditionality in GSP Programmes, in: Cottier, T./Pauwely, J./Bonanomi, E. Bürgi (eds.): *Human Rights and International Trade*, OUP (Oxford) 2005, pp. 463-485 at 484; Bartels, in: Charnovitz et al, op cit., p. 245, Clapham/Martignoni, op cit., p. 289. This question had been left open by the Appellate Body; see WTO Appellate Body Report EC – Tariff Preferences, para. 129.

218 See also WTO Appellate Body Report EC-Tariff Preferences, para. 164.

219 See Bartels, Appellate Body Dispute 2005, op cit., p. 484.

220 See in this regard; Charnovitz, in: Charnovitz et al, op cit., p. 249; Mason, op cit., p. 541 and Blüthner, A., *Welthandel und Menschenrechte in der Arbeit*, Peter Lang Europäischer Verlag der Wissenschaften (Frankfurt/Main) 2004, p. 477.

b) *Procedural aspects*

Problems regarding the compatibility of the withdrawal clause with the relevant WTO-provisions are raised by the different kinds of discretion that the Commission and the Council exercise in the course of the withdrawal procedure. As mentioned above, the differentiation between developing countries is only admissible if the trade preferences are made available to all developing countries sharing a development need determined according to an independent criterion.<sup>221</sup> This implies that the withdrawal procedure of the withdrawal clause must be rigorous enough to ensure that the general preferences are withdrawn from all countries not complying with the relevant criteria.

In this light, it seems doubtful that the manifold discretion of the Commission and the Council is admissible under the “Enabling Clause”. In order to ensure that the preferences of those countries that violate the relevant conventions are actually withdrawn, it is necessary that an investigation is conducted in all cases where there is evidence of such violation. If the Commission may prevent the initiation of an investigation despite sufficient evidence, it may become impossible to determine whether a country is in line with the relevant conventions or not. Thus this procedure allows that even countries in flagrant breach of the relevant conventions can continue to benefit from the general preferences. A similar problem exists with regard to the decision-making process, taking place through the Council. These procedural provisions enable the Council to refrain from the withdrawal decision even though the competent international supervisory bodies, and the Commission, have established that the beneficiary country is in flagrant breach of the relevant conventions. The procedure of the withdrawal clause allows thus that those countries, which do not fulfil the criterion for differentiation between developing countries, still benefit from the tariff preferences granted by the GSP. This leads to a breach of the Enabling clause.

c) *The application of the withdrawal clause*

As far as the application of the withdrawal clause is concerned, similar problems arise as for the Human Rights and Good Governance Clause. The requirement of the Enabling Clause that the same preferential treatment must be available to all countries sharing the development need referred to, implies that the trade preferences of all those countries which do not comply with the withdrawal clause have to be withdrawn.<sup>222</sup> Not withdrawing the preferences of a

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221 WTO Appellate Body Report EC – Tariff Preferences, para. 165.

222 WTO Appellate Body Report EC – Tariff Preferences, para. 165.

country that commits “serious and systematic” violations of the relevant conventions generates a violation of the Enabling Clause.

It is true that it is not clear what exactly constitutes a “serious and systematic” violation. However, the Community has considered the situation in Belarus as sufficient to withdraw the country’s preferences. Hence, the Community would, arguably, have to withdraw at least the preferences of those countries that commit human rights violations to an equal or more severe degree than Belarus. Admittedly, it is difficult to establish a hierarchy between different human rights violations. However, it can be argued that the Commission would have to initiate proceedings against all those countries where there is evidence of grave human rights violations, in order to avoid further conflicts with the WTO supervisory bodies.

## V. Conclusion

The above analysis has attempted to give an overview of the state of human rights conditionality in the current GSP regulation. While certain achievements and, indeed, improvements, have been made, some major shortcomings subsist. The main problems concern substantive requirements of the clause less than a need to improve its procedural requirements and its practical application. Remedying these problems is not only a matter of political consistency but in some cases also a necessary condition for preventing further difficulties with respect to WTO law. Streamlining the application of the clause is all the more important given the fact that developing countries may challenge its arbitrary application before the European judiciary. The following seven theses summarize the major problems and suggest ways to redress them:

*Concerning the special incentive arrangement:*

1. The application of the GSP+ by the European Commission has considerable shortcomings. As shown above, four of the countries which have been admitted to the GSP+, i.e. Colombia, Guatemala, El Salvador and Georgia, do not fulfil the requirements of the relevant international conventions. The practice of the European Commission is inconsistent with that of competent international supervisory bodies. Given the lack of other convincing reasons, the inclusion of these countries in the GSP+ can not be justified. Furthermore, the arbitrary application of the criteria of the Human Rights and Good Governance Clause amounts to a breach of the non-discrimination requirement of the WTO Enabling Clause.

