



UNIVERSITY OF CAPE TOWN
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FACULTY OF LAW – SCHOOL FOR ADVANCED LEGAL STUDIES

The generalised system of preferences (GSP) of the EC: A way to enforce human rights law as well as social and environmental standards internationally?

- **an analysis of the perspective of emerging and developing countries under consideration of European Community – Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/R)**

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2010

Research dissertation presented for the approval of 'Senate in fulfilment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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LIST OF ABBREVIATIONS

BRIC	Brazil, Russia, India and China
EBA	Everything but arms
EC	European Community
EU	European Union
GSP	Generalized System of Preferences
ILO	International Labour Organisation
IMF	International Monetary Fund
LDC	Least Developed Country
MFN	Most-Favoured-Nation-Principle
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation

Introduction

Trade policy measures are an acknowledged means of development politics for some time and determine the relationship between industrial and developing nations. Tariff preferences that are granted to developing countries by industrialised countries unilaterally are of special significance since the seventies. In at least 13 states, respectively community of states, as for instance the European Community, are Generalised Scheme of Preferences (GSP) operated. The European Community plays an important role in this particular regard. 'The primary objective of the GSP is to contribute to the reduction of poverty and the promotion of sustainable development and good governance. Preferential tariff rates when exporting to the EC market enable developing countries to participate more fully in international trade and generate additional export revenue to support them in developing industry and jobs and reducing poverty'.¹

In 1969, for instance, John Jackson defined the concept of preferences:

"... 'preference' generally refers to tariff preferences. The basic idea is that products from less developed countries that are imported into an industrialised nation would be subject to a tariff rate by the industrialised nation that would be less than the rate applied to products from a source other than a less developed country".²

It is questionable whether the preferences granted by the EC address the concerns of the World Trade Organisation (WTO) set out in Art. XXXVI paragraph 1 GATT, namely to facilitate progressive development of the contracting parties economies, particularly those contracting parties, of which the economies can only support low standards of living and are in the early stages of development.³ The purpose of allowing preferred imports of specific products from developing countries, is that their economy grows and their general development is supported. The WTO has set out fundamental principles to reduce barriers of trade in form of reciprocity as well as to ensure non-discrimination⁴ between WTO

1 European Commission Generalised System of Preferences

Available at:

http://ec.europa.eu/trade/wider-agenda/development/generalised-system-of-preferences/index_en.htm

(Accessed 10 September 2010).

2 Jackson, J *The jurisprudence of GATT and the WTO* (2000) at 661.

3 Article XXXVI paragraph 1 GATT.

4 Article I paragraph 1 GATT.

members.⁵ Granting preferences to specific countries, in form of a GSP, does not comply with these principles in the first place.

Furthermore, one need to bear in mind that trade policy in a certain way is always related to other policies, as for instance development and economic politics or human rights policies as well as to general external and corporate safety interests.

Special attention and criticism within the public discourse is directed to the use of positive conditionality by some GSPs. Several developing countries get additional incentives by being granted special tariffs under conditions that have been defined upfront in terms of so-called preferential treatment. In this particular regard external interests including humanitarian and environmental considerations attract notice besides trade politics. The actual profit and effectiveness of these conditional special treatments as well as their advantage and disadvantage for developing countries is controversial.

If the generalized system of preferences of the EC is a way to enforce human rights law as well as social and environmental standards internationally, the main question to consider is to what extent this impacts on beneficiary countries.

Thus, the aim of this thesis is to examine the special treatment system of the EC and its relevance for world trade among one another. For this purpose, I firstly intend to give a brief introduction about the background and aims of the general preferential system with regards to the world trade system and its general compliance to WTO regulations. Afterwards, I will focus on the EC's general preferential treatment system and its conditional special treatment regulations. The provisions for special treatments which were set out by WTO's Dispute Settlement Body in *EC – Tariff Preferences*⁶ will be considered. The aim is to examine the purpose of the EC special treatment regulations as an incentive for development and responsible governance and its implementation. Lastly, the actual

5 Jessen, H' Zollpräferenzen für Entwicklungsländer: WTO-rechtliche Anforderungen an Selektivität und Konditionalität – Die GSP-Entscheidung des WTO Panel and Appellate Body' (2004) 27 *Beiträge zum Transnationalen Wirtschaftsrecht* at 5.

6 WT/DS246/R, Report of the Panel of 1 December 2003, European Communities – Conditions For The Granting Of Tariff Preferences To Developing Countries

Available at

[http://www.worldtradelaw.net/reports/wtopanels/ec-preferences\(panel\).pdf](http://www.worldtradelaw.net/reports/wtopanels/ec-preferences(panel).pdf)

(Accessed 23 June 2010); WT/DS246/AB/R, Report of the Appellate Body of 7 April 2004, European Communities – Conditions For The Granting Of Tariff Preferences To Developing Countries

Available at:

[http://www.worldtradelaw.net/reports/wtoab/ec-preferences\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/ec-preferences(ab).pdf)

(Accessed 23 June 2010).

suitability of this incentive scheme for the enforcement of human rights, environmental and social standards will be considered, as this is necessary to point out the impact on developing and emerging countries.

CHAPTER 1: Basics of the Generalized System of Preferences

I. The Need for Generalized Systems of Preferences

Developing countries are usually characterized by an economy that is less strong than the economies of developed countries. Important factors are the disproportionate gap between high and low income groups, often not existent minimum labour standards or such that only apply to the minority of the population, that are not part of the informal workforce, human rights as well as social and environmental standards that have not been instituted or carried through. Export products in developing countries are mainly raw materials due to the limited or lacking level of industrialization, compared to developed countries. Their economy often suffers from a lack of diversity of export products. As a result, developing countries usually do not hold similar market access to developed nations, as for instance to the Member States of the European Community. 'The underlying premise for preferential treatment in market access relates to the importance for developing countries to diversify their export into manufacturing and the difficulties that they may face in breaking into international markets for such products'.⁷

It therefore appears to be clear, not only from the perspective of developing countries, that opening market access to products from those countries would assist them. 'It is a useful and necessary means to reduce poverty'⁸ and supporting economic growth. Due to continual developed country tariffs, export subsidies and domestic support, exports from developing countries remain limited.⁹ Market access in products of export interest to poor countries would be an important way to enhance livelihoods in those countries'.¹⁰

On the other hand, it is important to consider the political and ethical needs of developed countries. The EC, in this particular regard, 'has to take care of workers in competing industries, as well as consumers'.¹¹ Since poverty is a world-wide problem, the interests of poor consumers also need to be taken into account. Despite the fact that citizens of developing countries suffer proportionally more from poverty, there is however a huge

7 Sampson, G & Bradnee, W *Developing Countries in the WTO: Policy approaches* (2008) at 111.

8 Trachtman, JP 'Legal Aspects of a Poverty Agenda and the WTO: Trade Law and 'Global Apartheid' (2003) *Journal of International Economic Law* at 5.

9 Ibid at 12.

10 Ibid.

11 Ibid.

number of consumers in Member States of the EC, who are heavily affected by raising costs of basic goods. This conflict of interest results in reluctance to reduce trade barriers.

II. The Meaning of Generalized Systems of Preferences

The legal framework of the Community's trade relations with any specific country is usually composed of autonomous measures'.¹² An example of such an autonomous measure is the Generalized System of Preferences (GSP), bilateral agreements on the other hand are conventional measures.¹³ Other than bilateral agreements, preferential treatment does not require negotiated agreements, and can be conferred unilaterally.

Within the scope of a GSP an industrialized state, or a community of states, grants unilateral low customs duties to developing countries without receiving a service in return. However, this is often attendant to specific conditions.¹⁴ The fundamental aim of such GSPs is based on development politics and comprises the support of the competitiveness of goods from favoured countries, their better integration in the world trade by offering favoured market access to industrialized countries, higher export capacity and prices as well as faster economic growth.¹⁵ It grants 'lower tariffs to developing countries that comply with international labour standards and eschew the drug trade. The scheme contains a list of general exceptions, potentially denying all trade preferences to developing countries that do not comply'.¹⁶

1. The History and Extension of the General System of Preferences (GSP)

In the 1966 the GATT was expanded to include part IV 'Trade and Development', which for the first time officially, enabled the special and differential treatment of developing

12 Snyder, F *International Trade and Customs Law of the European Union* (1998) at 483.

13 Ibid.

14 Krajewski, M *Wirtschaftsvölkerrecht* (2006) at 265.

15 Rieck, H 'Zu der Reform des Allgemeinen Präferenzsystems der EG' (2006) 9 *Zeitschrift für Europarechtliche Studien* at 179.

16 Chaudhary, O 'The Propriety of Preferences an Evaluation of EC and U.S. GSP Schemes in the Wake of the EC-Preferences' (2005) 5 *Asper Review of International Business* at 160.

countries.¹⁷ The reason for that was the increasing number of developing countries joining as new members of GATT during the sixties due to decolonization.

Against this background, the demand of the active economical preferential treatment of these countries grew to ensure the actual equality of opportunities within world trade system. Since then, special and differential treatment can be seen as a central term of the International Development Relations Law and the general WTO Law.¹⁸ The United Nations Conference on Trade and Development (UNCTAD)¹⁹ founded in 1964, supported a general system of preferences to encourage concrete trade benefits for developing countries. Subsequent to that, in 1968 the GATT members stipulated the unilateral trade advantages for developing countries in terms of the general system of preferences.²⁰ Until 1971 there was no provision in place which allowed developed countries to provide preferential treatment to developing countries'.²¹ However, 'originally sponsored by the UNCTAD, the GSP has been implemented by the Community since 1971 and extends unilateral tariff preferences to developing countries'.²² The EC was the first GATT member, followed by other industrialized countries that established a generalized system of preferences

1971.²³ The GSP system is managed by the Commission in conjunction with the Commission of Management of Generalized Preferences'.²⁴ 'There are currently 13 national GSP notified to the UNCTAD secretariat'.²⁵

17 dos Santos, NB, Farias, R & Cunha, R 'Generalized System of Preferences in General Agreement on Tariffs and Trade/World Trade Organization: History and Current Issues' (2005) 39 *Journal of World Trade* at 642; Krajewski, M (note 14) at 264.

18 Meng, W 'Völkerrecht als wirtschaftlicher Ordnungsfaktor und entwicklungspolitisches Steuerungsinstrument' in Meng, W *Das internationale Recht im Nord-Süd-Verhältnis, Berichte der Deutschen Gesellschaft für Völkerrecht* (2005) Vol. 41 at 61; Jessen, H *WTO-Recht und ,Entwicklungsländer'. 'Special and Differential Treatment for Development Countries' im multidimensionalen Wandel des Wirtschaftsvölkerrechts* (2006) at 23; Gracia, F 'Beyond Special and Differential Treatment' (2004) 27 *Boston College International and Comparative Law Review* at 292.

19 See UNCTAD United Nations Conference on Trade and Developmental
Available at:

<http://www.unctad.org/Templates/Page.asp?intItemID=1530&lang=1>
(Accessed 3 August 2010).

