nccr trade regulation
swiss national centre of competence in research

Working Paper No 2008/04

APRIL 2008

Do Social Clauses in Generalized Systems of Preferences Advance the Cause of Women?

Franziska Humbert*

ABSTRACT
While in the era of globalization, millions of women got paid employment in labour-intensive industries in developing countries, they still face precarious working conditions. Women rights violations persist. In recent years, there has been an increasing number of social clauses in trade regimes to address poor working conditions in developing countries. Generalized Systems of Preferences (GSPs) are the prominent among unilateral mechanisms. This paper analyzes the social clauses contained in the EU and US GSPs with a view to the question whether they are adequate means of tackling poor working conditions and advancing the cause of women.
The analysis of the EU GSP social clause is complemented by a case study highlighting the impact of the EU GSP social clause on labour and women rights in Sri Lanka.
The evaluation of the GSP social clauses is followed by an analysis of their WTO compatibility. The study concludes by suggesting a multilateral framework de lege ferenda for GSP social clauses.

KEY WORDS
Generalized Systems of Preferences, Human Rights, Women Rights, WTO, Trade, Sri Lanka.

* Franziska Humbert is consultant of the NCCR Individual Project "Human Rights" and employed by Oxfam Germany. Contact at fhumbert@oxfam.de.

NCCR TRADE WORKING PAPERS are preliminary documents posted on the NCCR Trade Regulation website (<www.nccr-trade.org>) and widely circulated to stimulate discussion and critical comment. These papers have not been formally edited. Citations should refer to a "NCCR Trade Working Paper", with appropriate reference made to the author(s).

FNSNF
FONDS NATIONAL SUISSE
SCHWEIZERISCHER NATIONALFONDS
FONDO NAZIONALE SVIZZERO
SWISS NATIONAL SCIENCE FOUNDATION

Die Nationalen Forschungsschwerpunkte (NFS) sind ein Förderinstrument des Schweizerischen Nationalfonds.
Les Pôles de recherche nationaux (PRN) sont un instrument d'encouragement du Fonds national suisse.
The National Centres of Competence in Research (NCCR) are a research instrument of the Swiss National Science Foundation.

Do Social Clauses in Generalized Systems of Preferences advance the Cause of Women?

1. INTRODUCTION 2

2. THE EU AND US GSP SOCIAL CLAUSE 4

2.1. The US GSP 4

2.1.1. Granting and Withdrawing of Tariff Preferences........ 4

2.1.2. The Reporting and Review Process........ 8

2.1.3. Application of the GSP Social Clause........ 9

2.1.4. Changes in Law and Practice 11

2.1.5. Value of US GSP Trade Preferences to Beneficiary Countries 13

2.1.6. Lessons from the US GSP 14

2.2. The EU GSP 16

2.2.1. Granting of Preferences under the Special Incentive Arrangement.. 17

2.2.2. Temporary Withdrawal 20

2.2.3. Application of the Special Incentive Arrangement 22

2.2.4. Value of EU GSP Trade Preferences to Developing Countries........ 26

2.2.5. Case Study: Sri Lanka........ 26

2.2.6. Lessons drawn from the EU GSP social clause 37

2.3. Conclusion........ 39

3. THE WTO LAW COMPATIBILITY OF THE EU AND US GSP SOCIAL CLAUSE 40

3.1. Exceptions under the Enabling Clause........ 41

3.2. Conclusion........ 46

4. CONCLUSION 47

1. Introduction

In the era of globalization, millions of women got paid employment in labour-intensive industries in developing countries. [1] However, most of these women workers face precarious working conditions. [2] They lack the right to organize and bargain collectively, they work overtime in unhealthy working conditions, they have low-paid and insecure jobs without sick leave, accident cover and maternity leave, and they often face sexual harassment. [3] If these trends continue, those women will not find their way out of poverty and gender inequality will rise.

In recent years, there has been an increasing number of social clauses [4] in trade regimes to address poor working conditions in producing developing countries. Generalized Systems of Preferences (GSPs) are the most frequently used unilateral trade mechanisms that condition trade preferences on a country's human rights or labour rights performance. [5] Under GSPs, developed countries grant reduced or zero tariff rates to selected products originating in certain developing countries. According to a resolution taken at the United Nations Conference of Trade and Development (UNCTAD) II in Delhi in 1968, their aim is 'to increase their export earnings, to promote their industrialization and to accelerate their rates of economic growth'. [6]

The US and EU GSPs contain both a set of, *inter alia*, labour and human rights conditionality, requiring countries to respect certain human and labour rights in order to be eligible or, as in the case of the EU, to get further preferences.

The following paper will analyze these so-called social clauses with a view to the question whether they are adequate means of tackling poor working conditions in developing producing countries and advancing the cause of women.

---

[1] Cf. OXFAM, «Trading Away Our Rights, Women Working in Global Supply Chains», Oxford: Oxfam International, 2004, p. 16.

[2] Ibid., p. 5.

[3] Ibid., p. 17, 18 and 25.

[4] For the purpose of this work, the term 'social clause' is broadly defined and refers to any linkage of trade rules and rules relating to labour or human rights in one international agreement or unilateral trade regime. See also GIJSBERT VAN LIEMT, «Minimum labour standards and international trade: Would a social clause work?» in International Labour Review, 128 (4) (1989), pp. 433 – 448, p. 434, who defines a social clause as a clause that 'aims at improving labour conditions in exporting countries by allowing sanctions to be taken against exporters who fail to observe minimum standards. A typical social clause in an international trade agreement makes it possible to restrict or halt the importation of products originating in countries, industries or firms where labour conditions are inferior to certain minimum standards.'

[5] Another example is the Caribbean Basin Initiative enacted by the US Caribbean Basic Economic Recovery Act, Public Law 98–67, see JORGE F. PEREZ-LOPEZ, «Worker Rights in the Omnisbus Trade and Competitiveness Act», in Labour Law Journal, 41 (4) (1990), pp. 222–234, p. 223.

[6] Resolution 21 (ii) taken at the UNCTAD II Conference in New Delhi in 1968, www.unctad.org/Templates7Page.asp?intIitemID=2309&lang=1 (visited 2 January 2008).

Although a closely related research question is how GSPs *per se* might have improved the situation of women workers in GSP beneficiary countries, this paper will focus on changes in law and practice due to the application of the GSP social clauses. Nevertheless will the trade rules of GSPs and resulting benefits for beneficiary countries briefly be considered.

When evaluating the effectiveness of these schemes, the criteria will be the architecture and content of the rules, the performance of the bodies applying these rules and the actual changes in law and practice following the application of GSP labour or human rights conditionality.

The analysis of the EU GSP will be complemented by a case study highlighting the impact of the EU GSP social clause on labour and women rights in Sri Lanka.

The evaluation of the GSP social clauses will be followed by an examination of their WTO compatibility. The study will conclude by suggesting some criteria for a multilateral framework *de lege ferenda* for GSP social clauses.

Finally, it should be recalled that major human rights treaties protecting women rights are the non-discrimination clauses in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Cultural and Social Rights (ICECSR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the ILO Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value No. 100 and Convention concerning Discrimination in Respect of Employment and Occupation No. 111. Other important ILO Conventions are the Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities No. 156 and the Convention concerning Home Work No. 177.

Indicators based on these conventions for a women rights impact assessment include gender equality in income or wages, maternity leave and childcare responsibilities, gender-based violence or sexual harassment, reproductive and health rights and infrastructure to reduce women and girls' time burdens. [7]

[7] Cf. UNDP/BRIDGE CSW Side Event, Expert Panel Discussion, GENDER SENSITIVE INDICATORS AND MEASURUREMENTS OF CHANGE, http://www.bridge.ids.ac.uk/reports/UNDP_BRIDGE_CSW.doc (visited 4 January 2008).

2. The EU and US GSP Social Clause

2.1. The US GSP

The US GSP was authorized under the Trade Act of 1974 and firstly instituted in 1976. It was amended by the Trade and Tariff Act of 1984, introducing requirements that beneficiary countries observe «internationally recognized worker rights». The rationale for adopting a clause on labour rights was to improve working conditions in developing countries and to slow down the exodus of jobs from the US. [8] The Trade Act of 2002 extended the scheme through 2006. The current regime will continue through 31 December 2008. [9]

2.1.1. Granting and Withdrawing of Tariff Preferences

The US GSP grants zero tariff rates to eligible products. An eligible product must be from a designated beneficiary developing country, must be eligible for GSP treatment and must meet the GSP rules of origin. [10]

A. Article Eligibility

An article to be exported under the US GSP must not be prohibited from receiving duty-free treatment und must meet the rules of origin.

According to 19 United States C. Sec. 2463 (b) (1) (A) of Subchapter 19 of the Trade Act of 1974, an import-sensitive product such as textile and apparel articles is not eligible under the GSP. Neither are agricultural products exceeding the in-quota quantity, 19 United States C. Sec. 2463 (b) (3).

These regulations are part of the reasons why the current US GSP is only of limited use for developing countries. For the textile and apparel sector are major export industries in developing countries. [11]

According to 19 United States C. Sec. 2643 (a) (2), an eligible article must be imported directly from a beneficiary developing country into the US and the sum of the cost or value of materials produced in the beneficiary country plus the direct costs of processing must equal at least 35 per cent of the appraised value of the articles at the time of entry into the US. As will be

---

[8] H. Rep. No. 98 – 1090, 98th Cong., 2nd Sess (1984) quoted in BENJAMIN DAVIS, «The Effects of Worker Rights Protections in United Trade Laws: A Case Study of El Salvador» in The American University Journal of International Law and Policy, 10 (3) (1995), pp. 1167–1214, p. 1172.

[9] Office of the USTR, «US Generalized System of Preferences, Guidebook», Washington 2007, http://www.ustr.gov/assets/Trade_Development/Preference_Programs/GSP/assest_upload_file412_8359.pdf (visited 3 January 2008), p. 3.

[10] UNCTAD, «GSP-Handbook on the scheme of the United States of America 2003, Including features of the African Growth and Opportunities Act», http://www.unctad.org/en/docs/itcdtsbmisc58rev1_en.pdf (visited 3 January 2008), p. 4.

[11] CF. OXFAM, «Stitched-Up, How rich-country protectionism in textiles and clothing prevents poverty alleviation», Briefing Paper No. 60 (2004), p. 7.

discussed later, these are rather strict rules preventing beneficiary countries from fully benefiting from the GSP.

Finally, pursuant to 19 United States C. Sec. 2463 (c), the President may withdraw duty-free treatment with respect to a product if competitive need limitations are exceeded, i.e. if a product is determined to be sufficiently competitive according to the limits set forth in Sec. 2463 (c). According to 19 United States C. Sec. 2463 (d), the President may grant a waiver with respect to any article to a beneficiary country if for example such waiver is in the national economic interest or there has been a historical preferential trade relationship between the US and such country. It is positive that the President shall take into account the worker rights clause. Considerations such as reasonable market access to such country also play a role, 19 United States C. Sec. 2643 (d) (29 (A). The latter provisions demonstrate that not only interests of developing countries in economic growth or their labour rights performance but also competitive interests of the US play a vital role in granting or withdrawing GSP benefits.

B. Country Eligibility

There are currently 133 designated beneficiary countries, territories and associations. [12]

Mandatory and discretionary criteria exist with regard to country eligibility.

Pursuant to 19 United States C. Sec. 2642 (b) (2) (G), the President is prevented from according GSP benefits to a country if «such country has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country (including any designated zone in that country)».

The wording «has not taken or is not taking steps» is very vague, neither defining legal or administrative measures, nor the level of implementation required. This vagueness represents a shortcoming since it could be a source of arbitrariness or even misuse in the implementation process.

It is however laudable that the provision applies to «any designated zone», i.e. also to Export Processing Zones (EPZs). [13] This is particularly important since, as will be seen, many human and labour rights violations occur in EPZs.

The term «internationally recognized worker rights» is not defined in the statute. It is however understood that the term includes the right to association, the right to organize and bargain collectively, freedom of compulsory labour, a minimum age for employment of children and acceptable working conditions with respect to minimum wages, hours of

[12] USTR, «US Generalized System of Preferences, Guidebook», p. 17.

[13] The ILO defines EPZs as 'Industrial zones with special incentives set up to attract foreign investors, in which imported materials undergo some degree of processing before being re-exported', cf. ICFTU, SARAH PERMAN, «Behind the Brand Names, Working Conditions and labour rights in export processing zones, 2004, http://www.icftu.org/www/PDF/EPZreportE.pfd (visited 15 November 2006).

work and occupational health and safety. [14] Although overlapping with the core labour standards as defined in the ILO Declaration on Fundamental Principles and Rights at Work, the term not only fails to refer to the ILO fundamental Conventions but completely falls short of referring to any anti-discrimination protection including the right to non-discrimination on the basis of sex. Thus, inequality of wages or other employment- or work-based discrimination is not reviewed under the US GSP social clause. The same holds true for gender-based violence or sexual harassment, maternity leave or other constraints due to childcare responsibilities. Rights related to such problems are not addressed by the worker rights clause of the US GSP. This is a major shortcoming given the fact that women produce most of the goods exported to the US under the GSP and often suffer daily discrimination, including sexual harassment and forced pregnancy testing. [15]

Although women may in theory also benefit from the enforcement of the right to organize or occupational health and safety, in practice they are often excluded from the right to organize. [16] Thus, a gender-based impact assessment of the implementation of such rights is needed. In sum, the US GSP worker rights clause falls short of adequately protecting women rights. Besides a gender-based impact assessment, it would be recommendable to include into the worker rights clause the ILO Conventions on non-discrimination No. 100 and 111, the ILO Conventions No. 156 and 177 to address childcare responsibilities and homework and, most importantly, CEDAW, which protects most comprehensively women rights, addressing also sexual harassment. It should however be noted that the US still has to ratify CEDAW. [17]

Moreover, it should be highlighted that according to 19 United States C. Sec. 2462 (b) (2), the President may designate a country as a beneficiary country despite worker rights violations if this is in the national economic interest. This is another proof that the national economic interest of the US takes precedence when applying the worker rights clause.

There are also discretionary criteria to take into account when classifying a country as a beneficiary country. In accordance with 19 United States C. Sec. 2462 (c), besides economic criteria such as the economic development, the President shall again take into account «whether or not such country has taken or is taking steps to afford to workers in that country internationally recognized worker rights». Thus in theory, the President is granted some discretion when considering such factors. However, since the worker rights clause is at the same time a mandatory criterion, the President is prevented from using this discretion. Yet, as already stated above, the vagueness of the wording leaves some room for interpretation.

