

THE APPELLATE BODY REPORT IN *EUROPEAN COMMUNITIES – CONDITIONS FOR THE GRANTING OF TARIFF PREFERENCES TO DEVELOPING COUNTRIES, WT/DS246/AB/R* AND ITS IMPLICATIONS FOR CONDITIONALITY IN GSP PROGRAMS

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A. INTRODUCTION

Following discussions in UNCTAD during the 1960s, developed countries agreed to institute a Generalized System of Preferences according to which they would grant preferential tariff treatment to goods from developing countries. As preferential treatment of this nature would contravene the most-favoured-nation obligation in Article I of the GATT, it was necessary to obtain a waiver from this obligation within the GATT system. This waiver was obtained in a 1971 Decision, which stated as follows:

[T]he provisions of Article I shall be waived for a period of ten years to the extent necessary to permit developed contracting parties ... to accord preferential tariff treatment to products originating in developing countries and territories ... without according such treatment to like products of other contracting parties, *Provided* that any such preferential tariff arrangements shall be designed to facilitate trade from developing countries and territories and not to raise barriers to the trade of other contracting parties ...¹

The preamble to this ‘GSP Decision’, though not this operative part of the waiver, also referred 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 products originating in developing countries’.² The current legal significance of these terms was one of the issues arising in *EC – GSP*.

In 1979, shortly before the expiry of the GSP Decision, the GATT Contracting Parties adopted a Decision, known as the ‘Enabling Clause’, that permanently authorizes the GSP programs ‘described in’ the GSP Decision.³ The Enabling Clause, now a part of the GATT 1994, specifies that ‘treatment accorded by developed contracting parties to developing countries [shall] be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.’ The Enabling Clause also permits other forms of differential and more favourable treatment, including treatment concerning non-tariff measures, regional or global arrangements for the mutual reduction or elimination of tariffs among developing countries, and special treatment of least developed countries.⁴

GSP programs have been notified to the UNCTAD secretariat by Australia, Belarus, Bulgaria, Canada, Japan, New Zealand, Norway, the Russian Federation, Switzerland, Turkey, the European Community (now comprising 25 Member States) and the United States of Amer-

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¹ GATT Document, *Generalized System of Preferences* (‘GSP Decision’), Decision of 25 June 1971, BISD 18S/24 (reproduced in Annex).

² Emphasis added.

³ GATT Document, *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries* (‘Enabling Clause’), Decision of 28 November 1979, L/4903 (reproduced in Annex), paragraph 2(a).

⁴ Paragraphs 2(b) to (d) of the Enabling Clause.

ica.⁵ While these programs generally have a broad scope, they also tend to draw distinctions between developing country beneficiaries on various grounds. Many GSP programs provide for the ‘graduation’ of competitive product sectors as well as of any beneficiary country that reaches a certain development threshold. In addition to these economic reasons for differentiating between developing countries, the EC and US impose non-trade conditions on the granting of trade preferences to developing countries. The central question in *EC – GSP* was the extent to which GSP donors are entitled to differentiate between developing countries for such non-trade reasons.

This article begins by outlining the types of conditionality found in the EC and US GSP Programs. It then discusses the measure at issue in the *EC – GSP* dispute, before turning to a discussion of the issues raised in the panel and Appellate Body reports.⁶ The first issue concerns the status of the ‘Enabling Clause’, and in particular whether it should be seen as an ‘exception’ to Article I:1 GATT. This has implications primarily as to whether the complainant or the defendant bears the burden of proving that the Enabling Clause applies to a challenged measure. The second issue is whether the references in the Enabling Clause to ‘generalized, non-discriminatory and non-reciprocal’ GSP preferences should be treated as binding conditions and, if so, how these terms (and in particular the term ‘non-discriminatory’) are to be interpreted. Following an evaluation of the approaches taken by the panel and the Appellate Body to these questions, this article concludes with a discussion of the continuing legality of those types of non-trade conditions not addressed in the *EC – GSP* dispute.

B. CONDITIONALITY IN THE EC AND US GSP PROGRAMS

1. Conditions in the EC GSP Program

The EC’s existing GSP program provides for two types of tariff preferences for goods from developing countries.⁷ ‘Non-sensitive’ products receive duty-free treatment, while ‘sensitive’ products receive a reduction in the most favoured nation duty rate. Over and above this, the EC’s GSP program provides for ‘special incentives’ in a number of areas. Accordingly, all products (except arms) from least developed countries receive duty-free treatment,⁸ and developing countries may apply to receive additional preferences on *all* products if they can demonstrate that they comply with specified labour standards in the production of those prod-

⁵ See www.unctad.org/Templates/Page.asp?intItemID=2309&lang=1 (visited 15 February 2005), updated here to take account of EU enlargement. The granting of GSP preferences by *developing* countries (Belarus, Bulgaria, the Russian Federation and Turkey) is not authorised under paragraph 2(a) of the Enabling Clause, but rather under WTO Document, *Preferential Tariff Treatment for Least-Developed Countries – Decision on Waiver*, adopted on 15 June 1999, WT/L/304.

⁶ WTO Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted as modified by the Appellate Body report on 20 April 2004; WTO Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004.

⁷ The current EC GSP Program is set out in Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004 [2001] OJ L 346/1 (the ‘GSP Regulation’), as amended and extended by Council Regulation (EC) No 2211/2003 [2003] OJ L 332/1. A detailed description of the EC GSP program is set out in UNCTAD, *Handbook on the Scheme of the European Community*, UNCTAD/ITCD/TSB/Misc.25/Rev.2, 2002, available at www.unctad.org/en/docs/itcdtsbmisc25rev2_en.pdf (visited 15 February 2005).

⁸ Article 9 of the GSP Regulation.

ucts,⁹ and on tropical timber products if they can demonstrate that they comply with international standards on the sustainable management of tropical timber resources.¹⁰

Prior to *EC – GSP*, there were also additional preferences granted to countries engaged in efforts to combat drug production and trafficking.¹¹ There was no mechanism for a beneficiary country to apply for these special preferences, unlike the mechanisms available for the additional preferences for countries complying with labour and tropical timber standards (although there was monitoring of the use of the effects of the drugs preferences on the beneficiaries use of the preferences, and the beneficiaries' efforts in combating drugs).¹² Rather, it was the European Community that decided on the beneficiaries of these preferences, based on its own criteria. For reasons that will be explained shortly, the Appellate Body found the administration of these preferences to be discriminatory, in violation of one of the requirements of the Enabling Clause.

There is also a 'negative' aspect to the EC's GSP program. Preferences can be temporarily withdrawn for the following reasons: slavery or forced labour, violation of core labour standards, export of goods made by prison labour, ineffective customs controls on drugs, money laundering, fraud in rules of origin, unfair trading practices, infringement of the objectives of international conventions concerning the conservation and management of fishery resources, and significant detrimental effects on the environment arising from the production of products included in these arrangements.¹³ For a withdrawal of preferences on these grounds, there is an administrative scheme, involving investigation and reporting.¹⁴ Following reports of forced labour practices, the EC withdrew GSP preferences from Myanmar in 1997 under a predecessor to these provisions.¹⁵

The European Commission has proposed reforms to the EC's GSP program from 1 July 1995.¹⁶ In addition to many simplifications to the existing program, the proposal aims to add to the reasons for which developing countries can apply to receive additional preferences. The proposal also bases itself firmly on international conventions. According to the proposal, additional preferences will be made available to developing countries which can demonstrate that they have implemented major international conventions in the following areas: sustainable development, including basic human rights conventions, labour rights conventions and certain conventions relating to environmental protection, as well as the various conventions relating to the fight against illegal drugs production and trafficking. The proposal notes that these incentives will be accompanied by a 'credible suspension clause' that can be activated

⁹ Articles 14-18 of the GSP Regulation. Note amendments to Article 14 by Council Regulation (EC) 2211/2003, above at n 7.

