(Non-)Conformity of Social Standards in the Generalized System of Preferences of the EC and the USA with WTO Law

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This article examines the conformity with WTO law of the European Community (EC) and the US generalized system of preferences (GSP) schemes with respect to social conditionality. It especially elaborates on all grounds of justification put forward in favor of conditionality in GSP schemes and assesses them critically. Though this examination is limited to social clauses, the conclusions drawn here can be transferred to environmental clauses as well.

I. Introduction

1. The EC and the US grant imports from developing countries (DC) a more favorable tariff treatment, called Generalized System of Preferences[1]. However, this

1 *Hilf/Oeter*, WTO-Recht, Rechtsordnung des Welthandels, Nomos 2005, § 31, para 29; *Mason*, The Degeneralization of the Generalized System of Preferences (GSP): Questioning the

grant is not unconditioned. Both the EC and the US use so-called social clauses in their respective GSP programs. The EC makes available additional tariff preferences to DCs ratifying and effectively implementing a list of core human and labor rights conventions (GSP+). The US scheme authorizes the suspension of GSP status, if the Beneficiary Developing Country (BDC) has not taken or is not taking steps to afford internationally recognized worker rights.

2. GSP schemes are domestic law.[2] They can be found in the external trade law of developed WTO Members. By granting tariff preferences to DCs on condition that they observe core labor and human rights, the EC and the US try to encourage DCs to respect these rights.[3] What is problematic about conditionality is that there is always the risk that GSP programs – thought as a means to promote export earnings of DCs (cf. Preamble of Decision of 25 June 1971 on Generalized System of Preferences [1971 Waiver][4]) and, thus, integrating them better into the world trade – are instrumentalized for foreign policy and (ab)used to promote non-trade objectives.[5] Since GSP preferences are granted voluntarily,[6] i.e. without a legal obligation, Members are free in determining whether and to which extent preferential treatment is accorded.[7] But, when bestowing preferences, Members are

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Legitimacy of the U.S. GSP, Duke Law Journal (DLJ) 2004, p. 513, 514; *de Haan*, in: Weiss/Denters/de Waart, International Economic Law with a Human Face, Kluwer Law International 1998, p. 311; *McKenzie*, Case Note, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, Melbourne Journal of International Law (MJIL) 2005, p. 118.

2 *Grynberg/Qalo*, Labour Standards in US and EU Preferential Trading Arrangements, Journal of World Trade (JWT) 2006, p. 619, 644.

3 *Inama*, Trade Preferences and the World Trade Organization Negotiations on Market Access, Battling for Compensation of Erosion of GSP, ACP and Other Trade Preferences or Assessing and Improving Their Utilization and Value by Addressing Rules of Origin and Graduation?, JWT 2003, p. 959, 973.

4 "Recognizing that a principal aim of the contracting parties is promotion of the trade and export earnings of developing countries for the furtherance of their economic development."

5 *Garcia*, Trade and Inequality: Economic Justice and the Developing World, Michigan Journal of International Law (MiJIL) 2000, p. 975, 1036.

6 *Vadcar*, Le traitement spécial et préférentiel. Plaidoyer contre les systèmes de préférences généralisées, Journal du Droit International (JDI) 2005, p. 317, 319; *Schneuwly*, Sind Handelssanktionen ein geeignetes Mittel zur Durchsetzung von Arbeitsnormen? Eine Untersuchung der Wirksamkeit der Sozialklausel im US GSP, Aussenwirtschaft 2003, p. 121, 124; *de Haan*, in: Weiss/Denters/de Waart, note 1, p. 309-310; *Durán/Morgera*, Case Note, WTO India – EC GSP Dispute: The Future of Unilateral Trade Incentives Linked to Multilateral Environmental Agreements, Review of European Community & International Environmental Law (RECIEL) 2005, p. 173, 175; *Inama*, note 3, JWT 2003, p. 959, 973.

7 *Schneuwly*, note 6, Aussenwirtschaft 2003, p. 121, 124; *Hilf/Oeter*, note 1, § 31, para 37; *de Haan*, in: Weiss/Denters/de Waart, note 1, p. 309, 312; *Trebilcock/Howse*, The Regulation of International Trade, 3nd ed., Routledge, Taylor & Francis Group 2006, p. 477.

bound by WTO law. Hence, imposing conditions on the receipt of preferences must be in conformity with WTO law.[8]

3. The legal basis for GSP schemes – first suggested by *Raúl Prebisch* at the 1st session of the United Nations Conference on Trade and Development (UNCTAD) in 1964[9] – is para 2(a) "Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries", GATT Document L/4903, 28 November 1979, BISD 26S/203 (Enabling Clause[10], EnablC)[11]. The EnablC was preceded by the 1971 Waiver which was limited to a ten-year period.[12] This 1971 Waiver had its origins in the Agreed Conclusions elaborated by the Special Committee on Preferences which was set up by the Resolution 21 (II) adopted by the 2nd session of UNCTAD in 1968.[13] Though being a deviation from the MFN (Most-Favoured-Nation) principle these schemes are an integral part of the WTO legal system[14] (the EnablC is one of the other decisions of the Contracting Parties within the meaning of para 1(b)(iv) General Agreement on Tariffs and Trade [GATT] 1994[15]) and therefore legalized. Consequently, a waiver is not necessary for GSP schemes being consistent with the EnablC.[16]

4. That GSP schemes are justified in general, even wanted[17] (cf. 2nd consideration of the Preamble of the Agreement Establishing the World Trade Organization [WTO Agreement] and Art. XXXVI:5 GATT[18]), is beyond controversy. What is unclear is how to design these schemes such that they are compatible with WTO law. Whether the EC and the US have achieved this with regard to social clauses

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8 *Durán/Morgera*, note 6, RECIEL 2005, p. 173, 175-176; *Harrison*, Incentives for Development: the EC's Generalized System of Preferences, India's WTO Challenge and Reform, Common Market Law Review (CMLR) 2005, p. 1663, 1674.

9 *Mason*, note 1, DLJ 2004, p. 513, 517 fn. 22; OECD, Report of the Secretary-General, The Generalised System of Preferences: Review of the First Decade, 1983, p. 9.

10 See annex.

11 *Jessen*, WTO-Recht und "Entwicklungsländer", "Special and Differential Treatment for Developing Countries" im multidimensionalen Wandel des Wirtschaftsvölkerrechts, Berliner Wissenschafts-Verlag 2006, p. 530; *Vadcar*, note 6, JDI 2005, p. 317, 318; *de Haan*, in: Weiss/Denters/de Waart, note 1, p. 311.

12 *McKenzie*, note 1, MJIL 2005, p. 118, 120.

13 *Mason*, note 1, DLJ 2004, p. 513, 518; *McKenzie*, note 1, MJIL 2005, p. 118, 120.

14 *Cottier/Mavroidis*, Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law, University of Michigan Press 2000, p. 24.

15 *Tariff Preferences*, AB, para 90, fn. 192.

16 Director-General of GATT, The Tokyo Round of Multilateral Trade Negotiations, 1979, Vol. I, p. 99.

17 *Tariff Preferences*, AB, para 98.

18 Articles in the following without statutory indication are GATT Articles.

will be the central question of this paper. Although environmental clauses are not object of examination, the found results can be transferred to them.

5. This article is structured like a Panel Report having as subject matter the imaginary cases brought forth by a developing Member challenging the social conditionality in the EC/US GSP scheme. Owing to this structure, the historical background will only be presented inasmuch as it is relevant to the historical interpretation method. Wherever the same questions arise in both schemes, they will be answered together. The Report is prefixed with a description of the schemes with regard to social clauses. In the end, social conditionality in the EC and the US will be evaluated.

II. Definitions

6. In the following, when referring to "social standards", human and labor rights standards are meant. GSP preferences granted because of compliance with social standards will be called "social preferences". And the term "social condition" applies to the condition to comply with social standards. "Social clauses" are the provisions in GSP schemes containing social conditions, namely Art. 9(1)(a) Council Regulation (EC) No. 980/2005 of 27 June 2005 applying a scheme of generalized tariff preferences (GSP Reg) in the EC scheme and 19 US Section 2462(b)(2)(G)-(H), 19 US Sec 2462(c)(7)[19] in the US scheme.

III. Social clause in the EC GSP scheme: GSP+

7. The GSP Reg consist of a general arrangement open for all DCs (Art. 2, 7 GSP Reg) and two special arrangements, Art. 1(2) GSP Reg, one for least developed countries (LDCs) (guaranteeing duty-free access to the European market, Art. 12 GSP Reg) and one special incentive arrangement for sustainable development and good governance, also called GSP+. GSP+ stands for an additional tariff reduction for BDCs compared with the general arrangement, in concrete: *ad valorem* tariffs are suspended for the BDCs, as well as specific duties unless combined with an *ad valorem* duty, motive 7, Art. 8 GSP Reg In this case (agricultural products), the zero rate only applies to the *ad valorem* component.[20]

8. In order to receive GSP+, the EC demands from a BDC the ratification and effective implementation of 16 core human and labor rights UN/ILO Conventions listed in Part A of Annex III to the GSP Reg, Art. 9(1)(a), 10(1)(b) GSP Reg.[21]

19 See annex.

20 UNCTAD GSP Newsletter, No. 8, 2005, p. 3.

This means that a formal adherence to those conventions is not enough. What is required of a BDC is an implementation that really improves the social standards situation in the country for the benefit of the population. This interpretation is supported by Art. 10(2) GSP Reg which requires that a BDC must commit itself to accept and fully comply with the monitoring and review mechanism envisaged in the relevant conventions and related instruments.

9. Further, a BDC must be considered as vulnerable according to Art. 9(3) GSP Reg: (a) it must not be classified by the World Bank as a high income country (GNI per capita 10,726 US Dollar[22]), and the five largest sections of its GSP-covered imports to the EC must represent more than 75 percent in value of its total GSP-covered imports (this criterion determines the diversification degree of exports of any DC[23]), and (b) its GSP-covered imports to the EC must represent less than 1 percent in value of the total of GSP-covered imports to the EC (this criterion shall exclude competitive emergent countries[24]). Only low and middle-income, small-sized, and mono-culturally aligned DCs with a specialized export range meet these criteria[25]. BDCs are listed in Annex I, Art. 2 GSP Reg.[26]

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21 Those are: 1) International Covenant on Civil and Political Rights; 2) International Covenant on Economic, Social and Cultural Rights; 3) International Convention on the Elimination of All Forms of Racial Discrimination; 4) Convention on the Elimination of All Forms of Discrimination Against Women; 5) Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; 6) Convention on the Rights of the Child; 7) Convention on the Prevention and Punishment of the Crime of Genocide; 8) Convention concerning Minimum Age for Admission to Employment (No. 138); 9) Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No. 182); 10) Convention concerning the Abolition of Forced Labour (No. 105); 11) Convention concerning Forced or Compulsory Labour (No. 29); 12) Convention concerning Equal Remuneration of Men and Women Workers for Work of Equal Value (No. 100); 13) Convention concerning Discrimination in Respect of Employment and Occupation (No. 111); 14) Convention concerning Freedom of Association and Protection of the Right to Organise (No. 87); 15) Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (No. 98); 16) International Convention on the Suppression and Punishment of the Crime of Apartheid.

22 http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20420458~menuPK:64133156~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html, last visited on 3/12/2007.

23 UNCTAD GSP Newsletter, No. 8, 2005, p 3.

24 *Rieck*, Zur Reform des Allgemeinen Präferenzsystems der EG, ZEuS 2006, p. 177, 198.

25 UNCTAD GSP Newsletter, No. 8, 2005, p. 3; *Jessen*, note 11, p. 583.

26 According to the Commission Decision 2005/924/EC, BDCs countries are: Bolivia, Colombia, Costa Rica, Ecuador, Georgia, Guatemala, Honduras, Moldova, Mongolia, Nicaragua, Panama, Peru, El Salvador, Sri Lanka, Venezuela.

10. GSP+ preferences may be temporarily withdrawn in the following cases:

– when a BDC seriously and systematically violates the principles laid down in the listed conventions, Art. 16(1)(a) GSP Reg;

– when the legislation of a BDC no longer incorporates the conventions or when that legislation is not effectively implemented, Art. 16(2) GSP Reg;

– when a BDC systematically fails to provide the administrative cooperation as required to control the respect of the listed conventions, Art. 17(1), (2)(c), 9(1)(d) GSP Reg, i.e. lack of administrative cooperation is equal to non-compliance with the social clause.

A possible withdrawal affects all or of certain products originating in a BDC, Art. 16(1), 17(1) GSP Reg.

11. The current GSP Reg is in force until 31 December 2008, Art. 1(1), 30(2) GSP Reg.

IV. Social clause in the US GSP scheme

A. Mandatory criteria for eligibility

12. The President may provide duty-free treatment for any eligible article from any BDC, 19 US Sec 2461. He shall not designate any country as BDC if such country has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country (including any designated zone in that country), 19 US Sec 2462(b)(2)(G), or if such country has not implemented its commitments to eliminate the worst forms of child labor, 19 US Sec 2462(b)(2)(H).

B. Discretionary criteria for eligibility

13. In determining whether to designate any country as a BDC or whether a BDC should be subjected to the lower competitive need limits with respect to a particular article, the President shall take into account whether or not such country has taken or is taking steps to afford to workers in that country (including any designated zone in that country) internationally recognized worker rights, 19 US Sec 2462(c)(7), 15CFR2007.8(b)(2)(x).[27]

[27] See annex.

C. Internationally recognized worker rights

14. It is noticeable that the US human rights conditions exclusively concern labor standards. Internationally recognized worker rights include: 1) the right of association (including the right of workers to establish and join organizations, the right to strike[28]), 2) the right to organize and bargain collectively, 3) freedom from compulsory labor, 4) a minimum age for the employment of children, and 5) acceptable conditions of work with respect to minimum wages (the amount a worker or family needs to meet basic needs of nutrition, clothes and shelter[29]), hours of work and occupational safety and health, 19 US Sec 2467(4)[30].

15. The US scheme does not refer to ILO conventions; the first four of the "internationally recognized worker rights" as understood by the US correspond to para 2(a)-(c) ILO Declaration on fundamental principles and rights at work from 1998 (ILO Declaration)[31]. The requirement of acceptable conditions of work is not recognized by the International Labour Organisation (ILO) as fundamental. The right to elimination of discrimination in respect of employment and occupation (para 2(d) ILO Declaration) is excluded:[32] This omission can be explained by the fact that Israel and allied oil-producing Arab states – potential victims of such a clause (Israel because of its treatment of Palestinian workers, the Arab states because of their treatment of women and non-Muslims[33]) – are important US trading partners.

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28 *Jackson/Davey/Sykes*, Legal Problems of International Economic Relations, 4th ed., West Group 2002, p. 1037.

29 Ibid., p. 1042.

30 USTR, US GSP Guidebook, 2006, p. 19-20.

31 Para 2 ILO Declaration: [The International Labour Conference] Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:
(a) freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.

32 *Hepple*, Labour Laws and Global Trade, Hart 2005, p. 94; Institute for International Economics (IIE), Labor Standards & Trade Agreements, p. 75.

33 *Compa/Vogt*, Labor Rights in the Generalized System of Preferences: A 20-Year Review, Comparative Labor Law and Policy Journal (CLLPJ) 2001, p. 199, 203.

D. Withdrawal, suspension of GSP status

16. The President may withdraw, suspend, or limit the application of the duty-free treatment with respect to any country, 19 US Sec 2462(d)(1). In taking any action, the President shall consider the factors set forth in 19 US Sec 2462(c). The President shall withdraw or suspend the designation of any country as a BDC if, after such designation, the President determines that as the result of changed circumstances such country would be barred from designation as a BDC under 19 US Sec 2462(b)(2), 19 US Sec 2462(d)(2).

17. In 2006 the US scheme has been reauthorized through 2008, 19 US Sec 2465.[34]

V. Conformity of the EC/US social clauses with WTO law

A. Jurisdiction

18. A panel can only rule on this matter if it is within the scope of its jurisdiction. This could be questionable since social standards are not subject to WTO law.[35] Panels have jurisdiction only to decide on claims of violations of covered agreements, Art. 1.1 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU):[36] As the EnablC is not listed in Appendix 1 to the DSU and, therefore, not covered, nor does it contain any dispute settlement provision;[37] it is not possible to bring an action simply on the basis of a violation of the EnablC .[38] So that the Panel can hear this claim, the complaining party shall maintain that the measure at issue is inconsistent with Art. I:1 and not justified by the EnablC .[39]

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34 http://www.ustr.gov/Trade_Development/Preference_Programs/GSP/Section_Index.html, last visited on 21/11/2007.

35 *Grynberg/Qalo*, note 2, JWT 2006, p. 619, 649; *Santos/Farias/Cunha*, Generalized System of Preferences in General Agreement on Tariff and Trade/World Trade Organization: History and Current Issues, JWT 2005, p. 637, 662, fn. 91.

36 *Pauwelyn*, How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?, Questions of Jurisdiction and Merits, JWT 2003, p. 997, 1000; *Pauwelyn*, The Role of Public International Law in the WTO: How Far Can We Go?, American Journal of International Law (AJIL) 2001, p. 535, 554; *Pauwelyn*, in: Cottier/Pauwelyn/Bürgi Bonanomi, Human Rights and International Trade, Oxford University Press 2005, p. 212; *Santos/Farias/Cunha*, ibid., JWT 2005, p. 637, 662; *Bartels*, The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program, Journal of International Economic Law (JIEL) 2003, p. 507, 516.

37 *Santos/Farias/Cunha*, ibid., JWT 2005, p. 637, 662.

38 *Bartels*, note 36, JIEL 2003, p. 507, 516.

39 *Santos/Farias/Cunha*, note 35, JWT 2005, p. 637, 662; *Bartels*, note 36, JIEL 2003, p. 507, 516; cf. *Tariff Preferences*, Panel, para 7.19.

B. Consistency with Art. I:1 GATT

19. Pursuant to Art. I:1, any advantage granted by any Member to any product originating in any other country shall be accorded immediately and unconditionally to the like product originating in all other Members.

1. Of GSP schemes

20. Under GSP programs, developed Members grant reductions in customs duties exclusively to imports from some BDCs.[40] This treatment of BDCs is not extended to all other Members.[41] The whole system only works if the preferences are not accorded to the like products originating in all other Members.

