

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
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I. INTRODUCTION¹

The use of trade sanctions for broad foreign policy purposes has been a matter of longstanding controversy in the United States. Apart from questioning the effectiveness of such sanctions, and pointing out that they may have innocent victims (such as workers in oppressive regimes whose jobs are dependent on export opportunities), free traders often claim that sanctions violate the rules of the World Trade Organization ("WTO").

In fact, the General Agreement on Tariffs and Trade ("GATT"), the centerpiece of the WTO as far as trade in goods is concerned, does not put free trade above other political values and contains exceptions for trade measures "necessary" for the protection of public morals and for national security purposes. It is thus a matter of debate how much, or how little, leeway the WTO affords to politically-motivated trade sanctions.

* Professor of Law, University of Michigan. In writing this paper I have benefited greatly from comments by Lorand Bartels, Nathaniel Berman, Deborah Cass, Claus Ehlermann, Kevin Gray, Gary Horlick, the late Robert Hudec, Petros Mavroidis, Joost Pauwelyn, Dan Tarullo, Richard Tarasofsky, and Chantal Thomas. Dr. Bartels' own work on this dispute is now published in the *Journal of International Economic Law*, and those who read it will see how general is my debt to him, even though my analysis goes in quite different directions. See Lorand Bartels, *The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program*, 6 J Intl Econ L 507 (2003).

¹ Some parts of this paper draw substantially on a much longer and different manuscript that considers aspects of the original much broader Indian claim; the longer manuscript will be published as Robert Howse, *Back to Court after Shrimp/Turtle: India's Challenge to Labor and Environmental Linkages in the EC Generalized System of Preferences*, in Eyal Bevenisti and Moshe Hirsch, eds, *The Impact of International Law on International Cooperation* (Cambridge forthcoming 2003).

While political sanctions that withdraw trade concessions to which the US is legally bound under WTO rules have been divisive, the conditioning of Generalized System of Preferences (“GSP”) on criteria that are argued to be political has been much less controversial. These preferences are voluntarily granted to developing countries to assist their economic development and not bound as legal commitments in the WTO. As Lance Compa and Jeffrey Vogt explain, “[t]he GSP is a centerpiece of U.S. trade policy, providing preferential duty-free entry for more than 4,650 products from approximately 140 designated beneficiary countries and territories.”²

From the outset, countries with a Communist system of government have been denied access to GSP treatment. In addition, US GSP status may not be granted or may be withdrawn if a country fails to take steps to afford certain core labor rights or if it harbors terrorists.³ In the wake of the attacks on September 11, 2001, the 2002 Trade Bill extended the anti-terrorism criteria so as to deny GSP preferences to any country that “has not taken steps to support the efforts of the United States to combat terrorism.”⁴

But around the same time that Congress was strengthening the anti-terrorism conditions in the GSP, India brought a case to the WTO dispute settlement mechanism that will challenge the very possibility that any such conditions on GSP are legal within the WTO system.⁵ The case, which is against the European Community (“EC”), originally attacked conditions relating to the environment, labor rights, and drug enforcement. The case is now limited to the issue of drug enforcement conditions, which, if met, would lead the EC to grant preferences at a higher rate than the EC normally grants to developing countries. But India’s argument is sweeping, and if it wins this case, the consequences for the United States will be clearly serious: Congress and the President will no longer be able to grant or withdraw GSP treatment on the basis of American policy objectives and American political values, unless those actions can be justified under exception provisions in the WTO Agreements (such as the exception for public morals and for national security in GATT). GSP conditions

² Lance Compa and Jeffrey S. Vogt, *Labor Regulation and Trade: Labor Rights in the Generalized System of Preferences: A 20-Year Review*, 22 Comp Labor L & Poly J 199, 201 (2001).

³ Office of the United States Trade Representative, Executive Office of the President, *U.S. Generalized System of Preferences Guidebook* 23–24 (1999), available online at <<http://www.ustr.gov/reports/gsp/index.html>> (visited Oct 9, 2003).

⁴ Trade Act of 2002, § 4102(a), Pub L No 107-210, 116 Stat 933, codified at 19 USCA § 2462(b)(2)(F) (West Supp 2003).

⁵ World Trade Organization, Request for the Establishment of a Panel by India, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc No WT/DS246/4 (Dec 9, 2002), available online at <<http://docsonline.wto.org/DDFDocuments/t/WT/DS/246-4.doc>> (visited Oct 6, 2003). Earlier, Thailand and several other countries requested consultations on the EC measures but have not yet filed requests for a panel.

will be subject to similar concerns about WTO legality—or illegality—as trade sanctions that entail rolling back negotiated, legally binding WTO concessions.