20 Jessen, H (note 5) at 7.

21 Harrison, J 'Incentives of Development: The EC's Generalized System of Preferences, India's WTO Challenge and Reform' (2005) 42 *Common Market Law Review* at 1664.

22 Snyder, F (note 12) at 485.

23 Harrison, J (note 21) at 1666.

24 Snyder, F (note 8) at 485.

25 See UNCTAD Generalized System of Preferences

Available at:

<http://www.unctad.org/Templates/Page.asp?intItemID=2309&lang=1>
(Accessed 12 May 2010).

The EC's GSP grants far-reaching unilateral preferences.²⁶ By now, there are often different types of preferences operational within the GSP, which partially overlap. This includes GSPs in the narrower sense, preferences for the least developed countries (LDCs) as well as conditional special preferences, which are tied up with special conditions not specifically based on trade policies. LDCs are characterized by the need to eradicate extreme poverty, 'which is a major challenge in itself, as well as for the international community'.²⁷ Developing and least developed countries receive additional trade preferences, but these can be withdrawn, as for instance in the case of a violation of core labour standards.²⁸

2. Generalized Systems of Preferences according to WTO Law

Generally speaking, the unilateral preferential treatment concerning customs duties is a violation of Art. I paragraph 1 GATT, namely the Most-Favoured-Nation-Principle (MFN). This principle states that a WTO member has to treat every other member as it treats its most favoured state with regards to customs agreements.²⁹

The meaning of this principle is described in the wording of Article I paragraph 1 GATT itself:

'With respect to customs duties and charges of any kind (...) any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties'.³⁰

'MFN disallows discriminatory practices such as allocating a more or less favourable treatment to products originating from one country compared to similar products from another'.³¹ 'It is the conception of the Most-Favoured-Nation-Principle, as one of the basic principles of world trade law, to achieve welfare gains by leveraging comparative cost

²⁶ Rieck, H (note 15) at 179.

²⁷ Stiglitz, JE & Charlton, A *Fair Trade for All How Trade can Promote Development* (2005) at 87.

²⁸ Kryvoi, Y 'Why European Union Trade Sanctions Do Not Work' (2008) 17 *Minnesota Journal of International Law* at 210.

²⁹ Matsushita, M *The World Trade Organization. Law, Practice and Policy*, 2. Edition (2006) at 202.

³⁰ Article 1 paragraph 1 GATT, Niedrist, G *Rechtsfragen der Globalisierung, Präferenzabkommen Europarecht und Welthandelsrecht*, Part 16 (2009) at 72.

³¹ dos Santos, NB, Farisa, R & Cunha, R (note 17) at 637.

advantages in terms of manufacturing of goods as well as in terms of sovereign equality of states. This achieves liberalization of market access and prevents trade hegemony of individual states'.³² Hence, 'the provision seeks to ensure that the benefits of liberalization of world trade are attained by all WTO members'.³³ Equality of opportunity on the world trade market is after all based on economic efficiency as its aim.³⁴

To implement preferential laws favouring the disadvantaged position of developing nations in the world trade system, the GATT members pledged reciprocal non-discriminatory preferences in favour of developing countries in waivers of Article XXV paragraph 5 GATT (1947).³⁵ Member states were thus authorized to deviate from the GSP in terms of trade with developing nations by weakening the Most-Favoured-Nation-Principle. An obligation to enforce such a GSP was however not foreseen at any time.³⁶ This waiver, limited at that stage to 10 years, was expanded in 1979 by the detailed "decision about differential and favourable treatment, unilateralism and strengthened treatment of developing countries", also known as the "Enabling Clause".³⁷ This clause, valid to this day, enables industrialized countries to grant preferential export duties for goods from developing nations in accordance with the GSP, despite Article I paragraph 1 GATT, without recourse to individual waivers conforming to Article IX paragraph 3 of the Agreement Establishing the World Trade Organisation (previously Article XXV paragraph 5 GATT 1947).³⁸ According to the Enabling Clause customs and non-tariff barriers need to be completely removed. Thus, individual customs duties can be reduced independent from non-tariff barriers, and vice-versa.³⁹ It 'became the framework for trade and development in the GATT and authorizes preferential trade through the GSP, which prior to this had been pursued under a GATT waiver'.⁴⁰ As started in section 2 paragraph a Enabling Clause, that refers to the waiver decision of 1971, this implementation of the GSP is only allowed when the concessions are of a general nature without enforcing any service in

32 Hermann, C *Welthandelrecht*, 2. Edition (2007) at 174.

33 Harrison, C (note 23) at 1664.

34 Niedrist, G (note 31) at 72.

35 Waiver, Generalized System of Preferences, Decision of 25 June 1971, BISD 18S/24, The Contracting Parties to the General Agreement on Tariffs and Trade
Available at:

<http://www.worldtradelaw.net/misc/gsp.pdf>

(Accessed 1 June 2010).

36 dos Santos, NB, Farias, R & Cunha, R (note 17) at 649; Hermann, C (note 33) at 180.

37 Chaudhary, O (note 9) at 160.

38 Sections 1, 2 paragraph A Enabling Clause.

39 Hilf, M & Oeter, S (Editor) *WTO-Recht, Rechtsordnung des Welthandels* (2005) at 185.

40 Gracia, F (note 19) at 295.

return and do not bring about discriminatory practices.⁴¹ ‘The cornerstone of the Enabling Clause, however, is the principle of non-reciprocity in trade relations between developed and developing countries’.⁴² Preferential trade agreements have to encourage ease of trade for developing countries and may not establish trade barriers for third countries or lead to the diminishing of trade limitations (paragraph 3 lit. a, b Enabling Clause). Trade limitations for developing countries can be diminished by granting preferential treatment (as for instance easier access to developed countries markets) based on non-reciprocity. Accordingly, developed countries do not benefit from the same preferential treatment by developing countries in reverse. This interpretation of the Enabling Clause, with regards to the GSP with reference to enforcement of non-discrimination and conditional special preferences was the subject of the case *EC vs. Tariff Preferences*, as heard by the Dispute Settlement Body of the WTO. The result of this dispute in context of the acknowledgement of GSP by the EC, will be discussed in further detail in the next chapter.

41 Schmahl, S "Enabling Clause' versus Meistbegünstigungsprinzip. Die EG-Zollpräferenzen auf dem Prüfstand des Dispute Settlement Body der WTO' (2004) 42 *Archiv des Völkerrechts* at 400.

42 Gracia, F (note 19) at 295.

Chapter 2: Special Preferences in the System of Preferences of the EC and their Compatibility with the Laws of the WTO

As previously mentioned the European Community administers the oldest and most far reaching current preferential systems in terms of Art 133 EC Treaty. Since 1971 GSPs were set out in 10 years cycles.⁴³ This shows an objective of stability. In the preference systems of the EU one can find no guarantees for excise preferences of products from favoured developing nations. Such guarantees would be impermissible. Instead, a selective and gradual process of preference takes place, where the extent of preferential guarantees depends partly on the level of development of the said nation and on the current demand for the specific import product.⁴⁴ By the so-called principle of graduation preferences are directed to low-income countries. Its background is to enable less developed countries to take better advantage of the GSP as the privileges are 'removed from more advanced industries of the third world'.⁴⁵ This system of preferences, valid until 2005, and its conformity to the WTO - law was questioned by the Dispute Settlement Body of the WTO with regards to the conditional specialized preferences of India. As this had a deciding influence on the development of the EC's preferential system, this ruling will be used to clarify the development of conditional systems of preferences, from the old system by way of the WTO ruling to the new GSP, as incentive for lasting development and responsible governance.

I. The System of Preferences of the European Community until 2006

The previous GSP of the European Community⁴⁶ valid from 2005 till 2006, was composed of a double strategy. On the one hand, there was the conventional GSP, that granted tariff preferences to every developing country for specific goods (so-called general arrangements). On the other hand there were so-called special incentive arrangements added to this model. While the preferences in the general arrangements were basically granted to every developing country, special incentive arrangements were only granted to a

43 Jessen, H (note 5) at 11.

44 Senti, R *WTO. System und Funktionsweise der Welthandelsordnung* (2000) at 269; Rieck, H (note 15) at 189; this also applies to the system of preferences of the United States of America (see dos Santos, NB, Farias, R & Cunha, R (note 17) at 657).

45 dos Santos, NB, Farias, R & Cunha, R (note 17) at 657.

46 Council Regulation (EC) No 2501/2001 of 31 December 2001.

couple of developing countries. Overlapping preferences for particular countries were the result. This will be examined below. To these are counted 3 groups of conditional special preferences that attempted to influence a specific kind of politics in developing countries as well as the granting of further trade preferences achieved conformity to the trade conditions set out by the EU.⁴⁷ The three groups of special arrangements are namely special arrangements for the protection of worker's rights and environmental standards, special arrangements for least developed countries and special arrangements for the fight against illegal drug production and trade. These special arrangements will be discussed below in greater detail. This is still the case as the degree of lowering of excise duties are measured against these methods. 'A system of varying preference margins for groups of products with different degrees of sensitivity was established'.⁴⁸ The general arrangements contained a differentiation between very sensitive, semi-sensitive or non-sensitive goods, each category having a different preferential margin.⁴⁹ Sensitive classified goods, especially foodstuffs, are generally granted lesser lowering of excise duties, as the EC member states try to protect their own agricultural producers from foreign competition.⁵⁰

1. General Arrangements

The general arrangements of the EC's GSP in the Council Regulation (EC) No 2501/2001 granted 178 countries excise free access to around 3.300 non-sensitive products as well as a reduction of 3,5 % of excise duty for approximately 3,700 products classified as sensitive.⁵¹ 'All beneficiary countries benefit from the the general arrangements of the GSP'.⁵² 'Tariff preferences offered by the general arrangements differ according to whether products are deemed "sensitive", "semi-sensitive" or "non-sensitive"'.⁵³ The general arrangements therefore regulate the product coverage and treatment.

47 Jessen, H (note 5) at 12.

48 dos Santos, NB, Farias, R & Cunha, R (note 17) at 659.

49 Ibid.

50 Hemker, F "'Handelspolitik und Menschenrechte: Das Allgemeine Präferenzsystem Plus (ASPplus) der Europäischen Union" (2006) 11 *MenschenRechtsMagazin* at 283.

51 Article 7 and Annex I to Council Regulation 2501/2001 of 31 December 2001; Rieck, H (note 15) at 189.

52 Harrison, J (note 21) at 1666.

53 Ibid.

2. Special Incentive Arrangements

The aim of special incentive arrangements were proceeded by tariff preferences. If a developing country wanted to benefit from those preferences it had to act according to a prescribed way or had to meet certain criteria determined by the EC.⁵⁴

a. First Group: Special Incentive Arrangement for the Protection of Worker's Rights and Environmental Standards.

