

2003

Back to Court After Shrimp/Turtle? Almost but not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exceptions in the European Union's Generalized System of Preferences

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BACK TO COURT AFTER *SHRIMP/TURTLE*? ALMOST BUT NOT QUITE YET: INDIA'S SHORT LIVED CHALLENGE TO LABOR AND ENVIRONMENTAL EXCEPTIONS IN THE EUROPEAN UNION'S GENERALIZED SYSTEM OF PREFERENCES

ROBERT HOWSE*

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* In writing this paper, I have benefited greatly from comments by Lorand Bartels, Nathaniel Berman, Deborah Cass, Claus Ehlermann, Kevin Gray, Gary Horlick, the late Robert Hudec, Petros Mavroidis, Joost Pauwelyn, Dan Tarullo, Richard Tarasofsky, and Chantal Thomas. Dr. Bartels' own work on this dispute is now forthcoming in Vol. 6(2) of the *Journal of International Economic Law*, and those who read it will see how generous is my debt to him, even though my analysis goes in quite different directions. A different version of this essay will appear in *The Impact of International Law on International Cooperation* Eyal Bevenisti and Moshe Hirsch Eds. Cambridge University Press (2003).

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INTRODUCTION

The World Trade Organization's Appellate Body rulings in *United States-Import Prohibition of Certain Shrimp and Shrimp Products* ("*Shrimp/Turtle*")¹ created a new baseline for the labor and environment debate at the World Trade Organization ("WTO").² These landmark decisions effectively rejected (without citing!) the

1. See *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp/Turtle I*]), available at <http://docsonline.wto.org:80/DDFDdocuments/t/WT/DS/58ABR.DOC> (last visited July 18, 2003); see also *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter *Shrimp/Turtle II*] (upholding the Panel's finding that Article XX of GATT 1994 justified the U.S. measure), available at <http://docsonline.wto.org:80/DDFDdocuments/t/WT/DS/58ABRW.doc> (last visited June 25, 2003).

2. See Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491, 508 (2002) (discussing, *inter alia*, the Appellate Body's use of international environmental standards to determine whether the discriminatory behavior of the United States was justifiable).

previous General Agreement on Tariffs and Trade (“GATT”) holding in *United States—Restrictions on Imports of Tuna Case* (“Tuna/Dolphin”),³ where the panel ruled that Article XX limits exporting countries from using market access measures on policy grounds.⁴ The basic logic of the Appellate Body’s ruling applies to, *inter alia*, Article XX(a).⁵

Before *Shrimp/Turtle*, conventional wisdom had it that the framework of Article XX could not justify the trade embargoes targeted at other countries’ environmental and labor policies.⁶ On the other hand, it was also conventional wisdom that conditions relating to environmental and labor policies could be placed on voluntary and non-binding preferences granted to developing countries under the Generalized System of Preferences (“GSP”) without violating GATT provisions.⁷ Initially a waiver⁸ and later on a Tokyo Round decision, called the “Enabling Clause,” exempted GSP treatment from the Most Favored Nation (“MFN”) requirement in Article I.⁹ The issues

3. See GATT Dispute Panel Report on Mexican Complaint Concerning United States – Restrictions on Imports of Tuna, DS21/R – 39S/155, 1991 GATTPD LEXIS 1 (Sept. 3, 1991) [hereinafter *Tuna/Dolphin*].

4. See *id.*

5. See *Shrimp/Turtle I*, *supra* note 1, para. 121.

6. See Howse, *supra* note 2, at 492 (arguing that Article XX provided a mechanism for justifying environmental trade measures); see also Steve Charnovitz, *A Critical Guide to the WTO’s Report on Trade Environment*, 14 ARIZ. J. INT’L & COMP. L. 341, 345 (1997) (discussing the dispute surrounding the scope of Article XX exceptions).

7. See Kyle Bagwell, Petros C. Mavroidis & Robert W. Staiger, *The Boundaries of the WTO: It’s a Question of Market Access*, 96 AM. J. INT’L L. 56, 71-72 (describing the European Union’s new GSP framework that includes incentives for compliance with certain labor and environmental standards by developing beneficiary nations).

8. See GATT Secretariat, *Waiver: Generalized System of Preferences*, Jun. 25, 1971, GATT B.I.S.D. (18th Supp.) at 24 (1972) [hereinafter *GSP Decision*] (pronouncing that the Contracting Parties to GATT agreed to employ GSP preferences to assist developing nations), available at <http://www.worldtradelaw.net/misc/gsp.pdf> (last visited July 28, 2003).

9. See GATT Secretariat, *Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries*, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) (1980) [hereinafter *Enabling Clause*] (stating again that the Contracting Parties decided to institute preferential tariff

India proposed to bring before the WTO dispute settlement process are: (1) how broad or narrow this exemption is, and (2) to what extent dispute settlement could police this exemption, based on scrutiny of whether the "conditions" of the Enabling Clause are met¹⁰

After *Shrimp/Turtle*, there were many who thought that the focus on the environmental and social agenda had shifted to political and diplomatic negotiations within the WTO and other international organizations.¹¹ In late 2002, however, India brought its complaint before the Appellate Body to challenge the European Union's ("EU") use of market access measures on policy grounds in its GSP.¹² India's claim tested conventional wisdom that such measures fell outside WTO's legal scrutiny.¹³ The claim specifically addressed market access measures justified by labor, environmental, and drug

arrangements on an individual-member basis to assist developing nations), available at http://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm#fntext1 (last visited August 19, 2003).

10. See European Communities-Conditions for Granting of Tariff Preferences to India, Request for the Establishment of a Panel by India, WT/DS246/4 (Dec. 9, 2002) [hereinafter Indian Panel Request] (communicating India's view that EC tariff preferences to developing countries were inconsistent with the GATT 1994 and did not meet the requirements set out in the Enabling Clause), available at <http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/246-4.doc> (last visited July 18, 2003).

11. See Howse, *supra* note 2, at 491.

12. See Indian Panel Request, *supra* note 10 (cataloging India's complaints with the EC GSP scheme).

13. See European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries, Request to Join Consultations, Communication from Columbia, WT/DS246/3 (Apr. 5, 2002) (requesting to join in the consultations between the European Union and India concerning conditions for granting GSP preferences to developing countries), available at <http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/246-3.doc> (last visited July 18, 2003); see also, European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, Request to Join Consultations, Communication from Venezuela, WT/DS246/2, Mar. 25, 2002 (requesting to be joined in the consultations between the European Union and India concerning conditions for granting GSP preferences to developing countries), available at <http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/246-2.doc> (last visited July 18, 2003). Colombia, Venezuela, and Thailand, unlike India, have not filed requests for a panel. *Id.*

enforcement concerns.¹⁴ India dropped any arguments concerning the labor and environmental incentives in its first submission to the panel. Nevertheless, the general jurisprudential approach that the panel and Appellate Body adopted in this case would likely impact future litigation concerning labor and environmental conditionality in GSP schemes, as well as other kinds of differential treatment.

This essay examines India's *original* legal claim as far as it concerns environmental and labor incentives, and how the Appellate Body interprets its strengths and weaknesses under WTO law today. The conclusion presents various possible outcomes of a challenge to such preferences.

The EU measures that India challenged are unlike the typical conditionality measures imposed in GSP schemes.¹⁵ For instance, both the European Union and the United States provide for withdrawal of GSP treatment altogether where there is a record of serious abuse of workers.¹⁶ India's challenge did not concern the

14. See Indian Panel Request, *supra* note 10 (noting the anti-drug production and trafficking scheme under the EC GSP scheme).

15. See Council Regulation 2501/01 on Applying a Scheme of Generalised Tariff Preferences for the Period from 1 January 2002 to 31 December 2004, 2001 O.J. (L 346) 1 [hereinafter EC GSP Scheme] (providing the GSP scheme), available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001R2501&model=guichett (last visited June 26, 2003); see also *Handbook on the Scheme of the European Community*, U.N. Conference on Trade and Development, UNCTAD/ITCD/TSB/MISC.25/Rev.2 (2002) (helping the exposition of the scheme for special preferential treatment that is challenged by India) available at http://www.unctad.org/en/docs/itcdtsbmiksc25rev2_en.pdf (last visited June 27, 2003).

16. See SOPHIE DUFOUR, ACCORDS COMMERCIAUX ET DROITS DES TRAVAILLEURS 42-86 (Les Éditions Revue de Droit de l'Université de Sherbrooke 1998) (discussing the history of regional and bilateral labor rights programs in the European Union); see also Kimberly Ann Elliot, Preferences for Workers? Worker's Rights and the U.S. Generalized System of Preferences, Speech Before the Faculty Spring Conference at the Institute for International Economics (May 8, 2000) (presenting a more recent discussion of the U.S. GSP scheme) at <http://www.iie.com/publications/papers/elliott0598.htm> (last visited June 27, 2003). "The U.S. experience in applying worker rights conditionality to trade benefits under the GSP suggests that external pressure can be helpful in improving treatment of workers in developing countries and that linkage of trade and worker rights need not devolve into simple protectionism." *Id.*

possibility of a total withdrawal from the GSP when egregious violations of labor rights occur.¹⁷ India instead opposed EU measures that provide an *additional* margin of preference to countries that effectively monitor and enforce International Labor Organization (“ILO”) conventions that promulgate fundamental rights.¹⁸ Similarly, the environmental conditionality grants a margin of preference beyond that generally accorded under the GSP scheme of the European Communities (“EC”). Tropical timber products from countries that implement, monitor, and enforce internationally acknowledged standards and guidelines for sustainable forest management obtain an additional margin of preference.¹⁹

I. THE ENABLING CLAUSE AND ITS RELATIONSHIP TO ARTICLE I:1 OF THE GATT

India claimed in its request for a panel that the labor and environmental conditionality in the EC GSP scheme violated the

17. See Indian Panel Request, *supra* note 10 (requesting that the panel examine the EC GSP regime for consistency with the GATT without challenging the propriety of total withdrawal by the European Union in cases of egregious labor rights violations in beneficiary country).

18. See International Labor Organization Declaration on Fundamental Principles and Rights at Work, June 1998 [hereinafter ILO Declaration] (expressing international agreement with the adoption of basic labor rights), *available*

at <http://www.ilo.org/public/english/standards/decl/declaration/text/index.htm> (last visited June 27, 2003). The core conventions of the International Labor Organization (“ILO”) are conventions 29 and 105 (concerning forced labor), conventions 87 and 98 (concerning collective bargaining), conventions 100 and 111 (concerning non-discrimination), and convention 138 (concerning child labor). International Labor Organization, ILOLEX Database of International Labor Standards (cataloguing ILO conventions), *available at* <http://ilolex.ilo.ch:1567/english/convdsp1.htm> (last visited Jun. 30, 2003).

19. See International Tropical Timber Organization, *ITTO Guidelines for the Restoration, Management and Rehabilitation of Degraded and Secondary Tropical Forests*, 13 ITTO POL. DEV. SERIES 1, 3 [hereinafter *ITTO Guidelines*] (describing guidelines for forest conservation and management), *available at* <http://www.itto.or.jp/policy/guidelines/download/E-Guidelines.pdf> (last visited June 27, 2003).

