GENERALISED SYSTEMS OF PREFERENCES: A TOOL TO ENSURE LINKAGE BETWEEN ACCESS TO MARKETS AND SUSTAINABLE DEVELOPMENT

Olivier De Schutter

2015

Institute for Interdisciplinary Research in Legal sciences (JUR-I)
Centre for Philosophy of Law (CPDR)

CRIDHO Working Paper 2015/3

La Cellule de recherche interdisciplinaire en droits de l'homme (CRIDHO) a été constituée au sein du Centre de philosophie du droit, centre de recherches localisé au sein de l'Institut pour la recherche interdisciplinaire en sciences juridiques (JUR-I) de l'Université de Louvain, par des chercheurs soucieux de réfléchir le développement contemporain des droits fondamentaux à l'aide d'outils d'autres disciplines, notamment l'économie et la philosophie politique. La CRIDHO travaille sur les rapports entre les mécanismes de marché et les droits fondamentaux, aussi bien au niveau des rapports interindividuels qu'au niveau des rapports noués entre Etats dans le cadre européen ou international.

The Interdisciplinary Research Cell in Human Rights (CRIDHO) has been created within the Centre for Legal Philosophy (CPDR), a research centre located in the Institute for Interdisciplinary research in legal science (JUR-I) of the University of Louvain, by scholars seeking to understand the development of fundamental rights by relying on other disciplines, especially economics and political philosophy. The CRIDHO works on the relationship between market mechanisms and fundamental rights, both at the level of interindividual relationships as at the level of the relationships between States in the European or international context.

GENERALISED SYSTEMS OF PREFERENCES: A TOOL TO ENSURE LINKAGE BETWEEN ACCESS TO MARKETS AND SUSTAINABLE DEVELOPMENT

Olivier De Schutter[*]

ABSTRACT

This paper discusses whether access to markets can be made conditional upon compliance with labour rights and environmental standards. It examines one tool used by the EU in which such a linkage is explicit: The EU's generalised system of preferences was established in favor of developing countries, in accordance with the 1979 "Enabling Clause" adopted under the General Agreement, to accelerate the integration of developing countries into the international trading system. It includes both sanctions-based ("negative") and incentives-based ("positive") measures: it provides for the possibility of imposing sanctions for 'serious and systematic violations' of human rights or core labour standards, as well as for a special incentive ('GSP+') arrangement for sustainable development and good governance. The paper reviews the history of the successive GSP schemes established by the EU, and how such an approach fits within the broader framework of the multilateral trade regime.

[*] Olivier De Schutter is Professor at the University of Louvain (UCL) and at SciencesPo (Paris). This paper appears in slightly amended form as chapter 4 of Olivier De Schutter, Trade in the Service of Sustainable Development. Linking Trade to Labour Rights and Environmental Standards (Bloomsbury / Hart Publ., 2015).

Introduction

Over the past decades, the growth of international trade and investment has allowed a number of developing countries to catch up with the rich countries, thanks to a strong, export-led growth. But many developing countries are still being left behind from this process. And even where the convergence process is at work, inequalities have often developed within the countries that benefit. The international charity group Oxfam calculated that seven out of ten people live in countries where the gap between the rich and poor is worse today than it was thirty years ago.[1] Moreover, while growth has had powerful poverty-reducing effects in many developing countries, it has also led in many cases to environmental degradation and to an uncontrolled increase of greenhouse gas emissions. We now use about 1.6 planets annually to provide us with resources and to absorb our waste, and this ecological overshoot increases each year.[2] The concentration of carbon dioxide (CO_2) in the atmosphere is now 40% higher than it was in 1750, before the industrial era, and the levels of concentration of methane (NH_4) and nitrous oxide (N_2O), the two other major greenhouse gases resulting from human activity, increased by 150% and 20% respectively: these concentrations exceed what has been recorded during the past 800,000 years, and the rates of increase we are witnessing today are unprecedented in the last 22,000 years.[3]

The expansion of volumes of trade in recent decades may be successful, in certain respects, as long as we consider countries as a whole, and as long as we define success as increase in GNP per capita. But once we examine the situation of different groups within countries and once we abandon the fetichism of growth as measured by GNP increase to take into account the other pillars of sustainable development, serious doubts emerge as to its ability to deliver what it promises. If globalization as such is not to be blamed, then perhaps its current form is.

It is against this backgrond that calls have been made to improve the linkage between trade policies and sustainable development, in particular by making access to markets conditional upon compliance with labour rights and environmental standards. May linkage thus conceived be the solution? The multilateral trade regime, now developed under the auspices of the World Trade Organisation, allows Members of the WTO to link their trade policies to concerns related to labor rights or the environment, in order to use market access as a leverage to encourage their trading partners to improve labor conditions and to better protect the environment. Generalised Systems of Preferences, as have been developed since the 1970s, are one particular example of such a demarche. The EU's generalised system of preferences was established in favor of developing countries, in accordance with the 1979 "Enabling Clause" adopted under the General Agreement, to accelerate the integration of developing countries into the international trading system. It includes both sanctions-based ("negative") and incentives-based ("positive") measures: it provides for the possibility of imposing sanctions for 'serious and systematic violations' of human rights or core labour standards, as well as for a special incentive ('GSP+') arrangement for

[1] Calculation based on data updated in June 2013: http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:22301380~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html. A range of authors have expressed their concern about growing inequality in recent years. They include François Bourguignon, *La mondialisation de l'inégalité*, (Paris: Seuil, 2012; Joseph Stiglitz, *The Price of Inequality. How today's divided society endangers our future* (W.W. Norton & Co.: New York and London, 2012); James K. Galbraith, *Inequality and Instability: A Study of the World Economy Just Before the Great Crisis* (Oxford University Press, 2012); Thomas Piketty, *Capital in the Twenty-First Century* (Cambridge: Harvard Univ. Press, 2014). Probably the most detailed indictment of the impacts of growing inequality on the health of societies is Richard Wilkinson and Kate Pickett, *The Spirit Level. Why Greater Equality Makes Societies Stronger* (New York: Bloomsbury Press, 2009).

[2] See the calculations of the Global Footprint Network, available at: http://www.footprintnetwork.org/ar/index.php/GFN/page/world_footprint/ (consulted on Jan. 30th, 2015).

[3] International Panel on Climate Change (IPCC), 5th Assessment Report, *Approved Summary for Policymakers adopted at the Twelfth session of Working Group I: Climate Change 2013: The Physical Science Basis* (IPCC WG1 AR5) (27 Sept. 2013), p. 7.

sustainable development and good governance. The GSP+ scheme benefits vulnerable countries that have ratified a number of conventions in the areas of human rights, labor rights, and the protection of the environment and that accept to be monitored for their effective implementation of these conventions.

This paper, which is one part of a larger project, illustrates that the GSP scheme thus established is compatible with WTO law provided it complies with the strict authorisation of the 1979 "Enabling Clause". According to the WTO Appellate Body, the key requirement is that any preference should be granted on a non-discriminatory basis, so that all similarly-situated GSP beneficiaries, who have the same 'development, financial and trade needs', should have access to the scheme under the same conditions. In this as in other areas, the key concern of the WTO Dispute-Settlement bodies is not with the very idea of linking trade to non-trade issues: it is with the risk of abuse that such a linkage may imply, where conditionalities are not designed or implemented in full transparency, and may hide prohibited discrimination between trading partners. In order to present this conclusion, the paper first examines the origins of the GSP schemes (1.). It then looks at how "special incentives" emerged within the EU GSP scheme after 1998 (2.). A description of the three layers of the current EU GSP scheme then follows (3.).