Based on the Revision in 2001, the GSP of the EC provided furthermore an option for additional Preferences, the so-called Special Incentive Arrangements.⁵⁵ These Special Incentive Arrangements were used in the GSP of the EC until 2006 as incentives, through special regulations, for the protection of worker's rights and the environment. The intention was to promote sustainable development in the before mentioned fields, 'and the Special Incentive Arrangement were designated to those countries that demonstrate that they are complying with certain specific environmental or labor standards'.⁵⁶ These special incentive arrangements were basically granted to all developing countries. A developing country had to apply at the European Commission to become a beneficiary. After adjudicating the requirements of Article 14 paragraph 2 of Council Regulation (EC) No 2501/2001 the Commission decided, in the case of compliance, about granting the tariff preference for the imported good. Within the context of these models, developing countries could, through application, be granted additional reductions in customs duties for sensitive products by conforming to protection standards in these areas. Special Preferences incentive for the Protection of Worker's rights⁵⁷ should be granted to those developing countries "whose internal labor laws conform to and apply the standards, set out in the 'ILO conventions about forced labor, freedom of association, right to collective bargaining, non-discrimination in the workplace and child labor.'"⁵⁸ 'Developing countries do not need

54 Eberhard, T *Diskriminierende Gleichbehandlung von Entwicklungsländern in der WTO? Enabling Clause und die allgemeinen Präferenzsysteme auf dem Prüfstand* (2008) at 101.

55 dos Santos, NB, Farias, R & Cunha, R (note 17) at 659.

56 Ibid; European Communities' GSP Regulation

Available at:

http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_346/l_34620011231en00010059.pdf

(Accessed 16 August 2010).

57 See Articles 8, 14-20 Council Regulation (EC) 2501/2001 of 31 December 2001.

58 Article 14 paragraph 2 Council Regulation (EC) 2501/2001 of 31 December 2001.

to have signed and ratified these conventions, but must have incorporated the substance of them into their domestic laws, and must be able to demonstrate to the EC that the relevant laws are being effectively applied'.⁵⁹ The model of trade incentives for the protection of the environment are applied in international regulation of developing countries⁶⁰. Its aim was the effective use of the “internationally acknowledged standards and guidelines for the sustainable management of tropical forests”, set out under the brand heading reduction of tropical hardwood trade. These special incentive arrangements were addressed to countries 'complying with international standards concerning sustainable forest management, in particular the standards of the International Tropical Timber Convention'.⁶¹ By complying, beneficiary countries were granted 'additional tariff preferences for the import of products of tropical forests, which are included, as sensitive arrangements, in general arrangements'.⁶² However, neither of these special incentive arrangements were of any practical use. According to a statement of the European Commission in 2004, special incentive arrangement had not been as successful as expected, these special negotiations were “hardly applied to date”, as some developing nations had “rather renounce the stringent assessment of their social legal regulations and their implementation (by the EU).”⁶³ As for example: At the time Council Regulation (EC) No 2501/2001 was published, the incentive for the protection of worker’s rights was only granted to Moldova and Sri-Lanka (according to Annex I of the Regulation), the incentive for reduction of tropical hardwood trade was of no use for any country.⁶⁴ The reason for the limited success can either be found in the complexity of procedures or the relatively small profit margin.⁶⁵ Furthermore, the EC reserved the right to adjudicate the compliance against its established requirements. Pursuant to Article 14 paragraph 2 of Council Regulation (EC) 2501/2001, tariff preferences were only granted to those countries that had implement national law, which grounded on ILO Conventions and that effectively made use of these laws.⁶⁶ Against this background, applicants feared a factual interference in their internal sovereignty. Furthermore, from the perspective of developing countries the special

59 Harrison, J (note 21) at 1667.

60 See Articles 8, 21-24 Council Regulation (EC) 2501/2001 of 31 December 2001.

61 Harrison, J (note 21) at 1668.

62 Ibid.

63 Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – Developing countries, international trade and sustainable development: the function of the Community's generalized system of preferences (GSP) for the ten-year period from 2006 to 2015, COM (2004) 461 at No 6.5.

64 See Annex I Council Regulation (EC) 2501/2001; Hemker, F (note 49) at 285.

65 dos Santos, NB, Farias, R & Cunha, R (note 17) at 659.

66 Eberhard, T (note 51) at 103.

incentive arrangements for environmental standards did not appear to be an effective cost-benefit calculation as they only favored few tropical goods like for instance wood and specific coats. These products had been protected by the required international environmental standards of the EC trade in the relatively limited amounts of those goods that were not environmentally harmful was not beneficial.⁶⁷

b. Second Group: The Special Arrangement for the Least Developed Countries

Least developed countries are the world's poorest countries. 'Forty of the African, Caribbean and Pacific (ACP) countries are classified as LDCs'.⁶⁸

However, the Cotonou-Agreement of 2000⁶⁹ established a regulation, put into practice in 2001, called "Everything but arms" (EBA) that saw to it that products from countries classified by the UN as least developed, were granted customs free access to European markets. This excluded trade in arms and munitions. 'Under EBA, all LDCs are thus allotted equal preferential access to the EU market, while GSP schemes provide different treatment for beneficiary countries and their individual products'.⁷⁰ 'So all sensitive products are therefore also covered under the duty-free exemption'.⁷¹ The EBA is, unlike the GSP scheme, not limited to a particular time period.⁷² For the categories of products seen as specifically sensitive, namely sugar, bananas and rice, certain crossover periods were instituted which expired in October 2009 with the concluding liberalization of sugar imports.⁷³

67 Ibid.

68 Milton C & Ochieng, O 'The EU-ACP Economic Partnership Agreements and the 'Development Question': Constraints and Opportunities posed by Article XXIV and Special and Differential Provisions of the WTO' (2007) 10 (2) *Journal of International Economic Law* at 364.

69 According to Article 37 paragraph 9 Cotonou-Agreement, the EU should grant customs-free access to their markets to LDCs till latest 2005.

70 dos Santos, NB, Farias, R & Cunha, R (note 17) at 659.

71 Harrison, J (note 21) at 1666.

72 Ibid.

73 The Least Developed Countries Report 2008

Available at:

http://www.unctad.org/en/docs/ldc2008_en.pdf

(Accessed 8 August 2010).

c. Third Group: The Special Arrangements for the Fight against illegal Drug Production and Trade

The last model of the old GSP forms the so-called special incentive arrangements to assist beneficiary countries to fight against the production and trade of illegal drugs.⁷⁴ These special incentive arrangements were provided to beneficiary countries, 'who are predetermined by the EC on the basis that their development and their "social, economic and political stability is hampered by drug production and trafficking"⁷⁵. The regulations were applied through additional reduction or even complete removal of customs duties for sensitive products from developing countries that have problems with the control over drug-production and trade, as seen by the EU.⁷⁶ Since the beginning of 2001, eleven South American countries received benefits from this special regulation, namely Bolivia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Columbia, Nicaragua, Panama, Peru and Venezuela.⁷⁷ From 2002, was Pakistan added as beneficiary of this preferential incentive as only non-Latin-American nation. These countries were named beneficiaries of the EC in terms of a selected list. Other than the special incentive arrangements discussed above, this programme was not an actual incentive arrangement. In this particular regard, tariffs were not granted to the 12 countries to re compensate them for the implementation of a political reform. It was more like a sort of credit to enable the countries to manage the future task of fighting against illegal drug production and trade. An incentive arrangement, in contrast, requires an advance performance of a developing country with regards to specific political reforms.⁷⁸

II. The Drug Dispute as seen by the Dispute Settlement Body of the WTO (EC –Tariff Preferences)

The special regulation regarding the fight against the production and trade of illegal drugs in the GSP of the EU and the addition of Pakistan in the circle of beneficiaries thereof

74 Articles 10, 25 Council Regulation (EC) 2501/2001 of 31 December 2001.

75 Harrison, J (note 21) at 1667.

76 Lester, S & Mercurio, B *World trade law, Texts, materials and commentary* (2008) at 801.

77 See Annex I of Council Regulation (EC) 2501/2001 of 31 December 2001.

78 Eberhard, T (note 51) at 105.

(generally judged as reward for their co-operation after 9-11⁷⁹), lead to a complaint to the WTO's Dispute Settlement Body by India in 2002. 'This constituted the first panel regarding GSP ever'.⁸⁰

As direct competitor to Pakistan in the worldwide textile industry, India invoked the trade advantage granted to Pakistan to the value of \$ 250 million and verified that the drug preference system of the EC is incompatible with the "Most-Favored-Nation Principle" in Article I paragraph 1 GATT and am not covered by the Enabling Clause.⁸¹ The proceedings thus dealt with the non-discrimination in granting of preferences, as set out in section 2 paragraph an Enabling Clause. According to that

"Preferential tariff treatment accorded by contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences (...)"

In the opinion of India, preferences of a certain product should be granted in some manner to all developing countries in the context of the GSP. If further preferences may be granted to the "most favored nations", it brings to question the granting of conditional preferences in the General System of Preferences in principle.⁸² India led the proceedings in this manner against all special incentive arrangements in the GSP of the EC. As described before these are special incentive regulations for the protection of worker's rights and environmental standards, special regulations for least developed countries and special regulations for the fight against illegal drug production and trade. It limited later proceedings to the question of drug preferences and therefore only referred to the last regulations.⁸³

The Panel of the Dispute Board confirmed India's opinion with regards to Footnote 3, and declared the incompatibility of the differentiation by the EC between developing countries through use of the drug preference system; with Article I paragraph 1 GATT as well as the Enabling Clause (clause 2).⁸⁴

79 Kryvoi, Y (note 29) at 237; Jessen, H (note 5) at 13.

80 dos Santos, NB, Farias, R & Cunha, R (note 17) at 659.

81 Grossmann, GM & Sykes, AO 'European Communities – Conditions on Tariff Preferences to Developing Countries (WT/DS246/AB/R, DSR 2004:III, 925)' at Horn, H & Mayroidis, P (Editor) *The American Law Institute Reporter's Studies on WTO Case Law, Legal and Economic Analysis*(2007) at 797.

82 Dos Santos, NB, Farias, R & Cunha, R (note 17) at 660.

83 WT/DS246/R, Report of the Panel of 1 December 2003, European Communities – Conditions for Granting of Preferences to Developing Countries No. 1.5

Available at:

[http://www.worldtradelaw.net/wtopanels/ec-preferences\(panel\).pdf](http://www.worldtradelaw.net/wtopanels/ec-preferences(panel).pdf)

(Accessed 23 June 2010).