MFN obligation in Article I:1 of the GATT.²⁰ However, the Enabling Clause limits the applicability of Article I:1 to GSP preferences.²¹ Paragraph 1 of the Enabling Clause specifically states: “[n]otwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.”²² By virtue of Paragraph 2(a), this override of Article I applies to “[p]referential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences.”²³

India conceded that the Enabling Clause affected the application of GATT Article I to GSP schemes.²⁴ However, India attacked the EC scheme on grounds it was inconsistent with several provisions of the Enabling Clause. Because of this non-compliance with what India claimed to be legal requirements of the Enabling Clause, the EC, according to India, could not benefit from the Article I override in Paragraph 1 of the Enabling Clause.²⁵

Paragraph 2(a) of the Enabling Clause requires that preferential tariff treatment be consistent with the GSP.²⁶ India argued that the kind of conditionality that exists in the labor and environmental provisions at issue was not compatible with the notion of a

20. See Indian Panel Request, *supra* note 10 (requesting establishment of a dispute panel to examine whether the EC GSP scheme violates Article I:1 of the GATT).

21. See Enabling Clause, *supra* note 9, para. 1 (applying differential and more favorable treatment provisions to GSP measures).

22. *Id.*

23. *Id.* para. 2(a).

24. See Indian Panel Request, *supra* note 10 (noting that India requested consultations with the European Union pursuant to the Enabling Clause).

25. See Enabling Clause, *supra* note 9, para. 1 (stating that the preferential treatments outlined in Paragraph 2 constitute the differential and more favorable treatment to developing countries introduced in Paragraph 1).

26. See *id.* para. 2(a) (applying the Enabling Clause to preferential treatment of “products originating in developing countries in accordance with the GSP”).

Generalized System of Preferences, particularly the element of non-discrimination that is fundamental to GSP.²⁷

India also claimed that the EC scheme failed to meet two other requirements of the Enabling Clause found in Paragraphs 3(a) and 3(c).²⁸ Paragraph 3(a) states that preferences “shall be designed to facilitate and promote the trade of developing countries in the context of any general or specific measures in favour of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties.”²⁹ In addition, paragraph 3(c) requires that “preferences be designed, and if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.”³⁰

A. THE JUSTICIABILITY OF THE ENABLING CLAUSE AND ITS ALLEGED “REQUIREMENTS”³¹

A prevalent interpretation of the GSP framework in WTO law is that the GSP scheme escapes dispute settlement under the Dispute Settlement Understanding (“DSU”) because the language of the Enabling Clause is permissive and allows for unilateral modification,

27. See Indian Panel Request, *supra* note 10, at 1 (noting that the European Communities only extends certain tariff preferences to countries complying certain “labour and environmental” standards).

28. See Indian Panel Request, *supra* note , at 2 (requesting that the panel examine whether the European Union violated paragraphs 3(a) and 3(c) of the Enabling Clause).

29. Enabling Clause, *supra* note 9, para. 3(a) (“[a]ny differential and more favourable treatment provided under this clause: (a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties”).

30. *Id.* para. 3(c) (“Any differential and more favourable treatment provided under this clause: . . . (b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis”).

31. What follows on this question obviously applies not only to a potential new or renewed claim on environmental and labor incentives, but to India’s actual modified claim concerning drug preferences.

extension, or withdrawal from such preferences.³² Yet, as the outcome of the *Shrimp/Turtle* dispute illustrates, conventional wisdom with respect to GATT/WTO law is not a binding authority and may even turn out wrong.³³

In fact, the Appellate Body has been very reluctant to interpret WTO legal instruments as outside the jurisdiction of the dispute settlement organs, even where conventional wisdom has been that the monitoring of such provisions ought to be left, by in large, to political or diplomatic organs of the WTO.³⁴ Some commentators criticize such an expansive view of dispute settlement jurisdiction, and favor deference to the political and diplomatic organs even in the absence of any formal bar that prevents the DSU from adjudicating disputes under Article XXIV.³⁵ I believe that judicial restraint, or as I prefer to call it, institutional sensitivity, should not preempt the

32. See Enabling Clause, *supra* note 9 (noting that any contracting party may take unilateral action such as modification or withdrawal of the preferences in the Enabling Clause).

33. See Howse, *supra* note 2, at 495 (responding to critics of the *Shrimp/Turtle* ruling, who have complained that the AB interpretation of Article XX to permit trade measures to protect the global environmental commons was contrary to the "practice" of the GATT, as reflected in the *Tuna/Dolphin* panels and the purported wide support among the WTO Membership for the narrower approach in those reports).

34. See, e.g., Turkey-Restrictions on Imports of Textile and Clothing Products, Report of the Appellate Body, WT/DS34/AB/R, paras. 58, 60 (Oct. 22, 1999) [hereinafter Turkey – Textiles] (asserting jurisdiction of the dispute settlement organs of the WTO to assess overall compatibility of customs unions with Article XXIV), *available at* <http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/34ABR.DOC> (last visited July 16, 2003); see also, India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, Report of the Appellate Body, WT/DS90/AB/R, paras. 80-83 (Aug. 23, 1999) [hereinafter Balance of Payments] (examining jurisdictional power and competence of WTO panel regarding India's balance-of-payments restrictions), *available at* <http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/90ABR.DOC> (last visited July 16, 2003).

35. See Frieder Roessler, *The Institutional Balance Between the Judicial and the Political Organs of the WTO*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON 325, 325-46 (Marco Bronckers & Reinhard Quick eds., 2000) (arguing that WTO panels should respect the competence and powers of the political bodies established under WTO agreements).

fundamental right to dispute settlement because other organs of the WTO could monitor or review legal compliance.³⁶ At the same time, where such political and diplomatic organs within the WTO or other international institutions are implicated in an area of WTO law (for example, UNCTAD in the case of the GSP) it is only appropriate that the views of those organisms be taken into account in dispute settlement, and especially that expert competence be respected.³⁷

If the Enabling Clause were non-justiciable, then merely by *asserting* the applicability of the Enabling Clause, a WTO member could escape a fundamental legal obligation, such as the MFN with respect to trade in goods, regardless of how implausible it is that the Member's measures are a GSP scheme.³⁸ Thus, GATT panels rightly adjudicated the issue of whether the Article I override in Paragraph 1 of the Enabling Clause applied to a scheme of trade preferences.³⁹ In *United States—Denial of Most-Favoured-Nation Treatment as To Non-Rubber Footwear from Brazil* ("Rubber Footwear"),⁴⁰ a GATT panel examined whether the Enabling Clause would find preferential

36. See Robert Howse, *The Least Dangerous Branch? The Extent and Limits of the Judicial Power in WTO Appellate Body Jurisprudence*, in *THE ROLE OF THE JUDGE IN THE WTO* (Cottier & Mavroidis eds., forthcoming 2003); Howse, *supra* note 2, at 519-20 (noting that the AB will not decline a case where the law is unclear).

37. See Balance of Payments, *supra* note 34, para. 11 ("Each organ of the WTO must, in determining the scope of its own powers, proceed with due regard to the powers of the other organs of the WTO, and with due regard for the rights and obligations of Members.").

38. See Enabling Clause, *supra* note 9, at 203 (according preferential tariff arrangements in goods trade in favor of developing nations).

39. See, e.g., European Communities-Regime for the Importation, Sale, and Distribution of Bananas, Report of the Appellate Body, WT/DS27/AB/R ¶ 7.80 (Sept. 9, 1997) [hereinafter *Bananas*] (finding EC measures to be inconsistent with the GATT 1994), available at <http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/27ABR.WPF> (last visited July 18, 2003).

40. See GATT Dispute Panel Report on Brazil Complaint Concerning United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil, DS18/R – 39S/128, Jan. 10, 1992, GATT B.I.S.D. (39th Supp.) at 128 (1992) [hereinafter *Rubber Footwear*] (finding the United States in violation of Article I:1 of the GATT).

treatment of countervailing duties in violation of Article I.⁴¹ The panel held that “the Enabling Clause expressly limits the preferential treatment accorded by developed contracting parties in favour of developing contracting parties under the Generalized System of Preferences to tariff preferences only.”⁴² The panel referred to *United States-Customs User Fee*,⁴³ which held that the Enabling Clause does not allow for a non-tariff measure that violates Article I.⁴⁴

In sum, the Enabling Clause is justiciable. The nature and extent of the legal obligation created by individual provisions within the Enabling Clause is, however, another matter.⁴⁵ In order to ascertain these legal effects, the standard rules of interpretation in the Vienna Convention on the Law of Treaties⁴⁶ must be applied to the language of each provision.⁴⁷

41. *See id.* para. 4.2 (citing the requests made by the parties with respect to the U.S. countervailing duty order).

42. *Id.* para. 6.14.

43. GATT Dispute Panel Report on Canada Complaint Concerning United States – Custom User Fee, L/6264 – 35S/245, Nov. 25, 1987, GATT B.I.S.D. (35th Supp.) at 245 (1988) [hereinafter *Customs User Fee*] (finding the U.S. processing fee in violation of the GATT).

44. *See id.* para. 122 (commenting that the measure at issue was not authorized by the Enabling Clause, because it authorized preferential tariff and non-tariff measures for the benefit of developing countries only if such measures conformed to the Generalized System of Preferences or to instruments multilaterally negotiated under GATT auspices).

45. *See* PATRICK LOW, *TRADING FREE: THE GATT AND U.S. TRADE POLICY* 151 (The Twentieth Century Fund Press 1993) (noting that the Enabling Clause states that developed countries “do not expect to receive reciprocal commitments from developing countries that are inconsistent with the latter’s individual development, financial, and trade needs,” while also stating that “developing countries expect to participate more fully in the framework of GATT rights and obligations as their development and trade situation improves,” which gives rise to “endless debate and disagreement in the GATT”).

46. *See generally* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) [hereinafter *Vienna Convention*] (laying out the procedures by which countries must abide by and properly interpret treaty obligations).

47. *See id.* art. 31 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”). *See generally*, Peter C. Maki, *Interpreting GATT Using the Vienna Convention on the Law of Treaties: A Method to Increase*

Not all provisions in WTO Agreements have the effect of “hard” legal obligations. In *European Communities - Measures Concerning Meat and Meat Products (“Beef Hormones”)*,⁴⁸ the Appellate Body found that certain provisions of the Agreement on Sanitary and Phytosanitary Measures (“SPS Agreement”) resemble “best efforts” obligations, where WTO members progressively achieve certain goals without a binding legal commitment to reach certain results in the future.⁴⁹ Based on its reading of the Preamble of the SPS Agreement, and other considerations, the Appellate Body found that it was unreasonable to interpret Article 3.1 as imposing an immediate and absolute obligation on members to base all of their regulations on international standards.⁵⁰ The Appellate Body concluded that the presence of mandatory language, here the word “shall,” cannot itself

the Legitimacy of the Dispute Settlement System, 9 MINN. J. GLOBAL TRADE 343 (2000) (arguing that by applying the Vienna Convention on the Law of treaties, the WTO may increase the legitimacy of decisions, the confidence of parties in getting predictable results, and subsequently increase the amount of negotiation for new tariff concessions and reduce tariffs).

48. See *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS26/AB/R (Jan. 16, 1998) [hereinafter *Beef Hormones*] (holding that certain EC measures related to the treatment of hormone treated meat were not in conformity with the SPS Agreement), *available at* <http://docsonline.wto.org/DDFDocuments/t/WT/DS/26ABR.WPF> (last visited July 16, 2003).

49. See Agreement on the Application of Sanitary and Phytosanitary Measures, April 15, 1994, art. 3.1, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1125 (1994) (“To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.”), *available at* http://www.wto.org/english/docs_e/legal_e/15-sps.pdf (last visited July 27, 2003).