1. The origins of the Generalised System of Preferences

Schemes establishing Generalized Systems of Preferences (GSP schemes) are a legacy from the attempts, from the late 1960s to the late 1970s, to build a "New International Economic Order" improving the position of developing countries in the global economic system. By the mid-1960s, a decade after the process of decolonization was launched in Asia and Africa, it had become clear to all observers that the existing international economic order was not working for the benefit of developing countries, and that the rules of international trade should be revised in order to take into account the specific needs of these countries. The establishment of the United Nations Conference on Trade and Development (UNCTAD) in 1964 was both a result of the effort to better link the international economic regime to the aims of development ad an instrument to achieve this aim. Revisiting the rules of international trade in order to allow for special and differential treatment of developing countries formed an integral part of that agenda.[4] One way to contribute to this was to allow developed countries to grant preferential market access to their former colonies, and to extend such preferential treatment to other developing countries in order to support their efforts at development and the diversification of their economies: GSP schemes were borne out of this ambition.

The European Economic Community (as it was then) launched its initial GSP scheme in June 1971, with the intention at the time of establishing it for a period of ten years. The scheme provided unilateral and non-reciprocal trade preferences to developing countries, ostensibly in order to encourage their integration in the global trading system; a more implicit agenda was to maintain strong relationships with the formerly colonized regions, who therefore could be quietly maintained within the geopolitical sphere of influence of the then declining imperial powers. The United States soon followed suit, with the first US GSP scheme entering into force on 1 January 1976, on the basis of the 1975 Trade Act.

By definition, GSP schemes treat preferentially products originating from developing countries, in derogation of the Most Favoured Nation (MFN) principle established by Article 1 of the General Agreement on Tariffs and Trade (GATT). Therefore, in order to allow for the launch of the EEC's GSP scheme, a waiver was granted from the MFN principle in 1971.[5] The derogation from the principle of

[4] The Preamble to the 1971 Decision refers to the agreement reached at the Second UNCTAD conference (of 1968), in favour of 'the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries' (see **Resolution 21 (ii)** taken at the UNCTAD II Conference in New Delhi in 1968).

[5] Decision relating to the establishment of generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries, Decision L/3545 (June 25, 1971) GATT B.I.S.D. (18th Supp.) at 24 (1972).

non-discrimination was confirmed on a permanent basis in 1979, as part of the Tokyo Round of trade negotiations under the GATT (1973-1979), thus allowing the regime to be maintained beyond the initial limit of ten years, and making it possible for such schemes to become de facto a permanent feature of the EU's trade policy. The so-called 'Enabling Clause' adopted in 1979 provides that, under certain conditions, in derogation to 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'.[6] The waiver was later integrated as part of the WTO Agreements when the World Trade Organisation was established in 1995.

2. The emergence of "special incentives" within the EU GSP scheme

The EU GSP scheme took a different turn when, beginning in 1998,[7] the EU complemented the general GSP arrangement with 'special incentive' provisions. These so-called 'GSP+' arrangements encouraged developing countries to comply with the fundamental labor standards adopted by the International Labor Organisation and with certain environmental standards. Establishing such a linkage -- making preferential market access conditional upon compliance with certain environmental and labour standards -- was, of course, controversial. Yet, in a communication it submitted in 1997, in which it presented in a report to the Council of the EU on the work done within OECD, ILO and WTO on the link between international trade and social standards, the European Commission took the view that, while protectionism is "ruled out", this leaves the way open for a "positive, incentive-based approach to the issue which could include greater cooperation between the WTO and ILO".[8] The European Commission was alluding to the Ministerial Declaration adopted in December 1996 at the first WTO Ministerial Conference, where, as we have seen, the Governments explicitly rejected "the use of labour standards for protectionist purposes", while at the same time noting, approvingly, the collaboration between WTO and ILO Secretariats.[9]

To present the GSP+ schemes that the Community was about to introduce as not "endangering the natural comparative advantage of developing countries", the Commission noted that fears of protectionism stem from a focus on the "negative and punitive aspects of the social clause" : in contrast, it stated, "the Community GSP is offering incentives to developing countries in an approach based on cooperation rather than confrontation".[10] The distinction between *positive incentives*, in the form of preferential access to markets by lower tariff rates, and *negative sanctions*, in the form of denying advantages to countries that do not comply with certain standards, is not particularly convincting. Such a distinction is in fact entirely dependent on the existence of a baseline – a specific tariff structure applicable to the imports from developing countries – that is supposed to be neutral : without such a baseline, the distinction collapses entirely, and whether you call 'positive incentive' the advantage or 'negative sanction' its denial has more to do with packaging than with content.

Initially, few developing countries had in fact expressed their interest in benefiting from the positive incentives of the 'GSP+' schemes, presumably because they felt that the advantages they could gain were not worth the increased scrutiny they would be subjected to as a result of them joining the scheme,

[6] Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision L/4903 (Nov. 28th, 1979) GATT B.I.S.D. (26th Supp.) at 203 (1980).
[7] The 'GSP+' scheme was inaugurated by Article 7 of Council Regulations (EC) Nos 3281/94 of 19 December 1994 and 1256/96 of 20 June 1996, which provide for extra preferences to be granted, at their request, to countries implementation ILO conventions Nos 87 and 98 on the right of association and collective bargaining, and No 138 on a minimum working age.
[8] Commission of the European Communities, Commission Report to the Council pursuant to Article 7(2) of Council Regulations Nos 3281/94 and 1256/96 on the Scheme of Generalised Preferences, Summary of work conducted within the OECD, ILO and WTO on the link between international trade and social standards, COM(97) 260 final, of 2.6.1997.
[9] See above, text corresponding to note 24.
[10] Commission of the European Communities, Commission Report to the Council pursuant to Article 7(2) of Council Regulations Nos 3281/94 and 1256/96 on the Scheme of Generalised Preferences, cited above, p. 14.

and also perhaps because of the lack of transparency in the operation of the scheme. The Commission therefore proposed, in 2001, to improve the attractiveness of the scheme by widening the range of the additional trade preferences under the incentives schemes, by increasing the transparency and by streamlining the procedures, so as to help countries make better use of the special incentives and the market access opportunities offered.[11] But the key question – whether the use of "positive conditionalities" is acceptable under WTO law – was only addressed in 2004 by a panel of the WTO, and then by the Appellate Body, at the request of India (Box 1).