84 Ibid paragraph 7.177, see Lester, S & Mercurio, B (note 65) at 802.

'The panel finds that the term 'non-discriminatory' in footnote 3 requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori limitations'.⁸⁵

'Any restriction on imports from developing countries not especially affected by the drug problem which are an inherent effect of the exclusion of that category of countries from the Drug Arrangements cannot be relied upon in order to establish that the application of the drug Arrangements leads to a "disguised restriction" of trade. Instead, in order to establish, that the Drug Arrangements fail to comply with that standard, it would have to be shown that imports from India are restricted because, as a matter of application of the Drug Arrangement, India has been unduly excluded from the list of beneficiaries of the Drug Arrangements even though it qualifies as a country that is especially affected by the drug problem. However, the selection of beneficiaries of the Drug Arrangements has been made according to objective, non-discriminatory criteria'.⁸⁶

In the appeal against this ruling by the EC, the Appellate Body⁸⁷ upheld the decision of the Dispute Board, but modified certain points of the report.⁸⁸ However, 'the Appellate Body rejected that the term "non-discriminatory" in the Enabling Clause requires identical tariff preferences under GSP schemes to be provided to all developing countries'.⁸⁹

In this manner preference granting WTO-members may, pursuant to section 3 paragraph c Enabling Clause, differentiate in granting preferences in context of the Enabling Clause, between specific developing nations and exclude certain developing countries from being beneficiaries without this leading to discrimination.⁹⁰ Differentiation between developing nations, where the development requirements are the same or similar, are therefore not compatible with the Enabling Clause. Instead, differentiation between countries must be judged by means of "objective, transparent and non-discriminatory criteria", and be

⁸⁵ Ibid paragraph 7.117 – 7.161.

⁸⁶ Ibid No. 4.104.

⁸⁷ WT/DS246/AB/R, Report of the Appellate Body of 7 April 2004, European Communities – Conditions For The Granting of Tariff Preferences To Developing Countries
Available at:
[www.worldtradelaw.net/reports/wtoab/ec-preferences\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/ec-preferences(ab).pdf)
(Accessed 23 June 2010).

⁸⁸ See Jessen, H (note 5) at 29; Rieck, H (note 15) at 192.

⁸⁹ Dos Santos, NB, Farias, R & Cunha, R (note 17) at 660.

⁹⁰ WT/DS246/AB/R, Report of the Appellate Body (note 75) paragraphs 165, 173-176; see Eckhard, F 'Welthandelsrecht und Sozialstaatlichkeit' *Arbeitspapier, Globalisierung und soziale Ungerechtigkeit, No 170 (2009) at 48.*

accessible to all developing nations that fulfill the corresponding criteria.⁹¹ The Appellate Body set out further conditions for such differential treatment'.⁹² The identified problem 'must by its nature, be such that it be effectively addressed through tariff preferences'.⁹³ Lastly, with regards to the case in question 'a sufficient nexus should exist between, on the one hand, the preferential treatment provided...and, on the other hand, the likelihood of alleviating the relevant "development, financial (or) trade need"'.⁹⁴

The lack of these objective criteria in the EC's drug preference system and the apparent "closed list" of beneficiaries thereof, deny other excluded nations the enjoyment of these preferences that suffer from similar problems of drug production and trade.⁹⁵

The Appellate Body concluded that the justification of the drug preference system by means of paragraph 2 of the enabling clause was not possible. This Dispute Settlement Body of the WTO determined on 23 April 2004, on basis of the recommendations of the Panel as well as the Appellate Body, that the Council Regulation (EC) 2501/2001 was a non justifiable violation of ART I paragraph 1 GATT with regards to the obligation of the EC.⁹⁶

Thus, India won the fight with regards to its trade disadvantages in relation to Pakistan. In contrast to the report of the Panel the, generally seen as more practically-orientated, Report of the Appellate Body, restricted the use of differentiating as well as conditional preference systems, although it did not question its premises.⁹⁷

III. The Reformed Preference System of the EC

The requirement of the EC to change its preference systems according to demands of the Dispute Settlement Body coincided with the next 10 year circle of re-planning of preference systems.⁹⁸ 'The drugs arrangements and the special arrangements for worker's rights and environmental standards were replaced with a new uniform arrangement known

91 WT/DS246/AB/R, Report of the Appellate Body (note 75) at paragraph 182.

92 Bartels, L 'The WTO Legality of the EU's GSP+Arrangement' (2007) 10(4) *Journal of International Economic Law* 873.

93 WT/DS246/AB/R, Report of the Appellate Body (note 75) at paragraph 164.

94 Ibid.

95 Ibid at paragraph 187; Jessen, H (note 5) at 34.

96 See WT/DS246/10 EC – Tariff Preferences, Action by the Dispute Settlement Body of 23 April 2004; WT/DS246/AB/R, Report of the Appellate Body (note 75) at paragraph 191.

97 See Grossmann, GM & Skykes, AO (note 69) at 804; Jessen, H (note 19) at 572.

98 Jesen, H (note 19) at 579.

as GSP+'.⁹⁹ With GSP+ 'additional tariff preferences (normally duty free treatment) were made available to countries committing to ratify and implement a list of human rights and good governance conventions'.¹⁰⁰

The foundations of the planned reforms to the GSP were established with the publishing of the guidelines 2006-2015 by the European Commission in 2004.¹⁰¹ The GSP+ was conceptualized to be simpler, more stable, objective, clearer and more attractive with regards to the requirements of developing nations.¹⁰² 'It has been created especially for vulnerable countries with special development needs'.¹⁰³

Other than the old GSP, the GSP+ contains incentive arrangements in form of "positive conditionality". This means a distinction between beneficiaries with regards to tariff preferences. In other words individual countries are treated differently under the GSP+.¹⁰⁴

These goals were integrated in the generally reformed structure of the GSP in the Council Regulation (EC) No 980/2005 as a System of Generalized Preferences that came into effect on 31 December 2008.¹⁰⁵

While the new general preferences maintained, for example, the *Everything-But-Arms*-System without significant change and accommodated the expansion of the preferential group of export products, it removed the system of special preferences dealing with protection of worker's rights, protection of the environment and fight against drugs. In the EC-Regulation 732/2008¹⁰⁶, which lapsed in July 2008, this new GSP+ system was extended to the period 2009-2011. The GSP included three separate preference regulations.¹⁰⁷ Under the GSP, which does not give preferential benefits to one favored country over another, customs free import of non-sensitive products from 176 developing countries are granted with further 3.5 % reduction in import duties for sensitive

99 Bartels, L (note 80) at 869; Hemker, F (note 49) at 285.

100Ibid.

101Communication from to Commission (note 61) COM (2004) 461 at No 1.

102Rieck, H (note 15) at 194.

103Gasiorek, M & Conzalez, JL 'Mid-term Evaluation of the EU's Generalised System of Preferences'
Available at:

http://trade.ec.europa/doclid2010/may/tradoc_146191.pdf

(Accessed 14 September 2010).

104Eberhard, T (note 51) at 233.

105Council Regulation (EC) No 980/2500 of 27 June 2005.

106Council Regulation (EC) No 732/2008 of 22 July 2008.

107Article 1 paragraph 2, Article Council Regulation (EC) 732/2008 of 22 July 2008.

products.¹⁰⁸ The special regulation “*Everything but arms*”, in favor of Least Developed Countries (LDCs), that granted duty free access to European markets for all products of the 49 LDCs¹⁰⁹ with exception to weapons, was as previously stated kept without further change.¹¹⁰ On the grounds of the Council Regulation (EC) No 552/97¹¹¹, Myanmar is still excluded from being granted a preferential treatment in terms of the GSP of the EC. This is a result of the country's controversial political situation.

A further addition to the GSP is the conditional special regulation as incentive for lasting development and responsible governance (GSP+) which will be dealt with in the next chapter.

IV. The Special Regulation as incentive for sustainable Development and responsible Governance (GSP+) in detail

To replace the incentive regulations for the protection of worker's rights, the environment and the war against drugs, a simplified and generally more objective model for conditional customs preferences in favor for developing nations was introduced, the GSP+. This was done in line with the targets of the guidelines 2004 as well as the demands of the *WTO's Dispute Settlement Body* in EC-Tariff Preferences, WT/DS246/AB/R. The main objective of the “special regulation as incentive for sustainable development and responsible governance” can be inferred from its name.

Especially needy developing countries, whose development is threatened by poor diversification and insufficient access to international markets, would receive additional customs reductions for the ratification and effective implementation of international treaties, setting out norms for human rights, worker's rights, lasting development and responsible governance.¹¹² Compared to the described GSP of the EC until 2006 with the introduction of the GSP+ there are still three arrangements in place. These are the general arrangements, the special arrangements for sustainable development and good governance

108Article 6 and Annex II Council Regulation (EC) 732/2008; Möller, T & Schumann, Gesa *Warenursprung und Präferenzen. Handbuch und systematische Darstellung* (2007) at 121.

109Annex I part E Council Regulation (EC) No 732/2008 of 22 July 2008; Current List of Least Developed Countries

Available at:

<http://www.unohrrls.org/en/ldc/related/62>

(Accessed 12 August 2010).

110See Articles 11, 12 Council Regulation (EC) 732/2008.

111Council Regulation (EC) No 552/97 of 24 March 1997.

112Recital 7 of Council Regulation 980/2005; recitals 7-9 of Council Regulation (EC) 732/2008.

(“GSP+”) and the special arrangements for LDCs (“EBA”). The first and the latter one have been described above.

The customs preferences, implemented as a dropping of customs duties, cover around 6,400 custom tariffs. Hereby around 91% of goods with custom duties may be exported to the EC excise-free.¹¹³

The GSP+ scheme is granted, above the customs-preferences of the GSP, when 3 conditions, set out in Article 8 b paragraph 1 Council Regulation (EC) No 732/2008 are met.

Firstly, the nation in question must have ratified and successfully implemented all regulations set out in Annex 3 of the above mentioned Council Regulation. The list of conventions in Annex 3 is comprised of 16 “agreements of the UN and the ILO for Human and Workers Rights (Part A)¹¹⁴ as well as further 11 agreements concerning the environment and the principles for responsible governance”¹¹⁵ This is set out in Part B to the GSP Regulation.

The country must secondly guarantee to “maintain the ratification of the regulations and measures for their implementation, as well as regularly check the implementation of said measures against implementation targets set out in the ratified agreements”.

Thirdly, the country must be seen as endangered in the sense set out in Article 8 paragraph 2 of Council Regulation (EC) No 732/2008. The level of “endangerment” of a country is established when (1.) the country is categorized by the world bank as having low income

¹¹³Hemker, F (note 49) at 285.

¹¹⁴ (1) International Covenant on Civil and Political Rights, (2) International Convent 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 of Admission for 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 for 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 Organize and to Bargain Collectively (No 98) and (16) International Convention on the Suppression and Punishment of the Crime of Apartheid.

¹¹⁵(17) Montreal Protocol and Substances that Deplete the Ozone Layer, (18) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, (19) Stockholm Convention on Persistent Organic Pollutants, (20) Convention on International Trade in Endangered Species of Wild Fauna and Flora, (21) Convention of Biological Diversity, (22) Cartagena Protocol on Biosafety, (23) Kyoto Protocol to the United Nations Framework Convention on Climate Change, (24) United Nations Single Convention on Narcotic Drugs (1961), (25) United Nations Convention on Psychotropic Substances (1971), (26) United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), (27) United Nations Convention against Corruption (Mexico).

for three consecutive years, (2.) the fifth largest parts of exports to the EC, under the GSP, is more than 75 % of the value for the entire GSP exports, (3.) the exports under the GSP are less than 1 % of value than the entire exports falling under the GSP.¹¹⁶ The GSP+ thus addresses those countries with low income and a poorly diversified economy, that is due to this fact disadvantaged in the global trade competition and has a comparatively small part in the overall import to the EC.