¹⁰ Articles 21-23 of the GSP Regulation.

¹¹ Article 10 of the GSP Regulation. At the time of writing, the EC has undertaken to reform the administration of these preferences.

¹² Article 25 of the GSP Regulation.

¹³ Article 26 of the GSP Regulation.

¹⁴ Articles 27-29 of the GSP Regulation.

¹⁵ Council Regulation (EC) No 552/97 of 24 March 1997 temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar [1997] OJ L 85/8.

¹⁶ EU Commission, *Communication from the Commission concerning amendment of the Commission's proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period 1 July 2005 to 31 December 2008*, Amended Proposal for a Council Regulation applying a scheme of generalised tariff preferences, COM (2005) 43 final, 10 February 2005; see also EU Commission, *Developing countries, international trade and sustainable development: the function of the Community's generalised system of preferences (GSP) for the ten-year period from 2006 to 2015*, COM (2004) 461 final, 7 July 2004, available at www.europa.eu.int (visited 15 February 2005).

by the Commission, the Member States or the European Parliament, in the event of a serious breach of the international agreements. The proposal says nothing about whether the existing provisions allowing for the suspension of *all* GSP preferences will continue.

2. Conditions in the US GSP Program

The United States GSP program adopts solely a ‘negative’ approach to conditionality. Under a set of *mandatory criteria*, countries are deemed ‘ineligible’ to be GSP beneficiaries for any of the following reasons: communism (with exceptions), membership of an international cartel causing damage to the world economy, reverse preferences, expropriation, failure to enforce arbitral awards, involvement in terrorism, violation of worker rights and child labor.¹⁷ There are also *discretionary criteria*, which must be taken into account in determining GSP status, which are: the desire to be a beneficiary, level of economic development, whether other developed countries are granting GSP treatment, market openness, level of intellectual property protection, trade policies, and implementation of worker rights.¹⁸ If the President determines that as the result of changed circumstances a beneficiary country would be barred from designation as such, the President may withdraw or suspend its designation¹⁹ and must notify the Congress of this action.²⁰ The Federal Regulations provide for private petition to request the withdrawal or suspension of GSP beneficiary status, along with public hearings.²¹

C. BACKGROUND TO THE EC – GSP CASE

The dispute in *EC – GSP* concerned the additional tariff preferences granted by the EC to countries involved in combating drug production and trafficking. For some time, the EC had been granting these additional ‘drugs’ preferences to eleven South and Central American countries,²² but in late 2001 the EC added Pakistan to the list of countries receiving these additional preferences. There was an acknowledged political aspect to this decision, as this EU Press Release documents:

In recognition of Pakistan’s changed position on the Taliban regime and its determination to return to democratic rule in 2002, the Commission has stepped up the EU’s assistance to Pakistan (up to €100 million in 2001/2002) On 16 October, the Commission presented a package of trade measures designed to significantly improve access for Pakistani exports to the EU. The proposed package has been specifically tailored to target clothing and textiles accounting for three-quarters of Pakistan’s exports to the EU. It removes all tariffs on clothing and increase quotas for Pakistani textiles and clothing by 15% In return, Pakistan will improve access to its markets for EU clothing and textile exporters. The package gives Pakistan the best possible access to the EU short of a Free Trade Agreement by making it eligible for the new Special Generalised System of Preferences Scheme for countries combating drugs. The Commission considers that this should be

¹⁷ US Code, Section 2462(b).

¹⁸ US Code, Section 2462(c).

¹⁹ US Code, Section 2462(d)(2).

²⁰ US Code, Section 2462(d)(3).

²¹ 15 CFR 2007.0(a) and (b).

²² The former beneficiaries of the EC’s drugs preferences were Bolivia, Colombia, Ecuador, Peru and Venezuela (Andean Community), El Salvador, Guatemala, Honduras, Nicaragua, Panama and Costa Rica.

supported, particularly given the difficulties Pakistan will face, while a massive influx of refugees arrive from Afghanistan.²³

Believing that it was suffering trade diversion to Pakistan as a result of these additional trade preferences, India requested consultations with the EC in March 2002 and ultimately requested the establishment of a panel on 6 December 2002. India's claim was that the drugs regime under the EC's GSP program was discriminatory, in violation of one of the requirements for GSP programs set out in the Enabling Clause. The panel decided in India's favour in December 2003 (there was a dissenting panel member), and the panel report was upheld by the Appellate Body, though with significant modifications to the panel's interpretations of the legal status and effect of the Enabling Clause, and with differences as to the reasons why the drugs regime was discriminatory. In addition to the twelve beneficiaries of the drugs preferences, Paraguay, Brazil, Cuba, Mauritius, Sri Lanka, and the United States reserved their right to participate in the panel proceedings as third parties. Seven of the twelve beneficiary countries (the five Andean Community countries as well as Costa Rica and Panama) as well as Paraguay and the United States participated as third parties before the Appellate Body.

D. RELATIONSHIP BETWEEN ENABLING CLAUSE AND GATT

One of the main issues in *EC – GSP* concerned the relationship of the Enabling Clause to Article I:1 GATT (the most favoured nation obligation). It was agreed by all parties that the Enabling Clause should be considered a part of the GATT 1994 as an 'other decision' under para 1(b)(iv) of GATT 1994.²⁴ What was in dispute was whether Enabling Clause should be characterised as an 'exception' to Article I of the GATT 1994, or rather as some sort of *lex specialis* setting out a special regime for trade preferences for products from developing countries. This question was important primarily because it would determine whether the complainant or the defendant bore the burden or proof in demonstrating whether the conditions in the Enabling Clause had been met in the given case.

The panel found (by majority) that the Enabling Clause is an exception to Article I:1 GATT 1994.²⁵ A dissenting panelist decided that the Enabling Clause is not an exception,²⁶ and furthermore that the complaint had to be dismissed on the procedural grounds that India had not made any claims under the Enabling Clause in its request for the establishment of a panel.²⁷ The Appellate Body agreed with the panel that the Enabling Clause is an exception,²⁸ and (in the course of addressing another issue) also overturned the factual findings of the dissenting panelist on whether India had sufficiently addressed the Enabling Clause in its request for the establishment of a panel.²⁹ Before addressing these issues, it is convenient first to describe the previous jurisprudence of the Appellate Body on when a provision is to be characterized as an 'exception'.

²³ EU Commission, 'Briefing on 12 March 2002', available at http://europa.eu.int/comm/110901/memo120302_en.htm (visited 15 February 2005).

²⁴ WTO Panel Report, *EC – GSP*, para 7.32; WTO Appellate Body Report, *EC – GSP*, para 108 n 230.

²⁵ WTO Panel Report, *EC – GSP*, para 7.39.

²⁶ *Ibid*, para 9.2.

²⁷ *Ibid*, para 9.21.

