Human Rights Conditionality in the EU's Generalised System of Preferences: Legitimacy, Legality and Reform

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A. Introduction

Under the EU's Generalised System of Preferences (GSP),[1] 176 developing countries benefit from custom reductions on more than 6.200 tariff lines. Additional preferences can be granted under the special incentive arrangement for sustainable development and good governance (commonly referred to as GSP+) if the beneficiary country is (economically) vulnerable and complies with certain international conventions on human rights, environment and governance principles.[2] Currently, 14 countries[3] are benefiting from GSP+ reductions. Finally, a special arrangement for

1 Regulation 732/2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011, OJ L 211 of 6/8/2008, p. 1, extended by Regulation 512/2011, OJ L 145 of 31/5/2011, p. 28.

2 See Art. 11 of Regulation 732/2008 and the list of Conventions in Annex III to the same regulation.

3 Armenia, Azerbaijan, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Georgia, Guatemala, Honduras, Mongolia, Nicaragua, Paraguay, Panama.

the least developed countries provides for suspension of custom tariffs for all products except arms and ammunition (Everything But Arms scheme, EBA). All preferences can be withdrawn in case of violation of certain human and labour rights conventions.

The expiry of the current GSP by the end of 2013 and the submission of a reform proposal by the Commission[4] (hereafter: the Proposal) offer the opportunity to assess several aspects of the GSP that are important for its legality and legitimacy. 40 years after the entry into force of the EU's first GSP, the linkage of trade and human rights is still contested. A major criticism alleges that such instruments are unilateral[5] and protectionist and possibly interfere with internal politics of developing countries.[6] In addition, the WTO Appellate Body elaborated a catalogue of legal constraints specifying the generalised, non-discriminatory and non-reciprocal nature of a GSP, including clear procedures and predictability of its application. By referring to universally accepted values as reflected in international conventions and by guaranteeing an objective and predictable granting and withdrawal procedure, the GSP has the potential to meet these requirements. Therefore, this article examines the choice of the conventions referred to in Annex III of Regulation 732/2008 (Section B.) and assesses the current practice of the withdrawal procedure (Section C.). Finally, the legality of human rights conditionality in the current GSP under WTO law will be assessed (Section D.), taking into account the Commission's reform proposal.[7]

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4 Proposal for a Regulation of the EP and of the Council applying a scheme of generalised tariff preferences, SEC (2011) 536 final and 537 final. Most notably, the number of GSP beneficiary countries will be reduced to approximately 80 less developed countries, which aims at increasing the benefits for those countries while taking account of the progress in development of the withdrawn countries. Under the current Regulation, almost 40 % of the preferences benefit Russia, Brazil, China, India and Thailand, cf. *De Gucht*, Remarks at the Press Conference on the Review of the GSP on 10/5/2011, p. 2, http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147895.pdf (5/9/2012).

5 *Cottier/Oesch*, International Trade Regulation, 2005, p. 564 et seq.

6 See *Sancho*, What Kind of ‚Generalized' Systems of Preferences?, E.J.L. & E. 21 (2006), p. 270; *Shaffer/Apea*, Institutional Choice in the Generalized System of Preferences Case: Who Decides the Conditions for Trade Preferences?, The Laws and Politics of Rights, J.W.T. 39 (2005), p. 993.

7 This article will deal mainly with the human rights aspects of the GSP; on the labour rights aspects see for instance *Orbie/Tortell*, The New GSP+ Beneficiaries: Ticking the Box or Truly Consistent with ILO Findings?, E.F.A.Rev. 14 (2009), p. 663; *Kenner*, The Remodeled European Community GSP+: A Positive Response to the WTO Ruling?, in: Bermann/Mavroidis (eds.), WTO Law and Developing Countries, 2007, p. 292 et seq.; on the environmental aspects see *Switzer*, Environmental Protection and the Generalized System of Preferences: a Legal and Appropriate Linkage?, I.C.L.Q. 57 (2008), p. 113; *McKenzie*, Climate Change and the Generalized System of Preferences, J.I.E.L. 11 (2008), p. 679.

B. The choice of human rights conventions contained in Annex III Part A of Regulation 732/2008

In drawing the list of conventions to be ratified and implemented for the granting of preferences under the GSP+, two leading motives can be discerned. The first results from the WTO Appellate Body's report which stated that the inclusion into and removal from a GSP must follow objective criteria.[8] The Commission justifies the choice of conventions as being "those with mechanisms that the relevant international organisations can use to regularly evaluate how effectively they have been implemented."[9] As the EU does not conduct genuine monitoring on the human rights situation in the beneficiary countries, it bases its decision on the granting or withdrawal of GSP+ benefits mainly on the reports of international bodies (cf. Art. 15(1)(a) and 18(3) of Regulation 732/2008),[10] which recognises the "functional autonomy" of the respective instruments[11] and reinforces the legitimacy of the GSP. Yet, a closer look at the conventions casts some doubt upon their ability to provide a tool for assessment (Section B.I.).

Secondly, the choice of conventions responds to the criticism of advancing self-serving policy goals of the preference-granting country. Therefore, it is contended that the conventions referred to in Annex III reflect universal values of general acceptance; if this is true, the GSP does not promote Western interests, but serves a universally recognised, common interest of all nations.[12] Accordingly, the Commission's justification for the choice of conventions is that they "incorporate universal standards and reflect rules of customary international law and they form the core basis of the concept of sustainable development".[13] This proposition will be assessed in Section B.II.

I. The convention mechanisms – a suitable basis for the EU's granting/withdrawal decision?

If the reports of the relevant monitoring bodies are to be used as the main sources for the granting or withdrawal of preferences, it is compelling that the conventions listed in Annex III provide for reporting or even complaint procedures that imply the

8 See below, Section D.

9 Developing Countries, International Trade and Sustainable Development: The Function of the Community's Generalised System of Preferences (GSP) for the Ten-Years Period from 2006-2015, COM (2004) 461 final.

10 As discussed below in Section B.I., these findings are not necessarily the only source for the decision.

11 *Kenner*, (fn. 7), p. 296, concerning the ILO conventions.

12 *Harrison*, Incentives for Development: The EC's Generalized System of Preferences, India's WTO Challenge and Reform, CML Rev. 42 (2005), p. 1682 et seq.

13 Proposal for a Council Regulation applying a Scheme of Generalised Tariff Preferences, COM (2004) 699 final, Explanatory Memorandum, p. 4.

drafting of reports by monitoring bodies. This is true for most of the conventions; however, somewhat surprisingly, the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention, Annex III No. 7) does not provide for a monitoring procedure at all, while the Committee under Art. IX of the Convention on the Prevention and Punishment of the Crime of Apartheid (Apartheid Convention, Annex III No. 16) has never been established.

Article 18(3) of Regulation 732/2008 leaves some space for the consideration of other sources, such as the reports of NGOs, as it entitles the Commission to "seek all information it considers necessary, *including* [the relevant findings of the] supervisory bodies", which shall serve as a "point of departure for the investigation into whether temporary withdrawal is justified". In addition, this investigation can be triggered when "the Commission or a Member State *receives information*" justifying withdrawal (Art. 17(1) of Regulation 732/2008). Accordingly, the withdrawal procedures against Myanmar and Belarus were initiated after complaints made by trade unions.[14] However, NGOs have no formal position in the procedure; the same is true for the European Parliament (EP), which means that the initiation of investigations is at the discretion of the Commission. Therefore, the lack of cooperation with civil society and the EP has been repeatedly criticised by the latter.[15] An amendment to the GSP 2005-2008 Regulation,[16] including "the European Parliament and relevant representatives of civil society, such as social partners"[17] as sources to be heard before the granting of preferences was rejected by the Council; the issue was reconsidered by the EP in the procedure leading to the current GSP Regulation[18] but without success.

