

**Institutional Choice in the General System of Preferences Case:
Who Decides the Conditions for Trade Preferences?
The Law and Politics of Rights**

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Abstract: The WTO case EC-Conditions for the Granting of Tariff Preferences to Developing Countries involved a challenge by India of special tariff preferences granted by the European Community (EC) to twelve developing countries in order “to combat drug production and trafficking” (the Drug Arrangements), resulting in decisions of a judicial panel and the Appellate Body of the World Trade Organization (WTO). After providing background to the dispute and examining key ambiguities in the legal texts, we focus on three aspects of the interpretive context that are of broader concern and which have not previously been developed: first, the normative framing and how that frame may elide the larger historical and political contexts of colonialism and asymmetric power in international economic relations (sections II and III); second, the institutional choices faced by the WTO judicial decision-makers when deciding over conditions for preferences, and the implications of these choices for participation in political, judicial and market decision-making (sections IV and V); and third, the potential shaping of judicial interpretation in response to commentary from an interpretive legal community that comes predominately from North America and Europe (section VI). However hyper-technical and brilliantly legalistic our reasoning may be, our interpretation of the ambiguities of the relevant legal texts will inevitably be affected by our backgrounds and normative approaches. Our backgrounds and normative inclinations affect the framing and understanding of a case in which a WTO judicial body exercises significant power.

The WTO case *EC-Conditions for the Granting of Tariff Preferences to Developing Countries* involved a challenge by India of special tariff preferences granted by the European Community (EC) to twelve developing countries in order “to combat drug production and trafficking” (the Drug Arrangements), resulting in decisions of a judicial panel and the Appellate Body of the World Trade Organization (WTO).³ Under

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³ European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries - Report of the Panel, WT/DS246/R (Panel Report); and Appellate Body Report, European Communities - Conditions for the granting of tariff preferences to developing countries, WT/DS246/AB/R, 7 April 2004 (AB Report).

the Drug Arrangements, the EC granted preferential tariff rates to Pakistan and eleven other countries over and above the EC's normal preference system for developing countries, the "Generalized System of Preferences" (GSP). The case has significant implications for all conditional grants of trade preferences, including those conditioned on human rights and intellectual property and investment protection. The decision likewise informs multilateral negotiations over "special and differential" treatment in the Doha negotiating round regarding the definition of beneficiaries and the content of preferences.⁴ Much of the academic analysis of this case, however, remains rather a-historic and de-contextualized. This article highlights some of the historical, political, sociological, and institutional contexts in which India's GSP claims have been interpreted.

After providing background to the dispute and examining key ambiguities in the legal texts, we focus on three aspects of the interpretive context that are of broader concern and which, in our view, have not previously been developed: first, the normative framing and how that frame may elide the larger historical and political contexts of colonialism and asymmetric power in international economic relations (sections II and III); second, the institutional choices faced by the WTO judicial decision-makers when deciding over conditions for preferences, and the implications of these choices for participation in political, judicial and market decision-making (sections IV and V); and third, the potential shaping of judicial interpretation in response to commentary from an interpretive legal community that comes predominately from North America and Europe (section VI). However hyper-technical and brilliantly legalistic our reasoning may be, our interpretation of the ambiguities of the relevant legal texts will inevitably be affected by our backgrounds and normative approaches. Our backgrounds and normative inclinations affect the framing and understanding of a case in which a WTO judicial body exercises significant power.

The GSP system is arguably not that important for overall imports into the United States and Europe. It is reported that "only 1.3 percent of U.S. imports in 1999 entered duty-free under the GSP,"⁵ and only 3.1 percent of EC imports entered duty-free under the GSP in 1997.⁶ However, the GSP system remains important for many developing country sectors and it has been politically important in US and European relations with developing countries, where it has been heavily used, in particular, by promoters of enhanced intellectual property and labor rights. Moreover, the GSP case illustrates the centrality of institutional choice in the WTO judiciary's handling of the linkage between WTO trade provisions and other policies. Those wholly familiar with the legal texts, the

⁴ Discussion of Gregory Shaffer with an ambassador to the WTO from a European country, July 2004.

⁵ See 'Generalized System of Preferences: Handbook on the Scheme of the United States.' UNCTAD/ITCD/TSB/MISC.58/ (2000), at 4 (hereafter Handbook on US Scheme). This is in part due to the number of "free trade agreements" and special trade preferences (such as the under the Caribbean Basin Initiative and Andean Trade Preferences Act) that the US has negotiated and that cover more products.

⁶ See Juan C. Sanchez Arnau, *The Generalised System of Preferences and the World Trade Organization* (2002), at 237. He also cites a figure of 1.71 percent of total imports into the US in 1998 and an average figure of 2.80 percent of total imports into the five most important providers of GSP benefits—the US, EC, Japan, Canada, and Switzerland. This amount had reduced to 2.7% for the EC in 2003, although GSP imports (duty-free and at a reduced duty) constituted about 5.7% of total imports into the EC that year. E-mail from Hannu Pitänen of the European Commission, April 20, 2005.

US and European preference systems, and the WTO judicial decisions may wish to skip or skim the next section that we provide as background.

I. Factual and Legal Background to the Dispute

A. GATT Article I, the Enabling Clause, and the US and EC Preference Programs.⁷ The GSP case involved an interpretation of the GATT “Enabling Clause” and its relation to Article I of the General Agreement on Tariffs and Trade (GATT), the cornerstone of the international trading system. GATT Article I.1 provides that, “with respect to customs duties and charges,” as well as other tax and regulatory matters, “any advantage, favour, privilege or immunity granted by any contracting party to any product... shall be accorded immediately and unconditionally to the like product originating in... the territories of all other contracting parties.” Simply stated, a WTO member is not to discriminate among the products of other WTO members.

In the 1960s and 1970s, however, developing countries demanded that their exports receive generalized preferential treatment so as to advance their economic prospects. They attempted to collectively exercise their voice in international economic relations through the “Group of 77” to promote the creation of a “new international economic order.”⁸ In particular, they pushed for the establishment of the UN Conference on Trade and Development (UNCTAD) in 1964 as an alternative or counterpart to GATT that would focus on development priorities. They also pressed for modifications to the GATT itself, with Part IV of the GATT, entitled “Trade and Development,” being added in 1965. After long negotiations, UNCTAD set up a Special Committee on Preferences in 1968 which worked in parallel with the OECD Trade Committee in which the United States, EC members and other developed countries negotiated. In October 1970, both the UNCTAD Special Committee and the UNCTAD Trade and Development Board adopted “Agreed Conclusions” on the establishment of a “Generalized System of Preferences,” with the approval of the OECD countries, pursuant to which developed countries would apply lower tariff rates on goods imported from developing countries.⁹

Such preferential tariff treatment, however, could only be applied were GATT Article I amended or a waiver granted. In response to these demands, GATT members agreed in June 1971 to a ten-year waiver.¹⁰ The waiver’s time limits were removed when

⁷ For an excellent background to the dispute, see Llorand Bartels, “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,” in Thomas Cottier & Joost Pauwelyn, *Trade and Human Rights* (forthcoming 2005).

⁸ The Group of 77 was established in June 1964 by a group of seventy-seven developing nations.

⁹ See UNCTAD, Doc. TD/B/AC.5/36. (containing the text of the Agreed Conclusions) and UNCTAD, Doc. TD/B/330 (containing the approval by the Trade and Development Board). See also discussion in Sanchez Arnau, *The GSP*, supra note..., at 89-92, noting the “Agreed Conclusions of the Special Committee on Preferences” adopted in October 1970 by the Trade and Development Board of UNCTAD as Decision 75 (IV) at its Fourth Extraordinary Period of Sessions. For a general overview of the background to the GSP, see Abdulqawi Yusuf, *Legal Aspects of Trade Preferences fro Developing States: A Study in the Influence of Development Needs on the evolution of International Law* (1982); and Juan C. Sanchez Arnau, *The Generalised System of Preferences and the World Trade Organization* (2002).

¹⁰ GATT Document, *Generalized System of Preferences* (‘GSP Decision’), Decision of 25 June 1971, BISD 18S/24 (reproduced in Annex). The waiver provided: “[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

the GATT parties adopted the November 1979 GATT Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, commonly known as the “Enabling Clause,” which remains in effect today.¹¹ At the time of the WTO’s creation in 1995, the Enabling Clause was formally made part of GATT 1994, which consists of the original agreement as amended over time, together with a list of other related instruments, including all decisions on waivers still in force. (For the relevant text of the Enabling Clause, see the Annex at the end of this article).

A few provisions of the Enabling Clause were the subject of contestation in the GSP case, including a footnote of the Enabling Clause which makes reference to the 1971 waiver which, in turn, refers to the UNCTAD Agreed Conclusions. Paragraph 1 of the Enabling Clause states that the contracting parties “may accord differential and more favorable treatment to developing countries.” Paragraph 2(a) specifies that they may do so “in accordance with the Generalized System of Preferences.” Footnote 3 to paragraph 2(a) provides that by the term GSP, the parties refer to the system “as described in the Decision of the Contracting Parties of 25 June 1971, relating to the establishment of ‘generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries’” (emphasis added). The preamble to the 1971 waiver, in turn, notes 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.”

Since the United States, EC and other developed countries would not agree to a multilaterally coordinated GSP program, the GSP was implemented by individual GATT members following the June 1971 GATT waiver. From the start, preference-granting countries included conditions based on the competitiveness of the developing countries’ products.¹² These conditions replicated the situation in “imperial preference” schemes that predated the GATT.¹³ Countries often limited preferences to a quota of products that they would periodically revise. They also retained the ability to withdraw preferences where the developing country reached a “competitive level” in a given product sector or to graduate that country entirely from the program once it reached a certain level of development. They often provided for an “escape-clause type” mechanism to protect a domestic industry from injury where GSP imports caused or threatened to cause it.

Over time, however, preference-granting countries tied the grant of preferences to other conditions, including human rights ones. The United States, the last developed country to provide a preference program,¹⁴ packed its program with conditions over time.

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 ...”

¹¹ GATT Document, Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (“Enabling Clause”), Decision of 28 November 1979, L/4903.

¹² For information on the key GSP programs offered, see UNCTAD’s web site on GSP, at <http://www.unctad.org/Templates/Page.asp?intItemID=1418&lang=1>.

¹³ The imperial preference programs that preceded the GSP contained “competitiveness” limitations that could be modified by the grantors at the grantor’s will. As a result, as Benham notes, although ordinarily “Great Britain followed her usual practice of not discriminating between her various Dominions and Colonies,” she sometimes did “discriminate between the various parts of her Empire.” Frederic Benham, *United Kingdom under Protection* (1941), at 109.

¹⁴ Yusuf, Legal Aspects, *supra* note..., at 127.

The US Congress first approved a GSP program for ten years in the Trade Act of 1974, but it did not come into effect until 1976.¹⁵ When Congress renewed the US program for ten years pursuant to the Trade and Tariff Act of 1984, it delegated to the United States Trade Representative (USTR) the ability to condition the grant of preferences, whether on a country-wide or product-specific basis, on a beneficiary's meeting a series of eligibility requirements, which included a country's intellectual property and labor rights protections.¹⁶ The US system permits any interested US private party to petition for a country's removal, in whole or in part, as a GSP beneficiary, creating a de facto public-private review process.¹⁷ Labor unions and intellectual property trade associations have been the two most active users of these procedures.¹⁸ The USTR subjects countries to annual and special interim reviews to maintain pressure on them.

The EC, in contrast, provided GSP benefits as early 1971, but it did not apply any specific conditions (other than competitiveness ones) until 1998 when it added special incentive arrangements to advance labor, environmental, and anti-drug trafficking goals. Although the EC has included provisions for the withdrawal of trade preferences on labor grounds since 1994, it only applied it once, which was against Myanmar in 1997.¹⁹ As Sanchez Arnau affirms, unlike the US, "the EU has tried to avoid using GSP-linked sanctions."²⁰ By the time of India's WTO complaint in March 2002, the EC's GSP program was based on five separate schemes. A general one benefited all developing

¹⁵ Handbook on US Scheme, supra note...., at 8.

