



THE JEAN MONNET PROGRAM

Professor J.H.H. Weiler
European Union Jean Monnet Chair

in cooperation with the



UNIVERSITÀ DEGLI STUDI DI TRENTO
Dipartimento di Scienze Giuridiche
Facoltà di Giurisprudenza

Professor Roberto Toniatti
Dipartimento di Scienze Giuridiche

EUROPEAN LEGAL INTEGRATION: THE NEW ITALIAN SCHOLARSHIP

Jean Monnet Working Paper 15/08

Fabio Pantano and Riccardo Salomone

Trade and Labour within the European Union Generalized System of Preferences

All rights reserved.
No part of this paper may be reproduced in any form
without permission of the author.

ISSN 1087-2221
© Fabio Pantano and Riccardo Salomone 2008
New York University School of Law
New York, NY 10012
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

European Legal Integration: The New Italian Scholarship (ELINIS)

This Working Paper is part of the ELINIS project: *European Legal Integration: The New Italian Scholarship* – Second Series. The project was launched in 2006 on the following premise. Even the most cursory examination of the major scientific literature in the field of European Integration, whether in English, French, German and even Spanish points to a dearth of references to Italian scholarship. In part the barrier is linguistic. If Italian scholars do not publish in English or French or German, they simply will not be read. In part, it is because of a certain image of Italian scholarship which ascribes to it a rigidity in the articulation of research questions, methodology employed and the presentation of research, a perception of rigidity which acts as an additional barrier even to those for whom Italian as such is not an obstacle. The ELINIS project, like its predecessor – the New German Scholarship (JMWP 3/2003) – is not simply about recent Italian research, though it is that too. It is also new in the substantive sense and helps explode some of the old stereotypes and demonstrates the freshness, creativity and indispensability of Italian legal scholarship in the field of European integration, an indispensability already familiar to those working in, say, Public International law.

The ELINIS project challenged some of the traditional conventions of academic organization. There was a “Call for Papers” and a selection committee which put together the program based on the intrinsic interest of each proposed paper as well as the desire to achieve intellectual synergies across papers and a rich diversity of the overall set of contributions. Likewise, formal hierarchies were overlooked: You will find papers from scholars at very different stages of their academic career. Likewise, the contributions to ELINIS were not limited to scholars in the field of “European Law.” Such a restriction would impose a debilitating limitation. In Italy as elsewhere, the expanding reach of European legal integration has forced scholars from other legal disciplines such as labor law, or administrative law etc. to meet the normative challenge and “reprocess” both precepts of their discipline as well as European law itself. Put differently, the field of “European Law” can no longer be limited to scholars whose primary interest is in the Institutions and legal order of the European Union.

The Second Series followed the same procedures with noticeable success of which this Paper is an illustration.

ELINIS was the result of a particularly felicitous cooperation between the Faculty of Law at the University of Trento – already distinguished for its non-parochial approach to legal scholarship and education and the Jean Monnet Center at NYU. Many contributed to the successful completion of ELINIS. The geniality and patience of Professor Roberto Toniatti and Dr Marco Dani were, however, the leaven which made this intellectual dough rise.

The Jean Monnet Center at NYU is hoping to co-sponsor similar Symposia and would welcome suggestions from institutions or centers in other Member States.

J.H.H. Weiler

Director, Jean Monnet Center for International and Regional Economic Law & Justice

Trade and Labour within the European Union Generalized System of Preferences

By Fabio Pantano and Riccardo Salomone*

Abstract

This paper analyses the relationship between the EU scheme of generalized system of preferences (GSP) and international trade law in the context of the GATT/WTO. We argue that the analysis of GSP schemes and the concerned Appellate Body (AB) case law demonstrate the possibility of an integration between trade liberalization and workers' rights. We point out that unilateral economic measures can be implemented without coming into conflict with the non-discrimination principle, on the basis of the reasonableness principle. In this regard, the importance of a multilateral approach and of the role of international organizations - namely the ILO – is emphasized as a result of their function as standards-setting bodies and their monitoring activities.

* Fabio Pantano is Lecturer of Labour Law at the Faculty of Law, University of Bologna (fbpantano@gmail.com) ; Riccardo Salomone is Associate Professor of Labour law at the Faculty of Law, University of Trento (salomone@jus.unitn.it) . This work is the fruit of a joint reflection by the two authors; however, § 1-3 and § 11 are accredited to Riccardo Salomone, while § 4-10 to Fabio Pantano; § 12 has been written jointly. The authors are extremely grateful to Joseph H.H. Weiler, Roberto Toniatti, Marzia Barbera, Giandomenico Falcon, Barbara Marchetti, Marco Dani and all the participants of the ELINIS Seminar held at NYU School of Law on 19-20 May 2008, for their comments and discussions on an earlier version of this paper. Usual disclaims apply.

Summary

1. Introduction
2. GSP schemes and the integration between Trade and Labour in the international economic legal system
3. The evolution of the EU GSP: labour standards and the role of ILO
4. Legalizing the WTO: broader spaces for labour standards within the international trade system?
5. The protection of non-trade interests within WTO case law
6. GSPs: the “port key” for labour standards into the international trade legal system?
7. Protectionism vs. non-discrimination and the principle of reasonableness
8. Generality, non reciprocity and non discrimination
9. Substantial reasonableness: non discrimination and development, financial and trade needs of the recipient state
10. Procedural reasonableness: transparency and flexibility of GSPs
11. European Union GSP under “reasonableness” scrutiny: some conclusive remarks
12. Conclusions for an open debate

1. Introduction

The purpose of this paper is to analyse the relationship between the EU scheme of generalized system of preferences (GSP) and the international trade law in the context of the GATT/WTO. What follows is an attempt to focus on the issue of trade preferences from the perspective of labour law.¹ We do not intend to resolve the perennial problem of what limitations should be imposed on free trade in order to enforce workers' rights or if such limitations could be an effective instrument to this end.² We assume that the demand for free trade will continue in the future and that the opposition between trade liberalization and the protection of workers' interests can find a fair balance within the legal regime of the global market.³

Globalization initially heightened concerns about the ineffectiveness of labour law and there have been a number of efforts to shift the "*locus*" of regulation downward to smaller units of governance, including firms themselves, or upward to larger units such as regional and international organisations.⁴ In recent years, the crisis of labour regulation has probably taken a positive turn.⁵ Several proposals were launched with the strategy of having an overall and integrated view of the challenges in the social field and new forms of labour regulations are emerging.⁶

In this scenario, we detect and explore an area of convergence between international trade law and international labour law. This paper argues that the analysis of GSP schemes and Appellate Body (AB) case law on their consistency with WTO legal system can constitute a precious

¹ Notwithstanding the doubts on the effectiveness of trade preferences for the implementation of social standards in relation to the aims of the new global labour law; see B. Hepple, "Is the eradication of child labour 'within reach?' achievements and challenges ahead", in G. Nesi, L. Nogler, M. Pertile (eds.), "Child Labour in a Globalized World", Aldershot, Ashgate, 2008, p. 426.

² See C. Summers, "Free trade v. labor rights/human rights: doubts, definitions, difficulties", in R. Blanpain and M. Weiss, "Changing industrial relations and modernisation of labour law. Liber amicorum in honour of professor Marco Biagi", The Hague, London, New York, Kluwer, 2003, pp. 381 ff.

³ See C. Kaufmann, "Globalisation and labour rights", Oxford and Portland OR, Hart Publishing, 2007.

⁴ See B. Bercusson, C. Estlund (eds.), "Regulating labour in the wake of globalisation, new challenges, new institutions", Oxford and Portland, Oregon, Hart Publishing, 2008.

⁵ See, B. Hepple, "Labour laws and global trade", Oxford and Portland OR, Hart Publishing, 2005. But see also B. Hepple, "New approaches to international labour regulation", *Industrial Law Journal*, 1997 (26), pp. 353 ff. and B. Langille, "What is international labour law for?", Geneva, International Institute for Labour Studies, 2005.

⁶ G. Conaghan, M. Fischl, K. Klare (eds.), "Labour law in an era of globalization", New York, Oxford University Press, 2002; G. Davidov, B. Langille (eds.), "Boundaries and frontiers of labour law", Oxford and Portland, Oregon, Hart Publishing, 2006.

instrument in order to verify the possibility of an integration between trade liberalization and workers' rights within the international regulation of trade.⁷ This approach is based both on the recent trends of AB jurisprudence on non-trade-related interests and on the fact that GSP schemes' regulation represents the most relevant explicit reference within WTO legal system to workers rights protection and social standards implementation.

2. GSP schemes and the integration between Trade and Labour in the international economic legal system

The debate on GSP schemes is not new, dating back to the origin of the global trading regime.⁸ In 1947, the majority of the members of the current WTO were colonies and, when the GATT was signed, the U.S. failed to secure the abolition of the UK imperial preference system as the price of post-war Marshall aid. They wanted a change of commercial policy on trade preferences for the Commonwealth and empire, but the UK government had successfully defended the imperial preference system.⁹ Indeed, modern GSPs were intended to replace imperial preference schemes on a universal basis.¹⁰

The idea of granting developing countries preferential tariffs was originally presented by the Secretary-General at the first UNCTAD conference in 1964. The GSP Resolution was adopted at UNCTAD II in Delhi in 1968, when the U.N. suggested the creation of a "generalized" Tariff System of Preferences under which developed countries would grant trade preferences to all developing countries¹¹. In 1971, in response to these demands, the contracting parties agreed to a

⁷ See C. Kaufmann, "Globalisation..", op. cit.; M. Nussbaum, "Women and human development", New York, Cambridge University Press, 2000; A. Sen, "Development as freedom", Oxford, Oxford University Press, 1999.

⁸ See A. Perulli, "Diritto del lavoro e globalizzazione (clausole sociali, codici di condotta e commercio internazionale)", Padova, Cedam, 1999; J.M. Servais, "The social clause in trade agreements: wishful thinking or an instrument of social progress", *International Labour Review*, 1989 (128), p. 424.

⁹ See A. Toye, "The Attlee Government, the Imperial Preference System and the Creation of the Gatt", *English Historical Review*, 2003 (CXVIII), pp. 478 ff.

¹⁰ See J. C. Sanchez Arnau, "The Generalised System of Preferences and the World Trade Organization", London, Cameron, 2002.

¹¹ As stated in Resolution 21 (ii) adopted at the UNCTAD II Conference in New Delhi in 1968, "the objectives of the generalized, non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least advanced among the developing countries, should be: (a) to increase their export earnings; (b) to promote their industrialization; and (c) to accelerate their rates of economic growth."

ten-year waiver from article 1 of the GATT, creating the legal framework for the actual system. In 1979, the time limits of the waiver were removed, adopting the so-called Enabling Clause.¹² When the WTO was created in 1995, the Enabling Clause was formally included in the WTO legal system.

Under this normative support, developed countries are authorized to establish individual GSPs as exceptions to the most-favoured nation principle (MFN). According to the Enabling Clause, preferential treatments have to be non-discriminatory, non-reciprocal and autonomous. Therefore, while imbalances in favour of developing countries are now allowed, there should be no discrimination between them.¹³ Moreover, preferences are unilateral and unidirectional. They cannot be negotiated nor can they be granted in the framework of an agreement under which beneficiary countries make mutual concessions. Among other things, the Enabling Clause provides that any differential and more favourable treatment accorded to developing countries has to be designed and modified to respond positively to the development, financial and trade needs of developing countries¹⁴.

Developed countries have established GSP schemes since the 1970s, but the developmental outcomes of GSPs have not always been clear. Since preferences have non-reciprocal, unilateral and unidirectional assets, their effects have always been considered as “non-optimal” from an economic point of view and their significance as tools of economic development has progressively declined. Writing before they were implemented, someone argued that non-reciprocal preferences would fail if developing countries did not cease protectionist trade policies which “create disadvantages frequently far greater than the competitive advantage that could be conferred by preferences from the developed countries”.¹⁵

¹² Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979.