[14] UNCTAD, «GSP Handbook», p. 24.

[15] HUMAN RIGHTS WATCH, «US: Congress must protect women workers in trade law», 2006, http://hrw.org/english/docs/2006/11/15/usdom1491_txt.htm (visited 18 October 2007).

[16] GLOBAL POLICY FORUM, BAMA ATHREYA, «Trade is a Women's Issue», 20 February 2003, http://www.globalpolicy.org/socecon/labor/2003/0220women.htm (visited 18 October 2007), p. 3.

[17] Cf. http://www.un.org/womenwatch/daw/cedaw/states.htm.

As to the content of the worker rights clause, the same what has been said above holds true: lacking any anti-discrimination protection or other gender-sensitive regulation, women rights are not adequately protected under this clause.

C. *Graduation of a Beneficiary Country*

According to 19 United States C. Sec. 2642 (e) of Subchapter V of the Trade Act of 1974, if the President determines a country as a «high-income» country in accordance with the official statistics of the IBRD, such country must graduate from the programme. Such graduation is mandatory. Without examining in detail whether such graduation rule is best suited to support economic growth of developing countries, it should be stated that at least objective factors such as official statistics used by the IBRD are used to determine the «high income» status.

According to 19 Unites States C. Sec. 2462 (d) (1) in conjunction with Sec. 2461, the President may also withdraw country designation because of advances of a beneficiary country in its economic development or trade competitiveness. He shall also consider factors such as reasonable market access and worker rights as stated in Sec. 2462 (c). The GSP bodies generally also review the overall economic interest of the US, including the effect continued GSP treatment would have on the relevant US producers, workers and consumers. [18] Thus, such discretionary graduation very much depends on economic and competitive interests of the US. It is also in line with the rationale of the US GSP social clause to slow down the exodus of jobs from the US. Since such graduation neither is based on a clear threshold, it risks being applied arbitrarily. Put it more bluntly, with the words of a legal scholar, exporting developing countries are placed at the mercy of domestically and unilaterally defined thresholds by importing industrialized countries. [19] Therefore, the question is how to accommodate competitive interests of the US and the need for objective and transparent rules including thresholds based on objective data. It is however positive that worker rights shall be taken into account. To examine this question in detail is however beyond the scope of this study.

Finally, according to 19 United States C. Sec. 2462 (d) (2), the President may withdraw any beneficiary country's duty-free treatment if he or she determines that as a result of changed circumstances in the country it would be barred from designation as a beneficiary developing country according to subsection (b) (2); this subsection upholds mandatory criteria including worker rights. Although this withdrawal clause is principally to be welcomed, it contains the same shortcomings with respect to the worker rights clause as mentioned above: women rights are not adequately protected.

[18] USTR, «US Generalized System of Preferences, Guidebook», p. 13.

[19] THOMAS COTTIER, «From Progressive Liberalization to Progressive Regulation in WTO Law» in Journal of International Economic Law, 9 (4) (2006), pp. 779-821, p. 782.

2.1.2. *The Reporting and Review Process*

A. *Reporting*

Pursuant to 19 United States C. Sec. 2465 (c), the President has to submit an annual report on the protection of internationally recognized worker rights in each beneficiary country. This is done by including a passage on this matter in the State Department's annual Country Report on Human Rights Practices. [20] Such reporting is an important precondition for implementing the worker rights clause of the GSP. It would however be recommendable to refer to decisions and reports of international UN and ILO bodies to draw upon their expertise when drafting such a report.

B. *The Petition and Review Process*

This section will briefly examine the petition and review process in order to find out whether it could be a valuable tool for the improvement of women rights in beneficiary countries if a revised worker rights clause included anti-discrimination protections.

Sec. 2007.0 (b) of GSP 15 CFR Part 2007 regulates that any person may file a request for a review of the GSP status of any beneficiary country with respect to any of the designation criteria listed in 19 United States C. Sec. 2641 (b) and (c), i.e. the mandatory and discretionary criteria regarding eligible countries including worker rights. The request is permitted for review if it contains sufficient information on the alleged violations of worker rights. [21] It is positive that upon a rejection of a request, a written statement of the reasons must be given. [22]

It is noteworthy that there must not be a causal link between the labour rights violation and job losses in the US, as may suggest the rationale of the GSP law or like other unilateral trade regimes such as the Caribbean Basin Initiative. [23]

It is also notable that the person filing the request does not need to have an economic interest in the matter.

If the subject matter of the request has already been reviewed pursuant to a previous request, the new request must include substantial new information that warrants further consideration of the issue, Sec. 2007.0 (b) of GSP 15 CFR Part 2007. According to Sec. 2007.0 (f), the Trade Policy Staff Committee (TPSC) may also request a review on its own motion.

The GSP Subcommittee conducts the first level of interagency consideration. [24] The GSP Subcommittee consists of representatives from the Department

[20] Cf. http://www.state.gov/g/drl/hr/c1470.htm (visited February 2007).

[21] CF. Sec. 2007.2 (a) of GSP 15 CFR Part 2007.

[22] Ibid.

[23] See above p. 4

[24] Sec. 2007.2 (f) of GSP 15 CFR Part 2007.

of Agriculture, Commerce, the Interior, Labour, State and the Treasury. [25] This is to be welcomed since the labour staff is able to ensure that labour issues are dealt with correctly.

The TPSC makes further investigations including public hearings and makes recommendations to the United States Trade Representative (USTR), who in turn advices the President whether to change the status of eligible beneficiary countries. [26]

According to Sec. 2007.3 (a) of GSP 15 CFR Part 2007, reviews of requests shall be conducted at least once each year with a deadline of acceptance for review on June 1. The results are announced in April the following year and implemented on July 1, Sec. 2007.3 (a) of GSP 15 CFR Part 2007.

The existence of a review process is generally to be welcomed. However, it also has a number of limitations. Firstly, although the bodies initially reviewing the petition include representatives from the Department of Labour, the USTR makes the final decision. This potentially leads (and in the past has led, see the examples in the following sections) to a biased final decision in favour of trade concerns. Secondly, although workers' interests in foreign countries are concerned, only US administrative bodies take part in the process. Thirdly, the annual review cycle is very strict. Since violations of workers' rights can happen any time, one should be able to file petitions at any time during the year.

2.1.3. Application of the GSP Social Clause

One major concern regarding the US GSP social clause has been its biased application. The following sections will examine the most important shortcomings.

A. Lack of International Standards

As mentioned above, one major criticism is the lack of international standards. [27] The GSP social clause does refer neither to ILO nor to UN Conventions.

In practice, the GSP bodies have differentiated between human rights and labour rights by specifically rejecting petitions that address human rights. For example, the GSP Subcommittee has qualified the murder of a trade unionist as a human rights violation and rejected the respective petition. [28]

---

[25] US GENERAL ACCOUNTING OFFICE, «International Trade, Assessment of the Generalized System of Preferences Programme», GAO/GGD -95.9, http://www.gao.gov/archive/1995/gg95009.pdf (visited 22 December 2006), p. 22.

[26] Cf. Sec. 2007.2 (g) and (h) of GSP 15 CFR Part 2007.

[27] Cf. PHARIS J. HARVEY, «US GSP Labour rights Conditionality: 'Aggressive Unilateralism' or a Forerunner to Multilateral Social Clause?» in International Labour Rights Fund Publications, www.laborrights.org/publications/usgsp.html (visited 14 December 2006).

[28] US GENERAL ACCOUNTING OFFICE, «International Trade», p. 119; DAVIS, «The Effects of Worker Rights Protections in United Trade Laws», p. 1186 et seq.

B. *Rejection of Petitions*

Overall, the petition system has been used frequently. From 1985 to 1993, 80 labour rights petitions were filed. However, 46 of these petitions were rejected. [29] According to Schneuwly, by 2001, 100 petitions were submitted of which approximately half were rejected. [30] This high number of rejections indicates a certain reluctance to use the review process.

C. *Political and Economic Bias*

The US GSP has been heavily criticized for its politically and economically biased application. [31] This was especially the case during the 1980s and early 1990s when petitions were accepted or rejected according to strategic alliances. [32]

As indicated in the analysis of the actual GSP provisions, the national economic interest often takes precedence over labour rights considerations. It has been stated that as a general rule, US foreign direct investment was up to 50 per cent higher in countries for which petitions were rejected than in those for which petitions were accepted. [33]

In order to make the review process more objective and predictable, it has rightly been proposed that guidelines should be published that set forth detailed requirements for a petition to be rejected. [34]

D. *Removal of GSP Status*

So far, 12 beneficiary countries have lost their status as beneficiary country, i.e. Romania, Myanmar, Central African Republic, Chile, Maldives, Mauritania, Paraguay, Sudan and Syrian Arabic Republic. [35] This is not much in light of the fact that 133 countries are accorded GSP status, many of which have bad labour rights records such as Uganda or Bangladesh. Some

---

[29] US GENERAL ACCOUNTING OFFICE, «International Trade», p. 109.

[30] PHILIPPE SCHNEUWLY, «Sind Handelssanktionen ein geeignetes Mittel zur Durchsetzung von Arbeitsnormen? Eine Untersuchung der Wirksamkeit der Sozialklausel im US GSP» in Außenwirtschaftsrecht, 58 (2003), pp. 121–144, p. 125.

[31] GEORGE TSOGAS, «Labour Standards in the Generalized Systems of Preferences of the European Union and the United States» in European Journal of Industrial Relations, 3 (6) (2000), pp. 349–370, p. 357; PHILIP ALSTON, «Labour rights Provisions in US Trade Law, 'Aggressive Unilateralism'» in LANCE A. COMPA/STEPHEN F. DIAMOND (eds.), Human Rights, Labour Rights and International Trade, Philadelphia: University of Pennsylvania Press, 1996), pp. 71–95; THERESA A. AMATO, «Labour Rights Conditionality: United States Trade Legislation and the International Trade Order» in New York University Law Review, 65 (1) (1990), pp. 79–125, p. 155 et seq.; DAVIS, «The Effects of Worker Rights Protections in United Trade Laws», p. 1213, 1214.

[32] For example, petitions regarding the torture of trade unionists in El Salvador or petitions in Colombia were rejected while petitions in Nicaragua directly led to the removal of GSP benefits, cf. TSOGAS, «Labour Standards in the Generalized Systems of Preferences», pp. 358 and 360; HARVEY, «US GSP Labour rights Conditionality», p. 3.

[33] SCNEUWLY, «Sind Handelssanktionen ein geeignetes Mittel zur Durchsetzung von Arbeitsnormen?», p. 128.

[34] US GENERAL ACCOUNTING OFFICE, «International Trade», p. 122.

[35] UNCTAD, «GSP Handbook», p. 13.

government representatives have argued that it is more effective to use the labour rights provision to encourage countries to improve their labour standards rather than to remove the GSP status and lose leverage. [36]

E. *Other Criticisms*

Some labour rights advocates are in favour of separating the labour rights petition review from the product review in order to allow for an adequate period of investigation and negotiation with the beneficiary country. [37] It would indeed be a good idea to make *in situ* visits and to negotiate with the country concerned in order to combat the causes for the labour rights violations and to help it with the implementation of labour rights.

It also has been stated that the wording «taking steps» has often been used to the detriment of labour rights. [38] Therefore, labour rights advocates have argued that the statute should require full compliance with all five «internationally recognized worker rights».

Furthermore, it has been criticized that cases are being held over too long a period. [39] In the case of Bangladesh, as of January 2004, its GSP status has not been removed although the Government has been breaking its promise to improve labour standards in its EPZ permanently since a petition was submitted in 1991. [40] In such cases, it is indeed questionable what the use of the petition system is if workers are denied their rights over such a long period.

Finally, implementation of GSP law has often been considered hypocritical since the US themselves only has ratified two of the fundamental ILO Conventions, it is ILO Convention No. 105 on forced labour and ILO Convention No. 182 on the Worst Forms of Child Labour. [41]

Despite these criticisms, so far no reform of the GSP laws has taken place.

2.1.4. *Changes in Law and Practice*

In a number of cases, the application of GSP labour rights provision indeed had a positive impact:

The Dominican Republic made the use of debt bondage illegal in a response to the threat of losing its GSP status for sugar exports. [42] In Peru, trade unionists have stated that their government reacted more seriously to GSP

---

[36] US GENERAL ACCOUNTING OFFICE, «International Trade», p. 112.

[37] Ibid., p. 119.

[38] HARVEY, «US GSP Labour rights Conditionality», p. 5.

[39] US GENERAL ACCOUNTING OFFICE, «International Trade», p. 120.

[40] AFL-CIO, «Statement by the AFL-CIO on its Generalized System pf Preferences (GSP) petition to Establish Freedom of Association and Other Core Labour Standards in Bangladesh's Export Processing Zones», www.aflcio.org/mediacenter/prsptm/pr01152004.cfm?RenderForPrint=1, (visited 10 May 2004).

[41] CF. http://www.ilo.org/ilolex/english/docs/declworld.htm (visited 13 January 2008).

[42] HARVEY, «US GSP Labour rights Conditionality», p. 6.

petition than to the criticism of the ILO Committee on Freedom of Association or the ILO Committee of Experts. [43] In Chile, the removal of its GSP status caused democratic reforms. [44] In Paraguay and the Central African Republic, GSP trade preferences were removed and later reintroduced because of the improvement of labour standards. [45] The Guatemalan Government reformed its labour code in order to maintain its GSP status. [46] Following a petition filed in 1990, a minor success was achieved in El Salvador when the country implemented a new labour code in 1994. [47] However, the law fell short of the recommendations made by the ILO. [48] In Thailand in the year 2000, the Government finally re-introduced a labour law instituting the core labour standards in state enterprises – the corresponding petition having been filed in 1992. [49] The Indonesian Government decided to introduce a new labour law including a higher minimum age for child work, i.e. 15 years, in 1997 following a denial by the US Government to grant a competitive need limit waiver. [50] In 2006, the TPSC closed the case on the protection of worker rights in Uganda, deciding that the country had made considerable progress. [51]

These cases demonstrate that the removal of GSP status or the mere threat of it may contribute to the improvement of the labour rights situation. Hence, labour rights conditionality may work. Other studies came to the same conclusion, affirming that the US GSP provides evidence that non-protectionist threats of trade measures can be effective instruments for the implementation of labour standards. [52]

However, it should be borne in mind that some cases were pending over an excessive amount of time before the case was closed and the change occurred. In addition, it is also questionable whether the change in law or in practice can always be exclusively attributed to the application of the GSP clause.