¹⁶ See Handbook on US Scheme, supra note...., at 18. The US program creates mandatory and discretionary criteria for GSP status. Under the mandatory criteria, developing countries are ineligible on the following grounds: communism, membership in an international cartel (such as OPEC), expropriation, failure to enforce arbitral awards (as in investment disputes), provision of sanctuary for terrorists, and violation of "internationally recognized worker rights." Under the discretionary criteria, USTR can take account of such factors as the desire to be a beneficiary, level of economic development, market openness, level of intellectual property protection, trade policy, and implementation of "internationally recognized worker rights." See U.S.C. §§ 2462 (b) and (c), from Title V of the Trade Act of 1974, as amended. In fact, both the mandatory and discretionary criteria offer the USTR a great deal of discretion.

¹⁷ See Gregory Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (2003), at 54-55.

¹⁸ Labor rights issues accounted for 121 out of 192 "country practices" petitions filed with the USTR between 1985-1999. See 'Generalized System of Preferences: Handbook on the Scheme of the United States.' UNCTAD/ITCD/TSB/MISC.58/ (2000), at 20. During this time, Burma, Central African Republic, Chile, Maldives, Mauritania, Paraguay, Sudan and Syria had their benefits temporarily suspended, and Liberia and Nicaragua had their benefits terminated. Violations of intellectual property rights were "the second most common source of complaint" during this period in the form of petitions. Id., at 20.

¹⁹ Under the EC program, the EC can temporarily withdraw preferences on such grounds as slavery, violation of four core labor standards as defined in conventions under the auspices of the International Labour Organization (ILO), prison labor, customs controls on illicit drugs, money laundering, rules of origin fraud, unfair trading practices, and fisheries management pursuant to international conventions. See Article 26 of Council Regulation 2501/2001 (hereinafter referred to as 'the EC Regulation'). On the withdrawal of preferences from Myanmar, see 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. The European Commission was, also investigating Belarus in respect of its violation of the freedom of association and was to report to the EC GSP committee in 2005. See European Commission, Notice of initiation of an investigation of violation of freedom of association in Belarus in view of temporary withdrawal of benefits under the Scheme of Generalised Tariff Preferences (2004/C 40/04), Feb. 14, 2004.

²⁰ Sanchez Arnau, *The GSP*, supra note...., at 270. See also Commission Communication to the Council and Parliament on integration of developing countries in the international trading system. Role of the GSP 1995 2004: COM(94) 212, available at: <http://europa.eu.int/scadplus/leg/en/lvb/r11014.htm>.

countries and was subject to traditional competitiveness and escape clause conditions, as well as a withdrawal procedure based on labor and other criteria. An “everything but arms initiative” exclusively targeted least developed countries. And three specific incentive schemes provided additional tariff preferences to developing countries that applied for them on the basis of meeting defined labor, environmental, and anti-drug trafficking criteria.²¹

For the EC’s labor and environment preference programs, a developing country had to formally request the EC to accord it additional benefits based on its having proven that it met specified EC conditions. A developing country that requested additional preferences on labor grounds had to prove that it had adopted in its national legislation and “effectively applies” the standards set forth in certain conventions under the auspices of the International Labour Organization (ILO)—those covering forced labor, the right to organize and bargain collectively, non-discrimination in respect to employment and occupation, and child labor.²² A developing country applying for additional preferences on environmental grounds had to show that it enacted and “effectively applies” national legislation for the sustainable management of tropical forests in accordance with standards of the International Tropical Timber Organization.²³ In light of the stringency of these criteria, developing countries generally did not even apply for additional preferences. Moldova and Sri Lanka were the only countries that received them, and they did so only under the labor scheme.²⁴

In 1998, the EC also granted special preferences to those that undertook effective programs to combat illicit drug production and trafficking (the Drug Arrangements).²⁵ In this case, however, the country beneficiaries were simply designated upfront by the EC, subject to no defined review criteria. As we will see, the lack of procedural transparency became the primary ground for the Appellate Body’s finding against the EC’s scheme, permitting the Appellate Body to avoid addressing the legality of the substance of this condition. While only Moldova and Sri Lanka received additional preferences under the EC’s labor scheme, twelve countries, including Pakistan, did so under the Drug Arrangements, triggering India’s claim.

Although the GSP was supposed to represent a “generalized” system, preference granters continued to create and operate distinct preferential regimes.²⁶ For example, the

²¹ The EC’s general scheme provides for duty-free treatment for “non-sensitive” products and a reduced tariff for “sensitive” products. The EC GSP Regulation, covering GSP schemes from 1 January 2002 to 31 December 2004 was Council Regulation 2501/2001. For previous regulations see the following: Council Regulations No. 3281/94, No. 1256/96 and Council Regulation (EC) No 2820/98 of 21 December 1998. See also ‘Generalised System of Preferences: Handbook on the Scheme of the European Communities’ UNCTAD/ITCD/TSB/MISC.25/Rev.2 (2002). For the EC’s proposal for a revised GSP scheme to start in April 2005, see *infra* notes....

²² See articles 14020 of the EC Regulation.

²³ See articles 21-24 of the EC Regulation.

²⁴ See Commission Regulation (EC) No 1649/2000 of 25 July 2000 granting the Republic of Moldova the benefit of the special incentive arrangements concerning labour rights OJ 2000 L 189/13; and Commission Regulation (EC) No 2342/2003 of 29 December 2003 granting the Democratic Socialist Republic of Sri Lanka the benefit of the special incentive arrangements for the protection of labour rights.

²⁵ See Article 10 and 25 of the EC Regulation.

²⁶ See e.g., *The Future of the WTO: Addressing institutional challenges in the new millennium*, Report of the Consultative Board to the Director-General Supachai Panitchpakdi 78 (World Trade Organization, 2004), at 21-22 (“Out of a total 300 PTAs [Preferential Trade Agreements] notified to the GATT and the

EC continued to provide special preferential benefits to former European colonies, first under the Yaoundé Convention of 1963 for certain African countries, and then extended to former British colonies around the world when Great Britain joined the EC in 1973. The beneficiaries are collectively known as the African Caribbean and Pacific (ACP) group and they have received special access to the EC market pursuant to the four Lomé Conventions starting in 1975 through the Cotonou Agreement of 2000. The EC received GATT and WTO waivers for the Lomé and Cotonou agreements so that there were no grounds for a GATT or WTO legal complaint. The United States, however, did not seek a waiver when it adopted special preference provisions under the African Growth and Opportunity Act (AGOA) of 2000, so that the US program could be subject to challenge.²⁷

These special preference schemes have also been subject to increasing conditions. The agreement known as Lomé III, which spanned the period 1980-85, included a human rights clause for the first time.²⁸ Lomé IV *bis* (for the period 1995-2000) introduced a political element and the possibility of suspension of benefits if a country breached fundamental principles relating to human rights and the rule of law. The Cotonou Agreement, which currently addresses trade relations between the ACP and the EC, went further in entrenching principles “of human rights, processes of democratisation, consolidation of the rule of law, and good governance” by creating a system of “political dialogue” between the EC and ACP countries.²⁹ Article 96 of the Cotonou Agreement provides that market access benefits may be suspended in serious cases where a country has failed to comply with these core principles and has continued to do so after the political consultations.³⁰

B. India’s WTO Complaint. Although developing countries complained about these conditions, they never legally challenged them until India initiated its GSP claim through a formal request for consultations on March 5, 2002.³¹ In its initial WTO filing, India challenged both the EC’s Drug Arrangements and the EC’s preference schemes conditioned on labor and environmental grounds. On February 28, 2003, India dropped its challenges to all aspects of the EC incentive schemes other than to the Drug

WTO up to October 2004, 176 were notified after January, 1995. Of these, 150 are currently in force, and an additional 70 are estimated to be operational, although not yet notified. By the end of 2007, if PTAS reportedly planned or already under negotiation are concluded, the total number of PTAs enforced might well approach 300”).

²⁷ Certain developing countries have complained and raised concerns about the compatibility of AGOA with the Enabling Clause in the WTO Committee on Trade and Development. See WTO Secretariat, Note of the Meeting of 22 and 23 May 2001, WT/COMTD/M/34, September 26, 2001, p. 2, cited in James Harrison, “GSP Conditionality and Non-Discrimination,” 9:6 *International Trade Law and Regulation* 159, 162 (2003).

²⁸ See the history of the Lome Convention between the EU and the African, Caribbean and Pacific group of states (ACP) at: http://europa.eu.int/comm/development/body/cotonou/lome_history_en.htm :Belgium, France, Italy, Luxembourg Netherlands and West Germany

²⁹ Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States, of the Other Part, June 23, 2000, 2000 O.J. (L 317) 3 [hereinafter Cotonou Agreement], available at: http://www.europarl.eu.int/meetdocs/committees/acp/2003_03_brazzaville/JOL317_EN.pdf (last visited April 17, 2005).. articles 8-13.

³⁰ *Id.*

³¹ See WT/DS246?R (5 March 2002).

Arrangements, apparently because the Drug Arrangements had the greatest negative commercial impact on India and India did not wish to prejudice its claim by raising more politically sensitive trade-labor and trade-environment issues.³² The Drug Arrangements were particularly problematic for India because they provided specific tariff advantages to Pakistani producers, the primary competitor of Indian producers in the region. India estimated that that “its textile trade on account of benefits given by [the] EU to Pakistan [has] suffered a trade diversion to the extent of 250 million Euro annually.”³³

In December 2003, a WTO panel upheld India's complaint against the Drug Arrangements aspect of the EC's GSP program. The panel was noteworthy in that it included one former member of the WTO Appellate Body, Mr Julio Lacarte Muro, the only time that this has occurred. The panel decision also contained a dissenting opinion, constituting only the fifth dissent out of ninety-nine panel decisions.³⁴ The panel majority upheld India's claim that the preferences granted under the EC Drug Arrangements were inconsistent with GATT Article I because they discriminated among developing countries. The panel found that that the preferences violated paragraph 2(a) of the Enabling Clause which calls for the establishment of "non-reciprocal and non-discriminatory preferences," as well as paragraphs 3(a) and 3(c) which require that preferences be designed to "facilitate and promote the trade of developing countries" and "respond positively to the development, financial and trade needs of developing countries." The panel interpreted the word "non-discriminatory" to mean that identical tariff preferences must be provided to all developing countries without differentiation under a GSP scheme, subject only to the competitiveness exceptions.³⁵

³² See *Panel Report, supra note...*, at par. 1.5. On the political economy of these issues, see Gregory Shaffer, “The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO’s Treatment of the Trade and Environment Matters,” 25 *Harvard Environmental Law Review* 1-93 (Winter 2001); and Gregory Shaffer, “WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO’s Future,” special issue on “The Future of the World Trade Organization,” *Fordham International Law Journal* 608-651 (Nov.-Dec. 2000).

³³ “WTO-LD India,” *The Press Trust of India*, Jan. 28, 2003 (on file).

³⁴ This figure is based on a count as of April 19, 2005. The cases were: Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264 (Apr. 13, 2004) (One panelist dissented on the issue of “zeroing,” stating: “I consider that the US interpretation of Article 2.4.2 as not prohibiting zeroing is a permissible one”; thus, the dissenter found that “the application by DOC of ‘zeroing’ in this case was not inconsistent with Article 2.4.2 of the AD Agreement”; in addition, the dissenter stated: “Canada has not established that the application of zeroing in the underlying investigation methodology was inconsistent with the United States’ obligation under Article 2.4 to conduct a ‘fair comparison.’” See paras. 9.1-24); Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R (Dec. 1, 2003) (One panelist dissented in the context of findings on the Enabling Clause and its relationship to GATT Article I:1. See paras. 9.1-21); Panel Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/R (July 3, 2002) (One panelist dissented in the context of the findings on de minimis standards under SCM Agreement Article 21.3. See paras. 10.1-15); Panel Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/R (July 17, 2000) (One panelist expressed the view that the increased bonding requirements constituted import restrictions that violate GATT Article XI, rather than duties or charges subject to GATT Article II. See paras. 6.60-61); Panel Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/R (Mar. 12, 1998) (One Panelist dissented from the majority’s finding of a violation of Agriculture Agreement Article 5.1. See paras. 289-292). I thank Steve Charnovitz for providing me with this information in an email, April 19, 2005.

³⁵ See discussion in *infra* notes 52-53 and accompanying text.

Among the most interesting and controversial aspects of the GSP case is how the panel brought in UNCTAD debates and texts as “preparatory work” for purposes of interpreting the Enabling Clause, and, in particular, the UNCTAD “Agreed Conclusions” as an “agreement relating to the treaty” under Article 32 of the Vienna Convention on the Law of Treaties.³⁶ It did so because the Enabling Clause referred to language in the 1971 waiver which, in turn, referred to the “agreement” in UNCTAD. Given US and European mistrust of UNCTAD as a developing country-dominated organization, these references to UNCTAD were bound to raise some controversy.