¹³ Of course, in the GATT/WTO legal framework, non-discrimination is a complex and varied concept: see R. Howse, “Reconciling Political Sanctions With Globalization And Free Trade: India’s WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for ‘Political’ Conditionality in US Trade Policy”, *Chicago Journal of International Law*, 2003; see also J.L. Dunoff, “When – and Why – Do Hard Cases Make Bad Law? The GSP Dispute”, in G. Bermann, P. Mavroidis (eds.), “The Wto And Developing Nations”, Cambridge University Press, 2007, for references within this paper in Temple University School of Law – Legal Studies Research Paper Series, No. 2008-50,.

¹⁴ See *infra* and see generally S. Lester, “The Asian newly industrialized countries to graduate from Europe’s GSP tariffs”, *Harvard International Law Journal*, 1995, pp. 220 ff.; G. O. Lunt, “Graduation and the GATT: the problem of the NICs”, *Columbia Journal of Transnational Law*, 1994, p. 611; R. E. Hudec, “Developing Countries in the GATT Legal System”, Gower, Brookfield, VT, 1987.

¹⁵ H.G. Johnson, “Economic Policies Toward Less Developed Countries”, Brookings, Washington DC, 1967.

Most notable attacks¹⁶ on trade preference schemes have dealt with the claim that they can disguise protectionist or “imperialistic” measures, adopted by developed countries in order to hinder the access of the developing ones to the international market.¹⁷ As mentioned above, these criticisms are not unjustified if related to the historical origin of GSPs, which is linked to the colonial relationships between some developing countries and their “mother country”. Many subsequent developments — taking into account, first of all, the never ending story of the sensitive agricultural products — could have confirmed these critics.¹⁸ Furthermore, scholars argue that non-reciprocal preferences actually delay trade liberalization in beneficiary countries. The negative effects of GSPs are a consequence of domestic political-economical dynamics within not only developing countries but also donor states. Thus, several factors may account for the negative effects of GSPs schemes on the trade politics of developing countries.¹⁹ Especially having regard to the problem of unemployment in developed countries, such measures, as well as trade sanctions in general, are often viewed as ineffective or even counterproductive. In other words, any link between trade and labour is simply considered as an attempt to raise the stakes for developing countries.²⁰

Other studies, for example, have stressed the possibility that preferences may alter investment determinations rather than encouraging investments where long-term growth opportunities are

¹⁶ For a pessimist evaluation of GSP schemes as instruments to foster the implementation of labour standards see, recently, B. Hepple, “The WTO as a mechanism for labour regulation”, in B. Bercusson, C. Estlund (eds.), “Regulating labour in the wake of globalization...”, op. cit., p. 161 ff.

¹⁷ G. Shaffer, Y. Apea, “Institutional choice in the generalized system of preferences case...”, op. cit., pp. 990-991; G.M. Grossman, A.O. Sykes, “European Communities – conditions for granting of tariff preferences to developing countries (WT/DS246/AB/R)”, *www.ali.org*; G.M. Grossman, A.O. Sykes, “A Preference for Development: The Law and Economics of GSP”, *World Trade Review*, 2005 (4), pp. 254.

¹⁸ For example, after September 11th, 2001 terrorist attack on the Twin Towers, the use of GSPs as geopolitical instruments has increased, in order to foster the support of developing countries for the fight against terrorism on the part of US and European countries. See G. Shaffer, Y. Apea, “Institutional choice in the generalized system of preferences case...”, op. cit., pp. 985-986. See also O. Brown, “EU Trade Policy and Conflict”, International Institute for Sustainable Development, 2005.

¹⁹ C. Ozden, E. Reinhardt, “The perversity of preferences...”, op. cit., p. 1 ff.

²⁰ See also K.D. Raju, “Social Clause in WTO and Core ILO labour standards: Concerns of India and other developing Countries”, in D. Sengupta, D. Chakraborty and P. Banerjee (eds), “Beyond the Transition Phase of WTO, An Indian perspective on emerging issues”, Delhi, academic Foundation, 2006, pp. 313 ff: The underlying motive of the developed countries in linking the social clause with international trade, was yet another attempt to introduce unilateral and arbitrary non-tariff protectionist barriers to the multilateral free trade regime’ (at 337). however, the ILO declaration on Fundamental Principles and Rights at Work (1998, at 5) stresses that labour standards should not be used for protectionist trade purposes, and that nothing in this declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this declaration and its follow-up.

present.²¹ It has been also maintained that the benefits of tariff preferences are often diminished in practice by compliance costs, and the benefits generated by tariff preference schemes are likely to be not notable.²² Along these lines, the value of preferences has been eroded as multilateral trade liberalization under the WTO has proceeded. As a result, the debate on trade preferences came to a standstill, since the flourishing of regional and bilateral trade agreements had shifted the attention of the international community to this form of “preferential” trade.²³

From a general point of view, the idea of imposing labour or social standards within systems with a completely different legal tradition could be challenged. A comparative approach would recommend the recourse to case studies, in order to evaluate the adaptability of those standards to the legal system within which preferential schemes have to be implemented. Nonetheless, labour standards to which GSP schemes refer are usually the fundamental ones (banning the worst form of child labour and forced labour, non discrimination in respect of employment, freedom of association and right to bargain collectively, etc.) and, on the basis of the contemporary evolution of international law, they concern principles unanimously agreed by the community of nations.

However, whether preferences actually benefit poor countries in terms of growth — fostering trade, social and human development — is therefore still an open issue²⁴. It has been argued, for example, that GSP schemes would be more effective if addressed to countries already presenting a primordial level of industrial development, since trade preferences may be able to act as a catalyst especially for manufacturing exports, leading to rapid growth in exports and employment. For this aim preferences need to be designed to be consistent with international trade in fragmented “tasks” (as opposed to complete products) and need to be open to countries with sufficient levels of complementary inputs such as skills and infrastructure²⁵.

²¹ J. M. Finger, L. A. Winters, “What can the WTO do for developing countries?” in A.O. Krueger (Ed.), “The WTO as an International Organization”, Chicago, University of Chicago Press, p. 365 ff.

²² G. M. Grossman, A.O. Sykes, “European Communities – conditions...”, pp. 255 ff. .

²³ At present, there has been a steady development of such agreements: see M. Weiss, “Architectural Digest For International Trade And Labor Law: regional Free trade agreements and Minimum Criteria for enforceable social Clauses, Research Paper”, No. 2006 -2, p. 4.; B. Hepple “Labour Laws and Global Trade...”, op. cit.; see also P. Alston, “Core Labour Standards And The Transformation Of The International Labour Rights Regime”, *European Journal of International Law*, 2004 (3), p. 504.

²⁴ See Y. Bourdet, J. Gullstrand, K. Olofsdotter (eds.), “The European Union and Developing Countries: Trade, Aid, and Growth in an Integrating World”, Cheltenham, UK, Northampton, MA, USA, Edward Elgar, 2007.

²⁵ See P. Collier, A.J. Venables, “Trade Preferences and manufacturing export response: lessons from theory and policy”, WP, Jan 30/2007, p. 29.

The EU and the US, in any case, are even now the main trading partners of developing countries and the providers of aid for development.²⁶ And this practice will, in all likelihood, go on. Doubts on the effective good faith of developed countries in the implementation of preferential schemes are legitimate and they are even stronger with regard to same recent statement of ECJ. In fact, while on the international level the implementation of labour standards through unilateral measures has been supported within internal market, ECJ has recently declared the illegitimacy of member states provisions imposing equal payment standards for workers involved in the translational supply of services.²⁷

Nonetheless, what is significant from the perspective of labour law is whether unilateral economic aids' implementation and their consequent scrutiny by WTO jurisdictional bodies actually may help to create a trade-related/non-trade related interests integrated approach for the regulation of international trade. We argue that the answer to this question can be an affirmative one²⁸. Firstly, the link between preferences and labour standards may help to maintain fair competition, by ensuring that producers and countries not observing these standards have to choose between the risk of increased trade barriers or labour reform. Moreover, our perspective starts from the assumption that an effective trend within AB case law toward the integration of trade-related and non-trade-related interests constitutes a concrete reality. Consequently, we argue that through GSPs schemes a specific concern on labour standards can be emphasized in this scenario, and that the inclusion of these standards within the WTO legal system can foster their effectiveness and increase the relevance of the ILO and other competent international institutions as standard setting and monitoring bodies, strengthening their interaction with the WTO.

3. The evolution of the EU GSP: labour standards and the role of ILO

In 1971, the European Community was the first to implement the GSP scheme (sheltered

²⁶ See UNCTAD, "Trade preferences for LCDs: some early assessment of benefits and possible improvement", New York and Genève, UN, 2005, pp. 3 ss.

²⁷ See *infra*, pr. 11.

²⁸ R. Howse, "The World Trade Organization and the protection of workers' rights", *Journal of Small and Emerging Business Law*, 1999 (131), pp. 171-172.

under the wide umbrella of Article 133 [ex 113]²⁹), offering special tariff treatment to the products of many developing countries. Between 1971 and 1991, the regulations for the EC GSP were promulgated annually and applied for the next calendar year. Since then, the GSP has significantly changed in many respects. A key reform of the original scheme was carried out in 1994.³⁰ The final text granted special incentives to countries applying certain labour standards and withdrawal of GSP privileges from those that do not.³¹ In 1998, two Council Regulations amended the GSP and the scope of its labour provisions.³² They detailed the additional tariff concessions granted to countries which have introduced and applied the ILO Convention No. 87 (Freedom of Association and Protection of the Right to Organize), No. 98 (Principles of the Right to Organize and to Bargain Collectively) and No. 138 (Minimum Age for Admission to Employment). In order to benefit from these reduced tariffs, developing countries had to apply to the EC Commission, specifying the legislation incorporating the ILO Conventions and specifying the actions taken to implement and monitor that legislation. The additional incentive arrangements could be temporarily withdrawn if the recipient countries did not observe their obligations. Such a decision could be reached after internal consultation between the Commission and the GSP Committee, with no involvement of interested parties or external interests.³³

During the 1994-2004 decade, “Everything But Arms” (EBA) amendments came into effect³⁴, granting unrestricted duty-free access to almost all products³⁵, excluding arms, which originate in least developed beneficiary countries. Since January 2002, a new GSP regulation has become

²⁹ Setting the case of the Article 133 [ex 113] in the context of the European integration process is not of secondary importance, but it is not the priority of this paper. On this point, see, for example, M. Cremona “EC External Commercial Policy after Amsterdam: Authority and Interpretation within Interconnected Legal Orders”, in J.H.H. Weiler (ed.) “EU, the WTO and the NAFTA : towards a common law of international trade?”, Oxford, Oxford University Press, 2000, pp. 5 ff., underlying the way in which the Treaty, after the Amsterdam amendment, leaves the extension of the scope of the common commercial policy open for future decision.

³⁰ See Lester, “The Asian Newly Industrialized Countries...”, op. cit.

³¹ Council Regulation 3281/94. The provisions for the withdrawal of trade preferences on labour applied once against Myanmar in 1997 (see Council Regulation 552/97 of 24 March 1997, temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar).

³² Council Regulation 1154/98 and Council Regulation 2820/98.

³³ See G. Tsogas, “Labour Standards in the Generalized Systems of Preferences of the European Union and the United States”, *European Journal of Industrial Relations*, 2000 (6), 349 ff.

³⁴ Council Regulation 416/01.

³⁵ Three sensitive products – fresh bananas, rice and sugar – however, were slated for gradual liberalization.

effective.³⁶ The final text, which fully incorporates the EBA amendments, is specifically designed to simplify the structure of the GSP regime. This regulation also provides for a special incentive arrangement for the protection of labour rights. Like the 1994 scheme, the new one granted special incentives to countries applying specific labour standards and withdrawal of special GSP privileges from those not fulfilling those requirements. But the connection between special incentives and the effective application of ILO standards and their implementation have been strengthened. According to Article 14, preferences may be granted to a country whose national legislation incorporates “the substance of the standards” laid down in ILO Conventions No. 29 and No. 105 on forced labour, No. 87 and No. 98 on the freedom of association and the right to collective bargaining, No. 100 and No. 111 on non-discrimination in respect of employment and occupation, and No. 138 and No. 182 on child labour. Moreover, the incentive may be granted to a country “which effectively applies that legislation”, even if not expressly established within explicit legislative or administrative provisions.