50. See *Beef Hormones*, *supra* note 51, para. 103 (explaining that “one purpose of the SPS Agreement, as explicitly recognized in the preamble, is to promote the use of international standards, guidelines and recommendations. To that end, Article 3.1 imposes an obligation on all Members to base their sanitary measures on international standards . . .”).

predetermine the nature and extent of the legal effect of a given provision, which must be read contextually.⁵¹

More recently, in *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup* (“*Corn Syrup*”),⁵² the Appellate Body considered the legal effect of DSU’s Article 3.7, which provides that: “[b]efore bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful.”⁵³ The Appellate Body based its interpretation of the legal effect of Article 3.7 on *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (“*Bananas*”),⁵⁴ stating that:

a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be *largely self-regulating* in deciding whether any such action would be “fruitful.”⁵⁵ (emphasis added)

51. See *id.* para. 104 (arguing that treaty interpretation requires one to view each specific provision in light of the general objective of the treaty); Cf. *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Report of the Panel, WT/DS113/RW2, July 26, 2002 (holding that Canada violated the Agreement on Agriculture by providing export subsidy in excess of its quantity commitment levels specified in its Schedule for exports of cheese and “other dairy products”), available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/113RW2.doc> (last visited July 16, 2003).

52. See *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Recourse to Article 21.5 of the DSU by the United States, WT/DS132/AB/RW (Oct. 22, 2001) [hereinafter *Corn Syrup*], available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/132ABRW.doc> (last visited July 16, 2003).

53. Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, art. 3.7, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1153, 1226 (1994) [hereinafter *Dispute Settlement Understanding*].

54. See *Bananas*, *supra* note 39, para. 132 (noting legal interest as a prerequisite for requesting a panel).

55. See *Corn Syrup*, *supra* note 52, para. 73 (quoting paragraph 135 of the *Bananas* decision).

The Appellate Body also noted that the “largely self-regulating” nature of the requirement in the first sentence of Article 3.7 meant that panels and the Appellate Body should presume that members submit panel requests in good faith.⁵⁶

As suggested by these precedents, an analysis of the legal effect of the individual provisions of the Enabling Clause should consider the nature of the Enabling Clause as a legal instrument, its status within the GATT/WTO framework, and also the historical context in which GSP emerged.⁵⁷

WTO law has a tendency to regard waiver provisions as strict conditions. Accordingly, members may only deviate from WTO obligations to the extent that their conduct can be shown to strictly adhere to the waiver.⁵⁸ If the Enabling Clause were a waiver, there would have been a presumption that the “requirements,” to which India averts in its complaint, are strict conditions and subject to close judicial scrutiny.⁵⁹ Although usually called a waiver in general and non-technical discussions of GSP, the Enabling Clause is *not* a waiver within the special meaning of Article XXV of the GATT or Article IX of the WTO Agreement.⁶⁰ Article XXV refers to waivers

56. See *id.* para. 74 (explaining why the panel was not obliged to consider the issue on its own motion).

57. See Vienna Convention, *supra* note 46, art. 31 (providing the rule of general interpretation for treaties).

58. See GATT Dispute Panel Report on EC Complaint Concerning U.S. Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions, L/6631 – 37S/228 GATT B.I.S.D. (37th Supp.) at para. 5.9 (Nov. 7, 1990) (“The panel took into account in its examination that waivers are granted according to Article XXV:5 only in “exceptional circumstances”, that they waive obligations under the basic rules of the General Agreement and that their terms and conditions consequently have to be interpreted narrowly.”); see also Daniel Marinberg, *GATT/WTO Waivers: “Exceptional Circumstances” as Applied to the Lome Waiver*, 19 B.U. INT’L. L. J. 129, 134 (2001) (describing the many hurdles that states must overcome in order to be granted a waiver, followed by a continuing review of the conditions for which the waiver was granted in the first place).

59. See India Panel Request, *supra* note 10, para. 2 (referring to articles 2(a), 3(a), and 3(c) of the Enabling Clause).

60. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 164 (MIT Press 2d ed. 1997)

of an obligation “imposed on a contracting party” in “exceptional circumstances.”⁶¹ The Enabling Clause fails to refer to any exceptional circumstances, fails to name any particular contracting party, and contains no waiver definition.⁶² It is also not a temporary waiver, which would typically exist in the case of exceptional circumstances⁶³ which are required for Article XXV waivers.⁶⁴ The Enabling Clause allows for what has become a basic tenet of the international economic legal order, namely the special and differential treatment of developing countries.⁶⁵ It modifies the existing law of the GATT and numerous international declarations and instruments such as the United Nations Conference on Trade and Development (“UNCTAD”) and the United Nations Economic and Social Council (“ECOSOC”) have adopted it. Rather than an exception to the GATT, the Enabling Clause is an integral part of the international trade legal system.

For those reasons, it is inappropriate to apply the narrow reading of the Lome Waiver in *Bananas* to the interpretation of the Enabling Clause.⁶⁶ Unlike the Lome Waiver at issue in *Bananas*, Paragraph 1

(describing how GATT Article XX “general exceptions” can allow departures from MFN).

61. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. XXV [hereinafter GATT].

62. See Enabling Clause, *supra* note 9 (discussing how the Enabling Clause is devoid of these requirements).

63. See WTO Agreement art. IX(3) (limiting each waiver, regardless of the termination date set, to one year of effectiveness); see also Marinberg, *supra* note 58, at 134 (describing additional provisions meant to keep waivers temporary).

64. See WTO Agreement Annex 1A n. 7 (listing the waivers granted under Article XXV of the GATT 1947 and still in force on the date of entry establishing the Multilateral Trade Organization).

65. See Enabling Clause, *supra* note 9, para. 3; see also Aisha L. Joseph, *The Banana Split: Has the Stalemate Been Broken in the WTO Banana Dispute? The Global Trade Community's “A-Peel” for Justice*, 24 FORDHAM INT’L L.J. 744, 746-47 (2000) (remarking that although the system of preferential treatment accorded to the developing countries contradicted the language of particular GATT provisions, the principles behind the preferential treatment “complied with the tenets of international economic development law”).

66. See *Bananas*, *supra* note 39, para. 168 (holding that Members may waive the compliance with the provisions of paragraph 1 of Article I in the GATT only “to the extent necessary” to permit the European Communities to provide the

of the Enabling Clause lacks language such as “to the extent necessary.” Thus, a developed country member of the WTO does not have to prove that each aspect of its deviation from the strictures of GATT Article I is necessary for purposes of granting differential and more favorable treatment to developing countries. Instead, as long as preferential treatment falls under one of the heads of Paragraph 2, Article I simply does not apply at all—it is overridden.

The Enabling Clause is also different from Article XXIV of the GATT, which provides an MFN exception for customs unions and free trade areas.⁶⁷ Article XXIV does not contain language that renders GATT Article I inapplicable to measures taken in the operation of customs unions and free trade areas; Article XXIV only provides that Article I shall not prevent the formation of customs unions and free trade areas.⁶⁸ Article XXIV does not authorize the operation of customs unions and free trade areas *notwithstanding* Article I. Instead, unlike GSP, the Article I framework still *applies* in customs unions and free trade areas, to the extent consistent with their formation or existence. The Enabling Clause does not explicitly provide for enforcement or policing of its provisions through dispute settlement⁶⁹ because it is an integral part of the Covered Agreements to which the DSU applies.

This approach to dispute settlement contrasts significantly with that of the predecessor instrument to the Enabling Clause, the GSP Decision of 1971.⁷⁰ The GSP Decision contained detailed and explicit language concerning the availability of dispute settlement.⁷¹

“preferential treatment” that is “required” by the relevant provisions of the Lome Convention).

67. See GATT, *supra* note 61, art. XXIV (allowing Members within unified economic areas to implement measures that might normally violate their GSP scheme).

68. See *id.*, art. XXIV, para. 9.

69. See Enabling Clause, *supra* note 9, para. 9 (noting instead that Members will meet collaboratively to review the operations of the provision).

70. See GSP Decision, *supra* note 8, para. (a) (providing a limited exception to MFN in order to facilitate developed Contracting Parties granting GSP preferences to assist developing nations).

71. See *id.* para. (e) (specifically stating that Members may bring disputes may before the Contracting Parties).

Such a distinction may derive from the fact that, unlike the Enabling Clause, the GSP Decision of 1971 is, in legal structure, a waiver. The operative provision of the Decision states: "... the provisions of Article I shall be waived for a period of ten years *to the extent necessary* ... [to permit developed countries to provide to developing countries generalized, non-discriminatory, non-reciprocal preferential tariff treatment]"(emphasis added).⁷² Since the GSP decision of 1971 is a waiver, it is not surprising that the provisions of the waiver required a deviation from Article I and a strict scrutiny by the Appellate Body.⁷³

In *India-Balance of Payments*, the Appellate Body rejected arguments that it should approach adjudication of the legal provisions at issue due to concerns about "institutional balance."⁷⁴ The practice of dealing with such issues through avenues other than dispute settlement (in this case a WTO committee on balance of payments measures) did not incline the Appellate Body to a less intrusive or less strict scrutiny of the defendant's measures. The Appellate Body relied in part on an explicit affirmation in Uruguay Round legal instruments concerning the role of dispute settlement in the implementation of the rights and obligations in question.⁷⁵

Similarly, a Uruguay Round text affirmed the availability of dispute settlement in the case of "the failure of the Member to whom a waiver was granted to observe the terms and conditions of the

72. *Id.* para. (a).

73. See Dispute Settlement Understanding, *supra* note 53, at 1226 (addressing which issues dispute settlement may address).

74. See Balance of Payments, *supra* note 34, para. 105 (rejecting the requirement of adjudicating legal provisions due to concerns about institutional balance).

75. See Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1125, 1158 (1994); Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1125, 1161 (1994).

waiver.”⁷⁶ Again, the issue is not justiciability as such, but rather whether the provisions of a waiver are “terms and conditions” that the dispute settlement organs must interpret strictly.⁷⁷ In contrast to the case of waivers, the Doha instrument, which addresses the *Enabling Clause*,⁷⁸ fails to mention the availability of dispute settlement to address violations of the Enabling Clause. It merely reaffirms that preferences granted to developing countries under the Enabling Clause “should be generalized, non-reciprocal, and non-discriminatory.”⁷⁹ This formulation, especially the use of “should” rather than stronger obligatory language, makes it clear that these elements of the GSP are not legally binding. Not only does the Decision not refer to the enforceability of “terms” or “conditions” of the Enabling Clause in dispute settlement, but it does not require a phase out or modification for non-conforming preferences within any kind of time period.⁸⁰

Another consideration to keep in mind is that, where a legal obligation is unclear, the international law principle of *in dubio mitius* requires a treaty interpreter to adopt the reading that least restricts the sovereignty of a signatory state. The Appellate Body in *Beef Hormones* thus found that:

76. Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1125, 1163, para. 3(b) (1994) (“...the application of a measure consistent with the terms and conditions of the waiver may invoke the provisions of Article XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding.”).

77. *See id.* para. 3(a) (requiring Members to observe or comply with measures explicitly set forth in a waiver).

78. *See* WTO Ministerial Conference, *Implementation-Related Issues and Concerns*, WT/MIN(01)/17 (Nov. 20, 2001) (reaffirming the preferences granted in the Enabling Clause). Within the meaning of the Vienna Convention rules on treaty interpretation, this instrument would be relevant as either a subsequent agreement or subsequent practice of the Parties regarding the interpretation of the treaty. *See, e.g.*, Vienna Convention, *supra* note 46, art. XX.