21. Yet, Art. I:1 states that any advantage must be provided [only] to the *like* product originating in all other Members. It is doubtful whether a product is unlike solely because it was produced under circumstances violating social standards.[42] The likeness of products is determined according to criteria such as (i) the properties, nature and quality of the products, (ii) the end-uses of the products, (iii) consumers' tastes and habits in respect of the products, (iv) the tariff classification of the products.[43] These criteria are cumulative.[44] One view argues that two identical products regarding their physical properties are unlike because the consumers' tastes and habits are different in respect of the two products if one has been produced under inhumane circumstances.[45] Another view objects that this would open the door to arbitrary and protectionist trade restrictions.[46] It maintains that an unequal treatment is only permissible if the difference is mirrored in the physical properties of the product.[47] Accordingly, a differentiation which is

40 http://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm, last visited on 3/12/2007; IIE, Glossary, p. 347; *Linan Nogueras/Hinojosa Martinez*, Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems, Columbia Journal of European Law (CJEL) 2001, p. 307, 331.

41 *Tariff Preferences*, AB, para 90.

42 *Meng*, International Labor Standards and International Trade Law, in: Benvenisti/Nolte (ed.), The Welfare State, Globalization, and International Law, Springer 2003, p. 387; *Koch*, Handelspräferenzen der Europäischen Gemeinschaft für Entwicklungsländer – Typologie, Konditionierungen, WTO-Konformität, Lang 2004, p. 240.

43 *Asbestos*, Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5/4/2001, paras 101-102.

44 *Asbestos*, AB, para 109.

45 *Koch*, note 36, p. 240.

46 *Hilf/Oeter*, note 1, § 34, para 28.

47 Ibid.

based solely on non-product related processes and production methods (PPMs) is impermissible.[48]

22. The last-mentioned view is to be preferred, as Art. XX(e) containing the only explicit non-trade PPM situation in WTO law[49] would be redundant according to the first view because products of prison labor would qualify *a priori* as unlike due to different PPMs.[50] One of the consequences of the general rules of interpretation is that the interpretation must give meaning to all stipulations of a treaty.[51]

23. In sum, every measure undertaken pursuant to the EnablC is inconsistent with Art. I:1.[52] That is why the EC/US GSP schemes can be challenged by each WTO Member without need to apply before in vain.[53]

2. Of conditionality in particular

24. It has been showed that GSP violates Art. I:1. Yet, conditionality in GSP schemes could constitute an own violation of Art. I:1. In the EC GSP regime, conditionality has the effect that different tariff rates are applied under the EnablC. However, according to Art. I:1 any advantage granted to the product of any country must be accorded to the like product of all WTO Members without discrimination as to origin.[54] Thus, whether conditions attached to an advantage contravene Art. I:1 depends upon whether such conditions discriminate regarding the origin of the imported products.[55] Hence, conditions may be imposed on receiv-

48 *Hilf/Oeter*, note 1, § 34, para 28.

49 *Chatton*, Die Verknüpfung von Handel und Arbeitsmenschenrechten innerhalb der WTO – Politisches Scheitern und rechtliche Perspektiven, Schulthess 2005, p. 126.

50 *Hilf/Oeter*, note 1, § 34, para 28.

51 *Gasoline*, Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20/5/1996, p. 23.

52 *Tariff Preferences*, AB, para 110; *Mathis*, Benign Discrimination and the General System of Preferences (GSP), WTO – Report of the Appellate Body, 7 April 2004, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries. WT/DS246/AB/R, Legal Issues of Economic Integration 2004, p. 289, 293; *Alston/Bustelo/Heenan*, L'Union Européenne et les Droits de l'Homme, Bruylant 2001, p. 743.

53 It is arguable that legislation may only be challenged if it mandates violation of WTO law. Where legislation is discretionary, a complainant must base his case on the exercise of discretion, *Howse*, Back to Court After Shrimp/Turtle? Almost But Not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exceptions in the European Union's Generalized System of Preferences, American University International Law Review (AUILR) 2003, p. 1333, 1365-1366.

54 *Canada – Autos*, Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139,142/R, adopted 19/6/2000, para 10.23.

55 *Canada – Autos*, Panel, para 10.29.

ing an advantage, as long as all Members are capable of meeting the conditions.[56] The social conditions at issue only use non-country-specific criteria and are thus origin-neutral;[57] they apply to all potential beneficiaries.[58] Consequently, the conditions violate Art. I:1 only if they are *de facto* discriminatory.[59] The EC and US could argue that they impose only conditions which all DCs are equally able to fulfill so that the schemes do not make up a *de facto* discrimination.[60] However, GSP treatment is unavailable to developed Members, even if they comply with all the conditions[61]. Therefore, conditionality in itself is not consistent with Art. I:1.

C. Justification under the Enabling Clause

25. It should be noted that the issue is not whether GSP in general is justified, but whether the concrete design of GSP schemes with regard to social conditionality is justified.

1. Enabling Clause sets out legal obligations

26. GSP programs have to fulfill the requirements set forth in the EnablC.[62] The Appellate Body (AB) has found in *Tariff Preferences* that also footnote 3 to Art. 2 EnablC is legally binding, cf. the obligatory language in the French and Spanish versions of the EnablC[63], Art. 3.2.2 DSU, 33(4) VCLT. Since it is virtually out of the question that the AB will change its view on this point, I will not dwell on the discussion whether this was the correct decision or whether footnote 3 is rather aspirational.[64]

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56 WorldTradeLaw.net DSC, *EC – Preferences*, Panel, p. 21.

57 *Mason*, note 1, DLJ 2004, p. 513, 538.

58 Ibid.

59 Ibid.

60 Ibid., p. 539.

61 *Howse*, note 53, AUILR 2003, p. 1333, 1365.

62 *Bartels*, in: Cottier/Pauwelyn/Bürgi Bonanomi (eds.), note 36, p. 478; *Quentel*, Le Schéma Communautaire de Préférences Généralisées face aux Règles de l'Organisation Mondiale du Commerce – L'Affaire du Régime Spécial « Drogues », Revue Belge de Droit International 2005, p. 501, 504.

63 *Tariff Preferences*, AB, paras 147-148.

64 As to this discussion see *Charnovitz/Bartels/Howse/Bradley/Pauwelyn/Regan*, Internet roundtable, The Appellate Body's GSP decision, World Trade Review (WTR) 2004, p. 239, 246-247; *Howse*, note 53, AUILR 2003, p. 1333, 1352.

2. Enabling Clause as an exception

27. Para 1 EnablC exempts Members from complying with Art. I:1 ("notwithstanding")[65]. Therefore, the EnablC is an exception to Art. I:1.[66]

3. Burden of proof

28. Since the EnablC is an exception, the defendant bears the burden of proof.[67] However, the EnablC, which expresses the Members' intent to encourage the adoption of GSP schemes,[68] has a special status in the WTO[69] and because of due process concerns,[70] the claimant must identify the provisions of the EnablC allegedly violated in order to convey the legal basis of the complaint sufficient to present the problem clearly, Art. 6.2.2 DSU.[71] The burden of establishing the facts[72] necessary to support the consistency of the scheme with the EnablC rests then with the defendant.[73]

4. Para 2(a) Enabling Clause

29. Para 2(a) in conjunction with footnote 3 pertinent to GSP schemes requires these schemes to be generalized, non-reciprocal and non discriminatory.[74]

a) Generalized

30. GSP schemes shall remain generally applicable.[75] This requirement shall thwart the restoration of special preferences between developed Members and their former colonies.[76] This does not necessarily rule out the possibility of conditioning

65 *Tariff Preferences*, AB, para 90.

66 *Tariff Preferences*, AB, para 99.

67 *Tariff Preferences*, AB, paras 98, 104, 105.

68 *Tariff Preferences*, AB, para 114.

69 *Tariff Preferences*, AB, paras 106-107.

70 *Tariff Preferences*, AB, para 113.

71 *Tariff Preferences*, AB, paras 110, 113, 118.

72 *Bartels*, in: Cottier/Pauwelyn/Bürgi Bonanomi, note 36, p. 475.

73 *Tariff Preferences*, AB, paras 115, 118.

74 *Tariff Preferences*, AB, para 112.

75 *Tariff Preferences*, AB, para 156.

76 *Tariff Preferences*, AB, paras 155-156.

GSP.[77] As not only former colonies but DCs in general can profit from EC/US social preferences, both schemes meet this requirement.

b) Non-reciprocal

31. One could argue that the conferral of benefits under certain conditions is reciprocal because it is used as a means to obtain itself benefits outside the area of trade,[78] thus representing a *quid pro quo*[79]. However, non-reciprocity refers in this context only to trade concessions and not to non-trade conditions,[80] cf. para 5 EnablC and Art. XXXVI:8 GATT where reciprocity is only related to tariffs and other trade barriers. So, in this sense, the EC and the US scheme in spite of social conditions are non-reciprocal.[81]

c) Non discriminatory

32. It is discriminatory to give different preferences to similarly situated DCs.[82] DCs are in the same situation when they share similar development, financial and trade needs.[83] Since DCs may have different needs,[84] cf. recital 1 ("respective needs and concerns at different levels of economic development")[85] and 2 ("commensurate with the needs of their economic development") Preamble WTO Agreement,[86] it is not discriminatory *per se* to differentiate between DCs.[87] This differentiation, however, must be based on objective criteria and respond to a particular

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77 *Mason*, note 1, DLJ 2004, p. 513, 540.

78 *Grossman/Sykes*, A preference for development: the law and economics of GSP, WTR 2005, p. 41, 56; Consultative Board (chairman: *Peter Sutherland*), The Future of the WTO – Addressing institutional challenges in the new millennium, 2004, para 94.

79 *Schrijver*, in: Weiss/Denters/de Waart (eds.), note 1, p. 390; *Stern*, in: Bronckers/Quick (eds.), New Directions in International Economic Law – Essays in Honour of John H. Jackson, Kluwer Law International 2000, p. 434; *Grossman/Sykes*, ibid., WTR 2005, p. 41, 55.

80 *Bartels*, in: Cottier/Pauwelyn/Bürgi Bonanomi, note 36, p. 479; *Bartels*, note 36, JIEL 2003, p. 507, 526-527, 529; *Vadcar*, La réciprocité dans le système commercial international, JDI 2002, p. 773, 774.

81 *de Haan*, in: Weiss/Denters/de Waart, note 1, p. 311; *Bartels*, note 36, JIEL 2003, p. 507, 529; *Garcia*, note 5, MiJIL 2000, p. 975, 990.

82 *Tariff Preferences*, AB, paras 153-154, 187.

83 *Tariff Preferences*, AB, para 173.

84 *Tariff Preferences*, AB, paras 160-162.

85 *Tariff Preferences*, AB, para 161.

86 *Tariff Preferences*, AB, paras 161, 168.

87 *Tariff Preferences*, AB, paras 173, 180.

development, financial or trade need.[88] Hence, the EC can provide additional preferences to DCs with a particular development need.[89]

33. The non-discriminatory requirement applies to the substantive prerequisites as well as to the procedural rules in GSP schemes.

(i) Substantive prerequisites in GSP schemes

34. All DCs have *per definitionem* the need for sustainable development. Social preferences are only bestowed on DCs which fulfill the conditions, though.

(aa) EC scheme

35. The selection of beneficiaries is based upon the ratification and effective implementation of UN/ILO Conventions which are listed in the Annex to the GSP Reg, Art. 9(1)(a) GSP Reg. Thus, GSP+ is potentially available to all DCs and all DCs are able to fulfill this condition in principle.[90] All DCs which meet this condition are entitled to identical tariff treatment.[91] Sustainable development goes hand in hand with an improvement of social standards. That is why there is a particular development need in this respect. Hence, the EC criteria are not discriminatory.

36. If a country now fulfilled the requirements of Art. 9(1)(a) GSP Reg, it could not be designated as a beneficiary anymore, since the list is final since December 2005, Art. 26(e) GSP Reg. Yet, that is the price for a scheme that is stable and that provides planning certainty for BDCs until 31 December 2008, Art. 30(2) GSP Reg.[92] The inclusion of new BDCs now would have negative impacts on the export earnings of the beneficiaries already included.

(bb) US scheme

37. The US grants all BDCs duty-free access. Among BDCs, there is no differentiation. The US scheme refers to internationally recognized worker rights which are defined more precisely in 19 US Sec 2467(4).[93]

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88 *Tariff Preferences*, AB, paras 162, 165.

89 *McKenzie*, note 1, MJIL 2005, p. 118, 139; *Howse*, Appellate Body Ruling Saves the GSP, at Least for Now, Bridges Monthly Review (BMR) 2004, p. 6; *Charnovitz*, et al., note 64, WTR 2004, p. 239, 247.

90 *McKenzie*, note 1, MJIL 2005, p. 118, 135.

91 Ibid.

92 *Rieck*, note 24, ZEuS 2006, p. 177, 216.

93 USTR, US GSP Guidebook, 2006, p. 19-20.

38. The first four rights enumerated in 19 US Sec 2467(4) can be found in para 2(a)-(c) ILO Declaration. Assuming the ILO Declaration is legally binding, one can derive from that fact

– that the ILO Declaration is an objective criterion to base a condition on it,

– that such a condition does not impose an additional disadvantage on DCs (since they are already obliged),

– that differentiating between DCs observing and such not observing the ILO Declaration corresponds to a particular development need (expressed in the acceptance of the legal obligation by the DCs),

– that making the grant of GSP preferences dependent on the implementation of the ILO Declaration serves only for law enforcement and, thus, functions as an award for the implementation. Hence, state A acting in contravention of its own legal obligations is excluded from claiming being discriminated when not being awarded like state B acting in conformity with its obligations. The infringements of state A warrant its different treatment.

39. On premise that the ILO Declaration sets out legal obligations, the above said is valid towards all DCs since all WTO Members are also ILO Members.[94] Therefore, it is necessary to clarify the legal nature of the ILO Declaration in the following.

40. According to one view, the ILO Declaration is soft law, a political statement without legal force.[95] The Declaration is a unilateral act of the International Labour Conference, not one of the states represented there. A conference declaration is not viewed as (hard) law.[96] Besides, there are no sanctions for non-compliance.[97] Another view replies that the Declaration was adopted with no opposing votes[98] and, therefore, obliges all ILO Members to comply with mandatory core labor standards irrespective of ratification of the corresponding ILO Conventions.[99] That is the opinion of the ILO itself, too.[100] A third view comes

94 *Meng*, note 42, p. 385, fn. 37; *Trebilcock/Howse*, note 7, p. 572.

95 *Hepple*, Labour Regulation in Internationalized Markets, in: Picciotto/Mayne (ed.), Regulating International Business: Beyond Liberalization, Macmillan et al. 1999, p. 194; *Alston*, 'Core Labour Standards' and the Transformation of the International Labour Rights Regime, European Journal of International Law (EJIL) 2004, p. 457, 458; *Shelton*, Normative Hierarchy in International Law, AJIL 2006, p. 291, 321.

96 *Shelton*, ibid., p. 320.

97 *Hepple*, note 95, p. 194.

98 OECD Study, 2000, p. 19; *Howse*, The World Trade Organization and the Protection of Workers' Rights, Journal of Small and Emerging Business (JSEB) 1999, p. 131, 142.

99 *Stoll/Schorkopf*, WTO – World Economic Order, World Trade Law, Max Planck Commentaries on World Trade Law 2006, p. 266 para 772; *Howse*, ibid., JSEB 1999, p. 131, 133; *Moorman*, Inte-

to the same result as the second, but gives a different reasoning: the core labor standards set forth in para 2 ILO Declaration are universal human rights[101] and as such customary international law.[102] The ILO Declaration provided the evidence of a general state practice accepted as law,[103] Art. 38(1)(b) ICJ statute, cf. also paras 4 WTO Singapore Ministerial Declaration, adopted on 13 December 1996, WT/MIN(96)/DEC (Singapore Declaration)[104], 8 WTO Doha Ministerial Declaration, adopted on 14 November 2001, WT/MIN(01)/DEC/1 (Doha Declaration)[105]. According to the new consensus theory, a provision which has been adopted on an international conference of universal character without any opposing votes can create public international law.[106]

41. Assessment: In my opinion para 3(b) shows that the ratification of the ILO Conventions is still the ultimate aim, as is suggested especially by the annual follow-up concerning non-ratified conventions. However, when interpreting the ILO Constitution, the Declaration is to be considered pursuant to Art. 31(3)(a) VCLT. That is why the two last-mentioned views are more persuasive. Hence, the ILO Declaration constitutes a binding commitment which the corresponding ILO Conventions specify in more detail. As a consequence, the criteria corresponding to para 2(a)-(c) ILO Declaration are not discriminatory.

42. The fifth right refers to ILO Convention No 176, Art. 23(1) Universal Declaration of Human Rights (right to "just and favourable conditions of work"), and Art. 7(1)(b) UN International Covenant on Economic, Social and Cultural Rights (ICESCR) ("safe and healthy working conditions"). Only few states have ratified ILO Convention No 176 (in total 21).[107] Recital 3 Preamble 1971 Waiver

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gration of ILO Core Rights Labor Standards into the WTO, Columbia Journal of Transnational Law 2001, p. 555, 556; *Cole*, Labor Standards and the Generalized System of Preferences: the European Labor Incentives, MiJIL 2003, p. 179, 203; *Grynberg/Qalo*, note 2, JWT 2006, p. 619, 622; *Gaedtke*, Welthandelsrecht und sein Verhältnis zu den Kernarbeitsstandards der Internationalen Arbeitsorganisation, Aussenwirtschaft 2003, p. 93, 107.

100 http://www.ilo.org/dyn/declaris/DECLARATIONWEB.ABOUTDECLARATIONHOME?var_language=EN, last visited on 3/12/2007.

101 *Schneuwly*, note 6, Aussenwirtschaft 2003, p. 121, 139.

102 *Meng*, note 42, p. 385; *Macklem*, Labour Law Beyond Borders, JIEL 2002, p. 605, 639.

103 *Macklem*, ibid.

104 "We renew our commitment to the observance of internationally recognized core labour standards."

105 "We reaffirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labour standards."

106 *Ipsen*, Völkerrecht, 5th ed., Beck 2004, § 18, para 21.

107 http://www.ilo.org/ilolex/english/convdisp2.htm, last visited on 21/11/2007.

to which footnote 3 refers describes GSP as mutually acceptable.[108] One can deduce that conditions must be mutually acceptable.[109] Hence, it is not required that DCs have agreed to a certain condition.[110] All DCs have the same chance to fulfill the condition of acceptable conditions of work and – if met – they receive the same (duty-free) treatment. Thus, this condition is valid.

43. As a result, the social standards applied by the EC/US are objective standards. That they also reproduce the interests of the EC/US is secondary.[111]

(cc) May the Panel scrutinize the concrete national decision?