²⁸ WTO Appellate Body Report, *EC – GSP*, para 90.

²⁹ *Ibid*, paras 122 and 125.

1. The distinction between ‘exceptions’ and ‘autonomous rights’

The Appellate Body has drawn a distinction between two types of provisions permitting a WTO Member to take measures otherwise in conflict with its WTO obligations. The first type it has termed ‘exceptions’ or (‘affirmative defences’), while the second has gone by a variety of names (for convenience these are here given the name of ‘autonomous rights’). One of the main purposes of this dichotomy is the allocation of the burden of proof between complainant and defendant. So, for example, in relation to the ‘affirmative defences’ of Article XI:2(c), Article XX and Article XXI of GATT, the defendant has the burden of proving the application of these provisions to the measure at issue, while in the case of ‘autonomous rights’, this burden rests on the complainant.

The distinction between these two types of provisions was first identified in *US – Wool Shirts*, which concerned the legal status of Article 6 of the Agreement on Textiles and Clothing (ATC), a provision that established a transitional special safeguards regime.³⁰ In this case, the Appellate Body said as follows:

We acknowledge that several GATT 1947 and WTO panels have required such proof of a party invoking a defence, such as those found in Article XX or Article XI:2(c)(i), to a claim of violation of a GATT obligation, such as those found in Articles I:1, II:1, III or XI:1. Articles XX and XI:(2)(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it.³¹

The Appellate Body here characterised ‘autonomous rights’ as ‘positive rules establishing an obligations in themselves.’ It is difficult to know quite what the Appellate Body meant by this, given that neither exceptions nor ‘autonomous rights’ (including the provision at issue in this case) contain any *obligations*; rather, they contain *conditions* on the voluntary exercise of a right to adopt a measure otherwise in conflict with WTO obligations. In any case, when it came to analyze Article 6 ATC the Appellate Body did not, in fact, apply its ‘test’. Instead, it characterised this provision as ‘an integral part of the transitional arrangement manifested in the ATC’ and ‘a fundamental part of the rights and obligations of WTO Members concerning non-integrated textile and clothing products covered by the ATC during the transitional period’.³² It was for these reasons, not because Article 6 established any ‘obligations’, that the Appellate Body decided that this provision was not an exception, and that the complainant had to demonstrate that the provision did not apply to the measure.

The issue next arose in *EC – Hormones*, in relation to Article 3.3 of the SPS Agreement. This provision authorises WTO Members, under certain conditions, to adopt a higher level of SPS protection than would be achieved by international standards, despite the fact that Article 3.1 SPS obliges Members to base their measures on such standards. The Appellate Body this time described Article 3.3 as an ‘autonomous right’, and said that ‘Article 3.1 of the SPS Agreement simply excludes from its scope of application the kinds of situations covered by Article 3.3 of that Agreement’.³³ Consequently, the complainant bore the burden of proving that Article 3.3 did not apply to the measure at issue. The Appellate Body did not analyse the

³⁰ WTO Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* (‘*US – Wool Shirts*’), WT/DS33/AB/R, adopted 23 May 1997.

³¹ *Ibid*, p 20, emphasis added.

³² *Ibid*, p 21.

³³ WTO Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* (‘*EC - Hormones*’), WT/DS26/AB/R, adopted 13 February 1998, para 104.

matter further, either by identifying whether Article 3.3 SPS contained ‘positive obligations’ (the ‘test’ in *US – Wool Shirts*) or by explaining why the text of either Article 3.1 or 3.3 necessarily led to this conclusion.

This reasoning was influential in *EC – Sardines*, in which the Appellate Body considered the legal nature of the second part of Article 2.4 of the TBT Agreement.³⁴ This provision entitles a Member to deviate from the requirement in the first part of Article 2.4 to base its technical regulations on international standards. The Appellate Body drew a direct analogy with *EC – Hormones*, stating that there is a ‘conceptual similarity’ between Articles 3.1 and 3.3 SPS and the two parts of Article 2.4, and came to the conclusion that ‘[s]imilarly, the circumstances envisaged in the second part of Article 2.4 are excluded from the scope of application of the first part of Article 2.4’.³⁵ Again, the burden of proving that the second part of Article 2.4 did not apply rested with the complainant.

The third case on this issue is *Brazil – Aircraft*, which concerned Article 27 SCM.³⁶ Article 27.2(b) SCM states expressly that the prohibition on export subsidies in Article 3(1)(a) *shall not apply* to developing countries for eight years, subject to compliance with the provisions of Article 27.4. It is notable that in this case there was a firm textual basis for stating that, as a result of one provision, another provision did not apply. It is therefore odd that the Appellate Body reverted in this case to the language of the ‘test’ in *US – Wool Shirts* when it concluded that ‘[i]t is clear that the conditions set forth in paragraph 4 are *positive obligations* for developing country Members, *not* affirmative defences. If a developing country Member complies with the obligations in Article 27.4, the prohibition on export subsidies in Article 3.1(a) simply does not apply’.³⁷ The Appellate Body could easily have reached the desired result without resorting to the infelicitous language of ‘positive obligations’.

In all the cases discussed so far, the Appellate Body came to conclusion that the provision at issue was not an exception. By contrast, in *US – FSC (Article 21.5)* the Appellate Body decided that the fifth sentence of footnote 59 of the SCM Agreement did constitute ‘an affirmative defence’ and therefore that the burden of proof rested on the defendant.³⁸ The Appellate Body said that the test was whether ‘that provision determines, in part, the proper scope of the obligations under Article 3.1(a) of the SCM Agreement, or whether it provides an exception for a provision that is otherwise an export contingent subsidy’.³⁹ Here the Appellate Body did not apply the ‘positive obligations’ language of *US – Wool Shirts*.

In summary, so far three tests have emerged for determining whether a provision is an ‘exception’, meaning that it is the defendant that must prove whether the measure falls within its scope. First is the Appellate Body’s test in *US – Wool Shirts*, according to which the provision is only an exception if it is not a positive rule establishing obligations in itself. This test was applied in *Brazil – Aircraft*. Second is the Appellate Body’s method in *US – Wool Shirts*, which is to look at the function of the provision in the overall scheme of rights and obliga-

³⁴ WTO Appellate Body Report, *European Communities – Trade Description of Sardines* (‘*EC – Sardines*’), WT/DS231/AB/R, adopted 23 October 2002.

³⁵ *Ibid*, para 275.

³⁶ WTO Appellate Body Report, *Brazil – Export Financing Programme for Aircraft* (‘*Brazil – Aircraft*’), WT/DS46/AB/R, adopted 20 August 1999.

³⁷ *Ibid*, para 140.

³⁸ WTO Appellate Body Report, *United States – Tax Treatment for ‘Foreign Sales Corporations’ – Recourse to Article 21.5 of the DSU by the European Communities* (‘*US – FSC (Article 21.5 – EC)*’), WT/DS108/AB/RW, adopted 29 January 2002, at para 133. The fifth paragraph of footnote 59 SCM justifies a prohibited export subsidy when the measure in question is taken ‘to avoid the double taxation of foreign-source income’.

³⁹ *Ibid*, para 128.

tions in the agreement at issue. Third is the Appellate Body's test in *EC – Hormones*, *EC – Sardines* and (though with slightly different language) *US – FSC (Article 21.5)*, which is to determine on a textual basis whether the primary provision – usually an obligation – *applies* to the cases covered by the provision at issue.