The new GSP has also provided for many innovations as regards the procedure for the selection of recipient countries and inclusion/exclusion mechanisms, with an explicit role for ILO and other international public or private institutions. According to Article 16, where the Commission receives a request, it shall publish a notice in the *Official Journal of the European Communities*, announcing that request. The notice shall state that any relevant information concerning that request may be sent to the Commission and it shall specify the period within which interested parties may make their views known in writing. The Commission shall examine the request asking any questions which it considers relevant and may verify the information received with the requesting country or any natural or legal person. According to Article 18, the Commission shall also decide whether to grant a requesting country the special incentive arrangements for the protection of labour rights.

The preferential arrangements may be temporarily withdrawn, with respect to all or to certain products originating in a beneficiary country for the following reasons: practice of any form of slavery or forced labour; serious and systematic violation of the freedom of association, the right to collective bargaining or the principle of non-discrimination in respect of employment and occupation; the use of child labour, as defined in the relevant ILO Convention; the export of goods made by prison labour. But, what is significant in our perspective is that, according to

³⁶ Council Regulation 2501/01.

Article 28 paragraph 3, the Commission shall seek all information it considers necessary, and the available assessments, comments, decisions, recommendations and conclusions of the various supervisory bodies of the ILO which “shall serve as the point of departure for the investigation” as to whether temporary withdrawal is justified.

In January 2006, the latest EU GSP Regulation came in to force.³⁷ It reflected an innovative approach considering that the very concept of development has been changing in recent years. The Doha Declaration³⁸ acknowledged that international trade could play a major role in promoting economic development and reducing poverty. An idea of Development correlated with environment protection, improved social conditions, anti-corruption measures and governance is more feasible, also within the legal regulation of international trade. Moreover, the jurisprudence of the Appellate Body (AB) has evaluated GSPs under WTO legal systems, stating that they are legitimate where applied in a non-discriminatory way, on the basis of requirements and criteria founded on the pattern of a reasonableness test. On this basis, the Commission sets out the guidelines for the application of the scheme of generalized tariff preferences for the period 2006 to 2015.³⁹ Council Regulation No. 980/2005 is the first Regulation implementing those guidelines and it applies until December 31st, 2008. The scheme consists of a general arrangement granted to all beneficiary countries and territories and two special arrangements taking into account the developing needs of developing countries. The general arrangement is granted to all beneficiary countries, unless they are as high-income countries by the World Bank and where they are not sufficiently diversified in their exports classified. The special incentive arrangement for sustainable development and good governance is based on the concept of development recognized by international conventions and instruments such as, among others,⁴⁰ the ILO Declaration on Fundamental Principles and Rights at Work of 1998.

Implementing social standards can constitute a big sacrifice for developing countries from an economic point of view, especially in the short or middle term since it binds them to accepting

³⁷ Council Regulation 980/05.

³⁸ Adopted by WTO Ministerial Conference on 14 November 2001.

³⁹ COM(2004) 461 final: Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee of 7 July 2004 entitled ‘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’.

⁴⁰ the UN Declaration on the Right to Development of 1986, the Rio Declaration on Environment and Development of 1992, the UN Millennium Declaration of 2000 and the Johannesburg Declaration on Sustainable Development of 2002.

fairer but, at the same time, unfavourable competition conditions. In the perspective of the EU, economic preferences counterbalance the economic disadvantages linked to the implementation of social standards. According to Article 9, paragraph 1, the special incentive arrangement for sustainable development and good governance may be granted to a country which has “ratified and effectively implemented” the conventions listed in Part A of Annex III including, among others, the Convention concerning Minimum Age for Admission to Employment (No 138), the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No. 182), the Convention concerning the Abolition of Forced Labour (No. 105), the Convention concerning Forced or Compulsory Labour (No. 29), the Convention concerning Equal Remuneration of Men and Women Workers for Work of Equal Value (No. 100), the Convention concerning Discrimination in Respect of Employment and Occupation (No. 111), the Convention concerning Freedom of Association and Protection of the Right to Organise (No. 87), the Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (No. 98). Moreover, the special incentive arrangement is granted to a country which commits itself to maintaining the ratification of the conventions and the implementation of their legislation and measures, and which “accepts regular monitoring and review of its implementation record in accordance with the implementation provisions of the conventions it has ratified”.

According to Article 10, paragraph 2, the requesting country shall submit its request to the Commission in writing and shall provide comprehensive information concerning ratification of the above mentioned 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 envisaged in the relevant conventions and related instruments”. The special incentive arrangement for sustainable development and good governance shall be granted if the examination shows that the requesting country fulfils the substantial conditions laid down in Article 9 *and* if the developing country has made a request to that effect by 31 October 2005. According to Article 16, preferential arrangements may be temporarily withdrawn, in respect of all or of certain products, originating in beneficiary countries, for serious and systematic violations of principles laid down in the conventions listed in Part A of Annex III, “on the basis of the conclusion of the relevant monitoring bodies”. Where the Commission decides to initiate an investigation, it shall seek all information it considers

necessary including the available assessments, comments, decisions, recommendations and conclusions “of the relevant supervisory bodies of the UN, the ILO and other competent international organizations”. These shall serve as starting point for the investigation as to whether temporary withdrawal is justified for the reason referred to the same Article 16.

In this scenario, the ILO - as well as the others competent international organizations – appears to remain the point of reference as standard setting bodies. But if it is clear that the formal ratification of international labour standards by a member state is not sufficient to ensure their practical implementation, one of the most important features to emerge from the EU GSP regulations is that, through their built-in cooperation mechanisms and monitoring system, they may provide a concrete “window of opportunity”⁴¹ for strengthening the ILO’s own supervisory work and related advisory services. Thus, in this case, the reporting activity of the ILO, the most important instrument of international labour standards’ implementation provided by the Committee of Experts and the Conference Committee,⁴² can achieve not only sanctions of a political nature, but also of an economic one.

The recent case of Belarus gives concrete evidences on the evolution of EU law. On January 29th, 2003, the International Confederation of Free Trade Unions (ICFTU), the European Trade Union Confederation (ETUC) and the World Confederation of Labour (WCL) made a joint request to the Commission for an investigation to be made under Article 27 of Council Regulation No. 2501/01 in relation to some violations of the freedom of association and of the right to collective bargaining in Belarus. The Commission examined the request and decided to initiate an investigation.⁴³ The information collected by the Commission during the course of the investigation corroborated the existence of serious and systematic violations of the freedom of association and of the right to collective bargaining under ILO Conventions No. 87 and No. 98. Among other things, the Commission considered, as relevant, that ILO examined the situation in Belarus with respect to the two conventions and had started its own respective investigation in November 2003. The resulting ILO Commission of Inquiry report of July 2004 contained 12 recommendations to undertake specific steps for improving the situation in Belarus. Belarus was

⁴¹ See F. Maupain, “Revitalization Not Retreat...”, op. cit., 439 ff.

⁴² See M. Borzaga, ‘Accommodating Differences: Discrimination and Equality at Work in International labor law’, *Vermont Law Review*, 2006 (30), pp. 749 ff, at pp. 774 ff..

⁴³ Commission Decision 2004/23/EC of 29 December 2003 providing for the initiation of an investigation pursuant to Article 27(2) of Council Regulation (EC) No 2501/2001.

urged to implement these recommendations by June 1st 2005, but no implementation took place. Based on this information and its own review, the Commission considered that a temporary withdrawal of the preferential arrangement was justified. On August 17th, 2005, the Commission decided to monitor and evaluate the labour rights situation in Belarus. The announcement of the start of the six-month period of monitoring and evaluation included a statement of the Commission's intention to submit a proposal to the Council for the temporary withdrawal of the trade preferences unless, before the end of the period, Belarus had made a commitment to take the measures necessary to conform with the principles referred to in the 1998 ILO Declaration on Fundamental Principles and Rights at Work, as expressed in the twelve recommendations in the ILO Commission of Inquiry report of July 2004. In the meantime, the ILO Governing Body had adopted the Committee on Freedom of Association (CFA) follow-up report in March 2006 in which the CFA pointed to the actual worsening of the situation of trade union rights in Belarus and urged the Belarusian authorities to take concrete measures immediately. The Commission came to the conclusion that Belarus did not demonstrate any sign of commitment or a convincing indication that the situation had improved, and the Council finally adopted the Regulation for temporary withdrawal.⁴⁴

4. Legalizing the WTO: broader spaces for labour standards within the international trade system?

The legal foundation of GSPs, as instruments for granting access to the international market under preferential conditions, bring them into conflict with the corner stone of WTO legal order, the MFN.⁴⁵ This inevitable conflict raises the question of the legitimacy of MFN exemptions based on the grounds of non-trade interests' protection, such as environment, public moral, and workers' rights. WTO agreements provide for many of such exceptions, which have often been the object of the most recent AB jurisprudence. In fact, they are established by broad and frequently obscure provisions, which have given rise to a complex discussion on their

⁴⁴ Council Regulation 1933/06 of 21 December 2006.

⁴⁵ See C. Kaufmann, "Globalisation...", op. cit., p. 135 ff.; and R. Howse, "Back to court after shrimp/turtle? Almost but not quite yet: India's short lived challenge to labor and environmental exemptions in the European Union's generalized system of preferences", *American University International Law Review*, 2003 (18), p.1365.

interpretation. The range of possible meanings to be attributed to WTO “covered agreements” exemptions is wide, and may result in the possibility of interpreting them in a non-trade-oriented fashion in order to create a linkage between trade and non-trade-oriented interests.⁴⁶

The AB has revealed itself to be sensitive to social as well as environmental concerns. Since “Shrimp I” to “ECs – Conditions for granting preferences”, AB jurisprudence has held an “evolutionary interpretation” and has opened the way to a steady removal of the most notable arguments against a non-trade oriented interpretation.

Most of the claims against the inclusion of non-trade interests within the scope of the WTO have been grounded on the possible protectionist misuse of “covered agreements” provisions allowing trade sanctions in the form of waivers from the implementation of the MFN principle, so as to affect international trade liberalization processes. Nonetheless, the AB has stressed procedural or substantial requirements for the implementation of waiver provisions, requiring them to be necessary, proportional and not used for protectionist or non-legitimate aims. On the basis of this approach, each unilateral trade measure implemented by a contracting party for the purpose of respecting environmental, health-related or social standards is potentially subject to strict case by case scrutiny by WTO jurisprudential bodies in order to ascertain their lawful nature.

There is no doubt that such an evolution has been fostered by the role acquired by the AB and, generally, by the WTO judicial bodies, on the basis of the Uruguay round. The establishment of the Dispute Settlement Understanding (DSU) has created a binding dispute settlement system. The AB is a real Court, which applies the “covered treaties” on the basis of a legal approach.⁴⁷ As it has already been pointed out, the use of such an ambiguous definition is mainly due to the will of not arousing suspicion among the states required to undertake the new system.⁴⁸ In fact, a name referring directly to the substantial judicial role that the AB was expected to perform would have deterred states from agreeing with the Dispute Settlement Understanding (DSU). Putting the interpretation of “covered treaties” in the hands of a court would have bound them to

⁴⁶ See O. Chaudhary, “The propriety of preferences: an evaluation of EC and U.S. Schemes in the Wake of EC-Preferences”, *Asper review of International Business & Trade Law*, 2005 (159), p. 185; E.U. Petersmann “Human right and international trade law: defining and connecting the two fields”, in “Human rights and international trade”, Oxford, New York, Oxford University Press, 2005, p. 63.

⁴⁷ J.H.H. Weiler, “The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement”, *American Review of international Arbitration*, 2002 (13), p. 187.