79. WTO Ministerial Conference, *supra* note 78, para. 12.2.

80. *See id.* (failing to address the enforceability of aspects of the Enabling Clause and not requiring a phase out period).

We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating conformity or compliance with such standards, guidelines and recommendations. To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling . . . would be necessary.⁸¹

One final general consideration is the role of UNCTAD in the implementation of the GSP.⁸² A Special Committee within UNCTAD annually reviews the implementation of the GSP and occasionally conducts in-depth studies.⁸³ By the time of the Enabling Clause negotiations, this Committee had issued numerous detailed reports and recommendations on the functioning of the GSP. These reports, various resolutions, and other UNCTAD instruments suggest that UNCTAD conceived itself as having a lead role in the oversight of the GSP, which may explain the lack of more detailed institutional arrangements in the text of the Enabling Clause.

B. INDIA'S CLAIM THAT EU PREFERENTIAL TREATMENT IS CONTRARY TO PARAGRAPH 2(A)

As noted above, in order for the override of GATT Article I to apply, Paragraph 2(a) states that preferential tariff treatment for developing countries must be "in accordance" with the GSP,⁸⁴ as "described" in the 1971 GSP decision.⁸⁵ If we turn to the 1971 decision, it is the Preamble of the 1971 Decision that contains the description of the preferential tariff treatment under the rubric of GSP.⁸⁶ That description is as follows: "a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences

81. Beef Hormones, *supra* note 48, para. 165.

82. See Vienna Convention, *supra* note 46, art. 31.

83. See U.N. TDBOR, Decision 75, *Generalised System of Preferences*, 4th Special Sess., 267th mtg. at Annex I, U.N. Doc. TD/B/330 (1970) [hereinafter Trade and Development Board Resolution 75].

84. See Enabling Clause, *supra* note 9, para. 2(a) (requiring countries to keep preferential treatment within the bounds of the GSP).

85. See GSP Decision, *supra* note 8, para. (a) (indicating the sort of preferential treatment reserved for developing countries).

86. See *id.* (describing preferential tariff treatment under the rubric of GSP).

beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries”⁸⁷

It is unclear what the Enabling Clause means by saying that “*preferential treatment*” must be *in accordance* with this description.⁸⁸ Does the requirement apply to a Member’s system of trade preferences for developing countries as a whole? Or must every individual element in a Member’s system of trade preferences fully or perfectly realize this description? The Preamble refers to “*mutually acceptable arrangements . . . drawn up in the UNCTAD concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential tariff treatment in the markets of developed countries for the products originating in developing countries.*”(emphasis added)⁸⁹ It is clear from the relevant UNCTAD instruments, which form part of the “context” for the interpretation of the Enabling Clause within the meaning of Vienna Convention Article 31, that the notion of a generalized, non-discriminatory, and non-reciprocal system of preferences refers to an objective to progressively realize such a systems on the basis of arrangements that are mutually acceptable to both developed and developing countries.⁹⁰

From the outset, developed countries were not willing to provide preferential treatment that applied to all countries and all products. For example, if one viewed the notion of preferences having to be “generalized” and “non-discriminatory” as requiring that every element of a Member’s scheme of preferences fully conform to that description in order to take advantage of waiver treatment under the 1971 Decision or the override of the Enabling Clause, then the GSP would never have gotten off the ground. This reading would have prevented developed countries from offering preferences on terms

87. *Id.* at pmbl.

88. See Enabling Clause, *supra* note 9, para. 2(a) (referring to the establishment of a system of preferences for developing countries).

89. GSP Decision, *supra* note 8, at pmbl.

90. See, e.g., Enabling Clause, *supra* note 9, para. 9 (requiring collaboration between contracting parties in establishing provisions designed to meet the needs of developing countries)

that were acceptable to them. In this respect, the language “mutually acceptable” informs and conditions the entire description of the generalized system of preferences in the Preamble to the 1971 GSP Decision.⁹¹ Such a description cannot impose conditions or limitations on the manner in which GSP treatment is granted or withdrawn unless they are “mutually acceptable” to both developed and developing countries.⁹²

The aspirational nature of the norm that preferences be generalized, non-discriminatory, and non-reciprocal was reflected as recently as the Doha Decision on Implementation in 2001. The Doha Decision “re-affirmed” that preferences granted under the Enabling Clause “should” have these characteristics, but without any defined timetable for the achievement of this goal, or any clear guidelines as to the extent of its development at a given future point in time.⁹³ The relevant language in the Declaration at UNCTAD IX, in 1980, states that “[t]here is concern among the beneficiaries that the enlargement of the scope of the GSP by linking eligibility to non-trade considerations may detract value from its original principles, namely non-discrimination, universality, burden sharing and non-reciprocity.”⁹⁴ This language is obviously a far cry from a condemnation of such linkage as placing the preferences in question *outside the ambit* of the relevant description of the GSP, *i.e.* as a *mutually acceptable* generalized, non-reciprocal, and non-discriminatory system of preferences. In addition, the reference to “beneficiaries” in this declaration is a reminder that the entire description of GSP is informed by the notion that the system is to be “mutually acceptable” to both developed and developing countries. Developed countries, however, have never accepted that they be able to operate a GSP scheme, unless the scheme is completely unconditional and non-selective.

91. See GSP Decision, *supra* note 8, at pmb1.

92. See *id.*

93. See WTO Ministerial Conference, *supra* note 78, para. 12 (outlining the framework for implementation of the preferences system).

94. UNCTAD, *Midrand Declaration and a Partnership for Growth and Development*, 9th Sess., para. 27, U.N. Doc. TD/377 (May 11, 1996) (providing the discussion on the new GSP scheme), available at <http://r0.unctad.org/en/special/u9toc377.htm> (last visited July 16, 2003).

Just prior to the coming into force of the Uruguay Round Agreements, and the incorporation of the Enabling Clause into the GATT 1994, the 1994 Joint Declaration of the European Union and ASEAN shows that concerns about labor conditionality in the European Communities' new GSP scheme were not understood to involve a claim of WTO illegality.⁹⁵ The language of the Declaration is as follows:

The Ministers recognized that the General System of Preferences (GSP) has contributed to the growth in exports from ASEAN to the EU. More than one third of ASEAN's exports to the EU enjoy tariff concessions under the GSP. The Ministers noted that the EU envisages a revision and updating of the GSP for the next decade. In this context, the Ministers recognized that the Cumulative Rules of Origin (CRO) provision has contributed to ASEAN's regional integration and would further assist ASEAN in achieving its objectives of an ASEAN Free Trade Area. The ASEAN Ministers stressed their concerns about certain elements such as 'Social Incentives' in the Commission proposals on the review of the GSP.⁹⁶

It is clear that although the ASEAN Ministers had "concerns" about social incentives, these concerns did not lead to the slightest questioning of the legality of the EC GSP scheme under the GATT Enabling Clause. Moreover, it is clear that there was no agreement between the European Union and the ASEAN Ministers that the WTO rules, in any legal sense, disciplined such incentives.

In sum, the subsequent practice of the Parties within the meaning of Vienna Convention Article 31 strongly points to an interpretation of the notion of a "non-discriminatory" and "non-reciprocal" system of preferences as aspirational. Despite persistent concern by developing countries about conditionality and selectivity in GSP schemes over a period of almost thirty years, no legal instrument has ever been promulgated that elevates the elements of non-discrimination or non-reciprocity to a legal condition precedent for the granting of preferences that would otherwise be inconsistent with

95. See Association of Southeast Asian Nations (ASEAN), *Joint Declaration The Eleventh ASEAN-EU Ministerial Meeting* paras. 8-10 (Sept. 23, 1994) available at <http://www.aseansec.org/5642.htm> (last visited July 16, 2003).

96. *Id.* para. 10.

Article I. The policy basis for continuing to treat these elements as, at most, “basic principles,” which developed countries are *exhorted* to reflect in their GSP schemes, is expressed in the judgment of a 1998 Report to ECOSOC by the Secretariats of UNCTAD and the WTO:⁹⁷ “[despite, *inter alia*, selectivity and conditionality in some GSP schemes] the GSP remains a valuable tool for promoting developing-country exports.”⁹⁸

When balanced against various “improvements” in GSP treatment, including “a substantial extension of product coverage for all GSP recipients,”⁹⁹ the remaining or new elements of selectivity and conditionality did not justify moving to a stricter approach, enforcing the elements of non-discrimination and non-reciprocity as legal conditions precedent. Leaving aside whether it could ever be part of “mutually acceptable” GSP arrangements, such a stricter approach might lead to waning enthusiasm on the part of developed countries to further extend and improve their GSP schemes to the benefit of developing countries. Thus, the repeated reaffirmations of non-discrimination and non-reciprocity as principles of the GSP, up to and including the Doha Decision on Implementation, have never been accompanied by requirements that aspects of WTO Members’ GSP schemes that detract from those principles be removed or modified within a definite period of time, or completely.¹⁰⁰

This is consistent with the approach of the adopted GATT panel in *Rubber Footwear*, which determined whether preferences fall within paragraph 2(a).¹⁰¹ The panel noted that, “the GSP programme of the United States, both in its nature and its design, accords duty-free

97. See U.N. ESCOR, Developments Since the Uruguay Round, Implications, Opportunities and Challenges, in Particular for the Developing Countries and the Least Developed among Them, in the Context of Globalization and Liberalization, U.N. Doc. E/1998/55 (1998).

98. *Id.* paras. 39-40.

99. *Id.* para. 39.

100. *Contra* Balance of Payments, *supra* note 34, para. 1 (reaffirming the commitment “to announce publicly, as soon as possible, time-schedules for the removal of restrictive import measures taken for balance-of-payments purposes”).

101. See *Rubber Footwear*, *supra* note 40, para. 6.15 (considering the extent to which paragraph 2(a) of the Enabling Clause allows for preferential tariff treatment for developing countries).

status to only certain products originating in only certain developing countries.”¹⁰² The panel further noted that this entailed both a *tariff* and a *non-tariff* advantage to the selected beneficiaries.¹⁰³ The panel made it very clear that the Article I override in the Enabling Clause excluded selective duty-free treatment under the U.S. GSP scheme, only to the extent that such duty free treatment results in the conferral of an additional, *non-tariff* preference on the beneficiary. Thus, while the Enabling Clause 2(a) protects tariff preferences that are provided on a selective basis, both in respect of products and countries, non-tariff preferences receive no similar protection.¹⁰⁴ The wisdom of this interpretive approach is strongly confirmed if we consider the jurisprudential challenge for the dispute settlement organs if, under Paragraph 2(a), non-discrimination or non-reciprocity were considered to be legal conditions that determined whether the GATT Article I override was applicable to a given case of preferential treatment.

It is one thing for political and diplomatic bodies and actors to make general assertions that selectivity and conditionality of preferences are inconsistent with, or detract from, the spirit or principle of non-discrimination or non-reciprocity. It is quite another matter, however, for a judicial body to examine the individual features of a preference scheme in order to determine whether each of them meets a legal condition of non-discrimination. In the GATT/WTO legal framework, non-discrimination is a complex and varied concept. One need only contrast the notion of discrimination in Article I of the GATT, which involves a comparison of the treatment of like products with the concept in the chapeau of Article XX, which entails a comparison of the treatment of countries “where the same conditions prevail.”¹⁰⁵

102. *Id.* para. 6.14.

103. *See id.* (expressing a non-tariff benefit as “the automatic backdating of countervailing duty revocation orders”).

104. *See id.* para. 6.15 (noting the limitations placed on preferential treatment to “tariff preferences only”).