Box 1. The compatibility of "special incentives" with WTO law: the *European Communities – Conditions for Granting of Tariff Preferences to Developing Countries* dispute

The context of the *European Communities – Conditions for Granting of Tariff Preferences to Developing Countries* dispute was the following. [12] Under the EU GSP scheme for the period 2001-2004,[13] developing countries could benefit from five different types of preferences, each corresponding to a specific logic. These were (i) general GSP arrangements, benefiting all developing countries ; (ii) special incentive arrangements for the protection of labour rights ; (iii) special incentive arrangements for the observance of environmental standards ; (iv) special arrangements for least developed countries (LDCs) – what has been referred to as the 'everything but arms' arrangements – ; and (v) special incentive arrangements to combat drug production and trafficking (art. 1). In its original request for consultations with the EU, India challenged three of these schemes, those referring to labour rights, to environmental standards, and to the fight against drug production and trafficking. In the subsequent proceedings, it then limited its claim to the latter scheme only, presumably because it considered that this was the most legally doubtful and the least popular politically, and because a finding of incompatibility on that scheme would probably also fragilize the others and perhaps lead to the removal of all such conditionalities. At the same time however, this could appear as a strange choice, because the special incentive arrangements to combat drug production and trafficking were in a sense the least suspicious of being a form of economic protectionism : while the imposition of labour or environmental conditionalities may be resented as a tool depriving developing countries of a comparative advantage they have in international competition, the same cannot be said of a condition imposing that the country wishing to benefit contribute to the fight against drugs.

[11] Commission of the European Communities, Promoting core labour standards and improving social governance in the context of globalisation, COM(2001) 416 final, of 18.7.2001.

[12] Appellate Body Report, *European Communities – Conditions for Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted on 20 April 2004. For comments, see Lorand Bartels, 'The Appellate Body Report in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* and its Implications for Conditionality in GSP Programmes', in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds), *Human Rights and International Trade*, cited above, p. 463-487 ; James Harrison, 'Incentives for development: the EC's Generalised System of Preferences, India's WTO challenge and reform', *Common Market Law Review*, vol. 42, n. 6, December 2005, p. 1663-1689; Robert Howse, 'India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalised System of Preferences: a Little Known Case with Major Repercussions for 'Political' Conditionality in US Trade Policy', *Chicago Journal of International Law*, 4/2 (2003), pp. 385-40; Gregory Shaffer and Yvonne Apea 'Institutional Choice in the General System of preferences Case: Who Decides the Conditions from Trade Preferences? The Law and Politics of Rights', University of Wisconsin Law School, Legal Studies Research Paper Series, Paper No. 1008, 2006. For general assessments of the compatibity with WTO law of the EU's GSP+ scheme, see Pedros Mavroidis, 'Così fan tutti [sic] – Tales of Trade and Development, Development and Trade', *German Yearbook of International Law 2004* (2005) vol. 47, pp. 39-62 ; and N. Breda dos Santos, R. Farias and R. Cunha, 'Generalised System of Preferences in General Agreement on Tariffs and Trade/World Trade Organisations: History and Current Issues', *Journal of World Trade* 39 (4), 2005, pp. 638-670. See generally, on the compatibility of the GSP scheme with the WTO rules, Lorand Bartels, 'The WTO and Positive Conditionality in the European Community's GSP Program', *Journal of International Economic Law*, vol. 6(2) (2003), pp. 507-532.

[13] Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalized tariff preferences for the period from 1 January 2001 to 31 January 2004, OJ L 346 of 31.12.2001, p. 1.

That is not to say, of course, that the linkage is necessarily justified. Indeed, that was the question the WTO dispute-settlement bodies were left to answer : could the drug arrangements be considered authorized under the 1979 Enabling Clause[14] ? Paragraph 2(a) of the Decision states that the waiver applied in particular to 'preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences', and a footnote (footnote 3) adds that this refers to the GSP 'as described in the Decision of the Contracting Parties of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries" (BISD 18S/24)'. Footnote 3 of paragraph 2(a) of the Enabling Clause thus requires that the preferences be 'non-discriminatory', implying that identical tariff treatment should be available to all similarly-situated GSP beneficiaries. The Appellate Body noted that, as clearly illustrated by the requirement of non-discrimination, "one of the objectives of the 1971 Waiver Decision and the Enabling Clause was to eliminate the fragmented system of special preferences that were, in general, based on historical and political ties between developed countries and their former colonies".[15]

Beyond this reminder however, the Appellate Body did not exclude the introduction of any kind of conditionality in the granting of special preferences to developing countries. Instead, it stated -- disagreeing on this point with the Panel's conclusions[16] --, the term 'non-discriminatory' should not be interpreted as requiring "that preference-granting countries provide "identical" tariff preferences under GSP schemes to "all" developing countries". To hold such a position (as did the Panel), the Appellate Body noted, would be to assume "that allowing tariff preferences such as the Drug Arrangements would necessarily "result [in] the collapse of the whole GSP system and a return back to special preferences favouring selected developing countries"", a conclusion which the Appellate Body considered to be incorrect: "We observe", is stated, "that the term "generalized" requires that the GSP schemes of preference-granting countries remain generally applicable. Moreover, unlike the Panel, we believe that the Enabling Clause sets out sufficient conditions on the granting of preferences to protect against such an outcome. [Indeed,] provisions such as paragraphs 3(a) and 3(c) of the Enabling Clause impose specific conditions on the granting of different tariff preferences among GSP beneficiaries".[17]

Linkage, therefore – the imposition of certain non-development related conditions on developing countries intending to benefit from preferential access to markets –, would not appear to be illegal *per se* under the Enabling Clause appended to the GATT 1994 agreement.[18] The Appellate Body nevertheless found that the Drug Arrangements as included in the EU GSP scheme for 2001-2004 (and codified in Council Regulation (EC) No 2501/2001) were in violation of the GATT rules. Indeed, in contrast to the special incentive arrangements for the protection of labour rights or for the protection of the environment, the drug arrangements provided no mechanism under which additional beneficiaries may be added to the list of beneficiaries : instead, the list of 12 countries benefiting from the scheme appeared to be a closed one, and the list could only be extended by amending the Regulation itself. The Drug Arrangements were also non-transparent : the Appellate Body remarked that they 'do *not* set out any clear prerequisites—or "objective criteria" – that, if met, would allow for other developing countries "that are similarly affected by the drug problem" to be *included* as beneficiaries under the Drug

[14] Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision L/4903 (Nov. 28th, 1979) GATT B.I.S.D. (26th Supp.) at 203 (1980).
[15] Appellate Body Report, *European Communities – Conditions for Granting of Tariff Preferences to Developing Countries*, para. 155.
[16] The Panel had expressed the view that "the term "non-discriminatory" in footnote 3 [of the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries ('Enabling Clause')] requires that *identical* tariff preferences under GSP schemes be provided to *all* developing countries without differentiation, except for the implementation of a priori limitations" (Panel Report, para. 7.161).
[17] Appellate Body Report, *European Communities – Conditions for Granting of Tariff Preferences to Developing Countries*, para. 156.
[18] See J. Harrison, *The Human Rights Impact of the World Trade Organisation*, (Oxford and Portland: Hart Publ., 2007), at 115-117.

Arrangements'.[19] In sum, the system was prone to being abused, in the absence of clear and transparent criteria guaranteeing to the potential beneficiaries of the scheme that they would be treated in a non-arbitrary fashion.