⁴⁸ J.H.H. Weiler, “The Rule of Lawyers and the Ethos of Diplomats... ”, *op. cit.*, p. 189.

the legal system that the court would have elaborated, depriving them of the power to solve controversies by negotiation, satisfying political needs rather than the rule of law.⁴⁹

A decade after DSU implementation, it can be stated that this fears were not completely unwarranted. The AB has performed its own role according to the approach followed by constitutional courts in national law systems and by European Court of Justice (ECJ) within European Law.⁵⁰ “Covered agreements” and particularly GATT have been interpreted as open texts, interrelating with other international law sources and sensitive to the claims for the protection of interests not directly related to international trade liberalization but, however, considered prominent within the community of nations.⁵¹

The AB has scrutinized the behaviour of contracting states on the basis of a case by case approach, aimed at assessing whether relevant national provisions were in conflict with WTO principles and in relation to their effect, refusing an aprioristic and strict interpretation. This approach has also certainly had remarkable consequences on the behaviour of first-instance panels. In this regard, it is uncontested that the composition of the panels has a more political inclination. In fact, since it does not consist of a specific permanent number of legal experts, but its members are chosen time after time by states involved in the relevant controversy, its decisions are expected to be more prone to political claims and to the exigencies of compromise. Nevertheless, since the decisions of the panels are subject to AB review, they will naturally take into account the legal interpretations and principles set up by the AB.⁵²

In this scenario, the idea of a political function attributed to the AB is not incorrect.⁵³ Decisive choices for the future of the WTO legal system are attributed to the AB, mostly in the relationship between trade and non-trade related interests.⁵⁴ However, this assessment is not necessarily inconsistent with the nature of the AB as a judicial body and does not challenge the trend toward a “legalized” international trade system. Also taking political interests into account, the AB merely behaves as national constitutional courts usually did and like the ECJ did in the

⁴⁹ J.H.H. Weiler “The Rule of Lawyers and the Ethos of Diplomats...”, op. cit., p. 180.

⁵⁰ The constitutional function of AB is stressed by J.H.H. Weiler, “The Rule of Lawyers and the Ethos of Diplomats...”, op. cit., p. 188 ff..

⁵¹ J. Pauwelyn, “Human rights in WTO Dispute Settlement”, in “Human rights and international trade”, Oxford – New York, Oxford University Press, 2005, p. 213 ff..

⁵² J.H.H. Weiler, “The Rule of Lawyers and the Ethos of Diplomats...”, op. cit., , p. 187.

⁵³ G. Shaffer, Y. Apea, “Institutional choice in the generalized system of preferences case...”, op. cit., p.995 ff.

⁵⁴ J.L. Dunoff, “When – and Why – Do Hard Cases Make Bad Law?...”, op. cit., p. 6; nonetheless this author criticizes the contents of AB case law’s creating activity.

early stages of their respective legal systems. The interpretation of fundamental legal acts requires choices of remarkable political value. The difference between a judicial system and a political system for the resolution of legal controversies is based on the principles which are the ground of fundamental interpretative choices adopted. The decisions of political bodies are affected by the economic and political power of the countries involved and not supported by legal argumentations. On the contrary, judicial bodies provide for specific arguments as grounds for their statements and set up principles granting rationales to be applied in futures controversies.⁵⁵ Under this perspective, the continued creation of multilayered case law among WTO judicial bodies provides for principles and rules permitting the WTO legal system to be applied in an equal and non-discriminatory way based on the rule of law, so as to prevent abuse and misuse against politically and economically weaker states. Uruguay round has marked the breakthrough of the WTO legal system, establishing a binding and non-voluntary system for the resolution of controversies, based on the activities of a real judicial body.

It has been argued that such decisions, affecting the choice between two different models of international economic legal order, would have been the “product of a larger political process, and cannot be imposed by judicial fiat”.⁵⁶ Nevertheless, the question can be regarded from the opposite perspective, stating that, after the Uruguay Round, DSU has been the issue of such a process. In fact, the establishment of a judicial system for the settlement of trade disputes appears as the preference for a legal resolution of main interpretative questions (like the weight that non-trade related interests have to acquire within the international trade system), based on the rule of law and not on political compromise.⁵⁷

In this scenario more possibilities have been opened for labour standards to be included within the scope of the WTO. The AB’s interpretation of the WTO “covered agreement” has shown itself much more sensitive to non-trade-related interests than GATT panels were. The AB has interpreted WTO “covered agreements” under an “evolutionary perspective”⁵⁸ and has stressed those provisions more directly related to a non-trade-oriented idea of development. This evolution has been due to the judicial approach which the AB has adopted in performing its role,

⁵⁵ S. Cassese, “La funzione costituzionale dei giudici non statali. Dallo spazio giuridico globale all’ordine giuridico globale”, www.irpa.eu, p. 18, also in *Rivista trimestrale di diritto pubblico*, 2007, pp. 609 ff.

⁵⁶ J.L. Dunoff, “When – and Why – Do Hard Cases Make Bad Law?...”, op. cit., p. 10.

⁵⁷ J.H.H. Weiler, “The Rule of Lawyers and the Ethos of Diplomats...”, op. cit., p. 181.

⁵⁸ Appellate Body Report, *United States –Import prohibition of certain shrimp and shrimp products*, WT/DS58/AB/R, adopted 22 October 2001, pr. 129.

concentrating on the legal principles on interpretation, mostly those codified in the Vienna Convention.⁵⁹ In fact, the copious production of conventions, recommendations and reports on labour standards within the international context, due to the activities of international organizations with a leading role of ILO, demonstrated the notable position that protection of workers' rights has acquired within the international agenda. The ILO declaration on fundamental principles and rights at work has expressly stated the general binding nature of the freedom of association and the right to collective bargaining, the elimination of forced and compulsory labour and, the abolition of child labour and the elimination of discrimination in the workplace. The fact that most of the internationally recognized labour standards are binding for WTO contracting parties, either on the basis of conventions which they have agreed to or simply as subjects of international law, has to be taken into account.⁶⁰ Specifically within a controversy involving two or more states, the fact that those states are bound to implement precise labour standards is to affect directly the decisions of the WTO judicial bodies, even if this obligation arises from an agreement alien to the WTO system or from customary international law.

Regarding at AB's case law this perspective appears able to be implemented and is feasible. On this basis, we assume that GSPs play a notable role in legitimizing labour standards' access within the scope of the WTO, through their interpretation the balance between the need for international trade liberalization and the protection of workers is recognized as consistent with the aims pursued by the WTO.

5. The protection of non-trade related interests within WTO case law

What is under discussion here is whether a link between trade and non-trade related interest is possible or – we should more correctly say – is legitimate under the WTO and “covered agreement”. In the most recent WTO case law there are many clues which lead us to an

⁵⁹ Appellate Body Report, *United States – Import prohibition of certain shrimp and shrimp products*, WT/DS58/AB/R, adopted 12 October 1998, pr. 129; see O. Chaudhary, “The propriety of preferences...”, op. cit., p. 184; R. Howse, “Back to court after shrimp/turtle?...”, op. cit., p. 1343; J. Pauwelyn, “Human rights in WTO Dispute Settlement...”, op. cit., pp. 209 ff.; G. M. Grossman, A.O. Sykes, “European Communities – conditions...”, p. 249 ff.; S. Cassese, “La funzione costituzionale dei giudici non statali...”, op. cit., p. 24.

⁶⁰ R. Howse, “Back to court after shrimp/turtle?...”, op. cit., p. 1364; E.U. Petersmann, “Human right and international trade law...”, op. cit., p. 42.

affirmative answer to this question. Moreover, if the object of the investigation concentrates on labour standards, the topic of the legitimacy of GSPs and the relevant statements coming from the AB are decisive.

Interpreting art. XX of the GATT, in its “shrimp I” case report the Panel has recognized the “security and predictability of trade relations” as the main purpose of the GATT and the WTO agreement. This statement was intended to have precise and direct interpretative consequences, since, under this perspective, any kind of exemption from GATT principles cannot be implemented if it is deemed to threaten trade related interests.⁶¹

This perspective is no longer well-grounded in the light of the most recent WTO case law. In its report on the same case the AB stated that “WTO objectives may well be pursued through measures taken under provisions characterized as exceptions”, implicitly accepting that non-trade-related interests provided for within an exemption can be considered on the same level as the aim of international trade liberalization.⁶² Within this approach, the role of the AB is to find a reasonable balance between the two different interests at stake by means of legal interpretation.

The most relevant exemptions in the GATT to MFN principle on the grounds of non-trade related interest are provided for in art. XX. It is stated that, among other things, “nothing” in the GATT “shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; (...) (e) relating to the products of prison labour; (f) imposed for the protection of national treasures of artistic, historic or archaeological value; (g) relating to the conservation of exhaustible natural resources (...)”. Many debates have taken place regarding this provision, because of its possible impact on the assets of interests within the WTO international legal system. Nonetheless, only after the Uruguay round, with the judicial role attributed to the AB, art. XX has been considered as the instrument to be used in order to maximize the role of non-trade related interests. This process has already had a profound effect as regards environmental issues. In fact, in “shrimp I” the legitimacy of waivers to the MFN principle in order to preserve environmental resources has been explicitly recognized. It has been stated that the interpretation

⁶¹ Panel Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R, adopted 15 May 1998, pr. 7.44

⁶² Appellate Body Report, *European Communities – Conditions for the granting of tariff preferences to developing countries*, WT/DS46/AB/R, adopted 7 April 2004, pr. 94; E.U. Petersmann, “Human right and international trade law...”, op. cit., p. 36.

of art. XX exemptions is not to be “static in its content or reference but”, as we have already mentioned, “is rather ‘by definition, evolutionary’”.⁶³ On this basis, the AB legitimized a broad interpretation of the exemptions from the substantial principles of GATT, offering room to many non-trade-related interests, according to the evolution of “contemporary concerns of the community of nations”.⁶⁴ In “Shrimp I”, the AB considered the adoption of trade sanctions by the US based on the use of fishing techniques by Malaysia, which jeopardize the survival of some maritime animal species such as turtles, legitimate under art. XX (g).

Art. XX (g) is not directly aimed at the protection of the environment, since it allows adoption of measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”. There is a legitimate basis to argue that in referring to “exhaustible natural resources”, the contracting parties didn’t mean “maritime turtles”. Nonetheless, the evolutionary interpretative approach held by the AB permitted it to include the protection of animal species near to extinction within the scope of art. XX (g). In this regards, the AB turned to a systematic interpretation of WTO “covered agreements” as an whole. It has referred to the wording of the preamble to the WTO Agreement, which explicitly states that “relations in the field of trade and economic endeavour” should allow “the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so”.⁶⁵ This statement addresses the interpretation of the broad provisions of WTO “covered agreements” (such as the ones provided for in art. XX exemptions) towards issues consistent with the aims pursued by the institution, as it is also indicated in the preamble. Despite criticisms on the inclusion of non-trade-related interests within the scope of WTO, the interpretative trends which the “juridification” of the WTO dispute settlement has brought into action cannot be denied. The asset of interests on which international trade regulation systems has changed and the primacy of trade liberalization among the aims of the WTO is no longer absolute, and it is to be reconciled with non-trade-related concerns, such as environmental, social and labour standards.

⁶³ Appellate Body Report, *United States –Import prohibition of certain shrimp and shrimp products*, 1998, pr. 129 and 130.

⁶⁴ *Ibidem.*; see S. Cassese, “La funzione costituzionale dei giudici non statali...”, op. cit., p. 24.

⁶⁵ Appellate Body Report, *United States –Import prohibition of certain shrimp and shrimp products*, 1998, cit., pr. 129; the influence of WTO agreement’s preamble is stressed also by R. Howse, “Back to court after shrimp/turtle?...”, op. cit., p. 1361.