2. Panel findings

The panel in *EC – GSP* decided that the Enabling Clause was an exception to Article I:1 of the GATT and therefore that the defendant had the burden of proving that it applied to the measure at issue. The panel had a number of reasons for coming to this conclusion. It quoted the passage from *US – Wool Shirts* set out above,⁴⁰ and derived from this the following test for identifying an exception: 'it must not be a rule establishing legal obligations in itself; and second, it must have the function of authorizing a limited derogation from one or more positive rules laying down obligations'.⁴¹ The panel next drew an analogy between the phrase 'notwithstanding the provisions of Article I' in paragraph 1 of the Enabling Clause and the language used in what it considered to be exceptions to GATT obligations, namely, Articles XX (General Exceptions), XXI (Security Exceptions) and XXIV (regional trade agreements).⁴² Third, and somewhat irrelevantly, the panel emphasised that the Enabling Clause does not *oblige* any country to grant preferences. Finally – after reaching its conclusion – the panel examined the relevant jurisprudence and found this to confirm its earlier interpretation.⁴³

The dissenting panelist took the view that the Enabling Clause is *not* an exception to Article I GATT. This was for a number of reasons, though these are not always easy to discern from the opinion and there is at least one legal error.⁴⁴ The dissenting panelist mainly emphasised the importance of the Enabling Clause for all WTO Members. In particular, the dissenting panelist pointed to the fact that concerned action was encouraged under the Enabling Clause (as in Article II GATT) rather than the individual action foreseen in 'exceptions'.⁴⁵ The dissenting panelist also explored the Latin origins of the word 'notwithstanding' in the phrase 'notwithstanding the provisions of Article I'. On this basis, the dissenting panelist came to the opposite conclusion to that of the panel, namely, that this phrase means '*despite* the law, not as an *exception* to the law.'⁴⁶

3. Appellate Body findings

The panel's conclusion on the question of the legal status of the Enabling Clause survived on appeal. In assessing the question, the Appellate Body began by summarising its previous jurisprudence on the characterisation of a provision as an 'exception'. It stated that:

⁴⁰ See above at text to n 31.

⁴¹ WTO Panel Report, *EC – GSP*, para 7.35. It is not entirely clear how the panel identified this second limb from the passage in *US – Wool Shirts*.

⁴² *Ibid*, para 7.36. The inclusion of Article XXIV in this list of exceptions is doubtful. See WTO Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted as modified by the Appellate Body report on 19 November 1999, para 9.50, where the panel drew an express analogy between Article XXIV and the Appellate Body's interpretation of Article 6 ATC in *US – Wool Shirts*. Though the analogy was made in a different context, the implication is that Article XXIV is *not* an exception.

⁴³ WTO Panel Report, *EC – GSP*, paras 7.47-7.51.

⁴⁴ In *ibid*, para 9.16, the dissenting panelist wrongly states that the 1971 GSP Decision was not a 'limited exception'. As a waiver under Article XXV GATT, it must have been precisely such a limited exception.

⁴⁵ *Ibid*, para 9.17.

⁴⁶ *Ibid*, para 9.13.

In cases where one provision permits, in certain circumstances, behaviour that would otherwise be inconsistent with an obligation in another provision, and one of the two provisions refers to the other provision, the Appellate Body has found that the complaining party bears the burden of establishing that a challenged measure is inconsistent with the provision permitting particular behaviour only where one of the provisions suggests that the obligation is not applicable to the said measure. Otherwise, the permissive provision has been characterized as an exception, or defence, and the onus of invoking it and proving the consistency of the measure with its requirements has been placed on the responding party. However, this distinction may not always be evident or readily applicable.⁴⁷

According to this summary, the question whether a provision is an exception to an obligation can be resolved by reference to the *text* of the two provisions at issue, and whether this text indicates that the obligation *does not apply* in the situations covered by the provision at issue.

In applying its ‘test’, the Appellate Body first considered the dictionary definition of the word ‘notwithstanding’ in the phrase ‘[n]otwithstanding the provisions of Article I’ in paragraph 1 of the Enabling Clause. This led the Appellate Body to state that Members may provide differential and more favourable treatment ‘in spite of’ Article I. However, unlike the dissenting panelist, who similarly paraphrased ‘notwithstanding’ as ‘despite’, the Appellate Body considered that this meant that the Enabling Clause was an exception. It said next that ‘[p]aragraph 1 thus excepts Members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause’. And, ‘[a]s such, the Enabling Clause operates as an “exception” to Article I:1.’⁴⁸

Having arrived at its conclusion, the Appellate Body went on to address the EC’s arguments on the issue. The EC had claimed that a measure should be not considered an exception when it pursues stated WTO objectives.⁴⁹ Rejecting this, the Appellate Body said that ‘WTO objectives may well be pursued through measures taken under provisions characterized as exceptions’.⁵⁰ The Appellate Body referred in this context to Article XX(g) GATT, which is an exception for certain environmental measures, and linked with the reference in the preamble to the WTO Agreement to ‘the recognition by Members that the expansion of trade must be accompanied by: ‘... the optimal use of the world’s resources in accordance with the objective of sustainable development.’⁵¹ The Appellate Body also rejected the EC’s additional suggestion that provisions regulating ‘trade measures’ should not be considered exceptions. Quite rightly, the Appellate Body referred to previous GATT and WTO jurisprudence in which provisions expressly regulating ‘trade measures’ were held to be exceptions, namely Article XVIII and Article XI:2(c) GATT, both of which are concerned with quantitative restrictions.⁵²

⁴⁷ WTO Appellate Body Report, *EC – GSP*, para 88 (footnotes omitted; underlining added).

⁴⁸ *Ibid*, para 90.

⁴⁹ *Ibid*, para 93.

⁵⁰ *Ibid*, para 94.

⁵¹ *Ibid*. It might be doubted whether this preambular reference to sustainable development represents an objective, *per se*, as opposed to a *condition* on the pursuit of the other objectives set out in the preamble.

⁵² *Ibid*, para 97 and n 211.

4. Problems with the Appellate Body test

a. *Alternative tests*

The Appellate Body's test is that a measure is *not* an exception 'only where one of the provisions suggests that the obligation is not applicable to the said measure'. One must be grateful that the language of 'positive obligations' in *US – Wool Shirts* now seems once and for all to be abandoned. And yet, it is difficult to share the Appellate Body's confidence that the text of the relevant provisions will be sufficient to indicate whether a given provision should be characterised as an exception (Article 27.2(b) SCM being a rare exception).