The reform proposal does not change the sources the Commission considers (neither NGOs nor the EP are expressly mentioned),[19] but the term "receive" in Art. 17 of Regulation 732/2008 is removed, which decreases the likelihood that withdrawal procedures will be initiated by civil actors. While the proposal introduces regular reports to the EP, there is no provision on the follow-up of these reports, and the Commission becomes the sole actor in the withdrawal procedure.[20] Therefore, the mere text of the Proposal is at odds with the assertion by the Commission that "[t]he

14 See Recitals to Regulation 552/97, OJ L 85 of 27/3/1997, p. 8, and to Regulation 1933/2006, OJ L 405 of 30/12/2006, p. 35.

15 See also *Bartels*, The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third Countries, Study on Request of the European Parliament, 2008, p. 10.

16 Regulation 980/2005, OJ L 169 of 30/6/2005, p. 1.

17 Draft EP Legislative Resolution on the Proposal for a Council Regulation on Applying a Scheme of Generalised Tariff Preferences, C6-0001/2005, Amendment 24 (with justification), adopted in Doc. P6_TA(2005)0066.

18 Comment by *Arif* in EP Debate on GSP, Procedure 2007/0289(CNS), A6-0200/2008 on 4/6/2008.

19 See Art. 14(3), 15(3) and 19(6) of the Proposal.

20 In the Proposal, neither the EP nor Member States can trigger or influence the withdrawal; the final decision is delegated to the Commission.

Council [...] and the European Parliament will exert more scrutiny" and "[t]he EU will have access to more sources of information, not limited to UN/International Labour Organisation reporting systems";[21] future practice will show whether this aim is met.

In summary, it is not evident how the compliance with the Conventions on Apartheid and Genocide is assessed by the Commission, which suggests that the observance of these conventions is of no relevance for the granting of trade preferences. This is confirmed by the Commission's Report on the Ratification and Implementation of the Conventions in Annex III (2008),[22] where the sections on these conventions are left blank.[23] Such an approach is regrettable if, as the Commission asserts, these conventions form part of the universally accepted core of human rights. As suggested above, an appropriate remedy to this deficiency would be a much stronger consideration of civil actors such as human rights NGOs, and of the EP, vesting these bodies with a procedurally formalised right to be heard before the granting or withdrawal of preferences and, ideally, including a right to initiate such a procedure.

A further problem for the assessment of the human rights situation results from diverging and extensive reporting periods under the conventions. The periodical reviews under the conventions take place every two to five years,[24] which makes it particularly difficult to be aware of the deterioration of the human rights situation in a (possible) beneficiary country at the moment of the granting or withdrawal decision.[25] Again, a better integration of other sources, especially NGO reports, would enhance the functioning of the procedure, as most of these reports are available on a more frequent basis.[26] Although NGO reports are often focussed on particular topics or individual cases and may be more open to influence by victim groups, read in conjunction with the findings of the monitoring bodies, they provide a more exhaustive picture of the current situation in the monitored country.

II. A core of universally accepted human rights?

In addition to their ability to provide a source for monitoring, the conventions have been chosen as reflection of a core of universal human rights. A good, although not absolute[27] indicator for the universal acceptance of a convention is the quantity and

21 European Union, More benefits from preferential trade tariff for countries most in need: Reform of the EU Generalised System of Preferences, MEMO/11/284 of 10/5/2011, p. 4.

22 COM (2008) 656 final.

23 Only in the Annex, the relevant legal provisions are mentioned.

24 CERD: 2 years; CEDAW and CAT: 4 years; ICCPR, ICESCR and CRC: 5 years.

25 This has also been criticized in the European Commission Staff Working Paper, Impact Assessment, SEC (2011) 536 final, Vol. I, p. 17.

26 For example, the Amnesty International Report is published annually, see http://www.amnesty.org/en/annual-report/2011 (5/9/2012).

27 Other reasons may have contributed to the ratification of conventions, such as political pressure or, of relevance here, economic incentives.

geographical coverage of its ratifications. However, it is not only necessary that the conventions are universally accepted; as the EU conditions preferential access on their ratification and effective implementation, member states should have ratified and implemented these conventions themselves in order to avoid the accusation of double-standards.[28]

Furthermore, several important human rights conventions, such as the International Convention for the Protection of All Persons from Enforced Disappearances (CPED) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) – both quoted among core conventions by the United Nations High Commissioner for Human Rights (UNHCR)[29] –, and the optional protocols to the conventions in Annex III are not included. Therefore, the EU has been accused of being inexplicably selective in the choice of conventions.[30]

Most of the conventions listed in Annex III are accepted by a large number of both developing and developed countries. However, in the case of the Genocide Convention, it is conspicuous that this convention has not been ratified by Malta. More noticeably, the Apartheid Convention has only been ratified by a third of the EU member states. Yet, in order to convincingly demand the ratification of these conventions from developing countries, EU members themselves should promptly ratify the relevant conventions. This is particularly true for Malta, as the prevention of Genocide is seen as a crucial concern of the international community. As for the Apartheid Convention, there is less confidence that it will be ratified by the missing 18 member states. As the convention does not provide for a monitoring body either, it seems justifiable to remove it from Annex III. Accordingly, it has been withdrawn in the reform proposal.[31]

Secondly, there are some clear candidates for the inclusion into the GSP. This concerns in particular the two Optional Protocols (OP1 and OP2) to the Convention on the Rights of the Child (CRC). Both have been ratified by more than 140 states, including various developing states and all EU members. As both specify and enlarge the protection of children under the CRC in important respects, they should be included into Annex III. Unfortunately, this approach has not been adopted in the Proposal. Furthermore, there are some less clear candidates for inclusion. This concerns OP1 to the International Covenant on Civil and Political Rights (ICCPR), which is largely accepted, and its OP2, which has less international recognition. The first provides for an individual complaint procedure; the findings of the Human Rights Committee under OP1 one could be helpful sources for the decision on the granting

28 *Kenner*, (fn. 7), p. 298, concerning the core labour standards.

29 See the list of Core International Human Rights Instruments on the OHCHR website, http://www2.ohchr.org/english/law/ (5/9/2012).

30 *Bartels*, The WTO Legality of the EU's GSP+ Arrangement, JIEL 10 (2007), p. 878.

31 See Annex VIII Part A of the Proposal.

or withdrawing of preferences.[32] Therefore, its inclusion would be desirable, provided, the lacking one EU member (United Kingdom) ratifies it. The same argument can be urged for the Optional Protocols to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), although a few more ratifications by EU member states are missing.[33] ICCPR-OP2, although only ratified by 73 states, sets important standards on the abolition of death penalty, which is a common standard within the European Union. As the missing EU member (Latvia) signed Protocol No. 13 to the European Convention on Human Rights, it could also sign ICCPR-OP2; however, the universal recognition of the abolition of death penalty is questionable,[34] which makes OP2 a less appropriate candidate for inclusion. Finally, the Convention on the Rights of Persons with Disabilities (CRPD) still lacks ratification by a majority of states, including seven EU members (which, at least, signed the convention). As the instrument is relatively new, there is hope that it will be ratified more universally in the near future; the CRPD then could be included into Annex III. In contrast, ICRMW and CPED are ratified only by a minority of states, their omission from Annex III seems therefore perfectly reasonable.

III. Conclusion: the human rights conventions in Annex III – a deliberate choice?

As outlined above, there are several obscurities in the choice of conventions for Annex III. An overview of the preparatory documents for the various GSP regulations suggests that the discussion on the choice of conventions has been surprisingly modest.[35] On the other hand, scholarship did not show exceeding interest for this specific question either.[36] This lack of discussion is surprising, because the conventions in Annex III form the core of the GSP+ mechanism, and because the promotion of human rights by economic measures is a sensible topic. At least, a public

32 In fact, the findings of the HRC under ICCPR-OP1 have been taken into account for the decision on withdrawal of Sri Lanka from the GSP+, see below, fn. 55.