Finally, the US Government was satisfied that the GSP contributed to a greater awareness of labour rights in beneficiary countries. [53]

---

[43] Ibid., p. 5.

[44] Ibid.

[45] US GENERAL ACCOUNTING OFFICE, «International Trade», p. 112.

[46] TSOGAS, «Labour Standards in the Generalized Systems of Preferences», p. 359.

[47] DAVIS, «The Effects of Worker Rights Protections in United Trade Laws», pp. 1200 et seq., p. 1213.

[48] Ibid., pp. 1213 and 1208.

[49] USTR, «The President's 1997 Annual Report on the Trade Agreements Programme», www.ustr.gov/html/1997tpa_part8.html (visited 10 May 2004), p. 186; USTR, «The President's 2000 Annual Report on the Trade Agreements Programme», http://www.ustr.gov/asset/Document_Library/Reports_Publications/2001/2001_TRade_Policy_Agenda/asset_upload_file931_6494.pdf (visited 28 December 2006), p. 134.

[50] USTR, «The President's 1997 Annual Report», p. 183.

[51] USTR, «Generalized System of Preferences (GSP): Notice Regarding the 2006 Annual Review for Products and Country Practices», in Federal Register, 72 (10) 17 January 2007.

[52] SCNEUWLY, «Sind Handelssanktionen ein geeignetes Mittel zur Durchsetzung von Arbeitsnormen?», p. 138.

[53] US GENERAL ACCOUNTING OFFICE, «International Trade», p. 101.

2.1.5. Value of US GSP Trade Preferences to Beneficiary Countries

Obviously, the potential impact of the GSP worker rights clause to improve the labour rights performance of beneficiary countries depends on the value of trade preferences under the US GSP to beneficiary countries. According to a recent study, already a share of 0.5 per cent of GSP exports in a country's gross national income might be sufficient for the country to react to threats of GSP status removal. [54] The following section therefore gives a short overview over the value of GSP trade preferences to beneficiary countries. [55]

After the Uruguay Round, there was a general belief that the value of tariff preferences to developing countries would decline due to MFN liberalization. [56] However, whilst concerns on the so-called «preference erosion» also determine the debate in the Doha Round [57], GSPs are still important for developing countries because tariff reductions did hardly occur in sectors of interest to developing countries. For example, whilst the average tax on industrial products is 3.8 per cent, the average tax imposed by developed countries on textiles and clothing imports from developing countries is 12 per cent. [58] Tariff peaks may even impose a 30 or 40 per cent tariff. [59] In addition, the tariffication process for agricultural products made it possible for developed countries to grant preferences. [60] Most importantly, the Doha Round currently being at an impasse, GSPs will continue to play an important role. Having said this, it should however be noticed that GSPs do not anymore offer the «most preferred» status. Better preference schemes are for example the US African Growth and Opportunity Act (AGOA) of 2000, which grants beneficiary Sub-Saharan countries duty-free and quota-free market access for essentially all products including apparel made in Africa from US yarn and fabric. [61]

In addition, the impact of the US GSP on developing countries is limited since, as already mentioned, products of interest to developing countries such as agricultural products, textiles and apparel products are not eligible under the US GSP. A striking example is the clothing industry, representing

---

[54] SCNEUWLY, «Sind Handelssanktionen ein geeignetes Mittel zur Durchsetzung von Arbeitsnormen?», p. 138.

[55] For a thorough discussion of trade preferences, preference erosion and the development potential of preference regimes see however *inter alia* BERNHARD HOEKMAN/CAGLAR ÖZDEN, «Trade Preferences and Differential Treatment of Developing Countries: A selective Survey», World Bank Policy Research Working Paper 3566, April 2005; BERNHARD HOEKMAN/WILLIAM J. MARTIN/CARLOS A. PRIMO BRAGA, «Preference Erosion: The Terms of the Debate», World Bank, May 2006 (on file with the author); DOUGLAS C. LIPPOLDT, PRZEMYSLAW KOWALSKI, «Trade Preference Erosion, Potential Economic Impacts», OECD Trade Policy Working Papers No. 17, 2005.

[56] UNCTAD, «Trade Preferences for LDCs: An Early Assessment of Benefits and Possible Improvements», UNCTAD/ITDC/TSB/2003/8, (New York and Geneva: UNITED NATIONS, 2003), www.unctad.org/en/docs//itcdtsbmisc58rev1_en.pdf (visited 13 December 2006), p. p. ix.

[57] HOEKMAN/MARTIN/PRIMO BRAGA, «Preference Erosion», p. 1.

[58] OXFAM, «Stitched-Up», p. 12.

[59] Ibid.

[60] Ibid.

[61] HOEKMAN/ÖZDEN, «Trade Preferences and Differential Treatment of Developing Countries», p. 9.

over 50 per cent of all exports in Bangladesh, Cambodia, Pakistan, El Salvador, Mauritius, Sri Lanka and the Dominican Republic. [62] By contrast, as just said, beneficiary countries under the AGOA may be granted trade preferences with respect to textile or clothing products. [63] Whilst the AGOA had been expected to boost real trade opportunities for Africa [64], the recent UNCTAD study found that only 4 per cent of all exports from LDCs were granted trade preferences under the US GSP, excluding petroleum from Angola. [65] The USTR 2006 report on the implementation of the AGOA even found that there was a decrease by 16 per cent in non-oil AGOA imports due to increased global competition in the apparel sector resulting from the termination of the Multifibre Arrangement. [66]

Like other authors[67], the UNCTAD study also found that the rules of origin requirements and related administrative procedures were one of the main reasons for the under-utilization of existing trade preferences. [68] It should however be noted that on the other hand, with rules of origin in place, there is a potential for substantial value to be added in Africa. [69]

Another reason for the reduction of the value of trade preferences to developing countries is the increased country graduation of more advanced developing countries. [70] Inama maintains that the application of graduation on the basis of criteria that are more transparent and objective in their requirements would help to reduce adverse impacts on the effectiveness of GSP schemes. [71] In the light of the above mentioned rather discretionary criteria that clearly favour US national economic interests, this may indeed be true. A full discussion of this issue is however beyond the scope of this study.

In sum, at the current state of affairs, there is still some potential for GSPs to generate significant trade effects. However, reforms are needed to increase product and country coverage. Under this condition, the US GSP may be an efficacious means of improving labour rights.

2.1.6. Lessons from the US GSP

[62] OXFAM, «Stitched-Up», p. 7.

[63] STEFANO INAMA, «Trade Preferences and the World Trade Organization Negotiations on Market Access» in Journal of World Trade, 37 (5) (2003), pp. 959–976, p. 964.

[64] LIPPOLDT/KOWALSKI, «Trade Preference Erosion, Potential Economic Impacts», p. 11.

[65] UNCTAD, «Trade Preferences for LDCs», p. xi.

[66] USTR, «2006 Comprehensive Report on US Trade and Investment Policy toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act», www.ustr.gov/assets/Trade_Development/Preference_Programs/AGOA/asset_upload_file997_3744.pdf (visited 7 February 2007), p. 4.

[67] See for example Stevens and Kennan (2004) quoted in LIPPOLDT/KOWALSKI, «Trade Preference Erosion, Potential Economic Impacts», p. 14.

[68] UNCTAD, «Trade Preferences for LDCs», p. xi; see also INAMA, «Trade Preferences», p. 971.

[69] LIPPOLDT/KOWALSKI, «Trade Preference Erosion, Potential Economic Impacts», p. 15.

[70] INAMA, «Trade Preferences», p. 974.

[71] Ibid.

The main lesson from the US GSP is that labour rights conditionality may work but so far, the US GSP social clause did not improve the situation of women and suffered from a political and economic bias.

In particular, the following lessons may be drawn.

The major flaw with regard to the social clause is the lack of any anti-discrimination protection as well as any gender-sensitive regulation. Moreover, the US GSP law neither does refer to international law such as the UN and ILO Conventions. Besides a gender-based impact assessment of the worker rights included in the social clause, it would be recommendable to incorporate into the worker rights clause the ILO Conventions on non-discrimination No. 100 and 111, the ILO Conventions No. 156 and 177 to address childcare responsibilities and homework and, most importantly, CEDAW, which protects most comprehensively women rights, addressing also sexual harassment.

Furthermore, the general wording of the worker rights clause is very vague which represents a risk of abuse. It should thus be more detailed, prescribing more concrete steps to be taken by a government. Especially the national economic interest clause gives the implementation bodies too much discretion. There should also be some guidelines when to accept or reject a petition. The discretionary wording in the past has led to a discriminatory and biased application of the worker rights clause. However, so far the worker rights clause has seldom been used in a protectionist way. [72]

A less biased application could be ensured by involving labour staff and integrate more the country concerned as well as case law of international organizations such as the UN or ILO.

Despite the shortcomings mentioned, it should be acknowledged that in almost all cases where the GSP status was removed, national labour legislation improved. With respect to the small numbers of approved petitions, the argument by government officials should be considered that often, its is more effective to use labour rights provisions to encourage countries to improve their labour standards rather than to impose punitive trade measures and lose leverage. [73]

As regards the economic rules with respect to article eligibility including rules of origin or country graduation, it should be highlighted that objective non-discriminatory and transparent rules are needed that duly take into account the interests of beneficiary countries.

In sum, the question arises whether unilateral rules implementing labour rights conditionality are adequate since unilateral action always tends to be dependent on foreign political and economic relations and thus be biased. It might be recommendable to introduce a multilateral framework for such mechanisms, ensuring an objective implementation of labour rights conditionality. Unilaterally imposed trade measures, if not applied

---

[72] THOMAS GREVEN, «Social Standards in Bilateral and Regional Trade and Investment Agreements», Occasional Papers No. 16, Geneva: Friedrich-Ebert-Stiftung, 2005, p. 14.

[73] US GENERAL ACCOUNTING OFFICE, «International Trade», p. 112.

objectively, risk distorting trade relations and undermining the rules-based international trade system of the World Trade Organization (WTO). At the very least, unilateral imposed trade measures should be subject to an effective appeal mechanism. The same holds true for GSP tariff rules.

2.2. The EU GSP

The European Union firstly introduced its GSP in 1971. [74] The current system is based on Council Regulation (EC) 980/2005 [75] and replaces the expired system based on Council Regulation (EC) 2501/2001 [76], which ended in 2005 [77]. The current scheme provides tariff preferences to certain developing countries and consists of general arrangements, a special incentive arrangement for sustainable development and good governance, and special incentive arrangements for least developed countries, also referred to as the Everything But Arms (EBA) initiative. Special incentive arrangements for the protection of labour rights were first introduced in 1998 by Council Regulation (EC) 3281/94. [78] The new special incentive arrangement, also known as GSP plus, follows the approach of the previous labour rights scheme and intends to promote the objectives of sustainable development, in particular the protection of labour rights and of the environment. [79] Art. 3 (2) of the Treaty of the European Union requests the linkage between trade policies with development. However, it is assumed that through the GSP plus, the EU also attempts to improve its political and economic foreign alliances with a view to gaining a good position in international power relations, especially with regard to the US. [80]

The current GSP is granted to 178 beneficiary countries. [81]

[74] EUROPEAN COMMISSION, «Generalized System of Preferences, User's Guide to the European Union's Scheme of Generalized Tariff Preferences», 2003, http://europa.eu.int/comm/trade/issues/global/gsp/gspguide.htm (visited December 2006).

[75] Council Regulation (EC) No. 980/2005 of 27 June 2005 applying a scheme of generalized tariff preferences, OJ 2005 L 169/1.

[76] Council Regulation (EC) No. 2501/2001 of 10 December 2001, OJ 2001 L 346/1 applying a scheme of generalized tariff preferences.

[77] Council Regulation (EC) No. 2501/2001 has been amended by Council Regulation (EC) No. 2211/2003 of 15 December 2003, OJ 2003 L 332/1, which extended the scheme to 31 December 2005.

[78] Council Regulation (EC) 328/94 of 19 December 1994, OJ 1994 L 348/1.

[79] COMMISSION OF THE EUROPEAN COMMUNITIES, «Proposal for a Council Regulation applying a scheme of generalized tariff preferences for the period 1 January 2002 to 31 December 2004», COM(2001)293 final, 2001/0131(ACC), p. 2.

[80] UDO DIEDRICHS, «Lateinamerikapolitik» in Jahrbuch der Europäischen Integration 2005, 2006, p. 258 et seqq., quoted in FABIAN HEMKER, «Handelspolitik und Menschenrechte: Das Allgemeine Präferenzsystem Plus (ASPplus) der Europäischen Union» in MenschenRechtsMagazin, (3) (2006), pp. 281–291, p. 288.

[81] JANAKA WIJAYASIRI, «Utilization of Preferential Trade Arrangements: Sri Lanka's Experience with the EU and US GSP Schemes», Asia-Pacific Research and training Network on Trade, Working Paper Series, No. 29, January 2007, p. 7.

When analyzing the implementation of the EU social clause, cases under the previous system will also be drawn upon since the current system only entered into force in 2006.

2.2.1. *Granting of Preferences under the Special Incentive Arrangement*

Under the general arrangements, products originating in beneficiary countries listed as non-sensitive, except for agricultural components, are entirely suspended from tariff duties. [82] Similar to the US GSP, many agricultural products are classified as sensitive and thus excluded from zero tariffs. [83] This represents a disadvantage for developing countries.

According to Art. 7 (2) of Council Regulation (EC) 980/2005, Common Customs Tariff *ad valorem* duties on products listed as sensitive products are granted a tariff reduction of 3.5 per cent. This reduction is 20 per cent for textiles and clothing. Thus, in contrast to the US scheme, textiles and clothing are covered, which represents a major advantage.

In accordance with Art. 7 (4) of Council Regulation (EC) 980/2005, specific duties on sensitive products shall be reduced by 30 per cent.