The EC appealed the panel's findings, and although the Appellate Body found against the EC, it did so on narrower grounds. In contrast to the panel, the Appellate Body concluded that the reference to “non-discriminatory” preferences in the Enabling Clause did not prohibit developed countries from granting different tariff preferences to products originating from different developing country beneficiaries on grounds other than competitiveness, provided that the differential treatment met conditions set forth in the Enabling Clause for which the Appellate Body provided interpretive guidance. In particular, the Appellate Body found that preference-granting countries must apply the programs in a transparent manner, must tailor them to respond “positively” to “development, financial and trade needs,” and must ensure that identical treatment is available to all “similarly-situated” GSP beneficiaries that share the needs to which the preferential treatment responds.³⁷

Although the Appellate Body’s interpretation permits greater differentiation among developing country beneficiaries, the Appellate Body found the EC’s Drug Arrangements to be inconsistent with the Enabling Clause. The Appellate Body noted, in particular, that the EC Drug Arrangements lacked transparency. According to the Appellate Body, the Drug Arrangements failed to establish any “clear prerequisites” or objective criteria that, if met, would allow for other developing countries similarly affected by the drug problem to be included as beneficiaries.³⁸ The Drug Arrangements did not even provide a mechanism under which additional beneficiaries could petition to be added to the existing list of beneficiaries, nor criteria according to which a beneficiary could be removed when it was no longer affected by the problem. In addition, the Appellate Body was concerned that the EC regulation failed to provide any indication as to how the EC would assess whether the Drug Arrangements constituted an “adequate and proportionate response” to the needs of developing countries suffering from the drug problem.³⁹ EC officials simply had unfettered discretion to implement the Drug Arrangements without any criteria specified whatsoever. The EC, in fact, had included Pakistan for political reasons in response to Pakistan’s cooperation against the Taliban and Al Qaeda following the September 11 terrorist attacks.⁴⁰

³⁶ Par 7.86-7.88. See also Jane Bradley’s comments in *Trade and Human Rights* (edited by Thomas Cottier and Joost Pauwelyn) (forthcoming 2005); and Jane Bradley, in “Internet Roundtable: The Appellate Body’s GSP decision,” 3:2 *World Trade Review* 239-265 (2004), at 253.

³⁷ See discussion in *infra* notes 54, 110-120 and accompanying text.

³⁸ AB Report.,par. 183

³⁹ AB Report.,par. 184

⁴⁰ As stated in an EC press release at the time, “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....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

The Appellate Body's decision has implications for all conditional preference programs, including those of the United States and EC in relation to labor rights, those of the EC in respect of environmental protection, and those of the US in respect of intellectual property and foreign direct investment protection. Although the Appellate Body noted in passing that the EC special incentive arrangements for the protection of environment and labor rights include, in contrast, "detailed provisions setting out the procedure and substantive criteria,"⁴¹ the Appellate Body decision still applies to the way these conditions are implemented in practice. Most importantly, the WTO judicial ruling implicates decision-making in other institutional fora, as we show in section IV.

C. Key Textual Ambiguities that Open Judicial Discretion. One issue on which the WTO panel, the Appellate Body, and most commentators agree is that the texts of the relevant WTO agreements are unclear, and thus ripe for interpretation by lawyers.⁴² The interpretation of these ambiguities thus determines the case's judicial outcome. The ambiguities in this case include, first, whether the Enabling Clause, which begins with the phrase "Notwithstanding the provisions of Article 1," is a limited *exception* to Article 1 of GATT 1994, the most-favored-nations clause, or excludes its application. The WTO judges' interpretation of this phrase and response to this question would determine whether the complainant (India) or the defendant (EC) had the burden of proof, and whether India's claims would be dismissed for failing to make a *prima facie* case. If the Enabling Clause is not an "exception" to Article I,⁴³ then the Enabling Clause would be a self-standing text and India would have the burden of proving that the EC had violated it. If so, and if India failed to claim that the EC had violated the Enabling Clause (rather basing its claim on a violation of GATT Article I), then India's claim would be simply dismissed.

The panel majority, dissent, and Appellate Body each read this phrase differently, with important consequences. The dissenting panel member found that the Enabling Clause was not an "exception," that the Enabling Clause was a self-standing agreement, and that India's claims should be dismissed because India had failed to make a *prima facie* case. The panel majority, in contrast, found that the Enabling Clause was an exception to GATT Article I so that India set forth a *prima facie* case of its violation, shifting the burden of proof to the EC. Under this interpretation, India had appropriately claimed that the EC discriminated against it in violation of Article I by treating India less favorably than Pakistan and the other beneficiaries of the Drug Arrangements. The majority found that "as an exception provision, the Enabling Clause applies concurrently with Article I:1 and takes precedence to the extent of a conflict between the two

specifically tailored to target clothing and textiles accounting for three-quarters of Pakistan's exports to the EU." EU Commission, Briefing on 12 March 2002, available at http://europa.eu.int/comm/110901/memo120302_en.htm (visited April 9, 2005).

⁴¹ AB Report, *supra* note __, par. 182

⁴² See e.g. Gene Grossman & Alan Sykes, "A preference for development: the law and economics of GSP," 4:1 World Trade Review 41, 42, 52 (2005) ("As with most hard cases, it is difficult to say which side was 'right' on a purely legal basis. The case is hard because, as both the panel and the Appellate Body acknowledged, the text of the Enabling Clause is ambiguous").

⁴³ Under this interpretation, the term "notwithstanding" in the Enabling Clause would mean "regardless of the provisions of Article 1 of GATT."

provisions.”⁴⁴ The Appellate Body agreed with the panel majority that the Enabling Clause was an “exception,” but found that the “Enabling Clause is not a typical ‘exception’” so that India had to raise the Enabling Clause in its initial claim in order to put the EC on notice.⁴⁵ The Appellate Body found that India had done so, and thus that India had made a *prima facie* case so that the burden of proof switched to the EC.⁴⁶

Second, the judicial decision-makers needed to interpret the term *non-discriminatory* as used in footnote 3 to paragraph 2(a) of the Enabling Clause quoted above. Advocates in this case argued over whether the term *non-discriminatory* creates an obligation on developed countries or merely constitutes “aspirational” language in a largely “hortatory” document that essentially leaves decision-making discretion to the preference-granting countries. Even if one agrees that the term *non-discriminatory* creates a legal obligation, the judicial bodies had to decide whether “non-discriminatory” has a “neutral” meaning or a “negative” one. If the term has a neutral meaning, then developed countries may not differentiate among developing countries at all, except in respect of certain “competitiveness” criteria. If it has a negative one, then developed countries may differentiate among developing countries on other criteria based on their varying development contexts, provided that the preference-granter does not discriminate against similarly-situated developing countries. The Appellate Body wrote, “both definitions can be considered as reflecting ordinary meanings of the term ‘discriminate.’”⁴⁷ If the latter “negative” definition is chosen, however, then interpreters also need to determine what procedural and substantive conditions apply to ensure that similarly-situated countries are treated equally.

Some have contended that the language in the Enabling Clause is “aspirational,” with the result that preference-granting countries may differentiate among developing countries as they see fit, subject at most to “soft law” normative constraints. As Robert Howse writes, “My own view of state practice is that donor states never accepted that their ability to modify or withdraw GSP preferences would be subject to such a ‘hard’ legal constraint. At most, they considered ‘non-discriminatory’ as an aspirational, soft-law norm.”⁴⁸ Howse contended that, under the “prevalent” and “conventional view,” “the GSP scheme escapes [WTO] dispute settlement... because the language of the Enabling Clause is permissive,” so that the Enabling Clause is “self-policing” by the US and European powers.⁴⁹ The US and EC legal positions in the GSP case, however, were less clear. In their legal submissions, the US and EC adopted a “negative” interpretation of the term discrimination, arguing that preference-granters are entitled to differentiate between developing countries on this interpretive ground. Nonetheless, in oral argument, the US

⁴⁴ Report of the Panel, par 7.45.

⁴⁵ Report of the AB, par. 106.

⁴⁶ Report of the AB, par. 190.

⁴⁷ Report of the AB, par. 152. See also Report of the Panel, par. 7.126.

⁴⁸ See e.g., Robert Howse, “Appellate Body Ruling Saves the GSP, at Least for Now,” 4 *Bridges (ICTSD)* 4 (April 2004).

⁴⁹ Robert Howse, “Reconciling Political Sanctions with Globalization and Free Trade: India’s WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for ‘Political’ Conditionality in US Trade Policy,” 4 *Chicago Journal of International Law* 385, 391 (Fall 2003).

and EC seemed to suggest that the GSP footnote on non-discrimination was not legally binding at all.⁵⁰

The panel majority and Appellate Body's decisions diverged on account of their different interpretations of the term "discriminatory," although they both found the term to be legally binding.⁵¹ The panel majority found that the term has a neutral meaning, so that developed countries are obligated to treat developing countries the same, subject to only competitiveness exceptions and an exception for "least developed countries."⁵² Under the panel's first "a priori" exception, a country may limit preferences granted to a developing country in a product sector up to a set quota. Under the second ex post exception, a preference-granting country may employ an "escape-clause type" mechanism to protect its domestic industry from injury.⁵³ The Appellate Body, in contrast, although it attempted to collapse the two connotations of "discriminatory" into one, basically found that the term had a "negative" connotation. According to the Appellate Body, both definitions "suggest that distinguishing among similarly-situated beneficiaries is discriminatory," a point on which "India and the European Communities effectively appear to agree."⁵⁴ As a result, it found that preference-granting countries may differentiate between developing countries based on different development contexts, but subject to conditions, including those that the Appellate Body found in paragraph 3 of the Enabling Clause.⁵⁵

In short, the GSP case represents a lawyer's paradise of ambiguous legal provisions interpreted by judicial bodies in a case having significant political and institutional implications. Depending on the panel majority, dissent, or Appellate Body interpretations of these provisions, India's claims would be dismissed, upheld with only minimal conditions, or subject to more significant conditions that would have to be subsequently clarified on a case-by-case basis, if indeed any future cases are brought.

II. The Importance of the Normative Framing

Let us start with the normative framing of much of the analysis of the trade and human rights-labor-environment debate, which often presents the issues in terms of a conflict between "free traders" and those who prioritize other "political values," such as those held by "civil society." One of the most brilliant commentators on WTO law, for example, initially framed some of his analysis of the GSP case in terms of "American values." As Howse wrote, "Congress and the President will no longer be able to grant or withdraw GSP treatment on the basis of American policy objectives and American

⁵⁰ The Appellate Body wrote that, in "response to questioning at the oral hearing," the EC maintained that the phrase "generalized, non-reciprocal and non discriminatory" does not impose a legal obligation. AB Report, par. 146. See also discussion in Howse, *id.*, at 403-404 (concerning the US in oral argument).

⁵¹ In Bartels' view, "'the Appellate Body [and the panel] essentially converted the non-binding words of the preamble to the 1971 GSP Decision into binding conditions in the Enabling Clause.'" He finds that the interpretation is "plausible," but certainly "not unambiguous.." Bartels, "The Appellate Body Report," *supra* note.

⁵² Report of the Panel, par. 7.106. The UN Economic and Social Council determines which countries are "least developed" based on per capita income and related development criteria. See UNCTAD, *What are the Least Developed Countries?*, at: <http://r0.unctad.org/lDCs/LDCs/index.html> (last visited April 17, 2005) (listing 49 LDCs).

⁵³ Report of the Panel, par. 7.107-7.108.

⁵⁴ See AB Report, par. 153.

⁵⁵ See *infra* notes 110-120 and accompanying text.

political values, unless those actions can be justified under exception provisions in the WTO Agreements...."⁵⁶ Howse noted that, "If the WTO dispute settlement mechanism significantly constrains the ability to impose conditionality of a 'political' or policy nature on the granting of GSP treatment to developing countries, lawmakers on Capitol Hill may well direct their wrath, once again, at WTO judges."⁵⁷ He warned that such a decision "could well lead to a reconsideration of the basis on which Congress granted the President fast-track authority," and could trigger "a united front of 'civil society' against the Doha Round," so that the WTO judicial body could put the entire trade negotiating round in jeopardy.⁵⁸ Such a conceptualization resonates not only with those who construct a normative frame around "human rights," but also with US economic nationalists and those who must respond to them in a world of unequal economic power.