Indeed, the limits of this test are evident from the Appellate Body's application of this test in *EC – GSP*. The Appellate Body relied entirely on the meaning of the word 'notwithstanding', but failed to give a convincing explanation of why this word means that the Enabling Clause is an exception. It is obvious that this word is ambiguous. Indeed, in *EC – Hormones* the Appellate Body itself decided that Article 3.3 SPS was an 'autonomous right', even though this provision contains a sentence stating that '[n]otwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement'.⁵³

This leads one to question whether there might be a need, in at least some circumstances, to look beyond the text. This is what the Appellate Body did in *US – Wool Shirts* (ignoring its own 'test' in that case), and it was also at the heart of the EC's submissions to the Appellate Body.⁵⁴ Arguably, the dissenting panelist was correct to focus on the function of the Enabling Clause in the overall balance of rights and obligations making up the WTO legal system. Arguably, it should be relevant that all WTO Members are actively *encouraged* to take measures under the Enabling Clause. The fact that the Appellate Body ignored these issues is not convincing. At the very least, the Appellate Body should have acknowledged that the word 'notwithstanding' is ambiguous, and entered into an analysis of the provisions in accordance with Articles 31 and 32 of the Vienna Convention.

b. *Exceptions and conflicts*

There is an additional problem arising from this part of the Appellate Body report. This is the finding of the Appellate Body (confirming a finding in the panel report)⁵⁵ that, when a measure falls within the scope of an exception, both the exception and the rule from which exception derogates continue to apply concurrently, the exception prevailing to the extent of any inconsistency.⁵⁶ There is something counterintuitive about interpreting a rule/exception relationship in terms of conflicts rules. Given this, it is perhaps not inappropriate to speculate that the Appellate Body came to this conclusion on the basis of a false syllogism derived from the test just discussed. The Appellate Body formulated its test by saying that 'autonomous rights' exclude the application of the ordinary rule. From this, the Appellate Body seems to have inferred that exceptions *do not* exclude the application of the ordinary rule. Regardless of

⁵³ Emphasis added.

⁵⁴ See Appellant submission of the EC, *EC – GSP*, WT/DS246, 19 January 2004 (available at http://trade-info.cec.eu.int/doclib/cfm/doclib_type.cfm?type=4, visited 15 February 2005), paras 22-26.

⁵⁵ *Ibid.*, para 7.45.

⁵⁶ WTO Appellate Body Report, *EC – GSP*, para 101.

whether or not the test is valid, as a matter of logic the inference simply does not follow. One is tempted, therefore, to regard this description of the rule/exception dyad as incorrect.

5. Burden of proof

a. *The principle jura curia novit*

Having decided that the Enabling Clause is an exception to Article I:1 GATT, the Appellate Body held that the defendant bore the burden of proof. This was not surprising. What was new is that, for the first time, the Appellate Body made it quite clear that the burden of proof relates only to issues of *fact*, and not issues of *law*. It said:

Consistent with the principle of *jura novit curia*, it is not the responsibility of the European Communities to provide us with the legal interpretation to be given to a particular provision in the Enabling Clause; instead, the burden of the European Communities is to adduce sufficient evidence to substantiate its assertion that the Drug Arrangements comply with the requirements of the Enabling Clause.

This is a welcome clarification of some of the Appellate Body's previous *dicta*, which had tended to blur a party's burden of proof with its obligation to make out a *prima facie* legal case. This can be seen in the following *dictum* of the Appellate Body in *US – Wool Shirts*:

We agree with the Panel that it ... was up to India to put forward evidence and legal argument sufficient to demonstrate that the transitional safeguard action by the United States was inconsistent with the obligations assumed by the United States under Articles 2 and 6 of the ATC. India did so in this case. And, with India having done so, the onus then shifted to the United States to bring forward evidence and argument to disprove the claim.⁵⁷

What remains to be seen is whether the Appellate Body's express recognition of the principle *jura curia novit* affects the law on a party's obligation to make out a *prima facie* legal case.

b. *Responsibility for raising the defence*

Another novelty was the Appellate Body's qualification, in cases involving the Enabling Clause, to the litigation rules ordinarily applicable to exceptions. Under Article 6.2 DSU, which sets out the conditions on requests to establish a panel, a complainant must set out the 'legal basis for the complaint', but this does not ordinarily oblige a complainant to list any potential exceptions under which a defendant may seek to justify its measure. In *EC – GSP*, however, the Appellate Body said that a complainant seeking to challenge a measure taken pursuant to the Enabling Clause must also 'identify those provisions of the Enabling Clause with which the scheme is allegedly inconsistent'. The Appellate Body emphasised that this did not mean that the complainant 'bear[s] the burden of establishing the facts necessary to support such inconsistency. That burden, as we concluded above, remains on the responding party invoking the Enabling Clause as a defence.' On the facts, the Appellate Body found that India had sufficiently referred to the Enabling Clause in its request for the establishment of a panel, thus incidentally contradicting the findings of the dissenting panelist on this issue.

The main reason given by the Appellate Body for extending the application of Article 6.2 DSU was that the Enabling Clause has a 'special status' that distinguishes it from other ex-

⁵⁷ WTO Appellate Body Report, *US – Wool Shirts*, p 21. See also WTO Appellate Body Report, *EC – Hormones*, para 109; WTO Appellate Body Report, *EC – Sardines*, para 290.

ceptions. The Appellate Body pointed to the ‘the fundamental role of the Enabling Clause in the WTO system as well as its contents’ and noted that the Enabling Clause ‘plays a vital role in promoting trade as a means of stimulating economic growth and development’. It mentioned that ‘Members are *encouraged* to deviate from Article I in the pursuit of “differential and more favourable treatment” for developing countries’ and considered that it would contradict this principle to ‘[e]xpos[e] preference schemes to open-ended challenges.’⁵⁸ Moreover, said the Appellate Body, Members responding to this encouragement are subject to the ‘extensive requirements’ set out in the Enabling Clause, and therefore ‘the failure of such a complaining party to raise the relevant provisions of the Enabling Clause would place an unwarranted burden on the responding party.’⁵⁹

This analysis may well be sound in the result, but it is highly peculiar in light of the reasons given by the Appellate Body as to which the Enabling Clause is an exception. In that context, the Appellate Body dismissed the EC’s arguments on the ‘special status’ of the Enabling Clause, and yet here it relies quite heavily on those very same arguments as a basis for extending the scope of Article 6.2 DSU. There is no apparent reason why the context of the Enabling Clause should be insufficient to affect its status, and yet be sufficient to affect the application of Article 6.2 DSU, and it is therefore difficult not to form the impression that the Appellate Body has undermined its own previous conclusion on the status of the Enabling Clause as an exception.

In addition, it is not entirely clear whether this gloss on Article 6.2 DSU will be limited to cases involving the Enabling Clause. Certainly, if one accepts the Appellate Body’s statement earlier in its report that environmental protection is an objective of the WTO (which is admittedly doubtful), it could also be argued that Members are encouraged to adopt environmental measures. Should this not require complainants to explain why Article XX(g) does not apply to an environmental measure? And a similar question arises in relation to Article XXIV GATT? While the status of this provision as an exception has not yet been determined, it is possible that the same rule on Article 6.2 DSU might well apply to the regional trade agreements authorized under this provision, which, if not exactly encouraged under WTO rules, are certainly recognized as an important part of the international trading system.

E. THE ENABLING CLAUSE REQUIREMENTS

1. Are the conditions binding?

Paragraph 2(a) of the Enabling Clause provides for an exception to Article I GATT for ‘[p]referential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences³’. Footnote 3 continues, ‘[a]s described in the [1971 GSP Decision], relating to the establishment of “generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries”’. This raises a question whether these three terms – ‘generalized, non-reciprocal and non-discriminatory’ – amount to binding conditions, as argued by India.

The panel in *EC – GSP* seems to have assumed that these terms did amount to conditions, though without analyzing the matter. More surprising, perhaps, is that the EC agreed with this in its written submissions to the Appellate Body, despite the fact that this concession robbed it of an obvious defence. The EC stated in these submissions that ‘[f]rom the quotation included in footnote 3 it can be inferred that the drafters of the Enabling Clause consid-

⁵⁸ WTO Appellate Body Report, *EC – GSP*, para 114.