Under the special incentive arrangement for sustainable development and good governance, Common Customs Tariff *ad valorem* duties shall be suspended on all products listed in Annex II if the products originate in a country included in this special incentive arrangement. [84] Art. 8 (2) of Council Regulation (EC) No. 980/2005 provides for a suspension of specific duties for such products, except for products for which *ad valorem* duties also apply. In contrast to the US GSP law, the EU thus uses a so-called «more carrot» or positive conditionality approach [85], providing incentives instead of punitive measures. [86]

According to Art. 14 (1) of Council Regulation (EC) No. 980/2005, tariff preferences accorded to the beneficiary country under Art. 7 and 8 can be withdrawn if the respective country holds more than 15 per cent of the EU market share for three consecutive years of any good imported from all beneficiary countries. The ceiling for textiles is 12.5 per cent of the market share. While these graduation rules may be more objective than those of the US GSP, they also highlight the tension between competitive interests of the EU and the interests of developing countries. The question is therefore whether unilaterally imposed incentive schemes are the most adequate. In the view of Oxfam, this means that a beneficiary country may be graduating

---

[82] Art. 7 (1) of Council Regulation (EC) No. 980/2005.

[83] Annex II of Council Regulation (EC) No. 980/2005.

[84] Art. 8 (1) of Council Regulation (EC) No. 980/2005.

[85] BARBAR BRANDTNER/ALLAN ROSAS, «Trade Preferences and Human Rights», in PHILIP ALSTON/MARA BUSTELO/JAMES HEENAN (eds.), The EU and Human Rights, Oxford: Oxford University Press, pp. 699–722, p. 718; LORAND BARTELS, «The WTO Enabling Clause and Positive Conditionality in the Community's GSP Programme», in Journal of International Economic Law, 6 (2) (2003), pp. 502–532, p. 508.

[86] However, the EU also uses negative conditionality, see below p. 4.

out of GSP just as it begins to get its food on the ladder. [87] These graduation rules will mostly have an impact on India and China due to their large market shares in textile and clothing. [88]

Art. 9 (1) of Council Regulation (EC) No. 980/2005 is at the core of the special incentive arrangement, regulating that additional tariffs may be granted to countries that first of all have ratified and effectively implemented 16 human rights conventions including the ICCPR, the ICESCR, CEDAW and ILO Convention No. 100 and 111. Secondly, beneficiary countries must have ratified and effectively implemented at least seven conventions from a choice of conventions on the environment and governance principles. Thirdly, such countries must commit themselves to ratify and effectively implement by December 2008 the remaining conventions and have undertaken to maintain the ratification of conventions and their implementing legislation and measures, and accept regular monitoring and review of its implementation record in accordance with the implementation provisions of the conventions ratified.

Hence, with regard to women rights, the EU GSP is much more advanced than the US GSP, which does not incorporate any of these treaties. The high number of conventions from different areas of law are evidence of a more coherent approach than the former EU GSP that differentiated between special incentive arrangements for labour, environment and drugs. [89] On the other hand, under this coherent approach, it might be more difficult for countries to be eligible since they need to ratify and implement much more international conventions. Under the previous special incentive arrangements for labour rights, beneficiary countries needed to implement «only» the ILO core Conventions as set out in the ILO Declaration on Fundamental Principles and Rights at Work. [90]

Another advantage over the US GSP is the requirement to «effectively implement» the conventions rather than «taking steps to afford to workers internationally recognized worker rights».

According to Art. 9 (3) of Council Regulation (EC) No. 980/2005, a beneficiary country under the special incentive arrangement must be vulnerable, i.e. it must not be classified by the World Bank as a «high income» country during three consecutive years and its economy must be poorly diversified. This is case if its five largest sections of its GSP-covered exports to the EU represent more than 75 % in value of its total GSP-covered imports, and less than 1 per cent in value of total GSP-covered imports. This condition of vulnerability clearly is a major limitation. This regulation is

---

[87] OXFAM, JO LEADBEATER, quoted in TRADE LAW CENTER FOR SOUTHERN AFRICA (TRALAC), «New EU GSP scheme explained», World Bank Press Review, 25 October 2004, www.tralac.org/scripts/content.php?id=3008 (visited 17 April 2006).

[88] TRALAC, «New EU GSP scheme explained».

[89] Cf. Council Regulation (EC) 2501/2001.

[90] Ibid.; The ILO core Conventions are the Conventions on forced labour No. 29 and 105, child labour 138 and 182, non-discrimination No. 100 and 111 and freedom of association and the right to collective bargaining No. 87 and 98.

similar to the one of the US GSP mandatory graduation rules. However, under the US GSP, a country must not be poorly diversified for getting zero tariffs. Only under the discretionary graduation rules, economic interests of the US are taken into account. On the other hand, the vulnerability rules only apply under the special incentive arrangement. These rules exclude countries such as China, Brazil, India and Pakistan.

According to Art. 9 (4) of Council Regulation (EC) 280/2005, the Commission shall keep under review the status of ratification and effective implementation of the conventions in the beneficiary countries. Before the end of the period of the current GSP scheme, the EU Commission shall present to the Council a report regarding the status of ratification of the conventions, taking into account recommendations by monitoring bodies, i.e. the UN treaty bodies and ILO supervisory bodies.

This provision is very commendable, since countries are kept under review and decisions of international organisations are taken into account, ensuring an objective application of the GSP plus.

The application procedure is much more complex than under the US GSP:

According to Art. 10 (2) of Council Regulation (EC) No. 980/2005, the requesting country shall provide comprehensive information regarding ratification of the relevant conventions, the legislation and measures to effectively implement the provisions of the conventions and its commitment to accept and fully comply with the monitoring and review mechanism. Having received the request, the European Commission examines the request taking into account the findings of the relevant international organizations and agencies. [91] Thus, here again, decisions of UN and ILO bodies shall be considered. This is highly recommendable also for the US GSP since it ensures an objective implementation of standards.

The European Commission may verify the information with the requesting country or any other source. [92] This provision leaves open whether *in situ* visits are included. The preceding EU GSP clearly provided for the possibility to carry out assessments in the country concerned. [93] While *in situ* visits clearly ensure that implementation of human or labour rights actually takes place, this provision made the application procedure very cumbersome and lengthy with the result that only two countries passed the procedure. [94]

As under the US system, the Commission shall state reasons if a request is rejected. [95]

In sum, the EU application procedure provides for more objective and concrete criteria than the US system, which neither takes into account

[91] Art. 11 (1) of Council Regulation (EC) No. 980/2005.

[92] Ibid.

[93] Art. 16 (3) of Council Regulation (EC) No. 2501/2001.

[94] See below p. 23.

[95] Art. 11 (5) of Council Regulation (EC) No. 980/2005.

decisions of international bodies nor explicitly provides for a verification procedure.

2.2.2. *Temporary Withdrawal*

A. *Content of the Norms*

According to Art. 16 (1) (a) of Council Regulation (EC) No. 980/2005, the preferential arrangements may be temporarily withdrawn, if the monitoring bodies of the relevant conventions ratified by a beneficiary country find the occurrence of serious and systematic human or labour rights violations. This provision could have been applied in the case of Myanmar in which the ILO Governing Body recommended reviewing trade relations with the country. [96]

Thus, the EU is not limited to «carrots», but also uses «sticks». It needs to be highlighted that in contrast to the US GSP, this provision only applies in cases of serious and systematic violations. This could be a drawback. However, the regulation corresponds to the term «consistent pattern of gross, systematic and reliably attested violations of human rights» utilized by the Commission of Human Rights (now the Human Rights Council) under the 1235 and 1503 procedures to respond to human rights violations of UN member states. [97]

The reference to the conclusions of human rights bodies is commendable. It ensures transparency and coherence of international law.

In addition, the special incentive arrangement may be temporarily withdrawn for some or all products originating in countries that no longer incorporate the conventions that they ratified in fulfilment of the requirements of the special incentive arrangement in their national laws, or if the relevant legislation is not effectively implemented. [98] Hence, if a country ceases to implement the relevant conventions, the additional tariff preferences may be withdrawn. In contrast to the US GSP, it is possible to withdraw preferences with respect to certain products, which is preferable since it targets the industry where the non-compliance, e.g. the discrimination of women with respect to wages, may occur.

Upon receiving information that may justify a temporary withdrawal, the Commission or a member state shall inform the Generalized Preferences Committee and ask for consultations, which should take place within one month. [99] If the Commission decides to investigate the situation, interested

---

[96] ILO, Provisional Record No. 4, Measures recommended by the Governing Body under art. 33 of the Constitution – Implementation of recommendations contained in the report of the Commission of Inquiry entitled Forced Labour in Myanmar (Burma), International Labour Conference, 88th session, Geneva: International Labour Office, 2000.

[97] ECOCOC Resolution 1235 (XLII) and ECOCOC Resolution 1503 (XLVIII), 1693rd plenary meeting, 27 May 1970.

[98] Art. 16 (2) of Council Regulation (EC) No. 980/2005.

[99] Art. 18 (1) of Council Regulation (EC) No. 980/2005.

parties may present their views. [100] The Commission shall cooperate with the country concerned. [101] Most importantly, it shall seek all relevant from the ILO and UN bodies. Such information shall be the point of departure for the investigation. [102] Thus, the procedure is very much linked to the international human rights system. This is very commendable as long as it does not prevent timely action. The Commission should not only have the possibility to verify the information received, it shall also be able send fact-finding missions in order to ensure that it has the newest information and to act accordingly. The investigation shall take place within a year. [103]

If the Commission finds that serious and systematic human rights violations justify a temporary withdrawal, it may monitor and evaluate the situation for a period of six months. [104] Unless the country, before the end of the period, makes a commitment to remedy the situation in a reasonable period of time, the Council upon a proposal from the Commission may decide by qualified majority to withdraw the preferences. [105]

In other cases, if e.g. the Commission after the investigation finds that a country's legislation does not any longer incorporate the relevant conventions of the special incentive arrangement, it may suggest the Council to withdraw the additional preferences. This procedure does not include the six months monitoring period. The reason might be that only additional preferences will be withdrawn. However, the question arises why in cases of serious human rights violations an additional monitoring period is needed. One reason could be that the country concerned should be given a chance to remedy the situation before all preferences will be withdrawn.

In both cases of withdrawal, decisions only enter into force after a period of six months. [106]

B. Assessment

As indicated in the previous section, the EU procedure has a number of advantages over the US system. It is more flexible, participatory and provides for more objective criteria, referring to international law.

Firstly, it is a multi-layered system, providing for withdrawal procedures for general arrangements including one for serious human rights violations as well as for one with regard to the special incentive arrangement. Secondly, the investigation may be initiated at any time of the year upon receiving information, i.e. there are no admissibility criteria for a petition by private parties. In theory, it is thus easier to initiate the EU withdrawal procedure than the US withdrawal procedure. Thirdly and most importantly, the

[100] Art. 19 (1) of Council Regulation (EC) No. 980/2005.

[101] Art. 19 (2) of Council Regulation (EC) No. 980/2005.

[102] Art. 19 (3) of Council Regulation (EC) No. 980/2005.

[103] Art. 19 (6) of Council Regulation (EC) No. 980/2005.

[104] Art. 20 (3) of Council Regulation (EC) No. 980/2005.

[105] Art. 20 (3), (4) of Council Regulation (EC) No. 980/2005.

[106] Art. 20 (5) of Council Regulation (EC) No. 980/2005.

investigation shall be based on information and decisions of the ILO and UN bodies. Thus, the correct interpretation of international is ensured. Fourthly, the procedure obliges the EU to cooperate with the country concerned. Fifthly, the country concerned, in case of serious human rights violations has the chance to comply with the relevant conventions following the decision of the Commission. Sixthly, the preferences with respect to certain products may be withdrawn. Finally, it is not only the European Commissioner for Trade alone who decides on the matter, but the Commission collectively, including the European Commissioner for Employment and Social Affairs. [107]

However, the withdrawal procedure (as well as the country election) are conducted and determined by the EU bureaucracy and not open to judicial review. While it might in theory be easier to initiate a withdrawal procedure, it might in practice be more difficult since there are no objective criteria when to accept or reject a request for an investigation. Thus, the investigation is at the mercy of the Commission, which has a lot of discretion in deciding whether to conduct an investigation or to propose a withdrawal. Also, the final decision is made by the Council, i.e. a political body where a group of countries can block action.

It is also unfortunate that the procedure does not anymore explicitly provides for in *situ visits*, thereby ensuring that the most actual and accurate information will be relied upon. Furthermore, as already indicated, the additional sixths months period in case of serious human rights violations may rather be a deferral of a decision given that the final decision does not enter into force before the end of sixth months. Finally, the procedure on the whole might be too long, taking at least one and half years compared to the US procedure, in theory taking less than a year.

2.2.3. *Application of the Special Incentive Arrangement*

A. Granting of Preferences

As of December 2005, the special incentive arrangement for sustainable development and good governance was accorded to 15 countries: Bolivia, Colombia, Costa Rica, Ecuador, Georgia, Guatemala, Honduras, Sri Lanka, Mongolia, Nigeria, Panama, Peru, El Salvador and Venezuela. [108] This list is much broader than the one of the previous regime regarding the protection

[107] According to the rules of procedure of its weekly 'college' meetings, the Commission decides by oral, written, empowerment or delegation procedure, by which all members have a say (Commission Decision of 15 November 2005 amending its Rules of Procedure, OJ 2005 L 347/83, 2005).

[108] Commission Decision of December 2005 on the list of the beneficiary countries that qualify for the special incentive arrangement for sustainable development and good governance, provided for by Art. 26 (e) of Council Regulation (EC) 980/2005 applying a scheme of generalized tariff preferences, OJ 2005 L 337/50, 2005.

of labour rights where only granted to Sri Lanka in 2003 [109] and the Republic of Moldova in 2000 [110]. This might be due the new procedure, which is less lengthy, but also to strong historical ties between the EU member state Spain and Latin American countries.

The new list of countries lets also the question arise how serious the provision is taken to rely on decisions of ILO and UN bodies given that at the time of granting these preferences, there were for example several cases pending with regard to the implementation of ILO Conventions No. 87 and 98 on freedom of association and collective bargaining in Colombia [111] and concerns raised by the ILO Committee of Experts on the Application of Conventions and Recommendations with regard to acts of violence including murder and kidnapping of trade unionists in Colombia [112].

Similarly, the case of Moldovia is ambivalent given that the European Court of Human Rights found the occurrence of torture and inhuman and degrading treatment in Moldovia in 2004. [113] The case of Sri Lanka will be dealt with separately in a later section.

Hence, although the EU GSP social clause is more in accordance with international law than the US GSP law, similar problems regarding a rather random election of beneficiary countries may arise.