33 CAT: Hungary, Latvia, Lithuania, Slovakia; CEDAW: Estonia, Latvia, Malta.

34 *Rodley*, Integrity of the Person, in: Moeckli/Shah/Sivakumaran/Harris (eds.), International Human Rights Law, 2010, p. 224.

35 In most of the Commission and Council meetings, the issue was not discussed at all; see email correspondence with the Commission and negative responses to requests for access to documents, on file with author. The only evidence for a debate of this point is the agenda of the 2650th Council Meeting in 2004, http://register.consilium.europa.eu/pdf/en/05/st07/st07358.en05.pdf (5/9/2012), p. 3 et seq.; however, the press release on this meeting does not indicate any detailed discussion, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/84485.pdf (5/9/2012), p. 9.

36 One of the few considerations is found in *Bartels*, (fn. 30), p. 878.

consultation conducted by the Commission in 2010 on the reform of the GSP contained a question specifically relating to the identity of the conventions in Annex III,[37] although the impact of this consultation has been modest. Comments reached from the appraisal of the list or demand for its expansion, to the claim for abolition of all linkage between trade and human rights. A more open discussion would potentially have increased the acceptance of the GSP+ mechanism. With the suppression of the Apartheid Convention in the next GSP, the Commission showed some sensibility for the topic, although a wider approach would have been desirable. In conclusion, however, the conventions chosen largely constitute an appropriate point of reference for linking trade benefits with human rights concerns and thus enhance the legitimacy of the GSP.

C. Withdrawal from GSP/GSP+: an objective procedure?

Not only must the EU refer to objective criteria when deciding on the granting of preferences, but the procedure itself must be impartial in order to exclude withdrawal for protectionist reasons. In its guidelines for the GSP 2006-2015, the Commission set as a main objective that "the GSP must be stable, objective, predictable and simple" and envisaged inclusion of "a credible suspension clause that can be rapidly activated".[38] In order to see how objective and predictable withdrawal from the GSP/GSP+ is, the text of Regulation 732/2008 will be analysed and its current application in practice will be examined. Finally, the changes introduced in the Proposal will be assessed.

I. Withdrawal provisions in Regulation 732/2008

1. Substantial provisions

Regulation 732/2008 contains two withdrawal provisions (Art. 15(1) and (2)). Article 15(1)(a) justifies the withdrawal from any of the preferential arrangements if there is a "serious and systematic violation of principles laid down in the conventions listed in Part A of Annex III".[39] The provision contains several uncertainties. First, Art. 15(1) refers to "serious and systematic violation", which is a notion open to valuation, and it depends on the practice how coherently and predictably it is applied.

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37 Public Consultation on the EU GSP, Listing of Answers received, http://trade.ec.europa.eu/doclib/html/146463.htm (5/9/2012), Question 23 and answers, p. 265 et seq.

38 COM (2004) 461 final, pp. 3 and 10.

39 Note that Part B (conventions on environmental protection and good governance) is not mentioned here.

In addition, reference is made to violation of "principles laid down in the conventions" only (as opposed to violation of the – provisions of these – conventions; see also Recital 22 with the same wording). Although it is not obvious what the principles of the conventions are, the notion can be understood as ruling out violation of minor provisions, thereby reinforcing the term "serious and systematic". Consequently, it can be derived that a high threshold must be reached before a withdrawal procedure is initiated, and that withdrawal will be applied in exceptional circumstances only.

Article 15(2) provides for withdrawal from the special arrangement GSP+, "in particular if the national legislation no longer incorporates those conventions referred to in Annex III […] or if that legislation is no longer effectively implemented." Without leaving room for further judgement, clearly the incorporation of the conventions into national legislation is lacking when the ratification has been reversed. However, it is open to valuation when the legislation is "effectively implemented". Regulation 732/2008 does not specify as to when this provision applies. Theoretically, any interpretation of the term is possible. At least, some guidelines for the interpretation of the provisions can be deduced from the object and purpose of the GSP+. The interpretation of the term "effective implementation" must take into consideration the incentive nature of the GSP+: neither can the GSP+ expect full compliance with the provisions, nor can ignorance of the provisions be accepted. On the one hand, to expect from developing countries the full respect of all 27 conventions listed in Annex III from the outset would be very demanding.[40] On the other hand, if non-compliance by one country is easily tolerated, the incentive for other countries to comply with the conventions is reduced.[41] The Commission stressed the importance of encouraging abidance by international standards and applying withdrawal from GSP+ "only in cases of evident non-cooperation or violations of standards confirmed by international monitoring bodies".[42] More precisely, monitoring under Art. 8(3) of Regulation 732/2008 should focus on the evolution of the situation in the beneficiary countries and aim at its successive improvement. This would mean that the withdrawal procedure is triggered if the standards of compliance in a beneficiary country degrade or even fail to improve over a reasonable period. Unfortunately, this approach is not only reflected insufficiently in the wording of the Regulation, but also limited by the protracted monitoring intervals under the conventions in Annex III.

40 The costs of attaining of an impeccable standard of implementation would then be rewarded by the granting of preferences years after their ratification only, Impact Assessment, (fn. 25), Vol. II, Annex 1, p. 3.

41 *Vandenberghe*, On Carrots and Sticks: The Social Dimension of EU Trade Policy, E.F.A. Rev. 13 (2008), p. 581.

42 Impact Assessment, (fn. 25), Vol. II, Annex 1, p. 6.

2. Procedure

The procedure for withdrawal is provided for in Art. 17-19. When the Commission or a member state receives information that might justify temporal withdrawal, and after consultation with the Generalised Preferences Committee, the Commission can initiate an investigation following which a decision on the withdrawal is taken. Where the Commission considers withdrawal justified, it grants a six month evaluation and monitoring period; where this period expires without a commitment by the concerned country to take appropriate measures, the Council decides on the withdrawal. Several aspects of this procedure have been criticised in the Commission's impact assessment,[43] namely the lack of clear rules concerning data protection and rights of defence in the administrative proceedings, the lack of a precise timeline for the different procedural steps in the investigation procedure, and the absence of a procedure for reinstatement of preferences. Nevertheless, it has to be noted positively that the concerned country is involved in the entire procedure (Art. 18(2)), and that the six month period at the end of the investigation procedure provides the country with a last chance to take appropriate steps to achieve maintenance of preferences.

II. The current practice of withdrawal from the GSP/GSP+

The first withdrawal took place in 1997, when Myanmar was temporarily withdrawn from the GSP for use of forced labour.[44] This was institutionalised in later GSP regulations and applies to the entire GSP scheme, including the EBA programme.[45] The decision was taken on the basis of the GSP 1996, which did not provide for withdrawal in case of serious and systematic violations or non-implementation of certain conventions; therefore, it does not help to clarify these notions.

Since 2005, three more investigations on withdrawal have been initiated, two times for non-compliance with labour standards, and once for violation of human rights conventions.[46] As the withdrawal for violation of labour standards is subject to the same provisions (non-implementation or serious and systematic violation), these cases will equally be considered.

43 Ibid., Vol. I, p. 17.

44 Regulation 552/97, OJ L 85 of 27/3/1997, p. 8.

45 See Recital 23 of Regulation 732/2008.

46 Venezuela was granted GSP+ status in 2008 after its commitment to ratify the Convention Against Corruption by 31 December 2008; as it failed to do so, it was then removed from the list by Decision 2009/454/EC, OJ L 149 of 12/6/2009, p. 78. Technically, this was not a case of withdrawal under Art. 15 because Venezuela never fulfilled the requirements for being granted GSP+ status.