105. *See* European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body, WT/DS135/AB/R (March 12, 2001) [hereinafter *Asbestos*], available at http://docsonline.wto.org/gen_search.asp?searchmode=simple (last visited July 18,

To begin an analysis of whether the European Commission's preferential treatment, based on labor and environmental conditionality, violated a purported legal condition of non-discrimination in the Enabling Clause, the panel and the Appellate Body would have to cut from whole cloth as it were an appropriate juridical concept of non-discrimination. Since the issue here is whether an override to Article I applies, the dispute settlement organs could not simply appropriate the MFN concept of non-discrimination, without the risk of rendering the Enabling Clause, in important respects, inutile.

In the case of special preferences based upon labor conditionality, the core labor standards in the ILO Declaration on Fundamental Principles and Rights at Work form the basis for the conditions in question.¹⁰⁶ All ILO Members are committed to these standards, as indeed are all WTO Members, indirectly, through the Singapore Declaration.¹⁰⁷ Therefore, the Commission similarly regards all developing countries with respect to the conditions for special preferential treatment. The question then arises as to whether the condition therefore results in discrimination.

A different kind of issue about the concept and meaning of non-discrimination would arise with respect to the preferences with environmental conditionality. These preferences apply only to products from certain forests, where the country of origin "effectively applies national legislation incorporating the substance of internationally acknowledged standards and guidelines concerning

2003). As discussed below, however, there is one relatively uncontroversial meaning to non-discrimination as a characteristic of GSP schemes—preferential schemes restricted permanently to an exclusive regional grouping of countries do not fall within the GSP rubric. However, this meaning is sufficient to allow the WTO adjudicator to play its proper role under Enabling Clause Paragraph 2(a), namely assuring that overall the scheme in question falls within the general GSP rubric. But it would be an entirely different matter, for the adjudicator to be called upon to evaluate all the individual distinctions and differentiations drawn within a GSP scheme against "non-discrimination" as a legal condition, which is what India is calling for.

106. See ILO Declaration, *supra* note 18 and accompanying text (providing internationally agreed upon labor standards).

107. See Brunei Darusslam – Indonesia – Malaysia – Philippines – Singapore – Thailand: Singapore Declaration of 1992, Jan. 28, 1992, 31 I.L.M. 498 (1992).

sustainable management of forests.”¹⁰⁸ What would happen if a potential recipient country were to argue that, despite the absence of national legislation, products from its tropical forests do not create environmental externalities of the kind addressed by internationally acknowledged standards and guidelines? It is not obvious that the EC Regulation prohibits the European Commission from granting preferences where there is such equivalence.¹⁰⁹ Thus, one could interpret the EC Regulation as not mandating discrimination of the kind based on country of origin. Neither the Enabling Clause nor the GSP Decision of 1971, to which the Clause refers, provide the dispute settlement organs of the WTO with a textual anchor to articulate an appropriate concept of discrimination.¹¹⁰

Here, one must recall that the 1971 GSP Decision describes GSP as a mutually acceptable system of generalized, non-reciprocal, and non-discriminatory preferences.¹¹¹ Developed countries have never accepted the notion of non-discrimination invoked by those developing countries claiming that preferences conditioned on environmental and labor rights performance are discriminatory.

108. Council Regulation 2501/01, *supra* note 15, art. 21.2.

109. *See id.*, para. 7 (“Preferences should be differentiated according to the sensitivity of products. It would be sufficient to differentiate between two product categories, non-sensitive and sensitive products.”).

110. Although the drug preferences are not the focus of the paper, this is, if anything, even more true for them. One could argue that developing countries with a drug enforcement challenge are different from, and have different development needs than, those without such a challenge. On the other hand, is it truly non-discriminatory for the European Union to offer special, additional preferences to respond to those countries’ special challenges with respect to drugs, and not to other challenges faced by other developing countries that equally might be addressed through greater access to export markets, such as the need for foreign currency to buy AIDS medications, in the case of those developing countries devastated by AIDS? Additional preferences might partially alleviate many special circumstances in individual developing countries, and from this perspective, the drug criterion appears arbitrarily selective, and thus arguably non-objective and discriminatory. It all depends on the comparator, or the grounds on which it is permissible to distinguish the situations or conduct of different developing countries. The Enabling Clause appears to offer no explicit indication of what the permissible or impermissible grounds are, but as the example just discussed indicates, the notion of development needs, which admittedly does exist in the Enabling Clause itself, is too vague to serve as an adequate comparator.

111. *See* GSP Decision, *supra* note 8, at pmbl.

Instead, developed countries have maintained that such conditionality is non-discriminatory because all developing countries are judged equally against the same neutral or objective criteria.¹¹²

If dispute settlement organs were to regard each element of a Member's GSP scheme as reviewable against legal norms of non-discrimination and non-reciprocity, the dispute settlement organs would be throwing the operation of the GSP as it now stands into profound uncertainty.¹¹³ All GSP schemes contain elements of selectivity and conditionality that a panel or the Appellate Body could view as discriminatory depending on one's conception of discrimination. From the perspective of developing countries, this uncertainty would make the preferences in question even more precarious and uncertain in the short term, and erode the viability of any "mutually acceptable" systems of preferences in the long term.¹¹⁴ Of course, these concerns could not override specific treaty text, explicitly directing the dispute settlement organs to adjudicate non-discrimination as a legal condition of the Enabling Clause.¹¹⁵ In the absence of explicit language, however, these concerns deserve to be weighed in determining whether such a direction should be *inferred*.¹¹⁶

112. See Lorand Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, 36(2) J. WORLD TRADE 353, 358-65 (2002).

113. See Robert Hudec, *The Structure of South-South Trade Preferences in the 1988 GSTP Agreement: Learning to Say MFMFN in DEVELOPING COUNTRIES AND THE GLOBAL TRADING SYSTEM* 210, 223-228 (John Whalley, ed., Macmillan 1989) (assessing the difficulties of drawing a line between permissible and impermissible differential treatment within a preferential, and thus inherently discriminatory scheme).

114. See *id.* at 228 (questioning the participants reasoning in granting or prohibiting certain types of benefits).

115. See Turkey - Textiles, *supra* note 34, paras. 58-60 and (noting the Appellate Body's reluctance to interpret that WTO legal instruments as falling outside the adjudicative jurisdiction of dispute settlement organs).

116. See Enabling Clause, *supra* note 9, para. 2 (maintaining that paragraph 2(d) of the Enabling Clause explicitly allows additional margins of preferences for least-developed countries). One might also interpret that the Enabling Clause implicitly prohibits grants of additional margins of preferences to any select group of countries within a GSP scheme except on grounds that they are "least developed". In this sense, one could argue that there is one permitted comparator

The above analysis obviously points to the conclusion that, as a general matter, the Enabling Clause's reference to a non-discriminatory and non-reciprocal system of preferences is of an aspirational nature and does not create enforceable conditions. However, just as subsequent practice sustains this conclusion as a general matter, subsequent practice also suggests that *some* discriminatory preferential arrangements are understood to fall *outside* the ambit of the Enabling Clause, by virtue of their *overall* character.¹¹⁷

In *Rubber Footwear*, the panel held that to benefit from the MFN override in the Enabling Clause, preferential treatment must fall into one of the categories in Paragraph 2.¹¹⁸ The WTO adjudicator must therefore consider whether, overall or generally, the preferential treatment at issue is in "accordance" with the description imported from the 1971 GSP Decision. Preference schemes designed to benefit only countries within a particular region or grouping are, as a general matter, outside the notion of a GSP. This is the extent to which there is a discernable mutually acceptable meaning to the idea of non-discrimination in relation to GSP. Since these schemes are *in principle* limited to an exclusive group of developing countries, they are simply outside the ambit of 2(a) altogether.

C. PARAGRAPH 3(A) OF THE ENABLING CLAUSE

Paragraph 3(a) of the Enabling Clause states that "[a]ny differential and more favourable treatment provided under this clause . . . shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties"¹¹⁹ This

for differential treatment within GSP schemes; whether or not a country is "least developed," with all other comparators prohibited. But given the enormous consequences described above in the text, deriving it would seem judicial overreaching to derive a prohibition on other distinctions within GSP schemes by implication alone of based on what paragraph 2(d) permits.

117. See *Bananas*, *supra* note 39, paras. 167-68

118. See *Rubber Footwear*, *supra* note 40, paras. 6.14-6.15 (explaining that the U.S. measure fell outside of Paragraph 2(a) by affording a non-tariff advantage).

119. See Enabling Clause, *supra* note 9, para. 3 (setting forth the limitations on EU preferences).

language, unlike that in Paragraph 2(a), appears to establish something like a legal condition for the operation of the MFN override in the Enabling Clause. Paragraph 3 makes stipulations that apply to “[a]ny differential and more favorable treatment provided”¹²⁰ Thus, all particular instances or aspects of preferential treatment must be consistent with the strictures of Paragraph 3(a). These provisions, even if conditions of a sort, may be largely self-policing¹²¹ or be more appropriately policed by institutions other than the dispute settlement organs of the WTO. The question of whether a given preference scheme is designed to facilitate and promote the trade or development questions seems to be an economic and policy question.

With respect to the second clause of Paragraph 3(a), India would appear to be ill situated to complain about the negative trade effects that GSP has on developed countries. Since the incorporation of the Enabling Clause in the 1994 GATT, the first clause of Paragraph 3(a), which requires that preferences be “designed to facilitate and promote the trade of developing countries,”¹²² must now be read in light of the Preamble to the WTO Agreement. The Preamble to the WTO Agreement deals with the objectives of facilitating and promoting developing country trade in light of the general purposes of the WTO.¹²³ These purposes include:

[r]aising standards of living, ensuring full employment and a large and steadily growing volume of real income, and . . . expanding . . . trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with . . . [the] respective needs and concerns [of WTO Members] at different levels of economic development.¹²⁴

120. *Id.*

121. *See* Corn Syrup, *supra* note 52, paras. 72-74 (noting that GATT Members exercise broad discretion in the decision of whether or not to bring a case against another member would be fruitful).

122. Enabling Clause, *supra* note 9, para. 3.

123. *See id.* para. 1 (detailing the values of the founding parties of the WTO).

124. *Id.*

The question remains as to whether the EU's labor preferences would facilitate and promote the trade of developing countries when the Preamble to the WTO Agreement serves to explain the context of the Enabling Clause. The EU's preferences essentially provide lower tariff rates to imports from developing countries that certify compliance with core labor standards. If the EU's preferences were not designed to facilitate and promote trade, it is difficult to see how the preferences could induce developing countries to comply with core labor standards because such countries would have little reason to participate in the GSP scheme. It is possible, however, that these principles may also enable the kind of growth and income-enhancing effects of liberal trade described in the Preamble to the WTO Agreement.¹²⁵ Studies by the Organization for Economic Co-operation and Development ("OECD") and independent academic economists suggest a positive correlation between compliance with core labor standards and higher levels of economic growth and development.¹²⁶

With respect to the EU's environmental preferences, in addition to the obvious trade promotion effect of a reduced level of tariff, the environmental conditionality in these preferences may contribute to increased trade consistent with sustainable development,¹²⁷ as stated in the Preamble to the WTO Agreement. To the extent that adherence to international guidelines on sustainable forest management results in better internalization of environmental externalities, it will

125. *See id.* (describing the effects of liberal trade).