B. *Use of the Withdrawal Procedure*

The withdrawal provisions so far were not much used. As stated above, also cases under the previous GSP schemes will be considered.

In the case of Myanmar, after a complaint lodged by the European Trade Union Federation (ETUC) et al. alleging practices of forced labour in Myanmar under Art. 9 of Council Regulation (EC) No. 3281/94, the Commission decided to conduct an investigation. [114] Having found based on

---

[109] Commission Regulation (EC) No. 2342/2003 of 29 December 2003 granting the Democratic Socialist Republic of Sri Lanka the benefit of the special incentive arrangements for the protection of labour rights, OJ 2003 L 346/34.

[110] Commission Regulation (EC) No. 1649/2000 of 25 July 2000 granting the Republic of Moldova the benefit of the special incentive arrangements concerning labour rights, Bull. 7/8-2000, point 1.6.69.

[111] See for example the complaint raised by the World Confederation of Labour et al. regarding social security and collective bargaining (Case No. 2434) or the complaint raised by the Workers' Unitary Central et al. regarding inter alia the dismissal of 54 workers (Case No. 2384), http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?hdroff=1 (visited 21 January 2008).

[112] See the observation made by ILO Committee of Experts on the Application of Conventions and Recommendations on the implementation of the Freedom of Association and Protection of the Rights to Organize Convention No. 87 regarding Colombia at its 76th session, 2005, http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?hdroff=1 (visited 21 January 2008).

[113] Cf. HEMKER, «Handelspolitik und Menschenrechte», p. 288.

[114] EUROPEAN COMMISSION, «Notice of an investigation of forced labour practices being carried out in Myanmar in view of a temporary withdrawal of benefits under the European Union's Generalized scheme of preferences», Bull. 1/2 -1996, point 1.4.58.

written and oral statements that the alleged practices of forced labour were «routine and widespread», the Commission proposed the Council to withdraw GSP benefits. [115] The Economic and Social Committee of the EU fully supported the Commission's proposal. [116] The Council then immediately withdraw the preferences.

Having been decided without delay and in strict accordance with the GSP regulations, the case of Myanmar is a positive example for the application of the GSP social clause. However, this might be different in other cases where more trade interests are involved. Moreover, there is a strong consensus among countries worldwide condemning the practices of forced labour in Myanmar. The ILO has criticized and condemned such practices in Myanmar for almost 30 years. [117]

The change in law and practice is however limited. While there has been some cooperation with the ILO, forced labour still exists. [118]

Also in 1995, the ETUC's committee on textiles, clothing and leather at al. submitted a complaint against Pakistan for the use of forced child labour under Council Regulation (EC) No 3281/94. [119] However, in this case, the Commission did not deem it necessary to conduct an investigation. [120] Whilst finding that child labour occurred, it stressed that Pakistan had introduced legislation to outlaw child labour, and that the Government intended to keep the Commission informed. [121] At the request of the Pakistani Government, the Commission started to fund a development project in cooperation with the International Programme on the Elimination of Child Labour (IPEC) and referred to the special incentive regime for the protection of labour rights. [122]

Hence, the Commission in this case focussed more on encouraging countries with incentives rather than using punitive trade measures. While this is in principle a good approach, it might not be appropriate in cases of serious and systematic human rights violations. Moreover, the decision might also

---

[115] EUROPEAN COMMISSION, «Proposal for a Council Regulation (EC) temporarily withdrawing access to generalized tariff preferences for industrial goods from the Union of Myanmar», /* COM/96/0711 FINAL – ACC 96/0317*/, OJ C 1997 035/14.

[116] Opinion of the Economic and Social Committee on: - the «Proposal for a Council Regulation (EC) temporarily withdrawing access to generalized tariff preferences for industrial goods from the Union of Myanmar», and the «Proposal for a Council Regulation temporarily withdrawing access to generalized tariff preferences for agricultural goods from the Union of Myanmar», OJ 1997 C 133/47.

[117] ILO, Provisional Record No. 24, Special Sitting to examine developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930, (No. 29), International Labour Conference, 91st session, Geneva: International Labour Office, 2003.

[118] ILO, ILCCR: Observations concerning Convention No. 29, Forced Labour, 1930 Myanmar (ratification 1955), Published 2006, http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=774&chapter=13&query=Year%3D2006&highlight=&querytypebool&context=0 (visited 19 March 2007).

[119] EUROPEAN PARLIAMENT, «Resolution on the application of social clauses within the framework of the multiannual programme for generalized tariff preferences *inter alia* with regard to Pakistan and Myanmar», OJ 1996 C 17/201.

[120] Written Question No. 2368/97 by ULF HOLM to the Commission, OJ 1998 C 21/148.

[121] Ibid.

[122] Ibid.

have been influenced by the fact that some EU member states with important relations with Pakistan were not willing to pursue the investigation, fearing retaliation and the cancellation of contracts. [123]

The IPEC project nonetheless has been successful, having withdrawn 6,000 children from the football industry by the year 2000. [124] Since the IPEC programme might not have been initiated without the threat of trade measures, the GSP social clause may have had a positive impact.

The different treatment of these two cases demonstrates that the EU bodies also are influenced by economic and political considerations. However, the different treatment might also be because forced labour in Myanmar was found to be «routine and widespread» while in Pakistan, child labour was found to «occur». [125]

Another complaint dealt with under the withdrawal procedure was lodged in 2004 by the ETUC et al., alleging systematic and serious violation of the freedom of association in Belarus. [126] Relying on information by the ILO Commission of Inquiry Report requiring Belarus to take steps to improve the situation regarding freedom of association, the Commission decided to monitor the situation within the six months period. [127] In light of the June 2006 report by ILO Committee on the Application of Standards of the International Labour Conference that deplored the continued failure by Belarus to improve the situation, in December 2006, the Commission recommended to withdraw trade privileges from Belarus over serious and systematic violations of core labour rights. [128] This decision was backed by EU member states and followed promptly by the Council. [129] In accordance with Art. (5) of Council Regulation 980/2005, the decision entered into force on 21 June 2007.

This case is the second case where trade privileges have actually been withdrawn. Like in the Myanmar case, there was a consensus among

---

[123] TSOGAS, «Labour Standards in the Generalized Systems of Preferences», p. 362.

[124] ILO, «A Future without Child Labour», Report of the Director-General, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report I (B), International Labour Conference, 90th session, Geneva: International Labour Office, 2002, para. 372, Box 4.12.

[125] BRANDTNER/ROSAS, «Trade Preferences and Human Rights», p. 717.

[126] EUROPEAN COMMISSION, «Notice of initiation of an investigation of violation freedom of association in Belarus in view of temporary withdrawal of benefits under the scheme of Generalized Tariff Preferences (GSP)», OJ 2004 C 40/4; Beschluss der Kommission, 29. Dezember 2003 über die Eilnleitung einer Untersuchung gemäß Artikel 27 Absatz 2 der Verordnung (EG) Nr. 2501/2001 des Rates hinsichtlich der Verletzung der Vereinigungsfreiheit in Belarus, OJ L 2004 5/90.

[127] Council Regulation (EC) No 1933/2006 of 21 December 2006 temporarily withdrawing access to the generalized tariff preferences from the Republic of Belarus, (5), OJ L 2006 405/35.

[128] Cf. Council Regulation (EC) No 1933/2006 of 21 December 2006 temporarily withdrawing access to the generalized tariff preferences from the Republic of Belarus, (5), OJ L 2006 405/35 and EUROPEAN COMMISSION, «EU Member States back Commission recommendations to withdraw trade privileges from Belarus over labour standards», http://ec.europa.eu/Trade/issues/bilateral/pr201206_en.htm (visited 4 December 2006).

[129] Council Regulation (EC) No 1933/2006 of 21 December 2006 temporarily withdrawing access to the generalized tariff preferences from the Republic of Belarus, OJ L 2006 405/35.

various countries that human rights violations should be stopped. There were also ILO findings condemning these violations. It is commendable that the EU in this case followed closely the ILO reports and decisions. The only question is why this case took almost three years, it should have been decided within two years.

In sum, the EU with regard to the withdrawal procedure seems to rely more on ILO and UN decisions and findings than under the granting procedure.

2.2.4. *Value of EU GSP Trade Preferences to Developing Countries*

As already stated in relation to the US GSP, while EU GSP trade preferences still play a role, their impact is somehow limited to developing countries.

In 2002, the EU imports under its GSP were worth € 53.2 billion out of the total of € 360 billion from all imports from developing countries. [130] Although this is more in comparison to imports under the US GSP (€ 16 billion), it still merely equals 14.7 per cent of all imports from developing countries.

Agricultural products accounted for approximately 10 per cent of GSP products including EBA imports. [131] However, products important to developing countries such as cocoa are often classified as sensitive products and therefore excluded from zero tariffs. [132] Yet, such products may be subject to tariff suspension under the special incentive arrangement for sustainable development and good governance. [133]

Textile products accounted for 18 per cent of the total products imported under the GSP clause. [134] While it is to be appreciated that textiles are covered under the EU GSP system in contrast to the US system, the utilization rate is still comparatively low because of strict rules of origins. [135] In 2002, the utilization rate was only 52 per cent. [136] This might have changed under the GSP plus as in the case of Sri Lanka, which will be presented below. In addition, the EU rules now provide for so-called «regional cumulation», which may improve the utilization rate. [137]

2.2.5. *Case Study: Sri Lanka*

[130] EUROPEAN COMMISSION, «Generalized System of Preferences, Developing Countries: Commission unveils system of trade preferences for next ten years – simple, transparent and objective», www.europa.eu.int/comm/trade/issues/global/gsp/pr070704_en.htm (visited 10 July 2004).

[131] Ibid.

[132] Cf. Art. 7 (1) in conjunction with Chapter 18, Annex II of Council Regulation (EC) 980/2005.

[133] Art. 8 (1) of Council Regulation (EC) 980/2005.

[134] EUROPEAN COMMISSION, «Generalized System of Preferences».

[135] UNCTAD, «Trade Preferences for LDCs», p. xi.

[136] Communication from the Commission to the Council, the European Parliament andn 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 final, p. 5.

[137] TRALAC, «New EU GSP scheme explained».

The following case study evaluates the application of the EU social clause in Sri Lanka. The central question is whether the EU GSP social clause is an adequate tool of advancing the cause of women, especially of women workers. Examining whether the clause has actually improved the situation of women workers with a focus on EPZs, i.e. assessing the human rights impact of the clause, the case study attempts to find out whether the EU social clause in general has the potential to improve the situation of women.

Based on the evidence gathered, indicators of the women rights impact will be equality of wages, violence and sexual harassment, employment opportunities, gender perceptions and gender issues addressed by trade unions.

A. Value of the EU GSP Trade Preferences to Sri Lanka

As indicated above, GSPs still are of importance to developing countries. However, because of rules of origin and other obstacles developing countries do not fully benefit. Such is the case with Sri Lanka:

The overall utilization rate of including the GSP plus is 51 per cent of imports covered by the GSP scheme, while the product coverage has been approximately 98 per cent since 2000. [138] This might be due to the textile sector. The clothing industry is unable to meet the rules of origin incorporated into the EU GSP scheme. [139] Textiles, which are to a large extend produced in EPZs, are the most important products for Sri Lanka, accounting for 55 per cent of total imports to the EU. [140] They have a utilization rate of only 28 per cent. [141] The problem is that Sri Lanka like many other countries does not produce fabrics in sufficient amount required by the clothing industry. [142] It is therefore positive that the EU is currently reviewing its rules of origin. [143]

Other problems regarding low utilization rates are a lack of awareness among small producers [144] and other preferential schemes with more favourable market access such as EBA, AGOA or the Cotonou Agreement for Asian- Caribbean-Pacific countries. [145] However, the latter problem could be remedied by granting GSP plus. [146]

Indeed, in view of the Sri Lankan Government, the GSP plus is of utmost importance for the Sri Lankan industry, especially for the textile sector.

[138] WIJAYASIRI, «Utilization of Preferential Trade Arrangements», p. 21.

[139] Ibid., p. 31.

[140] Ibid., p. 22.

[141] Ibid., p. 22.

[142] Ibid., p. 31.

[143] Ibid., p. 35.

[144] Ibid., p. 38.

[145] Ibid., p. 40.

[146] Ibid.

Exports to the EU are worth 1.2 billion US $. [147] It can therefore be concluded that while the GSP scheme should be improved in order to benefit more Sri Lanka and other beneficiary countries, it is still of value for these countries. Thus, the EU in theory has a lot of leverage when applying its GSP social clause.

B. *Sri Lanka's Implementation of Women Rights Conventions*

Sri Lanka has ratified CEDAW in 1981. [148] The Committee on the Elimination of Discrimination of Women considered Sri Lanka's third and fourth reports under Art. 18 of CEDAW in 1999. [149] According to the reports, the Sri Lankan Government's proposal for constitutional reform suggested a provision for the right to non-discrimination on the grounds of gender, marital status, maternity and parental status. [150] Sri Lanka also has a national Human Rights Commission and a Ministry of Women Affairs. [151] Its Women's Charter relates to political and civil rights, rights within a family, the right to education and training, the right to economic activity and benefits, the right to health care and nutrition, the right to protection from social discrimination and the right protection from gender based violence. [152] In accordance with Part 11 of the Charter, a National Committee for Women has been established. [153] The Ministry of Women's Affairs also set up a National Plan of Action for Women. [154] Sri Lanka has also introduced legislative reforms providing for more effective remedies for gender-based violence. [155]

Sri Lanka has also ratified ILO Convention No. 100 on Equal Remuneration, No. 103 on Maternity Protection, No. 110 on Condition of Employment of Plantation Workers [156] and No. 111 on Discrimination with Respect of Employment and Occupation [157]. It has also ratified the ILO Freedom of Association and Right to Organize Convention No. 87, the ILO Right to Organize and Collective Bargaining Convention No. 98, the ILO Minimum Wage Fixing Convention No. 131, ILO Forced Labour Convention No. 29 and the ILO Abolition of Forced Labour Convention No. 105 . [158]

---

[147] DAILY NEWS, 29 October 2007, Regierung vor Verhandlungen über Verlängerung von GSP +, www.srilanka-botschaft.de/NEWSupdates_neu/Press_Releases/Press_Pol_Grove... (visited 18 December 2007).

[148] Cf. http://www2.ohchr.org/english/bodies/ratification/8.htm (visited 4 February 2008).