The main lesson from the case presented to the WTO Appellate Body at the request of India is that *any preference should be granted on a non-discriminatory basis, so that all similarly-situated GSP beneficiaries, who have the same "development, financial and trade needs", should have access to the scheme*.[20] It is discrimination between developing countries with the same "development, financial and trade needs" which is condemned ; it is not linkage itself. It is also noteworthy that a scheme such as the EU GSP scheme, that imposes compliance with certain standards in the areas of labor rights and the environment across the whole country (rather than just in the supply chains through which goods are produced that will seek access to the EU market) may, paradoxically perhaps, be easier to justify than a GSP scheme that reaches the export sector alone: although the EU GSP is more intrusive in that respect, it also makes a more important contribution to sustainability in the developing country seeking access to the EU markets, and it is less suspect of being a form of disguised protectionism.[21]

Following the adoption by the Appellate Body of its report on 20 April 2004, the European Commission adopted a communication defining the principles that the EU's GSP should follow for the period 2006-2015. It noted that the Appellate Body "found that WTO Members are in principle allowed to grant different tariffs to products originating in different GSP beneficiaries under the condition that identical treatment is available to all similarly-situated GSP beneficiaries. A WTO Member which intends to grant additional tariff preferences under its GSP scheme would have to identify on an objective basis the special "development needs" of developing countries which can be effectively addressed through tariff preferences".[22] The Commission announced a number of reforms to the GSP scheme. It simplified the scheme by grouping the then three separate types of special incentives (to encourage the protection of labour rights, to encourage protection of the environment and to combat illegal drug production and trafficking) into one single 'GSP+' arrangement described as referring to 'sustainable development', so as to arrive at three arrangements in total: the general arrangement open to all developing countries[23]; the special 'Everything But Arms' arrangement for the least developed countries ; and the 'GSP+' arrangement to encourage sustainable development.

As part of the reforms, this latter arrangement itself (the 'sustainable-development incentive', as the Commission called it) was redesigned in certain significant ways. Essentially, it would build more than in the past on existing international conventions in the areas of human rights, labour rights, environmental protection (including the protection of endangered species) and the fight against illegal drug protection and trafficking. The countries intending to benefit from the 'GSP+' scheme would be subjected to scrutiny, but the advantage of defining the expectations by reference to international instruments was that these instruments included control mechanisms that could be relied upon, and the Commission stated its intention to "take account of these evaluations", as made by the mechanisms established by the relevant conventions, "before deciding which of the applicant countries will be

[19] Para. 183.
[20] Para. 173.
[21] The GSP scheme put in place by the United States adopts a more narrow approach, focusing on the export supply chains. For a more systematic comparison between the GSP schemes adopted respectively by the EU and the US, which cannot be offered here, see Bob Hepple, *Labour Laws and Global Trade*, Hart Publ., Oxford and Portland, Oregon, 2005, chapter 4 ; James Harrison, *The Human Rights Impact of the World Trade Organisation*, cited above, at 111-118. For a critique of the US linkage of trade preferences to labour rights, see Philip Alston, 'Labor Rights Provisions in US Trade Law : 'Aggressive Unilateralism' ?', *Human Rights Quarterly*, vol. 15 (1993), at 1.
[22] Commission of the European Communities, Communication to the Council, the European Parliament, and the European Economic and Social Committee, Developing countries, international trade and sustainable development: the function of the Community's generalised system of preferences (GSP) for the ten-year period from 2006 to 2015, COM (2004) 461 final of 7.7.2004, p. 6.
[23] At the time of the communication, the EU GSP scheme covered 178 independent countries and territories.

selected to benefit from the incentive schemes".[24] The reference to existing international instruments and to the monitoring mechanisms established by these instruments was clearly a reaction to the WTO's Appellate Body ruling and its insistence that the 'needs' of developing countries which GSP schemes should respond to were to be defined objectively, rather than left to the subjective appreciation of the preference-granting country (see Box 1). In addition to these reforms, the Commission announced that the incentive scheme "would include a credible suspension clause that can be rapidly activated" : at the initiative of the Commission itself, of the Member States or of the European Parliament, an investigation by the Commission could be triggered "which could lead to suspension of the additional benefits if it is established that countries have not honoured their commitments".[25]

3. The three layers of the current EU GSP scheme

These are the components that define the system, as it has been operating since. It follows that, as regards developing countries that benefit the GSP scheme, some form of linkage between acess to market and compliance with labour or environmental standards is already established. The GSP scheme for 2014-2024 was established under Regulation (EU) n° 978/2012, adopted on the basis of Article 207 of the Treaty on the Functioning of the European Union.[26]

Consistent with the approach followed since 2004, the current GSP scheme comprises three layers, comprising one general arrangement and two special incentives. A *general arrangement* is granted to 90 beneficiary countries that are particularly in need of support.[27] Under the former scheme, covering the period 2009-2014, this arrangement benefited all countries that were not classified by the World Bank as high-income countries and which were not sufficiently diversified in their exports. In total, this meant 177 countries benefited, although the distinction between sensitive and non-sensitive products, and the exclusion from duty-free access, among the latter, of the agricultural components, limited the advantages of the scheme to developing countries that were not among the least-developed countries.[28] Thus, a number of countries are removed from the more recent scheme, because they have graduated to achieve a high or upper middle income per capita, according to the classification of the World Bank, or because they already have preferential access to the EU through other means. Under the new Regulation, GSP preferences are intended to be better focused on the countries most in need: noting that, currently, "40% of preferential exports are absorbed by the more advanced countries", the Commission considers

[24] Commission of the European Communities, Communication to the Council, the European Parliament, and the European Economic and Social Committee, Developing countries, international trade and sustainable development: the function of the Community's generalised system of preferences (GSP) for the ten-year period from 2006 to 2015, COM (2004) 461 final of 7.7.2004, p. 10.
[25] Id.
[26] Regulation (EU) n° 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) n° 732/2009, OJ L 303 of 31.10.2012, p. 1. The new scheme succeeds the GSP scheme established under Council Regulation (EC) No 732/2008 of 22 July 2008, applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007, OJ L 211 of 6.8.2008, p. 1 (adopted under Art. 133 EC). The period of application of Regulation No 732/2008 was extended until 31 December 2013, with a few minor amendments, by the GSP "roll-over" regulation: Regulation (EU) No. 512/2011 of the European Parliament and of the Council of 11 May 2011 amending Council Regulation (EC) No. 732/2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011, OJ L 145 of 31.5.2011, p. 28.
[27] Regulation (EU) n° 978/2012, Arts. 4-8.
[28] Regulation No. 732/2008 rather shamelessly stated that, as regards the general arrangement, 'there should be continued differentiation of the preferences between 'non-sensitive' products and 'sensitive' products, to take account of the situation of the sectors manufacturing the same products in the Community' : therefore, while tariff duties on non-sensitive products were suspended for the products originating in the countries benefiting from the scheme, duties on sensitive products were reduced – not eliminated –, 'in order to ensure a satisfactory utilisation rate while at the same time taking account of the situation of the corresponding Community industries'. See Preamble, Recitals 14 and 15, and Art. 6.

that this competition the low-income countries face "goes some way to explain the disappointing performance of the poorest".[29]