44. Here the question arises whether the Panel may scrutinize the concrete national decision not to grant GSP status to the complaining DC or to withdraw GSP preferences. This is to be answered in the negative, because otherwise the Panel would deliberate on a violation of human and labor rights norms, which would ultimately lead it to examine non-WTO law. As the AB decided in *Soft Drinks* (with regard to NAFTA obligations), this is excluded by Art. 3.2 DSU.[112] The Panel is limited to the covered agreements.[113]

45. The Panel rather looks if the decision-making process is designed to prevent discriminations. Whether this is the case will depend on factors like whether the procedure is transparent and fair, based on objective, all available information, whether due process is fulfilled, i.e. whether the DC concerned is given the opportunity to be heard. This is an example of how substantive and procedural requirements are linked. To be non discriminatory, it is not sufficient for a GSP scheme to contain non-discriminatory substantive prerequisites, rather the scheme must be administered in a non-discriminatory manner, too. If this is to be answered in the affirmative with regard to the EC/US GSP procedure will be examined in the following.

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108 "*Recalling* that at the Second UNCTAD, unanimous agreement was reached in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries."

109 *Mason*, note 1, DLJ 2004, p. 513, 542.

110 Ibid.

111 *McKenzie*, note 1, MJIL 2005, p. 118, 134.

112 *Soft Drinks*, Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24/3/2006, para 56.

113 *Soft Drinks*, AB, para 56.

(ii) GSP procedure

46. The conditions for the inclusion and exclusion of DCs must be based upon objective and transparent criteria.[114] The EnablC does not explicitly require transparent criteria and a lack of transparency does not automatically lead to discrimination.[115] However, otherwise, an inquiry into the appropriateness of the GSP procedure would not be feasible.[116]

(aa) EC scheme

47. More objective and more transparent criteria than the ratification and effective implementation of UN/ILO Conventions are not conceivable since these refer to concrete legal texts which have been elaborated by the international community and have been clearly defined by international bodies.

48. The procedure for the inclusion of BDCs is not relevant anymore, since the deadline has expired. The Commission published a notice in the Official Journal listing the countries benefiting from GSP+, Art. 11(3)(3) GSP Reg. If a DC was refused as BDC, the Commission notified this DC of the denial, Art. 11(3)(1) GSP Reg, and explained the reasons for the denial if the DC so requested, Art. 11(4) GSP Reg.

49. As to the withdrawal procedure, Art. 16-20 GSP Reg, the EC guarantees an objective and transparent investigation on which the closing decision (by the Council on a proposal by the Commission, Art. 19(4) GSP Reg) is based: the Commission provides the BDC concerned with every opportunity to cooperate in the investigation, Art. 19(2) Reg. Moreover, the Commission seeks all information it considers necessary including the available information from the relevant supervisory bodies of the UN, the ILO and other competent international organizations. These serve as the point of departure for the investigation, Art. 19(3) Reg. Where the Commission considers that findings justify a temporary withdrawal for the reason of serious and systematic violations of the conventions with which compliance is demanded, it shall decide to monitor and evaluate the situation in the BDC concerned for a period of six months, Art. 20(3), 16(1)(a) GSP Reg. The BDC concerned is notified of the investigation, Art. 19(1) GSP Reg, as well as of the decision to monitor and evaluate the situation, Art. 20(3) GSP Reg.

50. The BDC can prevent the temporary withdrawal by making a commitment, before the end of the period of six months, to take the measures necessary to con-

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114 *Tariff Preferences*, AB, para 183; *Mason*, note 1, DLJ 2004, p. 513, 536; *Jessen*, note 11, p. 577.

115 *Bartels*, in: Cottier/Pauwelyn/Bürgi Bonanomi, note 36, p. 483-484.

116 *Shrimp*, Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para 165.

form, in a reasonable period of time, with the international conventions, Art. 20(3) GSP Reg. The final decision is taken on the basis of the conclusion of the relevant monitoring bodies, Art. 16(1)(a) Reg. A withdrawal decision enters into force six months after its adoption, unless the reasons justifying it no longer prevail, Art. 20(5) Reg. After withdrawal, the DC receives standard GSP according to the general arrangement if its prerequisites are given (Art. 3(1) GSP Reg).

51. In total, a DC can avert the withdrawal at any time while the procedure runs and even after (cf. Art. 20(5) GSP Reg) and it has a lot of time to react: investigation of a maximum of one year (Art. 19(6) GSP Reg), monitoring for a period of six months (Art. 20(3) GSP Reg), decision of the Council within one month (Art. 20(4) GSP Reg), entering into force after six further months (Art. 20(5) GSP Reg).

52. In sum, the EC procedure is in accordance with the rule of law. Currently, preferences are only being withdrawn from Myanmar because of human rights violations, Art. 29 GSP Reg. In 2004, the EC initiated an investigation against Belarus,[117] cf. Official Journal of the European Union 2004/C 40/04, which led to the Commission Decision 2005/616/EC to monitor and evaluate the labor rights situation there.

(bb) US GSP review process

53. The process to review the GSP status of any BDC can be triggered either by a petition submitted by any interested party or by the United States Trade Representative (USTR), 15CFR2007.0(b), (f). The GSP Subcommittee, an interagency set of trade officials,[118] conducts annual reviews,[119] 15CFR2007.3(a), and expedited reviews because of unusual circumstances,[120] 15CFR2007.3(b). The request will be published in the Federal Register, 15CFR2007.4(a).

54. Having accepted a request, 15CFR2007.2(b), which will be announced in the Federal Register, 15CFR2007.2(c), the USTR investigates whether the DC complies with US conditions.[121] The procedure includes public hearings in order to provide the opportunity for public testimony on petitions and requests, 15CFR2007.2(d). Interested parties (affected industries, foreign governments, especially the one of the BDC concerned, 15CFR2007.0(d)) are invited to make sub-

117 *Hepple*, note 32, p. 104, fn. 62.

118 *Trebilcock/Howse*, note 7, p. 575; *Trebilcock/Howse*, Trade Policy & Labor Standards, Minnesota Journal of Global Trade (MJGT) 2005, p. 261, 294; *Cleveland*, Human Rights Sanctions and International Trade: A Theory of Compatibility, JIEL 2002, p. 133, 180, fn 190.

119 UNCTAD Handbook, p. 2.

120 *Shaffer/Apea*, Institutional Choice in the Generalized System of Preferences Case: Who Decides the Conditions for Trade Preferences? The Law and Politics of Rights, JWT 2005, p. 977, 981.

121 *Hepple*, note 32, p. 96; *Schneuwly*, note 6, Aussenwirtschaft 2003, p. 121, 125.

missions, 15CFR2007.0(c).[122] This information is open to public inspection, 15CFR2007.6 with the exception of 15CFR2007.7 [information submitted in confidence]. During the examination, communication with the BDC concerned takes place.[123] The Subcommittee bases its assessment on information from the State Department's annual Country Reports on Human Rights Practices, the US Labor Department, from the US embassy in the BDC concerned, the ILO, and information made available by the petitioners and the BDC.[124] In evaluating the present state of social standards in the BDC concerned, the Subcommittee falls back on ILO conventions as a yardstick.[125] After the review, the USTR can recommend the President that the duty-free treatment should be withdrawn, which results in a re-introduction of MFN rates, 15CFR2007.2(g), (h).

55. The Administration has discretion in three phases of the procedure: whether to accept a petition; whether a DC is taking steps to implement the demanded social standards; and whether to withdraw or suspend GSP status.[126] The scope of discretion is unfettered when taking into account the soft language of "taking steps" (rather than obeying the standards[127]) and "acceptable conditions of work". How the discretion will be exercised depends mostly on the geopolitical importance of the DC, the importance as a US trading partner, the lobbying of US enterprises which do business in the DC concerned,[128] and not on a DC's performance regarding social standards,[129] cf. 19 US Sec 2462(b)(2) at the end.[130] One can detect that trade volume and US direct investments were considerably lower in DCs excluded from the US GSP scheme than in DCs where the US Administration renounced a suspension.[131] US trade volume with spared BDCs

122 UNCTAD Handbook, p. 2; *Seyoum*, US trade preferences and export performance of developing countries: Evidence from the generalized system of preferences, International Business Review (IBR) 2006, p. 68, 70.

123 *Cleveland*, note 118, JIEL 2002, p. 133, 180, fn. 190.

124 OECD Study, 1996, p. 184.

125 *Trebilcock/Howse*, note 7, p. 575.

126 *Schneuwly*, note 6, Aussenwirtschaft 2003, p. 121, 127.

127 *Hepple*, note 32, p. 96.

128 *Schneuwly*, Aussenwirtschaft 2003, p. 121, 128; *Garg*, A Child Labor Social Clause: Analysis and Proposal for Action, New York University Journal of International Law and Politics (NYUJILP) 1999, p. 473, 500-501; *Grossman/Sykes*, WTR 2005, p. 41, 45; *Alston*, EJIL 2004, p. 457, 497.

129 *Hepple*, note 32, p. 93; *Compa/Vogt*, CLLPJ 2001, p. 199, 235.

130 Subparagraph (G) and (H) shall not prevent the designation of any country as a BDC if the President determines that such designation will be in the *national economic interest* of the US.

131 *Schneuwly*, note 6, Aussenwirtschaft 2003, p. 121, 130; *Hepple*, note 32, p. 101.

was approximately eight times higher than with the excluded DCs.[132] US direct investments were five times higher.[133]

56. This huge range of discretion of the US Administration is problematic with respect to clarity of law.[134] An express link to ILO supervisory bodies like in Art. 11(1), 19(3) GSP Reg is missing in the US scheme,[135] cf. 15CFR2007.2(h). One cannot say on which grounds the final decision is based in reality[136] and it is impossible to predict the outcome. This has induced the District Court of Columbia to state that it could not rule on GSP worker rights provisions, since "they were so vague that they gave the court no law to apply"[137].

57. According to the AB in *Shrimp*, it is discriminatory, too, when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program.[138] Here, the Panel cannot examine whether the US criteria are applied in a discriminatory manner or not because of the immense scope of discretion US authorities have. That is why the US GSP process does not satisfy the non-discriminatory requirement.

5. Para 3(a) Enabling Clause

58. Para 3(a) requires that social preferences do not impose unjustifiable burdens on other Members.[139] As seen in *Tariff Preferences* between India and Pakistan, preferential treatment leads to trade diversions.[140] This enhances the pressure for DCs violating social standards to abide by them in order to benefit from preferences, too. Thus, burdens on other Members intensify the effectiveness of the measure. Since the effectiveness of the measure is a prerequisite for a positive response to a development need within the meaning of para 3(c) EnablC, these burdens are not unjustifiable.

59. *Harrison* argues that a country whose starting position is backward could be reckoned to be facing unjustifiable burdens by being demanded to implement the

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132 *Schneuwly*, note 6, Aussenwirtschaft 2003, p. 121, 130.

133 Ibid.

134 *Alston*, Labor Rights Provisions in U.S. Trade Law: 'Aggressive Unilateralism?', Human Rights Quarterly 1993, p. 1, 7-8.

135 *Hepple*, note 32, p. 99.

136 Ibid.

137 Ibid., p. 97.

138 *Shrimp*, AB, para 165.

139 *Tariff Preferences*, AB, paras 167, 179; *Durán/Morgera*, note 6, RECIEL 2005, p. 173, 176.

140 According to Indian estimate, the competitive losses of India owing to the inclusion of Pakistan into the incentive arrangement ran into approx. 250 million US Dollar; *Jessen*, note 11, p. 551.

standards just as effectively as countries which are emergent.[141] However, the conditions are not so onerous that they place unjustifiable burdens on any DC wishing to take advantage of social preferences. In the EC GSP, there is no need for LDCs to fulfill the social conditions, since they fall under a special arrangement granting them duty-free treatment anyway, Art. 1(2)(c), 12-13 GSP Reg. In the US GSP, the level of economic development is a discretionary criterion, 19 US Sec 2462(c)(2). Therefore, one can state that both schemes consider the starting points of DCs.[142]

6. Para 3(b) Enabling Clause

60. Any differential and more favorable treatment shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a MFN basis. One can observe two things: firstly, that BDCs defend the preferences they receive by blocking further tariff reductions in multilateral negotiation rounds because their advantage by preferential treatment looses its meaning to the extent MFN duties go down;[143] secondly, that DCs after being dropped from GSP treatment liberalized their markets considerably.[144] However, this is a general problem of GSP as a whole and not caused by social clauses. Besides, it should be taken into consideration that it is not GSP which constitutes an impediment to the reduction of tariffs on MFN basis, but the behavior of BDCs. As for freedom of association and the right to collective bargaining, an OECD study[145] found that respect for these rights boosts trade reforms in DCs without jeopardizing their comparative advantage.[146]

7. Para 3(c) Enabling Clause

61. One can derive from *Tariff Preferences* that the EnablC permits the EC and US to condition their GSP schemes on policy choices of DCs.[147] On the other hand, pursuant to para 3(c) EnablC, conditions must be designed in a manner that responds positively to the development, financial and trade needs of DCs. The question is whether social clauses meet these requirements.

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141 *Harrison*, note 8, CMLR 2005, p. 1663, 1682.

142 *Harrison*, note 8, CMLR 2005, p. 1663, 1682.

143 *Mattoo/Subramanian*, The WTO and the poorest countries: the stark reality, WTR 2004, p. 385, 402.

144 Future of the WTO, note 78, para 100.

145 Organization of Economic Cooperation and Development Study, 1996, p. 112.

146 *Howse*, note 53, AUILR 2003, 1333, 1371; *Trebilcock/Howse*, note 7, p. 561-562.

147 *Patterson*, Rethinking the Enabling Cause, Journal of World Investment & Trade (JWIT) 2005, p. 731, 738; *Tariff Preferences*, AB, para 169.

a) Response to a development, financial or trade need

62. Social clauses must respond to one of the enumerated needs.[148] According to motive 7 GSP Reg, GSP+ wants to respond to the need for sustainable development. Though there is no explicit statement on that, the same applies to the US scheme. Thus, social preferences respond to a development need.

b) Wide recognition of the addressed need[149]

63. According to the Preamble to the WTO Agreement, sustainable development is an objective of the WTO, likewise the protection of some social concerns such as raising standards of living, ensuring a large and steadily growing volume of real income. The need to protect core labor standards has been accepted by DCs in para 2 ILO Declaration. Thus, a complaining DC is barred from contending that a condition of obedience to core labor standards is not consistent with its development need (*venire contra factum proprium*).[150]

c) Positive response

64. Here it is necessary to differentiate between positive and negative conditionality. Negative conditionality is given when preferences are removed from DCs which fail to meet the prescribed criteria; positive conditionality means the bestowal of additional preferences to DCs which fulfill an extra set of prescribed criteria.[151] The US adopted a solely negative approach, whereas the EC follows with GSP+ a positive one,[152] although the GSP Reg provides withdrawal clauses, too,[153] e.g. Art. 16(1)(a) GSP Reg.

(i) Positive conditionality

65. There must be a sufficient nexus between social preferences and the likelihood of alleviating the relevant need.[154] The need for sustainable development can be

148 *Tariff Preferences*, AB, paras 163-165.

149 *Tariff Preferences*, AB, paras 163-164.

150 *Bartels*, note 36, JIEL 2003, 507, 529.

151 *Mason*, note 1, DLJ 2004, p. 513, 524; *Hepple*, note 95, p. 197; *McKenzie*, note 1, MJIL 2005, p. 118, 119, 134; *Linan Nogueras/Hinojosa Martinez*, note 40, CJEL 2001, p. 307, 309.

152 *Mason*, note 1, DLJ 2004, p. 513, 524; *Hepple*, note 95, p. 197; *Bartels*, in: Cottier/Pauwelyn/Bürgi Bonanomi, note 36, p. 466-467; *Shaffer/Apea*, in: Cottier/Pauwelyn/Bürgi Bonanomi, note 36, p. 494; *Harrison*, CMLR 2005, p. 1663, 1684-1685.

153 *McKenzie*, note 1, MJIL 2005, p. 118, 135.

154 *Tariff Preferences*, AB, para 164.

effectively addressed through tariff preferences, as tariff preferences mean increased export earnings for BDCs.[155] There is neither a need for any empirical proof of effectiveness nor must preferences be the only available means: a rational connection is sufficient.[156] Social preferences shall help to improve the situation in BDCs concerning social standards. As motive 7 GSP Reg states, DCs assume special burdens due to the implementation of social standards. Social preferences shall alleviate these burdens.[157] Moreover, the implementation of social standards offers the basic preconditions for economic development[158] so that the question whether GSP schemes can also be designed for a non-economic benefit of recipients can be left open.[159]

66. In sum, the granting of social preferences (positive conditionality) is a positive response to the need for sustainable development.

(ii) Negative conditionality

67. It is questionable, however, whether the same is valid for negative conditionality, as it penalizes non-compliance with social standards.[160] Can this be a positive response?

68. The possibility to withdraw GSP preferences again is a necessary element of conditionality in order to be in a position to pressurize BDCs to comply with social standards. Otherwise, BDCs would not take the conditions seriously. The threat to suspend GSP status has often moved BDCs to improve the protection of social standards, for instance in Central American and Caribbean states.[161] Without a withdrawal clause, positive conditionality would be without teeth. Therefore, grant and withdrawal of preferences are two sides of the same coin[162] ("carrot and stick" approach). Moreover, a threat of withdrawal is often more effective than the granting of further preferences, since the BDCs concerned are still treated better than the developed Members.[163] So, since a withdrawal clause

155 *Durán/Morgera*, note 6, RECIEL 2005, p. 173, 178.

156 *Howse*, BMR 2004, p. 6; *Durán/Morgera*, ibid., p. 173, 178; *Charnovitz*, et al, note 64, WTR 2004, p. 239, 247.

157 *Durán/Morgera*, note 6, RECIEL 2005, p. 173, 178.

158 *Jessen*, note 11, p. 616.

159 *Cole*, MiJIL 2003, p. 179, 198 argues that the inclusion of "development" supports the argument that GSP benefits need not be shaped exclusively for the economic benefit of recipients.

160 *Durán/Morgera*, note 6, RECIEL 2005, p. 173, 175; *Seyoum*, note 6, IBR 2006, p. 68, 69; *Charnovitz*, et al., note 64, WTR 2004, p. 239-240; *Harrison*, note 8, CMLR 2005, p. 1663, 1685.