Excluded from this are emerging countries, for example as BRIC-countries, as well as Pakistan, because no further need for development aid is acknowledged.¹¹⁷

As soon as it is seen as that a country has “graduated” and cannot further be classified as “endangered”, seen by the country having achieved a competitiveness as well as a diversified export market, the imports for particular wares from these countries are removed from the system of special preferences. Preferences for individual imports of the communal tariff preferences are removed when the country has maintained 15% EC-exports in the relevant parts over 3 years, without being more than 50 % the value of all GSP exports from that country to the EC.¹¹⁸ In contrast to the GSP of the USA, this graduation is only applicable to groups of goods and not only on the entire country.¹¹⁹

The Commission observed in their decision of 9th December 2008¹²⁰, that 16 countries who applied for granting of preferences under the GSP+, met the criteria set out and were acknowledged as beneficiaries of the special regulation for sustainable development and responsible governance. The list of these countries included Armenia, Azerbaijan, Bolivia, Mongolia, Nicaragua, Paraguay, Sri Lanka and Venezuela. Even though this list included, for the most parts, countries that benefited from the old protection of worker’s rights and drug preferences (with the exception of Pakistan), the new GSP+ achieved greater practical relevance as the special incentive arrangements preferences under the GSP of the EC until 2006. As described above to become a beneficiary from the GSP+ scheme, applicants need to ratify and implement certain conventions. Whereas under the special incentive arrangements for the protection of worker's rights and environmental standards under the

116 Article 8 paragraph 2 Council Regulation (EC) No 732/2008 of 22 July 2008.

117 Hemker, F (note 49) at 286.

118 Article 13 Council Regulation (EC) No 732/2008 of 22 July 2008.

119 See Rieck, H (note 15) at 201.

120 Commission Decision of 9 December 2008 on the list of beneficiary countries which qualify for the special incentive arrangement for sustainable development and good governance, provided for in Council Regulation (EC) No 732/2008 applying a scheme of generalized tariff preferences for the period from 1 January 2009 to 31 December 2011

Available at:

<http://eur-lex.europa.eu/LexUriServ.do?uri=OJ:L:2009:149:0078:0079:EN:PDF>

(Accessed 4 August 2010).

GSP of the EC until 2006 developing countries did not need to sign and ratify ILO conventions. They only had to demonstrate these laws are applied in an efficient way. According to Articles 15-19 Council Regulation (EC) No 732/2008, the EC monitors compliance to regulations and conditions of the three models of preferences (GSP, GSP+ and EBA) by developing nations and maintains the right to forfeit the preferences in case of non-compliance. With regards to the GSP+ model, a decision was made by the EC-Commission in June 2009 to remove Venezuela from the list of beneficiaries.¹²¹

It can be said that overall, the EC took a lot of effort to comply with the conditions of the *Dispute Settlement Body in EC-Tariff Preferences (WT/DS246/AB/R)* by replacing the old conditional models of the fight against drugs, protection of workers and environmental protection with the new GSP+, based on objective and transparent criteria.¹²² To explain the background for changing the special incentive arrangements for the protection of worker's rights and environmental standards, basically two reasons shall be pointed out. Firstly, these special arrangements were not of enough practical use which has been described above. Secondly, by requiring the ratification and implementation of the ILO conventions other than required in the previous GSP, tariff preferences were based in an objective way. Accordingly, the EC can prove more easily whether the requirements for granting the preferences are given or should be reviewed or withdrawn. On the other hand the criteria are more transparent to applicants. As in the sense of the WTO-decision, the conditions for granting trade-preferences are now based on the objective legal mechanisms of International Organizations to allow all countries that fulfill the criteria access to trade preferences.¹²³

The report of the *Appellate Body in EC-Tariff Preferences* made no particular indications as to which of the criteria were unacceptable due to discrimination¹²⁴ and even commented that the detailed criteria for granting trade preferences based on protection of worker's rights and environment could be classified as non-discriminatory.¹²⁵ However, the EC has acted correctly in simplifying and further objectifying the criteria for granting trade preferences with the result that the model is supposed to be non-discriminatory.

121Ibid.

122Hemker, F (note 49) at 285; Jessen, H (note 19) at 581.

123Rieck, H (note 15) at 177, WT/DS246/AB/R, Report of the Appellate Body (note 75) paragraphs 163, 182.

124Eckardt, F (note 78) at 48.

125Grossmann, GD & Skykes, AO (note 69) at 804.

The actual conformity of the new model to the regulations of the WTO stays an open matter that could very well be the object of a new dispute.¹²⁶ The GSP+ contains special incentive arrangements in form of “positive conditionality” as mentioned before.¹²⁷ Especially in the case of the requirement for ratifying environmental agreements can be difficult to reconcile with the development, financial and trade requirements of the third world countries in the sense of the argument of the *Appellate Body*, notwithstanding the benefit of these agreements for the world as whole.¹²⁸ The *Appellate Body* said:

*'...the response of a preference-granting country must be taken with a view to improving the development, financial and trade situation of beneficiary country, based on the particular need at issue. As such, in our view, the expectation that developed countries will 'respond positively' to the 'needs of developing countries' suggests that a sufficient nexus should exist between, on the one hand, the preferential treatment...and, on the other hand, the likelihood of alleviating the relevant 'development, financial (or) trade need'.*¹²⁹

In certain points countries that apply for being granted preferences if they, in fact, do not have a problem are an issue addressed by a special incentive arrangement. One has to look at the impact on an applicant if it complies with the requirements of such an arrangement anyway.¹³⁰ A good example of this is Genocide and Apartheid Conventions. It appears to be in the interest of all developing countries to prevent racial segregation and genocide. However, for some developing countries there is simply no risk of suffering from genocide or apartheid, as for instance Bolivia.¹³¹ By forcing such a country to implement Genocide and Apartheid Conventions to be granted GSP+ preferences for development, financial and trade needs, would meet problems the particular applicant may not have. The purpose of the granted preferences, namely to support economic growth of developing countries, while at the same time promoting development in terms of human rights as well as social and environmental standards (that is lastly beneficial for the specific country but not only from a world-wide perspective), is then questionable. The applying country, while not

¹²⁶Bartels, L (note 80) at 869; Rieck, H (note 49) at 213; Healy, M "'European Communities _ Conditions for Granting of Tariff Preferences to Developing Countries: The Use of Positive Conditionality in the European Generalised System of Preferences' (2009) 15 *International Trade Law & Regulation* 83.

¹²⁷Eberhard, T (note 51) at 233.

¹²⁸Avgerinopoulou, D-T 'Implementation and Enforcement of Multilateral Environmental Agreements – The New EC Generalised System of Preferences Scheme' (2006) 12 *Columbia Journal of European Law* at 838.

¹²⁹WT/DS246/AB/R, Report of the Appellate Body (note 75) paragraph 164.

¹³⁰Bartels, L (note 80) at 880.

¹³¹Ibid.

having the particular problem in fact, bears the costs for the ratification and implementation of a Convention that is not specifically useful for its further development.

Therefore, lastly questionable is the issue if the new GSP of the EC does benefit the development goals and if the concepts of sustainable and responsible governance of the GSP would in reality would have the desired effect in favored countries.

Chapter 3: Conditional Special Preferences as Measure for enforcing Human Rights, Environmental and Social Standards

The question is how the conditional special preferences, that deal with non-trade related measures like enforcing Human Rights, Environmental and Social Standards, can integrate with trade measures for example the GSP. This is resolved by observing that the preferences for goods from developing countries is not purely a question of trade politics, but moreover a developmentally motivated project. As such, the national GSP is very often informed by decisions from other political areas that relate the developmental aid. To examine this question the integration of human rights, social and environmental standards in the WTO system will be considered in the first step. Secondly, the principles and aims of the EC's conditional preferences will be looked at. Lastly, criticism of the conditional preference system will be pointed out.

I. The Integration of Human Rights, Social and Environmental Standards in the WTO System

As the integration of Human Rights, Social and Environmental Standards in trade policy can be seen as a necessity, the actual implementation of such standards in the world-trade system is a logical step. However all initiatives to date, especially of the EC, to implement such standards have failed. The inclusions of worker's rights standards of international workers organizations that are acknowledged in practically all countries, in international trade relations is a debate that has gone on for decades.¹³²

The main objection from developing countries to such initiatives is the suspicion of protectionism by industrialized nations that could partially remove comparative trade privileges if these initiatives were implemented.¹³³

This was raised by the Singapore Ministerial Conference in 1996:

'We renew our commitment to the observance of internationally recognized core labor standards. The International Labor Organization (ILO) is the competent body to set and

¹³²Vandenberghe, J 'On Carrots and Sticks: The Social Dimension of EU Trade Policy' (2008) 13 *European Foreign Affairs Review* at 562.

¹³³Birk, R 'Die Durchsetzung internationaler arbeitsrechtlicher Standards in Entwicklungsländern durch die Europäische Union' at Hanau, Peter (Editor) (2008) *Gegen den Strich. Festschrift für Klaus Adomeit* at 74.

*deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labor standards for protectionist purposes, and agree in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.*¹³⁴

Generally speaking, from the perspective of a protectionist, 'preference is a legitimate gesture of friendship'.¹³⁵ 'According to this, preference involves discrimination, less against the preference-receiving country than, against other foreigners and treating them more like residents of the granting country'.¹³⁶ From a developing countries' point of view the implementation of human rights, social and environmental standards may have the result of weakening their trade privileges due to a lack of these standards compared to the EC. In relation to environmental standards similar skepticism is brought forth by developing countries. As such, to date most trade limitations on basis of environmental standards were removed by the WTO as not GATT-compliant.¹³⁷

These factors contribute an insufficient integration of Human Rights, Social and Environmental Standards into the WTO System. As the WTO is a relatively capable trade orientated institution, it begs the question why there is practically no co-ordination of non-trade political content with the trade measures of the WTO.¹³⁸ Particularly with these measures the unilateral incentive schemes, in the context of the GSP, could lead to the foundation of basic standards in world trade to fight against violations of human rights, social and environmental standards.¹³⁹ The EC acts as a sort of enabling authority to enforce social standards, as for instance minimum workers' rights, that have been developed by the ILO. Due to the constitution and structure of the ILO itself, the organization can only enforce standards within the system of agreements but not beyond

134 Singapore WTO Ministerial 1996: Ministerial Declaration WT/MIN(96)/DEC of 18 December 1996

Available at:

http://www.wto.org/english/thewto_e/min96_e/wtodec_e.htm

(Accessed 6 August 2010).