126. *See, e.g.,* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, TRADE, EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE 104-105 (OECD 1996) (finding that the economic gains of short term low core standards are outweighed in the long term and that all countries could strengthen their economic performance by adhering to core standards); PETER MORICI & EVAN SCHULTZ, LABOR STANDARDS IN THE GLOBAL TRADING SYSTEM 7-11 (Econ. Strategy Inst. 2001) (explaining that empirical findings suggest that enforcement of the four core labor standards would promote trade).

127. *See* WTO Agreement ¶ 1 (contending that trade relations should allow "for the optimal use of the world's resources in accordance with the objective of sustainable development").

contribute to “optimal use of the world’s resources,”¹²⁸ and more efficient trade based upon the relative environmental costs of different sources of tropical timber.¹²⁹ Moreover, the conditionality in the EC scheme requires only the implementation and enforcement of the “substance” of such guidelines. The European Commission, therefore, has the discretion to decide that a developing country qualifies for the special preferences even if that country, for example, decides not to incorporate aspects of the guidelines that appear to be inappropriate to its needs. India’s position in *Shrimp/Turtle* is not that of a developing country that has applied for the special preferences, but is instead the position of a developing country that the European Union has refused to grant preferences because its domestic legislation or the application of that legislation does not ensure the “substance” of international standards and guidelines. Given the experience of the Commission administration with special preferences to date, a claim that the conditionality in question is not sufficiently accommodating or supportive of the different needs of different developing countries would clearly be unripe.

D. PARAGRAPH 3(C) OF THE ENABLING CLAUSE

Paragraph 3(c) of the Enabling Clause states that preferences provided under the Enabling Clause shall “be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.”¹³⁰ With respect to labor conditionality, both the ILO’s developing country and developed country membership have declared the labor rights at issue to be “fundamental”. Similarly, with respect to environmental conditionality, the internationally acknowledged standards and guidelines to which the EC scheme is indexed are essentially those developed in the International Tropical Timber Organization

128. See *id.* (recognizing that trade relations should endeavor to make optimal use of the world’s resources).

129. See *ITTO Guidelines*, *supra* note 19, at 7 (noting that proper conversion and management of forests may “play an important role in the production of timber, wood, and non-wood forest products for local and national use and international trade”).

130. Enabling Clause, *supra* note 9, para. 3(c).

("ITTO"), an entity where both developing country producers and predominately-developed country consumers have equal voting rights and full membership.¹³¹ The WTO adjudicator is not institutionally competent to make its own judgments about whether the design of the preferences in question responds positively to the development and related needs of developing countries. Thus, assuming that Paragraph 3(c) of the Enabling Clause is not entirely self-policing, the full and active involvement of developing countries in the elaboration of the standards in question should provide the appropriate assurance that the EC scheme is consistent with paragraph 3(c) of the Enabling Clause.¹³²

Moreover, as noted with respect to Paragraph 3(a), the conditionality in the EC scheme entails only that the recipient of the special preferences implement and enforce "the substance" of the international standards and guidelines in question.¹³³ On its face, this allows the Commission to apply the special preference conditionality to permit recipients to maintain and adopt forest management

131. See U.N.C.T.A.D., International Tropical Timber Agreement, Jan. 10, 1994, art. 5, U.N. Doc. TD/TIMBER.2/Misc.7/GE.94-50830, reprinted in 33 I.L.M. 1014 (describing the terms of membership under the agreement, including voting rights).

132. One should not understand this as an "estoppel" argument against the possibility of developing countries complaining about the standards in question being a basis for trade conditionality. After all, not all the instruments in question are binding, and not all developing countries consent to these instruments being enforced or applied through trade conditionality. It is only an argument that the standards themselves could not easily be considered to be at odds with paragraph 3(c). As I go on to suggest, the way that trade conditionality is applied based on such standards may indeed raise separate issues under 3(c). So far, however, as is noted in the text to follow, there does not seem to be any evidence that the application of the conditionality in the EC scheme has taken place in a manner contrary to the norm in 3(c). Of course, if India is able to muster such evidence it would have to be taken seriously, and the claim would be in no way undermined by the fact that the standards themselves represent broad agreement between developed and developing countries.

133. See EC GSP Scheme, *supra* note 15, art. 21 (giving the option of granting special incentives to countries that incorporate the "substance" of international agreement, such as the sustainable management of tropical forests).

legislation and regulation that “respond positively to their development, financial and trade needs.”¹³⁴

II. THE CONSISTENCY OF EU LABOR AND ENVIRONMENTAL PREFERENCES WITH GATT ARTICLE I

Article I:1 of the GATT requires that, “any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”¹³⁵ The extra margin of preference accorded under the EC scheme to products from developing countries that meet the relevant labor and environmental criteria is an advantage or favor with respect to customs duties. Since only the context of the EC’s GSP scheme authorizes the preferential treatment in question, such treatment is simply unavailable to WTO members who are not developing countries, even if they happen to be fully compliant with the criteria in question. Thus, this preferential treatment violates Article I.

At the same time, the EC scheme does not exclude India from such preferential treatment. The EU regulation merely authorizes the European Commission to grant an additional margin of preference to developing countries that request it and meet certain non-country-specific criteria. In the case of India, however, while the Commission has not granted India the special preferential treatment in question, this is because India apparently never requested such treatment.

Long-established GATT doctrine allows legislation itself, as opposed to actions taken pursuant to legislation, to be challenged only if the legislation actually mandates violation of WTO rules.¹³⁶

134. *Id.* para. 3(c) (stating that differential treatment positively enhance development, economics, and trade).

135. GATT, *supra* note 61, art. I:1.

136. *See* GATT, *supra* note 61, art. XXIII (allowing Members to challenge the legislation of another Member if that legislation nullified and impaired rights arising under the GATT); *see also* Dispute Settlement Understanding, *supra* note 53, art. 3 (requiring an impairment of WTO benefits prior to initiation of dispute

Where legislation merely grants a discretion that may or may not be used in such a manner to violate WTO rules, a complainant must base its case on an actual instance where the *application* of the law—*i.e.* the exercise of the discretion—violates WTO rules. In addition, one WTO panel decision has suggested that it may sometimes be possible to challenge discretionary legislation, where the nature of the discretion is such as to threaten the security of specific rights under the WTO Agreements and would deprive a member the normal enjoyment of those rights.¹³⁷ This does not apply here, however, as India could eliminate any uncertainty about India's rights by applying to the European Union, which would decide whether to extend the extra preferential treatment to India.

However, there are some developing countries that *have* applied for labor and environmental incentives under the EC scheme, and the question is whether this is sufficient for India's claim, even if India itself cannot argue that the EC scheme is "mandatory" in relation to *India*. In *Havana Club*, the Appellate Body found that the United States had violated the Trade Related Aspects of Intellectual Property's ("TRIPs") national treatment obligation by treating Cuban nationals more favorably than U.S. nationals.¹³⁸ MFN is a foundational norm of the multilateral trading system¹³⁹ and India has a persuasive case that the EU special preferential treatment violates Article I of the GATT.

settlement proceedings, which however is normally to be assumed when a treaty provision is violated).

137. See United States – Sections 301-310 of The Trade Act of 1974, Report of the Panel, WT/DS152/R, paras. 7.72-7.94 (Dec. 22, 1999) [hereinafter S. 301 Case] available at, http://www.wto.org/english/tratop_e/dispu_e/wtds152r.doc (last visited June 21, 2003).

138. See United States—Section 211 Omnibus Appropriations Act of 1998, Report of the Appellate Body, WT/DS176/AB/R para. 281 (Jan. 2, 2002) [hereinafter *Havana Club*] (concluding that the United States discriminatorily distinguished between Cuban and U.S. nationals in possession of trademarks used in connection with a business confiscated in Cuba), available at http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm (last visited June 21, 2003).

139. See Joost Pauwelyn, *The Nature of WTO Obligations* § I(A)4 (2002) (addressing whether, and which, WTO obligations are *erga omnes partes*), available at, <http://www.jeanmonnetprogram.org/papers/02/020101.html> (last visited June 21, 2003).

III. ARTICLE XX OF THE GATT

Shrimp/Turtle determined that that Article XX could justify measures that condition market access on the policies adopted by the exporting WTO Member.¹⁴⁰ Thus, even though the EU special preferential treatment violates Article I of the GATT, it may nevertheless be justified under GATT Article XX. In such a case, the European Union would not need to depend on the Enabling Clause to maintain its special preferential treatment. Labor rights and environmental conditionality raise rather different sets of issues with respect to Article XX justification, and thus need separate consideration.

A. LABOR RIGHTS CONDITIONALITY

The first step in considering an Article XX justification is to determine whether the defending member's measures fall into any of the individual provisions of Article XX.¹⁴¹ There are three exceptions under Article XX that may apply to measures concerned with the enforcement of labor rights: Article XX(a) refers to measures that are necessary to protect public morals, Article XX(b) refers to measures necessary to protect human, animal, or plant life or health, and Article XX(e) refers to measures related to products of prison labor.

I. Article XX(a) "Public Morals"

Neither the GATT nor the WTO has had the opportunity to adjudicate the meaning and scope of "public morals."¹⁴² Numerous

140. See *Shrimp/Turtle I*, *supra* note 1, para. 121 (1998) (asserting that importing countries commonly require that exporting countries comply with various policies, and that to assume all such interactions are unjustified under Article XX invalidates the exceptions).

141. See *id.* paras. 99-113 (concluding that the initial threshold question for an Article XX analysis is whether a measure falls under one of the particular exceptions in paragraphs (a) to (j) of the Article); see also *Asbestos*, *supra* note 105, paras. 155-57 (examining first whether the use of certain products fell within the scope of Article XX(b)).

142. See C.T. FEDDERSEN, *Der Ordre Public in der WTO: Auslegung und Bedeutung des Art. XX lit. a) GATT im RAHMEN DER WTO-STREITBEILEGUNG* (Duncker & Humblot eds. 2002) (examining Article XX(a) in depth).

scholars, including myself, have argued that internationally recognized human rights articulate elements of international public morality and come within the ordinary meaning of “public morals.”¹⁴³ In the Singapore Declaration, WTO Members renewed their commitment to internationally recognized core labor standards, and to the role of the ILO in articulating these standards. In turn, the ILO has declared these core labor standards to be “Fundamental Principles and Rights.” Thus, human rights and labor standards would help interpret the content of public morality under Article XX(a). In the modern world, the very idea of public morality has become inseparable from the concern for human personhood, dignity, and capacity reflected in fundamental rights.¹⁴⁴ A conception of public morals or morality that excluded notions of fundamental rights would simply be contrary to the ordinary contemporary meaning of the concept.¹⁴⁵

143. See Robert Howse, *The World Trade Organization and the Protection of Worker's Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 142-45 (1999) (offering the argument that human rights are a core element of modern public morality and that Article XX(a) should evolve with the modern disapproval of detrimental labor practices) ; Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689, 745-46 (1998) (reviewing the extended history of trade exceptions for moral and humanitarian purposes and the growing link between morality and economic policy in an interdependent global community); Gabrielle Marceau, *WTO Dispute Settlement and Human Rights* 13 EUR. J. INT'L L. 753, 790-91 ((2002) stating that panels are able to determine if a measure is necessary to protect public morals by relying on a members participation in human rights treaties).

144. See U.N. CHARTER pmbl. (proclaiming the United Nation's goal of reaffirming “faith in fundamental human rights, the dignity and worth of the human person, in the equal rights of men and women . . .”).