161 OECD Study, 2000, p. 69.

162 Different view *McKenzie*, note 1, MJIL 2005, p. 118, 136.

belongs to an effective positive conditionality, both as a whole constitute a positive response.

8. Para 4 Enabling Clause

69. Para 4 obliges Members to notify the Committee on Trade and Development of the introduction, modification or withdrawal of GSP arrangements.[164] Para 4 is, however, of no practical meaning.[165] The EnablC does not actually obligate Members to notification[166] and the consultation procedure was rarely used.

9. Result

70. The EnablC does not forbid the EC and US social clauses. However, the US review process is not in conformity with the non-discriminatory requirement in footnote 3 to para 2(a) EnablC because of the excessive discretionary powers the administration has (especially with regard to the element of "taking steps") what makes it impossible for the Panel to check on it. In line with *Shrimp*, this is discriminatory.

D. Justification under Art. XX GATT

71. Following the above proposed solution that the EnablC cannot justify the US GSP scheme, the question arises whether Art. XX can keep up the US scheme nevertheless. For the EC Reg, Art. XX could serve as a second safeguard.

1. Object of justification

72. The *chapeau* of Art. XX makes it clear that it is the "measures" which are to be justified under Art. XX.[167] The object of justification is neither the MFN infringement nor GSP schemes in general. Rather, the issue is whether Art. XX permits Members to condition the grant of GSP preferences with reference to social standards and to withdraw or suspend GSP status in case of non-fulfillment.

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163 *Koch*, note 42, p. 245.

164 *Tariff Preferences*, AB, para 112; http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_01_e.htm#article1, para 39, last visited on 23/9/2006.

165 *Jessen*, note 11, p. 337.

166 *Jessen*, note 11, p. 337, fn. 946; *Dicke/Petersmann*, Foreign Trade in the Present and a New International Economic Order, University Press 1988, p. 91.

167 *Gasoline*, AB, p. 16.

2. Enabling Clause as "lex specialis" to Art. XX GATT?

73. Is the EnablC a *lex specialis* to the effect that it excludes other grounds of justification, even if its preconditions are not given (*lex specialis derogat legi generali*)?[168] In order to answer this question, we have to have a look at the relationship between different grounds of justification.

74. The EnablC was designed as legal basis for GSP schemes. Thus, it is the specific ground of justification for GSP preferences. The issue here, however, is not whether GSP schemes in general are justified, but the social clauses included therein. Even if viewing the EnablC as *lex specialis* vis-à-vis other grounds of justification, a *lex specialis* only excludes other norms in the scope where they overlap. Thus, we have to examine their respective scope of application. Article XX and the EnablC overlap with regard to Art. I:1. Both can justify measures violating the MFN principle. But the EnablC carves out different aspects of Art. I:1.[169] Hence, the Panel should be able to fall back to Art. XX, if a justification under the EnablC is ruled out[170], so that both grounds of justification are applicable side by side.[171]

75. This is correct because the whole WTO system is one legal unity: when one WTO rule decides that a state's behavior is lawful, this decision calls for respect in the whole WTO legal system. What is lawful according to one WTO rule cannot be unlawful according to another one. Therefore, without paying attention to this issue, the Panel in *Tariff Preferences* accepted the applicability of Art. XX.[172] Accordingly, the EC and US can invoke Art. XX in principle.

3. Burden of proof

76. The burden of proof rests upon the party who asserts the affirmative of a particular claim or defense.[173] Thus, the defending party (EC/US) has to prove *prima facie*:[174] first, that the measure falls under one of the subheadings of Art. XX and, second, that the measure meets the requirements of the *chapeau*.[175]

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168 *Charnovitz*, et al, note 64, WTR 2004, p. 239, 258; to the principle in general see *Lennard*, Navigating by the Stars: Interpreting the WTO Agreements, JIEL 2002, p. 17, 70 et seq.; *Reiertsen*, Governing Conflicts of Law: Lex Posterior, Lex Specialis and the Swordfish Case, ZEuS 2007, p. 387, 394 et seq.

169 *Charnovitz*, ibid., p. 239, 260.

170 *Charnovitz*, ibid., p. 239, 259.

171 *Charnovitz*, ibid., p. 239, 260; *Mason*, note 1, DLJ 2004, p. 513, 544.

172 *Tariff Preferences*, Panel, paras 7.178 et seq.

173 *Wool Shirts*, AB, p. 15.

174 *Asbestos*, Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, adopted 5/4/2001, paras 8.177, 8.178.

4. Art. XX(b) GATT

77. Article XX(b) permits measures to protect human life and health. Thus, Art. XX(b) can only encompass human and labor rights whose violation endanger human life and health, e.g. forced and child labor.[176] Social standards like freedom of association or the right to collective bargaining are not covered by Art. XX(b).[177]

78. Since the human and labor rights violations occur abroad, Art. XX(b) is only pertinent if it allows a Member to protect the population of another Member. This is disputed. One view answers this question in the affirmative.[178] The AB in *Shrimp* confirmed that trade measures may be justifiable under WTO law for protecting things not only inside the importing Member, but also in other Members.[179] But in *Shrimp*, the legality of the extraterritorial measures was justified by a sufficient nexus with domestic concerns.[180] Another argument is that the Panel has to consider the objective of "raising standards of living" (recital 1 Preamble WTO Agreement) according to Art. 3.2.2 DSU, 31(2) VCLT.[181] Improving social standards would raise living standards.[182] Another view limits the scope of Art. XX(b) to cases where human beings suffer health damages because of over-directed action, e.g. in case of forced labor.[183]

79. Considering the express territorial limitations of para 1 Annex A to the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)

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175 WT/CTE/W/203, p. 5-6; *Gasoline*, AB, p. 22.

176 *Chatton*, note 49, p. 122; *Howse*, AUILR 2003, p. 1333, 1373; *Mitro*, Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions, American University Law Review (AULR) 2002, p. 1223, 1245, 1247; *Samida*, Protecting the Innocent or Protection Special Interests? Child Labour, Globalization, and the WTO, Denver Journal of International Law (DJIL) 2005, p. 411, 427.

177 *Chatton*, note 49, p. 122; different view *Howse*, note 53, AUILR 2003, p. 1333, 1373.

178 *Bartels*, Article XX of GATT and the Problem of Extraterritorial Jurisdiction, The Case of Trade Measures for the Protection of Human Rights, JWT 2002, p. 353, 402; *Stevenson*, Pursuing an End to Foreign child Labor Through U.S. Trade Law: WTO Challenges and Doctrinal Solutions, UCLA Journal of International Law and Foreign Affairs (UCLA JILFA) 2002, p. 129, 162; *Koch*, note 42, p. 223.

179 *Petersmann*, Constitutional Economics, Human Rights and the Future of the WTO, Aussenwirtschaft 2003, p. 49, 84.

180 *Shrimp*, AB, para 133; *Linan Nogueras/Hinojosa Martinez*, note 40, CJEL 2001, p. 307, 329.

181 *Mitro*, note 176, AULR 2002, p. 1223, 1243; *Shrimp*, AB, para 153.

182 *Mitro*, ibid., p. 1223, 1246.

183 *Neumann*, Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen – Konflikte des materiellen Rechts und Konkurrenzen der Streitbeilegung, Duncker & Humblot 2002, p. 138.

which applies only to a Member's own territory, it should not be allowed, within the context of Art. XX(b), to take measures to protect life or health of people being not subject to a Member's own jurisdiction.[184] Hence, Art. XX(b) cannot be used to protect human life and health abroad.[185]

5. Art. XX(d) GATT

80. One could argue that a withdrawal of GSP status is necessary to secure compliance with social standards which BDCs have committed themselves to respect. Yet, in *Soft Drinks*, the AB stated that international obligations cannot be subsumed under "laws or regulations"[186]. Its scope of application is limited to the domestic law of a Member.[187] Article XX(h) ("obligations under any intergovernmental commodity agreement") would be superfluous if international agreements were implicitly encompassed by Art. XX(d).[188] Besides, Art. X:1 distinguishes between laws, and regulations, on the one hand, and international agreements, on the other.[189] Such a distinction makes only sense if both terms do not overlap.[190]

6. Art. XX(e) GATT

81. One view argues that Art. XX(e) should be extended teleologically to situations which are similar to prison labor,[191] such as forced labor:[192] if Art. XX(e) permits to ban the importation of products originating from legal prison production, then Art. XX(e) should find application *a fortiori* to products which have been produced under inhumane conditions, namely exploitation by forced or slave labor.[193]

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184 *Hilf/Oeter*, note 1, § 34, para 32; *Hilf/Hörmann*, Die WTO – Eine Gefahr für die Verwirklichung von Menschenrechten, Archiv des Völkerrechts (AVR) 2005, p. 397, 450; *Reuß*, Menschenrechte durch Handelssanktionen – Die Durchsetzung sozialer Standards im Rahmen der WTO, Nomos 1999, p. 97.

185 *Hilf/Hörmann*, note 184, AVR 2005, p. 397, 450.

186 *Soft Drinks*, AB, paras 69, 79.

187 *Soft Drinks*, AB, para 69.

188 *Soft Drinks*, AB, para 71.

189 Ibid.

190 Ibid.

191 *Zagel*, The WTO & Human Rights: Examining Linkages and Suggesting Convergence, International Development Law Organization, Voices of Development Jurist Paper Series, Vol. 2, No 2, 2005, p. 12.

192 *Cleveland*, note 118, JIEL 2002, p. 133, 162.

193 *Chatton*, note 49, p. 124; *Cleveland*, ibid., p. 133, 147.

82. However, the AB pursues a strictly literal approach concerning Art. XX(e) excluding a broad interpretation of "prison labour"[194]. When GATT was negotiated, other kinds of "odious labour" were known, the fact that the drafters only included prison labor implies that there is no unintended loophole in the law.[195] Besides, there is a difference between, on the one hand, prison labor which is thought as punishment or reintegration into society and, on the other hand, economic exploitation of people driven into forced labor. Ultimately, one has to consider the limits of Art. 3.2.3, 19.2 DSU.[196]

7. Art. XX(a) GATT

83. Measures necessary to protect public morals can be justified pursuant to Art. XX(a). In *Gambling*, within the scope of Art. XIV(a) GATS, "public morals" were defined as standards of right and wrong conduct maintained by or on behalf of a community or nation.[197] The Panel[198] and the AB[199] in *Gambling* used insights gained from Art. XX GATT for the benefit of Art. XIV GATS. Vice versa, it is equally possible to transfer the *Gambling* definition to Art. XX(a) GATT.

84. This definition enables Members not only to protect national values, but even to decide on the level of protection.[200] In the case at hand, the EC and the US do not want to force the DCs into accepting their national social standards. The EC and US GSP schemes are only about international standards.

85. National human rights are part of the national public morals.[201] Internationally recognized human and labor rights constitute international public morals. If national human rights standards can be subsumed under public morals as defined in *Gambling*, then this is all the more true of international standards.[202]

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194 *Howse*, note 53, AUILR 2003, p. 1333, 1373.

195 *Meng*, note 42, p. 387.

196 *Meng*, Wirtschaftssanktionen wegen Menschenrechtsverletzungen – Probleme im WTO-Recht, in: Bröhmer, Jürgen et al, Internationale Gemeinschaft und Menschenrechte, Fs. für Georg Ress zum 70. Geburtstag, Heymann 2005, p. 183.

197 *Gambling*, Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20/4/2005, para 6.465, AB, para 296.

198 *Gambling*, Panel, para 6.461.

199 *Gambling*, Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20/4/2005, para 291.

200 *Gambling*, Panel, para 6.461.

201 *Meng*, note 42, p. 388.

202 *Howse/Mutua*, Protecting Human Rights in a Global Economy, Challenges for the World Trade Organization, Rights & Democracy, 2000, p. 11; *Howse*, note 53, AUILR 2003, p. 1333, 1368; *Trebilcock/ Howse*, note 118, MJGT 2005, p. 261, 290; *Neumann*, note 183, p. 141; *Charnovitz*, The

It would be illogical if Art. XX(a) were to allow an exception for the benefit of national values, but not for the benefit of international ones which are codified in public international law as e.g. in the ILO Declaration, ILO Conventions, UN International Covenant on Civil and Political Rights [ICCPR], ICESCR, etc.

a) Inclusion of human rights via Art. 3.2.2 DSU, 31(3)(c) VCLT

86. Before *Gambling*, the inclusion of human rights (core labor rights are universal human rights[203]) into Art. XX(a) was managed via Art. 3.2.2 DSU, 31(3)(c) VCLT and an evolutionary interpretation. However, Art. 31(3)(c) VCLT can only be applied according to the prevailing view[204] in constellations where both parties have already committed themselves to abide by social standards. Without having ratified a special treaty of public international law, this is given with respect to labor rights only for those laid down in para 2 ILO Declaration, and with regard to human rights only for those having become customary international law or *ius cogens*.

b) As to the counterargument inferred from Art. XX(e) and the Havana Charter

87. One view argues that Art. XX(a) was not meant to encompass social standards; otherwise the drafters would have created a special exempting provision like in case of Art. XX(e)[205] or Art. 7(1)[206] of the failed Havana Charter.[207]

Moral Exception in Trade Policy, Virginia Journal of International Law (VJIL) 1998, p. 689, 742; *Cleveland*, note 118, JIEL 2002, p. 133, 162-163; *Bal*, International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT, MJGT 2001, p. 62, 108; *Meng*, note 42, p. 389; *Gaedtke*, note 99, Aussenwirtschaft 2003, p. 93, 95; *Bartels*, note 178, JWT 2002, p. 353, 356, 402; *Powell*, The Place of Human Rights Law in World Trade Organization Rules, Florida Journal of International Law 2004, p. 219, 223.

203 *Gaedtke*, ibid., p. 93, 101; *Chatton*, note 49, p. 147.

204 *Hilf/Hörmann*, note 184, AVR 2005, p. 397, 422-423; *Marceau*, WTO Dispute Settlement System and Human Rights, EJIL 2002, p. 753, 781-782; *Marceau*, A Call for Coherence in International Law – Praises for the Prohibition against "Clinical Isolation" in WTO Dispute Settlement, JWT 1999, p. 87, 124; *Bartels*, note 178, JWT 2002, p. 353, 360-361.

205 *Gaedtke*, note 99, Aussenwirtschaft 2003, p. 93, 102.

206 Art. 7(1) Havana Charter: The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.

88. It is true that the drafters thought primarily of trade restrictions on pornographic papers and alcohol.[208] However, the historic interpretation method is subsidiary, cf. Art. 32 VCLT, and only to consider if a literal, systematic, and purposive interpretation (Art. 31(1) VCLT) does not bring about any or an evidently absurd result.[209] Besides, one could use Art. 7 Havana Charter just to demonstrate the contrary: as Art. 7 Havana Charter shows, the ILO was socially tailored, thus GATT planned as part of the failed International Trade Organization is to interpret in a social light.

89. According to the prevailing view, the interpretation of treaties has to be oriented to the state of the time of interpretation (and not of creation of the norm concerned).[210] Article 31(3)(a) and (b) VCLT recognize expressly the pertinence of events subsequent to the conclusion of the treaty for interpretation.[211] In *Shrimp*, the AB followed a dynamic approach: the words "exhaustible natural resources" in Art. XX(g) must be read in the light of contemporary concerns.[212] Terms which are open for changes in meaning such as "natural resources"[213] or "public morals"[214] are to be interpreted in an evolutionary manner[215] and "should not be frozen in time"[216]. Hence, Art. XX(a) should be interpreted in the light of current human rights law.[217]

90. Pursuant to Art. 3.2.3, 19.2 DSU, an interpretation conforming to human rights must not go as far as adding to or diminishing the rights and obligations provided in the covered agreements. Hence, such an interpretation is only possi-

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207 *Howse*, note 98, JSEB 1999, p. 131, 142.

208 *Hilf/Oeter*, note 1, § 34, para 31; *Hilf/Hörmann*, note 184, AVR 2005, p. 397, 448; *Gaedtke*, note 99, Aussenwirtschaft 2003, p. 93, 102; *Neumann*, note 183, p. 141.

209 *Gaedtke*, note 99, Aussenwirtschaft 2003, p. 93, 104; *Chatton*, note 49, p. 107.

210 *Ipsen*, note 106, § 11 para 21; *Gaedtke*, note 99, Aussenwirtschaft 2003, p. 93, 105; *Namibia Expertise* of 1971, ICJ Reports (1971), p. 31-32; Judgment to the *Aegean Sea Continental Shelf* Case of 1978, ICJ Reports (1978), p. 34-35.

211 *Gaedtke*, ibid., p. 93, 105; *Marceau*, note 204, JWT 1999, p. 87, 120; *Howse*, note 98, JSEB 1999, p. 131, 142.

212 *Shrimp*, AB, para 129.

213 *Shrimp*, AB, para 130.

214 *Gambling*, Panel, para 6.461.

215 *Gaedtke*, note 99, Aussenwirtschaft 2003, p. 93, 105; *Sinclair*, The Vienna Convention on the Law of Treaties, 2nd ed., Manchester University Press 1984, p. 139; *Lennard*, note 168, JIEL 2002, p. 17, 75-76.

216 *Howse*, note 98, JSEB 1999, p. 131, 142; *Trebilcock/Howse*, note 7, p. 573; *Trebilcock/Howse*, note 118, MJGT 2005, p. 261, 290.

217 *Cleveland*, note 118, JIEL 2002, p. 133, 162; *Chatton*, note 49, p. 126.

ble to the extent that the WTO norm leaves leeway for interpretation.[218] Article XX(a) leaves leeway to interpret it consistently with human rights.[219]

c) As to the issue of extraterritoriality

91. One view would deny Art. XX(a) here by arguing that Art. XX is limited to the protection with regard to domestic issues, *argumentum e contrario* from Art. XX(e), whereas GSP preferences are intended to improve the general human rights situation in another Member State.

92. There are two practicable argumentations to refute this opinion. The first is to accept that Art. XX does not encompass – apart from Art. XX(e) – extraterritorial measures and then to substantiate that the measure at issue is not extraterritorial. Again, there are different ways to argue:

93. GSP laws refer to the importation of products into the domestic markets. They only designate certain products originating in certain DCs which may enter the domestic markets at more favorable rates of duties.[220] Regulating the import into the domestic market is a legitimate state interest which satisfies the principle of territory.[221]

94. When the EC withdraws GSP preferences according to Art. 16(1)(a) GSP Reg, then it will force the DC concerned to comply with its own obligations it has ratified before.[222] When the US urges DCs by means of its GSP scheme to observe the social standards laid down in para 2 ILO Declaration, this cannot be viewed as an interference with internal affairs, because all developing Members are also ILO Members and as such committed to these standards[223] (controversial, see paras 39-41).