⁵⁹ *Ibid*, para 113.

ered that those characteristics are the essential features of the Generalized System of Preferences'.⁶⁰ Despite this concession, it seems that the EC deviated from this position in its oral statements. According to the Appellate Body report, the EC argued orally before the Appellate Body that the phrase 'generalized, non-reciprocal and non discriminatory' merely refers to the description of the GSP in the 1971 Decision and, of itself, does not impose any legal obligation on preference-granting countries.⁶¹ This accords with the argument made by the United States in its third party submission that '[t]his footnote is simply a cross-reference to where the Generalized System of Preferences is described. Nowhere does the footnote itself specify any obligations or requirements for GSP donor countries ...'.⁶²

The Appellate Body rejected the revised oral argument of the EC, and the argument of the US, and agreed with the panel that GSP programs must be 'generalized, non-reciprocal and non discriminatory', though unlike the panel, the Appellate Body did analyse this question. The Appellate Body considered the key question to be the description of GSP preferences in the *preamble* of the original 1971 GSP Decision, which, as mentioned above, contains the phrase 'generalized, non-discriminatory and non-reciprocal'. In other words, the Appellate Body essentially converted the non-binding words of the preamble to the 1971 GSP Decision into binding conditions in the Enabling Clause. The Appellate Body supported its argument by noting that the other language versions of the Enabling Clause use the more obligatory language 'as defined in' rather than 'as described in' the 1971 GSP Decision.⁶³

This is a plausible interpretation,⁶⁴ but the issue is not unambiguous. It might be argued that the reference in footnote 3 to the 'description' of preferences in the 1971 GSP Decision should be read as a reference to the description of the preferences in the *operative* part of the that waiver (which does not contain the phrase 'generalized, non-reciprocal and non-discriminatory'). Indeed, the use of the more obligatory language in the other language versions of the Enabling Clause would seem to support this argument. In addition, there are historical reasons for doubting the binding nature of these 'conditions'. Robert Howse has argued that, based on the history of the Enabling Clause, the description of GSP preferences as 'generalized, non-discriminatory and non-reciprocal' was always meant to be aspirational.⁶⁵ Howse notes also that this is reflected in the 2001 Doha Decision on Implementation Related Concerns, which states in similarly hortatory language that GSP preferences '*should be* generalized, non-reciprocal, and non-discriminatory'.⁶⁶

Again, as with question of whether a provision should be considered an 'exception', the point is not that the Appellate Body was wrong in its conclusion, rather that its method of interpretation is simplistic. In both cases, the Appellate Body report would have been more convincing had it referred to the context of the provision at issue, both textual and historic, as it is required to do under Article 31 and 32 of the Vienna Convention on the Law of Treaties.

⁶⁰ Appellant submission of the EC, above at n 54, para 79 fn 72.

⁶¹ WTO Appellate Body Report, *EC – GSP*, para 146.

⁶² Third Participant Submission of the United States, *EC – GSP*, WT/DS246, 2 February 2004, available at www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Index_-_Concluded.html (visited 15 February 2005)

⁶³ WTO Appellate Body Report, *EC – GSP*, para 147.

⁶⁴ Compare Lorand Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program' (2003) 6 *Journal of International Economic Law* 507.

⁶⁵ Robert Howse, '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' (2003) 6 *American University International Law Review* 1333, at 1352.

⁶⁶ WTO Document, *Doha Decision on Implementation Related Concerns*, WT/MIN(01)/17. Emphasis added.

2. Meaning of ‘generalized’, ‘non-discriminatory’, ‘non-reciprocal’

a. *Generalized and non-reciprocal*

It was not argued in *EC – GSP* that the drugs preferences were not ‘generalized’ or ‘non-reciprocal’. However, the term ‘generalized’ was discussed by the panel and the Appellate Body and it is convenient to comment on this issue before turning to the more fundamental question of the meaning of ‘non-discriminatory’.

The panel considered the term ‘generalized’ to mean two things: that GSP preferences should be provided to all developing countries, and that GSP preferences should cover a sufficiently broad range of products.⁶⁷ In its submissions to the Appellate Body, the EC contested the second of these meanings,⁶⁸ and countered that the term ‘generalized’ allows developed countries *a priori* to exclude developing countries from a preference scheme (and later to withdraw preferences), for any reason considered compelling by the donor country.⁶⁹ This argument was mirrored by the United States in its third party submission.⁷⁰

Regrettably, perhaps, the Appellate Body did not dwell on these issues to any great degree. Quoting the Oxford English Dictionary, the Appellate Body said that ‘generalized’ means that GSP preferences must ‘apply more generally; [or] become extended in application’. The Appellate Body also noted that, given the history of negotiations leading to the GSP system, ‘generalized’ also has a more specific meaning, namely, the contrary of the special preferences existing between developed countries and their former colonies, and it finally observed that ‘the term “generalized” requires that the GSP schemes of preference-granting countries remain generally applicable’.⁷¹ Perhaps this is all that could or needed to be said about this term, and yet it is a shame that the Appellate Body did not make its views clear on the contentions of the EC and the United States that donor countries may exclude *a priori* specific beneficiaries from their GSP schemes, as this is a matter of some importance for the purposes of assessing the continuing legality of negative conditionality in the EC and US GSP programs.

Neither the panel nor the Appellate Body mentioned the requirement of ‘non-reciprocity’, but for convenience it is noted that this requirement most likely prohibits developed countries from requiring reciprocal *trade concessions* as a condition of granting GSP trade preferences, but it does not prohibit them from requiring compliance with non-trade conditions.⁷²

b. *Non-discrimination*

(i) Panel findings

The crucial issue in both the panel and the Appellate Body reports is the meaning of the condition that GSP preferences be ‘non-discriminatory’. The panel majority interpreted this term as follows:

⁶⁷ WTO Panel Report, *EC – GSP*, para 7.175.

⁶⁸ Appellant submission of the EC, above at n 54, para 99.

⁶⁹ The EC gave the example of its withdrawal of preferences from Myanmar in 1997. Appellant submission of the EC, above at n 54, para 95.

⁷⁰ Third Participant Submission of the United States, above at n 62, para 21.

⁷¹ WTO Appellate Body Report, *EC – GSP*, para 156.

⁷² See Bartels, above at n 64, at 526-30 for further details.