The normative frame of human rights is a compelling one and it competes with ones focused on trade. To give an example, much of the debate over the treatment of pharmaceutical patents under the TRIPS Agreement is conducted under two competing frames. Is it appropriate to view patent protection as the core rule and measures taken to protect human health, life and dignity as an exception? Or should the protection of the human right to health, life and dignity be viewed as the core and patent protection as a tool available to governments to further the right's protection? Similarly, in the trade-environment debate, is it appropriate to view liberalized trade as the core rule and the protection of the environment as a permitted exception? Or should environmental protection (or perhaps sustainable development) be viewed as the core goal and trade measures, be they measures of liberalization or restriction, as instruments to achieve it? Howse's work has been particularly valuable in clarifying the importance of this framing.⁵⁹

These questions also raise key institutional questions that are implicit in any case decided by the Appellate Body. As one of us wrote regarding the US shrimp-turtle case, the Appellate Body was effectively confronted with an institutional choice of deferring to US decision-making processes, of delegating decision-making to global market processes by issuing an injunction, of weighing the competing concerns itself, or of attempting to spur international harmonization and to constrain national decision-making procedures so that they take better account of affected foreign parties.⁶⁰ Similarly, these institutional

⁵⁶ See Howse, *Reconciling Political Sanctions*, supra note..., at 386.

⁵⁷ *Id.*, at 404.

⁵⁸ See Robert Howse, "Back to Court After Shrimp-Turtle? Almost but not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exceptions to the European Union's Generalized System of Preferences," 18 *American University International Law Review* 1333, 1381 (2003). After the panel decision, Howse nonetheless noted, "I am sympathetic to the result the majority [of the panel] was seeking. It is difficult to admire the behavior of developed countries in reasserting over a period of more than 30 years, the objective that GSP should be non-discriminatory, while shirking from formal legal obligation, and all the while adding new distinctions and conditions to their schemes (albeit while often increasing the margin of preference in favour of developing countries)." See Robert Howse, "The Death of GSP? The panel ruling in the India-EC dispute over preferences for drug enforcement," 1 *Bridges (ICTSD)* 7 (January 2004).

⁵⁹ See e.g. Robert Howse & Donald Regan, "The Product/Process Distinction: An illusory basis for disciplining 'unilateralism' in trade policy," 11 *European Journal of International Law* 249 (2000); and Robert Howse, *The World Trade Organization and the Protection of Worker Rights*, 3 J. SMALL & EMERGING BUS. L. 131 (Summer 1999).

⁶⁰ See Gregory Shaffer, "Power, Governance and the WTO: A Comparative Institutional Approach," in

choices over “who” decides the weighing of conflicting goals apply to the pharmaceutical patent and public health debates, as raised by the global AIDS epidemic.⁶¹

The importance of institutional choice, and the accompanying tradeoffs encompassed by this choice, is again present in the GSP dispute. Just to start, a normative frame based on a dichotomy of trade liberalization goals and “American” and European “values” reflected in preference schemes ignores that others around the world see themselves neither in a “free trade” camp nor an “American value” camp. They rather distrust the language of “American values” because it can camouflage the pursuit of “American interests” in relation to developing countries.

Developing country scholars, activists and officials across the political spectrum are wary of US justifications for trade restrictions and preferences granted on trade, environment, human rights or any other ground. For example, Martin Khor, a prominent developing country critic of the WTO from the NGO Third World Network, has written, “The push by the United States, France, and others in the North for the WTO to consider the relationship between trade and international labor standards and workers’ rights is prompted, not by feelings of goodwill and solidarity with Third World workers, but protectionist motives aimed against competitive imports from the South.”⁶² The Indian environmental activist Vandana Shiva has contended that developed countries have sought to link trade and the environment in the WTO “to serve as a justification for unilateral trade measures.”⁶³ The Indian scholar Bhupinder Chimni writes in response to the WTO shrimp-turtle case, “it brings about a situation whereby the powerful north can use unilateral trade measures to coerce the poor south to accept bilateral or multilateral environmental arrangements, but not accept constraints on itself when it does not suit its interests.”⁶⁴ Brazil’s Worker’s Party government also criticized the Appellate Body decision in the GSP case as legitimizing the use of unilateral measures.⁶⁵ Even transnational labor rights advocates have themselves been “concerned by the narrow trade policy position of many unions,” noting that, at least when the labor conditions were first added to the US GSP scheme, “‘Stop Imports’ and ‘Buy American’ were the most prominent trade calls from the labor movement.”⁶⁶

Power and Global Governance, Michael Barnett and Bud Duvall, eds. (Cambridge University Press, 2005).

⁶¹ See Gregory Shaffer, “Recognizing Public Goods in WTO Dispute Settlement: Who Decides Who Decides?: The Case of TRIPS and Pharmaceutical Patent Protection,” *Journal of International Economic Law* vol. 7:2, 459-482 (2004). Republished in *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Keith Maskus & Jerry Reichman, eds.) (Cambridge University Press 2004).

⁶² Marin Khor, “The World Trade Organization, labour standards and trade protectionism,” *Third World Resurgence* 30-34 (May 1994).

⁶³ Vandana Shiva, *South Concerned over New Issues at WTO*, available at <http://www.sunsonline.org/trade/process/followup/1996/07150096.htm> (remarks from a conference in Malaysia on July 9, 1996 entitled “The WTO: Perspectives from the South”)

⁶⁴ BS Chimni, “WTO and Environment: Legitimation of Unilateral Trade Sanctions,” *Economic and Political Weekly*, at 133, 137-8, Jan. 12, 2002. See also B.S. Chimni, “WTO and Environment: Shrimp-Turtle and EC-Hormone Cases,” *35 Economic and Political Weekly*, 1752 (May 13, 2000).

⁶⁵ See infra note 125 and accompanying text.

⁶⁶ Lance Compa and Jeffrey Vogt, “Labor Rights in the Generalized System of Preferences,” 22 *Comparative Labor Law & Policy Journal* 199, 201 (2001). See also David Trubek and Lance Compa, “Trade Law, Labor and Global Inequality,” in Trina Jones and Paul Carrington, eds., *America’s Second Gilded Age? Perspectives on Law and Class Difference* (forthcoming 2005).

Whether or not these commentators are correct, the normative framing of the issues in the GSP case will benefit from not creating a dichotomy between “free trade” and other “values,” but rather from examining the political economy, institutional implications, and tradeoffs of alternative choices for WTO judicial oversight of US and EC-imposed “conditionality” in the granting of tariff preferences. From a comparative institutional vantage, the key question is: how are affected parties able to participate in each institutional context in comparison with its alternatives?

III. The historical-political background: The colonial heritage of preference programs

Because of the implications of the GSP decision, and the ambiguities of the legal texts, it is appropriate to put them in a larger historical, political and institutional context. Otherwise, commentators who focus on a trade-human rights dichotomy may simply be playing into asymmetries of power in the international system. This section examines the historical context out of which the GSP grew, before we turn to the tradeoffs among the institutional choices faced by WTO dispute settlement panels in this case and any that follow.

When the GATT was signed in 1947, the majority of the members of the current WTO were colonies in one form or the other—around 78 out of a current membership of 148. The colonizing countries granted these territories tariff preferences because the territories were often viewed as extensions of the state itself. The preferences granted were commonly referred to as “imperial preferences.”⁶⁷ The colonizing countries granted them out of a mix of self-interest and other “values.” On the one hand, it was the “white man’s burden” to assist with the development of these “uncivilized” lands, which, because they were “uncivilized,” were not recognized as participants in the making of international law.⁶⁸ As Anthony Anghie recalls about international law at the time, “since the non-European world was not ‘sovereign,’ virtually no legal restrictions were imposed on the actions of European states with respect to non-European peoples.... Lacking sovereignty, non-European peoples exercised no rights recognizable by international law over their own territory.”⁶⁹ Many colonialists nonetheless viewed themselves as on a

⁶⁷ See e.g. Richard Toye, “The Attlee Government, the Imperial Preference System and the Creation of the GATT,” *English Historical Review*, vol 118: 478, pp: 912-939 (Sept. 2003); and Sir Roper Lethbridge, *India and Imperial Preferences* (1907).

⁶⁸ On the traditional concept that public international law is only made by and applies to “civilized states,” see e.g. J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th edition, 1963) 41 (“If then we speak of the ‘law of nations’, we are assuming that ‘society’ of nations exists, and the assumption that the whole of the civilized world constitutes in any real sense a single society or community is one which we are not justified in making without examination”); and T.J. Lawrence, *The Principles of International Law* (7th ed.) (1923, at 1 (“International law may be defined as the rules which determine the conduct of the body of civilized states in their mutual dealings”). See also the seminal US Supreme Court case *The Paquete Habana*, 175 U.S. 677 (1900) (“by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law.... Like all the laws of nations, it rests upon the common consent of civilized communities...., which, when generally accepted, became of universal obligation”).

⁶⁹ Anthony Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law,” 40 *Harvard International Law Journal* 1 (1999). See also Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) (arguing that “international law has always been animated by the ‘civilizing mission’ - the project of governing non-European peoples”).

civilizing “mission,” exemplified by the phrase “white man’s burden,” the title of Rudyard Kipling’s poem of 1889 in which he appealed for the United States to develop the Philippines, a colony that it had just won in the Spanish-American War.⁷⁰

On the other hand, the colonial powers used these territories to advance their own interests in competition with each other. In fact, it was the colonies who first offered preferences to the colonizer, known as the “metropole,” including out of gratitude for protection by the British fleet and access to the British capital market for the financing of investments.⁷¹ Over time, the British Empire began to grant preferences to the “Colonies, Dominions and Protectorates” without necessarily demanding reciprocity in tariff preferences, although if one defines reciprocity broadly, it certainly played its part. For example, the historian Frederic Benham has shown how certain of the United Kingdom’s trade preferences were a way of reciprocating for the assistance that colonies offered to the United Kingdom during World War I.⁷² In short, the preferences were not simply handouts, but part of larger imperial policies.

The reason that we call attention to the colonial heritage is two-fold. First, and most importantly, there are neo-colonial strands in the debate over the “conditionality” of tariff preferences. Most of the laws of former colonies were written by the colonial powers before these countries obtained independence in the 1960s and 1970s.⁷³ Many of these laws remain in force today. The laws were determined by political processes in Western capitals, whether to promote “civilized” values or to promote Western strategic and commercial interests. Similarly, in the GSP schemes applied today by the United States and Europe, it is the political processes within the United States and Europe that have determined, on a case-by-case basis, which conditions to apply, which countries to target, and when to apply these conditions to such countries. The justifications for the conditional grants combine a sense of righteousness in that preferential benefits are provided in the first place, with a moral claim that the goals pursued through conditional grants are for the benefit of developing countries, their constituents, and the world order. In short, the mix of self-interest and other more “altruistic” values is a characteristic that applies equally to the preference programs of the colonial era and to the US and EC GSP schemes today.

⁷⁰ For a recent book that addresses the “mission” of British colonization, see Niall Ferguson, *Empire: The Rise and Demise of the British World Order and the Lessons for Global Power* (2003), 93-136 (and discussing Kipling’s appeal in the “white man’s burden” on pp. 315-316). See Rudyard Kipling, *McClure’s Magazine* 12 (Feb. 1889). Kipling’s poem’s first stanza reads:

*Take up the White Man's burden—
Send forth the best ye breed—
Go bind your sons to exile
To serve your captives' need;
To wait in heavy harness,
On fluttered folk and wild—
Your new-caught, sullen peoples,
Half-devil and half-child*

⁷¹ Frederic Benham, *United Kingdom under Protection* (1941), at 86-117.

⁷² *Id.*

⁷³ According to Oliver and Fage, the general disintegration of the colonial system in Africa was initiated when the British Colony of the Gold Coast became the independent state of Ghana in 1957. Roland Oliver and J.D Fage, *A Short History of Africa* (6th ed. 1996), at 200.

Second, the former imperial preference schemes were the predecessors of GSP schemes today, which the GSP was intended to replace on a “generalized” basis. The imperial preference scheme had initially been written into GATT Article I itself, after contentious negotiations between the US, UK, and France.⁷⁴ In the end, GATT Article I:2 expressly provided that the GATT’s most-favored-nation clause would not apply to preferences between the following countries and territories:

- France and its colonies, including “French West Africa,” “French Equatorial Africa,” “French Somali Coast,” various territories under “French Trusteeship,” and others listed;
- the United Kingdom, its “dependent territories,” including the “dominions of India and Pakistan,” and a long list of commonwealth countries;
- the Benelux countries and “Belgian Congo,” “Ruanda Urundi,” Indonesia, and others; and
- the United States, Cuba, the Philippines and other US “dependent territories.”