95. Conditioning market access on whether exporting Members abide by or adopt certain policies prescribed by the importing Member, does not make it *a priori* impossible to justify such a measure under Art. XX; such an interpretation would render Art. XX redundant.[224] One can draw from *Shrimp* the conclusion that at least in cases where a sufficient nexus exists between the object of protection (here social standards in DCs) and the import state, a justification under Art. XX is pos-

218 *Hilf/Hörmann*, note 184, AVR 2005, p. 397, 423.

219 Ibid.

220 *Howse*, note 98, AUILR 2003, p. 1333, 1370.

221 *Charnovitz*, note 202, VJIL 1998, p. 689, 719, fn. 179.

222 *Gaedtke*, note 99, Aussenwirtschaft 2003, p. 93, 103.

223 *Koch*, note 42, p. 192.

224 *Shrimp*, AB, para 121.

sible in principle.[225] It is disputed whether a sufficient nexus is given between the import state and the human rights violations. One view denies this,[226] since the violations take place in another Member's territory with no direct effect on the nationals or the territory of the importing Member.[227] However, human and core labor rights with which compliance is demanded are universal rights.[228] When these rights are at stake, there is a global consensus about the need to protect them.[229] Because of this, a sufficient nexus exists to the EC and US.[230]

96. If a DC does not meet the social conditions, the only consequence will be a change in the rates of duties at which its exports are admitted to the EC/US market.[231] The DC concerned is therefore not subject to any kind of sanction.[232] The importation at MFN level remains possible. GSP laws neither steer conduct abroad nor do they assign national authorities jurisdiction over any persons or property abroad.[233] Ultimately, grant and withdrawal of tariff preferences do not infringe on another Member's sovereignty.[234]

97. This view does not conflict with the view taken under Art. XX(b), as the decisive argument from above, para 1 Annex A to SPS which refers to the protection of life or health is not applicable to Art. XX(a).

98. Second, one could give reasons why Art. XX justifies extraterritorial measures, too. *Shrimp* suggests that Art. XX could be interpreted so as to justify measures aimed at conduct outside a Member's own territory.[235] The main argument of the above mentioned opinion excluding extraterritorial measures is that if Art. XX should be able to justify such measures, the drafters would have established it expressly as they have done it in Art. XX(e); *expressio unius est exclusio alterius*[236].

225 *Hilf/Hörmann*, note 184, AVR 2005, p. 397, 446.

226 *Meng*, note 196, p. 183.

227 *Marceau*, note 204, EJIL 2002, p. 753, 813.

228 *Chatton*, note 49, p. 103.

229 Ibid., p. 103, 115, 137.

230 Ibid., p. 103-104.

231 *Howse*, note 53, AUILR 2003, p. 1333, 1370.

232 Ibid.

233 Ibid.

234 *Zagel*, note 191, p. 34.

235 *Cleveland*, note 118, JIEL 2002, p. 133, 160; *Petersmann*, Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration, EJIL 2002, p. 621, 645; *Macklem*, note 102, JIEL 2002, p. 605, 628.

236 *Bartels*, note 188, JWT 2002, p. 353, 359; *Lennard*, note 168, JIEL 2002, p. 17, 55-56; *Feddersen*, Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and 'Conventional' Rules of Interpretation, MJGT 1998, p. 75, 109.

Another view, however, contends that Art. XX(e) which takes PPMs in another Member as a ground of justification[237] just shows that Art. XX permits the protection of things abroad.[238] The thought of Art. XX(e) also applies to the other exceptions in Art. XX[239], as Art. XX(e) is the expression of a general legal concept underlying Art. XX as a whole.[240]

99. As this discussion shows, Art. XX(e) can be used in both directions maintaining as the one as the contrary. In my opinion, this does not matter here because the argumentation denying extraterritoriality of GSP laws is convincing.

100. Interim result: only Art. XX(a) is pertinent.

8. Necessity test

a) End pursued

101. The end pursued is the promotion of social standards in BDCs. Means to that end is the grant of tariff preferences. End and means are connected in the social clauses in the GSP schemes. One can regard social preferences as partial compensation for the costs incurred by compliance with the demanded standards, cf. motive 7 GSP Reg, and as support for the complying DCs towards competing DCs which try to secure a comparative advantage by not complying.[241]

102. In the following, one has to consider two things: first, the EC and the US do not intend to harmonize social legislation worldwide, they merely want to promote a minimum standard. Second, the issue is not whether GSP schemes are necessary, but the social clauses contained therein. This is the measure the Panel is mandated to examine since the complaining DC only challenges the social clauses and not GSP in general[242] (principle of *non ultra petita*).

b) Suitability of social clauses to attain the end pursued

103. The question here is whether the measure at issue contributes to the attainment of the stated objective. The examination is to be limited to the question whether social conditions are suitable to promote social standards in BDCs

237 *Hilf/Hörmann*, note 184, AVR 2005, p. 397, 445.

238 *Charnovitz*, note 202, VJIL 1998, p. 689, 700 et seq.

239 *Bal*, note 202, MJGT 2001, p. 62, 107; *Bartels*, note 178, JWT 2002, p. 353, 358.

240 *Gaedtke*, note 99, Aussenwirtschaft 2003, p. 93, 104.

241 *Koch*, note 42, p. 241-242.

242 In *Tariff Preferences*, para 128, the AB reprimanded the panel for having made findings on issues that were not before it; *Charnovitz*, et al, note 64, WTR 2004, p. 239, 256.

although this question is related to the one of whether GSP schemes are suitable at all (regarding under-utilization,[243] restricted product coverage, preference erosion[244]; on the other hand, GSP approximately doubles trade[245]). However, the existence of the EnablC indicates that the Members consider GSP as a suitable means to reach the development goals.

104. The leverage the EC/US has upon BDCs depends on the economic dependence of the BDCs on trade with the EU/US.[246] Considering that the US and the EC markets are the largest in the world, there is sufficient influential potential.[247] There is no country for which the GSP amounts to more than 0,1 percent of its gross domestic product which would not have reacted to a serious threat to withdraw GSP status.[248] Exporters are the first hit by a withdrawal. Responsible for human rights violations are, however, national governments.[249] Finally, it depends on the governments of DCs if the situation improves.[250] But, at least, a possible withdrawal of preferences exerts pressure on the BDCs' governments.

105. Since capital is invested in DCs because of low production costs,[251] stricter social laws could lead to a decrease of investments there. However, in order to attract investments, DCs must offer stable political and legal basic conditions.[252]

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243 *Inama*, note 3, JWT 2003, p. 959, 961, 971, 975; *Brenton*, Integrating the Least Developed Countries into the World Trading System: The Current Impact of European Union Preferences Under "Everything But Arms", JWT 2003, p. 623, 636, fn. 8, 641, 645; *Cottier/Oesch*, International Trade Regulation, Staempfli/Cameron May 2005, p. 564; *François/Hoekman/Manchin*, Preference Erosion and Multilateral Trade Liberalization, World Bank Policy Research Working Paper WPS3730, 2005, p. 23.

244 COM(2004) 461 final, p. 7; *Stern*, in: Bronckers/Quick, note 79, p. 434; *Cottier/Oesch*, note 243, p. 564; WPS3730, note 243; *Hoekman/Prowse*, Economic Policy Responses to Preference Erosion: From Trade as Aid to Aid for Trade, WPS3721, 2005; *Jessen*, note 11, p. 613; *Seyoum*, note 122, IBR 2006, p. 68, 69; *Cottier/Evtimov*, Präferenzielle Abkommen der EG: Möglichkeiten und Grenzen im Rahmen der WTO, ZEuS 2006, p. 477, 488; *Limão/Olarreaga*, Trade Preferences to Small Developing Countries and the Welfare Costs of Lost Multilateral Liberalization, WPS3565, p. 2, fn 9; *Nottage*, Trade and Competition in the WTO: Pondering the Applicability of Special and Differential Treatment, JIEL 2003, p. 23, 28.

245 *Rose*, Do We Really Know That The WTO Increases Trade?, American Economic Review 2004, p. 98; *Seyoum*, note 122, IBR 2006, p. 68.

246 *Gaedtke*, note 99, Aussenwirtschaft 2003, p. 93, 109.

247 OECD Study, 1996, p. 186.

248 *Schneuwly*, note 6, Aussenwirtschaft 2003, p. 121, 137.

249 *Hilf/Hörmann*, note 184, AVR 2005, p. 397, 454.

250 Ibid.

251 *Charnovitz*, Fair Labor Standards and International Trade, JWT 1986, p. 61, 72.

252 *Jessen*, „GSP Plus" – Zur WTO-Konformität des zukünftigen Zollpräferenzsystems der EG, Policy Paper on Transnational Economic Law (PPTEL) 2004, No. 9, 7.

To this end, it belongs that DCs ratify and respect the major treaties of public international law.[253] Many international conventions and declarations have acknowledged the interdependence between development and compliance with social standards.[254]

106. Having the effect of an affirmative action and thus leading to trade diversions, social preferences limit the competitiveness of DCs not obtaining these preferences.[255] This increases the pressure on these DCs to meet the social conditions.

107. To benefit from social preferences, it is not enough for BDCs to apply social standards in the export sector.[256] What is required is compliance throughout the country. Thus, the problem with upstream suppliers not observing social standards is avoided.[257]

108. In sum, social clauses as designed in the EC/US scheme are suitable to attain the above stated objective.

c) Proportionality test[258]

109. Since the measure at issue is not indispensable,[259] it has to pass a process of weighing and balancing a series of factors[260]: the more a measure contributes to the realization of the end pursued, the smaller the impacts the measure has on international trade, and the more important the values protected, the more likely is that the measure is necessary.[261]

253 *Jessen*, note 252, PPTEL 2004, 7.

254 COM (2004) 461 final, p. 10.

255 *Patterson*, note 147, JWIT 2005, p. 731, 744.

256 *Harrison*, note 8, CMLR 2005, p. 1663, 1685.

257 *Charnovitz*, note 251, JWT 1986, p. 61, 76.

258 WT/CTE/W/203, p. 16; *Howse*, Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann, EJIL 2002, p. 651, 657.

259 *Howse*, note 53, AUILR 2003, p. 1333, 1371.

260 *Korea – Beef*, Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161,169/AB/R, adopted 10 January 2001, para 164; *Eres*, The Limits of GATT Article XX: A Back Door for Human Rights?, Georgetown Journal of International Law (GJIL) 2004, p. 597, 625; *Trebilcock/Howse*, note 118, MJGT 2005, p. 261, 291.

261 *Korea – Beef*, AB, paras 162-163; *Asbestos*, AB, para 172; *Hilf/Oeter*, note 1, § 9, para 74; *Eres*, note 260, GJIL 2004, p. 597, 625; *Cleveland*, note 118, JIEL 2002, p. 133, 169; *Neumann/Türk*, Necessity Revisited – Proportionality in WTO Law after *EC – Asbestos*, in: *Nettesheim/Sander*, WTO-Recht und Globalisierung, Duncker & Humblot 2003, p. 103, 122.

(i) Importance of the values protected

110. The level of scrutiny depends on the importance of the values protected by the measure.[262] Here universal rights are at stake. The importance of these values is obvious, apart from the fact that they are codified in public international law for example the ILO Declaration, ILO Conventions, ICCPR, ICESCR, etc.[263] By establishing the improvement of living standards and sustainable development as objectives of the WTO, the Preamble to the WTO Agreement recognizes the importance of these values. The Preamble is to be considered in the contextual interpretation of "necessary", Art. 3.2.2 DSU, 31(2) VCLT. It adds "colour, texture and shading" to the interpretation of Art. XX.[264] Motive 7 GSP Reg calls sustainable development the ulterior motive of the special incentive arrangement.

(ii) Effectiveness

111. It is necessary to evaluate whether the measure at issue is likely to achieve the stated end.[265] As social clauses provide a significant incentive to DCs to comply with social standards, they seem to make a meaningful contribution to the promotion of those standards.[266] Whenever a request was filed to have the GSP status of any BDC reviewed on account of disobedience to social standards, advancement in raising these standards was reached more often than not.[267]

112. As to the discussion whether to grant GSP preferences to all DCs, it is worth noting that the less DCs benefit from GSP, the more effective preferences are, since BDCs enjoy a greater advantage compared with their competitors not benefiting from GSP.

(iii) Monitoring mechanism on the effectiveness

113. In *Tariff Preferences*, it was important for the issue of necessity whether the GSP law contained a monitoring mechanism on the effectiveness of the arrangement with respect to the end pursued.[268]

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262 WT/CTE/W/203, p. 16.

263 *Howse*, note 53, AUILR 2003, p. 1333, 1372.

264 *Shrimp*, AB, para 153.

265 *Eres*, note 260, GJIL 2004, p. 597, 616, 631.

266 *Howse*, note 53, AUILR 2003, p. 1333, 1373.

267 OECD Study, 1996, p. 186; *Trebilcock/Howse*, note 7, p. 575-576; *Elliott*, Preferences for Workers? Worker Rights and the US Generalized System of Preference, IIE, Speech for the Faculty Spring Conference, '98, "Globalization and Inequality", Calvin College Grand Rapids, Michigan, May 28-30, 1998, revised May 8, 2000.

268 *Tariff Preferences*, Panel, para 7.214.

114. According to Art. 28(3) GSP Reg, the Generalized Preferences Committee, composed of representatives of Member States and presided by the Commission,[269] examines the effects of the EC scheme. The Commission monitors the implementation of social standards, Art. 9(4), 10(2) GSP Reg, by using the monitoring instruments of the relevant conventions, Art. 11(1), 19(3) GSP Reg, and assesses the relationship between additional preferences and the promotion of sustainable development, motive 9 GSP Reg. A BDC must accept regular monitoring and review of its implementation record in accordance with the implementation provisions of the conventions it has ratified, Art. 9(1)(d), 10(2) GSP Reg.

115. The US has installed an annual review system to assess the performance of BDCs regarding social standard. Because of this, BDCs must recurrently re-qualify in order to gain GSP treatment. This exerts pressure on BDCs to observe the demanded standards.

116. So, in this respect, both schemes are safe.

(iv) As to the withdrawal clauses in the schemes

117. The Panel in *Tariff Preferences* reasoned that a measure that could be suspended for reasons unrelated to the policy objective does not seem necessary.[270]

118. The withdrawal clauses apply to violations of social standards, Art. 16(1)(a) GSP Reg, 19 US Sec 2462(d). However, an actual withdrawal looms only in case of serious and systematic violations, Art. 16(1)(a) Reg. Considering the practice of 19 US Sec 2462(d), the same is valid for the US scheme.[271] Withdrawal clauses as such are just the other side of the coin and a necessary element of social clauses. Without the possibility to pressurize by means of a withdrawal of GSP benefits, the conditions would not be taken seriously by Members being already beneficiary.[272] Additionally, if a BDC no longer enforces social standards, the grounds for GSP preferences (which are to compensate the costs of implementation) are not given anymore, so that their withdrawal is justified.

119. One can summarize that the reasons for which GSP preferences are withdrawn are not unrelated to the end pursued by the measure.

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269 http://ec.europa.eu/trade/issues/global/gsp/gspguide.htm, last visited on 3/12/2007.

270 *Tariff Preferences*, Panel, paras 7.215, 7.216.

271 Less than 10 percent of filed requests to have the GSP status of any BDC reviewed had as a result a withdrawal of GSP preferences; *DiCaprio*, Are Labor Provisions Protectionist?: Evidence From Nine Labor-Augmented U.S. Trade Arrangements, CLLPJ 2004, p. 1, 23.

272 *Koch*, note 42, p. 245.

(v) Any reasonably available alternatives?

120. The question here is whether there are less WTO-inconsistent measures reasonably available to the EC and US which would achieve the same end.[273] An alternative measure, however, must be seriously capable of attaining this end.[274] This analysis calls for its own weighing and balancing of factors such as administrative and economic troubles associated with the alternative measure.[275]

(aa) Financial and technical assistance pooled with multilaterally negotiated tariff reductions on products of export interest to DCs

121. The Panel in *Tariff Preferences* suggested this as a less inconsistent alternative with regard to the Drug Arrangement.[276] This proposal has the advantage of attaching a price to the measure and thus safeguarding that social standards are not subverted by protectionism.[277]

122. The extent to which the alternative measure contributes to the realization of the end pursued has to be taken into consideration.[278] Financial and technical assistance is not necessarily an aid to self-aid. Facilitating market access is one important component in this strategy. However, whether multilateral tariff reductions materialize depends on the results of the WTO negotiation rounds and not (solely) on the EC and US. Incidentally, development aid in form of financial and technical assistance is nowadays conditioned, too, to have an influence that it is used for the benefit of the population and not for the personal budget of the governing regime.

(bb) Action against the disregard of core labor standards according to Art. 33 ILO Constitution[279]

This measure is not effective due to the lack of any practical consequences.[280]

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273 *Tariff Preferences*, Panel, para 7.219; *Asbestos*, AB, para 171.

274 *Korea – Beef*, AB, paras 166, 173-174; *Asbestos*, AB, para 172; *Eres*, note 260, GJIL 2004, 597, 626; *Gaedtke*, note 99, Aussenwirtschaft 2003, p. 93, 108.

275 *Eres*, note 260, GJIL 2004, p. 597, 626.

276 *Tariff Preferences*, Panel, para 7.222.

277 *Howse*, note 98, JSEB 1999, p. 131, 159.

278 *Asbestos*, AB, para 172.

279 "In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith."

280 *Gaedtke*, note 99, Aussenwirtschaft 2003, p. 93, 109.

(cc) Social labeling along with media campaigns

123. Goods produced in accordance with social standards would be entitled to be attached with a logo[281] regularly awarded by NGOs.[282] The question arises whether an alternative within the context of Art. XX must be a sovereign measure. One could argue that, since only states and the EC are Members, Art. XI:1 WTO, a reasonable alternative can only be a state measure. However, state inaction is an alternative when deliberate. But supervising all locations of all companies, including the subcontractors, is not possible for NGOs.[283] So, in order to avoid arbitrary or fraudulent labeling, an independent, state or international monitoring (also of the labeling NGOs) is essential.[284]

124. Labeling can only work if a great number of consumers who participate and direct its shopping behavior accordingly. This will only happen if the object of protection carries sufficient emotions.[285] Thus, labels can be used against child labor, whereas they fail in case of trade unions' rights.[286] And despite media campaigns, most people will still purchase unlabeled commodities in ignorance.[287] Furthermore, labeling is not feasible when only some components of a commodity are produced in a certain DC under conditions satisfying social standards.[288] As a result, labeling cannot achieve an equivalent effect as social clauses in GSP.[289]

(dd) Codes of conduct for transnational companies

125. In codes of conduct, companies oblige themselves voluntarily to respect social standards. This voluntary nature is the first reason why the protection of social standards is not equally matched in those codes: not all transnational companies will draw up a code of conduct and, second, not all workers in a DC are reached by those codes.[290] A third reason is that trade unions' rights are not mentioned therein.[291] Fourth, it is difficult for an importing Member to control the obser-

281 *Howse*, note 98, JSEB 1999, p. 131, 160.