6. GSPs: the “port key” for labour standards into the international trade legal system?

The GATT and other WTO “covered agreements” do not explicitly refer to labour or social standards. Although, with the WTO Ministerial declaration of Singapore (1996), the contracting parties renewed their “commitment to the observance of internationally recognized core labour standards”, they declared that “the International Labour Organization (ILO) is the competent body to set and deal with these standards”, and affirm their “support for its work in promoting them”. Some commentators have stressed as this statement could be interpreted as a definitive removal of labour standards from the WTO agenda⁶⁶, but this idea does not appear incontrovertible. Within the same declaration, the WTO states have agreed that “economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion” of core labour standards, implicitly admitting that the two interests at stake are not incompatible. Then, rejecting “the use of labour standards for protectionist purposes”, they do not deny that measures aimed at their implementation can be legitimized under the WTO if adopted for purposes and in manners which have not proven to be “protectionist”, on the contrary, they implicitly confirm it. Otherwise it could have been no use to clarify that the use of labour standards was rejected “for protectionist purpose”: on the contrary it would be sufficient to clarify that labour issues have no linkage with the WTO system and the trade-related interests which it is aimed to promote. Instead, the idea of a linkage between labour standards and international trade liberalization has not been denied, for the very reason that (as the AB has pointed out in its case law) in the contemporary concerns of the international community trade and non-trade related interests are no longer perceived as opposite or in contraposition to each other. AB has expressly affirmed that “the relationship between trade and development (..) remain prominent on the agenda of the WTO, as recognized by the Doha Ministerial Conference in 2001”.⁶⁷ This statement support the possibility of an harmonic pursuit of trade related and non-trade related issues within the WTO, especially on the basis of the recent AB case law, which has accepted the idea that environment or social standards’ implementation can be

⁶⁶ M. J. Trebilock, R. Howse, “Trade policy & labor standards”, *Minnesota Journal of Global Trade*, 2005 (14), p., 264.

⁶⁷ Appellate Body Report, *European Communities – Conditions for the granting of tariff preferences to developing countries*, pr. 108.

targeted by measures consistent with the non discrimination system, to the extent to which they are “reasonable”.⁶⁸

Stating that the ILO is the competent body to set and deal with labour standards only means that WTO will not be directly committed in promoting their development and their codification within international law. It does not prevent implementation within the WTO regulation system of standards already recognized in the conventions of the ILO and of other international bodies. The recognition of the role of the ILO in this field states a specific link between it and the WTO, relating to every labour concerns involved in the implementation and interpretation of WTO “covered agreements”.⁶⁹ This perspective has been widely upheld by the AB case law, which explicitly refers to “multilateral instruments adopted by international organizations”.⁷⁰

In this scenario, GSPs assume a central role, since they constitute the most notable link between the WTO and labour standards.⁷¹ Most of the GSPs refer to labour standards as the criteria for granting the preferential treatments to developing countries which GSPs provide for. Under this perspective the Enabling Clause constitutes the most binding evidence of direct recognition of the importance that non-trade related interests acquire within the WTO legal system, in light of the AB interpretation.⁷² The Enabling Clause is a binding document for all contracting parties and it legitimizes exemption from substantial WTO “covered agreements” rules.⁷³ Since preferential treatments are attributed on the basis of the level of implementation of labour and other non-trade related standards, it cannot be argued that interest in implementation of these standard is not included within the assets of interest which constitute the basis of the

⁶⁸ E.U. Petersmann, “Human right and international trade law...”, op. cit., p. 57 ff.

⁶⁹ See M. J. Trebilock, R. Howse, “Trade policy & labor standards”, *Minnesota Journal of Global Trade*, 2005 (14), p.285.

⁷⁰ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 12 march 2001, pr. 162; see O. Chaudhary, “The propriety of preferences...”, p. 191, R. Howse, “Back to court after shrimp/turtle?...”, op. cit., p. 1368.

⁷¹ About the link between GSP dispute and “much larger questions about how to understand trade law, if not international more generally”, J.L. Dunoff, “When – and Why – Do Hard Cases Make Bad Law?...”, op. cit., p. 2.

⁷² This is the scenario prospected by R. Howse, “Back to court after shrimp/turtle?...”, op. cit., pp. 1378-1379, assuming that AB would have upheld EU preferences scheme under the Enabling Clause.

⁷³ The idea of Enabling Clause as a hard law provision, providing for an exemption to GATT substantial principles had been challenged, pointing out its aspirational nature and, as a consequence, denying its enforceability before WTO DS; R. Howse, “Back to court after shrimp/turtle?...”, op. cit., pp. 1339 ff. However, this argumentations have been rebutted by AB, which expressly affirmed that “Enabling Clause operate as an ‘exemption’ to Article I:1”; Appellate Body Report, *European Communities – Conditions for the granting of tariff preferences to developing countries*, pr. 90.

WTO. Neither can it be stated that the implementation of labour standards is necessarily subordinate to trade liberalization.⁷⁴

The AB has tackled most of the questions related to GSPs system implementation in its statement on “European Communities – Conditions for the granting of tariff preferences”.⁷⁵ This judgment established the basic criteria for evaluating the legitimacy of preferences schemes, according to a case by case approach.⁷⁶ The interpretative perspective that the AB has adopted is decisive, since it stresses the interconnections of the WTO systems with other international law’s sources and its flexibility as regards the balancing between trade and non trade related interests. In this scenario, the legitimacy of all GSPs *tout court* has not been maintained, nor has an interpretation denying the legitimacy of requirements related to the implementation of labour or other social or non-trade related standards, based on a strict interpretation of the non-discrimination principle. The flexibility of the system is based on the chosen interpretation of non-discrimination, which allows the verification of the discriminatory nature of the scheme on the basis of the reasonableness principle.

7. Protectionism vs. non-discrimination and the principle of reasonableness

The AB “European Communities – Conditions for the granting of tariff preferences” judgment sets a benchmark in the debate on the legitimacy of GSPs. As we have already remarked, GSP schemes have been object of many criticisms, accused to conceal protectionist measures, contrary to the liberalization of international trade. Nonetheless, AB’s case law demonstrates that the problem of protectionist misuse of GSPs is not a matter of whether they are allowed or not under the WTO legal system, since the Enabling Clause expressly legitimizes them. On the contrary, it has to be verified whether the implementation of preferences can concretely produce a protectionist effect. To this end, the AB has utilized a flexible interpretation

⁷⁴ L. 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 programs”, in “Human rights and international trade”, Oxford – New York, Oxford University Press, 2005, p. 476.

⁷⁵ L. Bartels, “The Appellate Body report...”, op. cit., p. 478.

⁷⁶ G. Shaffer, Y. Apea, , “Institutional choice in the generalized system of preferences case...”, op. cit., p.1002.

of the non discrimination principle, which is commonly shared among the constitutional courts of national states and is also adopted by the ECJ.

Under this perspective, diverse treatments are not prohibited. However, they have to be justified on the basis of specific and precise criteria, which rationally demonstrate the existence of different conditions. Within GSPs, the diversification of treatments is aimed at the targeted interest of the recipient country's being completely achieved. If the targeted interest is the economic development of developing countries, differentiations are justified on the basis of the differences between the economic and social realities of those countries, in order to obtain treatments which better fit their specific needs.

Under this approach, non-discrimination evolves into reasonableness. It has been demonstrated that the reasonableness principle is broadly used in international economic law "to protect foreign products and investors *vis-à-vis* unjust or irrational treatments afforded to them by importing/host country through internal measures".⁷⁷ On the basis of a reasonableness scrutiny, differential treatments are not justified if they are not deemed to be consistent with the aim to which the differentiation is addressed.⁷⁸ In evaluating the consistency of the relevant measure taken with regard to its specific purpose the interpreter has to take into account the objective standards, adapting them to the specific circumstances of the case to be considered. Criteria are elaborated on the basis of the relevant provisions which allowed the different or preferential treatments, more or less restrictive according to its wording or its systematic interpretation. Moreover, the broadness of the clauses gives a great discretion to the judicial bodies, which in their case by case intervention clarify the meaning of different criteria and requirements, providing, time after time, for a more certain and predictable implementation, which is essential for the security and stability of international trade.

Since the application of the reasonableness principle is increasingly consolidating, the criteria on whose basis the misuse of exemptions is ascertained are also becoming gradually more specific. They can be related to substantive or procedural requirements, imposing a multilayered test aimed at assessing the suitability, necessity and proportionality of the relevant measure with respect to the aim pursued, as well as, from a procedural point of view, the transparency of the procedure for its implementation.

⁷⁷ See F. Ortino, "From 'non-discrimination' to 'reasonableness': a paradigm shift in international economic law", NYU - Jean Monnet Working Paper no 01/05, <http://www.jeanmonnetprogram.org/papers/05/050101.html> , p. 33.

⁷⁸ E.U. Petersmann, "Human right and international trade law..." , op. cit., p. 70.

The idea of verifying the misuse or abuse of provisions providing for exemptions to substantial WTO principles through a reasonableness test has already been concretely stated by the AB. Art. XX head-note provides for the implementation of exemptions clauses to the condition that “such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”. In interpreting this provision the AB has related it to the doctrine of *abus de droit* as an expression of the good faith principle, stating that it “prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right ‘impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say reasonably’”. The legitimate adoption of measures derogating the substantial principle of WTO “covered agreements” requires them to be implemented in order to achieve the aim to which they are related within the provision which applies to them. The link of good faith with the *abus de droit* doctrine confirms this idea, and the related test is based on substantial or procedural criteria

We will not go further in reporting a detailed analysis of the relevant statements.⁷⁹ From our point of view, it is of prominent importance to point out the decisive contribution that the reasonable approach brings for the creation of a possible link between labour standards protection and international trade liberalization within the WTO legal system.

Protectionist abuses of exemptions to the non-discrimination principle within the regulation of international trade are hampered by the establishment of the reasonable principle as an instrument of interpretation and implementation of the relevant rules. As it has been stated, “reasonableness functions as a normative yardstick to control the exercise of discretionary powers by States”; in fact, it “may be seen as a principle of ‘administrative validity’ to protect the rights of (foreign) citizens against abuses by the State of its (administrative, legislative and judicial) powers, as well as a ‘liberalization instrument’ imposing certain general requirements on the ability of Member States to adopt national regulations which restrict trade or investment in the name of legitimate public policy objectives”.⁸⁰ As a matter of fact, a “reasonableness approach” appears to be the only means not to look at the issue of relationships between trade and non-trade-related interests not in terms of opposition. Through reasonableness, protectionist

⁷⁹ For such an analysis see F. Ortino, “From ‘non-discrimination’ to ‘reasonableness’...”, op. cit., pp. 33 ff.

⁸⁰ See F. Ortino, “From ‘non-discrimination’ to ‘reasonableness’...”, op. cit., p. 33.

abuses of trade sanctions, non-discrimination exemptions, their exploitation in order to preserve the advantage position of developed countries in the international market, appear less feasible, and the protection of fair competition within international market less subject to their arbitrary discretion.⁸¹

8. Generality, non reciprocity and non discrimination

In European Communities – Conditions for the granting of tariff preferences, following the line taken in many of its previous judgments, the AB has applied a reasonableness test to the challenged European GSP, aimed at assessing the protectionist misuse of the measures adopted, referring both to substantial and to procedural criteria. Moreover, in this regards, the role of the standards codified by international organizations, and therefore of those shared among the community of nations, has been stressed as an instruments for evaluating the legitimacy of unilateral measures, thus confirming the possibility of a coordinated action of the WTO, the ILO and other relevant institutions in the creation of an integration of trade-related and non-trade-related interests within the international trade regulation system.

AB has turned to both substantial and procedural criteria, referring to Enabling Clause provisions, in order to assess unlawful abuses, related to protectionist intents.

“Enabling Clause” establishes that “notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatments to developing parties”. The treatments allowed are listed in the pr. 2 of the Enabling Clause. Among them letter a) mentions “preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences”. In a footnote to this provision there is an explicit reference to the decision of the contracting parties of June 25th, 1971, and to the explicit statement provided therein according to which such schemes of preferences are to be “generalized, non reciprocal and non discriminatory”.