135 Johnson, HG 'Trade Preferences for Manufactured Goods' at *Economic Policies Towards Less Developed Countries, Chapter VI* (1967) at 200.

136 Ibid.

137 Koch, K 'Handelspräferenzen der Europäischen Gemeinschaft für Entwicklungsländer, Typologie, Konditionierungen, WTO-Konformität (2004) Vol. 10 *Europäische Integration und Internationale Wirtschaftsbeziehungen*, Frankfurt am Main, Peter Lang at 32.

138 Eckhard, F (note 78) at 16.

139 Birk, R (note 118) at 74; Eckhard, F (note 78) at 16.

this. Furthermore, the ILO does not have a system of effective sanctions.¹⁴⁰ To integrate human rights, social and environmental standards there is only the option of unilateral trade sanctions by single states such as the USA and regional international organizations like the EU. The only effective way to achieve the implementation of fundamental labor standards in developing countries is the ratification and implementation arising from special incentive arrangements. Against this background, developing countries that fail to comply with these standards have to face sanctions, which is the enforcement mechanism.¹⁴¹ Such a system has been established by the EC with the GSP. Its aim is to grant additional preferences to developing countries, which implement those standards. Still, an integration of non-trade political content to further certain elementary rights within the WTO could be beneficial for all member states and may counter the tendency of market imperialism through and one-sided trade measures by industrialized nations.

II. Principles and Aims of the EC's Conditional Preferences

For a long time unilateral preference measures in the trade system of the states have been connected to the conditions to be fulfilled by the favored nations. Compared to the demands for the instituting of certain economic and political rights on favored nations, the enforcement of human rights, social and environmental standards has only recently played a significant role.¹⁴² Conditionality in this form is generally justified with the argument that the granting of preferences to developing nations takes place on a purely voluntary basis and as this is not a claim for preferential treatment; the enforcement of particular conditions does not present a service in return¹⁴³ and thus is not a breach of GSP ban on reciprocity.¹⁴⁴ One must differentiate between negative conditionality, where the general preferences granted to nations are unilaterally removed once certain conditions are not met¹⁴⁵, and positive conditionality. The latter functions to incentive further customs reductions instead of removing general preferences to encourage certain reforms in favored countries.¹⁴⁶

140 Birk, R (note 118) at 74.

141 Ibid.

142 Avgerinopoulou, D-T (note 113) at 832; Healy, M (note 112) at 81.

143 This would not comply with paragraph 5 Enabling Clause.

144 Healy, M (note 112) at 81.

145 Chaudhary, O 'The Propriety of Preferences: An Evaluation of EC and U.S. GSP Schemes in the Wake of EC-Preferences' (2005) 5 *Asper Review of International Business and Trade Law* at 161, 168.

146 Healy, M (note 112) at 81.

The EU has, since the beginning, believed that Generalized Systems of Preferences represent a means of co-operative development.¹⁴⁷ To this day the conditional trade policies of the EC represent an attempt to connect the external international relations in various political areas such as trade, human rights and developmental policies, as can be inferred by the aim of furthering political coherence noted in Article 3 EC Treaty.¹⁴⁸ As mentioned, the EC generally uses the concept of positive conditionality to encourage developing nations to implement certain human rights, social and environmental standards by granting special privileges in the trade sector, instead of sanctioning nations for violating these standards.¹⁴⁹ These standards originated from an agreement in the Annex III of the Council Regulation (EC) No 732/2008 that should be entered into by favored states, to a “substantive agreement of the UN and the ILO over human rights and worker’s rights” on the one hand, and “agreement over the environment and the foundations for responsible governance”¹⁵⁰ on the other. The conditionality of the developmentally motivated trade preferences of the EC is based on these agreements, and originates from the concept sustainable development¹⁵¹ as well as supported by Article 177 paragraph 2 EC Treaty and Article 173 paragraph 3 EC Treaty. These Articles prescribe the “general goals for the legal state as well as goals for the protection of basic human rights”, and furthermore, the requirements for environmental protection that are to be taken into account in the context of co-operative development. To raise the level of standards of living in developing countries, from the view of the EC, it must be ensured that there is benefit for the entire population from growth, and not only benefit for the economy.¹⁵² Certain industries may benefit from tariff preferences while it still has not the impact of new job creation and raising income levels.

Another relevant aspect is that the ratification of the human rights, social and environmental standards is only the first step. One can speak of actual implementation, if norms are applicable beyond the limits of the state and can be actually implemented in practice. Especially in this aspect, it can be foreseen that developing countries may face problems with implementation, as this presupposes a functioning legal and governing

147Healy, M (note 112) at 81 that refers to Commission Statement on the Future Development of the European Community’s Generalized Tariff Preferences of 3 February 1975, Com (1975).

148Hemker, F (note 49) at 287.

149Koch, K (note 121) at 31.

150 The fundamentals of responsible governance refer in this particular regard to conventions 24-27 (note 101).

151Recital 7 of Council Regulation (EC) No 732/2008 of 22. July 2008.

152Koch, K (note 121) at 31.

system.¹⁵³ Developing countries often suffer from problems in these areas. This can reach from a lack of sufficient and competent employees to inefficiency due to corruption.

III. Criticism of the Conditional Preference Systems

A considerable measure of criticism has been raised against even the fundamental concept of conditional preference systems and debates around benefits and detriments of these systems have been going on for quite a while.¹⁵⁴

This criticism is especially lodged against the unilateral character of programs, the connection to non-trade related requirements as well as their limitation to particular product groups. The economic benefit of preferences for developing nations is diminished by the insecurity of developing countries as to whether the preferences are further granted, The pressure of political concessions as well as the one-sided emphasis on preferential industries, which may lead to a dependence on industrial countries.¹⁵⁵

For some critics, positive conditionality of preference systems represent a unilateral pressure to conform to western human-rights politics based on the economic power advantage of the US and EC as well as an attack on the rights to national sovereignty of developing states in the world trade system.¹⁵⁶

The main question to consider, however, is in what sense conditional preferences are misused as a tool for foreign relations that legitimate an unjust advantage treatment of partner states because of foreign relating interests.¹⁵⁷

To ensure the benefit from tariff preferences, developing governments intervene in the economy of their countries by setting up measures in conformity with the social standards of western countries. The distinction between welfare-reducing government intervention on the one hand and economically useful measures on the other is problematic.¹⁵⁸

'Preference schemes provide the developing state exports with preferential access to developed state markets, without asking developing countries to “pay” for this increased

153Birk, R (note 118) at 79.

154Rieck, H (note 15) at 180.

155Gracia, F (note 19) at 303.

156Koch, K (note 121) at 32; Healy, M (note 112) at 81.

157Rieck, H (note 15) at 183.

158 Dunoff, JL 'Dysfunction, Diversion, and the Debate over Preferences (How) do Preferential Trade Policies work? in Thomas, C & Trachtmann, JP *Developing Countries in the WTO Legal System* (2009) at 58.

access through tariff reduction'.¹⁵⁹ Therefore export interests in such developing countries 'will have little incentive to lobby governments to reduce tariffs'.¹⁶⁰ Even if protectionist interests still exist, the governments in question will face less pressure from those interests that favor liberalization. As a result it may have the consequence that 'governments will be more likely to pursue protectionist's policies'.¹⁶¹ This opposition to trade liberalization will be established by individuals and companies that are negatively affected by liberalization as they have to face more competition. In conclusion in such a case preferential treatment would not be beneficial but counterproductive. It can cause more damage than economic support if there is a lack of ability of a government of a particular developing country in setting up useful measures to provide the required social standards. This would lastly lead to an economical step back for the specific country while developed countries industries in return benefit from this. An 'empirical study found that in the absence of GATT/WTO membership or a regional trade agreement, preferences programs increase trade between states by 41 percent; however, if states have one of these or other trade relations, then the granting of preferences appears to benefit the importing state and harm the exporting state'.¹⁶² However, it needs to be pointed out that identifying the effects of preferences empirically is generally very difficult. It is therefore questionable whether the ability of various developing countries governments to provide the legal framework for these social standards and later on to implement and enforce them has been taken into account properly by the granting western countries. A further involvement of international institutions, in form of assisting developing countries' governments, appears to be necessary.

In reference to the ILO conventions, there exists a double system of checks and balance in regard of their actualization. For the one, reporting on the side of the ILO, on the other, through the EC Commission by application through independent research. Thereby, recourse does not have to be made to information from NGO's, individuals and independent experts.¹⁶³ Against this background, more efficient measures can be developed to guarantee economic growth for developing countries that benefit from GSPs.

¹⁵⁹Ibid.

¹⁶⁰Ibid.

¹⁶¹Ibid.

¹⁶²Ibid; Golstein, T, Rivers, D & Tomz, M 'Institutions in International Relations: Understanding the Effects of the GATT and the WTO and World Trade' (2007) 61 *Int'l Org.*

¹⁶³Birk, R (note 118) at 80.

Another difficulty is 'that the GSP+ preferences are only made available to the applicant once the ratification and implementation of the conventions has been undertaken. As there is a lag of time/delay before the benefits begin to flow, this means that the GSP+ applicants are required to bear the immediate costs, which, in theory, will be compensated later'.¹⁶⁴ The most problematic consequence in this regard is that there is a 'clear risk of discrimination in favor of would-be beneficiaries that are able to meet the immediate costs from those who are not'.¹⁶⁵

An example of the problematic connection of trade and foreign relations interests is the granting of drug preferences to Pakistan as a reward for their co-operation in the fight against Terrorism.¹⁶⁶

As mentioned above, in the case *EC – Tariff Preferences* the Appellate Body 'rejected that the term "non-discriminatory" in the Enabling Clause requires identical tariff preferences under GSP schemes to be provided to all developing countries without differentiation'.¹⁶⁷ According to this 'preferences may function as bargain leverage'.¹⁶⁸ 'It means that preference-granting countries, through their GSP programs, can offer higher preference margins to a specific group of developing countries in exchange for concessions in other issue areas of the multilateral negotiations'.¹⁶⁹

In question is also the issue of double standards where different treatment is used for smaller countries, like Belarus or Myanmar on the one hand, and countries like Russia on the other, with their different requirements in terms of human rights and social politics, even when the latter group does not fall under the requirements of the GSP. The regulation for temporary removal of preference regulations as set out in Articles 15 ff EC Treaty of the current system allows room for political opportunities, although the use of this negative conditionality in the EC has not been of great importance compared to the US.¹⁷⁰ 'The EC grants additional tariff cuts for each and every condition met (e.g. compliance with international labor rights); the US provides an all-or-nothing solution to developing countries, demanding that all conditions be met before any preferences are granted'.¹⁷¹

¹⁶⁴Bartels, L (note 80) at 881.

¹⁶⁵Ibid.

¹⁶⁶Jessen, H (note 5) at 13; Kryvoi, Y (note 1) at 237.

¹⁶⁷Dos Santos, NB, Farias, R & Cunha, R (note 17) at 660.