1. Withdrawal for non-compliance with labour standards

In 2006, Belarus was withdrawn from the GSP for violation of ILO Conventions No. 87 and 98.[47] As the decision on Belarus concerned withdrawal from the entire GSP, it could only be based on Art. 16(1) of Regulation 980/2005 (corresponding to Art. 15(1) of Regulation 732/2008 – "serious and systematic violation of principles contained in these Conventions"). However, the decision was not only justified on these grounds, but also by the lack of effective implementation of these Conventions (Recital 10). Whereas the situation in Belarus can be seen as a clear case of systematic violations, the justification is somewhat confusing. Furthermore, although the withdrawals of Myanmar and Belarus were certainly justified on objective grounds, Recital 23 of Regulation 732/2008 maintains these withdrawals "[d]ue to the political situation in Myanmar and in Belarus", which does not contribute to the clarity in the application of the withdrawal mechanism either. Accordingly, political reasons have been suspected behind the withdrawal of Belarus, considering that other countries with a comparably poor labour rights record have not been withdrawn from the GSP.[48]

In 2008, the Commission opened an investigation against El Salvador because of a ruling by the Supreme Court of El Salvador, according to which certain provisions of ILO Convention No. 87 were inconsistent with the Constitution of El Salvador.[49] However, when El Salvador ratified ILO Convention No. 87, a constitutional review had been launched with the aim of eliminating legal obstacles by extending the right to form trade unions to the public sector. With the entry into force of this amendment, the Commission terminated the investigation without withdrawing El Salvador from the GSP+.[50] Although the Commission noted that a limited inconsistency between the revised Constitution and ILO Convention No. 87 subsisted, it considered the efforts made by El Salvador as sufficient, referring especially to the incentive nature of the GSP+.[51] This argumentation is reasonable, and the case of El Salvador is a good example for the successful incentive effect of the GSP and its impending withdrawal when combined with open dialogue with the beneficiary country.

47 Regulation 1933/2006, OJ L 405 of 30/12/2006, p. 35.

48 *Vandenberghe*, (fn. 41), p. 573 et seq.

49 Decision 2008/316/EC, OJ L 108 of 18/4/2008, p. 29.

50 Notice pursuant to Art. 19(2) of Council Regulation (EC) 732/2008 of the Termination of an Investigation with Respect to the Protection of the Freedom of Association and the Right to Organise in the Republic of El Salvador, 2009/C 255/01, OJ C 255 of 24/10/2009, p. 1.

51 European Commission, Investigation pursuant to Article 18(2) of Council Regulation (EC) No 980/2005 with respect to the protection of the freedom of association and the right to organise in El Salvador, C(2009) 7934, http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145210.pdf (5/9/2012), para. 43.

2. Non-implementation of human rights conventions: lessons to be learnt from Sri Lanka?

In February 2010, the GSP+ was temporarily withdrawn from Sri Lanka for lack of effective implementation of ICCPR, CAT and CRC.[52] The decision was preceded by an investigation that involved a public call for comments,[53] a request for dialogue with the Government of Sri Lanka[54] and the drafting of an independent expert report;[55] a request for a country visit was denied.[56] Reading the expert report, there is no doubt that the withdrawal of benefits was justified, as it reveals numerous grave and officially sanctioned violations of human rights.

The procedural conduct has to be approved. The investigation was carried out in an objective way, involving the concerned country and, particularly welcome, independent experts and NGO representatives; apparently, the process was free from political considerations. Unfortunately, though, the withdrawal decision does not specify the standards applied to the notion of effective implementation. This may have been negligible because Sri Lanka was in clear violation of the relevant conventions. However, the questions what the minimum threshold is for an investigation procedure to be initiated, and when withdrawal from the whole GSP will be considered, remain. After all, the expert findings suggest withdrawal from the entire GSP for serious and systematic violations, and it remains obscure why such proceedings have not been initiated.

Concerning the threshold triggering an investigation of withdrawal from GSP+, it has to be reminded that most beneficiary countries have a dubious human rights record. For example, in 2010, Amnesty International reported extra-judicial killings (especially in Colombia), violations of the rights of indigenous people (Bolivia, Ecuador, El Salvador, Guatemala, Paraguay, Panama, Peru), impunity for international crimes (Georgia) and for torture and other ill-treatment (Armenia, Georgia, Mongolia, Paraguay), violence against women (Armenia, El Salvador, Guatemala, Nicaragua, Panama) and violations of freedom of association, opinion and press (most beneficiaries).[57] Only in a few of these countries, improvements were reported.

52 Regulation 143/2010, OJ L 45 of 20/2/2010, p. 1.

53 Notice published in OJ C 265 of 18/10/2008, p. 1.

54 European Commission, Report on the Findings of the Investigation with Respect to the Effective Implementation of Certain Human Rights Conventions in Sri Lanka, http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145152.pdf (5/9/2012), para. 4.

55 *Hampson/Sevon/Wieruszewski*, The Implementation of Certain Human Rights Conventions in Sri Lanka, 2009.

56 Report on Sri Lanka, (fn. 54), para. 7.

57 Amnesty International Report 2011, http://www.amnesty.org/en/annual-report/2011/downloads#en (5/9/2012).

Against this background, it is unclear in which cases the Commission initiates investigations. True, the Commission keeps under review the status of implementation of the conventions and presents a report to the Council (Art. 8(3) of Regulation 732/2008), but the findings in the current report on implementation are trivial at best. Although the annex reproduces the censuring findings of the relevant monitoring bodies on more than 150 pages,[58] the (6-page) main report confines itself to reiterating the objectives and functioning of the GSP and concludes that "[a]s far as effective implementation is concerned, the recommendations of the ILO and UN monitoring bodies […] reveal various shortcomings in the implementation process but in general demonstrate a satisfactory state of play".[59] Any analysis of the development in the beneficiary countries as argued for above is missing, which calls into question the possibly incentive effects of the scheme.

Accordingly, the rare use of the withdrawal mechanism has been criticised. As one author notes, "[t]he history of the preference system [...] has thus been one of avoidance of 'GSP-linked sanctions'".[60] So far, withdrawal was rightfully effected in three "hard cases", but the incentive effect of the GSP+ for countries that have a mediocre human rights record remains questionable, which does not fully meet the Commission's objectives to provide for a "credible suspension clause that can be rapidly activated".

III. Granting and withdrawal under the Proposal

The reform proposal takes into account many of the criticisms mentioned above. Whereas the withdrawal from the GSP for serious and systematic violation of principles laid down in the conventions remains largely unchanged,[61] the Commission's impact assessment came to the conclusion that "to require implementation before entry is at odds with the logic of the instrument. If a country has already achieved sufficient implementation, it will tend to have overcome already the most significant political and economic hurdles […]".[62] Therefore, the conditions for granting and withdrawal of GSP+ have been changed. To benefit from GSP+, a vulnerable country must now have ratified all the conventions listed in Annex VIII[63] and the most

58 Accompanying Document to the GSP+ Report on the status of ratification and recommendations, SEC (2008) 2647.

59 GSP+ Report on the status of ratification and recommendations, COM (2008) 656 final, p. 6.

60 *Switzer*, (fn. 7), p. 117.

61 See Art. 19(1); however, a new reason for withdrawal is failure to comply with international conventions on anti-terrorism.

62 Impact Assessment, (fn. 25), Vol. I, p. 22; a footnote even acknowledges the differing degree of implementation of the conventions within the EU, ibid., fn. 45.