As affirmed in a 1984 UN Secretary General report to the General Assembly, “the move towards a GSP was largely motivated by a desire to substitute it for [these] pre-existing... preferences, which helped in preserving the economic ties between many newly independent countries and the former colonial powers, and were thus considered by many as maintaining economic dependence.”⁷⁵ As the WTO panel majority pointed out, the term “generalized” in GSP covered two concepts—first the fact that not just former colonies, but developing countries were to benefit generally from these tariff preferences, and second that these preferences were to apply to a broad (general) scope of products.⁷⁶

Developing countries that benefit from special or conditional preferences not surprisingly support the schemes that profit them. In fact, this division among developing countries characterized the debates over the creation of the GSP in the 1960s and ‘70s, splitting African beneficiaries of European imperial preferences from other developing nations.⁷⁷ In the new GSP case, nine of the twelve designated beneficiaries of the EC’s Drug Arrangements supported the EC as third parties.⁷⁸ As Steve Charnovitz writes, this

⁷⁴ The United States obtained an understanding, however, “that in due time the effect of those preferences would decline.” See Toye, *supra* note... See also Clair Wilcox, *Charter for World Trade* 69-70 (1972); and Kenneth Dam, *The GATT: Law and International Economic Organization* 42 (1970).

⁷⁵ Report of the Secretary-General, *Progressive Development of the Principles and Norms of International Law relating to the New International Economic Order*, Thirty-ninth session of the General Assembly, A/39/504/Add.1 (23 Oct. 1984), at 76.

⁷⁶ Par. 7.175 (the panel found that the term “generalized” refers “to *all* developing countries,” as well as to a “sufficiently broad coverage of products”).

⁷⁷ As Sanchez Arnau writes, “On the one hand, we had the African countries, wary of the GSP affecting preferences obtained through EEC association agreements, and on the other, the Latin American and Asian countries, which expected to share these advantages, or at least they hoped that the GSP would mitigate the diversion of trade caused by these agreements, especially in the tropical products sector. This conflict lasted many years and threatened the unity of the so-called ‘Group of 77.’” See Sanchez Arnau, *the GSP*, *supra* note..., at 90-91. See also Yusuf, *Legal Aspects of Trade Preferences*, *supra* note..., at 21.

⁷⁸ They were the Andean Community (consisting of Bolivia, Colombia, Ecuador, Peru, and Venezuela), Costa Rica, Nicaragua, Pakistan, and Panama. The other three beneficiaries (El Salvador, Guatemala, Honduras) surely supported the EC as well.

“is probably a record for third-party support of the plaintiff.”⁷⁹ The Andean Community, for example, hired the Brussels-based office of Wilmer Cutler & Pickering, which included a former member of the European Commission and the WTO Appellate Body, to support the EC’s tariff scheme by using an argument that seemed to go even further than the EC’s written submissions. The Andean Community emphasized the “aspirational tone” of the GSP texts and argued that the panel “mischaracterized” texts as binding or reflecting “unanimous agreement.”⁸⁰

Yet one needs to differentiate how developing countries act when in a bilateral relationship with the United States and EC, and how they act in their collective interest. Developing countries often can be played off each other through bilateral bargaining because of the importance of the US and EC markets to their products. The Andean Community and the other beneficiaries of the EC’s Drug Arrangements supported the EC because it was in their individual competitive interest against other developing countries to receive the preferences. Similarly, Pakistani textile makers are in competition with textile producers from India in the EC market, so that when Pakistan suddenly received lower tariff rates under the EC’s Drug Arrangements following the September 11 terrorist attacks, then Pakistan of course supported the EC position. Ordinarily, however, Pakistan and India are known for taking similar positions in the WTO, often coordinating in various developing country negotiating groups in opposition to positions advanced by the United States and EC. Surely these same developing countries would not favor preferential benefits if their industries were prejudiced because they were excluded from the EC scheme on some other EC-determined condition.

The issue of intellectual property protection exemplifies the different stances that developing countries take when they act collectively, compared to when they negotiate bilaterally with a great power. Collectively, developing countries have pressed for interpretations of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) that grant them considerable “flexibility.” Notwithstanding these positions, however, developing countries have individually negotiated free trade agreements with the United States that include obligations that go beyond those set forth in the TRIPS Agreement, known as “TRIPS plus” requirements.⁸¹ When these countries negotiate bilaterally with the US and EC, not only are they in a weaker bargaining position, they are in competition with each other for access to the most valuable markets in the world.⁸²

⁷⁹ See Steve Charnovitz and others, “Internet Roundtable: The Appellate Body’s GSP decision,” 3:2 *World Trade Review* 239 (2004).

⁸⁰ See AB Report, par. 59, citing Andean Community’s third participant’s submission, pars. 50, 55, 56. Similarly, Panama maintained “that ‘non-discrimination’ does not mean equal treatment.” AB Report, par. 67.

⁸¹ See Carlos Correa, “Bilateralism in intellectual property: defeating the WTO system for access to medicines,” 36 *Case Western Journal of International Law* ... (2005) (“The USA seems to have strategically opted for bilateralism as the main route to support US industry in its relentless campaign to increase the levels of IP protection world wide”); Peter Drahos, *Securing the Future of Intellectual Property: Intellectual Property Owners and their Nodally Coordinated Enforcement Pyramid*, 36 *Case Western Journal of International Law* __ (2005).

⁸² See e.g. Peter Drahos, “When the Weak Bargain with the Strong: Negotiations in the World Trade Organization,” 8 *International Negotiation* 79-109 (2003). For a theoretical analysis, see Lloyd Gruber, *Ruling the World: Power Politics and the Rise of Supranational Institutions* (2000).

In short, while the initial purpose of the GSP was to create a general system to advance the interests of developing countries as a whole, the proliferation of specialized preference regimes with unilaterally-determined conditions has placed developing countries in a less-advantageous negotiating situation.

IV. Institutional Choices Faced by the WTO Judiciary

In interpreting the Enabling Clause, the WTO judicial bodies implicitly had to make institutional choices as to who should decide the conditions for the grant of tariff preferences.⁸³ In general terms, the choices for the judicial bodies were:

- (i) to defer to the United States and EC by finding that the Enabling Clause was permissive of whatever conditions that they might apply, in which case the setting and application of conditions would be determined wholly by a *US or EC political process*, potentially subject to certain “soft law” normative constraints;
- (ii) to limit conditions to the competitiveness exceptions accepted by the panel, in which case any additional conditions would have to be accepted through a *multilateral political process*, whether through a waiver by at least a three-quarters vote of the WTO’s membership, an amendment of the Enabling Clause, or otherwise; or
- (iii) to clarify guidelines for conditional preferences set forth in the Enabling Clause itself and to oversee their application on a case-by-case basis whenever a claim is brought before them, in which case the *WTO judicial processes* could play a more central role.

There are of course many variants of these institutional choices. Yet all of these variants will be based on showing greater or lesser deference to the political process of the preference-provider, requiring greater or lesser reliance on multilateral agreements, and reserving a greater or lesser role for the Appellate Body as a function of the open-endedness of the created guidelines. Alternatives (i) and (ii) would create relatively bright line rules, although involving different institutional allocations of authority, while alternative three would rely on more open-ended standards that would generate more case-by-case, factually contextualized jurisprudence. The Appellate Body chose the third option, creating general guidelines and then applying them to a particular factual context to find against the EC’s Drug Arrangements. The panel chose the second one, creating more of a bright line rule that would provide greater clarity but show less deference to the preference-providing government.

The advantages of the first “self-policing” option is that the WTO would show greater deference to national decision-making based on national values and interests (in this case, those of its most politically important and influential members, the United States and EC). Such broad deference would ensure that there would no litigation because a largely “aspirational” Enabling Clause would be found to lie outside the scope of judicial review. The determination of conditions would be a political question left for developing countries to work out with the United States and Europe. Given the relative bargaining power of the parties, and the collective action challenges faced by developing

⁸³ The analytics in this section benefits from the seminal work on comparative institutional analysis of Neil Komesar, such as *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (1995); and *Law’s Limits: The Rule of Law and the Supply and Demand of Rights* (2002).

countries, this first choice (of deference to the preference-provider) would mean that the United States and EC would retain significant discretion to do what they want.

One might find this alternative (i) to be suspect procedurally. However, before one rejects it, one should compare it with alternative institutional choices. Advocates of unilaterally-determined conditional preferences, for example, rightfully point out flaws in multilateral decision-making processes, such as those of the United Nations, the International Labor Organization, the World Intellectual Property Organization, and the WTO itself. They thus press the United States and EC to act unilaterally, whether it be in overturning the government of Saddam Hussein in Iraq, or with respect to the use of carrots and sticks to affect environmental, labor, intellectual property and other conditions in developing countries.⁸⁴ Lance Compa and Jeffrey Vogt, two advocates of transnational labor rights, for example, conclude that, “on balance, the GSP workers’ rights clause [in the US program] has been an important instrument in international labor affairs that has yielded concrete positive results for workers in many instances. Flaws in the law and its application should inspire further efforts to improve it, not to abandon it.”⁸⁵ Advocates of conditional preferences maintain that any “development package” should be comprehensive enough to address social and environmental issues. In fact, they likely take this position as regards the trading system generally.

The obvious (but not necessarily trumping) disadvantage of this first institutional alternative is that developing countries are seriously affected by US and EC decisions without having much input into the decision-making process. As Sanchez Arnau writes regarding the history of the GSP, “The donor countries very rarely took the voice of those who should be heard most into consideration.”⁸⁶ Although US and European application of GSP benefits may be rightfully justified on the basis of “values” or the “special needs” of certain developing countries, the fact remains that it is a US and EC political process that makes the determinations. In practice, this process will be subject to considerable biases. For example, the United States withdrew GSP benefits in the 1980s on labor protection grounds from Nicaragua (governed by the Sandinistas) and not from El Salvador or Guatemala, actions that appeared targeted to advance the Reagan administration’s foreign policy goals rather than labor protection.⁸⁷ As the human rights scholar Philip Alston has written, “the form in which the [labor] standards are stated [in U.S. trade laws] is so bald and inadequate as to have the effect of providing a *carte blanche* to the relevant U.S. government agencies, thereby enabling them to opt for

⁸⁴ On environmental conditions, see e.g. Daniel Bodansky, “What’s So Bad about Unilateral Actions to Protect the Environment,” 11 *European Journal of International Law* 339 (2000) (maintaining that the choice might be “between unilateralism or inaction,” not “multilateralism”). On labor conditions, see e.g. Lance Compa and Jeffrey Vogt, “Labor Rights in the Generalized System of Preferences,” 22 *Comparative Labor Law & Policy Journal* 199 (2001). In respect of US foreign security policy, see e.g. Robert Kagan, *Of Paradise and Power: American and Europe in the New World Order* (2003).

⁸⁵ Compa and Vogt, *Labor Rights and Trade*, supra note..., at 200. The also contend, “In sum, a modest amendment in a little-known U.S. trade program promoted by a small group of idealistic reformers helped build a broad movement for workers’ rights in the global trading system.” *Id.*, at 208.

⁸⁶ He maintains, “[t]his lack of effective (or ‘tout court’) participation, of the beneficiary countries has, from the beginning, been a serious limitation to the scope of the GSP.” Sanchez Arnau, *The GSP*, supra note..., at 202.

⁸⁷ See e.g. Harrison, *GSP Conditionality*, supra note..., at 163. For other examples of the operation of US policy biases, see Compa and Vogt, *Labor Rights and Trade*, supra note....

whatever standards they choose to set in a given situation.”⁸⁸ Similarly, the EC granted preferential benefits to Pakistan under the Drug Arrangements just after the September 11, 2001 terrorist attacks. The EC’s decision appeared to be aimed at obtaining Pakistan’s assistance against the Taliban in Afghanistan more than at the special development context faced by Pakistan on account of trafficking in illicit drugs.⁸⁹ Likewise, following the September 11 attacks, the United States reinstated GSP benefits for Pakistan that had been suspended on labor rights grounds in 1997, which “many observers believe... would not have occurred without Pakistan’s strong support for the American military campaign.”⁹⁰ Even before the EC extended the Drug Arrangements’ benefits to Pakistan, they became important to a powerful internal EC political constituency, the Spanish fishing industry, which used the Andean country preferences to gain an advantage over Asian competitors.⁹¹

Commentators, whether they address labor, environment, or intellectual property goals, often focus on the *ends* of GSP conditions, and pay less attention to the *means* by which they are deployed. Even if one agrees with the normative goals reflected in the condition, the processes by which they are implemented involve little input from affected developing country constituencies. For example, the Pharmaceutical Research and Manufacturers of America (PhRMA) may maintain that U.S. pressure on developing countries to enhance pharmaceutical patent protection, despite these countries’ protests benefits them, including economically, in terms of governance, and in terms of healthcare.⁹² Yet these countries and their constituencies’ priorities are not represented in the US decision-making process. After all, US representatives are elected to represent US constituencies, not foreign ones.