[149] UN COMMITTEE IN THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, «Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women», Third and Fourth reports of States parties, Sri Lanka, 18 October 1999, CEDAW/C/LKA/3-4.

[150] Ibid., p. 5.

[151] Ibid., p. 6 and 7.

[152] Ibid., p. 8.

[153] Ibid.

[154] Ibid., p. 9.

[155] Ibid., p. 10.

[156] Ibid., p. 39.

[157] Cf. http://www.ilo.org/ilolex/english/convdisp1.htm (visited 25 January 2008).

[158] Ibid.

Legislation provides for maternity benefits for working women. [159] However, the restriction of the scope of labour legislation to the formal sector deprives the majority of rural women of equal rights and protection in employment. [160]

C. *The Situation of Women before the Application of the EU GSP Social Clause*

Despite the relatively high number of ratifications of conventions relating to women rights and many related legislative and administrative acts, discrimination against women and women workers' rights violations existed in 2003, when the special incentive arrangements for labour rights were accorded to Sri Lanka. [161]

For example, there were many cases of gender-based violence reported. [162] There was also discrimination in employment outside the state sector [163], where women enjoyed no legal protection against discrimination. [164] Often perceptions of «gender appropriate» tasks reinforced the inequitable gender division of labour in employment and in the household. [165] Especially in the informal sector and EPZs, where large numbers of women were employed as piece rate workers, labour laws were not strictly enforced. [166] In factories in and outside EPZs, women faced long working hours, sexual abuse and were vulnerable to occupational hazards and without job security. [167] Especially in EPZs, there was compulsory overtime and a lack of adequate health and safety measures such as protective clothing. [168] In addition, women workers are usually held in very low esteem by society. [169]

---

[159] UN COMMITTEE IN THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, «Consideration of reports submitted by States parties», p. 42.

[160] Ibid., p. 47.

[161] See above p. 23

[162] UN COMMITTEE IN THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, «Consideration of reports submitted by States parties», p. 9.

[163] Ibid., p. 33.

[164] SUNDAY OBSERVER, «General Special Preference (GSP) status from the EU: TUs urge investigation of SL's labour standards», 1 September 2002, www.sundayobserver.lk/2002/09/01/fea06.html (visited December 2007).

[165] UN COMMITTEE IN THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, «Consideration of reports submitted by States parties», p. 42.

[166] Ibid. p. 39. As of 2006, between 80 and 85 % of workers working in EPZs were women (INTERNATIONAL CONFEDERATION OF FREE TRADE UNIONS (ICFTU), «Specific trade union strategies for export processing zones», in TRADE UNION WORLD BRIEFING No 19, August 2006).

[167] Ibid.

[168] DABINDU COLLECTIVE, «Problems Faced by Women Working in Sri Lanka's Export Processing Zones», in ASIAN LABOUR UPDATE, Issue 38, January–March 2001, www.amrc.org.hk/Arch/3804.html (visited 12 November 2007).

[169] Ibid.

There was substantial evidence of a large fraction of a gender-wage differential in the labour market due to discrimination.[170] Especially in the agricultural sector, there was a stable gender-wage gap.[171] In the cinnamon and tobacco trade, there were wage differentials between men and women and different time/piece-rates for men and women.[172] Overall, in the last two decades, women mostly were employed in the lower occupational tiers particularly in occupations that provide cheap labour for factory type production especially in EPZs or as domestic workers.[173]

The problem of women workers in EPZs was aggravated since there were hardly trade unions to defend their rights.[174]

D. Granting of EU GSP Special Incentive Arrangements for the Protection of Labour Rights

Following the request by Sri Lanka to benefit from the special incentive arrangements for labour rights in 2002[175], the Free Trade Zones Workers Union informed the EU of violations of the ILO core Conventions, especially of the ILO Conventions No. 87 and 98 on freedom of association and collective bargaining. It asked the EU to grant the GSP status on the condition that these violations would be remedied within one year and the relevant conventions fully implemented. If this was not the case, the GSP status should be withdrawn.[176] In addition, the International Confederation of Free Trade Unions (ICFTU), the ETUC and World Confederation of Labour raised objections to Sri Lanka's application with regard to occurrence of anti-union discrimination, child labour, discrimination against women and unequal pay for men and women in certain sectors.[177]

In response to these requests, EU delegation investigated the labour rights situation in Sri Lanka.[178] It should be recalled that Art. 16 (3) of Council Regulation (EC) 2501/2001, i.e. the former GSP, provided explicitly for *in situ* visits to carry out assessments. As stated above, Sri Lanka has ratified the ILO core Conventions.

---

[170] WORLD BANK Report, «Sri Lanka: Strengthening Social Protection, Part I», http://siteresources.worldbank.org/INTSOUTHASIA/Resources/Strengthening_Social_Protection.pdf (visited 4 February 2008), p. 34.

[171] Ibid.

[172] ILO COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, Individual Observation concerning Equal Remuneration Convention, 1951 No. 100, Sri Lanka, 2007, http://www.ilo.org/ilolex/gbe/ceacr2007.htm (visited 24 January 2008).

[173] MINISTRY OF YOUTH AFFAIRS, «National Action Plan for Youth Employment, Sri Lanka», Development of the National Action Plan supported by the International Labour Office, Colombo, & World Bank, August 2007, p. 10.

[174] DABINDU COLLECTIVE, «Problems Faced by Women Working in Sri Lanka's Export Processing Zones», p. 3.

[175] EC Press Release, 7 January 2004, on file with the author.

[176] FREE TRADE ZONES WORKERS' UNION, Letter to the European Commission, June 2002, on file with the author.

[177] SUNDAY OBSERVER, «General Special Preference (GSP) status from the EU», p. 1.

[178] Interview with Anton Marcus, Free Trade Zones Workers' Union, on 19 December 2007.

In 2003, EU granted the special incentives to Sri Lanka. [179] Complying with the request made by the trade unions, this decision was accompanied by a roadmap that provided for certain conditions to be fulfilled during the course of 2004. [180] The roadmap called upon Sri Lanka to make further progress with regard to the strengthening of freedom to associate and the right to collectively bargain in Sri Lanka with special emphasis on EPZs, to the modification of legislation on forced labour and the elimination of all forms of child labour. [181] It also set forth the steps that would be assessed under the review to be conducted in the second half of 2004: *Inter alia*, the minimum age restrictions for membership in a trade union should be removed; measures should be taken to ensure that the operations of the Board of Investment (BOI) [182] do not undermine the rights of workers to form free and independent trade unions and to bargain in full freedom collectively; the BOI guidelines and its manual should be amended to guarantee free elections for employee's councils in EPZs; trade unions and employee's councils should enjoy the same facilities without discrimination and the implementation of administrative measures to protect workers from anti-union discrimination through the filing of complaints of unfair labour practices with the Department of Labour should be strictly monitored to ensure their implementation; ILO assistance should be called upon; the exaction of forced labour should be made illegal; the penalty of forced prison labour for engaging in strikes and the lists of hazardous work should be determined and made legally binding. [183]

It is very commendable that the EU actually carried out an assessment and finally granted the special incentive arrangements subject to certain conditions to be fulfilled within a year, as requested by Sri Lankan trade unions. This is a prove that the EU was committed to improve the workers' rights situation in beneficiary countries. This step was also welcomed by the Free Trade Workers' Unions. [184]

However, it is unfortunate that conditions with regard to gender-based discrimination such as gender-based violence, sexual harassment or gender-wage differentials were not included in the roadmap of the EU. While this is certainly the fault of the EU, another reason might be a stronger lobbying for trade union rights conducted by the trade unions. Often, young women working in EPZs are not members of trade unions and gender issues are only dealt with to a certain extend by trade unions. [185] While a full

---

[179] See above p. 23.

[180] EUROPEAN COMMISSION, «Towards further compliance with core labour standards in Sri Lanka», 9 December 2003, on file with the author.

[181] Ibid., p. 2.

[182] The BOI is created by the Ministry of Finance and has formulated guidelines for companies which allow for the formation of employees' councils (ESTHER BUSSER, «Labour Standards and Trade Preferences in Sri Lanka», in Friedrich-Ebert Stiftung, Briefing Papers, March 2005, p. 4).

[183] EUROPEAN COMMISSION, «Towards further compliance with core labour standards in Sri Lanka», p. 3.

[184] Interview with Anton Marcus, Free Trade Zones Workers' Union, on 19 December 2007.

[185] Cf. ICFTU, «Specific trade union strategies for export processing zones», p. 2.

implementation of trade union rights in EPZs in theory also benefits women since the majority of the labour force is female, women-related issues are often neglected. This problem highlights the need for a gender-based impact assessment of the workers' situation in beneficiary country if the EU GSP social clause is to benefit women.

E. *Changes in Law and Practice*

In response to the EU roadmap and EU pressure as well as campaigning activities by the Free Trade Workers' Union, the BOI amended their manual on labour relations including the right to organize with regard to trade unions. [186] It stated that the country's labour laws applied to all enterprises. [187] Immediately afterwards, the situation of trade unions improved. [188] There has also been a marginal increase in wages. [189] In addition, a tripartite gender audit was conducted in 2004 involving the government, employers' and workers' organizations. [190] Recommendations included capacity building with respect to gender equality. [191]

However, the majority of gender-related problems has remained. In 2004, the ICFTU made a communication with the ILO raising issues regarding the lack of legislative protection against discrimination in employment and occupation, women's access to employment and occupation, sexual harassment in the plantation sector and poor working conditions in EPZs. [192] Most girls in EPZs worked at least ten hours a day and sixty hours of forced overtime. [193] Their wage levels were approximately 1 US $ per day, i.e. poverty wages. [194]

In sum, while there have been some improvements regarding trade union rights and some efforts have been made to address gender-related problems, the situation did not improve greatly. However, part of the reason may by the short time period since the special incentive arrangements already elapsed in 2005.

F. *Granting of the EU GSP Special Incentive Arrangement for Sustainable Development and Good Governance*

[186] Email by Anton Marcus, Free Trade Zones Workers' Union, of 2 January 2008.

[187] ILO CONFERENCE COMMITTEE ON THE APPLICATION OF STANDRADS, Observations and information on the application of Conventions, International Labour Conference 96th Session, 2007, Geneva: International Labour Office, 2007, Sri Lanka, p. 22.

[188] Email by Anton Marcus, Free Trade Zones Workers' Union, of 2 January 2008.

[189] Interview with Anton Marcus, Free Trade Zones Workers' Union, on 19 December 2007.

[190] ILO COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, Individual Observation concerning Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Sri Lanka, 2007, http://www.ilo.org/ilolex/gbe/ceacr2007.htm (visited 24 January 2008). It is however questionable whether the audit can be attributed to the implementation of the EU scheme.

[191] Ibid.

[192] Ibid.

[193] BUSSER, «Labour Standards», p. 5.

[194] Ibid., p. 4.

As mentioned above, the special incentive arrangement for sustainable development and good governance under the current EU scheme was granted to Sri Lanka in 2005. [195] Unfortunately, this was rather a fast track decision, also taking account of the difficult situation of the Tsunami-hit country. [196] Unlike in the granting procedure in 2003, the EU did not send a delegation to examine the human and labour rights situation but relied on written information. [197] Furthermore, while the EU examined documents provided by the ILO supervisory mechanism, it did not recommend corrective measures to remedy the inconsistencies with the ILO standards. [198] Hence, in view of one commentator, the EU took the Tsunami as an excuse to grant the special incentive regime to Sri Lanka. [199] While this might be true, it should also be borne in mind that the current system does not explicitly provide for visits *in situ*.

Nonetheless, in light of the gender-related problems mentioned above, the EU decision to grant Sri Lanka further preferences was surprising and was probably attributable to the high number of ratified ILO and UN Conventions. Even the situation of trade unions had only improved slightly; they still faced intimidation and threatening of their members, and were constantly undermined. [200] In 2005, the ILO Committee on Freedom of Association had decided in a case on intimidation against trade union workers in an EPZ brought by the ICFTU and invited the Government to conclude the case. [201] Thus, Sri Lanka faced a problem of implementation of human rights and labour law.

G. *Changes in Law and Practice*

The EU is currently planning to conduct a review in order to determine whether the GSP plus status will be renewed after 2008 with regard to Sri Lanka. [202] In the view of the EU and the Sri Lankan Government, the GSP plus so far has been a success since it creates jobs for young women that

[195] See above p. 22

[196] Interview with an attorney specializing in labour issues from Sri Lanka, on 21 December 2007; see also Emerging Textiles, After the tsunami devastated the country, Sri Lanka gets EU duty-free access, 14 January 2005, www.emergingtextiles.com/_print/?q=art&s=050114-trade&r=free (visited 18 December 2007).

[197] Interview with an attorney specializing in labour issues from Sri Lanka, on 21 December 2007.

[198] Ibid.

[199] Ibid.

[200] BUSSER, «Labour Standards», p. 4.

[201] ILO Governing Body, 336th Report of the Committee on Freedom of Association, x, 292nd Session, Geneva: International Labour Office, March 2005, GB.292/8, ILO CONFERENCE COMMITTEE ON THE APPLICATION OF STANDRADS, Observations and information on the application of Conventions, International Labour Conference 96th Session, 2007, Geneva: International Labour Office, 2007, Sri Lanka, p. 22..

[202] Interview with an attorney specializing in labour issues from Sri Lanka, on 21 December 2007.

thereby make some savings.[203] However, while this may demonstrate how better market access may improve the livelihood of women in beneficiary countries, it does not illustrate how the GSP social clause has improved the poor working conditions faced by women in EPZs or other gender-related problems such as sexual harassment. To date, while there have been some minor improvements, the overall situation of women workers has not changed greatly. According to one commentator, due to lack of continued EU pressure, the Government turned a blind eye on enforcing some of its labour laws, e.g. the law dealing with Unfair Labour practices.[204] Despite repeated flagrant violations and following complaints, hitherto no offender has been prosecuted.

There are however some improvements:

Some statistics submitted to the ILO Committee of Experts on the Application on Conventions and Recommendations indicate that in the tobacco sector, there are now the same wage rates for men and women.[205] This is however not the case for the cinnamon trade.[206] The National Committee on Women has contributed to the drafting of a Women Rights Bill.[207] The Employers' Federation of Ceylon has adopted Guidelines for company Policy on Gender Equity/Equality recommending measures and strategies relating to working conditions, the prevention of sexual harassment, and workers with family responsibilities.[208] In addition, a Gender Bureau has been set up under the Ministry of Labour Relations in order to promote *inter alia* upward employment mobility of women, the prohibition of sexual harassment and the improvement of working conditions in EPZs.[209] In addition, the National Plan of Action for Women is currently being revised.[210] It is also to be welcomed that the Government has taken measures to amend the Shops and Office Employees Act and the Employment of Women, Young Persons and Children Act in order to facilitate the employment of women in the information technologies sector.[211]

---

[203] DAILY NEWS, 29 October 2007; Email by the EU from 14 January 2008, on file with the author.