The *special incentive ('GSP+') arrangement for sustainable development and good governance* constitutes the second layer. This scheme benefits 90 vulnerable countries (vulnerable insofar as they are highly dependent on the export of a limited range of products to the EU)[30] that have ratified a number of conventions in the areas of human rights, labor rights, and the protection of the environment (see Box 2). Under the GSP scheme established for 2008-2013, the countries seeking to benefit from this special incentive undertook 'to maintain the ratification of the conventions and their implementing legislation and measures', and to accept 'regular monitoring and review of [their] implementation record in accordance with the implementation provisions of the conventions [they have] ratified'.[31] The Commission was in charge of monitoring the effective implementation of these conventions in accordance with the mechanisms established under each of these instruments, using the information collected through such mechanisms[32]; and it was expected to assess 'the relationship between the additional tariff preferences and the promotion of sustainable development'.[33] The new GSP scheme (2014-2024) further strengthens the mechanisms used to track the implementation of conventions that the countries having sought and obtained "GSP+" status (and thus benefiting from special incentives for good governance and sustainable development) must ratify and implement.[34] Specifically, a country benefiting from the GSP+ arrangement "accepts without reservation the reporting requirements imposed by each convention and gives a binding undertaking to accept regular monitoring and review of its

---

[29] *The EU's new Generalised System of Preferences - Factsheet*, presented on the website of the European Commission (http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151705.%2013-07%20GSP%20InfoPack%20Update%20Final.pdf, last consulted September 22nd, 2013). The European Commission explains that "even marginal drops in exports by the more advanced, bigger economies can potentially provide significant opportunities for the poorest, whose exports are very small in comparison. To give an idea of the order or magnitude, a drop of 1% in, say, Brazilian exports, is equivalent to more than 16 times Burkina Faso's total exports to the EU".

[30] For the definition of a 'vulnerable country', see Annex VII of Regulation 978/2012. A vulnerable country is one that is highly dependent for its export revenues on its exports to the EU on a limited range of products, showing a relatively little diversified economy (the seven main products it exports to the EU should represent at least 75 % of its total exports of the products concerned by the GSP arrangement, on a three-years average), and whose share of the market in the EU for the products concerned is very low (less than 2 %). Under Article 4(2) of Regulation No. 732/2008, which defined the earlier GSP scheme, three conditions applied : (i) the country seeking to benefit should not be classified as a high-income country during three consecutive years, i.e. its per capita GNI should not exceed 11.456 USD according to the World Bank 2007 data ; (ii) its five largest sections of GSP-covered imports had to represent more than 75 % in value of its total GSP-covered imports to the EU ; (iii) finally, the GSP-covered imports into the Community of the products originating in the country had to represent less than 1 % in value of the total GSP-covered imports into the Community. Under both schemes therefore, once a vulnerable country increases its exports to the Community above a certain level (in proportion to the total imports from developing countries benefiting from the GSP), it ceases to qualify for the GSP+ special incentive scheme. However, in comparison to the regime in force in 2008-2013, the current regime is more flexible as regards the conditions under which a country may be considered as "vulnerable".

[31] Art. 8, para. 1, b).

[32] Art. 8, para. 3.

[33] Preamble, Recital 11.

[34] On the procedure for the examination of applications from countries seeking to benefit from the "GSP+" scheme, see Commission Delegated Regulation (EU) No 155/2013 of 18 December 2012 establishing rules related to the procedure for granting the special incentive arrangement for sustainable development and good governance under Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences, OJ L48 of 21.2.2013, p. 5. The Commission bases its examination of the application on "the most recent available conclusions of the monitoring bodies of the relevant conventions [which the applicant country concerned pledged to remain a party to and to effectively implement, under the control of the supervisory bodies concerned. The Commission] may ask the requesting country any questions which it considers relevant, and may verify the information received with the requesting country or with any other relevant sources" (Art. 9, para. 1).

implementation record in accordance with the provisions of the relevant conventions"[35]; it will be subject every two years (and not, as is the case currently, every three years) to monitoring by the European Commission, which presents a report to the Council and the European Parliament on the compliance of the country concerned with reporting obligations under the relevant convention as well as on the status of its effective implementation.[36] By mid-2014, thirteen countries benefited from the "GSP+" scheme.[37]

Finally, one special arrangement benefits the 48 least-developed countries (LDCs): this third layer is known as the *'Everything-but-arms' initiative*, because the advantages (essentially, duty-free and quota-free access) apply to all products except those listed under Chapter 93 of the Common Customs Tariff, which concerns arms and ammunition.

Box 2. 27 international conventions related to sustainable development and good governance that countries seeking to benefit from the 'GSP+' scheme must ratify and effectively comply with[38]

Part A. 16 conventions relating to core political, human and labour rights: International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; Convention on the Prevention and Punishment of the Crime of Genocide; Convention concerning Minimum Age for Admission to Employment (No 138); Convention converning the Prohibition and Immediate Action for the Elimination of the Worst Form of Child Labour (No. 182); Convention concerning the Abolition of Forced Labour (No. 105); Convention concerning Forced or Compulsory Labour (No. 29); Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (No. 100); Convention concerning Discrimination in Respect of Employment and Occupation (No. 111); Convention concerning Freedom of Association and Protection of the Right to Organize (No. 87); the Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively (No. 98); and International Convention on the Suppression and Punishment of the Crime of Apartheid.

Part B. 11 conventions relating to the environment, good governance and the fight against drug production and trafficking: Montreal Protocol on Substances that Deplete the Ozone Layer; Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal; Stockholm Convention on Persistent Organic Pollutants; Convention on International Trade in Endangered Species of Wild Founa and Flora; Convention on Biological Diversity; Cartagena Protocol on Biosafety; the Kyoto Protocol to the United Nations Framework Convention on Climate Change; United Nations Single Convention on Narcotic Drugs (1961); United Nations Convention on Psychotropic Substances (1971); United Nations Convention against Illicit Trafic in Narcotic Drugs and Psychotropic Substances (988); United Nations Convention against Corruption (Mexico).

[35] Regulation (EU) No 978/2012, Art. 9, para. 1 (e)
[36] Id., Art. 14, para. 1.
[37] These countries are Armenia, Bolivia, Costa Rica, Cape Verde, Ecuador, El Salvador, Georgia, Guatemala, Mongolia, Panama, Peru, Pakistan, Paraguay, See Commission Delegation Regulation (EU) No 1/2014 of 28 August 2013 establishing Annex III to Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences, OJ L1 of 4.1.2014, p. 1; and Commission Delegated Regulation (EU) No 182/2014 of 17 December 2013 amending Annex III to Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences, OJ L57 of 27.2.2014, p. 1.
[38] These instruments are listed in Annex III of Council Regulation (EC) No 732/2008 of 22 July 2008, applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011; and in Annex VIII of Regulation (EU) n° 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences.

In the Generalised System of Preferences established by the EU, the linkage of market access to labour and environmental standards therefore is ensured through two separate mechanisms. A first mechanism consists in the possibility of imposing sanctions for "serious and systematic violations" of human rights or core labour standards: it allows the EU to deny preferential treatment to developing countries that flout basic labour rights. The European Commission first announced its intention to propose the inclusion of the "serious and systematic violations" of core labour standards among the reasons for temporary, full or partial, withdrawal of GSP benefits in 2001. These core labour standards are defined by reference to the 1998 ILO Declaration on Fundamental Principles and *Rights* at *Work.* As summarized by the Commission, henceforth "all beneficiary countries would thus have the option of the additional incentives, provided that they meet the criteria of effective enforcement of core labour standards. Countries that receive only the general preferences under GSP, may lose temporarily, fully or partly, the benefit of these preferences, only if they are found to seriously and systematically infringe core labour standards".[39]

That describes, in substance, the sanctions system that was later put in place. Under certain conditions that are now described in chapter V of Regulation No 978/2012,[40] any country benefiting from the GSP scheme – whether under the general arrangement or under the other arrangements – may be denied the preferential access to the market, *inter alia*, if it commits "serious and systematic violations of principles laid down in the conventions listed in part A of annex VIII [relating to human rights and labour rights]"[41]; or if it is found that it exports goods made by prison labour.[42] In addition, a country may be suspended from the GSP advantages if it fails to adequately control drug trafficking, or to comply with international conventions on combating terrorism or money laundering; if it is guilty of "serious and systematic unfair trading practices", as determined by the WTO; or in cases of "serious and systematic infringments" of the objectives of the international regimes on the conservation and management of fishery resources.[43] The Regulation describes in detail the procedure that may lead to such a temporary withdrawal (Box 3).