Peter Drahos, Susan Sell and others have shown how US industry has used GSP as a “carrot and stick” to globalize the industry’s intellectual property goals.⁹³ When the

⁸⁸ Philip Alston, “Labor Rights Provisions in U.S. Trade Law: ‘Aggressive Unilateralism?’,” 15 *Human Rights Quarterly* 1, 7-8 (1993).

⁸⁹ See EC press release cited in *supra* note 40.

⁹⁰ Compa and Vogt, *Labor Regulation and Trade*, *supra* note..., at 231. In response to Pakistan’s cooperation following the Sept. 11, 2001 attacks, the Bush administration decided to “restore Pakistan’s Generalized System of Preferences benefits that were suspended in 1997,” and “expand market access for Pakistani textiles.” See Diana Gregg, Administration to Restore GSP Benefits to Pakistan; Seeks More Access for Textiles,” 18:43 *International Trade Reporter (BNA)* 1739 (Nov. 1, 2001); and “Both U.S. And Pakistani Textile Groups ‘Disappointed’ with Final Trade Package,” 19:8 *International Trade Reporter (BNA)* 319 (Feb. 21, 2002) (noting increases in quotas for Pakistani textiles).

⁹¹ See Margaret A. Young, “WTO Undercurrents at the Court of Justice,” *European Law Review* (forthcoming) (noting how Spain challenged EC reductions to tariffs on canned tuna applied to Thailand and the Philippines by arguing that such treatment undermined the EC’s existing preferential tariff arrangements. The Spanish tuna fleet had invested in Latin American canneries and had strong commercial interests in retaining preference margins under the Drug Arrangements aspect of the GSP)). *Id.*

⁹² See e.g., Harvey Bale, “Patent Protection and Pharmaceutical Innovation,” 29 *N.Y.U. Journal of International Law and Policy* 95, 100 (1997). Bale is Director General of the Geneva-based International Federation of Pharmaceutical Manufacturers Associations. He was previously Senior Vice President and head of the international division of PhRMA..

⁹³ See Peter Drahos, *Information Feudalism: Who Owns the Knowledge Economy* 86 (2002); Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (2003) and *Power and Ideas: North-South Politics of Intellectual Property and Antitrust* (1998); and Michael Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* (Brookings Institution Press: 1998).

US congressional representatives moved to eliminate the US GSP program in 1993, industry lobbyists pressed them to retain it, not out of altruistic motives, but because it could be used “against developing countries where necessary.”⁹⁴ As a result, GSP conditionality was used as “a key lever” to press recalcitrant developing countries to agree to the inclusion of the TRIPS Agreement into the new WTO system in 1995.⁹⁵ Even following the TRIPS Agreement, intellectual property industries in the United States have continued to pressure the United States Trade Representative to withdraw preferential tariff benefits from Brazil, Costa Rica, the Dominican Republic, Guatemala, Honduras, Pakistan, Panama, Paraguay, Peru, Thailand, Turkey, Uruguay, and so on.⁹⁶ In March 2005, the International Intellectual Property Alliance (IIPA) again entered its requests under the USTR’s rating system for developing country protection of intellectual property rights,⁹⁷ recommending that the USTR designate Pakistan, the Russian Federation, and Ukraine as “Priority Foreign Countries,” list fifteen countries on the USTR’s “Priority Watch List,”⁹⁸ and nineteen others on the “Watch List.”⁹⁹ As UNCTAD notes, the US has employed the GSP as a “substitute form of enforcement authority.”¹⁰⁰ Through the GSP process, the US does not need to limit itself to WTO-defined intellectual property requirements and avoids having to refer intellectual property matters to the WTO dispute settlement system. Rather, the mere threat of withdrawal of GSP benefits presses countries to comply with US demands.

Another flaw with open-ended GSP schemes is that they undermine the certainty of WTO trading rules for developing country traders in their most important foreign markets. The United States, for example, decides on the allocation of GSP benefits at least annually. The government calls for petitions from US private parties as to whether the beneficiary complies with US conditions, and private parties have systematized their responses in a highly effective manner.¹⁰¹ Sometimes the grant of preferences is for a shorter period in order to jack up pressure on the target. For example, in July 2004,

⁹⁴ Peter Drahos, *Information Feudalism: Who Owns the Knowledge Economy* 86-90 (2002).

⁹⁵ See Drahos, *Information Feudalism*, supra note..., at 87. See also John Braithwaite and Peter Drahos, *Global Business Regulation* 62 (2000).

⁹⁶ See International Intellectual Property Alliance (IIPA), GSP, at <http://www.iipa.com/gsp.html>. For a 2005 petition to the USTR from the IIPA, see http://www.iipa.com/special301_TOCs/2005_SPEC301_TOC.html.

⁹⁷ See International Intellectual Property Alliance, “2005 Special 301 Report on Global Copyright Protection and Enforcement,” available at: http://www.iipa.com/special301_TOCs/2005_SPEC301_TOC.html (March 22, 2005).

⁹⁸ *Ibid.* Ukraine is currently listed as a Priority Foreign Country by the USTR. The fifteen countries recommended for the Priority Watch List were Argentina, Brazil, Bulgaria, Chile, Colombia, Dominican Republic, Egypt, India, Indonesia, Kuwait, Lebanon, People’s Republic of China, Philippines, South Korea, and Thailand.

⁹⁹ *Ibid.* Those countries recommended for the Watch List were Bolivia, “C.I.S.” (the Commonwealth of Independent States, including Belarus, Kazakhstan, Tajikistan, Turkmenistan, and Uzbekistan), Ecuador, Hungary, Israel, Italy, Latvia, Lithuania, Malaysia, Mexico, New Zealand, Peru, Poland, Romania, Saudi Arabia, Serbia & Montenegro, Taiwan, Turkey, and Venezuela.

¹⁰⁰ See ‘Generalized System of Preferences: Handbook on the Scheme of the United States.’ UNCTAD/ITCD/TSB/MISC.58/ (2000), at 18.

¹⁰¹ See generally, Gregory Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (2003), at 54, 55. For a particular example, see Rosella Brevetti, “USTR Accepts Petitions Challenging Eligibility of Several Countries for GSP,” 20:36 *International Trade Reporter (BNA)* 1501 (Sept. 11, 2003) (noting intellectual property and worker rights petitions).

“Brazil’s GSP status was renewed for three months rather than the customary year.”¹⁰² Brazil commissioned and submitted to US officials a special report on efforts and strategies against “piracy” in Brazil in order “to help convince US officials not to withdraw Brazil’s GSP eligibility.” In the report, a special commission suggested that Brazil make “changes in its legislation that recognise piracy as a crime,” and it recommended “the creation of a Council to Combat Piracy.” It is estimated that “loss of GSP status could cost [Brazil] over US\$ 2 billion in exports annually.”¹⁰³ In addition to these annual reviews, the US GSP scheme must be periodically renewed by Congress, which Congress has failed to do in time on five occasions, so that the program completely elapsed from several days to over a year.¹⁰⁴ In addition, as the Consultative Board to the WTO Director General noted in its January 2005 report, “insecurity has been introduced through alterations in local content requirements within increasingly complex rules of origin.”¹⁰⁵ These product and conditionality reviews, quota allocations, and rules-of-origin processes create considerable uncertainty for local and multinational companies as regards short and long-term investment decisions in developing countries.¹⁰⁶ The impact of this uncertainty on the value of GSP benefits has been well-documented.¹⁰⁷

A second institutional alternative would be to find that no conditions for preferences are permissible other than the competitiveness conditions specified by the panel majority. What would be the institutional implications of such a decision? There are at least three possibilities. The US and EC could eliminate the conditions, in which

¹⁰² See International Centre on Trade and Sustainable Development, *Bridges Weekly Trade News Digest*, vol 8, no. 32, “Brazil submits piracy report to USTR to Retain GSP status” (Sept. 29, 2004). See also “U.S. to Review Brazilian IPR Report, No Deadline for GSP Decision,” *Inside U.S. Trade*, vol 22: 40, 1 (Oct. 1, 2004) (noting that the US had launched “a 90-day investigation... to explore past and future Brazilian initiatives and work with Brazilian authorities to ‘determine what should be our next steps,’” quoting Deputy US Trade Representative Peter Allgeier).

¹⁰³ *Id.*

¹⁰⁴ Organization for Economic Cooperation and Development (OECD), *Assessment of Utilization and Motive for Under-Utilization of Preferences in Selected Least Developed Countries*, 2004. See also *Handbook on US Scheme*, at 21 (noting expirations in 1993, 1994, 1996, 1997 and 1999).

¹⁰⁵ See *The Future of the WTO: Addressing institutional challenges in the new millennium*, Report of the Consultative Board to the Director-General Supachai Panitchpakdi 78 (World Trade Organization, 2004) (noting how the US raised local content requirements for GSP eligibility in one sector under the Caribbean Basin Initiative from 35% to 70% after corporations invested in Jamaica and Costa Rica).

¹⁰⁶ Sanchez Arnau writes in terms of GSP schemes generally, “[t]he main uncertainty is produced by the periodic revision of the methods used to calculate the tariff quotas; as well as the revisions, often annual, of lists of products included or excluded from the preferential treatment; and the increasing tendency to introduce new criteria to determine the terms under which the status of beneficiary is granted to each country.” Sanchez Arnau, *The GSP*, *supra* note..., at 200. He also notes the problem of handling the complexity of so many disparate and changing schemes. *Id.*, at 279.

¹⁰⁷ See e.g., Stefano Inama, “Trade Preferences and the WTO negotiations on market access: Battling for compensation of erosion of GSP, ACP and other trade preferences or assessing and improving their utilization and value by addressing rules of origin and graduation?” UNCTAD, July 2003 (“Trade data show that these trade preferences are largely under utilized”). Some analysts conclude that developing countries would be better off were the GSP program simply scrapped. See for example, Çağlar Özden and Eric Reinhardt, *The Perversity of Preferences: The Generalized System of Preferences and Developing Country Trade Policies, 1976–2000*, World Bank, Working Paper no: 2955, January 13, 2003; and Grossman & Sykes, “A preference,” *supra* note..., at 60-63. Compare C. Stevens and J. Kennan, *Comparative Study of G8 Preferential Access Schemes for Africa, Report on a DFID-commissioned study*, Institute of Development Studies, April 2004.

case, advocates of labor and environmental conditions, in particular, would have to seek other means to advance their goals, whether through international negotiations, “soft law” codes of conduct, market-oriented “social labeling,” organized boycotts, pressures on brand name companies through media campaigns, or otherwise. Alternatively, the United States and EC could entirely eliminate the GSP program if they may not legally impose such conditions. Or finally, in response to such a decision, the United States and EC could threaten to eliminate the program, thereby pressing countries to negotiate over the conditions that could be applied. These negotiations would be conducted under the shadow of the possibility that the US or EC might simply close down their preference programs, and the risk to the US and EC of a further WTO legal challenge were they to do so.