63 Corresponding to current Annex III, with the exception of the Apartheid Convention, which has been removed.

recent available conclusions of the relevant monitoring bodies must not have identified serious failure to effectively implement these conventions. Furthermore, the country must have given a binding undertaking to a) maintain ratification of the conventions, b) ensure their effective implementation, and c) comply with the reporting requirements set out in the relevant conventions and in Art. 13 of the Proposal (cooperation with the Commission's monitoring). The proposal defines "effective implementation" as "the integral implementation of all undertakings and obligations undertaken under the relevant conventions, thus ensuring fulfilment of all the principles, objectives and rights guaranteed therein" (Art. 2(k)). A country can be withdrawn when it does not respect these undertakings (Art. 15(1)).

As a result from these requirements, effective implementation of the conventions is no longer requested from the outset, but GSP+ status will be granted if there is no "serious failure" of implementation. Although the notion of "serious failure" remains unclear, the objective of the provisions suggests that a genuine acceptance of the obligations resulting from the conventions is sufficient, unless this is contradicted by an unacceptable human rights record.

The procedure is provided for in Art. 15 and follows the standards in the current Regulation, with some considerable specifications. It is now the Commission alone who is responsible for the withdrawal (Art. 15(9), in accordance with delegation of powers in Art. 36). Every two years, the Commission will present to the Council and the EP a report on the compliance with the conventions (Art. 14(1)). The article provides for further requirements to the content of this report, especially the Commission's conclusion on whether each GSP+ country respects its binding undertakings to ensure effective implementation (para. 3). This should prevent the report from being confined to a reiteration of the monitoring bodies' findings without further conclusions. Instead, the report, along with other evidence available, shall serve as a basis for the Commission's decision to initiate the withdrawal procedure. Remarkably, the burden of proof for compliance with the undertakings in accordance with Art. 9 is on the beneficiary country (Art. 15). Therefore, lack of cooperation by the beneficiary country should allow for a more prompt withdrawal. Finally, Art. 16 expressly provides for a reinstatement of preferences if the reasons for withdrawal no longer exist.

The consideration of the incentive nature of the GSP+ has to be welcomed. Again, the thresholds for entrance into and withdrawal from the GSP+ have to be found in practice, and it remains to be seen if the withdrawal mechanism will be used appropriately. Yet, the wording of the GSP Proposal seems much more suited for attaining this objective.

D. Legality of the GSP+ under WTO law

As the granting of trade preferences to selected countries by definition conflicts with the most-favoured nation (MFN) treatment (Art. I:1 GATT), the GATT contracting parties adopted an exception to the MFN principle in the form of a ten-years waiver of the obligations of Art. I GATT[64] to the benefit of developing countries which became later institutionalised by the Enabling Clause.[65] Accordingly, preferences may be granted on a generalised, non-reciprocal and non-discriminatory basis.[66] In 2004, the WTO Appellate Body (AB) ruled on the consistency of the former Drug Arrangements with WTO law[67] and specified the term non-discriminatory as only prohibiting distinction among similarly-situated beneficiaries,[68] whereas differentiation between developing countries as such does not violate the Enabling Clause, provided that its remaining conditions are met.[69] As a consequence, preference-granting countries must make available identical tariff preferences to all similarly-situated countries.[70] However, the term "non-discriminatory" has to be read in conjunction with Art. 3(c) of the Enabling Clause, according to which preferential treatment "shall be designed, and, if necessary modified, to respond positively to the development, financial and trade needs of developing countries". According to the AB, this need cannot be defined unilaterally by the preference-granting or the beneficiary country.[71] Rather, the existence of such a need "must be assessed to an objective standard".[72] The AB specified that "[b]road-based recognition of a particular need, set out in the *WTO Agreement* or in multilateral instruments adopted by international organizations, could serve as such a standard".[73]

As the GSP must be a positive response to such a need, it must "be taken with a view to *improving* the development financial or trade situation."[74] This suggests that a

64 Generalized System of Preferences, Waiver Decision of June 1971, BISD 18S/24.

65 Differential and More Favourable Treatment – Reciprocity and Fuller Participation of Developing Countries, Decision of 28/11/1979, L/4903.

66 Fn. 3 to the Enabling Clause; for more details see Section D. below.

67 Appellate Body, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R; the GSP was provided for by Regulation 2501/2001, OJ L 346 of 31/12/2001, p. 1.

68 Appellate Body, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, para. 153.

69 Ibid., paras. 162, 173.

70 Ibid., paras. 154, 173.

71 Ibid., para. 163.

72 Ibid.

73 Ibid.

74 Ibid., para. 164.

sufficient nexus should exist between the preferential treatment and the likelihood of alleviating the relevant need.[75] Therefore, the particular need "must, by its nature, be such that it can be effectively addressed through tariff preferences."[76] As the Drug Arrangements were limited to the twelve beneficiaries listed in its annex and contained neither provisions for the modification of this list[77] nor criteria or standards as to the choice of beneficiaries,[78] the Drug Arrangements failed this test and was found in violation with the requirement of non-discrimination in the Enabling Clause.[79]

In the following, the most problematic aspects of the GSP+ will be assessed, taking into account the reform proposal.

I. The non-discriminatory nature of the GSP

1. The GSP+ must address a development, financial or trade need, which must be assessed to an objective standard

The object of the GSP+ is to compensate vulnerable countries for the burdens resulting from the implementation of human and labour rights conventions (and environmental protection and good governance) by granting them trade benefits.[80] However, not any need may be legitimately addressed, but the GSP must respond to a development, financial or trade need.[81] Hence, the question arises whether the respect for human rights is part of a development need as understood by the Enabling Clause.

At first sight, various GATT provisions refer to *economic* development only;[82] likewise, the preamble of the 1971 Waiver sets the object of furthering the economies of developing countries. However, the basic object of the agreement is defined as "the raising of the *standard of living* and the progressive development of the economies of all contracting parties" (Art. XXXVI:1(a) GATT) and the parties recognize "international trade as a means of achieving economic *and social* advancement" (Art. XXXVI:1(b) GATT). Furthermore, the fact that the Enabling Clause juxtaposes development to trade and financial needs suggests that these terms are not

75 Ibid.

76 Ibid.

77 Ibid., para. 182; technically, the GSP Regulation itself had to be amended.

78 Ibid., para. 183.

79 Ibid., para. 179 et seq., especially para. 189.

80 Recital (8) of Regulation 732/2008.

81 Appellate Body, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, para. 163.

82 Such as Art. XII(3)(d), Art. XVIII, Art. XXVIIIbis (3)(b) and (c), and various provisions in Part IV.

conterminous. Finally, the preamble to the WTO agreement recognises the object of sustainable development.[83] Against this background, it is possible to give the term "development" a wider meaning. Accordingly, the EC argued that "it is appropriate to move to a broader concept of sustainable development", as "multiple international conventions and declarations have recognised the link between development and the respect for basic human and labour rights, of the environment, and of the principles of governance."[84]

According to the AB, instead of a unilateral choice of the relevant need, this need must be assessed to an objective standard, which can be provided by broad-based recognition as included in multilateral instruments adopted by international organisations. In fact, there are various instruments confirming that development cannot be defined in economic terms only. The 1986 UN Declaration on the Right to Development located the debate in the context of human rights and recognised that "development is a comprehensive economic, social, cultural and political process".[85] Likewise, the UN's Johannesburg Declaration on sustainable development included human rights and environmental protection into the concept.[86] Finally, the UN Millennium Development Goals, adopted as objectives to be achieved until 2015 by all UN Member States,[87] reflect human rights in various aspects.[88] Therefore, it can be concluded that sustainable development, including the promotion of human rights, has become a universally accepted concept.[89] This evolution of the notion of development has to be considered whilst interpreting the Enabling Clause (cf. Art. 31(3) Vienna Convention on the Law of Treaties). Accordingly, the promotion of human rights, environmental protection and good governance is part of a development need and may be rightfully addressed in the GSP.