⁸¹ AB case law on GSPs is read under this approach by J.L. , “When – and Why – Do Hard Cases Make Bad Law?...”, op. cit., p. 2.

The term generalized expressly refers to the historical context within which GSPs have been developed and established.⁸² In fact, “by requiring tariff preferences under GSP to be ‘generalized’, developed and developing countries together sought to eliminate existing “special” preferences that were granted only to certain designated developing countries”. The AB expressly noticed that there is an agreed opinion among countries involved in the proceeding that “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”.⁸³ Under this perspective, requiring GSPs to be generalized, the Enabling Clause forbid preferential treatments based on traditional economic relationships between recipient and donor countries, rooted in previous colonial reciprocal dependence.

The non reciprocity requirement can also be explained on the basis of the historical origins of GSPs, since in their original form, they were intended to foster the commercial interests of both the donor and the recipient countries’. Instead, under the WTO system, derogations to the MFN principle are allowed only in order to support the developing country’s access to international trade. According to this interpretation, non-reciprocity means that donor countries are not allowed to receive any direct advantage in exchange for the granted preference. However, the implementation of labour, environmental or social standards constitutes an indirect advantage for developed countries, since, in the long term, it can support the creation of fairer competition in the international trade system.

AB statements’ issues do not dwell upon the meaning of non reciprocity and generality requirements. The main object of analysis within the relevant pronouncement is the interpretation of the non-discrimination requirement. In fact, while the first two refer to the nature and contents of preferences schemes as they were before the establishment of the GATT-WTO system, non-discrimination deals with the future evolution of GSPs. Items targeted by the non reciprocity and generality requirements are well-determined, since they deal with the historical meaning of preferences schemes, referring to the precise contents that they had in the past and are no longer allowed to have. The non-discrimination requirement acquires central importance since it is the

⁸² *Supra*. G. Shaffer, Y. Apea, “Institutional choice in the generalized system of preferences case... ”, *op. cit.*, p. 994.

⁸³ Appellate Body Report, *European Communities – Conditions for the granting of tariff preferences to developing countries*, pr. 155.

most general and, because of the linkage between non discrimination and reasonableness, leaves room for deep scrutiny by the WTO judicial bodies on GSP legitimacy.

According to the Panel's interpretation "the requirement of non-discrimination, as a general principle (...) obliges preference-giving countries to provide the GSP benefits to *all* developing countries without differentiation, except for the implementation of a priori limitations in GSP schemes", since "the clear intention of the negotiators was to provide GSP equally to all developing countries and to eliminate all differentiation in preferential treatment to developing countries".⁸⁴ A priori limitations, as required by the Panel, have to be explicitly authorized by the Enabling Clause. This refers to the provision of art. 2, let. d), under which "special treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries" can be provided for. Under this interpretation, differentiation within GSP are allowed between developing countries and those among them that can be considered "least developed", on the basis of precise criteria. Excepting for this specific exemption, under Panel's perspective, GSPs have to grant the same preferential treatment to all developing countries.

AB's report did not agree Panel's interpretation, adopting a more flexible approach, referring to a reasonableness test in order to evaluate the legitimacy of the contested European GSP. According to AB, identical tariff preferences are to be granted only to "similarly-situated beneficiaries"⁸⁵, meaning that non similarly-situated beneficiaries can be treated differently and that different preferences can be granted to countries according to their different social or economic situation. It is evident that the risk of differentiated treatments increases the possibility of protectionist measures or, however, of abuses related to the adoption of arbitrary provisions, aiming not legitimated pursues. Nonetheless, by means of this interpretation AB has legitimated the reference to labour standards' implementation as a criterion for granting preferences, allowing the creation of a notable linkage between labour and trade within WTO legal system. Under AB's interpretation, the nature of differentiated treatments granted on the basis of non-trade-related criteria is scrutinized through the application of a reasonableness test, based on substantial and procedural requirements, in order to verify their arbitrary or protectionist nature.

⁸⁴ Panel Report, *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries* - Report of the Panel, WT/DS246/R, adopted on 1st December 2003, pr. 128.

⁸⁵ Appellate Body Report, *European Communities – Conditions for the granting of tariff preferences to developing countries*, pr. 154.

The controversy under discussion in “European Communities - Conditions for the Granting of Tariff Preferences” had been raised on the basis of the former European GSP, provided for by regulation n. 20501/2001. India claimed against its exclusion from arrangements related to the implementation of labour or environmental standards and of “special arrangements to combat drug production and trafficking”. During the development of the controversy India limited its complaint to the drug arrangement scheme.

The main issue of the controversy lays exactly on the differentiation of the granted preferences on the basis of labour and environmental standards or anti-drugs’ traffic measures. Under the perspective proposed by the Panel such a system should be considered as “discriminating” and, for this reason, not legitimated. On the contrary, AB held a different approach, evaluating whether or not the restrictions are legitimated according to the actual economic and social context of recipients countries relating to the nature of the adopted requirements.

9. Substantial reasonableness: non discrimination and development, financial and trade needs of the recipient state

Enabling Clause states that “any differential and more favourable treatment provided under this clause (...) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries”. On the basis of this provision AB defined the necessary criteria for evaluating the “substantial reasonableness” of preferences measures adopted by donor countries under a GSP scheme. In fact, where those measures meet a “development, financial and trade needs” of recipients countries they are deemed to be addressed to a legitimate aim and not to pursue a protectionist or, in any case, an unlawful interest of the developed granting country.

AB has pointed out as the nature of developing countries’ “needs” is mutable, subject to changes according to the social and economic situation’s evolution and as the enabling clause’s provisions take it into account, requiring preferences schemes not only to be “designed” but also “modified, to respond positively to the development, financial and trade needs of developing

countries”. Holding that “it is simply unrealistic to assume” that the economic and social evolution “will be in lockstep for all developing countries at once, now and for the future”, AB set up the basis of a flexible system, within which preferences are granted on the basis of objective standards, in order to meet concrete development exigencies of involved countries. Under our perspective, the prominent question is whether preferences schemes differentiating on the basis of labour standards’ implementation meet enabling clause’s requirements. It appears that, according AB, reasonable preferential schemes referring to international labour standards authentically pursue a need of the recipient country, in conformity with Enabling Clause.

This question has a remarkable effect on the integration of trade and non-trade oriented interests within the WTO legal system. Its solution is directly correlated to the meaning to attribute to the term development within Enabling Clause provisions. It seems that, on the basis of recent AB case law on non-trade-related interest within WTO, the expression ‘development, financial and trade needs’ has to be understood as distinguishing development, from financial and trade concerns. In fact, an understanding of development as a purely economic matter is not consistent with the weight unanimously attributed to environment and social issues by the community of nations. Moreover, according to the recent most reliable economical, sociological and philosophic studies, the idea of development in the modern era cannot be conceived as a merely economic concern, disjointed from the extent of democratic, social and human rights’ implementation, which directly affect the possibility for each individual of determining freely his own choices.⁸⁶ Many international convention and instruments recognized the broad scope of the word “development”, referring to more than barely commercial and financial related issues.⁸⁷ In “Shrimp I”, AB has expressly referred to the preamble of WTO agreement, “which explicitly acknowledges ‘the objective of sustainable development’”.⁸⁸

The reasonableness test applied by AB requires the concrete existence of the need to be appreciated on the basis of “objective standards”. On this regard, AB stated that “broad-based

⁸⁶ L. Bartels, “The WTO legality of the EU’s GSP+arrangement”, *Journal of International Economic Law*, 2007 (10), p. 876; M. J. Trebilock, R. Howse, “Trade policy & labor standards”, *Minnesota Journal of Global Trade*, 2005 (14), pp. 271-272.

⁸⁷O. Chaudhary, “The propriety of preferences...”, p. 183, mentioning UN declaration on the right to development of 1986, Rio declaration on environment and development of 1992, Vienna declaration and program of action of 1993, UN agenda for development of 1997, ILO declaration on fundamental principles and rights at work of 1998, the UN millennium declaration of 2000, the Johannesburg declaration of sustainable development.

⁸⁸ Appellate Body Report, *United States –Import prohibition of certain shrimp and shrimp products*, 1998, cit., pr. 129; L. Bartels, “The WTO legality...”, op. cit.,p. 876.

recognition of a particular need, set out in the WTO agreement or in multilateral instruments adopted by international organizations, could serve as such a standard”.⁸⁹ The adoption of standards set up by international agreements or binding documents issued by international organization as criteria for differentiated treatments can constitute the evidence of a reasonable and, by consequence, non-discriminating preferential measure. In AB’s reasonableness test, the reference to standards provided for by ILO documents or convention demonstrates that a preference scheme authentically pursues a development need of the recipient country.

In “European Communities – Conditions for the granting of tariff preferences”, AB also required “a sufficient nexus ” between preferential measures adopted and their “likelihood of alleviating the relevant ‘development, financial [or] trade need’”, in order to comply with “the expectation that developed countries will ‘respond positively’ to the ‘needs of developing countries’”, as provided for by art. 3, lett. c), of enabling clause.⁹⁰ The meaning of this statement is not obscure: it requires a further analysis for the concerned preference scheme in order to fulfil Enabling Clause requirements. AB’s statements cannot be read as legitimizing differentiated preferences for the mere fact that a state has ratified the relevant ILO conditions.⁹¹ While the reference to international agreed labour standards seems to demonstrate that a GSP pursue a legitimate aim; requiring “a sufficient nexus” between the adopted preference and the relevant need, AB bind the donor State to give evidences – even if presumptive – that that measure is likely to achieve the aimed purpose.

AB does not go any further in the analysis of this requirement, so it is not made clear how the interpreter has to evaluate its existence in concrete.⁹² It can be maintained that the “suitability”⁹³ of the adopted measure for the achievement of the considered “need” of the recipient country has to be verified, meaning whether the measure adopted appears adequate in order to tackle the concerned development need. While in other cases AB has required the economic measure adopted to be the less restrictive as regard the MFN principle, this does not seem to be the case

⁸⁹ Appellate Body Report, *European Communities – Conditions for the granting of tariff preferences to developing countries*, pr. 163; G. Shaffer, Y. Apea, “Institutional choice in the generalized system of preferences case...”, op. cit., p. 1003.

⁹⁰ Appellate Body Report, *European Communities – Conditions for the granting of tariff preferences to developing countries*, pr. 164.

⁹¹ L. Bartels, “The WTO legality...”, op. cit. p. 877.

⁹² G. Shaffer, Y. Apea, “Institutional choice in the generalized system of preferences case...”, op. cit., p. 1002.

⁹³ Ortino, “From ‘non-discrimination’ to ‘reasonableness’...”, op. cit., p. 40 ff.

for GSPs. In fact, an excessively strict interpretation of Enabling Clause is not consistent with its “history and objective”, demonstrating that “members are encouraged to deviate from Article I in the pursuit of differential and more favourable treatments for developing countries”.⁹⁴ AB requires the existence of a reasonable relationship between the relevant measure and the pursued aim. It has to be evaluated on a comparative basis, considering the measure at stake on the basis of other hypothetically possible provisions.

On this regard it has to be stressed that, even relating to GATT exemptions requiring a stricter nexus on the basis of their literal interpretation, AB has demonstrated a flexible approach.⁹⁵ According to the “Korea – Beef” test⁹⁶, the importance of the relevant interest as perceived by the state adopting the concerned measure affects the scrutiny, since “the more vital or important those common interests or values are, the easier it would be to accept as “necessary” a measure designed as an enforcement instrument”.⁹⁷ On the other end, in “Shrimp” cases, the test has been carried out on the basis of the behaviour of the adopting state, namely the attempts in finding a shared solution for the achievement of the pursued interest through multilateral negotiations.⁹⁸

As it appears from the observations above, both in the evaluation about the legitimacy of the aim pursued by the preference scheme and in the scrutiny on the nexus between the adopted measures and the perceived needs, AB refers to indicators or criteria which demonstrate the reasonableness of the adopted measures relating to the development need of the recipient country taken into account. In the first case this indicator is the reference to international agreed labour standards, such as ILO conventions. As regard the “nexus”, it can be assumed that AB will require the effect of preferences on the social development of the recipient state to be supported by reports, investigations and studies carried out by international organization or institutions such as ILO.