[It] requires that identical preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of *a priori* limitations.⁷³

This reference to *a priori* limitations is directed to safeguard measures excluding competitive products (known as ‘graduation’ mechanisms) which the panel, in a finding expressly not addressed by the Appellate Body, decided were not in violation of the Enabling Clause.⁷⁴

The panel justified its strict interpretation of the term ‘non-discriminatory’ on various grounds. It first looked at paragraph 3(c) of the Enabling Clause, which states that ‘any differential and more favourable treatment shall ... respond positively ... to the development, financial and trade needs of developing countries’. The panel noted that nothing in this paragraph indicated that developed countries may respond to the development needs of selected countries ‘according to objective criteria’.⁷⁵ Rather, said the panel, these needs were best met by ‘tak[ing] into account *each and every* developing countries’ development needs by including, in the GSP schemes, a breadth of products of export interest to developing countries and by providing sufficient margins of preferences for such products.’⁷⁶ The panel also doubted the possibility of finding ‘objective criteria’, stating that:

There is no reasonable basis to distinguish between different types of development needs, whether they are caused by drug production and trafficking, or by poverty, natural disasters, political turmoil, poor education, the spread of epidemics, the magnitude of the population, or by other problems. There could be no reasonable explanation why certain causes of the problem of development should be addressed through GSP and why other causes of the same development problem should not be so addressed.⁷⁷

The panel also had additional arguments. It pointed to paragraph 2(d) of the Enabling Clause, which allows for special treatment to least developed countries, as *a contrario* evidence that no differentiation is possible between developing countries that are not least developed countries.⁷⁸ Finally, the panel referred to the practice of WTO Members of obtaining waivers for ‘special’ preferences schemes applying only to a subset of developing countries.⁷⁹ A list of these waivers is attached as Annex E to the panel report. It includes waivers for the US Caribbean Basin Economic Recovery Act and the ACP-EC Partnership Agreement (the Cotonou Agreement).

(ii) Appellate Body findings

The Appellate Body entirely rejected the panel’s understanding of the meaning of ‘non-discrimination’. It began by summarizing the parties’ different views on the term. India had claimed that ‘non-discrimination’ prohibits *any* unequal treatment, while the EC had argued that it only prohibits *improper* unequal treatment. The Appellate Body sought to reconcile these two opinions by stating that ‘the ordinary meanings of “discriminate” converge in one

⁷³ WTO Panel Report, *EC – GSP*, para 7.161. For the Appellate Body’s refusal to decide on this issue, see WTO Appellate Body Report, *EC – GSP*, paras 128 and 129.

⁷⁴ See also WTO Panel Report, *EC – GSP*, at para 7.107-114.

⁷⁵ *Ibid*, para 7.100.

⁷⁶ *Ibid*, para 7.105.

⁷⁷ *Ibid*, para 7.103.

⁷⁸ *Ibid*, para 7.104.

⁷⁹ *Ibid*, para 7.160.

important respect: they both suggest that distinguishing among similarly-situated beneficiaries is discriminatory' and that '[t]he participants disagree only as to the basis for determining whether beneficiaries are similarly-situated'.⁸⁰

The Appellate Body then moved to the context of the term 'non-discriminatory', beginning with the term 'generalized'. As noted, this analysis did not produce particularly fruitful results, and the Appellate Body rather lamely concluded that '[i]t does not necessarily follow [from the term 'generalized'] that "non-discriminatory" should be interpreted to require that preference-granting countries provide "identical" tariff preferences under GSP schemes to "all" developing countries.'⁸¹ More significantly, the Appellate Body disagreed with the panel on the type of 'needs' that must be afforded a 'positive response' under paragraph 3(c) of the Enabling Clause. Where the panel interpreted this provision as requiring a response to the *collective* needs of all developing countries,⁸² the Appellate Body found that these needs could be *individual*. The Appellate Body took the view that these needs are mutable and need not be common to all developing countries. It illustrated the point by reference to paragraph 7 of the Enabling Clause and the preamble of the WTO Agreement, which recognise the possibility that developing countries will have different needs according to their levels of development and particular circumstances.⁸³ The Appellate Body concluded as follows:

In sum, we read paragraph 3(c) as authorizing preference-granting countries to 'respond positively' to 'needs' that are not necessarily common or shared by all developing countries. Responding to the 'needs of developing countries' may thus entail treating different developing country beneficiaries differently.⁸⁴

Unlike the panel, the Appellate Body considered it possible – even mandatory – to assess the relevant needs according to an 'objective' standard, and suggested that '[b]road-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations, could serve as such a standard.'⁸⁵ Then, referring to the requirement to 'respond positively' to the needs, the Appellate Body said that there had to be a sufficient nexus between the type of measure authorized under paragraph 2 of the Enabling Clause and the likelihood that the measure would alleviate the relevant needs. In particular, '[i]n the context of a GSP scheme, the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences.'⁸⁶

Having identified the type of needs covered by the Enabling Clause, the Appellate Body then discussed what was meant by the condition that trade measures adopted in response to such needs must be 'non-discriminatory'. On this point, the Appellate Body said that:

[P]aragraph 3(c) suggests that tariff preferences under GSP schemes may be 'non-discriminatory' when the relevant tariff preferences are addressed to a particular 'development, financial [or] trade need' and are made available to all beneficiaries that share that need.⁸⁷

⁸⁰ WTO Appellate Body Report, *EC – GSP*, para 153. This is perhaps an oversimplification. Even on the basis that some differentiation is possible, the parties may have disagreed as to when such differentiation is 'proper'.

⁸¹ *Ibid*, para 156.

⁸² *Ibid*, para 159.

⁸³ *Ibid*, para 161.

⁸⁴ *Ibid*, para 162.

⁸⁵ *Ibid*, para 163.

⁸⁶ *Ibid*, para 164.

⁸⁷ *Ibid*, para 165.

Having arrived at this conclusion, the Appellate Body moved then to deal with various ancillary issues. First, it rejected India's argument that the most favoured nation rights under Article I of GATT continue to apply between developing countries in relation to benefits under the Enabling Clause. Second, it dismissed as irrelevant to the case India's arguments on paragraph 3(a) of the Enabling Clause, which require that 'differential and more favourable treatment ... 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.' The Appellate Body also disposed of the panel's argument concerning paragraph 2(d) of the Enabling Clause, on the basis that this paragraph 2(d) was merely an illustration of the possibility of differentiating between developing countries, rather than a case of *expressio unius exclusio alterius*.⁸⁸ Finally, as a matter of housekeeping, the Appellate Body reversed the finding of the panel that the term 'developing countries' in paragraph 2(a) of the Enabling Clause means 'all' developing countries. This finding, noted the Appellate Body, was predicated on the panel's incorrect conclusions that (except for graduation mechanisms) it was not permissible to differentiate between developing countries.

This reasoning, and the Appellate Body's conclusion, are quite plausible from a purely textual perspective. However, there are certain outstanding issues which could prove problematic in the future. First, it is difficult to share the Appellate Body's confidence that 'objective standards' exist according to which it might be possible to differentiate legitimate from illegitimate developing country needs. One may disagree with the conclusions of the panel, but on this issue it certainly had a point. Why should Pakistan's troubles with drug production and trafficking be any more a legitimate 'development need' than another developing country's problems with poor education, health epidemics – or refugee flows (the EC's rationale for adding Pakistan to the list of beneficiaries of the drugs preferences)?⁸⁹ The Appellate Body sought to limit the category of legitimate needs to those which could be addressed by means of trade preferences, but is this really a limitation? As will be shown shortly, one of the implications of the Appellate Body report is that it is appropriate to alleviate a country's difficulties with drug production and trafficking by granting trade preferences to its textiles exports. But if this is the case, might it not equally well be argued that it is appropriate to assist another developing country by granting it preferences in an industry of particular interest to that country?

Another difficulty follows from the Appellate Body's finding that 'paragraph 3(c) [of the Enabling Clause] sets out an obligation for developed-country Members in providing preferential treatment under a GSP scheme to "respond positively" to the "needs of developing countries".'⁹⁰ This might prove problematic, given the Appellate Body's earlier statement in *US – Shrimp* that:

[w]e believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.⁹¹

Does this not mean that if a developed country wishes to maintain a GSP program, it must identify *all* relevant needs of *all* GSP beneficiary countries, and ensure that its trade prefer-

⁸⁸ Ibid, para 172.