There would likely be strong pressures for political negotiations at the multilateral level before preference programs were simply withdrawn. Domestic constituencies that desire these programs and conditions would also pressure the executive and legislative branches not to withdraw them. It thus seems doubtful that the US and EC would simply eliminate all preferences or all preferential conditions in their GSP schemes, although these possibilities cannot be discarded. The United States and EC nonetheless might use the threat of withdrawal as leverage in negotiations over the details of accepted GSP schemes or, alternatively, of other development assistance programs.¹⁰⁸ Although they would exercise considerable leverage, they would be pressed to negotiate the substantive and procedural rules for GSP conditions with countries affected by their application, including the definitions of labor, sustainable development, and any other criteria at stake.¹⁰⁹

Under a third institutional alternative, the WTO judicial bodies can construct a framework for examining “legitimate” conditions that may be used in GSP schemes, and can apply that framework to disputes over preferential conditions on a case-by-case basis. The Appellate Body devised its framework from paragraph 3 of the Enabling Clause. According to the Appellate Body, “paragraph 3(c) does not authorize *any* kind of response to *any* claimed need of developing countries,” but envisages only responses that “are limited to ‘development, financial and trade needs’” and that have a “sufficient nexus” to “the likelihood of alleviating” these needs.¹¹⁰ Reminiscent of its decision in the shrimp-turtle case,¹¹¹ the Appellate Body took a more pragmatic, procedural approach. It noted that “we agree with the European Communities that paragraph 3(c) of the Enabling Clause should ‘be interpreted in a manner which, while preserving its relevance, is both workable for developed countries and consistent with the requirements that the

¹⁰⁸ Jeffrey Sachs, for example, recommends that development assistance replace tariff preferences. See Sachs, *Millennium Project Report* (UN 2005), at 217 and 220.

¹⁰⁹ For example, the labor conditions could be limited to “core labor rights” as defined by the International Labor Organization, as under the EC’s scheme. See e.g., ILO Declaration on Declaration on Fundamental Principles and Rights at Work, adopted on June 18, 1998, available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm>. See also Kimberly Ann Elliott, *Getting Beyond No...! Promoting Worker Rights and Trade*, in *THE WTO AFTER SEATTLE* 187, 193-94 (ed. Jeffrey Schott) (2000).

¹¹⁰ AB Report, pars. 163-164. The Appellate Body largely agreed with the EC’s argument that distinctions between developing countries are allowed if they pursue an “objective which is legitimate in the light of the objectives of the Enabling Clause” and represent a “reasonable” and “proportionate” means of achieving that objective.” See Report of the AB par. 27, citing EC appellant’s submission, par. 125.

¹¹¹ See Shaffer, “Power, Governance, and the WTO, *supra* note ____, at 153-155.

preferences be *non-discriminatory*.”¹¹² This approach retains flexibility, so that if multilateral agreement fails, or if a multilateral agreement contains so many loopholes that it is rendered largely meaningless, preference conditions may still be determined and applied unilaterally. The approach provides both a framework under which preference-granting countries must justify differential treatment of developing countries, and retains the check of international judicial review.

The Appellate Body did not leave preference-granting countries free to condition preferences at will. In fact, its conditions appear fairly tough. First, in line with its earlier jurisprudence in the US shrimp-turtle case, it held that the EC’s Drug Arrangements were in violation of the Enabling Clause on *procedural grounds* because the EC failed to prove “that the preferences granted under the Drug Arrangements are available to all GSP beneficiaries that are similarly affected by the drug problem.”¹¹³ It faulted the EC’s “Drug Arrangements because they provide no mechanism under which additional beneficiaries may be added to the list of beneficiaries,” because they do not “set out any clear prerequisites—or ‘objective criteria’—that if met, would allow for other countries ‘that are similarly affected by the drug problem’ to be included as beneficiaries,” and because they do not give any “indication as to how the beneficiaries... were chosen or what kind of considerations would or could be used to determine the effect of the ‘drug problem’ on a particular country.”¹¹⁴

In addition, the Appellate Body left open the possibility that the EC had failed to comply with a number of *substantive requirements* set forth in paragraphs 3(a) and 3(c) of the Enabling Clause, which could be the subject of future litigation were a developing country to bring such a case. Most importantly, it left open the question whether the Drug Arrangements “are consistent with the obligation contained in paragraph 3(c) to ‘respond positively to the development, financial, and trade needs of developing countries.’”¹¹⁵ In the Appellate Body’s words:

“This suggests that the response... must be taken with a view to *improving* the development, financial or trade situation of a beneficiary country, based on the particular need at issue... [A] sufficient nexus should exist between, on the one hand, the preferential treatment provided under the respective measure authorized by paragraph 2, and, on the other hand, the likelihood of alleviating the relevant ‘development, financial [or] trade need’. In 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” (emphasis in original).¹¹⁶

The Appellate Body affirmed that a positive response does not need to cover all countries “collectively,” so that some differentiation is permitted.¹¹⁷ However, under

¹¹² AB Report, footnote 330, citing EC appellant’s submission, par. 138.

¹¹³ AB Report, par. 180.

¹¹⁴ AB Report, pars. 183-184.

¹¹⁵ AB Report, par. 179.

¹¹⁶ AB Report par. 164

¹¹⁷ AB Report, par 158.

paragraph 3(a), the preference regime should not “raise barriers to or create undue difficulties for the trade of other members.”¹¹⁸ The Appellate Body also noted that the conditional preferences must be “generalized” and “non-reciprocal,” and that these issues had not been raised in this case.¹¹⁹ Finally, as regards the identifications of development, financial and trade needs, the Appellate Body attempted to promote multilateralism by pointing out that an “objective standard” could be determined in reference to a multilateral agreement adopted through another international organization.¹²⁰

The Appellate Body decision should raise questions about the US GSP system in particular, which is based on the removal of trade preferences instead of responding “positively” to development and trade needs. As Steve Charnovitz writes,

“In the US GSP, a failure to afford internationally recognized worker rights can disqualify a country from receiving GSP. In the EC GSP, countries that meet certain international environmental standards can receive *additional* GSP benefits. The Appellate Body’s decision can be read as seeing a distinction between a condition that denies tariff preferences and a condition that enhances them. Thus, carrying this logic forward, if both the EC and US GSP conditions noted above were challenged, the EC provision would face a lower hurdle than the US provision” (emphasis in original).¹²¹

One might question, for example, whether the intellectual property protection conditions contained in the US GSP scheme are designed to “respond positively to the development, financial, and trade needs of developing countries.” One could also argue that there is a strong “reciprocity” notion in the US GSP scheme, which states, to give one example, that beneficiaries must provide the US with “equitable and reasonable access to the markets and basic commodity resources” of the beneficiary.¹²² Moreover, especially now that the TRIPS Agreement is included in the WTO system, it may be more difficult to argue that the US intellectual property conditions do not constitute a form of “reciprocity,” one that is “trade-related” but non-tariff-based. Finally, the Appellate Body expressly noted that its decision concerns a scheme where “additional preferences” are granted on account of a development need. It found that the Enabling Clause allows “the possibility of additional preferences for developing countries with particular needs, provided that such additional preferences are not inconsistent with other provisions of the Enabling Clause.”¹²³ It thus implicitly left open whether the US GSP program, under which all or some preferences may be withdrawn, is consistent with a development aim.

A key challenge with this third institutional alternative, however, is whether the WTO judicial system can actually police GSP schemes under such a framework. First,

¹¹⁸ AB Report, par. 179.

¹¹⁹ AB Report par. 169.

¹²⁰ AB Report, par 163.

¹²¹ See Steven Charnovitz in “Internet Roundtable: The Appellate Body’s GSP decision,” 3:2 *World Trade Review* 239, 240 (2004).

¹²² See GSP, 19 U.S.C. § 2462 ©(4).

¹²³ See e.g. AB Report par. 169.

EC and US lawyers could devise procedural schemes pursuant to which the EC and US can meet pre-determined policy goals while going through the Appellate Body-required procedural hoops. The former EC Director-General and counsel to the Andean Community thus concluded, “While the Appellate Body found fault with the specifics of the regime at issue in the case, all it will take is a bit of tinkering for the European Union to bring its programme into line.”¹²⁴ For that reason, Brazil joined India in its criticism of the ruling, stating, “What the Appellate Body did, in a nutshell, might be construed, if taken without qualifications, as legitimizing the GSP as a tool of foreign policy of developed countries.”¹²⁵

Second, depending on the stringency of the WTO’s case-by-case oversight, the US and EC could create so many conditions that they might be able to shift benefits between developing countries as they desire, while either meeting the Appellate Body criteria or forestalling litigation because of a combination of high litigation’s costs, constrained litigation benefits, and political leverage that the US and EC wield. As the panel warned, “If the Panel were to uphold the European Communities’ [and now the Appellate Body’s] interpretation, the way would be open for the setting up of an unlimited number of special preferences favouring different selected developing countries,” whether the special development needs “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.”¹²⁶ The panel majority felt that, in such case, were the WTO judicial process actually to police such conditions, it “would be faced with having to decide what constitutes ‘objective criteria’ justifying the selective inclusion of only certain development needs, to the exclusion of others,”¹²⁷ a situation where the judicial body’s legitimacy to make such determinations could be challenged.

Third, it is costly to litigate a WTO case. Although India is one of the largest developing countries and is thus one of the more frequent developing country users of WTO dispute settlement, most developing countries do not have the resources or incentives to litigate, in particular because of the system’s constrained remedies and their concerns over political repercussions.¹²⁸ The Appellate Body’s ruling, compared to the panel’s, creates less certainty, thus reducing the incentive for a developing country (or its commercial constituent) to pay for lawyers and assume the political risk to defend its interests in the first place.

¹²⁴ Claus-Dieter Ehlermann and Natalie McNelis, “Tariff preferences scheme will be brought into line,” *Financial Times*, at 12 (April 15, 2004).

¹²⁵ Daniel Pruzin, “India Slams WTO Appellate Body Ruling on EU GSP Benefits; U.S. Welcomes Reversal,” 21:18 *International Trade Reporter (BNA)* 739, 740 (April 29, 2004).

¹²⁶ Panel Report, par. 7.102-7.103. The panel states, “Without explicit provision, agreed multilaterally, for other bases for differentiation among developing countries, the Panel does not think it can be assumed that Members intended to permit such differentiation.” Par. 7.104.

¹²⁷ Panel Report, par. 7.100.

¹²⁸ For an examination of the resource challenges for developing countries to use an increasingly complex WTO legal system, see Gregory Shaffer, “The Challenges of WTO Law: Developing Country Strategies for Adaptation,” *World Trade Review* (forthcoming); and Gregory Shaffer, “How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies” (*ICTSD monograph*, Geneva) 1-65 (March 2003), available at http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf.

V. The EC's Response to the Appellate Body Ruling

The immediate test of the institutional impact of the Appellate Body decision lies in how the EC and others respond to it. The WTO Dispute Settlement Body granted the EC until July 1, 2005 to comply with the decision,¹²⁹ by which time the EC planned to implement a new preference regime that complies with the ruling based on a “broader concept of sustainable development and governance.”¹³⁰ Would the EC comply with the judgment? If the EC complied, would it do so in a manner that would commercially prejudice India, perhaps in retaliation for India having brought the claim, calling into question the efficacy of developing country use of the WTO legal system?

On October 20, 2004, the EC adopted a proposal setting out the details for a revised GSP scheme for the period 2005-2008.¹³¹ The EC reduced its five GSP categories to three by modifying the general GSP scheme, retaining the Everything But Arms program for least developed countries, and replacing the three special incentive schemes for environmental protection, labor protection and the Drug Arrangements with a new “GSP Plus” scheme. This new incentive scheme targets smaller and more “vulnerable” developing countries (and thus not larger countries such as India), and conditions the grant of greater preferences on their adopting and implementing a broad spectrum of international conventions covering human rights, sustainable development, traffic in illicit drugs, and governance principles.¹³² Following the December 26, 2004 tsunami tragedy in Southeast Asia, the EC moved to reduce tariff rates for products of interest, such as textiles, in order to assist those countries hit hardest by the disaster.¹³³ The new scheme was finalized on June 23, 2005, and will be implemented in full on January 1, 2006, with the new GSP Plus scheme applying from July 1, 2005.¹³⁴

It is unclear whether India will actually benefit from the revised program. On the one hand, it appears that India could lose out under the revised schemes, which aim to provide greater GSP benefits to smaller developing countries. First, the new GSP Plus

¹²⁹ See Arbitration under Article 21.3c of the DSU, *EC-Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/14 (Sept. 20, 2004).

¹³⁰ European Commission, “Developing countries: Commission unveils system of trade preferences for next ten years – simple, transparent and objective,” July 7, 2004 available at: http://europa.eu.int/comm/trade/issues/global/gsp/pr070704_en.htm.

¹³¹ Proposal for a Council Regulation applying a scheme of generalised tariff preferences (presented by the Commission), COM(2004) 699 final (Oct. 20, 2004).