Furthermore, it has to be examined if the conventions chosen in Annex III reflect these aspects adequately. *Bartels* objects that the choice of conventions was selectively designed to comprise the beneficiaries of the former Drug Arrangements and there-

83 In Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, AB-1998-4, adopted on 12/10/1998, para. 129 et seq., the AB expressly referred to the term of sustainable development in the preamble as an aid of interpretation.

84 Developing Countries, International Trade and Sustainable Development: The Function of the Community's Generalised System of Preferences (GSP) for the Ten-Years Period from 2006-2015, COM (2004) 461 final, p. 10.

85 General Assembly, Resolution 41/128 of 4/12/1986.

86 Adopted at the 17th plenary meeting of the World Summit on Sustainable Development on 4/9/2002.

87 UN Millennium Declaration, General Assembly, Resolution 55/2 of 18/9/2000.

88 From economic, social and cultural rights (freedom from hunger, primary education, health) to civil and political rights (gender equality).

89 *Turksen*, The WTO Law and the EC's GSP+ Arrangement, J.W.T. 43 (2009), p. 955; see also *Bartels*, (fn. 30), p. 876; *Sancho*, (fn. 6), p. 281.

fore leads to the "resurrection of selective preferences".[90] However, it has been concluded above that the choice of conventions is largely justified on objective grounds. Although some optional protocols could have been included, and with the exception of the Apartheid Convention, which has been removed from the next GSP, Annex III contains a core of universally recognised human rights. The same argument can be made for the choice of ILO conventions, which contain the core labour standards and thus reflect an objective choice.[91] Likewise, the reference to environment protection progressed from the selective protection of tropical timber in the former environmental arrangement to a more holistic concept of environmental protection.[92] Therefore, Annex III adequately reflects the notion of sustainable development. It can be concluded that the GSP+ addresses needs which are universally recognised as shared by all developing countries.

2. The GSP+ must be available to all similarly situated developing countries

Preferences must be granted to all similarly-situated developing countries, whereas differently-situated developing countries must be excluded from the arrangement. A developing country has to fulfil several criteria in order to be eligible to GSP+, which will be assessed in turn.

a) Ratification and effective implementation of the conventions

It can be questioned whether the requirement of ratification and implementation is relevant for the existence of a development need.[93] In fact, a country that has not ratified or implemented the conventions could have a much more urgent need for sustainable development than a country with a relatively good human rights record, without, however, being eligible for the GSP+. Yet, not ratifying and, notably, not complying with the relevant conventions casts considerable doubt on the willingness of the country to address the development need. Granting trade preferences to such a country can therefore not be a "positive response" to this need and would treat differently-situated countries (i.e. those addressing and those not addressing the development need) similarly. Hence, including such a country into the list of GSP+ beneficiaries would not be justified. By contrast, conditioning the granting of preferences on the effective implementation of the relevant conventions allows determination of which countries are similarly-situated in terms of their development

90 *Bartels*, (fn. 30), p. 879.

91 *Kenner*, (fn. 7), p. 302.

92 See *Switzer*, (fn. 7), p. 139 et seq.

93 *Bartels*, (fn. 30), p. 877 et seq.

need, as only in those countries the status of implementation can be assessed objectively, i.e. by drawing on the mechanisms under the conventions.

Furthermore, it is argued that the GSP+ is not available to all developing countries because it grants preferences to those countries only that are able to bear the costs of effective implementation immediately, as only those are immediately granted GSP+ status.[94] Here, the interpretation of the requirement of "effective interpretation" is crucial. By requiring efforts to successively improve the human rights situation instead of full compliance from the outset, it is guaranteed that the GSP+ remains available to all developing countries that are truly committed to address the development need.

Thus, the granting of GSP+ to such countries only that have ratified and effectively implemented the relevant conventions does not violate the availability criterion. In addition, however, the preferences must be limited to the countries in need. One can imagine a vulnerable country that has ratified and fully respects all the required conventions; this country then would enjoy benefits without having the relevant need. However, this scenario is theoretical only: So far, there is no developing country (and, arguably, no developed country either) that has attained the highest possible level of implementation of the objects contained in the 27 conventions listed in Annex III. Therefore, the granting of GSP+ status to all countries that have ratified and effectively implemented the conventions in Annex III is not discriminatory.

b) Non-violation of Art. 15(1) of Regulation 732/2008

In contrast to withdrawal under Art. 15(2) of Regulation 732/2008, the reasons for withdrawal that are not specific to the GSP+ are problematic, as they are not related to the aforementioned aspects of sustainable development.[95] Article 15(1)(c)-(e)[96] allows for withdrawal in serious cases of unfair trading practices "which have an adverse effect on the *Union* industry", infringement of the objectives of regional fishery organisations, drugs trafficking and money-laundering; the Proposal adds the failure to comply with international conventions on anti-terrorism (Art. 19(1)(c) of the Proposal). As Art. 15(1) justifies withdrawal from any preferential arrangement under the Regulation, a country can be withdrawn from the GSP+ if it fails to address one of these issues. The provision could be phrased inversely: a country only benefits from the GSP+ if it fulfils the requirements set out in Art. 15(1). Thus, the question arises whether the GSP+ remains available to all similarly-situated

94 Ibid., p. 881 et seq.

95 Although withdrawal on these grounds has not been used so far, it is surprising that his aspect has been scarcely discussed in literature.

96 Para. (a) is related to the violation of conventions listed in Annex III and therefore fulfils the requirements for the reasons argued above; para. (b) (export of goods made by prison labour) constitutes both a violation of human and labour rights and can be justified under Art. XX(e) GATT.

countries. If the criteria in Art. 15(1)(c)-(e) are not relevant in terms of the Enabling Clause because they do not reflect a development, financial or trade need *of the developing country*, the EU discriminates between similarly-situated countries on unjustified grounds.[97]

Whereas it could be argued that compliance with WTO law (cf. Art. 15(1)(d)) responds to a trade need of the country (by safeguarding the integration of the developing country into the world trade order), the limitation of withdrawal to cases where the Union's industry is affected suggests that this clause serves the interests of the EU only. Likewise, there is wide agreement that the Drug Arrangements above all had the purpose of protecting the EC from illicit drug trafficking;[98] the same can be said about the prevention of terrorism and money-laundering. However, such trade restrictions can be justified under Art. XX and XXI GATT.[99] Measures under Art. XX GATT must be necessary, not amount to unjustifiable discrimination between GATT members and be justified on one of the listed grounds. Article XX(g) GATT provides for measures relating to the conservation of exhaustible resources, which comprise fish. Indeed, it is dubious whether the requirement to comply with fishery organisations serves this purpose rather than the economic interest of the EU; whether a withdrawal would be justified depends on the application in practice. Shortcomings in customs control on drugs traffic can be justified by the protection of health, public morals or customs enforcement (Art. XX(a),(b) and (d) GATT) and money-laundering could be legitimately addressed under Art. XX(d) GATT. Finally, the introduction of terrorism in the Proposal can be justified by Art. XX(a) GATT (public morals) or Art. XXI(b)(iii) GATT (emergency in international relations). Furthermore, as terrorism has been repeatedly condemned by the United Nations, action could also be taken pursuant to Art. XXI(c) GATT. In qualification, it is noted that the general exceptions to the GATT regime have scarcely been specified in practice, so that the scope of application remains somewhat unclear.[100] In conclusion, if withdrawal for the reasons of Art. 15(1)(c)-(e) is applied cautiously, this can be justified under Art. XX and XXI GATT.

c) Vulnerability

Regulation 732/2008 contains a considerable restriction of the eligible countries. According to Art. 8(1)(c) and (2), a country must be vulnerable, i.e. it must be classified

97 In other words, countries responsible for drug trafficking and countries not responsible for drug trafficking remain similarly-situated in terms of the Enabling Clause; however, only the latter would enjoy trade preferences. This would amount to discrimination.