[204] Interview with an attorney specializing in labour issues from Sri Lanka, on 21 December 2007.

[205] ILO COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, Individual Observation concerning Equal Remuneration Convention, 1951 (No. 100), Sri Lanka, 2007, http://www.ilo.org/ilolex/gbe/ceacr2007.htm (visited 24 January 2008)

[206] Ibid.

[207] ILO COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, Individual Observation concerning Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Sri Lanka, 2007, http://www.ilo.org/ilolex/gbe/ceacr2007.htm (visited 24 January 2008).

[208] Ibid.

[209] Ibid.

[210] Ibid.

[211] ILO COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, Individual Direct Request concerning Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Sri Lanka, 2007.

While these measures are to be welcomed, violations of women rights persist. Women are underrepresented in many sectors and mainly employed in self-employment or in low-wage and low-skilled work, often in the informal economy. [212] Especially in the private sector, women have difficulties to climb the corporate ladder. [213] While still many women work in the garment sector, problems of accommodation and stigma attached to women working in this sector has prevented women working in this sector, which has led to unemployment. [214] There are still poor working conditions in EPZs with regard to long working hours or restrictions on bathroom use. [215] Young women workers are sexually harassed on their way home from remote EPZs. [216] Workers deciding to join a trade union still risk being discriminated or dismissed. [217]

So far, no specific legislation has been enacted expressing the principle of equal remuneration for men and women for work of equal value. [218] The Human Rights Commission has received complaints with regard to harassment, discrimination in recruitment and promotion, retirement and termination of employment. [219]

A Sri Lankan worker representative recently stated that in Sri Lanka, there was a widening gap between law and practice because of a lack of political will. [220] Along the same lines, an Australian worker member recently denounced serious violations in the EPZs in terms of working hours, overtime, wage rates and non-payment of wages and the growing gap between men and women. [221]

H. Evaluation

This case study demonstrates that in both cases where additional preferences for compliance with the social clause were granted to Sri Lanka, the Government or other administrative or employer organizations took

[212] ILO COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, Individual Observation concerning Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Sri Lanka, 2007, http://www.ilo.org/ilolex/gbe/ceacr2007.htm (visited 24 January 2008).

[213] MINISTRY OF YOUTH AFFAIRS, «National Action Plan for Youth Employment», p. 10.

[214] Ibid.

[215] ILO COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, Individual Observation concerning Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Sri Lanka, 2007, http://www.ilo.org/ilolex/gbe/ceacr2007.htm (visited 24 January 2008).

[216] ICFTU, «Living indecently», in TRADE UNION WORLD BRIEFING No 19, August 2006, p. 6.

[217] ICFTU, «Specific trade union strategies», p. 2.

[218] ILO COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, Individual Direct Request concerning Equal Remuneration Convention, 1951 (No. 100) Sri Lanka, 2007, http://www.ilo.org/ilolex/gbe/ceacr2007.htm (visited 24 January 2008).

[219] Ibid.

[220] Cf. ILO CONFERENCE COMMITTEE ON THE APPLICATION OF STANDRADS, Observations and information on the application of Conventions, International Labour Conference 96th Session, 2007, Geneva: International Labour Office, 2007, Sri Lanka.

[221] Ibid.

some positive measures with regard to trade unions and even women rights. While in the first case, these measures can be attributed to EU action in form if the road map, in the second case, this remains open to speculation because the special incentive arrangement appear to be rather granted because Sri Lanka had ratified the relevant conventions instead of having effectively implemented them. As mentioned above, there is even the view that when EU pressure stopped, the Sri Lankan Government turned a blind eye on enforcing its labour laws. Accordingly, many violations of trade union rights and women rights persist to date in Sri Lanka. While with regard to trade union rights, the main problem is probably the gap between law and practice, in the case women rights, even the legal situation is not satisfactory, considering for example the lack of legislation requiring the equality of wages.

However, the persisting women and trade union rights violations do not lead to the conclusion that the EU GSP social clause is a failure. On the contrary, the drafting of the road map in response to complaints by trade unions and the following changes introduced by the Government prove that change is possible if the EU is committed to exert some pressure. Sri Lankan representatives are of the view that in case of Sri Lanka, the application of the social clause has been a lost opportunity. In principle, because of the importance of the EU trade, the GSP clause has a lot of potential. [222] Hence, the question is how to apply the EU GSP clause more effectively.

With regard to women rights, first, a gender-based impact assessment should be introduced when assessing whether a country should be granted special incentive arrangements for labour rights or human rights. As of now, it seems that the view is prevailing that GSP benefits *per se* advance the cause of women because they enable women to make a living. This is however not true if they suffer from discrimination such as gender-based violence or poverty wages. According to a recent study in Sri Lanka, 80 per cent of the women participating in the research mentioned gender-based violence, or the comparative lack of it, as a major way of measuring women's empowerment in developing nations. [223] Thus, based on the indicators such as equality of wages, violence and sexual harassment, employment opportunities, gender perceptions, recommendations how to improve the situation of women rights should integrated into country assessments. Specifically, the EU should include such recommendations into a roadmap and set a timeline until the conditions have to be fulfilled. Views of women workers, civil society groups and trade unions should be taken into account. While it is positive to rely on UN and ILO decisions, the EU should also make in *situ visits* to fully review the situation.

As mentioned above, the success of the EU GSP social clause also depends on the continued pressure of the EU. Thus, if a country stops to implement

[222] Interview with an attorney specializing in labour issues from Sri Lanka, on 21 December 2007; Interview with Anton Marcus, Free Trade Zones Workers' Union, on 19 December 2007.

[223] PETER HANCOCK, «Violence, Women, Work and Empowerment: Narratives from Factory Women in Sri Lanka's Export Processing Zones» in Gender, Technology and Development 10 (2) (2006), pp. 211–228, p. 224.

the relevant conventions, the EU should make use of the withdrawal procedure and withdraw the benefits. A country should not be granted GSP benefits under the special incentive arrangement for sustainable development because it is in a difficult situation. In such a case, technical assistance is more adequate.

The second major recommendation is to introduce an effective complaints mechanism. [224] While the EU may initiate an investigation under the withdrawal procedure upon receiving information, there should be clear criteria when to accept a request for investigation and when to reject it. In this case, the EU would have less discretion and would be forced to act in case of women rights violations. The remaining provisions of the withdrawal procedure should also grant less discretion to the EU.

Finally, in order to secure a long-term change, the EU should cooperate with UN and ILO bodies for providing technical and financial assistance to beneficiary countries for helping them complying with labour standards in practice through capacity building and empowerment of women and civil society as well as trade unions.

2.2.6. *Lessons drawn from the EU GSP social clause*

In contrast to the US GSP social clause, the EU uses a two-fold approach, combining positive with negative labour or human rights conditionality. This is in theory an adequate approach since it risks less distorting foreign trade or political relations. However, EU scheme so far had less impact on the on the ground than the US scheme.

Several lessons may be drawn:

Firstly, it is notable that applicant countries under the special incentive arrangement have to comply with international human rights and labour rights conventions in order to be eligible. This is a major advantage over the US scheme, which relies on unilaterally determined labour standards. It is also positive that the EU shall base its decisions on findings of international organizations such as the UN or ILO. This ensures a better application of international law.

Most importantly, in contrast to the US, the EU scheme requires compliance with the ICCPR, ICESCR, CEDAW and ILO Conventions No. 100 and 111, which all protect the right to non-discrimination on the basis of sex including sexual abuse, equal job opportunities etc. Thus, the EU scheme has much more potential to advance the cause of women.

However, in practice, results have been limited. Under the current GSP, so far only fifteen countries (from a total of 178 GSP beneficiary countries) were granted the special incentive arrangement. Under the previous special incentive arrangements for labour rights, only two countries benefited. In contrast, the US apply their labour clause to 133 countries. The reason for the

[224] Interview with an attorney specializing in labour issues from Sri Lanka, on 21 December 2007.

limited number of countries might the more complex procedure of the EU, previously even explicitly providing for in *situ visits*.

Having said this, the EU granting procedure is nevertheless preferable because it reflects more the labour rights situation on the ground. While this holds fully true for the previous scheme, it is only true to a limited extend under the current GSP social clause. As examined above, in the case of Sri Lanka, the granting of the special incentive arrangement for sustainable development might not have even been justified given all the existing human and women rights violations. The same holds true in case of Colombia. Therefore, country visits and recommendations based on these visits should be an obligatory part of the granting procedure. The case of Sri Lanka shows that only in case of EU investigations and following reviews, there is a chance for real change.

As regards the withdrawal procedure, it only has been used in two cases so far. In both cases, there were flagrant human rights violations. This shows that the EU bodies share the same the reluctance regarding the withdrawal of benefits as the US bodies. While it is in principle a good idea to work rather with incentives, the case of Sri Lanka shows that some trade pressure is needed to initiate change. Thus, it would be recommendable to limit the discretion and to provide for clearer guidelines when to withdraw further benefits. In this context, it should also be noted that an effective complaints procedure including criteria for the admissibility of complaints is recommendable since it would put more pressure on the EU to conduct investigations.

This view is supported by a recent motion for a resolution by the European Parliament that calls upon the Commission to strengthen its monitoring of the implementation of ILO conventions in GSP plus countries, and to inform the Generalized Preferences Committee of the reported infringements of labour rights as well as to consult whether an investigation should be carried out into the existence of serious and systematic violations of ILO's core conventions. [225] It strongly urges the Commission to keep it informed at all stages of the withdrawal procedure. [226]

While the case of Pakistan may show that the EU decisions may be economically and politically biased, the situation with regard to child labour actually improved. This could be proof of the fact that the mere threat of withdrawal already may cause change. Again, this is an argument for introducing a complaints procedure.

Most importantly, in view of the sometimes biased or arbitrary application of the social clause, it might be recommendable to incorporate the EU GSP into a multilateral framework. Important elements would be objective criteria for granting special benefits for woman and human rights, close examination of the local situation including a gender-based assessment with

[225] EUROPEAN PARLIAMENT, «Joint Motion for a Resolution», 13 November 2006, RC/639707EN.doc, para. 5.

[226] Ibid., para. 8.

follow-up recommendations and an effective complaints procedure. In addition, the granting and withdrawing decisions should be subject to judicial review. This gender-based impact assessment is important since the case of Sri Lanka has demonstrated that women rights are often neglected because they do not have a strong lobby.

In a similar vein, the European Parliament asked the Commission to cooperate with local bodies and to produce a comprehensive annual country-by-country report. [227]

2.3. Conclusion

While both the US and EU GSP social clauses have the potential to improve labour or, as in the case of the EU, women and human rights, and indeed brought about some change, many shortcomings still exist. However, since GSPs still are of economic value to developing countries, GSP social clauses have some leverage and could potentially substantially improve the human and labour rights situation of developing countries. This potential should not be lost. These are the recommendations to improve the GSP social clauses:

As stated above, the US GSP social clause should incorporate women rights in accordance with UN and ILO standards. The granting procedure of both schemes should be based on ILO and UN findings and provide for country assessments including visits *in situ*. Also, the women rights situation should be closely examined and implementation guidelines drafted. This is even more important given that women often lack lobby organizations.

In both cases, withdrawal procedures should grant less discretion to the decision-making bodies, which should consist, as it is the case with the EU system, of labour and trade representatives.

Most importantly, in both cases, an effective complaints mechanism should be introduced. It should provide for detailed admissibility criteria when to accept and when to reject complaints. This would have the merit of making the US or EU investigate more or even withdraw trade benefits.

Since the EU as well as the US bodies both were often reluctant to withdraw trade benefits in case of bad labour or human rights performance, and sometimes made biased decisions, the question is whether the schemes should not be made subject to an international appeal mechanism.

A related question is whether the whole schemes should not be incorporated into a multilateral framework. This may indeed be true considering the difficulties with unilaterally imposed schemes. As some authors rightly point out, the current systems are equally determined by political processes within the EU and US, as were the former laws written by colonial powers

[227] Ibid., para. 6 and 10.

before the 1960s and 1970s. [228] It should be recalled that at least the EU GSP is a replacement or continuation of tariffs granted to former colonies by former colonial powers. [229]

This relates to the question whether the trade rules, i.e. graduation rules, product coverage, rules of origin should not be improved in order make GSPs more transparent and responding to the interests of developing countries. While the current rules take some account of the economic development of developing countries, economic and competitive interests of the US and EU prevail. However, these questions are beyond the scope of this study.

Before suggesting some criteria for a multilateral framework for GSP social clause, the WTO compatibility of such clauses has to be analyzed.

3. The WTO Law Compatibility of the EU and US GSP Social Clause

The EU and US GSP may violate Art. I:1 of the General Agreement on Tariffs and Trade (GATT) because they grant tariff preferences to certain developing countries that they do not extend to other WTO members. GATT Art. I:1 contains the Most-Favoured-Nation (MFN) obligation and reads:

«*General Most-Favoured-Nation Treatment*

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraph 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any Member 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 Members.»

Since the EU and the US under their respective GSPs accord advantages in the form of tariff preferences to certain developing countries, which they do no grant to other WTO members, they contravene GATT Art. I:1. Therefore, the GATT CONTRACTING PARTIES in 1971 adopted a waiver to exempt the EU and US from their GATT obligations. [230] At the end of the Tokyo Round, the GATT CONTRACTING PARTIES replaced the waiver by the so-called «Enabling Clause». [231] The question whether and under what

[228] SHAFFER/YVONNE APEA, «GSP Programmes and Their Historical-Political-Institutional Context» in THOMAS COTTIER/JOOST PAUWELYN/ELISABETH BUERGI (eds.), Human Rights and International Trade, Oxford: Oxford University Press, 2006, pp. 489–503, p. 492.

[229] Cf. ibid., p. 491 et seqq.

[230] GATT CONTRACTING PARTIES, Generalized System of Preferences, Decision of 25 June 1971, BISD 18/S24 (1972).