¹⁶⁸Ibid.

¹⁶⁹Ibid.

¹⁷⁰Chaudhary, O (note 16) at 161; Healy, M (note 112) at 81.

¹⁷¹Chaudhary, O (note 16) at 161.

Further criticism can be put towards the EC that they to a certain extent implement measures that are not even complied with by their own member states. This can be seen in the case of some of the agreements set out in Council Regulation (EC) No 738/2008, for example the agreement for the fight and punishment of Apartheid abuses, that were not ratified by all EC member states.¹⁷² Actually, this convention has not been ratified by two-third of the EC Member States.¹⁷³ 'The Genocide Convention has not been ratified by one EU Member State, namely Malta'.¹⁷⁴ One also needs to point out 'the EU's choice of conventions, as the 'core' human rights conventions does not include the UN Migration Convention, which the UN considers as 'core' human rights convention'.¹⁷⁵ The UN Migration Convention has not been ratified by any Member State of the EC yet.

Furthermore the position of the EC with regards to the requirements of developing nations needs to be maintained if the EC itself implements convincing and wide-reaching human rights measures that follow the principles of reciprocity and consistence. In the face of human rights abuses within the EC, the criticism of other countries should be formulated more conservatively.¹⁷⁶

To comply with the principle of fairness, the fundamental criticisms against conditional preferences require a binding, stipulation-free and unlimited market access in the context of the preference system.¹⁷⁷ It has been criticized that the GSP of the EC 'suffers from some patent fairness problems'.¹⁷⁸ 'Their exclusionary features exist to accomplish or protect important donor country interests, not to enhance the effectiveness of the programs for beneficiary countries'.¹⁷⁹ The *Everything-but-Arms* initiative of the EC can be seen as a step in the right direction, as least developed countries have stipulation-free and unlimited access to markets in the EC under this regulation. Although even this initiative can be criticized for its non-binding nature and the long transition period of the exception-regulation with regards to certain agricultural produce.¹⁸⁰

These criticisms can be countered by the argument that conditionality in preference systems are necessary to further real changes in the living standards of the population

172Rieck, H (note 15) at 214.

173Bartels, L (note 80) at 878.

174Ibid.

175Ibid.

176Hemker, F (note 49) at 290.

177Gracia, F (note 19) at 304.

178Ibid.

179Ibid.

180 Ibid at 305.

through the agency of developmental aid. The combination of trade initiatives with human and worker's rights can be an important catalyst of improving the rights of the population and aiding NGO's.¹⁸¹

Especially the idea of development and the target of sustainability of the EC's GSP is recognized as a step in the right direction that world trade can only reach the capacity as vehicle for growth and development with an appreciation for far-reaching and multidimensional development.¹⁸²

In this sense, the GSP+ system could build up institutional capacity in developing countries and further civil society through the requisite realization and maintenance of agreements in combination with financial and technical support.¹⁸³

However, to reach these goals it is important to take the varying needs of applying countries to improve their development, financial and trade situation into account. It should be considered in terms of the EC's GSP+ scheme not to force developing countries to ratify and implement conventions that do not meet the countries' specific need but are only of (its) general interest.

Generally seen, conditional preference systems with incentive systems represent a good alternative for the implementation of human and workers rights in other countries through trade initiatives that respect the sovereignty of partner states.¹⁸⁴

The explicit involvement of the United Nations and international trade organizations, as protectors of human and worker's rights, in the process of granting and removing preferences are a positive indication for the multilateral nature of current EC preferences.¹⁸⁵ The statements put forth in the last Trade Policy reviews of the EC are signs that the preferences are being positively adopted by beneficiary states.¹⁸⁶

Especially Sri Lanka emphasized the positive effects of the system on their economy and its diversification as an achievement for the conception of the GSP+ preferences.¹⁸⁷

181 Healy, M (note 112) at 81.

182 Avgerinopoulou, DF (note 113) at 836.

183 Recital 7 of Council Regulation (EC) No 732/2008 of 22 July 2008.

184 Hemker, F (note 49) at 290.

185 Blüthner, A *Welthandel und Menschenrechte in der Arbeit, The Compatibility of Human Rights at Work with the WTO-System* (2004) Frankfurt am Main, Peter Lang.

186 World Trade Organization Trade Policy Review Body, Document Number WT/TRP/M/214 of 6 April 2009, paragraphs 340 and 442.

187 Ibid paragraphs 415-416

According to that, the GSP is 'designed to achieve the development goals through trade creation'.¹⁸⁸

Nigeria, while lauding the economic results, put forth concerns about increasing enforcement of political conditions that stand against state sovereignty and equal relations between countries:

'Nevertheless, it is with some concern that we see that, in order to have access to preferential schemes, political concerns are increasingly being imposed, which affect the sovereignty of States and weaken the preferences scheme by making the free trade system opaque. Such requirements should not be prerequisites for concluding preferential trade agreements as they have a negative impact on the promotion of fair systems of cooperation'.¹⁸⁹

¹⁸⁸Ibid.

¹⁸⁹Ibid paragraph 466.

Chapter 4: The suitability of the GSP+ System of the EC for implementing Human Rights, Social and Environmental Standards

Independent of the fundamental question if conditional preference systems should or should not be implemented; an important question is if this scheme is suitable for effectively implementing certain human, social and environmental standards.

The following chapter will clarify if the GSP system does in practice effect a noticeable incentive for developing nations to implement agreements dictated by the GSP regulations and take upon themselves the burdens and obligations set out in the regulations.

I. Accessibility and actual incentives for applications to GSP Benefits

To begin with, it is important to mention that the GSP scheme is only applicable to a limited circle of countries. The 49 states that belong to the group categorized as “least developed nations” already gain advantage from ongoing customs reductions and the *Everything-but-arms* initiative to the point that the GSP+ scheme plays no particular role for them. Furthermore emerging countries that have a high volume of exports or can be shown to have a particular degree of diversification in their export products are excluded from preferences due to the criteria of “endangerment”.¹⁹⁰ To add to this, a certain number of states have special preferential trade agreements that have preferences of the GSP in the case of the equal preference granting as set out in Article 3 paragraph 2 Council Regulation (EC) No 732/2008.¹⁹¹ These countries too, do not fall into the target group of the GSP+ scheme. The incentive system of international agreements does not, even in its fundamental conception, have a universal nature, and is not intended as such. Although the dissemination of certain values connected to trade and developmental politics is of importance to the EC, the question may be asked why these values are not consequently raised to a standard that is implemented in a general preference system as incentive for all developing countries.¹⁹² Either way is questionable if it is profitable for developing nations, which fall under the scope of the GSP+ scheme, to apply for preferences and implement the required ratifications of international agreements to that end.

190 Recital 8 as well as Article 8 paragraph 2 Council Regulation (EC) No 732/2008 of 22 July 2008.

191 Rieck, H (note 15) at 204.

192 Hemker, F (note 49) at 191.

For developing nations, the economic benefits garnered from implementing special regulations connected to customs benefits are at odds with the rights to sovereignty that are endangered through the political conditionality of preferences.¹⁹³ The implementation of higher social and environmental standards in developing states may detrimentally affect the comparative competitiveness in regards to more developed countries.

In any case, a major problem is the fact that especially those products from developing countries, such as agricultural and textile products, in whose production those countries have comparative market advantages, are classified as specially protected sensitive product groups in EC-regulations.¹⁹⁴ In the course of general customs de-regulation, a generally diminished effect of preference systems can be observed, to the point that additional preferences represent only a marginal benefit that is especially noticeable in direct competition of particular product groups with other countries.¹⁹⁵ This argument is used by developing countries to pull back from gearing their trade policies towards preference programs in the increasingly liberalized world trade, and even the motivation for implementing human, social and environmental standards to this end is not seen as being advantageous.¹⁹⁶

As seen by the International Crisis Group in the case of Moldavia¹⁹⁷, the trade preferences granted under the GSP+ system would not be sufficient to be seen as incentives to the point that additional trade reductions would have been necessary to provide enough incentive as an aside. We may comment on the criticism in conjunction with the fundamental regulations¹⁹⁸ of the EC that are seen as a hindrance to the effectiveness of preference systems due to their complexity and out-datedness.¹⁹⁹ The efforts since 2003 to reform these regulations have to date born no fruit.²⁰⁰ Against these critics, the European Commission stated that the GSP scheme does indeed provide strong special incentive arrangements. This is attested to in the privileged states have given great effort to fulfill the

193Koch, K (note 121) at 32.

194 Michaelis & Hessen, H in Hilf/Oeter (Editor) *WTO-Recht, Rechtsordnung des Welthandels* (2005) at 613.

195Blüthner, A (note 161) at 478.

196Gracia, F (note 19) at 304.

197Hemker, F (note 49) refers to International Crisis Group, *Moldavia's Uncertain Future*, Europe Report No 175 of 17 August 2006.

198See Article 66-97 and Annex 14-18 Council Regulation (EC) No 2454/93 of 2 July 1993 and Article 5 Council Regulation (EC) No 732/2008 of 22 July 2008.

199Rieck, H (note 15) at 205.

200 TAXUD/2046/2007_1 Draft of the Commission of a Regulation to reform the GSP of 13 November 2008 Available at

http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_duties/rules_origin/preferential/GSP_rev_proposal_en.pdf

(Accessed 18 May 2010).

requirements set out under the GSP scheme.²⁰¹ Objectively seen, the customs-free access of product group, categorized as sensitive, to the markets in the EC is a market improvement compared to the general regulations of the GSP as well as the special reductions, still limited to 8.5 %, for implementing social and environmental standards under the previous GSP.²⁰²

As officially reported by the Trade Directorate, 2007 saw imports to the value of 4.7 billion Euros under the GSP+ regulations, that amount to an improvement of 357 million Euros to import under the general GSP.²⁰³ To add to that, imports from GSP+ beneficiaries rose by 15 % in 2006 and by an additional 10 % in 2007.²⁰⁴

Generally, it can be seen that the GSP has become more transparent for potential beneficent states after the reforms of 2005.²⁰⁵ This is partly due to the fact that preferences were thus noticeably improved. If the actual incentive of the preferences is enough for developing nations to make additional efforts in implementing human and social rights as well as environmental standards (sustainable development and good governance) is however still questionable.

II. Policing and Consequences of (None) implementation of Preference Requirements by Beneficiary States.

The effectiveness of special incentive arrangements depends strongly on the control over actual observation of the required standards by beneficent countries and the consequences arising from insufficient implementation thereof. The ultimate political goals of the GSP+ are not worth anything if the effective implementation of agreements are not monitored by the EC and already granted preferences are not removed in the case of non-conformity to

201 Communication of the Directorate General for Trade 12/09/2008

Available at:

<http://trade.ec.europa.eu/doclib/html/141680.htm>

(Accessed 12 June 2010).