145. See Howse, *supra* note 143, at 142 (observing that the meaning of “public morals” could be limited to reflect the ordinary meaning of the expression at the time the GATT 1947 came into effect). But see Morceau, *supra* note 143, at 784 (citing that interpretations of Article XX(a) should evolve based on the endorsement of the Appellate Body of a dynamic interpretation of the meaning of “exhaustible natural resources” in Article XX(g) of the GATT in *Shrimp/Turtle*). Admittedly, in *Shrimp/Turtle* the Appellate Body related its dynamic interpretation to the mention of “sustainable development” in the Preamble of the WTO Agreement. *Id.* However, in the case of Article XX(a) it simply defies common sense to interpret the provision as allowing governments to respond only to moral imperatives that existed over fifty years ago: responsible and representative governments clearly have to be accountable to the values and interests of the citizens of today—and tomorrow—not those of yesteryear. See Howse, *supra* note

The text of Article XX(a) contains no territorial limitation on a member's objective in protecting public morals.¹⁴⁶ The very existence of international human rights, international labor rights law, and the institutions developed to deal with these areas suggest that the international community accepts that a state's legitimate concern about the morality of the treatment of individuals is not limited to its *own* nationals (denial of justice, for instance). The question of whether there are territorial limitations to the "public morals" in Article XX(a) is sometimes confused with whether a country could use a provision, such as Article XX(a), to justify actions that violate general norms of public international law concerning extraterritorial regulation. In *Lotus*, the International Court of Justice defined the default rule in international law with respect to extraterritorial regulation, stating that

[f]ar from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property, and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.¹⁴⁷

Many such prohibitive rules have arisen with respect to particular subject matter in individual treaties and conventions; however, attempts to create a more restrictive general or default rule

143, at 166 (noting that in reaffirming their commitment to observance of core labor standards in the Singapore Declaration, as well as the role of the ILO, the Membership have now explicitly acknowledged the importance and legitimacy of the protection of fundamental labor standards as a goal of national and international policy); *see also* Feddersen, *supra* note 142, at 301 ("[d]ie textuelle Auslegung der Vorschrift des Art. XX lit. a GATT erweist, dass es sich bei dem Begriff der public morals um einen Relationbegriff handelt, der auch einer dynamischen Entwicklung zugaenglich ist.").

146. *See Shrimp/Turtle I*, *supra* note 1, para. 133 (explaining that the panel refrained from addressing whether jurisdiction is implied by Article XX(g) because the migratory nature of turtles to U.S. waters limited the panel's holding to the specifics of the case).

147. *See S.S. Lotus Case (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7), at 19 (holding that jurisdiction is not based on international title over territory, but rather whether it conflicts with a recognized principle or prohibition of international law).

concerning extraterritorial jurisdiction¹⁴⁸ have not succeeded in modifying the default rule from *Lotus*.¹⁴⁹

The controversies in this area of public international law are irrelevant to the case of EU preferential treatment based on environmental and labor conditionality. The EU regulation purports only to provide the Commission with powers to make a determination of whether certain products can enter the European Union at particular rates of duty.¹⁵⁰ It does not purport to regulate conduct outside of the EU or give the Commission jurisdiction over any persons, property, or transactions outside the European Union. If a developing country is determined not to comply with the conditionality in question, the only legal effect is a change in the rate of duty at which the European Union will admit its products.¹⁵¹ Neither the government, nor the nationals, nor the property and territory of that country are subject to any legal penalty or sanction, or other form of control.

However, the WTO 1996 Singapore Declaration¹⁵² *does* appear to establish some kind of limit to the sort of trade measures that WTO Members deem consistent with the WTO legal framework. The Declaration states: "We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no

148. See S.S. *Lotus Case* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No.10 (Sept. 7) (recognizing the prohibitive rule that a state may not exercise power "in" the territory of another state, for example attempting to arrest, try or punish foreign nationals on their own territory).

149. See *Military and Paramilitary Activities* (Nicar. v. U.S.) 1986 I.C.J. 14, (June 27), at 125-26 (holding that there is no general or customary rule of international law that prohibits as such the use of economic pressure such as trade sanctions).

150. See EC GSP Scheme, *supra* note 15, art. 3 (granting the Commission the power to determine which products benefit from lower duties).

151. See *generally id.*

152. WTO Singapore Ministerial Declaration, WT/MIN(96)/DEC/W (Dec. 13, 1996), *available at* http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm (last visited June 26, 2003).

way be put into question.”¹⁵³ Given its nature as an extension of trade preferences, one could hardly attribute “protectionist purposes” to the EC scheme.¹⁵⁴ At least with respect to core labor rights, evidence from the OECD and other sources suggests that observance of these does not threaten the comparative advantage of low-wage developing countries, but may actually enhance it.¹⁵⁵

In sum, good reasons do not exist for excluding fundamental labor rights from the ambit of the concept of “public morals.” This means that the focus of analysis would become whether the EU measures are “necessary” for the “protection” of public morals. It would be difficult for the European Union to make the case that its measures are necessary, *i.e.* indispensable, because those countries that the European Union can effectively encourage to improve labor rights compliance would probably be encouraged to do so by other kinds of incentives, such as subsidies and technical assistance.

In *Korea-Beef*,¹⁵⁶ the Appellate Body held that in some cases, a provision of Article XX that contains a “necessity” test might justify certain measures even if they are not “indispensable” to the objective in question:

It seems to us that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. 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. There are other aspects of the enforcement measure to be considered in evaluating that measure as ‘necessary’. One is the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or

153. *See id.* para. 4.

154. *See id.*

155. *See Morici, supra* note 126, at 76 (concluding “empirical evidence does not support the notion that lax enforcement of [core labor standards] aids long-term development. Effective enforcement within the WTO could be expected to improve the circumstances of workers and the development prospects of countries that played by the rules.”).

156. *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body, WT/DS161/AB/R (Dec. 11, 2000) (defining what is a necessary measure).

regulation at issue. The greater the contribution, the more easily a measure might be considered to be 'necessary'. Another aspect is the extent to which the compliance measure produces restrictive effects on international commerce.¹⁵⁷

The importance of the common values or interests that the EU measures intend to protect are obvious from the fact that they are the subject of a multilateral declaration in the ILO that describes these in terms of "fundamental" rights and principles. Moreover, in this case, the restriction of commerce produced by the measure is minimal. It is true that if the European Union were to provide the special preferential tariff rate to all developing countries, regardless of labor or environmental conditionality, it would have a less restrictive impact on commerce because all developing countries already benefit from significant margins of preference under the EC scheme. Nevertheless, in considering the trade-restrictiveness of the EU measure, it must be taken into account that the European Union would be entirely within its rights in withdrawing the special preferential treatment altogether, and offering it to *no* developing country.¹⁵⁸

While the preferences in question are not indispensable, there is no reason to believe they make a trivial contribution to the achievement of compliance with the rights at issue, relative to other available instruments.¹⁵⁹ The design and structure seem well suited to making a significant contribution to the protection of the interests in question,

157. *Id.* paras. 162-63.

158. I do not mean to introduce here the simplistic notion that the EU measure is merely a "carrot" not a "stick", or to suggest that under some competitive conditions the selective granting of preferences of this kind could not achieve a significant trade restriction or distorting effect. The inquiry here, however, is one that concerns degree and nature of trade-restrictiveness, and this feature of the EU measure is pertinent to making such a relative assessment. In its effects on the behavior of individual market actors, granting of additional selective preferences cannot be considered equivalent to the withdrawal or suspension of bound concessions on the legal security of which market actors may have been expected to rely in their economic decision-making.

159. See Elliott, *supra* note 16 (noting the positive impact of GSP conditionality on labor practices). Admittedly, Elliott's empirical study does not address the same preferences challenged by India.

as it provides a meaningful incentive to developing countries to improve and maintain compliance with fundamental labor rights.

2. Article XX(b) Protection of Human Life and Health

At least two of the fundamental labor rights indexed to the EC scheme clearly relate to the protection of human life and health. Those include the elimination of all forms of forced and compulsory labor, and the effective abolition of child labor. Such labor practices notoriously endanger human life and health. A relationship between the other rights, *e.g.* freedom of association, the effective recognition of the right to collective bargain, and the elimination of discrimination in respect of employment and occupation, could also plausibly be connected to health, understood broadly as physical and psychological well-being.¹⁶⁰ The other issues concerning whether the EU measures fit under Article XX(b) are quite similar to those that exist for Article XX(a).¹⁶¹

3. Article XX(e) Prison Labor

It has been suggested that a teleological interpretation of Article XX(e) might extend the provision to include measures that address the right against forced labor generally.¹⁶² However, such interpretations are unsustainable under the Vienna Convention on the Law of Treaties.¹⁶³ The ordinary meaning of the word “prison” does not encompass other non-penal settings, even if they entail coercion.

160. See, *e.g.*, World Health Organization, World Health Declaration, *Health for All-Policy* (May 16, 1998), available at <http://www.who.int/archives/hfa/policy.htm> (last visited June 26, 2003) (describing how rights to health and physical well-being can also include psychological well-being).

161. See *supra* Part III(A)(i) and accompany notes (discussing the idea of public morals with reference to labor rights conditionality under GATT Article XX).

162. See, *e.g.*, Morici, *supra* note 126 (commenting that enforcement of labor standards would promote trade).

163. Cf., *e.g.*, Beef Hormones, *supra* note 48 (illustrating the Appellate Body’s decisions that continuously establish unsustainable interpretations).

4. *The Chapeau of Article XX*

Once the EU labor rights measures fall into one of the heads of Article XX, the remaining issue, under the “chapeau” of Article XX, is whether these measures will apply in a manner that gives rise to unjustified or arbitrary discrimination between countries where the same conditions prevail. The *Shrimp/Turtle* rulings illuminate the meaning of unjustified and arbitrary discrimination where Article XX measures condition market access on the exporting member’s policies.¹⁶⁴ The requirement to avoid unjustified discrimination implies that the way conditionality in the measure is applied should be sufficiently flexible as to permit the exporting member to satisfy the conditionality in a manner appropriate to its own conditions and circumstances.¹⁶⁵ The exporting country is required only to adopt it into domestic legislation and apply the substance of the labor rights in the ILO Conventions. The EU regulation thus provides the exporting country with flexibility with respect to the legal and regulatory modalities by which it implements this substance. Moreover, the regulation provides the Commission with discretion to grant special preferential treatment to products from certain particular sectors or areas of the country, in cases where the legislation applies only to those sectors and not throughout the country. Finally, while the exporting country must report the effective measures taken to implement and monitor these provisions to the Commission, the European Union leaves it up to the exporting country to devise implementation and monitoring measures, as long as these are effective.¹⁶⁶ In sum, the EC scheme, on its face, does not contain features that would give rise to “unjustified discrimination.”¹⁶⁷ The European Commission should be able to

164. See *Shrimp/Turtle I*, *supra* note 1, para. 121 (recognizing that one cannot assume that requiring export countries to comply with a certain policies would automatically render a measure incapable of justification under Article XX).

165. See *Shrimp/Turtle II*, *supra* note 1, para. 56 (relying on the fact the more flexible application of the U.S. measure in order to find the measure justifiable under Article XX of the GATT 1994).

166. See generally Council Regulation 2501/01, *supra* note 15 (noting the flexibility of requirements under the EU measures)

167. See *Shrimp/Turtle I*, *supra* note 1, para. 14 (defining “unjustifiable discrimination” as “discrimination between countries where the same conditions

make a *prima facie* case that its scheme conforms to this condition of the chapeau and then India would have had to allege specific instances where the Commission and its officials have applied the scheme in a manner that gives rise to unjustified discrimination. India did not participate in the scheme and the Commission and its officials have not found any specific instances of unjustified discrimination.