[231] WILLIAM DAVEY/JOOST PAUWELYN, «MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the

conditions WTO members may attach non-trade conditions to their GSPs has been decided by the Appellate Body in the case *EC–Tariff Preferences*. [232]

3.1. Exceptions under the Enabling Clause

The following section will briefly outline the Appellate Body report and then apply the criteria to the current EU and US GSP.

A. The Appellate Body Report EC-Tariff Preferences

The Enabling Clause reads:

> «Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries
> […]
> 1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries without according such treatment to other contracting parties.
> 2. The provisions of paragraph 1 apply to the following:
>   a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences[3].
>   […]
>   d) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.
> 3. Any differential and more favourable treatment provided under this clause:
>   a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties.
>   b) […]
>   c) Any differential and more favourable treatment provided under this clause shall be designed and, if necessary modified, to respond positively to

Issue of "Like Product"», in THOMAS COTTIER/PETROS C. MAVROIDIS (eds.), Regulatory Barriers and the Principle of Non-Discrimination in WTO Law: An Overview, Ann Arbor: University of Michigan Press, 2000, pp. 13–50, p. 24.

[232] European Communities–Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R, report of the panel, 1 December 2003 and Appellate Body, 7 April 2004.

> the development, financial and trade needs of developing countries.
>
> [3]As described in the Decision of the CONTRACTING PARTIES of June 25 1971, relating to the establishment of 'generalised, non-reciprocal and non-discriminatory preferences beneficial to the developing countries'.» [233]

As regards the first controversial issue, i.e. the status of the Enabling Clause, the Appellate Body found that the Clause should be considered as an exception. [234] This view is acceptable, given that in this case, the burden of proof regarding the WTO compatibility of the GSP is on the tariff preference granting country.

The second point of discussion was the meaning of the term «non-discrimination». In accordance with its mandate, the Appellate Body did not examine the question whether GSP granting countries might differentiate at all between developing countries according to their level of development. [235] It limited its analysis to non-trade conditions. As indicated above, the same will be done here since a thorough analysis of the trade rules with respect to the classification of beneficiary countries is beyond the scope of this study.

The Appellate Body convincingly argued that Enabling Clause in its footnote 3 provided for binding obligations, i.e. that a GSP must be «generalized, non-discriminatory and reciprocal», referring to the stricter French and Spanish language «[t]el qu'il est défini» or «[t]al como lo define» rather than «as described in». [236]

The most controversial issue was whether the term «non-discrimination» referred to formally equal treatment, or whether it meant to treat differently situations that are objectively different. [237]

The Appellate Body held that GSP granting countries did not have to provide for identical tariff treatment. [238] In relation to the words contained in paragraph 3 (c) «the development, financial and trade needs of developing countries», it found that it was «simply unrealistic to assume that such development will be in lockstep for all developing countries». [239] Rather, it held that a GSP scheme would still be non-discriminatory if the relevant

---

[233] GATT CONTRACTING PARTIES, Decision of 28 November 1979, «Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries», BISD, 26/203 (1980).

[234] *EC–Tariff Preferences*, report of the Appellate Body, para. 102.

[235] Ibid., paras. 128 and 129.

[236] Ibid., para. 147.

[237] Cf. ibid., paras. 148 et seqq.

[238] Ibid., para. 156.

[239] Ibid., para. 160.

tariff preferences corresponded to a particular development, financial or trade need and were made available to all beneficiaries that shared that need. [240] However, paragraph 3 (a) required that GSP schemes should not impose unjustifiable burdens on other WTO members. [241]

In relation to the contested Drug Arrangements that were part of the former EU GSP [242], the Appellate Body held that because they did not provide for objective criteria for the determination of beneficiary countries under the Drug Arrangements, or the withdrawal of such preferences, it was impossible to determine whether they were an adequate response to the need of developing countries and thus discriminatory or not. [243] They were not available to all similarly situated GSP beneficiaries. [244] Therefore, the Drug Arrangements could not be justified under the Enabling Clause. [245] It explicitly mentioned the former special incentive arrangements for the protection of labour rights that provided for a procedure and substantive criteria to become a beneficiary country. [246] This indicates that the Appellate Body may consider the special incentive arrangements to be compatible with WTO law.

In sum, it can be concluded that conditionality regimes setting forth objective criteria and a procedure for the granting and withdrawing of tariff preferences and being available to all similarly situated countries with the same development needs, are non-discriminatory as defined in paragraph 2 (a) read in conjunction with 3 (c) of the Enabling Clause.

To be consistent with the whole Enabling Clause, such schemes also have to be general and non-reciprocal.

B. The Compatibility of the EU Special Incentive Arrangement for Sustainable Development and Good Governance with the Enabling Clause

The current special incentive arrangement for sustainable development and good governance provides that beneficiary countries *inter alia* have to ratify and effectively implement several human rights conventions including CEDAW and ILO Convention No. 100 and 111 as well as some environmental conventions and conventions relating to good governance. [247] Beneficiary countries also have to subject themselves to a regular monitoring mechanism. According to Art. 16 (1) and (2) of Council Regulation (EC) 980/2005, tariff preferences may be temporarily withdrawn if serious and systematic human rights violations occur or if national legislation no longer incorporates the relevant conventions.

[240] Ibid., para. 165.

[241] Ibid., para. 167.

[242] Art. 10 of Council Regulation (EC) 2501/2001

[243] *EC–Tariff Preferences*, report of the Appellate Body, paras. 183 and 188.

[244] Ibid., para. 187.

[245] Ibid., para. 189.

[246] Ibid., para. 182.

[247] Art. 9 (1) paras. a–e of Council Regulation (EC) 980/2005.

The required ratification and implementation of the various conventions represent objective criteria for the eligibility of beneficiary countries. Likewise does the withdrawal procedure. Some doubt may arise with respect to the development need targeted by the EU scheme because of the great number of conventions to be ratified and implemented. However, the sustainable development approach can be considered to target the need of all development countries including human rights, social, environmental and good governance needs. The approach also takes into account that the development needs may differ and allows countries to first adopt seven environmental conventions while undertaking to ratify the remaining conventions. Such an approach avoids the risk of a *de facto* discrimination because some countries may not be able to comply with certain environmental standards. Since the human rights conventions comprise the basic human rights conventions and the ILO fundamental conventions included in the ILO Declaration on Fundamental Principles and Rights at Work, which applies to all 178 ILO members, developing countries should be assumed to be in a similar situation. The EU scheme may therefore be considered as an adequate response to the development needs of developing countries and non-discriminatory within the meaning of footnote 3 to paragraph 2 (a) of the Enabling Clause.

One could argue that by granting the EU implementation bodies a degree of discretion under the granting or withdrawal procedure, the special incentive arrangement amounts to *de facto* discrimination. As indicated above, the EU decision in e.g. the case of Pakistan could be called a rather biased decision. Yet, the mere fact that the GSP provisions grant some discretion to the EU bodies does not *per se* lead to the conclusion that these provisions are discriminatory. It has been long-established GATT doctrine that where a legislation merely grants a discretion that may or may not be used in such a manner to violate WTO rules, a complainant must base its case on an actual instance where the application of the law – the exercise of discretion – violates WTO rules. [248] However, one panel report stated that the legislation itself and not the administrative decision should be scrutinized where the discretionary nature is such as to deprive a WTO member of the normal enjoyment of those rights. [249]

Providing for objective criteria and a transparent granting and withdrawal procedure, the EU special incentive arrangement for sustainable development and good governance cannot be considered to grant the EU implementation bodies so much discretion as to deprive beneficiary countries of their rights.

[248] United States–Taxes on Petroleum and Certain Imported Substances, adopted 17 June 1987, BISD 34S/38 (1988), para. 5.2.9.; ROBERT HOWSE, «Back to Court after Shrimp/Turtle? Almost But Not Quite Yet: India's Short Lived Challenge to Labour and Environmental Exceptions in the European Union's Generalized System of Preferences» in American University International Law Review, 18 (6) (2003), pp. 1333–1381, pp. 1352, 1366.

[249] United States–Sections 301–310 of the Trade of 1974, WT/DS152/R, report of the panel, 22 December 1999, para. 7.82–7.92.

With respect to the criterion «generalized», there was a consensus that the term referred to the original objective of the 1971 Waiver to replace the fragmented system of preferences that were based on historical and political ties between developed countries and former colonies by a generalized system applicable to all developing countries. [250] Being available in theory to all developing countries, the EU GSP social clause is also «generalized».

With regard to the term «non-reciprocal», the original concept only referred to trade concessions. [251] One could however also apply the term to non-trade conditions. Yet, it has convincingly been argued that because paragraph 5 of the Enabling Clause – stating that developing countries should not be required to make concessions inconsistent with their development needs –, the principle of reciprocity should only apply to negotiations directed at the reduction of trade barriers. [252] Moreover, to prohibit non-trade conditions on the ground that they are not non-reciprocal would render the former finding in relation to non-discrimination meaningless because non-trade conditions would contravene WTO law in any event.

C. *The Compatibility of the US GSP Social Clause with the Enabling Clause*

As examined above, under the US GSP social clause, a country is *inter alia* eligible for GSP treatment if it takes steps to afford workers internationally recognized worker rights. *Vice versa*, the GSP status may *inter alia* be withdrawn, if the country is not taking steps to afford workers internationally recognized worker rights, either on motion of the President or following a petition process. Although the granting and withdrawing provisions do not refer to international standards, they are the same standards for all developing countries and in principle objective criteria within the meaning of the term «non-discriminatory».

The development need is the protection of labour rights, addressing all members that have ratified the ILO fundamental Conventions as well as ILO members.

Thus on their face, the US GSP social clause seems to be non-discriminatory. However, as it is the case with the EU scheme, the US provisions grant the implementing bodies a lot of discretion. The wording «taking steps» as well as the term «internationally recognized labour rights» not referring to international standards are grey legal concepts. The application of the US GSP social clause especially in the 1980s was politically and economically biased. The question therefore arises whether the discretionary nature is such as to deprive a WTO member of the normal enjoyment of its rights under the GSP labour conditionality.

It should be noted that in principle, under the US GSP social clause, if applied in a reasonable way, similarly situated countries will be treated

[250] *EC–Tariff Preferences*, report of the Appellate Body, para. 155.

[251] BARTELS, «The WTO Enabling Clause», p. 526.

[252] Ibid., p. 529.

equally, all being subject to the same mandatory criteria regarding internationally recognized worker rights. If there is an abuse of the discretion, a complainant country has the possibility of basing its case on the actual instance where the application of the law – i.e. the exercise of the discretion – has violated the «non-discriminatory» requirement of the Enabling Clause.

However, it should be recalled that the worker rights clause is subject to the national economic interest clause. Thus, under the national economic interest clause, two countries taking steps to implement labour rights could be treated differently because the US has a different economic interest in these countries. In such a case, identical treatment is not available for similarly situated countries. The national interest clause may therefore lead to discriminatory treatment. In contrast to the application of the terms «taking steps» or «internationally recognized worker rights», the national economic interest clause, even if applied reasonably, may nevertheless cause discriminatory treatment simply because the national economic interest is different vis-à-vis two countries. Thus, this clause is of such a discretionary nature as to deprive WTO members of their rights under the conditionality regime.

One could argue that under special incentive regimes such as GSPs, countries should be allowed to consider their economic or competitive interest. However, these interests are sufficiently protected under the graduation rules, which should be examined in further studies. To let economic interests prevail over non-trade concerns would deprive the non-discriminatory requirement of its meaning.

In conclusion, the national interest clause renders the US GSP social clause in its current form inconsistent with the Enabling Clause.

3.2. Conclusion

The analysis above has shown that incentive regimes providing for labour or human (women) rights conditionality may be compatible with WTO law as long as they provide for objective criteria and correspond to a development need of similarly situated countries. Such social clauses must however not be subject to national economic interest clauses. While the current EU special incentive arrangement for sustainable development and good governance is compatible with WTO law, the US GSP social clause is not. However, the criteria introduced do not provide a remedy for the shortcomings of these GSP social clauses in general. While an affected country may in theory file a complaint under the WTO dispute settlement, if it has been treated in a politically or economically biased way, such a procedure may not be sufficient to ensure an effective application for GSP social clauses. Thus, a multilateral framework *de lege ferenda* will be proposed for future GSP social clauses.

4. Conclusion

Having found that GSPs providing for labour and women rights conditionality have a great potential for bringing about some change in law and practice of beneficiary countries, and that they are compatible with WTO law if they provide for objective criteria and are not of such a discretionary nature as to deprive beneficiaries of their rights under these schemes, they should be used to advance the cause of women rights. However, to make them more effective, a multilateral framework de *lege ferenda* should be introduced. Such a multilateral framework could be established by a joint ILO or UN-WTO enforcement regime, being composed of human rights and trade experts.

GSPs social clauses taking due account of women rights should be adopted based on the following criteria:

Trade preferences granting procedures should be based on human rights conventions such as CEDAW, ICCPR, ICESCR, ILO Conventions No. 100 and 111. They should not be subject to a national interest clause. Moreover, better graduation rules taking into account the social and economic development of the country concerned should be developed.

The granting procedure should closely review the country situation including visits *in situ*. This would include a gender-based impact assessment using indicators such as gender equality in income or wages, maternity leave and childcare responsibilities, gender-based violence including sexual harassment, reproductive and health rights and infrastructure to reduce women and girls' time burdens.

Cooperation with ILO and UN bodies, women organizations and trade unions should be obligatory. Implementation guidelines should help the country to implement the relevant conventions.

Beneficiary countries should be under permanent review. A comprehensive annual reporting mechanism similar to the one under the US GSP should be introduced.

The withdrawal procedure should follow detailed guidelines based on UN and ILO jurisprudence including a gender-based impact assessment. The decision-making bodies should be composed of trade and human/women rights experts.

An effective complaints mechanism based on the US petition review should be introduced. Such a mechanism should be provide for detailed guidelines, not providing the implementation bodies with too much discretion.

Most importantly, the granting and withdrawing decisions should be subject to an ILO or UN-WTO appeal mechanism that ensures the objective application of the GSP social clauses. This is however without prejudice to the right to request the review of the GSP under the WTO dispute settlement. The new mechanism would have the merit that only GSP related complaints are dealt with, which ensures more capacity and knowledge in order to handle these cases in an efficient and timely manner.

In sum, such a mechanism would ensure that GSP social clauses are not any longer a lost opportunity.