Box 3. The sanctions mechanism for 'serious and systematic violations' of human rights and labour rights: the examples of Burma/Myanmar and Belarus

Regulation No 978/2012 describes in detail the procedure that shall be followed in cases of "serious and systematic violations of principles" laid down in the human rights and labour rights conventions listed in part A of its Annex VIII.[44] Similarly, during the period 2008-2013, Article 15 § 1, (a), of Regulation (EC) No 732/2008 provided that "the preferential arrangements provided for in the Regulation "may be withdrawn temporarily, in respect of all or of certain products originating in a beneficiary country", in particular if it is found "on the basis of the conclusions of the relevant monitoring bodies", that the country concerned has committed "serious and systematic violation of principles laid down in the conventions listed in Part A of Annex III" of the Regulations, related to human rights and basic labour rights.

[39] Commission of the European Communities, Promoting core labour standards and improving social governance in the context of globalisation, COM(2001) 416 final, of 18.7.2001, p. 17.
[40] For the period 2008-2013, the same conditions were specified in chapter III of Regulation No 732/2008.
[41] Regulation No 978/2012, Art. 19, para. 1, (a). In Regulation No 732/2008, the equivalent provision went on to say that such "serious and systematic violation" would be assessed "judging from the conclusions of the relevant monitoring bodies" (Regulation No 732/2008, Art. 15, para. 1, a)). However, Article 19 para. 6 of the current Regulation does mention that the European Commission "shall seek all information it considers necessary, inter alia, the available assessments, comments, decisions, recommendations and conclusions of the relevant monitoring bodies, as appropriate". The wording in the current Regulation appears to avoid creating the impression that the Commission would be somehow bound by determinations made by external monitoring bodies: it is for the Commission to assess the information received, and the Regulation makes clear that the Commission may consult whichever information it sees fit.
[42] Regulation No 978/2012, Art. 19, para. 1, (b). (For the equivalent provision in the earlier regime, see Regulation No 732/2008, Art. 15, para. 1, c)).
[43] Regulation No 978/2012, Art. 19, para. 1, (c) to (e).
[44] See Art. 19.

Under Regulation No 732/2008 applicable during the period 2008-2013, the procedure was as follows. When the Commission or a member State considersed that there were sufficient grounds for an investigation – typically following information received from trade unions or non-governmental organizations –, it informed the Generalized Preferences Committee, and consultations took place, in principle within one month.[45] The Commission had one month following this consultation to decide whether or not to initiate an investigation.[46] If it did launch an investigation, the Commission announced the initiation of the investigation in the *Official Journal of the European Union* and it notified the country concerned. This allowed any interested party, within a specified deadline, to provide information to the Commission, and it ensured that the country concerned with be given an opportunity to cooperate in the investigation.[47] The investigation was to be completed within one year, although the duration of the investigation could be extended if necessary. In the course of the investigation, the Commission could seek all the information it considered necessary, including the assessments, comments and decisions of the relevant supervisory bodies of the United Nations, the International Labour Organization and other competent international organizations; it could verify the information with economic operators and the competent authorities of the beneficiary country concerned; and it could hear interested parties.[48]

Once the investigation was complete, the Commission was expected to report the findings to the Generalized Preferences Committee. If the Commission considered temporary withdrawal unnecessary, it published a notice in the *Official Journal*, announcing the termination of the investigation and setting out its main conclusions. If, on the contrary, the Commission considered temporary withdrawal to be necessary, it notified the beneficiary country concerned of the decision and published a notice in the *Official Journal*, announcing its intention to submit a proposal to the Council for temporary withdrawal unless remedial measures are taken. This opened up a period of six months during which the beneficiary country had the possibility of taking the measures necessary to conform with human rights or labor rights conventions referred to in part A of annex III to the regulation, or of making a commitment to take the measures necessary to conform, within "a reasonable period of time".[49] At the end of this period, the Commission submitted a proposal to the Council, which decided within two months by qualified majority.[50] The decision entered into force six months later, "unless the Council, following an appopriate proposal by the Commission decides before then that the reasons justifying it no longer prevail".[51]

The procedure is essentially unchanged under Regulation No 978/2012 for the period 2014-2024. The result is that the country whose preferences may be removed because of its serious and sytematic violation of the principles of the relevant human rights and labor rights conventions (see conventions listed in part A of Box 2) has in fact a total of at least twelve months in order to amend its domestic legislation or practices, so as to put an end to such violation. The sanctions mechanism is therefore graduated, and the procedure allows for ample opportunity for the country concerned to seek to improve its record and to make the necessary improvements. There is, of course, a political dimension in the evaluation, with a role for Member States both through the Generalised Preferences Committee and through the Council, which makes the final decision. But this is counterbalanced by the requirement that the evaluation be based on assessments made, not by the institutions alone, but by external monitoring mechanisms, in particular those established by the international conventions themselves : sanctioning a country in the absence of strong evidence, originating from within these mechanisms, that it is in violation of the conventions, will be difficult to justify. In addition, insofar as a political dimension remains to the procedure (and it would be naive to think that it is removed entirely), that may be the

[45] Art. 27, para. 1.
[46] Art. 27, para. 2.
[47] Art. 18, paras. 1-2.
[48] Art. 18, paras. 3-5.
[49] Art. 19, para. 3.
[50] Art. 19, para. 4.
[51] Art. 19, para. 5.

price to pay for the necessary flexibility to be built into the system, allowing a "carrot-and-stick" approach[52] that can put credible pressure on countries without necessarily going to the final step, which is to suspend preferential access to the EU markets.