¹³² See “Proposal for a COUNCIL REGULATION applying a scheme of generalised tariff preferences for the period from 1 January 2006 to 31 December 2008 (presented by the Commission)” which was followed by the final proposal, “COM(2004) 461 final”, issued in October 2004 and available at <http://europa.eu.int>. The Commission defines “poor diversification and dependence” of vulnerable countries as meaning that the five largest sections of the country’s GSP-covered imports to the EC must represent more than 75% of its total GSP-covered imports. See European Commission, “GSP: The new EU preferential terms of trade for developing countries,” MEMO/05/43, Brussels, February 10, 2005.

¹³³ See Communication from the Commission, concerning amendment of the Commission’s proposal for a Council Regulation applying a scheme of generalized tariff preferences for the period 1 July 2005 to 31 December 2008, COM(2005) 43 final, (Feb. 10, 2005), available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005_0043en01.pdf; and European Commission, “European Commission accelerates preferential trade measures to benefit tsunami-hit countries,” IP/05/160, available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/160&format=HTML&aged=0&language=EN&guiLanguage=en>. (Feb. 10, 2005).

¹³⁴ “EU Adopts New GSP Scheme,” Bridges Weekly Trade News Digest, vol. 9:23 (29 June 2005).

scheme excludes India's exports because it only applies to countries that comprise less than 1% of EC imports under the general GSP scheme, among other conditions.¹³⁵ In addition, the revised general GSP scheme contains lower product graduation criteria. Under these criteria, a country's products can no longer benefit from preferential treatment at all when they exceed 15% of total GSP imports into the EC of that category of product over the previous three years. This threshold is reduced to 12.5% for textile products. Since India's share of GSP in textiles is a bit over 11%, it will continue to benefit in the near term, although a slight increase in market share could trigger graduation.¹³⁶ It is reported that outgoing EC Trade Commissioner Pascal Lamy said that he doubted the need for preferences for textile exports from China and India to the EC, suggesting that India would not benefit from having brought the complaint.¹³⁷ Oxfam thus "criticized the scheme for discriminating against larger-but-still poor developing countries like India."¹³⁸

On the other hand, the Drug Arrangements have been eliminated so that Pakistan, India's major rival in the textile sector along with China, will be placed in an equivalent legal situation so long as neither India nor Pakistan exceed the import threshold (or so long as they both do). Pakistan likewise will be unable to benefit from the alternative GSP Plus scheme because its exports to the EC exceed 1% of total EC imports under the GSP. In fact, few countries may meet the GSP Plus criteria because they require a country to ratify and effectively implement sixteen core conventions on human and labor rights and seven out of eleven of the conventions listed relating to good governance and the protection of the environment.¹³⁹ Moreover, as part of the EC's tsunami relief

¹³⁵ GSP: the new EU preferential terms, supra note...

¹³⁶ Malcolm Subhan, "Will the new GSP lay an April Fool joke on India?," *The Financial Express*, February 19, 2005, available at: http://www.financialexpress.com/fe_full_story.php?content_id=82998.

¹³⁷ See EUbusiness.com, "EU Commission unveils revamp of trade preferences," 7 July 2004; and WTO Reporter, "EC to Revamp to GSP Program to Aid Developing Countries," 8 July 2004.

¹³⁸ "EU Moves on GSP," 2-3 *Bridges* (Feb.-March 2005), at 19.

¹³⁹ Beneficiary countries must immediately ratify and effectively implement (if they have not already done so) sixteen listed conventions on human and labor rights and seven out of eleven of a list of conventions addressing good governance and the protection of the environment. All 27 conventions must be ratified by the beneficiary countries by December 31, 2008. The list of 27 conventions is as follows: International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child, Convention on the Prevention and Punishment of the Crime of Genocide; Minimum Age for Admission to Employment; Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor; Abolition of Forced Labor Convention; Forced Compulsory Labor Convention; Equal Remuneration of Men and Women Workers for Work of Equal Value Convention; Discrimination in Respect of Employment and Occupation Convention; Freedom of Association and Protection of the Right to Organize Convention; Application of the Principles of the Right to Organize and to Bargain Collectively Convention; International Convention on the Suppression and Punishment of the Crime of Apartheid; Montreal Protocol on Substances that deplete the Ozone Layer; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; Stockholm Convention on Persistent Organic Pollutants; Convention on International Trade in Endangered Species (CITES); Convention on Biological Diversity; Cartagena Protocol on Biosafety; Kyoto Protocol to the UN Framework Convention on Climate Change; UN Single Convention on Narcotic Drugs (1961); UN Convention on Psychotropic Substances (1971); UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988); UN Convention Against Corruption. See generally Bridges Weekly, "EU presents overhaul of GSP scheme," available at <http://www.ictsd.org/weekly/04-10-27/story5.htm>

package, India is to benefit from a reduced tariff rate for textiles of 9.5% compared to an MFN rate of 12% so that India has expressed some satisfaction with the EC's revised program.¹⁴⁰

VI. Conclusion: The Impact of Interpretive Legal Communities on WTO Judicial Decisions; the Potential Impact of the AB Ruling

We conclude this article with two final points. First, we note how legal commentators can play a significant role in framing debates that may influence WTO judges. This framing of interpretive choices of WTO texts can have significant impact in terms of the institutional choices made by WTO judicial bodies, and, in this way, affect people around the world.¹⁴¹ Second, we address the psychological impact of Appellate Body decisions on developing country use of the dispute settlement system. We point out that although developing country leaders may have valid grounds to criticize the Appellate Body ruling, the decision also offers opportunities for developing countries to constrain great power manipulation of the preference system.

The discourse regarding the interpretation of the Enabling Clause in the GSP case was dominated by an interpretive community of predominantly North American and European scholars publishing in the major trade law journals that are read by WTO judicial decision-makers. The discourse inevitably reflects and privileges certain backgrounds and normative priorities. To give two examples from the GSP case, one leading North American scholar admirably published three articles on the GSP case before the Appellate Body rendered its decision and at least two additional contributions after the decision.¹⁴² Within a few months of the decision's publication, the *World Trade Review* published a special issue on the case in July 2004. All six of the commentators were either from North America or the United Kingdom, and five of the six taught at US law schools.¹⁴³

While we applaud this intellectual engagement, it can tend to privilege certain perspectives over others. Academics at US law schools (and, to a lesser extent, European ones) are paid more and have more time from teaching obligations to dedicate to

¹⁴⁰ See GSP: The new EU preferential terms of trade for developing countries, MEMO/05/43 (Feb. 10, 2005); and Malcolm Subhan, "New GSP scheme may open more gates for India," *The Financial Express* (Feb. 19, 2005), available at http://www.financialexpress.com/fe_full_story.php?content_id=82998.

¹⁴¹ On the power of interpretive communities, see e.g., Ian Johnstone, "The power of interpretive communities," in Michael Barnett and Raymond Duvall, eds., *Power in Global Governance* 185 (2005); and Emanuel Adler and Steven Bernstein, "Knowledge in power: the epistemic construction of global governance," in Michael Barnett and Raymond Duvall, eds., *Power in Global Governance* 294 (2005).

¹⁴² See Robert Howse, "Back to Court After Shrimp-Turtle? Almost but not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exceptions to the European Union's Generalized System of Preferences," 18 *American University International Law Review* 1333 (2003); Robert Howse, "Reconciling Political Sanctions with Globalization and Free Trade: India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for 'Political' Conditionality in US Trade Policy," 4 *Chicago Journal of International Law* 385 (Fall 2003); and Robert Howse, "The Death of GSP? The panel ruling in the India-EC dispute over preferences for drug enforcement," 1 *Bridges (ICTSD)* 7 (January 2004); Robert Howse, "Appellate Body Ruling Saves the GSP, at Least for Now," 4 *Bridges (ICTSD)* 4 (April 2004); and Internet Roundtable, *supra* note....

¹⁴³ See Steve Charnovitz, Lorand Bartels, Robert Howse (roundtable organizer), Jane Bradley, Joost Pauwelyn, Donald Regan, "Internet Roundtable: The Appellate Body's GSP decision," 3:2 *World Trade Review* 239-265 (2004).

scholarship than any other academics in the world. They can publish law review articles in anticipation of WTO legal claims and while WTO legal claims are being heard. Legal academics in developing countries, including in Brazil and India, typically need to teach significantly more hours of classes and to work in private law practice on the side in order to earn a living. Many of them write in a first language other than English. As a result, it is more difficult for them to exercise the same influence in shaping interpretive understandings of WTO legal texts from their perspectives and priorities. Even if WTO judges do not formally accept *amicus curiae* briefs, they read legal articles out of intellectual curiosity, a sense of commitment to get their decisions right, and self-interest in writing opinions that withstand larger public scrutiny. A preponderance of articles from one interpretive vantage can shape their reading of the texts.

This “social fact” exists and there will always be constraints in addressing it. Nonetheless, we should not ignore it. Rather, we should continue to support mechanisms that ensure greater inclusion of developing country voices in WTO interpretive debates. To give an example, the International Centre on Trade and Sustainable Development (ICTSD) in Geneva actively solicits (and provides a venue for) developing country-oriented contributions to WTO debates.¹⁴⁴ In addition, through the conferences that we fund, we can facilitate greater inclusion of, and networking with, developing country representatives, commentators, and scholars. Finally, as academics, we can be reflective of the proclivities that we bring to the interpretation of WTO legal texts. In particular, we can think hard about the institutional implications of WTO legal decisions in terms of how these decisions facilitate or obstruct the ability of affected parties to voice their concerns in decision-making processes that affect them, including their ability to be heard in the WTO legal process itself. In this spirit, this article has attempted to advance a comparative institutional analytic approach to assessing the tradeoffs among institutional choices as to who decides the conditions for trade preferences.

Secondly and relatedly, the psychological impact of Appellate Body decisions is extremely important for countries that are less likely to engage the system in light of resource and political constraints. The Appellate Body decision in the cotton and sugar subsidy cases gave countries such as Brazil increased confidence in the system. The decision made the front pages of Brazilian papers, spurring the interest of Brazilian trading sectors in the Doha round negotiations and the potential of the WTO legal system.¹⁴⁵ The Appellate Body decision in the GSP case, in contrast, generated dejection, cynicism and political criticism by leading developing countries such as Brazil and India. Developing countries are generally concerned about manipulation of preferences to their detriment and are thus wary of challenging the US and EC system before the WTO.¹⁴⁶ India was bold to do so. The complex Appellate Body decision, by requiring further litigation to challenge US and EC strategic use of preferences on a time-consuming case-by-case basis raises the costs of participation, undermining incentives of poorer countries to use the system. Brazil and India maintained that, in fact, the Appellate Body had once

¹⁴⁴ See e.g., ICTSD’s new web site on WTO dispute settlement, at <http://www.ictsd.org/issarea/dsu/index.htm>.

¹⁴⁵ Confirmed in discussions with Brazilian officials, private lawyers and scholars in Sao Paulo, Brazil, May 15-17, 2005.

¹⁴⁶ This point was repeatedly raised in interviews conducted with over twenty developing country missions in Geneva in July 2005.

more implicitly authorized US and European use of trade as a political lever to advance US and European strategic and policy priorities.

There may be grounds for criticism of the Appellate Body decision. Yet this reading of the decision can be disempowering for developing countries. The Appellate Body ruling was actually quite tough in the criteria that it prescribed. In our view, the US preference conditions, and in particular the intellectual property conditions, would *not* survive scrutiny under the Appellate Body ruling if they are challenged in a new WTO case. We understand that Brazil, in fact, had prepared a legal analysis of its options when the US threatened to withdraw GSP benefits from it in 2004 on intellectual property grounds.¹⁴⁷ The GSP decision provided Brazil with at least some leverage in its bilateral negotiations with the US that Brazil otherwise would not have had. The Appellate Body decision and the relatively tough criteria that it prescribed offer opportunities for developing countries, provided that they understand the ruling's implications for bilateral bargaining and provided that they are able to follow through and initiate a new GSP case to discipline great power strategic use of preference allocations. This, however, may be easier said than done.

¹⁴⁷ Shaffer discussion with a Brazilian official, Sao Paulo, Brazil, May 15, 2005.

Annex

Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (paragraphs 1-3 only)

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 countries¹⁴⁸, without according such treatment to other contracting parties.
2. The provisions of paragraph 1 apply to the following:¹⁴⁹
 - (a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,¹⁵⁰
 - (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;
 - (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.

¹⁴⁸The words “developing countries” as used in this text are to be understood to refer also to developing territories.

¹⁴⁹It 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.

¹⁵⁰As 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).