282 *Reuß*, note 184, p. 198.

283 Ibid., p. 201.

284 Ibid., p. 202.

285 Ibid., p. 201.

286 Ibid.

287 *Garg*, note 128, NYUJILP 1999, p. 473, 504.

288 *Reuß*, note 184, p. 202.

289 *Trebilcock/Howse*, note 7, p. 564-565; *Garg*, NYUJILP 1999, p. 473, 505, 525, regarding child labour.

290 *Macklem*, note 102, JIEL 2002, p. 605, 635-636.

291 *Reuß*, note 184, p. 202; *Macklem*, note 102, JIEL 2002, p. 605, 635.

vance of social standards and the exact origin of the products.[292] As long as there is no independent external supervision, codes of conduct are considerably less effective than GSP social clauses.[293]

126. Moreover, WTO law governs the legal relationship between the Member States and not the relationship of a Member to a company.[294] To secure the respect for social standards is a sovereign task.[295] Private undertakings can enhance, but not replace state action in this field.[296] In addition, companies are profit-oriented. To make the observance of social standards dependent on market behavior contradicts the rule of law.[297]

127. Interim result: the conceivable alternatives are not as effective as social clauses. GSP preferences are gifts.[298] To withdraw a gift is the lightest coercion to further social standards in the world.[299]

(vi) Trade restrictiveness

128. A measure with a slight impact on imports is more easily viewed as necessary than a measure with intense restrictive effects.[300] The measure at issue neither prohibits the importation from products originating in DCs nor does it condition the WTO-required market access. GSP preferences rather relieve the importation to an extent which is not legally demanded and, thus, opens the possibility to increase trade thanks to lower tariff rates. A suspension of GSP status merely re-establishes normal MFN duty rates in the US or the level of the general arrangement in the EC (Art. 7 GSP Reg).

292 *Reuß*, note 184, p. 202.

293 *Koch*, note 42, p. 243. The Fair Labor Association which supervises the monitoring efforts of companies is in the hands of those companies it oversees; *Macklem*, JIEL 2002, p. 605, 633.

294 *Koch*, ibid.

295 *Reuß*, note 184, p. 206.

296 Ibid.

297 Ibid., p. 205.

298 *Grossman/Sykes*, note 122, WTR 2005, p. 41, 42; *Inama*, note 3, JWT 2003, p. 959, 972; *Seyoum*, note 122, IBR 2006, p. 68, 69.

299 *Charnovitz*, note 251, JWT 1986, p. 61, 77.

300 *Korea – Beef*, AB, para 163.

(vii) Venire contra factum proprium?

129. Not all EC Member States have ratified all the conventions listed in the Annex to the GSP Reg with which compliance is demanded; for instance, the International Convention on the Suppression and Punishment of the Crime of Apartheid has only been ratified by few EC Member States.[301] The US has only ratified two ILO Conventions, No. 105 (abolition of forced labor) and No. 182 (worst forms of child labor). Demanding the observance of standards from other Members that one has not recognized as binding on itself[302] has attracted criticism. However, the US is bound by para 2 ILO Declaration.[303] And the demanded standards are implemented in the EC and US in fact.

130. Given that the EC and US could abolish their GSP programs completely without violating any obligation,[304] GSP must be politically viable in the EC/US.[305] Social preferences are an offer which DCs voluntarily accept or not.[306] If DCs have accepted it, GSP withdrawal merely serves to enforce the commitments BDCs have made to benefit from GSP.

d) Result

131. The social clauses in both schemes are necessary to protect public morals.

9. Chapeau

132. The purpose of the *chapeau* is to prevent an abuse of the exceptions of Art. XX.[307] By the *chapeau*, an equilibrium shall be reached between Art. I:1 on the one hand, and the exempting clauses of Art. XX on the other hand.[308] The requirements of the *chapeau* are cumulative.[309] What must be examined here is the manner in which the measure is applied, cf. the wording of the *chapeau*.[310]

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301 http://www.unhchr.ch/html/menu3/b/treaty8_asp.htm, last visited on 3/12/2007.

302 *Hepple*, note 32, p. 94.

303 *Hepple*, note 32, p. 105; *Cleveland*, note 118, JIEL 2002, p. 133, 179, fn. 188.

304 *Howse*, note 53, AUILR 2003, p. 1333, 1372; *Jessen*, note 11, p. 333; *Rieck*, note 24, ZEuS 2006, p. 177, 215.

305 *Grossman/Sykes*, note 78, WTR 2005, p. 41, 43; *McKenzie*, note 1, MJIL 2005, p. 118, 137.

306 *Zagel*, note 191, p. 32.

307 *Gasoline*, AB, p. 22; *Shrimp*, AB, para 120.

308 *Hilf/Hörmann*, note 184, AVR 2005, p. 397, 451; *Shrimp*, AB, paras 156, 159.

309 WT/CTE/W/203, p. 6, 22.

310 *Gasoline*, AB, p. 22.

a) Arbitrary discrimination between countries where the same conditions prevail

133. The word "arbitrary" means unpredictable, inconsistent.[311] The function of this feature is to prevent Members from attempting to discriminate individual Members *vis-à-vis* others by trade measures.[312]

i) Countries where the same conditions prevail

134. The same conditions prevail, in this context, in countries with the same development need. This means that the measure at issue (social clauses plus corresponding withdrawal clauses) must be applied in the same way to DCs which are similarly situated, i.e. with similar development needs. Consequently, an arbitrary discrimination is given, in this context, when DCs where a similar social standard situation prevails (that is why they have the same development need) are not equally treated by the EC/US when refusing or withdrawing GSP status. A suspension of GSP status must not hit merely selected Members, but must be targeted at all Members that disregard social standards in the same way.[313]

135. The special gravity of violations of core labor standards in one state can deliver an argument for the EC/US for suspending GSP status solely from this state,[314] cf. Art. 16(1)(a) GSP Reg.

(ii) Discrimination

136. The application of the measure must result in discrimination, either between different exporting Members, or between exporting Members and the importing Member[315]. However, this kind of discrimination is different from that in Art. I:1[316]. That the US and some EC Member States have not ratified all standards with which they demand compliance does not establish an arbitrary discrimination within the meaning of the *chapeau*, since discrimination is only for-

311 *Shrimp (Art. 21.5)*, Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, adopted 21/11/2001, para 5.124.

312 *Gaedtke*, note 99, Aussenwirtschaft 2003, p. 93, 111.

313 Ibid.

314 Ibid.

315 *Shrimp*, AB, para 150; *Marceau*, note 204, JWT 1999, p. 87, 101.

316 *Shrimp*, AB, para 150.

bidden between countries where the same conditions prevail.[317] Hence, one has to compare the beneficiary and applicant DCs with each other and not the EC/US as donors with the group of DCs. Discrimination within the meaning of the *chapeau* is not given here, even if the EC/US places different demands on GSP beneficiaries/applicants than on itself because one cannot argue that in the EC/US and in DCs the same conditions prevail; for instance, in the EC/US the demanded standards are actually observed.

(iii) Only internationally recognized standards

137. An important aspect is that the EC/US only demand for standards which are internationally recognized and not for national standards which can be modified at any time.

(iv) Due process requirements for the process of including in or excluding from GSP scheme

138. Procedural rules must be applied in a fair manner by national authorities.[318] In *Shrimp*[319], the AB criticized a national procedure: because it was casual, not transparent and not predictable; it did not provide for an applicant Member the right to be heard and to respond to any arguments made against it; there were no formal written and reasoned decisions; the applicant Members were not notified specifically of the decisions made; there was no appellate procedure. If a procedure lacks transparency, fairness and due process, rejected Members are discriminated *vis-à-vis* accepted Members,[320] as the decisions made at the end of the procedure can neither be comprehended nor inquired. With regard to GSP procedures, the criteria for the inclusion/exclusion of DCs must be objective and non-discriminatory.[321]

(aa) EC scheme

139. As found above, the EC procedure is in accordance with the rule of law. Thus, the EC can make a *prima facie* case that the application of GSP+ does not dis-

317 *Shrimp*, Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, adopted 6/11/1998, para 7.33; *Asbestos*, Panel, para 8.226; *Trebilcock/Howse*, note 7, p. 573; *Trebilcock/Howse*, note 118, MJGT 2005, p. 261, 290; *Bal*, note 202, MJGT 2001, p. 62, 72.

318 *Shrimp*, AB, para 181.

319 *Shrimp*, AB, paras 180-181.

320 *Shrimp*, AB, para 181; *Howse*, note 98, JSEB 1999, p. 131, 145.

321 *Tariff Preferences*, Panel, paras 7.229, 7.232.

criminate arbitrarily.[322] It is then up to the complaining DC to allege any instances where the EC has applied GSP+ in an arbitrarily discriminating manner.[323]

(bb) US scheme

140. Because of providing the US authorities with an immense scope of discretion, the US scheme cannot guarantee a non-arbitrary, fair application, as an inquiry into how the decisions are taken is not possible. This finding is amplified by the fact that the procedural GSP rules do not provide the refused or suspended DC with a right to be given the reasons for the negative decision; only the party having submitted a request for review of GSP status of any BDC according to 15CFR2007.0(b) obtains a statement of reasons, 15CFR2007.2(a)(2), 15CFR2007.4(d).

b) Unjustifiable discrimination between countries where the same conditions prevail

(i) Primacy of multilateralism[324]

141. Before resorting to unilateral actions, a Member is obliged to make serious good faith efforts to reach a multi- or bilateral solution.[325] There were prior serious good faith efforts to introduce a social clause into WTO law, though these failed, para 4 Singapore Declaration, confirmed by para 8 Doha Declaration.

142. The social clauses in the EC/US GSP programs intend to improve the validity performance of universal standards already existing. The clauses do not set out new standards.

143. Primacy of multilateralism means in this context, too, that before withdrawing or suspending GSP status, the EC/US has to consult the supervisory bodies of the UN (UN Committee on Economic, Social and Cultural Rights and Human Rights Committee) and the ILO about the violation of social standards in the DC concerned.

144. The EC GSP Reg guarantees this in Art. 19(3) (the corresponding provision for the grant of GSP status is Art. 11(1) GSP Reg). It may be true that the US has

322 *Howse*, note 53, AUILR 2003, p. 1333, 1375.

323 Ibid.

324 *Gaedtke*, note 99, Aussenwirtschaft 2003, p. 93.

325 *Shrimp (Art. 21.5)*, Panel, para 5.67.

also this practice,[326] enabled by cf. 15CFR2007.2(h), but this is not mandated in the statute. This is a *malus* with respect to legal certainty.

(ii) Minimum standard

145. In *Shrimp*, the AB found that the application of the US measure was flawed because of its intended and coercive effect on the specific policy decisions made by foreign governments.[327] The measure, in its application, required all other Members to adopt essentially the same policy as the one applied in the US.[328]

146. First of all, social clauses do not set up an economic embargo: their worst effects are duty rates at MFN level. Second, DCs wanting to benefit from GSP preferences do not need to adjust to EC/US social legislation;[329] for instance, what acceptable minimum wages are can only be assessed on the basis of the specific price situation in the DC concerned. The goal is the protection of a minimum standard, whereas the means for attaining this standard are not stipulated by the EC/US.[330] So, though the EC and the US try to influence the social legislation in BDCs, they merely do so with respect to the objective to pursue.

(iii) Sufficient flexibility in the application of the measure[331]

147. The measure needs to show flexibility and has to take into account the different situations which may exist in different Members.[332]

148. In the inclusion process, the EC considered the constitutional situation of the applicant: if a DC was faced with specific constitutional constraints, and had neither ratified nor effectively implemented two of the sixteen core human and labor rights conventions listed in the Annex to the GSP Reg, it could nevertheless become a beneficiary: however, it had to make a formal commitment to ratify these conventions no later than 31 December 2006, Art. 9(2)(b) GSP Reg.[333]

149. Improvements of labor rights may take years before seeing the fruits.[334] The US considers this by being content with a BDC "taking steps" in the right direction.

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326 OECD Study, 1996, p. 184-185.

327 *Shrimp*, AB, para 161.

328 *Shrimp*, AB, para 161; *Linan Nogueras/Hinojosa Martinez*, note 40, CJEL 2001, p. 307, 329.

329 *Elliott*, note 267.

330 *Howse*, note 53, AUILR 2003, p. 1333, 1374.

331 *Shrimp (Art. 21.5)*, Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21/11/2001, para 144.

332 *Shrimp (Art. 21.5)*, Panel, paras 5.46, 5.123; *Howse*, note 98, JSEB 1999, p. 131, 145.

333 http://europa.eu/scadplus/leg/en/lvb/r11020.htm, last visited on 3/12/2007.

c) Disguised restriction on international trade

150. The EC and US GSP rules have been publicly promulgated. Decisions taken under GSP law are published, Art. 11(3), 17(3), 19(1), 20(2), 20(3) GSP Reg, 15CFR2007.4(b). However, this alone is not sufficient to satisfy the third requirement of the *chapeau* which is designed to prevent the measure from pursuing protectionist motives.[335] Therefore, the Member invoking Art. XX and bearing the burden of proof has to substantiate that non-economic interests supporting the measure are predominant.[336]

151. The measure at issue neither prevents the importation nor imposes another hurdle for market access, but merely makes a voluntary trade relief dependent on conditions. A withdrawal of GSP has as consequence MFN treatment at worst.

152. As to the US scheme, private petitions (most frequently used by labor unions and intellectual property trade associations[337]) always include the risk of protectionist motives[338]. However, most petitions dealt with freedom of association and the right to bargain collectively, which gives rise to the supposition that this was the impetus rather than impairing DCs' competitiveness.[339]

153. Further, the contents of human and labor rights treaties are so widely accepted as to provide sufficient evidence that no protectionism lurks behind the social clauses. If the EC/US wanted to practice protectionism, they would not grant any tariff preferences at all. Therefore, to make DCs abide by international standards cannot be viewed as protectionism. And by helping BDCs to implement social standards by giving advice as well as financial and technical assistance, the EC/US demonstrates that what matters is the respect for these standards.

10. Result

154. The social clauses in the EC GSP can be justified under Art. XX(a), too, whereas the US GSP process does not pass the scrutiny under the *chapeau*. The US cannot prove that the application of its GSP process does not constitute arbitrary and unjustified discrimination between countries where the same conditions prevail.

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334 *Emmert*, Labor, Environmental Standards and World Trade Law, U.C. Davis Journal of International Law and Policy 2003, p. 75, 108.

335 *Bal*, note 202, MJGT 2001, p. 62, 73; *Koch*, note 42, p. 227.

336 *Gaedtke*, note 99, Aussenwirtschaft 2003, p. 93, 113.

337 *Shaffer/Apea*, note 120, JWT 2005, p. 977, 981.

338 WPS3730, note 243, p. 7; *Hoekman/Özden*, Trade Preferences and Differential Treatment of Developing Countries: A Selective Survey, WPS3566, 2005, p. 8.

339 IIE, Labor Standards & Trade Agreements, p. 82-83.

E. Further grounds of justification

1. Art. XXI GATT

155. Article XXI(b)(iii) comes into account by arguing serious human rights violations cause an emergency in international relations, cf. the practice of the US to base unilateral trade restrictions for the protection of human rights on the International Emergency Powers Act.[340] Article XXI(b) requires that a state considers the action it takes necessary for the protection of its essential security interests. This means that the sanctioned human rights violations must threaten the essential security interests of the sanctioning state.[341] However, human rights violations abroad have no effects on the national security of Members like the US and the EC.[342]

2. Justification under Antidumping Agreement

156. DCs not meeting social standards are reproached for practicing "social dumping". However, dumping within the meaning of the AD is only price dumping which is given when products of one country are introduced into the commerce of another country at less than the normal values of the products, Art. VI:1 GATT, 2.1 AD. But products stigmatized as socially dumped are sold in the home market at the same or a (due to the lack of transport costs) lower price than abroad. Hence, the only possible way to apply the AD in the present case is to extend its scope by analogy. The prerequisites for an analogy are (1) an unintended loophole in the law, (2) comparability of the two situations.

157. First, by clearly defining dumping in Art. 2 AD, the drafters deliberately limited the scope of application of anti-dumping measures. It cannot be supposed that it arose from an accident that the AD does not encompass social dumping. The scope of the AD is predetermined by Art. VI GATT which does not contain any provisions on social dumping either. An anti-dumping measure is a particular trade instrument.[343] Second, the legal consequence of a permissible anti-dumping measure is a duty which is higher than the normal MFN duty, Art. VI:2. The consequence of a GSP withdrawal is at worst just the MFN duty. So, both situations – though they are about an increase of duties – are not comparable. Third, an extending analogy would contravene the bounds of Art. 3.2.3, 19.2 DSU.

340 *Hilf/Hörmann*, note 184, AVR 2005, p. 397, 451.

341 *Vázquez*, Trade Sanctions and Human Rights – Past, Present, and Future, JIEL 2003, p. 797, 825.

342 *Hilf/Hörmann*, note 184, AVR 2005, p. 397, 451.

343 *Meng*, note 42, p. 379.

3. Justification under Agreement on Subsidies and Countervailing Measures (SCM)

158. By failing to enforce social standards, DCs arguably confer a pecuniary benefit on their domestic industry.[344] Even if one regards this as a subsidy pursuant to Art. 1 SCM, it will not be specific within the meaning of Art. 2 SCM, since the whole national economy benefits from this legal situation.[345]

4. Justification under general public international law

159. To substantiate the pertinence of this ground of justification, the argumentation would run as follows: the complaining DC has breached social standards by which the DC is bound, be it because of an *erga omnes* obligation,[346] be it because the DC obliged itself. Therefore, the responding EC/US is allowed under the law of state responsibility to withdraw GSP preferential treatment as a proportionate countermeasure.