On 24 March 1997, Burma/Myanmar was the first country to be sanctioned under this mechanism. Acting on the basis of a complaint filed jointly by the International Confederation of Free Trade Unions (ICFTU) – since then renamed ITUC, the International Trade Unions Confederation – and the European Trade Union Confederation (ETUC), the Commission found that the country had a 'routine and widespread' use of forced labour, and the Council approved its proposal to withdraw access to tariff preferences.[53] Although the economic impacts of the measure were minor, since exports to the EU represented at the time only 3 % of the total exports from Burma (only 31 % of which were eligible for GSP treatment),[54] the political impacts were significant, since this signalled the failure of the policy of "constructive engagement" which had been hitherto followed by the EU.[55] Belarus followed a few years later. In this instance too, the procedure was triggered by a complaint from the trade unions, which denounced the systematic violation of freedom of association. The unions had already submitted a complaint before the ILO Committee on Freedom of Association, leading the ILO Commission of Inquiry to adopt twelve recommendations in July 2004, outlining specific measures to improve the situation, to be adopted by the Belarusian authorities within the next twelve months.[56] Given the failure of Belarus to implement these recommendations, the European Commission considered that a temporary withdrawal was justified. On 17 August 2005, it decided to place Belarus under monitoring for a period of six months, giving the Belarusian authorities the possibility to make a commitment to conform with the principles of the ILO Declaration and abide by the Commission of Inquiry's recommendation by the end of March 2006.[57] The responses by Belarus simply denied that they were in violation of their obligations, and contained no concrete commitment towards reform. The Commission ultimately had no choice but to confirm the withdrawal of preferences, particularly after the International Labour Conference held in June 2006 that the non-implementation of the twelve recommendations of the Commission of Inquiry constituted a case of continued failure : on 21 December 2006, the Council adopted a decision removing Belarus from the countries benefiting from the general arrangement of the GSP scheme, setting 21 June 2007 as the date for its entry into force.[58]

The fact that sanctions have been imposed on Burma and Belarus is an indication that, where

[52] That is how, quite appropriately, Bob Hepple describes the system : see Bob Hepple, *Labour Laws and Global Trade*, cited above, p. 102.

[53] For an extensive discussion, see M. Ewing-Chow, 'First Do No Harm: Myanmar Trade Sanctions and Human Rights', *Northwestern Journal of International Human Rights*, vol. 5, Issue 2 (Spring 2007), pp. 153-180.

[54] See Stefan Collignon, The Burmese Economy and the Withdrawal of European Trade Preferences, European Institute for Asian Studies, EIAS Briefing Paper n° 97/02, April 1997.

[55] Burma/Myanmar's access to GSP tariff preferences was reinstated on 19 July 2013, as a result of the political and economic reforms launched in 2011. The decision to re-establish GSP benefits followed the decision by the Conference of the International Labour Organisation to suspend its restrictive resolution on Myanmar in June 2012.

[56] Trade union rights in Belarus, Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organization to examine the observance by the Government of the Republic of Belarus of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Geneva, 2004. The recommendations included the immediate registration of trade union organizations involved in the complaint and the elimination of all obstacles to the right to organize created by current decrees, rules and regulations; guaranteed protection to carry out their activities freely for those organizations that have suffered interference in their internal affairs ; and the wide dissemination in Belarus of all its conclusions and recommendations without delay. The Commission of Inquiry was appointed in November 2003 by the ILO's Governing Body.

[57] Commission Decision 2005/616/EC of 17 August 2005 on the monitoring and evaluation of the labour rights situation in Belarus for temporary withdrawal of trade preferences, OJ L 213 of 18.8.2005, p. 16.

[58] 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 405 of 30.12.2006, p. 36.

violations are indeed 'systematic and serious', the pressure may be such on the EU institutions that remaining passive is not an option. At that level of violation, there is a clear consistency between the implementation of the GSP scheme and the hierarchy of sanctions within the ILO. As noted by Jan Orbie and Lisa Tortell, Burma and Belarus are the only states for which the ILO established a Commission of Inquiry, which is the highest level of reaction available to the ILO. It is therefore fitting that only in relation to Burma and Belarus did the EU institutions adopt the most severe of sanctions – withdrawal from the GSP general arrangement, for systematic and serious violations of the principles of the international conventions concerned.[59]

The second tool through which the GSP scheme favors a linkage between market access and compliance with labor or environmental standards is the 'special incentive' put in place to encourage countries to comply with certain requirements related to sustainable development and good governance, as defined in the 27 international conventions listed in Box 18. Since 2006, the GSP+ scheme requires ratification of these international instruments, and not just incorporation of their substance, as under previous GSP cycles ; and the evaluation of compliance explicitly relies on the findings made of the monitoring mechanisms established by those instruments. As a result, the GSP+ scheme increases the relevance of these instruments for the countries, and significantly raises the stakes of the monitoring that the countries are subjected to, for instance in the framework of the UN human rights system or of the ILO.

The aim is, clearly, to encourage countries seeking to benefit from preferential market access – in addition to the facilitated access they may seek as developing countries – to comply with certain core obligations in the areas of human rights, labor rights, environmental protection and biodiversity, the fight against corruption, and the fight against drug production and trafficking. In that respect, measured by its own benchmark, the scheme is a success. Scholars who have studied the record of the EU GSP+ scheme since its introduction concluded that "the prospect of additional market access under GSP-plus appears to have positively affected ratification of ILO core labour conventions in a number of countries. That is, Bolivia, Colombia, Venezuela, Mongolia, and El Salvador each ratified one or more of the core labour conventions during the period 2005-06, seemingly because, without those ratifications, they would have lost their beneficiary status".[60] Perhaps the most visible success in this regard concerns the ratification by El Salvador of ILO Convention No. 87 on Freedom of Association and the Protection of the Right to Organise and Convention No. 98 on the Right to Organise and Collective Bargaining on 24 August 2006, in no small part due to the combined pressure of the ILO and of the European Commission.[61]

Box 4. The 'special incentive' for sustainable development and good governance ('GSP+')

A country seeking to benefit from the EU's GSP+ scheme submits the application to the European Commission, accompanied with information about the ratification of the instruments listed in part A of annex VIII of the Regulation No. 978/2012 (also listed in Box 18). Under Regulation No 732/2008

[59] Jan Orbie and Lisa Tortell, *The New GSP Plus Beneficiaries : Ticking the Box or Truly Consistent with ILO Findings ?*, paper prepared for the European Union Studies Association 11th Biennal International Conference, Marina del Rey, California, 23-25 April 2009, p. 16.

[60] Orbie and Tortell, *The New GSP Plus Beneficiaries*, cited above, p. 12.

[61] The process was chaotic : after the Constitutional Chamber of the Supreme Court of Justice of El Salvador declared, on 16 October 2007, that Article 2 of the ILO Convention No. 87 (which guarantees a right to workers and employers, 'without distinction whatsoever', to establish and join trade unions) was inconsistent with Article 47(1) of the national Constitution (which refers to that right only for the benefit of employees in the private sector), the European Commission decided on 31 March 2008 to launch an investigation concerning El Salvador under Article 18(2) of Regulation (EC) No 980/2005, the instrument which was then applicable to the GSP.[61] In the course of the investigation, El Salvador emphasized its commitment to implement the ILO Convention No. 87 in full, and kept the Commission informed of the steps that were taken in order to amend the Constitution so as to remove the incompatibility found to exist by the Supreme Court. On 14 June 2009, the constitutional reform amending Article 47 of the Constitution of El Salvador entered into force.

applicable to the 2008-2013 GSP scheme, following such a request, consultations were to take place both within the Commission, across different Directorate Generals (Trade, External Relations, Justice and Fundamental Rights, Development and Humanitarian Aid) and with the Generalised Preferences Committee, a body composed of Member States' representatives and chaired by a representative of the Commission that the Regulation tasks with assisting the Commission in the implementation of the GSP. In evaluating the application, the Commission was expected to rely on the findings of the monitoring bodies set up under the conventions that the beneficiary country must ratify and effectively implement[62] ; in practice, the input from development or human rights NGOs and trade unions played an important, albeit informal, role. If the country is denied the benefit of the scheme, the Commission is under an obligation to provide the reasons, at the request of the country concerned.[63]

Under Regulation No 978/2012, that applies since 1 January 2014, the European Commission is authorized to examine the request and to grant the status of "GSP+" country, based on its own assessment: although the European Parliament and the Council of the EU are informed, they are not formally involved in making a determination as to the eligibility of the requesting country; nor is the Commission formally required to base its decision on the assessment of monitoring bodies established by the international conventions concerned. Moreover, in contrast to the earlier regime, the Commission is not in principle obliged to justify its decision not to grant "GSP+" status. However, once the status has been granted, "the Commission shall keep under review the status of ratification of the relevant conventions and shall monitor their effective implementation, as well as cooperation [by the country concerned] with the relevant monitoring bodies, by examining the conclusions and recommendations of those monitoring bodies".[64] It appears therefore that the more recent scheme allows the European Commission a broader margin of appreciation than was the case in the past.