⁹⁴ Appellate Body Report, *European Communities – Conditions for the granting of tariff preferences to developing countries*, pr. 111.

⁹⁵ Ortino, “From ‘non-discrimination’ to ‘reasonableness’...”, op. cit. p. 29 ff.

⁹⁶ Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, pr. 162 ff.

⁹⁷ Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, pr. 162; see R. Howse, “Back to court after shrimp/turtle?...”, op. cit., p. 1371, who applies the same argumentation to the necessity of preference measures to tackle labour standards’ implementation, even if under a test on European GSP’s provisions legitimacy carried out on the basis of art. XX *chapeau* and not under Enabling Clause.

⁹⁸ O. Chaudhary, “The propriety of preferences...”, p. 191.

10. *Procedural reasonableness: transparency and flexibility of GSPs*

The reasonableness test for unilateral measures or preferences schemes is based on both substantial and procedural criteria. The AB has scrutinized often the non-discriminating nature of unilateral measures on the basis of the transparency of the procedure by which they have been adopted. Moreover, this is a widespread principle in international economic law.⁹⁹ It has been argued that deciding on procedural grounds could constitute the means for escaping assessments on a substantial number of controversial questions.¹⁰⁰ This approach does not seem to take into account the complexities of the statements of the AB, which have put procedural and substantial statements into a strict relationship. Relating to GSP schemes, it is evident that the link established between the reference to multilateral or internationally agreed social standard constitutes a substantial criterion, since it directly refer to the content of the measure adopted. In this case the inquire activity of the court is not difficult, since the reference to international standards emerges directly from the content of provision providing for a GSP scheme. It could be more difficult to appreciate the existence of a direct “nexus” between the measure adopted and the development need aimed, especially when this evaluation relates to economic phenomena performing on an international level. In this case the interaction between procedural and substantial criteria could be critical. In such circumstances the adoption of some procedural steps before the implementation of the discussed measure can be appreciated as an evidence of a non protectionist or unlawful aim. That does not mean that a the specific evidence is not required, but that the conformity of a state behaviour to good faith patterns can be appreciated by the interpreter as an evidence of a reasonable decision. The implementation of transparent procedures and the involvement of targeted states in order to allow them to present documents, statements and information, can constitute the evidence of non-discriminating intent as well as a notable basis for judicial scrutiny of the legitimacy of the relevant measure.¹⁰¹

⁹⁹ F. Ortino, “From ‘non-discrimination’ to ‘reasonableness’...”, *op. cit.*, pp. 46 ff.

¹⁰⁰ J.L. Dunoff, “When – and Why – Do Hard Cases Make Bad Law?...”, *op. cit.*, p. 10.

¹⁰¹ In shrimp cases, regarding a trade measure adopted on the basis of the GATT art. XX letter (b), the AB has stated that that measure cannot be considered as discriminatory if it was adopted after “good faith efforts” from the implementing state “to reach international agreements” providing for a shared solution of the non-trade related interest at stake. Certainly, efforts have to be “comparable” with the ones dedicated to the solution of the same issue in relationships with other countries, but “so long as such comparable efforts are made, it is more likely that

As regards GSPs, the problem of procedural reasonableness is a prominent one and is, in fact, the basis of the procedural statements that AB has found the European GSP not to be consistent with the Enabling Clause requirement.¹⁰² According to AB's approach a scheme not providing for mechanisms to evaluate whether the relevant need persists or whether, on the contrary, the economic and social conditions have varied in such a way as to no longer justify the treatment granted cannot be considered reasonable. At the same time, mechanisms to allow not included countries to apply for the preference schemes are to be provided. AB has evaluated the former European GSP Drug Arrangement as not responding to the Enabling Clause because "no mechanism under which additional beneficiaries may be" included or "removed" from the original list on the basis of the fact that they have started to be or are no longer "similarly affected by the drug problem" was provided for.¹⁰³ Nonetheless, going further into the AB's arguments, such mechanisms do not appear to be sufficient to prove reasonableness and, by consequence, the non-discriminating nature of the preference scheme. In fact, since the original adoption of the GSP and the definition of the list of countries which can access preferences, donor countries have to indicate "how the beneficiaries (...) were chosen or what kind of considerations would or could be used to determine the effect of the 'drug problem' on a particular country".¹⁰⁴ These statements are the grounds for objections of the scholars who have stressed the necessity of scrutiny of the concrete existence of a specific need of the recipient countries.¹⁰⁵

According to AB's jurisprudence, the existence of mechanism granting a flexible system of access can constitute an evidence of the reasonableness of preferential schemes. This is a procedural criteria, since it does not scrutinize whether the inclusion or exclusion of a recipient state has been founded (for instance whether a development need exist or whether granted preferences have already affected the social situation within that country).

'arbitrary or unjustifiable discrimination' will be avoided"; Appellate Body Report, *United States –Import prohibition of certain shrimp and shrimp products*, WT/DS58/AB/R, adopted 22 October 2001, pr. 122. For references to the implementation of procedural reasonableness criteria within other international economic legal systems, see F. Ortino, "From 'non-discrimination' to 'reasonableness'...", op. cit., p. 36 ff.

¹⁰² G. Shaffer, Y. Apea, "Institutional choice in the generalized system of preferences case...", op. cit., p. 982.

¹⁰³ Appellate Body Report, *European Communities – Conditions for the granting of tariff preferences to developing countries*, pr. 183

¹⁰⁴ Appellate Body Report, *European Communities – Conditions for the granting of tariff preferences to developing countries*, pr. 183; G. Shaffer, Y. Apea, "Institutional choice in the generalized system of preferences case...", op. cit., p. 985.

¹⁰⁵ L. Bartels, "The WTO legality...", op. cit., p. 887

AB has explicitly rejected closed lists and it has been stated that justifications for the access or the exclusion of a recipient country from such lists has to be provided on the basis of a specific investigation. Under this approach, the problem of inclusion-exclusion mechanisms and of the requirements to be fulfilled in adopting the relevant provisions is a matter of transparency and participation. These are both procedural requirements, since they aim to evaluate not directly the content of the decision concretely adopted by the state, but whether that decision has taken place within a transparent and participated procedure potentially adequate to issue a non-discriminating measure. As regards GSPs, the establishment of flexible system of access as well as the involvement of ILO or other proper organizations in the definition and implementation of the preferences schemes and the reference to reliable inquires, reports and studies, can be deemed as sufficient in demonstrating their “likelihood” to target the development need at stake. Substantial and procedural criteria can be used by the court according to the specific circumstances of the concrete case, and on this regard they can acquire different relevance in the judge’s investigation, according to a case by case approach.

11. European Union GSP under “reasonableness” scrutiny: some conclusive remarks

The EU GSP attributes a central function to ILO core conventions as requirements for obtaining preferences, and the number of conventions to be implemented by the recipient countries has increased in the different stages and modifications of the European scheme. Substantial criteria outlined by AB’s jurisprudence have formally recognized the role of the ILO as standard setting body. Moreover, procedural criteria have emphasized the opportunity of ILO’s intervention within the inclusion-exclusion mechanisms provided for by preference schemes.

The establishment of flexible inclusion-exclusion mechanisms, their nature and structure, have a notable role in the scrutiny of GSP schemes’ reasonableness. Such mechanisms require a constant verification of the impact of preferences on the social and economic situation of the recipient country. On this regard, it is also stressed the role of the ILO as monitoring institution, since its documents, inquires or reports are a precious instrument to which refer. Consequently, coordinated activity of the ILO and the WTO seems possible, and even necessary in this field, in

order to grant a reasonable and non-protectionist implementation of labour standards based on trade preferences. Using this approach, it appears appropriate for developed countries to expressly refer to the monitoring role of the ILO within GSP systems or, at least, to explicitly mention the statement attributed to documents issued by the ILO for demonstrating the reasonableness and non-discriminating nature of their preference schemes. As a matter of fact, many possibilities for external intervention have been made available within the implementation of preferences' mechanisms in the most recent GSP regulation, not only for the ILO, but also for others private actors and institutions, as trade unions. Nonetheless, detailed scrutiny of the consistency of this system regarding the principles laid down by AB case law is necessary. In this analysis a comparison with the provisions of the US GSP can be useful in order to point out some controversial issues.

If compared with the EU GSP system, US preferences scheme appears less consistent with AB requirements, referring to the role attributed to the ILO conventions in determining the standards for granting preferences. In fact, there is no explicit reference to the ILO conventions or to any other multilateral instruments. Within the US scheme the labour standards to be implemented by recipient countries are broadly defined as "internationally recognized workers' rights".¹⁰⁶ Only as regards the "worst forms of child labour" the ILO convention n. 182 is expressly mentioned. For this reason, even if in theory the US system allows taking into account a larger range of workers' rights and working condition standards (such as acceptable working conditions with respect to minimum wages, hours of work, occupational safety and health), a great discretion is given to American administration, without referring to standards that can be considered as objective according to the AB interpretation.¹⁰⁷

US preferences scheme can also be criticized regarding the conditions allowing preferential treatments' withdrawal. In fact, among them many are related to particular individualistic interests of the US, such as those related to the failure to recognize or enforce arbitrary awards favouring US citizens or entities. In this regard scrutiny on the basis of non-discrimination and, by consequence, on reasonableness is not even necessary, since they directly infringe upon non-reciprocity requirement. Other conditions, not directly concerning specific US interests, do not

¹⁰⁶ See U.S.C. 2642 (b) and (c) from Title V of the Trade Act of 1984 as amended. See G. Shaffer, Y. Apea, "Institutional choice in the generalized system of preferences case...", op. cit.

¹⁰⁷ See B. Hepple, "The WTO as a mechanism...", op. cit., pp. 177-178; G. M. Grossman, A.O. Sykes, "European Communities – conditions...", pp. 242-241.

however meet the need of the recipient country. Example of this are the possibility of withdrawing preferences on the basis of unfair and distorted practices, trade-distorting investment measures or the failure to protect intellectual property rights. Furthermore, preferences cannot be given to communist countries or countries which aid terrorists or fail to support US efforts to combat terrorism. It could be maintained that these conditions meet a general political or economic interest into international security and fair competition, but it is hard to relate this general interest with the requirement of a “development, financial or trade need” of the recipient country and in any case no reference to international shared standards is provided for.¹⁰⁸ Moreover, in many case withdrawal of the preferences is not mandatory but is subject to a discretionary choice of the US administration and this broad power could easily be considered by the AB as an indicator of possible arbitrary abuse of unilateral measures.

In “European Communities – Conditions for the granting of tariff preferences” the AB has also required the impact of preference schemes on the targeted need to be demonstrated and the choice of the recipient country to be taken on the basis of the real existence of the same need. In this regard, the case by case flexible approach adopted by WTO case law has to be taken into account. Under the reasonableness perspective a precise scientific demonstration cannot be required. AB evaluation of the non discriminatory nature of preference schemes is founded on indicators. In this case a flexible system providing for inclusion-exclusion mechanisms based on objective criteria could be considered a sufficient evidence of its reasonable nature and of the absence of a discriminatory and/or protectionist aim. The existence of a flexible monitoring system for the inclusion or exclusion of countries on the list of recipients, with the notable intervention of international institution and private subjects, does not demonstrate either the concrete existence of a nexus between the adopted measure and the relevant need in a specific case, or the impact that this nexus can achieve or has achieved. However, it stipulates that the system provides for a verification mechanism on this issue and, presumably, has founded its main choices on this kind of evaluations. Such mechanisms constitute a clear indicator of transparency and work as evidence of the legitimacy of the scheme.