⁸⁹ See above at text to n 23.

⁹⁰ WTO Appellate Body Report, *EC – GSP*, para 158.

⁹¹ WTO Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products* ('*US – Shrimp*'), WT/DS58/AB/R, adopted 6 November 1998, para 165.

ences represent an appropriate response to these needs? If so, this could be the death of GSP programs. The only likely way out of this trap is for the Appellate Body to reinterpret paragraph 3(c) as a *right* rather than an *obligation*.

(iii) Application of the test to the EC's drugs regime

On the facts of the case, the Appellate Body did not find it difficult to determine that the EC's special preferences for countries involved in combating drug production and trafficking was discriminatory, and therefore in violation of paragraph 2(a) of the Enabling Clause. To reach this conclusion the Appellate Body did not investigate whether difficulties with drug production and trafficking qualify as a 'development need', nor (if so) whether the trade preferences are an appropriate response. It seemed to assume that this was at least arguable.⁹² Rather, the Appellate Body focused on the fact that the EC only granted its special preferences to a 'closed list' of beneficiaries, without also making these preferences available to all developing countries that might potentially be in the same situation.⁹³ In particular, the Appellate Body criticized the EC's measure for not including any standards or criteria by which it might be determined how beneficiaries of the drugs regime were included in its list.⁹⁴ The Appellate Body also noted that the measure lacked any means of *removing* a country from the closed list of beneficiaries.⁹⁵

This reasoning calls for some comment. First, although the EC's administration of its drugs preferences was entirely lacking in transparency, the Enabling Clause does not actually require transparency in the administration of GSP programs. This is relevant, because a lack of transparency is not necessarily discriminatory. In theory, even a closed list will not discriminate if the donor country has correctly assessed both the individual situation of each GSP beneficiary and the appropriateness of its response to these individual situations. For this reason, it would have been preferable for the Appellate Body to give an example of where the EC had, in fact, discriminated in this case.

F. IMPLICATIONS OF THE APPELLATE BODY REPORT FOR OTHER CONDITIONS IN GSP PROGRAMS

The foregoing has pointed out certain deficiencies in the reasoning – though probably not the result – of the Appellate Body Report in *EC – GSP*. But what does it mean for those other forms of conditionality that continue to survive in the EC and US GSP programs? Of these, the EC's existing additional trade preferences for countries demonstrating compliance with labour standards and standards for the sustainable management of tropical timber stand the best chance of survival. According to the Appellate Body Report, differentiation between developing countries can only be justified on three conditions: when there are legitimate development needs, when the preferences represent an appropriate (and positive) response to these needs, and when the preferences are available to all countries with those needs. It is arguable that developing countries have the 'objective' development needs of improving labour standards and encouraging the sustainable management of timber resources, and that the granting of trade preferences to goods produced according to these standards is an appropriate means of responding to these needs. On paper, the EC's GSP program is administered fairly, with sophisticated administrative, investigation and monitoring procedures. As for the

⁹² WTO Appellate Body Report, *EC – GSP*, paras 180.

⁹³ *Ibid*, paras 181-2, 187.

⁹⁴ *Ibid*, paras 183, 188.

⁹⁵ *Ibid*, paras 183, 184.

EC's proposals for additional preferences in its new GSP program, subject to a sufficiently generous understanding of 'development' needs, the same conclusions apply.

On the other hand, the provisions on 'negative' conditionality in the EC and US GSP programs now present a problem. If differentiation between developing countries is only permissible on the basis of a 'positive response' to development needs, this means that differentiation is permitted only when tariff preferences are *granted* to achieve an objective, not when they are *withdrawn* to achieve an objective. It might be possible to argue that the relevant development needs are those of the countries that are continuing to benefit from the preferences. However, the difficulty with this argument is that the country from which preferences have been withdrawn will no doubt share these development needs. Any failure to grant the same preferences will therefore be discriminatory.

Structurally, then, the main effect of the Appellate Body Report in *EC – GSP* will probably be a move from negative conditionality to positive conditionality, and a corresponding reduction in the reasons that can justify a differentiation between developing countries. But what this means for those countries from which GSP preferences are presently withdrawn, such as Myanmar, remains to be seen.

Annex

Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries

Decision of 28 November 1979 (L/4903)

Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES *decide* as follows:

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries⁹⁶, without according such treatment to other contracting parties.
2. The provisions of paragraph 1 apply to the following:⁹⁷
 - (a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,⁹⁸
 - (b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;

⁹⁶The words "developing countries" as used in this text are to be understood to refer also to developing territories.

⁹⁷It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.

⁹⁸As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

(c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another;

(d) Special treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

3. Any differential and more favourable treatment provided under this clause:

(a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;

(b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;

(c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:⁹⁹

(a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;

(b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.

5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs.

6. Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

⁹⁹Nothing in these provisions shall affect the rights of contracting parties under the General Agreement.

7. The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

8. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.

9. The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to meet the development needs of developing countries and the objectives of the General Agreement.

Generalized System Of Preferences

Decision of 25 June 1971 (BISD 18S/24)

The CONTRACTING PARTIES to the General Agreement on Tariffs and Trade,

Recognizing that a principal aim of the CONTRACTING PARTIES is promotion of the trade and export earnings of developing countries for the furtherance of their economic development;

Recognizing further that individual and joint action is essential to further the development of the economies of developing countries;

Recalling that at the Second UNCTAD, unanimous agreement was reached in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries;

Considering that mutually acceptable arrangements have been drawn up in the UNCTAD concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries;

Noting the statement of developed contracting parties that the grant of tariff preferences does not constitute a binding commitment and that they are temporary in nature;

Recognizing fully that the proposed preferential arrangements do not constitute an impediment to the reduction of tariffs on a most-favoured-nation basis,

Decide:

(a) That without prejudice to any other Article of the General Agreement, the provisions of Article I shall be waived for a period of ten years to the extent necessary to permit developed contracting parties, subject to the procedures set out hereunder, to accord preferential tariff treatment to products originating in developing countries and territories with a view to extending to such countries and territories generally the preferential tariff treatment referred to in the Preamble to this Decision, without according such treatment to like products of other contracting parties

Provided that any such preferential tariff arrangements shall be designed to facilitate trade from developing countries and territories and not to raise barriers to the trade of other contracting parties;

(b) That they will, without duplicating the work of other international organizations, keep under review the operation of this Decision and decide, before its expiry and in the light of the considerations outlined in the Preamble, whether the Decision should be renewed and if so, what its terms should be;

(c) That any contracting party which introduces a preferential tariff arrangement under the terms of the present Decision or later modifies such arrangement, shall notify the CONTRACTING PARTIES and furnish them with all useful information relating to the actions taken pursuant to the present Decision;

(d) That such contracting party shall afford adequate opportunity for consultations at the request of any other contracting party which considers that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the preferential arrangement;

(e) That any contracting party which considers that the arrangement or its later extension is not consistent with the present Decision or that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the arrangement or its subsequent extension and that consultations have proved unsatisfactory, may bring the matter before the CONTRACTING PARTIES which will examine it promptly and will formulate any recommendations that they judge appropriate.