2. Due to the short examination period of less than two months, the large

number of conventions to be checked and the large number of requesting countries, it seems difficult, if not impossible, for the Commission to undertake a thorough analysis of the situation in each country. A longer examination period is required in order to ensure the accuracy of the investigation.

3. A number of political actors have criticized a lack of publicity and transparency of the procedure. This could be improved by involving civil society and the European Parliament in the examination procedure and by obliging the Commission to motivate its decisions to admit developing countries to the GSP+.

*Concerning the withdrawal clause:*

4. The greatest objection to the withdrawal procedure lies in the high degree of discretion afforded to the institutions of the Community, enabling the Commission and the Council to refrain from the withdrawal of preferences even when there is a flagrant breach of the conditions of the withdrawal clause. This threatens the credibility of the withdrawal clause as a whole and constitutes a breach of WTO-law. The discretionary elements of the withdrawal procedure should therefore be discarded as soon as possible.

5. The human rights record of several countries benefiting from the GSP is equal to that of the countries whose preferences have been withdrawn for reasons based on the human rights situation, and in some cases even worse. The credibility of the withdrawal clause can only be maintained if all countries that commit “serious and systematic violations” of the relevant international conventions are excluded from the GSP. This is all the more important, since the half-hearted application of the conditions of the withdrawal clause could lead to a breach of WTO-law.

6. The length of the withdrawal procedure is currently more than four years, i.e. more than the lifetime of a GSP regulation. This hampers the efficiency of the withdrawal clause. The swiftness of the procedure could be increased by abolishing the six-month period between the adoption of the withdrawal decision and its entry into force, and by limiting the Commission’s power to prolong the procedure.

Beyond these concrete points, of course, other, more general questions may be raised. Does it really help the promotion of human rights if countries are rewarded for complying with the relevant international conventions? Would it not be more efficient to grant special preferences to countries that have problems implementing the international conventions but that take serious and reasonable steps to improve the situation? Is the withdrawal of trade preferences really apt of making countries that commit atrocities in terms of human rights change their policy? Does their incentive effect outweigh their negative ef-

fects, such as including the situation of the population and raising unemployment rates?<sup>223</sup> Also the longstanding question whether tariff preferences actually have a positive influence on the countries' economy, is far beyond doubt.<sup>224</sup> And in the long run, the practical importance of the GSP will increasingly diminish, as the tariff negotiations within the WTO progress.<sup>225</sup> This shows that there is much to think of as regards human rights conditionality in the GSP.

In any event, it is clear that human rights conditionality has a chance to bring about positive contributions for developing countries and their populations only if it is implemented in a credible manner. The aforesaid problems with the current GSP Regulation should therefore be addressed as soon as possible. The changes made with the adoption of the Regulation 732/2008 showed that the Council of Ministers may be prepared to improve aspects of the GSP regulation, if sufficient pressure is exercised upon it. It may be hoped that civil society and the European Parliament will continue to push for improvement of the GSP regulation, so that the remaining shortcomings can be removed as well.

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223 In the case of Myanmar the economic sanctions imposed by the international community, in particular by the United States, caused serious damage to the national economy. It has been reported that many women who had been employed by in the industries concerned by the sanctions had been laid-off and, subsequently, been driven into prostitution. At the same time there was no sign that the Burmese regime was affected by the sanction in any significant way; see Maupain, F., *Is the ILO Effective in Upholding Workers' Rights? Reflections on the Myanmar Experience*, in: Alston, P. (ed.): *Labour Rights as Human Rights*, OUP (Oxford) 2005, pp. 85-142 at 114.

224 The literature on this issue is abundant: A particularly critical stand is taken by Özden, C./Reinhardt, E., *The perversity of preferences: GSP and developing country trade policies, 1976-2000*, *Journal of Economic Development Economics* 2005, pp. 1-21; Schöppenthau, op cit., p. 44. Others are rather supportive of the GSP while arguing for improvement of the regulation and the effective utilization of the system see Onguglo B.F., *Developing countries and unilateral trade preferences in the new international trading system*, in: Mendoza, M.R./Low, P./Kotschwar, B. (eds.): *Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations*, The Brookings Institution Press/ Organisation of American States, 1999. For discussion of the effects of social clauses in international trade see Dessing, M., *The Social Clause and Sustainable Development, Sustainable Development and Trade Issues*, International Centre for Trade and Sustainable Development Research Paper No. 1 2001, available at: [http://www.ictsd.org/pubs/ictsd\\_series/resource\\_papers/SCpaper.pdf](http://www.ictsd.org/pubs/ictsd_series/resource_papers/SCpaper.pdf) (last checked 5 March 2009).

225 See Vincent, op cit., p. 702.

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