98 *Grossman/Sykes*, A Preference for Development: the Law and Economics of GSP, World T.R. 4 (2005), p. 55 et seq.

99 On these articles see *Cottier/Oesch*, (fn. 5), p. 428 et seq.

100 Ibid., p. 446.

as a low income country, it must have a low level of diversification of exports and its exports must represent less than one per cent of the exports into the EU. The latter requirement has been raised to two per cent in the Proposal, but its legality remains questionable as it is not defined with respect to the developing country, but in terms of EU imports.[101] Although it could be argued that a country with a higher level of exports has a stronger economy and therefore is not similarly-situated,[102] the criterion does not differentiate between smaller and larger countries. In contrast, the GSP connects the assessment of the need to a criterion that is independent from the country.[103] In fact, whether the imports amount to more than one (or two) per cent of total EU imports does not only depend on the economic strength of the relevant country, but also on the export ratio of other countries, which is independent from the development needs in the country at stake. The discussion is not a theoretical one because the vulnerability criterion currently excludes 51 developing countries from possible GSP+ benefits.[104] Therefore, the total-imports-related element of the vulnerability criterion is in violation of the Enabling Clause[105] and should be changed.[106]

Furthermore, it is problematic that the diversification criterion takes into account only GSP-covered imports,[107] as this is only a part of the total imports. This means that a country with high diversification in MFN tariff rates, but low diversification in GSP-covered imports would be considered vulnerable, whereas a country with highly diversified GSP-covered imports, but low diversified MFN imports would be excluded from the GSP+.[108] As both countries suffer from low diversification, this seems to discriminate unjustifiably between these countries. Hence, all product lines should be taken into account.

101 *Bartels*, (fn. 30), p. 882; *McKenzie*, (fn. 7), p. 693.

102 This conclusion is not compelling. Accordingly, Oxfam "criticised the scheme for discriminating against larger-but-still poor developing countries like India", as quoted in *Shaffer/Apea*, (fn. 6), p. 1006.

103 *Bartels*, (fn. 30), p. 882.

104 *Quick/Schmülling*, A New Approach to Preferences: the Review of the European GSP Scheme, G.T. & C.J. 6 (2011), p. 11.

105 *Bartels*, (fn. 30), p. 882; *Turksen*, (fn. 89), p. 959.

106 I.e. dropped or redefined as relating to per capita figures. *Bartels*, (fn. 30), p. 883 et seq. with further references, suggests that reference could be made to recognised UN categories, such as small islands developing states or landlocked developing countries.

107 A country is considered vulnerable only if the five largest sections of its GSP-covered exports represent more than 75 % of its total GSP-covered imports, Art. 8(2) of Regulation 732/2008.

108 This is also criticised by *Quick/Schmülling*, (fn. 104), p. 11, who give the example of Brazil, whose GSP covered exports to the EU amount to 12 % of its total exports only.

d) Procedural and substantive provisions in Regulation 732/2008

The AB noted two particular prerequisites for the availability of preferences: a procedure allowing for the modification of the list of beneficiary countries must be provided for in the GSP, and the GSP must contain clear substantive criteria that enable GSP+ beneficiaries to be distinguished from other GSP beneficiaries.[109] In contrast to the Drug Arrangements, Regulation 732/2008 contains procedural provisions on the granting and withdrawing of preferences, which have been refined in the Proposal. Notably, the current GSP+ provides fixed dates for the application of new beneficiaries (i.e. every 18 months[110]); in the Proposal, application can be made at any time. In addition, the Regulation enumerates the substantial provisions for inclusion into the GSP+. If a more consistent interpretation of the granting and withdrawal provisions as argued for in Section C. is adopted, the GSP+ complies with the AB's procedural requirements.

3. The GSP+ must be a positive response to the need it addresses

According to the AB, the granting of preferences must be a positive response to the development need. The Union's rationale for the GSP+ is that developing countries receive compensation for the costs resulting from the implementation of the conventions.[111] However, the nexus between the alleviation of the need and the economic benefits resulting from GSP+ has been contested because preferences are only granted once a certain level of implementation has been achieved.[112] Therefore, the GSP+ would impose high initial costs on the developing country, whereas compensation would follow after a considerable period of time only, which could hardly be seen as a "positive response".[113]

Firstly, it is noted that the compliance costs do not result from the conditions contained in the GSP+, but from a universally recognised development need. Taking the notion of sustainable development seriously involves the attainment of the objectives contained in Annex III, whose costs the GSP+ helps to bear.[114] Furthermore, if the notion of effective implementation is interpreted as requiring genuine commitment

109 Appellate Body, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, paras. 181-188.

110 See Art. 9 of Regulation 732/2008 as amended by Art. 1(3)(a) of Regulation 512/2011, OJ L 145 of 31/5/2011, p. 28.

111 Recital 8 of Regulation 732/2008.

112 *Healy*, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries: The Use of Positive Conditionality in the European Generalised System of Preferences, Int.T.L.R. 15 (2009), p. 87.

113 *Bartels*, (fn. 30), p. 881 et seq.; *Turksen*, (fn. 89), p. 964.

114 With a similar result ibid.

instead of full compliance from the outset, the threshold for inclusion into the GSP+ is lowered and the initial costs are reduced. As soon as a country commits to the objectives contained in Annex III, it could be granted GSP+ status and thus receive compensation. As examined above (Section C.III.), the Proposal takes this approach into account.

Moreover, it is discussed whether economic benefits will improve the situation in a developing country at all.[115] This question reveals two problems: Firstly, there is contention whether trade benefits have a positive impact on the economic situation in developing countries. Secondly, it is controversial if effectively an incentive effect for the protection of human rights is put in place. The first question has been addressed in several studies and can be answered positively,[116] although with some reluctance, as the obvious benefits resulting from the tariff reductions are reduced by compliance costs,[117] but nevertheless existent and of considerable importance for countries with weak economies.

As to the second controversy, the assumption is that a country with a stronger economy will spend more money on improving its human rights record.[118] The mid-term evaluation carried out for the Commission came to the result that several countries had ratified the missing conventions with the GSP+ as sole motivation,[119] whereas the impact on implementation was more difficult to assess. As a conclusion, the authors of the study found "some evidence suggesting positive effects in the sphere of gender equality" in the countries selected for review, whereas in other spheres, no positive or negative effects could be detected.[120] However, this study addressed effects over a limited period of time only and was rather concerned with the question of whether the prospect of GSP+ benefits had positive impact on the human rights records. Beyond that, there is the possibility that benefits from GSP+ would be (at least partly) reinvested in the implementation of the conventions as a growing economy would raise public revenues. The fulfilment of this assumption is further supported if the implementation is monitored and preferences are withdrawn in case of deterioration. Here, it has to be reminded that the AB demanded that the need must "*by its nature* be such that it can be effectively addressed through tariff

115 *Grossman/Sykes*, (fn. 98), p. 41 with further references.

116 Ibid., p. 60 et seq.

117 *Inama*, Trade Preferences and the World Trade Organization Negotiations on Market Access, J.W.T. 37 (2003), p. 970 et seq., remarks that the administrative rules set by the preference granting country can be exceedingly demanding.

118 For the improvement of labour rights: *Irish*, GSP Tariffs and Conditionality: A Comment on EC – Preferences, J.W.T. 41 (2007), p. 689.

119 *Gasiorek et al.*, Mid-term Evaluation of the EU's Generalised System of Preferences, CARIS, 2010, http://trade.ec.europa.eu/doclib/docs/2010/may/tradoc_146196.pdf (5/9/2012), p. 154 et seq.