Any country benefiting from the "special incentive" linked to sustainable development and good governance remains liable to the sanctions mechanism described above, which applies across the full GSP scheme. But a country granted entry into the GSP+ scheme is also subject to an additional scrutiny, which may lead to the advantages granted being withdrawn temporarily, in respect to all or some of its products, "in particular if the national legislation no longer incoporates [the relevant international conventions] or if that legislation is not effectively implemented" (as expressed in Regulation No 732/2008) or (as more succintly described in Regulation No 978/2012) in the absence of "effective implementation" of the conventions concerned.

The possibility to remove the benefits of the "GSP+" scheme materialized for the first time in February 2010, when the Council of the EU decided to withdraw Sri Lanka from the GSP+ special incentive scheme.[65] The decision was based on the findings of an investigation launched by the Commission in October 2008 that it took one year to complete. The investigation relied on reports and statements of the special procedures of the United Nations Human Rights Council, as well as "other publicly available

[62] As regards human rights conventions, this includes the human rights treaty bodies set up under the human rights treaties adopted under the UN framework ; and the special procedures established by the UN Human Rights Council (formerly the Commission on Human Rights). As regards the ILO instruments, this refers to the various ILO committees that are set up in order to assess the Member States' observance of the conventions they have ratified. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) provides technical supervision of the ILO conventions and examines the reports made by individual countries; thee reports are then considered by the Conference Committee on the Application of Standards (CAS), a tripartite committee composed of governments and representatives of workers and employers. In addition, the Committee on freedom of association constitutes a specific mechanism set up in order to monitor compliance with freedom of association : it decides upon complaints three times each year. Finally, a Commission of Inquiry (COI) may be set up by the ILO's Governing Body in relation to individual complaints, on an *ad hoc* basis.

[63] Art. 10, para. 4, of Regulation No 732/2008.

[64] Regulation No 978/2012, Article 13, para. 1.

[65] Implementing Regulation (EU) No 143/2010 of the Council of 15 February 2010 temporarily withdrawing the special incentive arangement for sustainable development and good governance provided for under Regulation (EC) No 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka, OJ L 45 of 20.2.2010, p. 45.

reports and information from other relevant sources, including non-governmental organisations", all of which led the Commission to conclude that Sri Lanka was failing to implement the International Covenant on Civil and Political Rights, the Convention against Torture and the Convention on the Rights of the Child.[66] Sri Lanka decided not to cooperate with the investigation. But the implementing regulation withdrawing Sri Lanka from the GSP+ scheme nevertheless insists that information received from Sri Lanka outside the formal context of the investigation "has been taken by the Commission fully into account and has contributed to inform its assessment".[67] The decision entered into force in August 2010, six months after its adoption.

It is perhaps odd that the decision to temporarily withdraw Sri Lanka from the special incentive for sustainable development and good governance was taken on the basis of violations of civil and political rights alone, since the workers' unions, through ETUC and ITUC, had expressed their concern about the failure of Sri Lanka to comply with ILO standards, particularly those related to freedom of association, already in March 2008, and that these concerns appeared to be shared by the ILO Committee on Freedom of Association.[68] This may signal either an unwillingness of the European Commission to remove a country from the GSP+ scheme on the basis primarily of labour rights violations, or an unwillingness to do so, at least, where the said violations are concentrated in particular sectors. There was one additional difficulty : the 'sweatshop conditions' denounced by the unions were concentrated in the textile and apparel sector in Sri Lanka. Since this sector exports about half of its production into the EU thanks to the GSP+ incentive, a decision by the EU to remove Sri Lanka from the GSP+ for such violations of labour rights might have been attacked as motivated by protectionist aims, an accusation the EU institutions understandably were unwilling to have to face. The choice to focus on civil and political rights in the case of Sri Lanka was therefore both easiest to justify in legal terms – the case was a clear-cut one –, and less risky diplomatically.

That also appears to be the pattern in the implementation of the EU's GSP+ scheme if we consider the range of countries that benefit from the scheme, and the delicate position in which the EU would find itself if it imposed a more exacting scrutiny on their record of compliance with the human rights and labor rights conventions that are listed in part A of annex VIII of Regulation No 978/2012. As Orbie and Tortell note, the group of countries benefiting from the scheme is a diverse one, with quite variable degrees of compliance, particularly in the area of labor rights : "For those countries with positive comments from the ILO committees, it could be argued that inclusion within the GSP plus scheme was a reward for improvements in their implementation of labour standards. That, however, is clearly not so for all the 15 countries chosen to receive trade preferences under the GSP-plus scheme in 2005. For these countries, membership in the GSP-plus scheme can only be justified as having been intended to provide an incentive to improvement in behaviour."[69] However, the level of condemnation of GSP+ beneficiaries has been fairly static, so that "the EU GSP-plus scheme has not led to an overall improvement in labour standards implementation in those countries".[70] In contrast to the application to Burma and Belarus of the general sanctions mechanisms for cases of "systematic and serious violations",[71] these researchers note, "the EU's granting of GSP-plus incentives is less clearly consistent with a reading of the ILO committees' reports. The system has been successful in ensuring the full ratification of the eight fundamental labour standards among the beneficiary countries, as exemplified

[66] Implementing Regulation, Preamble, Recital 3.
[67] Recital 6.
[68] See ILO Committee on Freedom of Association, Complaint against the Government of Sri Lanka by the Health Services Trade Union Alliance the Free Trade Zone and General Services Employees Union, the Jathika Sewaka Sangamaya, the Suhada Waraya Sewaka Sangamaya, the United Federation of Labour, the Union of Post and Telecommunication Officers, the Dumriya Podhu Sewaka Sahayogitha Vurthiya Samithiya, supported by the International Textile, Garment and Leather Workers' Federation (ITGLWF) and the International Transport Workers' Federation (ITF), Report No. 348, Vol. XC, 2007, Series B, No. 3, Case No. 2519, paras. 1113-1146.
[69] Orbie and Tortell, *The New GSP Plus Beneficiaries*, cited above, p. 18.
[70] Orbie and Tortell, *The New GSP Plus Beneficiaries*, cited above, p. 19.
[71] See above, Box 19.

by the case of El Salvador. However, several countries have received GSP-plus trade preferences despite being seriously criticized by the authoritative ILO committees for their *implementation* of the relevant conventions".[72]

[72] Orbie and Tortell, *The New GSP Plus Beneficiaries*, cited above, p. 20.