202 Article 7 paragraph 1 Council Regulation (EC) No 732/2008 of 22 July 2008; Rieck, H (note 15) at 199.

203 Communication of the Directorate General for Trade 12/09/2008 (note 177).

204 Directorate General for Trade, Factsheet. EC Generalised Scheme of Tariff Preferences (GSP) 2009-2011

Available at:

<http://trade.ec.europa.eu/doclib/html/139988.htm>

(Accessed 12 June 2010).

205 Hemker, F (note 49) at 290.

the standards. The current prescription contains comprehensive regulation to the effect of postponing and even removing granted preferences to realize the goals of these agreements. And to ensure that no country receives unjust benefits “through continual breaches of the agreements”.²⁰⁶

1. Monitoring

As per Article 8 paragraph 3 Council Regulation (EC) No 732/2008 of the European Commission the ratification and implementation of international agreements by profiting developing countries is monitored with the help of the supervisory committees. Furthermore, the UN human rights watch and the ILO are included in the process of supervision to ensure the continual regard for the agreements in national judicial regulations and their actual implementation. In practicality, relevant observations must be made to what degree the implementation of conventions is made in the every-day working environment. This cannot be reasonably guaranteed. Therefore a further participation of the ILO bodies should be an important goal to achieve.²⁰⁷

2. Removal of Trade Preferences

The removal of preferences for all or certain products is regulated equally for all 3 schemes by the regulation in Article 15 paragraph 1 Council Regulation (EC) No 732/2008 in certain instances. Of these, the accusation of “serious and systematic infringement against the set-out principles in the agreements for human and worker’s rights (Part I Annex 3 paragraph a)” plays the most important part. Also here, the principle judgments of the UN and ILO are taken into account.²⁰⁸

Additionally, the Article 15 paragraph 2 Council Regulation (EC) No 732/2008 regulates a special opportunity for removal of special preferences on the GSP+ scheme especially when the mentioned agreements are no longer regarded in national judicial regulations or when these regulations are not actually implemented.

²⁰⁶Recital 12 and Articles 15-19 Council Regulation (EC) No 732/2008 of 22 July 2008; Rieck, H (note 15) at 208.

²⁰⁷Birk, R (note 118) at 78.

²⁰⁸Article 18 paragraph 3 Council Regulation 732/2008 of 22 July 2008.

A postponement of preferences is in principle affected for 6 month. This period can however be increased if the conditions set out by the EC are not implemented within the stipulated time frame. In the process, the Commission is supported by the removal of general preferences.²⁰⁹

During the whole examination the affected developing country is however given opportunity for participation. Although the GSP of the EC is unilaterally implemented with regards to preference removal, it is still designed to be co-operative so as to acknowledge the sovereignty of the respective country and to avoid the impression of imperialism.²¹⁰

This shows that the EC follows a potentially effective course within the GSP+ system to establish breaches and remove trade preferences.²¹¹ Such a withdrawal of preferences cannot be categorized as an embargo in the sense of WTO rights, but represents a removal of a voluntary-granted special treatment. Although this has knock-on effects, it is meant not to establish trade barriers. It is however questionable how high the threshold is set to re-establish previously granted preferences.

III. The Meaning of Preference Removal in Practice

Although the temporary removal of granted preferences has been explicitly set out, this has to date had little practical meaning. As previously mentioned, the EC prefers political dialogue and the implementation of incentive systems to negative conditionality or sanctions, so that the removal of trade preferences is only a last measure.²¹² Taking this into account, there were only two cases of preferences removed in the history of general preference systems of the EC, and both fall under the general arrangements of the GSP.

For the first, Myanmar was denied trade preferences under the GSP in 1997 for serious and systematic infringement of the prohibition against slavery. This was due to a complaint to the European Commission by the International Trade Union and the European Trade Union in 1995.²¹³

209 Article 27 Council Regulation (EC) No 732/2008 of 22 July 2008.

210 Hemker, F (note 49) at 283.

211 Ibid at 286.

212 Healy, M (note 112) at 81; Hemker, F (note 49) at 289.

213 Council Regulation (EC) No 552/97 of 24 March 1997.

The second case dealt with the infringement by Belarus of the rights to association and collective bargaining as set out by the ILO Agreement 81 and 98. Again the trade preferences under the GSP were suspended after a four year case.²¹⁴ In this the European Commission based their judgment on the statements of the International Worker's Conference and the ILO.²¹⁵ Both preference suspensions are still in place due to the political landscape in Myanmar and Belarus.²¹⁶ Unfortunately with both countries this form of sanctioning has not brought results. On the one hand, both countries have important trade relations with Russia and China, who provide economic support independent of worker's rights measures.²¹⁷ On the other hand, one could accuse the EC of un-coordinated trade politics. Many concurrent and overlapping trade measures cancel each other out in certain cases, an example which is the important textile trade agreement between Belarus and the EC which is still in place despite the withdrawal of general preferences. In this sense, the missing fundamental principles of European trade politics may in some areas impact negatively on the efficiency of conditional trade preferences. Also the GSP+ scheme in the implementation of set-out standards has not been very successful. In the adoption of beneficiaries into the GSP+, the EC has achieved a formal ratification of required agreements, although the cost thereof was that many serious human rights violations in some countries were consciously disregarded.²¹⁸

Nevertheless, Venezuela was removed from the list of beneficiaries of the current GSP in June 2009 as it had not successfully ratified the agreement against corruption as required by 2008.²¹⁹ Reports over continual infringements of fundamental working standards by GSP+ beneficiary countries and the hesitant reaction from the European Commission does beg the question if the basic goals of preference systems are not being diluted.²²⁰ As such, it needs to be seen if the positive measures of the EC can actually lead to implementation of conditions by beneficiary countries with technical and financial support, and if the unilateral incentive system of the GSP does prove itself as an effective addition to bi-and multilateral negotiations.²²¹

214 Council Regulation (EC) No 1933/2006 of 21 December 2006; Kryvoi, Y (note 29) at 229f.

215 Recitals 5, 8 and 9 of Council Regulation (EC) No 1933/2006 of 21 December 2006.

216 Recital 23 and Articles 28, 29 of Council Regulation (EC) No 732/2008.

217 Kryvoi, Y (note 29) at 242.

218 Hemker, F (note 49) at 289.

219 Decision 2009/454/EC of 11 June 2009.

220 Vandenberghe, J (note 117) at 573.

221 Hemker, F (note 49) at 289.

Chapter 5. Conclusion

The GSP of the EC sets, as the most comprehensive preference system in the world, decisive standards in world trade. With the GSP+ system, the EC has achieved in implementing the criteria of the Dispute Settlement Body and creating a more transparent and objective scheme of conditional special preferences, compared to the previous system. With this, the effort in implementing a precaution for sustainable development that the EC tries to bring to expression with the system is to be applauded. To achieve this in practice, a strengthening of technical support and *capacity building* as accompaniment will be necessary for the incentive system of the GSP+ scheme to achieve a contribution to sustainable development of beneficiary countries as envisioned by the EC, without merely acting as bonus for already economically developed countries.²²²

In this regard, it is important to take the varying ability of setting up efficient measures of developing countries' governments into account. The lack of social and environmental standards in certain developing countries constitutes an economical advantage compared to developed countries. However, the establishment of such standards is generally positive for the workforce but not necessarily beneficent for the economy, or in other words specific industries, of particular developing countries. It is the aim of the GSP of the EC to achieve economical growth while establishing efficient social and environmental standards at the same time. The EC should therefore ensure that assistance is provided to developing countries' governments by setting up useful interventions. Otherwise more developed countries would not be treated equally to others.

Of relevance is also to further rethink the cost regulations for the ratification and implementation of certain conventions. Countries that are applying for the GSP+ preferences have to meet these immediate costs at the first place and only benefit once the preferences are granted. This implements a high risk of discriminating countries that are able to cover those costs from others that are not.

Moreover, the consideration of the specific needs of developing countries in terms of development and improvement of their financial and trade situation should be improved. The needs of countries applying to be granted GSP+ preferences vary in some aspects

²²²Jessen, H "GSP Plus' – Zur WTO-Konformität des zukünftigen Zollpräferenzsystems der EG (2004) 9 in *Policy Papers on Transnational Economic Law* at 8.

enormously. This problem is pointed out above with regards to Conventions of Genocide and Apartheid in the case of Bolivia. Accordingly, the ratification and implementation of certain conventions can support development and improve the financial and trade situation of some applicants, while it is not beneficial to others in return.

Even though the GSP is basically unilateral in its structure, it is furthermore co-operatively implemented to respect the sovereignty of developing countries and to avoid neo-imperial misperceptions. However, on grounds of its unilateral character, the GSP does lead to a lack of bindedness that results in uncertainty on the part of developing nations with regards to future export planning and thus may counteract the incentives of preferences.

Anyway the question remains how the incentives may be increased to allow access for more countries. With particular regard to agricultural products, the EC should extend the market access especially 'in products of export interest to all developing countries, with special focus on reducing tariffs, tariff peaks, and tariff escalation'.²²³ One should consider extending the market-access commitments on a MFN basis to all countries.²²⁴ This could lead to the advantage, that developing countries, which are not LDCs, 'make across-the-board commitments to agricultural liberalization in return'.²²⁵

An increase of conditional preferences for the group seen as endangered may further contribute to the increase of social, human and environmental rights as connected to incentive regulations. If this is realistically reconciled with the WTO laws as an option is however currently unlikely. It has to be shown, if the EC can convincingly react to the criticism regarding the dishonest connection of foreign policy measures to conditional preference systems and administration of double standards an example of which were the drug preferences. At the same time it is urgently required, purely for sake of meaningful communication, that the requirements set upon developing countries, as established in get to be ratified agreements of the GSP+ scheme, are guaranteed by all member states of the EC in the same way.

Added to this, the EC needs to clarify how it intends to unify its general preference system and the connected special regulations in the framework of its trade policy as a whole. The increasing administration of overlapping measures such as preferential trade agreements

223Epps, TD & Trebillock, MJ 'Special and Differential Treatment in Agricultural Trade: Beating the Impasse' in Thomas C & Trachtman, JP *Developing countries in the WTO Legal System (2009)* at 362.

224Ibid.

225Ibid.

alongside the GSP will cause in instances a reciprocal negation of incentive mechanisms. Although the GSP of the EC are a sign of connecting human, workers and environmental rights with trade and developmental policies, the efforts to integrate non-trade political content in context of the WTO, should nevertheless be continued. The involvement of international trade partners in the context of multilateral negotiations would lead in the long term to a wider acceptance of such integration. For the EC itself, the question of how concrete association with developing countries that benefit from special regulations of the GSP+ scheme, can be furthered, should be asked. To date, the implementation of agreements has often taken place only on paper. For achieving the goals as set out, the use of positive incentive regulations as implemented by the EC has been more successful compared to trade sanctions. Furthermore, the increased import numbers under the GSP+ are a positive indication of its effectiveness. Only through the conditional pursuit of its criteria supported by attendant measures, will the GSP+ reach its goal as an instrument in the unified concept of a sustainable developmental politic.

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