As for the “arbitrary discrimination” within the meaning of the Chapeau, the EC scheme provides transparent criteria against which a developing country applying for the special preferences must meet.¹⁶⁸ The relevant authorities of the applicant developing country “are invited to cooperate” in the Commission’s investigation of whether or not the country meets the criteria for the granting of the special preferences. These features on the face of the EC scheme should be sufficient to discharge the burden of proof to make a *prima facie* case that the scheme itself conforms to the chapeau prohibition on “arbitrary discrimination.” It would then be up to India again to allege any instances where the European Commission has engaged in “arbitrary discrimination” while applying the scheme.

B. ENVIRONMENTAL CONDITIONALITY

1. Article XX(g)

Based upon the Appellate Body’s reading of “exhaustible natural resources” in the *Shrimp/Turtle* case,¹⁶⁹ it would seem certain that measures to conserve tropical forests and their ecosystems would come within Article XX(g) of the GATT. A wide variety of international activities in this regard, including the various policy statements and guidelines of the ITTO, a multilateral organization whose members include both countries with tropical forest and those that are consumers of tropical forest products confirm that the

prevail . . . where the policy goal of the Article XX exception being applied provides a rationale for the justification”).

168. See Council Regulation 2501/01, *supra* note 15, para. 7 (detailing what developing countries must show in applying for special preferences).

169. See *Shrimp/Turtle I*, *supra* note 1, para. 128 (deciding that “exhaustible” natural resources and “renewable” natural resources are not mutually exclusive)

sustainability of tropical forests and their ecosystems is a legitimate and important policy goal, and a pressing environmental priority.¹⁷⁰ Providing a tangible incentive for developing countries to implement internationally acknowledged standards and guidelines concerning sustainable management of tropical forests seem to have a real and close connection with the policy objective of conserving these exhaustible natural resources.

Article XX(g) includes the condition that the measures in question are "made effective in conjunction with restrictions on domestic production or consumption."¹⁷¹ Since there are no tropical forests within the European Union, the focus here would naturally be on restrictions on domestic consumption. In this regard, the European Union is progressively taking effective steps to halt the importation of tropical timber harvested in violation of the laws of the exporting country. These restrictions on consumption of tropical timber clearly relate to the effectiveness of the EU trade preferences. To the extent that illegally harvested timber can find a market in the European Union, a major consumer, the incentives for compliance with domestic legislation, including the legislation that developing countries are encouraged to provide and enforce by the EU preferences, will be undermined, with consequent negative effects on the conservation of forests.

Finally, the issue of territorial nexus may arise, one on which the Appellate Body did not pronounce as a matter of law in *Shrimp/Turtle*. As the various policy statements of the ITTO and the international community more generally on the issue of sustainable forestry show, tropical forests and their ecosystems, have a global "commons" or public good dimension. This "commons" dimension

170. See *ITTO Guidelines*, *supra* note 19 (outlining guidelines for forest management and protection). See generally *Shrimp/Turtle I*, *supra* note 1, para. 123. Action under Article XX(g), as the Appellate Body emphasized in the *Shrimp/Turtle* implementation ruling, does not require the existence of a multilateral treaty. Sustainable forest management is an important and legitimate goal of public policy, and a matter that transcends the particular interests of individual consumer and producer countries.

171. GATT, *supra* note 61, art. XX(g).

creates an appropriate nexus with the interests of the European Union.¹⁷²

2. The Chapeau of Article XX

With respect to unjustified discrimination, EU preferences are based on implementation of internationally accepted guidelines and standards, which are principally those developed through the ITTO. Because such guidelines and standards are agreed among a wide variety of both producer and consumer countries, they reflect flexibility and sensitivity with respect to conditions in different countries, and do not seek to impose or copy the regulatory approach of any single jurisdiction. Moreover, the EU preference scheme requires only that developing countries implement such standards and guidelines to provide a further margin of flexibility to adapt them to local conditions.

The EC scheme confers a large measure of discretion on the Commission to determine whether implementation, monitoring, and enforcement meet the conditionality requirements. A developing country has the right to know why the Commission denied it a preferential status. The WTO doctrine does not find a violation of WTO legal requirements merely based on the discretion afforded to a decision-maker. State responsibility normally is engaged in when the exercise of discretionary powers granted by the statute lead to violations of WTO law. This view of state responsibility is especially applicable to the conditions of the chapeau of Article XX, since the conditions in the chapeau govern the application of a legislative or regulatory scheme, rather than its general structural features or characteristics. Absent evidence of specific incidences where the Commission has acted arbitrarily,¹⁷³ it would seem premature to

172. By “commons” here is not implied a legal state of affairs where individual states have ceded jurisdiction to control forests within their territory; rather, that, conceptually, the way that one state exercises, or fails to exercise that jurisdiction, may have significant effects on other states and the international community in general, thus leading other states and the international community to have a legitimate interest in how domestic jurisdiction is exercised.

173. Examples of arbitrary behavior include giving vague or inconsistent reasons for denial of preferential status, or interpreting the “substance” of

conclude that the nature of the criteria or conditions in and of itself results in "arbitrary discrimination."

CONCLUSION: THE POLICY AND ECONOMIC STAKES IN A CHALLENGE TO ENVIRONMENTAL AND LABOR CONDITIONALITY IN GSP

In this concluding section of the paper, I wish to speculate on the political and economic consequences that would flow from various possible outcomes, ¹⁷⁴ *had India gone forward* with its claims concerning the environmental and labor preferences. This analysis may help to understand why India may have chosen not to pursue its earlier claims. It may also help to grasp the likelihood and the consequences of some other country challenging labor and environmental conditionality.

A. SCENARIO #1: THE EU PREFERENCES UPHOLD UNDER THE ENABLING CLAUSE

If a panel and/or the Appellate Body find that the EU environmental and/or labor preferences are consistent with the Enabling Clause, at least Article 2(a), the policy status quo with respect to GSP and the related issues of environmental and labor conditionality would largely be preserved. WTO Members would be able to operate voluntary GSP preference schemes outside the (strict) scrutiny of the WTO adjudicator. A ruling on general jurisprudential grounds would say little specific about the legitimacy of trade action for labor and environmental purposes. On the other hand, it is possible (though I believe unlikely, based on the analysis above), that the WTO panel or Appellate Body could find that "non-discrimination" is a strict legal condition of the Enabling Clause, but that labor and environmental preferences are not discriminatory because they are based on general and objective criteria applied

international standards and guidelines in an inconsistent or discriminatory manner with respect to different applicants for preferential treatment.

174. I have selected only some of the possible outcomes, and not considered others that I view as remote or largely insignificant variations, i.e. that the Appellate Body would go one way on labor preferences and the opposite way on the environmental preferences.

equally to all developed countries. Such a statement would enhance the legitimacy of the linkage between trade, labor, and environmental issues, and would undermine the belief of the traditional trade policy elite (including many WTO heads of delegation) that labor and environmental conditionality is somehow inherently at odds with the idea of non-discriminatory liberal trade. Such a ruling would reinforce the decisions in *Shrimp/Turtle*,¹⁷⁵ and would legitimize the linkage between trade and labor rights for a first time. It would reinforce the position of “moderate” activists and civil society groups that the WTO is not hostile to environmental and labor interests, but would undermine the legitimacy of the current elite at the WTO, which has sought to keep such questions “out” of the trading system.

B. SCENARIO #2: EU PREFERENCES UPHOLD UNDER THE
ENABLING CLAUSE AND UNDER ARTICLE XX

The Appellate Body could hold that the EU preferences are legal, despite GATT Article I because of *both* the Enabling Clause *and* Article XX. Such a departure from strict judicial economy would create a signal that labor and environmental linkages are legitimate and appropriate within the WTO system. This would especially be true if the Enabling Clause analysis derives its basis from general jurisprudential grounds and the Appellate Body decides not to rule specifically on any labor and environmental questions.

C. SCENARIO #3: EU PREFERENCES UPHOLD UNDER ONLY
ARTICLE XX

The Appellate Body could find that the EU preferences are legal simply under Article XX, and therefore find it unnecessary to adjudicate the Enabling Clause. Such a ruling would not introduce any new instability into the GSP, but would send a positive signal about the legitimacy of labor and environmental linkages.

175. See *Shrimp/Turtle I*, *supra* note 1.

D. SCENARIO #4: EU PREFERENCES FAIL THE ENABLING CLAUSE
BUT UPHELD UNDER ARTICLE XX

Of all the outcomes where the EU measures are upheld, this one would have the most dynamic effect on current debates and negotiations within the WTO. If the EU preferences fail the Enabling Clause, then this will send a signal that the individual elements of members' GSP schemes will be subject to meaningful or even strict scrutiny of the WTO dispute settlement organs. This will make GSP preferences less attractive, from a political economy perspective, as it will constrain the room to maneuver in balancing the interests of different constituencies. Most of the selective or possibly discriminatory features of GSP schemes have nothing to do with labor and environmental concerns and this outcome would signal the vulnerability of current GSP schemes to a challenge under the Enabling Clause without the possibility of justification under GATT Article XX. At the same time, there would also be a positive signal concerning the legitimacy of labor and environmental linkages.

The GSP is already subject to much criticism, including a sophisticated economic and political economy analysis that suggests developing countries would be better off with deeper and bargained MFN tariff cuts.¹⁷⁶ The outcome of striking down the EU preferences based on the Enabling Clause may well give greater emphasis to proposals in the current Round for significant tariff cuts that would benefit developing countries. It could also further intensify the trend towards regionalism, which enables countries to use other mechanisms where they can operate selective and conditional preferential trade policies. Concessions on a MFN basis in multilateral negotiations may reduce the value of any preferential treatment available to regional trading partners.

176. See Caglar Ozden & Eric Reinhardt, *The Perversity of Preferences: GSP and Developing Country Trade Policies, 1976-2000* (Apr. 9, 2002) (finding that "countries removed from the GSP adopt more liberal trade policies than those [countries] remaining eligible), available at <http://userwww.service.emory.edu/~erein/research/gsp2.pdf> (last visited July 18, 2003).

E. SCENARIO #5: EU PREFERENCES FAIL BOTH THE ENABLING
CLAUSE AND ARTICLE XX

This scenario would have a very significant impact on the trading system. The result on the Enabling Clause will have the effects discussed under Scenario #4. However, the fact that neither the Enabling Clause nor Article XX can justify the labor and environmental conditionality in preferences, it is very likely to undermine the political equilibrium on the labor issue in the United States. If the partisan balance changes in Congress after the next congressional elections (in 2004), a ruling by the WTO Appellate Body that narrowed or eliminated the possibility for labor conditionality under GSP and more generally through Article XX justification, could well lead to a reconsideration of the basis on which Congress granted the President fast-track authority. And this would occur in the final year or so of the Doha Round negotiations. It should be noted that recently the United States has enacted new sanctions against Burma, based in part on the condemnation of Burma's record on labor rights by the International Labor Organization. The legislation in question was passed by a virtually unanimous vote in both the House and the Senate, which displays the fact that at least in some cases the appropriateness of taking labor and human rights-related trade action, indeed action much more drastic than conditionality in GSP preferences, is widely felt across the partisan divide in the US.

Finally, a WTO ruling of this nature, excluding even Article XX justification of conditionality, is likely to reunite more moderate activists who are critical but also hopeful for change at the WTO with die-hard opponents of the international trade system. As a result, a united front of "civil society" against the Doha Round would be a possible outcome.