160. In order to solve the case on the basis of general public international law, the Panel would have to find – as the first prerequisite of a justification according to the law of state responsibility – a breach of social standards by the complaining DC. As a result, the Panel would have to examine whether the relevant norm of public international law has been violated.[347] Thus, the Panel would determine rights and obligations outside the covered agreements.[348] However, the Members have restricted the jurisdiction of the Panel to the covered agreements,[349] cf. Art. 3.2.2 DSU which states that the WTO dispute settlement system serves to preserve the rights and obligations of Members *under the covered agreements*, and to clarify the existing provisions *of those agreements*,[350] and Art. 7.1 DSU which limits the Panel's mandate to examine the relevant provisions *of the covered agreements*[351]. Ultimately, the Panel does not have the competence to assess formally that a non-

344 *Stevenson*, note 178, UCLA JILFA 2002, p. 129, 165-166.

345 *Samida*, note 176, DJIL 2005, p. 411, 430; *Garg*, note 128, NYUJILP 1999, p. 473, 523.

346 *Linan Nogueras/Hinojosa Martinez*, note 40, CJEL 2001, p. 307, 327; Institute of International Law Yearbook 1990, Part II, p. 339-345.

347 *Pauwelyn*, in: Cottier/Pauwelyn/Bürgi Bonanomi, note 36, p. 223.

348 *Soft Drinks*, AB, para 56.

349 *Soft Drinks*, AB, para 78; *Marceau*, note 204, EJIL 2002, p. 753, 813.

350 *Soft Drinks*, AB, para 78 fn. 173.

351 *Petersmann*, Human Rights and the Law of the World Trade Organization, JWT 2003, p. 241, 247; *Marceau*, note 204, EJIL 2002, p. 753, 813; *Marceau*, note 204, JWT 1999, p. 87, 110, 113; *Hilf/Hörmann*, note 184, AVR 2005, p. 397, 420.

WTO norm has been breached,[352] as in doing so it would add to or diminish the rights and obligations provided in the covered agreements, Art. 3.2.3, 19.2 DSU.[353]

5. Acquiescence

161. Almost all GSP schemes have been conditioned on certain criteria from the outset.[354] This tallied with a permanent practice.[355] By taking advantage of GSP preferences, DCs, arguably, could have conclusively accepted the conditions. Unopposed acceptance of another state's acts (here the conditioning of GSP programs) for a long period of time can have binding effect in public international law,[356] if the acting state may regard the silence in good faith as the recognition of its right to act like this.[357] This is the case when, according to state practice, a protest or another reaction was to be expected.[358] The passive state is then treated as if it had consented (*qui tacet consentire videtur si loqui debuisset ac potuisset*)[359].

162. DCs were always skeptical about conditionality[360] and have criticized it sharply.[361] As the affected states reacted, one prerequisite for acquiescence is not fulfilled.

VI. Conclusions

163. The EC's special incentive arrangement for sustainable development and good governance is in conformity with WTO law.

164. The US GSP scheme violates WTO law in a unjustifiably manner. The problem is the GSP review process. So that substantive rights like the right not to be

352 *Hilf/Hörmann*, note 184, AVR 2005, p. 397, 424.

353 *Marceau*, note 204, EJIL 2002, p. 753, 756.

354 *Bradley*, in: Cottier/Pauwelyn/Bürgi Bonanomi, note 36, p. 505.

355 Ibid.

356 *Herdegen*, Völkerrecht, 4th ed., Beck 2005, § 18, para 2.

357 *Ipsen*, note 106, § 15, para 109.

358 *Cottier*, in: Bernhardt, Encyclopedia of Public International Law, North-Holland 1984, Vol 7, p. 5.

359 *Ipsen*, note 106, § 18, para 14.

360 *Dispersyn*, La Dimension Sociale dans le Système des Préférences Généralisées (SPG) de l'Union Européenne, Revue de la Faculté de Droit – Université Libre de Bruxelles 2001, p. 87, 109.

361 *Koch*, note 42, p. 189-190.

discriminated are effective, they must be safeguarded by a corresponding procedure which must be tailored in such a way that the substantive rights do not run the risk of being undermined. That is why failures in the procedure can lead to an inconsistency of the whole scheme with WTO law. The criteria which a procedure must fulfill not to be discriminatory were demonstrated by the AB in *Shrimp*[362].

165. At first glance, the fact that it suffices when a DC is taking steps to afford worker rights in order to benefit from US preferences seems to be more friendly towards DCs than to require full compliance with social standards, so that one could assume that US preferences are likely to start up earlier. However, then the US would have to define in advance, when it regards this requirement of "taking steps" as given in order to make it verifiable. To put it in a nutshell, the outcome of the US review process is unpredictable and the door to arbitrariness is open – and the US practice shows that.[363] The excessive powers US authorities have in the process make it impossible for the Panel to check on it. It may be true that the ILO conventions serve as an orientation for US authorities, but this is not obligatory; it rather corresponds to an administrative practice. An explicit link to the assessments of IOs such as UN or ILO like that provided in Art. 11(1), 19(3) GSP Reg is missing.

166. On the other hand, the EC uses the monitoring and review mechanisms in human and labor rights conventions, cf. Art. 10(2), 11(1), 19(3) GSP Reg. The EC Commission which is responsible for the implementation of the GSP Reg, Art. 211 TEC, 28(1) GSP Reg, has also discretion whether to initiate an investigation to review the GSP status of a BDC, Art. 18(2) GSP Reg. However, when the Commission decides to start an investigation, the discretionary powers of the Commission are restrained by Art. 19 GSP Reg. It shall seek all information of the relevant supervisory bodies of the UN, the ILO and other competent international organizations, Art. 19(3) GSP Reg This makes the EC procedure objective in the sense that not the EC's own assessment is decisive.

167. In order to legalize its scheme, the US has to modify the GSP review process such that it can guarantee that the decisions taken can be comprehended (e.g. set up binding guidelines when to accept that a DC fulfills the requirement of "taking steps"), or to strive for a waiver pursuant to Art. XXV:5 GATT, IX:3,4 WTO.

362 *Shrimp*, AB, paras 180-181.

363 *Schneuwly*, note 6, Aussenwirtschaft 2003, p. 121, 130.

VII. Evaluation of social conditionality in the EC/US GSP scheme

168. One general problem with social conditionality is that in the decision-making process whether to make available preferences or to withdraw them, a frequently decisive factor is not only the human and labor rights situation in the DC concerned, but other political and economic factors.[364]

169. The success of social clauses depends, *inter alia*, on the technical and financial assistance provided for by the EC/US which supplements the preferences and helps DCs implementing the social standards.[365] Furthermore, the US GSP preferences should be guaranteed for a longer period of time to enable BDCs to plan economic programs.[366]

170. The whole system could be improved if the EC, the US and the rest of preference-giving states used the same social clause so that BDCs are faced only with one standard.

364 *Hilf/Hörmann*, note 184, AVR 2005, p. 397, 452

365 IIE, Labor Standards & Trade Agreements, p. 80; Jessen, note 11, p. 616; *Rieck*, note 24, ZEuS 2006, p. 177, 213; Zagel, note 191, p. 34.

366 UNCTAD/ITCD/TSB/2003/8, p. xii; *Seyoum*, note 122, IBR 2006, p. 68, 80; *Garcia*, note 5, MiJIL 2000, p. 975, 1031, 1033. Currently, due to the "pas as you go" stipulation in the US Budget Act, GSP is only approved for a short period of time; *Schneuwly*, note 6, Aussenwirtschaft 2003, p. 121, 124, fn. 7.

Annexes

1. Differential And More Favourable Treatment

Reciprocity And Fuller Participation Of Developing Countries

Decision of 28 November 1979
(L/4903)

Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES *decide* as follows:

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries[1], without according such treatment to other contracting parties.

2. The provisions of paragraph 1 apply to the following[2]:

(a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences[3];

(b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;

(c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another

(d) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

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1 The words "developing countries" as used in this text are to be understood to refer also to developing territories.

2 It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.

3 As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

3. Any differential and more favourable treatment provided under this clause:

(a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;

(b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;

(c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall[4]:

(a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;

(b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.

5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latters' development, financial and trade needs.

6. Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be

4 Nothing in these provisions shall affect the rights of contracting parties under the General Agreement.

expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

7. The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

8. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.

9. The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to meet the development needs of developing countries and the objectives of the General Agreement.

2. U.S. Code Title 19 -- Customs Duties

Chapter 12 -- Trade Act of 1974

Subchapter V -- Generalized System of Preferences

Sec. 2461. Authority to extend preferences

The President may provide duty-free treatment for any eligible article from any beneficiary developing country in accordance with the provisions of this subchapter. In taking any such action, the President shall have due regard for

(1) the effect such action will have on furthering the economic development of developing countries

through the expansion of their exports;

(2) the extent to which other major developed countries are undertaking a comparable effort to assist developing countries by granting generalized preferences with respect to imports of products of such countries;

(3) the anticipated impact of such action on United States producers of like or directly competitive products; and

(4) the extent of the beneficiary developing country's competitiveness with respect to eligible articles.

Sec. 2462. Designation of beneficiary developing countries

(a) Authority to designate countries

(1) Beneficiary developing countries

The President is authorized to designate countries as beneficiary developing countries for purposes of this subchapter.

(2) Least-developed beneficiary developing countries

The President is authorized to designate any beneficiary developing country as a least-developed beneficiary developing country for purposes of this subchapter, based on the considerations in section 2461 of this title and subsection (c) of this section.

(b) Countries ineligible for designation

(1) Specific countries

The following countries may not be designated as beneficiary developing countries for purposes of this subchapter:

(A) Australia; (B) Canada; (C) European Union member states; (D) Iceland; (E) Japan; (F) Monaco; (G) New Zealand; (H) Norway; (I) Switzerland.

(2) Other bases for ineligibility

The President shall not designate any country a beneficiary developing country under this subchapter if any of the following applies:

(A) Such country is a Communist country, unless --

(i) the products of such country receive nondiscriminatory treatment,

(ii) such country is a WTO Member (as such term is defined in section 3501(10) of this title) and a member of the International Monetary Fund, and

(iii) such country is not dominated or controlled by international communism.

(B) Such country is a party to an arrangement of countries and participates in any action pursuant to such arrangement, the effect of which is --

(i) to withhold supplies of vital commodity resources from international trade or to raise the price of such commodities to an unreasonable level, and

(ii) to cause serious disruption of the world economy.

(C) Such country affords preferential treatment to the products of a developed country, other than the United States, which has, or is likely to have, a significant adverse effect on United States commerce.

(D)(i) Such country --

(I) has nationalized, expropriated, or otherwise seized ownership or control of property, including patents, trademarks, or copyrights, owned by a United States citizen or by a corporation, partnership, or association which is 50 percent or more beneficially owned by United States citizens,

(II) has taken steps to repudiate or nullify an existing contract or agreement with a United States citizen or a corporation, partnership, or association which is 50 percent or more beneficially owned by United States citizens, the effect of which is to nationalize, expropriate, or otherwise seize ownership or control of property, including patents, trademarks, or copyrights, so owned, or

(III) has imposed or enforced taxes or other exactions, restrictive maintenance or operational conditions, or other measures with respect to property, including patents, trademarks, or copyrights, so owned, the effect of which is to nationalize, expropriate, or otherwise seize ownership or control of such property, unless clause (ii) applies.

(ii) This clause applies if the President determines that --

(I) prompt, adequate, and effective compensation has been or is being made to the citizen, corporation, partnership, or association referred to in clause (i),

(II) good faith negotiations to provide prompt, adequate, and effective compensation under the applicable provisions of international law are in progress, or the country described in clause (i) is otherwise taking steps to discharge its obligations under international law with respect to such citizen, corporation, partnership, or association, or

(III) a dispute involving such citizen, corporation, partnership, or association over compensation for such a seizure has been submitted to arbitration under the provisions of the Convention for the Settlement of Investment Disputes, or in another mutually agreed upon forum, and the President promptly furnishes a copy of such determination to the Senate and House of Representatives.

(E) Such country fails to act in good faith in recognizing as binding or in enforcing arbitral awards in favor of United States citizens or a corporation, partnership, or association which is 50 percent or more beneficially owned by United States citizens, which have been made by arbitrators appointed for each case or by permanent arbitral bodies to which the parties involved have submitted their dispute.

(F) Such country aids or abets, by granting sanctuary from prosecution to, any individual or group which has committed an act of international terrorism or the Secretary of State makes a determination with respect to such country under section 2405(j)(1)(A) of title 50, Appendix.

(G) Such country has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country (including any designated zone in that country).

(H) Such country has not implemented its commitments to eliminate the worst forms of child labor.

Subparagraphs (D), (E), (F), (G), and (H) (to the extent described in section 2467(6)(D) of this title) shall not prevent the designation of any country as a beneficiary developing country under this subchapter if the President determines that such designation will be in the national economic interest of the United States and reports such determination to the Congress with the reasons therefor.

(c) Factors affecting country designation

In determining whether to designate any country as a beneficiary developing country under this subchapter, the President shall take into account --

(1) an expression by such country of its desire to be so designated;

(2) the level of economic development of such country, including its per capita gross national product, the living standards of its inhabitants, and any other economic factors which the President deems appropriate;

(3) whether or not other major developed countries are extending generalized preferential tariff treatment to such country;

(4) the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets and basic commodity resources of such country and the extent to which such country has assured the United States that it will refrain from engaging in unreasonable export practices;

(5) the extent to which such country is providing adequate and effective protection of intellectual property rights;

(6) the extent to which such country has taken action to --

(A) reduce trade distorting investment practices and policies (including export performance requirements); and

(B) reduce or eliminate barriers to trade in services; and

(7) whether or not such country has taken or is taking steps to afford to workers in that country (including any designated zone in that country) internationally recognized worker rights.

(d) Withdrawal, suspension, or limitation of country designation

(1) In general

The President may withdraw, suspend, or limit the application of the duty-free treatment accorded under this subchapter with respect to any country. In taking any action under this subsection, the President shall consider the factors set forth in section 2461 of this title and subsection (c) of this section.

(2) Changed circumstances

The President shall, after complying with the requirements of subsection (f)(2) of this section, withdraw or suspend the designation of any country as a beneficiary developing country if, after such designation, the President determines that as the result of changed circumstances such country would be barred from designation as a beneficiary developing country under subsection (b)(2) of this section. Such country shall cease to be a beneficiary developing country on the day on which the President issues an Executive order or Presidential proclamation revoking the designation of such country under this subchapter.

(3) Advice to Congress

The President shall, as necessary, advise the Congress on the application of section 2461 of this title and subsection (c) of this section, and the actions the President has taken to withdraw, to suspend, or to limit the application of duty-free treatment with respect to any country which has failed to adequately take the actions described in subsection (c) of this section.

(e) Mandatory graduation of beneficiary developing countries If the President determines that a beneficiary developing country has become a ``high income'' country, as defined by the official statistics of the International Bank for Reconstruction and Development, then the President shall terminate the designation of such country as a beneficiary developing country for purposes of this subchapter, effective on January 1 of the second year following the year in which such determination is made.

(f) Congressional notification

(1) Notification of designation

(A) In general

Before the President designates any country as a beneficiary developing country under this subchapter, the President shall notify the Congress of the President's intention to make such designation, together with the considerations entering into such decision.

(B) Designation as least-developed beneficiary developing country

At least 60 days before the President designates any country as a least-developed beneficiary developing country, the President shall notify the Congress of the President's intention to make such designation.

(2) Notification of termination

If the President has designated any country as a beneficiary developing country under this subchapter, the President shall not terminate such designation unless, at least 60 days before such termination, the President has notified the Congress and has notified such country of the President's intention to terminate such designation, together with the considerations entering into such decision.

[...]

Sec. 2465. Date of termination

No duty-free treatment provided under this subchapter shall remain in effect after December 31, 2008.

[...]

Sec. 2467. Definitions

For purposes of this subchapter:

(1) Beneficiary developing country

The term "beneficiary developing country" means any country with respect to which there is in effect an Executive order or Presidential proclamation by the President designating such country as a beneficiary developing country for purposes of this subchapter.

(2) Country

The term "country" means any foreign country or territory, including any overseas dependent territory or possession of a foreign country, or the Trust Territory of the Pacific Islands. In the case of an association of countries which is a free trade area or customs union, or which is contributing to comprehensive regional economic integration among its members through appropriate means, including, but not limited to, the reduction of duties, the President may by Executive order or Presidential proclamation provide that all 11 members of such association other than members which are barred from designation under section 2462(b) of this title shall be treated as one country for purposes of this subchapter.

(3) Entered

The term "entered" means entered, or withdrawn from warehouse for consumption, in the customs territory of the United States.

(4) Internationally recognized worker rights

The term "internationally recognized worker rights" includes —

(A) the right of association;

(B) the right to organize and bargain collectively;

(C) a prohibition on the use of any form of forced or compulsory labor;

(D) a minimum age for the employment of children; and

(E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

(5) Least-developed beneficiary developing country

The term "least-developed beneficiary developing country" means a beneficiary developing country that is designated as a least-developed beneficiary developing country under section 2462(a)(2) of this title.

(6) Worst forms of child labor

The term "worst forms of child labor" means --

(A) all forms of slavery or practices similar to slavery, such as the sale or trafficking of children, debt bondage and serfdom, or forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict;

(B) the use, procuring, or offering of a child for prostitution, for the production of pornography or for pornographic purposes;

(C) the use, procuring, or offering of a child for illicit activities in particular for the production and trafficking of drugs; and

(D) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety, or morals of children.

The work referred to in subparagraph (D) shall be determined by the laws, regulations, or competent authority of the beneficiary developing country involved.

3. USTR Regulations Pertaining to Eligibility of Articles and Countries for the GSP Program (15 CFR PART 2007)

Title 15 -- Commerce And Foreign Trade

Chapter XX -- Office Of The United States Trade Representative

[...]

Sec. 2007.0 Requests for reviews.

(a) An interested party may submit a request (1) that additional articles be designated as eligible for GSP duty-free treatment, provided that the article has not been accepted for review within the three preceding calendar years; or (2) that the duty-free treatment accorded to eligible articles under the GSP be withdrawn, suspended or limited; or (3) for a determination of whether a like or directly competitive product was produced in the United States on January 3, 1985 for the purposes of section 504(d)(1) (19 U.S. 2464(d)(1)); or (4) that the President exercise his waiver authority with respect to a specific article or articles pursuant to section 504(c)(3) (19 U.S.C. 2464(c)(3)); or (5) that product coverage be otherwise modified.