The European scheme provides for a system of investigation on the level of the implementation of the relevant standards, with an explicit reference to the ILO and the

¹⁰⁸ A. M. Mason, “The degeneralization of the generalized system of preferences (GSP): questioning the legitimacy of the U.S. GSP”, *Duke law journal*, November 2004, p.536.

intervention of other international organizations. The remarkable role of ILO in the verification of standards' implementation has been demonstrated by the Belarus case experience. Moreover, recipients countries are bound to accept "regular monitoring and review" on the implementation of standards, in accordance with the implementation provisions established by the relevant conventions.¹⁰⁹

Criticisms on the European scheme have been made regarding the system for the identification of countries admitted to the special incentive arrangement for sustainable development and good governance.¹¹⁰ It has been observed that the system provided for by art. 10 of the 2005 regulation would constitute a sort of "closed list", comparable with the one deemed illegitimate by the AB. This observations does not seem to be completely consistent with AB statements. In fact, inclusion in the special incentive arrangement is, in any case, based on a request and on an examination of the required conditions. There is no *a priori* preclusion, since any country can apply and its admission is based on a concrete assessment of its situation. Even if a deadline is established, it does not seem unreasonable. It can be considered justified to provide for a term for the application, since the scheme is destined to be in force for only two years after the deadline has expired. Such a period appears to be the minimum one in order to permit a preference scheme to have any notable effect on the economic and social context. It is true that, according to AB principles, a preference scheme is "to be permanently open to new applicants"¹¹¹, but, in our opinion, it appears harsh to maintain that the last EU 2005 GSP responds to an opposite fashion. Moreover, the drug arrangement criticized by the AB in European Communities – Conditions for the granting of tariff preferences to developing countries was not based on a system of free applications, either with or without a deadline, but on a real closed list, defined *a priori* by the donor countries on the basis of a unilateral evaluation. Such a question does not rise regarding the US GSP. It appears to be more consistent with AB requirements, since the President is endowed with a permanent exclusion power, based on a constant monitoring of the implementation of the prescribed requirements, which can be activated also by private actors, such as trade unions, ONGs and other institutions and associations.

¹⁰⁹ Art. 9, pr. 1, lett. (d).

¹¹⁰ L. Bartels, "The WTO legality...", op. cit., p. 882.

¹¹¹ L. Bartels, "The WTO legality...", op. cit., p. 882

Of course, the positive judgment on the European GSP scheme as regards its conformity with AB jurisprudence does not prevent some more general critical remarks about the EU approach on the implementation of labour and social standards, both at the international and at the internal level. Firstly, GSP schemes may cover, even now, “imperialistic” measures adopted in order to hinder the access of the developing countries to the European and to the international market.¹¹² Nonetheless, a concrete evaluation of EU GSP effectiveness would require a clearer position of economic scholarship on this point. On the contrary, as mentioned above, the theoretical discussion is still wide open. The problem of “economic aids” definition and the problem of the factors which influence their effects does not match an unanimous position within economical researches and scientific literature. In any case, the necessity of redesigning trade preferences — and particularly GSPs schemes — according to the development of economic scientific analysis is also to be taken seriously into account.

It has also to be stressed the inconsistency of the efforts performed by the European Union in order to comply with the principle elaborated by AB on preferences scheme and some recent statements of ECJ as regards the effectiveness of the WTO principles within the European legal system. In *Van Parys NV v. Belgisch Interventie-en Restitutiebureau (BIRB)*¹¹³, the Court has explicitly held that “an operator (...) cannot plead before a court of a Member State that Community legislation is incompatible with certain WTO rules, even if the DSB has stated that that legislation is incompatible with those rules”. ECJ argumentations on this regard are really significant, since it stated that requiring “courts to refrain from applying rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility (...) of reaching a negotiated settlement, even on a temporary basis”. Under this approach, WTO legal system is still considered by ECJ as a political institution, depriving its DSB of the judicial dignity which is attributed to it within its legal system. We cannot discuss here the opportunity and legitimacy of such an approach, but it is not consistent with the development of an integrated system for the regulation of international trade, based on the reciprocal recognition of international judges.

Secondly, ECJ has recently declared as illegitimate “social clauses” provided for by

¹¹² G. Shaffer, Y. Apea, “Institutional choice in the generalized system of preferences case...”, op. cit., pp. 990-991; G. M. Grossman, A.O. Sykes, “European Communities – conditions...”, op. cit., p. 254.

¹¹³ C-377/02, 1.3.2005, *Van Parys NV v. Belgisch Interventie-en Restitutiebureau (BIRB)*, in www.eur-lex.europa.eu, pr. 54.

legislative provisions of a member state which “impose on service providers established in another Member State where minimum rates of pay are lower an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State”.¹¹⁴ On this regard the activism demonstrated by EU within the international contest does not correspond to an extremely strict interpretation of the economic freedoms protected by the Treaty. In fact, while on the international level EU seems to foster the adoption of an evolutionary approach, based on the integration between trade-related and non-trade-related interests, on the other hand, the liberalization of services market is still considered as having a prominent importance on the internal level, if compared with the protection of workers’ economic interests. This argument does not appear to have a direct influence on the legal implementation of GSP schemes within or, in general, of economic provisions adopted within the WTO legal regime. However, it makes one doubt about the genuine progressive aim which should promote the adoption of unilateral economic provision for the protection of non-trade-related interests within the international economic system.

12. Conclusions for an open debate

Analysis of the EU GSP seems to demonstrate that a coordinated role of trade-related and non-trade-related interests is possible within the international economic legal system. They cannot be concealed the many difficulties which such an approach presents, both from a strictly legal point of view and from a political one. Unilateral economic measures adopted by states in order to foster the implementation of social standards have been highly criticized, since they can constitute the instrument for protectionist abuses. Especially with regard to GSP schemes these objections cannot be underestimated, since their very historical origin demonstrates their controversial nature and their possible ambiguous use. Moreover, the economic theories and researches’ results appear not conclusive in ascertaining the empirical effect of such measures on the economic and social reality of developing countries and the relationship between GSPs and the implementation of labour standards has been subject to a widespread discussion. It has also to be stressed that GSP schemes adopted by developed countries present a very differentiated

¹¹⁴ C-346/06, 3.4.2008, Dirk Ruffert v. Land Niedersachsen, in www.eur-lex.europa.eu, pr. 37.

structures and a general approach could be misleading. Nonetheless, we did not aim to demonstrate how or to what extent GSPs can be considered as an optimal instrument for the increase of workers' rights protection standards in developing countries. From the one hand, we are aware that on this point there is an open discussion among economic scholars and that developed countries' behaviour is not plainly addressed to the wellness of developing countries; on the other hand, the notable number of studies on this subject and the political commitment of diplomats, governments and international organizations demonstrate that GSPs have non-negligible effects on the economic interests of both developing and developed countries.¹¹⁵ However, even developed countries have interest in more spread implementation of social and labour standards as instruments of a fair international economic competition.

We do not maintain that GSPs have to be considered as the main instrument for the implementation of labour standards in developing countries. Nevertheless, the study of GSPs and of the related AB case law appears fruitful for an investigation on the recent evolution of international trade legal system and our investigation was designed to point out the notable effect that GSPs play in the creation of an integrated system of non-trade and trade-related interests within the current regulation of international trade regime. In fact, GSPs constitute a direct link between labour and trade within the WTO legal system, directly affecting the assets of interests which are at the basis of the international trade regulation system.

The main point is that AB jurisprudence has created spaces for the use of economic measures aimed at the implementation of social and labour standards, challenging fears for protectionist abuses by a judicial scrutiny under the reasonableness principle. Unilateral economic measures associated with non-trade related interests are not *per se* in conflict with the security and predictability of international trade. They can be implemented in a reasonable manner, without coming into conflict with the non-discrimination principle.

This approach has its roots in the recent evolution of the WTO system which has been dominated by judicial functions attributed to the AB after the Uruguay round. The legalization of the WTO Dispute Settlement has permitted a judicial interpretation of the "covered agreements", no longer founded on political interests but on the implementation of legal principles. AB interpretation has exploited the broad provisions of "covered treaties" in order to open the WTO legal system to principles elaborated within other international legal systems on the basis of an

¹¹⁵ G. M. Grossman, A.O. Sykes, "European Communities – conditions...", pp. 259 ff.

“evolutionary interpretation”, consistent with the main concerns of the international community.¹¹⁶ The AB has performed a constitutional function,¹¹⁷ manipulating the assets of interest on which the WTO legal system is based; rejecting the idea of inevitable opposition between trade-related and non-trade-related interests and challenging the traditional assessment that economic measures pursued for the protection of social, labour or environmental interests automatically affect the security and predictability of international trade. On the contrary, on the basis of a case by case approach, the AB has stressed the role of the reasonableness principle as an instrument for the prevention of protectionist abuses of exemptions and waivers to the substantial principles of the GATT and of the other WTO “covered agreements”. The non-protectionist implementation of economic measures has been scrutinized under both substantial and procedural requirements. In this regard, the importance of a multilateral approach and of the role of international organizations has been pointed out as a result of their function as standard-setting bodies and their monitoring activities.

These statements acquire a decisive value under the labour perspective. In fact, in interpreting the Enabling Clause, the AB has considered “multilateral instruments adopted by international organizations” as objective standards for a reasonable and, by consequence, non-discriminating implementation of preference schemes. Under this perspective, ILO and international agreed standards acquire a central role in the integration of the protection of workers’ rights within the WTO legal system. Nonetheless, the monitoring functions of the ILO also have to be stressed. The establishment of inclusion/exclusion mechanisms which directly refer to ILO documents, reports or investigations and their concrete implementation can give evidence of a reasonable application of preference schemes. In general, GSPs provide for a transparent and shared system of selections of the recipient countries, with specific references to objective criteria defined under a multilateral approach on an international level seems to meet Enabling Clause requirements according to AB interpretation.

All these arguments are based on an evolutionary interpretation of development. Opening WTO “covered” agreements to the concerns of other fields of international law, AB jurisprudence has held the idea that the increase of international wealth cannot be regarded as only an economic issue. There could be no real development if the increase of economic growth

¹¹⁶ J. Pauwelyn, “Human rights in WTO Dispute Settlement...”, op. cit., pp. 209 ff.; S. Cassese, “La funzione costituzionale dei giudici non statali...”, op. cit., p. 24.

¹¹⁷ S. Cassese, “La funzione costituzionale dei giudici non statali...”, op. cit., p. 30.

is not linked to the implementation of democratic, civil and social fundamental rights. This is a consolidated notion within the most important international conventions and declarations, binding the majority of WTO members, and it has been constantly taken into consideration by the AB. The main point of this paper is that sustainable development requires an integrated approach of labour and trade-related interests in the interpretation of the WTO legal system and that this idea appears to be legally binding on the basis of the recent WTO institutional and interpretative evolution. The logic of a separate regulation of international trade- and non-trade-related interests has shown itself not to be effective. In our opinion, experience with GSPs demonstrates that an integrated approach to the implementation of labour standards and international trade liberalization is not only possible but concretely acquired in AB case law. Moreover, the involvement of the ILO in the procedural mechanisms for granting trade preferences increases the possibility for labour standards to receive a more concrete implementation within the system of economic sanctions.

The most controversial question is whether these assessments are consistent with a “democratic” evolution of the regulation of relationships among states and individuals in the global context. In this regard, it is certainly true that the judicial functions acquired by many international dispute settlement bodies have increased the relevance of the rule of law within the international regulation of trade as contrary to the logic of political interests. Judicial bodies have intended international legal systems to be integrated and interconnecting, fostering the creation of shared principles granting a fair balance of the involved interests.¹¹⁸ The “democratic” evolution of the global legal system is a very controversial issue, deserving general investigation and in-depth debate and is subject to a continuous evolution. Certainly, we did not intend to resolve it, but we think that the perspective we have presented can provide an actual basis for its development.

¹¹⁸ E.U. Petersmann, “Human right and international trade law...”, op. cit., p. 89; S. Cassese, “La funzione costituzionale dei giudici non statali...”, op. cit., p. 19.