120 Ibid., p. 167.

preferences",[121] which suggests a rational connection rather than empirical proof of effectiveness.[122] In this context, it has been doubted that the withdrawal from the GSP+ of countries violating human rights can be a positive response to the need to improve the respect for human rights in this country.[123] However, as argued above, this withdrawal is justified by the fact that the country itself does not address the development need; therefore, the granting of preferences cannot improve the situation either. The continued granting of preferences to other countries with the possibility of withdrawal remains a positive incentive for these countries.

Some authors further find the GSP+ in violation of the Enabling Clause for compensating countries for needs they do not have, such as the protection from apartheid and genocide in countries where no such risks exist.[124] However, as the compensation is related to the implementation of 27 conventions, there are specific problems in any of the beneficiary countries justifying compensation. It is impossible to measure the precise compliance costs economically.[125] Therefore, as all developing countries have urgent development needs that are reflected in at least some of the conventions, it is justified to grant benefits without further differentiation.

II. The non-reciprocal nature of the GSP

Some authors argue that the GSP+ violates the principle of non-reciprocity because the EU demands beneficiary countries to ratify and effectively implement the 27 conventions, somewhat in exchange for the granting of benefits.[126] Indeed, it is controversial if the prohibition of reciprocity rules out such non-trade conditions.[127]

The counterpart to non-reciprocity, i.e. the principle of reciprocity, is a core concept of the GATT[128] and ensures that trade preferences granted by one member state to another have to be reciprocated, i.e. granted by the other state as well.[129] To the benefit of developing countries, the contracting parties agreed soon that developed

121 Appellate Body, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, para. 164.

122 *Howse et al.*, The Appellate Body's GSP Decision, World T.R. 3 (2004), p. 248.

123 In this direction *Bartels*, The Trade and Development Policy of the European Union, EJIL 18 (2007), p. 745.

124 *Bartels*, (fn. 30), p. 880; Turksen, (fn. 89), p. 963.

125 *Grossman/Sykes*, (fn. 98), p. 56.

126 Ibid.

127 For references to authors objecting to any conditionality, see *Bartels*, The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program, JIEL 6 (2003), p. 526.

128 See Preamble to the WTO Agreement.

129 *Turksen*, (fn. 89), p. 947.

countries cannot demand reciprocal concessions from developing countries in return for their preferences (cf. Art. XXXVI:8 GATT),[130] as this would thwart the latter's development. Therefore, the principle of non-reciprocity prohibits above all economic concessions for the granting of trade benefits.[131]

Indeed, non-economic counter-claims violating the principle of non-reciprocity are also conceivable. For instance, a country could condition the granting of preferences on compliance with its political goals, e.g. by requesting the country to abstain from cooperating with certain international institutions.[132] However, para. 5 of the Enabling Clause specifies the principle of non-reciprocity by stating that "the developed countries do not expect the developing countries […] to make contributions *which are inconsistent with their individual development, financial and trade needs*". Whereas compliance with foreign policy goals of developed countries can be inconsistent with the needs of the developing country, the improvement of human and labour rights, environmental protection and good governance as elements of sustainable development respond to a legitimate need of that country. Therefore, conditions related to the satisfaction of this need cannot violate the principle of non-reciprocity.

A further argument can be drawn from the wording of the Enabling Clause, which does not use the term "unconditional", but "non-reciprocal". Reciprocity can be understood as the mutual granting of benefits. In the case of reciprocal trade benefits, each side gains improved access to the market of the other party. In contrast, the GSP+ expects the beneficiary countries to fulfil requirements that are primarily in their own interest. Although the promotion of human rights is a political aim of the EU, the immediate beneficiary is the population of the developing country, whereas the benefit to the EU, namely stability in the relations to more stable beneficiary countries,[133] is more remote.[134]

III. Conclusion of Section D.

In the light of the AB report, the main parts of the GSP+ are consistent with the Enabling Clause. Most notably, it is legitimate to link the respect for human and labour rights, environmental protection and good governance with the granting of

130 *Bartels*, (fn. 127), p. 507.

131 With the same result ibid., p. 529; *Turksen*, (fn. 89), p. 948 (referring to the *Travaux Préparatoires* of the Waiver Decision).

132 In 2004, the *Bush* administration announced that it would cut off development aid from those countries that refused to enter into agreements with the US guaranteeing US-citizens immunity from the ICC, Congress Threatens to Cut Aid in Fight over Criminal Court, The Guardian of 27/11/2004, http://www.guardian.co.uk/world/2004/nov/27/usa.julianborger (5/9/2012). Although this did not involve trade preferences, an analogous case could easily be conceived.

133 *Turksen*, (fn. 89), p. 948.

134 With the same result *Grossman/Sykes*, (fn. 98), p. 56.

trade benefits, as this reflects a positive response to a development need of the beneficiary countries. However, full consistency with the Enabling Clause requires the interpretation and application of the granting and withdrawal procedure in the light of the incentive nature of the GSP+, as argued for in Section C. Furthermore, the vulnerability criterion should be changed by taking into account the entire exports of the country in question, as opposed to the GSP-covered imports only, for determining the diversification of exports. In addition, this number should not be related to the total imports into the EU by all GSP countries, as this exceeds the influence of the developing country. Unfortunately, these changes have not been addressed in the reform proposal.

E. Conclusion

Although ratification by EU members should correlate better with the conventions in Annex III and several optional protocols could be included, these provisions largely reflect what can be called a core of internationally accepted human rights. The universal recognition by a vast majority of states, both developed and developing countries, makes the conventions a legitimate frame of reference for the linkage of trade and non-trade policy goals. Whereas compliance with these conventions is hence a legitimate aim for the GSP, much depends on the application of this instrument in practice. Unfortunately, the ability of the conventions to provide for an assessment of the human rights situation in the beneficiary countries is limited by the fact that some of the conventions do not include monitoring mechanisms at all, whereas the monitoring intervals in others are extensive. The case of El Salvador has shown how the inclusion of NGOs and independent experts can improve the withdrawal procedure. However, a formal inclusion of such actors is desirable.

It can also be concluded that whilst the withdrawal mechanism has been applied objectively in three clear cases, the lack of investigations in others is surprising, resulting primarily from the lack of consideration for the incentive nature of the GSP+. A more adequate approach would require a continuous monitoring of the human rights situation in the beneficiary countries including withdrawal as a real option in case of deterioration, backed up by a close dialogue with the beneficiary country and technical assistance for countries truly committed to compliance.[135] The reform proposal raises some hope that this interpretation will be adopted.

135 The need for a holistic approach which does not only focus on withdrawal, but also implies technical assistance, has also been stressed by the EP, cf. EP Legislative Resolution P6_TA(2005)0066, amendment 3.

If these deficiencies are addressed and the vulnerability criterion is modified as set out above, the GSP+ is equally more likely to be found compatible with the GATT. As examined in Section D., the ruling in *EC – Preferences* did not fundamentally call into question human rights conditionality in the GSP, but requested clear substantive and procedural criteria, which are largely contained in the EU's GSP.

Not only can the GSP+ be justified under the GATT, there are a number of persuasive reasons that preferences *should* be withdrawn from countries that systematically violate human rights. Withdrawal in such cases demonstrates political commitment to values that are more than mere rhetoric. The credible appeal to international human rights by an important global actor in its external trade relations can have an incentive effect on other countries and thus stress the positive aspect of conditionality. In addition, the reference to a thoroughly chosen catalogue of core human rights in a regional trade instrument can contribute to international recognition of such values. With the GSP, the EU has taken action to promote these principles and to reduce the imbalance between economic and social development.[136] Certainly, this implies that policy within the EU – and at its frontiers – is comprehensively guided by the respect for human rights as well. Yet, in providing clear and universally recognised criteria for the granting and withdrawal of trade benefits, the GSP is far from being a disguised instrument of trade protectionism.

136 *Kenner*, (fn. 7), p. 297 with further references.