(b) During the annual reviews and general reviews conducted pursuant to the schedule set out in Sec. 2007.3 any person may file a request to have the GSP status of any eligible beneficiary developing country reviewed with respect to any of the designation criteria listed in section 502(b) or 502(c) (19 U.S.C. 2642 (b) and (c)). Such requests must (1) specify the name of the person or the group requesting the review; (2) identify the beneficiary country that would be subject to the review; (3) indicate the specific section 502(b) or 502(c) criteria which the requestor believes warrants review; (4) provide a statement of reasons why the beneficiary country's status should be reviewed along with all available supporting information; (5) supply any other relevant information as requested by the GSP Subcommittee. If the subject matter of the request has been reviewed pursuant to a previous request, the request must include substantial new information warranting further consideration of the issue.

(c) An interested party or any other person may make submissions supporting, opposing or otherwise commenting on a request submitted pursuant to either paragraph (a) or (b) of this section.

(d) For the purposes of the regulations set out under Sec. 2007.0 et seq., an interested party is defined as a party who has significant economic interest in the subject matter of the request, or any other party representing a significant economic interest that would be materially affected by the action requested, such as a domestic producer of a like or directly competitive article, a commercial importer or

retailer of an article which is eligible for the GSP or for which such eligibility is requested, or a foreign government.

(e) All requests and other submissions should be submitted in 20 copies, and should be addressed to the Chairman, GSP Subcommittee, Trade Policy Staff Committee, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20506. Requests by foreign governments may be made in the form of diplomatic correspondence provided that such requests comply with the requirements of Sec. 2007.1.

(f) The Trade Policy Staff Committee (TPSC) may at any time, on its own motion, initiate any of the actions described in paragraph (a) or (b) of this section.

Sec. 2007.1 Information required of interested parties in submitting requests for modifications in the last of eligible articles.

(a) General Information Required. A request submitted pursuant to this part, hereinafter also referred to as a petition, except requests submitted pursuant to Sec. 2007.0(b), shall state clearly on the first page that it is a request for action with respect to the provision of duty-free treatment for an article or articles under the GSP, and must contain all information listed in this paragraph and in paragraphs (b) and (c). Petitions which do not contain the information required by this paragraph shall not be accepted for review except upon a showing that the petitioner made a good faith effort to obtain the information required. Petitions shall contain, in addition to any other information specifically requested, the following information:

(1) The name of the petitioner, the person, firm or association represented by the petitioner, and a brief description of the interest of the petitioner claiming to be affected by the operation of the GSP;

(2) An identification of the product or products of interest to the petitioner, including a detailed description of products and their uses and the identification of the pertinent item number of the Tariff Schedules of the United States (TSUS). Where the product or products of interest are included with other products in a basket category of the TSUS, provide a detailed description of the product or products of interest;

(3) A description of the action requested, together with a statement of the reasons therefor and any supporting information;

(4) A statement of whether to the best of the Petitioner's knowledge, the reasoning and information has been presented to the TPSC previously either by the petitioner or another party. If the Petitioner has knowledge the request has been made previously, it must include either new information which indicates changed circumstances or a rebuttal of the factors supporting the denial

of the previous request. If it is a request for a product addition, the previous request must not have been formally accepted for review within the preceding three calendar year period; and

(5) A statement of the benefits anticipated by the petitioner if the request is granted, along with supporting facts or arguments.

(b) Requests to withdraw, limit or suspend eligibility with respect to designated articles. Petitions requesting withdrawal or limitation of duty-free treatment accorded under GSP to an eligible article or articles must include the following information with respect to the relevant United States industry for the most recent three year period:

(1) The names, number and locations of the firms producing a like or directly competitive product;

(2) Actual production figures;

(3) Production capacity and capacity utilization;

(4) Employment figures, including number, type, wage rate, location, and changes in any of these elements;

(5) Sales figures in terms of quantity, value and price;

(6) Quantity and value of exports, as well as principal export markets;

(7) Profitability of firm on firms producing the like product, if possible show profit data by product line;

(8) Analysis of cost including materials, labor and overhead;

(9) A discussion of the competitive situation of the domestic industry;

(10) Identification of competitors; analysis of the effect imports receiving duty-free treatment under the GSP have on competition and the business of the interest on whose behalf the request is made;

(11) Any relevant information relating to the factors listed in section 501 and 502(c) of Title V of the Trade Act of 1974, as amended (19 U.S.C. 2501, 502(c)) such as identification of tariff and non-tariff barriers to sales in foreign markets;

(12) Any other relevant information including any additional information that may be requested by the GSP Subcommittee. This information should be submitted with the request for each article that is the subject of the request, both for the party making the request, and to the extent possible, for the industry to which the request pertains.

(c) Requests to designate new articles. Information to be provided in petitions requesting the designation of new articles submitted by interested parties must

include for the most recent three year period the following information for the beneficiary country on whose behalf the request is being made and, to the extent possible, other principal beneficiary country suppliers:

(1) Identification of the principal beneficiary country suppliers expected to benefit from proposed modification;

(2) Name and location of firms;

(3) Actual production figures (and estimated increase in GSP status is granted);

(4) Actual production and capacity utilization (and estimated increase if GSP status is granted);

(5) Employment figures, including numbers, type, wage rate, location and changes in any of these elements if GSP treatment is granted;

(6) Sales figures in terms of quantity, value and prices;

(7) Information on total exports including principal markets, the distribution of products, existing tariff preferences in such markets, total quantity, value and trends in exports;

(8) Information on exports to the United States in terms of quantity, value and price, as well as considerations which affect the competitiveness of these exports relative to exports to the United States by other beneficiary countries of a like or directly competitive product. Where possible, petitioners should provide information on the development of the industry in beneficiary countries and trends in their production and promotional activities;

(9) Analysis of cost including materials, labor and overhead;

(10) Profitability of firms producing the product;

(11) Information on unit prices and a statement of other considerations such as variations in quality or use that affect price competition;

(12) If the petition is submitted by a foreign government or a government controlled entity, it should include a statement of the manner in which the requested action would further the economic development of the country submitting the petition;

(13) If appropriate, an assessment of how the article would qualify under the GSP's 35 percent value-added requirements; and

(14) Any other relevant information, including any information that may be requested by the GSP Subcommittee.

Submissions made by persons in support of or opposition to a request made under this part should conform to the requirements for requests contained in Sec.

2007.1(a) (3) and (4), and should supply such other relevant information as is available.

Sec. 2007.2 Action following receipt of requests for modifications in the list of eligible articles and for reviews of the GSP status of eligible beneficiary countries with respect to designation criteria.

(a)(1) If a request submitted pursuant to Sec. 2007.0(a) does not conform to the requirements set forth above, or if it is clear from available information that the request does not warrant further consideration, the request shall not be accepted for review. Upon written request, requests which are not accepted for review will be returned together with a written statement of the reasons why the request was not accepted.

(2) If a request submitted pursuant to Sec. 2007.0(b) does not conform to the requirements set forth above, or if the request does not provide sufficient information relevant to subsection 502(b) or 502(c) (19 U.S.C. 2642 (b) and (c)) to warrant review, or if it is clear from available information that the request does not fall within the criteria of subsection 502(b) or 502(c), the request shall not be accepted for review. Upon written request, requests which are not accepted for review will be returned together with a written statement of the reasons why the request was not accepted.

(b) Requests which conform to the requirements set forth above or for which petitioners have demonstrated a good faith effort to obtain information in order to meet the requirements set forth above, and for which further consideration is deemed warranted, shall be accepted for review.

(c) The TPSC shall announce in the Federal Register those requests which will be considered for full examination in the annual review and the deadlines for submissions made pursuant to the review, including the deadlines for submission of comments on the U.S. International Trade Commission (USITC) report in instances in which USITC advice is requested.

(d) In conducting annual reviews, the TPSC shall hold public hearings in order to provide the opportunity for public testimony on petitions and requests filed pursuant to paragraphs (a) and (b) of Sec. 2007.0.

(e) As appropriate, the USTR on behalf of the President will request advice from the USITC.

(f) The GSP Subcommittee of the TPSC shall conduct the first level of interagency consideration under this part, and shall submit the results of its review to the TPSC.

(g) The TPSC shall review the work of the GSP Subcommittee and shall conduct, as necessary, further reviews of requests submitted and accepted under this part. Unless subject to additional review, the TPSC shall prepare recommendations for the President on any modifications to the GSP under this part. The Chairman of the TPSC shall report the results of the TPSC's review to the U.S. Trade Representative who may convene the Trade Policy Review Group (TPRG) or the Trade Policy Committee (TPC) for further review of recommendations and other decisions as necessary. The U.S. Trade Representative, after receiving the advice of the TPSC, TPRG or TPC, shall make recommendations to the President on any modifications to the GSP under this part, including recommendations that no modifications be made.

(h) In considering whether to recommend: (1) That additional articles be designated as eligible for the GSP; (2) that the duty-free treatment accorded to eligible articles under the GSP be withdrawn, suspended or limited; (3) that product coverage be otherwise modified; or (4) that changes be made with respect to the GSP status of eligible beneficiary countries, the GSP Subcommittee on behalf of the TPSC, TPRG, or TPC shall review the relevant information submitted in connection with or concerning a request under this part together with any other information which may be available relevant to the statutory prerequisites for Presidential action contained in Title V of the Trade Act of 1974, as amended (19 U.S.C. 2461-2465).

Sec. 2007.3 Timetable for reviews.

(a) Annual review. Beginning in calendar year 1986, reviews of pending requests shall be conducted at least once each year, according to the following schedule, unless otherwise specified by Federal Register notice:

(1) June 1, deadline for acceptance of petitions for review;

(2) July 15, Federal Register announcement of petitions accepted for review;

(3) September/October--public hearings and submission of written briefs and rebuttal materials;

(4) December/January--opportunity for public comment on USITC public reports;

(5) Results announced on April 1 will be implemented on July 1, the statutory effective date of modifications to the program. If the date specified is on or immediately follows a weekend or holiday, the effective date will be on the second working day following such weekend or holiday.

(b) Requests filed pursuant to paragraph (a) or (b) of Sec. 2007.0 which indicate the existence of unusual circumstances warranting an immediate review may be

considered separately. Requests for such urgent consideration should contain a statement of reasons indicating why an expedited review is warranted.

(c) General Review. Section 504(c)(2) of Title V of the Trade Act of 1974 (19 U.S.C. 2464(c)(2)) requires that, not later than January 4, 1987 and periodically thereafter, the President conduct a general review of eligible articles based on the considerations in sections 501 and 502(c) of Title V. The initiation and scheduling of such reviews as well as the timetable for submission of comments and statements will be announced in the Federal Register. The first general review was initiated on February 14, 1985 and will be completed by January 3, 1987.

The initiation of the review and deadlines for submission of comments and statements were announced in the Federal Register on February 14, 1985 (50 FR 6294).

Sec. 2007.4 Publication regarding requests.

(a) Whenever a request is received which conforms to these regulations or which is accepted pursuant to Sec. 2007.2 a statement of the fact that the request has been received, the subject matter of the request (including if appropriate, the TSUS item number or numbers and description of the article or articles covered by the request), and a request for public comment on the petitions received shall be published in the Federal Register.

(b) Upon the completion of a review and publication of any Presidential action modifying the GSP, a summary of the decisions made will be published in the Federal Register including:

(1) A list of actions taken in response to requests; and

(2) A list of requests which are pending.

(c) Whenever, following a review, there is to be no change in the status of an article with respect to the GSP in response to a request filed under Sec. 2007.0(a), the party submitting a request with respect to such articles may request an explanation of factors considered.

(d) Whenever, following a review, there is to be no change in the status of a beneficiary country with respect to the GSP in response to a request filed under Sec. 2007.0(b), the GSP Subcommittee will notify the party submitting the request in writing of the reasons why the requested action was not taken.

Sec. 2007.5 Written briefs and oral testimony.

Sections 2003.2 and 2003.4 of this chapter shall be applicable to the submission of any written briefs or requests to present oral testimony in connection with a review under this part. For the purposes of this section, the term "interested party"

as used in Sec. Sec. 2003.2 and 2003.4 shall be interpreted as including parties submitting petitions and requests pursuant to Sec. 2007.0(a) or (b) as well as any other person wishing to file written briefs or present oral testimony.

Sec. 2007.6 Information open to public inspection.

With exception of information subject to Sec. 2007.7 any person may, upon request inspect at the Office of the United States Trade Representative:

(a) Any written request, brief, or similar submission of information made pursuant to this part; and

(b) Any stenographic record of any public hearings which may be held pursuant to this part.

Sec. 2007.7 Information exempt from public inspection.

(a) Information submitted in confidence shall be exempt from public inspection if it is determined that the disclosure of such information is not required by law.

(b) A party requesting an exemption from public inspection for information submitted in writing shall clearly mark each page "Submitted in Confidence" at the top, and shall submit a nonconfidential summary of the confidential information. Such person shall also provide a written explanation of why the material should be so protected.

(c) A request for exemption of any particular information may be denied if it is determined that such information is not entitled to exemption under law. In the event of such a denial, the information will be returned to the person who submitted it, with a statement of the reasons for the denial.

Sec. 2007.8 Other reviews of article eligibilities.

(a) As soon after the beginning of each calendar year as relevant trade data for the preceding year are available, modifications of the GSP in accordance with section 504(c) of the Trade Act of 1974 as amended (19 U.S.C. 2464) will be considered.

(b) General Review. Section 504(c)(2) of Title V of the Trade Act of 1974 as amended (19 U.S.C. 2464(c)(2)) requires that not later than January 4, 1987 and periodically thereafter, the President conduct a general review of eligible articles based on the considerations in sections 501 and 502 of Title V. The purpose of these reviews is to determine which articles from which beneficiary countries are "sufficiently competitive" to warrant a reduced competitive need limit. Those articles determined to be "sufficiently competitive" will be subject to a new lower competitive

need limit set at 25 percent of the value of total U.S imports of the article, or $25 million (this figure will be adjusted annually in accordance with nominal changes in U.S. gross national product (GNP), using 1984 as the base year). All other articles will continue to be subject to the original competitive need limits of 50 percent or $25 million (this figure is adjusted annually using 1974 as the base year).

(1) Scope of General Reviews. In addition to an examination the competitiveness of specific articles from particular beneficiary countries, the general review will also include consideration of requests for competitive need limit waivers pursuant to section 504(c)(3)(A) of Title V of the Trade Act of 1974 as amended (19 U.S.C. 2464(c)) and requests for a determination of no domestic production under section 504(d)(1) of Title V of the Trade Act of 1974 as amended (19 U.S.C. 2464(d)(1)).

(2) Factors To Be Considered. In determining whether a beneficiary country should be subjected to the lower competitive need limits with respect to a particular article, the President shall consider the following factors contained in sections 501 and 502(c) of Title V:

> (i) The effect such action will have on furthering the economic development of developing countries through expansion of their exports;
>
> (ii) The extent to which other major developed countries are undertaking a comparable effort to assist developing countries by granting generalized preferences with respect to imports of products of such countries;
>
> (iii) The anticipated impact of such action on the United States producers of like or directly competitive products;
>
> (iv) The extent of the beneficiary developing country's competitiveness with respect to eligible articles;
>
> (v) The level of economic development of such country, including its per capita GNP, the living standard of its inhabitants and any other economic factors the President deems appropriate;
>
> (vi) Whether or not the other major developed countries are extending generalized preferential tariff treatment to such country;
>
> (vii) The extent to which such country has assured the United States it will provide equitable and reasonable access to the markets and basic commodity resources of such country and the extent to which such country has assured the United States that it will refrain from engaging in unreasonable export practices;
>
> (viii) The extent to which such country is providing adequate and effective means under its laws for foreign nationals to secure, to exercise and to

enforce exclusive rights in intellectual property, including patents, trademarks and copyrights;

(ix) The extent to which such country has taken action to --

(A) Reduce trade distorting investment practices and policies (including export performance requirements); and

(B) Reduce or eliminate barriers to trade in services; and

(x) Whether or not such country has taken or is taking steps to afford workers in that country (including any designated zone in that country) internationally recognized worker rights.

4. ILO Declaration on Fundamental Principles and Rights at Work

86th Session, Geneva, June 1998

Whereas the ILO was founded in the conviction that social justice is essential to universal and lasting peace;

Whereas economic growth is essential but not sufficient to ensure equity, social progress and the eradication of poverty, confirming the need for the ILO to promote strong social policies, justice and democratic institutions;

Whereas the ILO should, now more than ever, draw upon all its standard-setting, technical cooperation and research resources in all its areas of competence, in particular employment, vocational training and working conditions, to ensure that, in the context of a global strategy for economic and social development, economic and social policies are mutually reinforcing components in order to create broad-based sustainable development;

Whereas the ILO should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers, and mobilize and encourage international, regional and national efforts aimed at resolving their problems, and promote effective policies aimed at job creation;

Whereas, in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned, to claim freely and on the basis of equality of opportunity, their fair share of the wealth which they have helped to generate, and to achieve fully their human potential;

Whereas the ILO is the constitutionally mandated international organization and the competent body to set and deal with international labour standards, and enjoys universal support and acknowledgement in promoting Fundamental Rights at Work as the expression of its constitutional principles;

Whereas it is urgent, in a situation of growing economic interdependence, to reaffirm the immutable nature of the fundamental principles and rights embodied in the Constitution of the Organization and to promote their universal application;

The International Labour Conference

1. Recalls:

(a) that in freely joining the ILO, all Members have endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia, and have undertaken to work towards attaining the overall objectives of the Organization to the best of their resources and fully in line with their specific circumstances;

(b) that these principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both inside and outside the Organization.

2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;

(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour; and

(d) the elimination of discrimination in respect of employment and occupation.

3. Recognizes the obligation on the Organization to assist its Members, in response to their established and expressed needs, in order to attain these objectives by making full use of its constitutional, operational and budgetary resources, including, by the mobilization of external resources and support, as well as by encouraging other international organizations with which the ILO has established relations, pursuant to article 12 of its Constitution, to support these efforts:

(a) by offering technical cooperation and advisory services to promote the ratification and implementation of the fundamental Conventions;

(b) by assisting those Members not yet in a position to ratify some or all of these Conventions in their efforts to respect, to promote and to realize the principles concerning fundamental rights which are the subject of these Conventions; and

(c) by helping the Members in their efforts to create a climate for economic and social development.

4. Decides that, to give full effect to this Declaration, a promotional follow-up, which is meaningful and effective, shall be implemented in accordance with the measures specified in the annex hereto, which shall be considered as an integral part of this Declaration.

5. Stresses that labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up.