Since GSP conditionality has often, in US trade policy, allowed for a compromise between free traders, who are fastidious about not backing away from WTO commitments, and those who believe America's trade should reflect America's political values and interests, a win for India in this case would have a significant impact on the politics of trade policy in Washington, probably provoking a starker and more polarized debate about sanctions, and perhaps more willingness on the part of lawmakers to test the limits of WTO rules in this regard.

II. THE ENABLING CLAUSE AND ITS RELATIONSHIP TO ARTICLE I:1 OF GATT (MFN)

While the Generalized System of Preferences is provided on a voluntary basis and is not binding on the United States, such preferences nevertheless require an authorization or a legal basis in GATT; otherwise, by providing to developing countries better tariff treatment under the GSP than the bound rates of tariff provided to all other WTO Members, the United States would be in violation of the Most Favored Nation (“MFN”) clause in GATT Article I:1.

The legal basis for GSP is found in a GATT/WTO legal instrument referred to as the Enabling Clause (“the Clause”),⁶ which authorizes GATT Contracting Parties/WTO Members to operate the Generalized System of Preferences “notwithstanding” the MFN obligation in Article I:1.

India's argument regarding the Clause is that it contains a requirement of non-discrimination as between different developing countries. On this narrow view, the Enabling Clause authorizes countries providing GSP treatment to give better tariff treatment to developing countries as a whole, but does not permit, within a GSP scheme, different developing countries to be treated differently.

There is, however, no non-discrimination requirement of this kind on the face of the Enabling Clause. India *infers* such a requirement from Paragraph 2(a) of the Clause, which deals with the applicability of the Clause to preferential tariff treatment. Paragraph 2(a) refers to “[p]referential tariff treatment accorded by developed contracting parties to products originating in developing *countries in accordance with the Generalized System of Preferences.*”⁷ Through a footnote, the Enabling Clause defines a Generalized System of Preferences as what was described by an earlier GATT legal instrument, the 1971 GSP Decision.⁸ The description in the 1971 GSP decision is: “a mutually acceptable system of

⁶ *Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries*, Nov 28, 1979, GATT BISD (26th Supp) 203 (1980) (hereinafter *Enabling Clause*).

⁷ *Id.* ¶ 2(a) (emphasis added).

⁸ *Generalized System of Preferences*, June 25, 1971, GATT BISD (18th Supp) 24 (1972).

generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries.”⁹

Thus, India’s argument that the Enabling Clause prohibits discrimination between developing countries rests on the following syllogism: (1) the Enabling Clause requires that preferential tariff treatment be in “accordance with a Generalized System of Preferences”; (2) the Enabling Clause defines GSP through incorporating (from the 1971 instrument) a description that includes the idea of non-discrimination; therefore (3) it is illegal, in every respect, to treat different developing countries differently within a GSP scheme.

Yet there is an enormous leap from the second premise of the syllogism to the conclusion that India seeks to draw. Given that the drafters of the Enabling Clause decided *not* to include explicitly a non-discrimination provision in the Enabling Clause, it is an open question *what legal effect* is created by saying that preferential treatment must be in accordance with a general description of GSP as, *inter alia*, non-discriminatory.

It should be conceded at the outset that India is right that, as a general matter, the Enabling Clause, including Paragraph 2(a), is *justiciable*, that is, that the Clause creates *some* legal effects. In the 1992 case, *Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil* (“Brazil Rubber Footwear”),¹⁰ a GATT Panel examined whether the Enabling Clause would render legal under GATT preferential treatment with respect to countervailing duties that would otherwise be in violation of Article I. The panel held: “It was clear that the Enabling Clause expressly limits the preferential treatment accorded by developed contracting parties in favour of developing contracting parties under the Generalized System of Preferences to tariff preferences only.”¹¹ The panel noted dicta from an earlier report, *United States—Customs User Fee*, which considered that a non-tariff measure in violation of GATT Article I was not “authorized” by the Enabling Clause.¹²

In sum, the Enabling Clause is justiciable. However, the nature and extent of the *legal effect* of individual provisions within the Enabling Clause is a different matter. That question has to be answered as a matter of interpretation, following the rules in the Vienna Convention on the Law of Treaties; the ordinary meaning of the words in question must be considered in light of their object, purpose, and context.

⁹ Id at 25.

¹⁰ Report by the Panel, June 19, 1992, GATT BISD (39th Supp) 128 (1993).

¹¹ Id at 153, ¶ 6.15.

¹² Report by the Panel, Feb 2, 1988, GATT BISD (35th Supp) 245, 290 ¶ 122 (1989).

Some provisions in WTO legal instruments have been held to have a largely aspirational character. In the *Beef Hormones*¹³ case, for instance, the Appellate Body (“AB”) found certain provisions of the Agreement on Sanitary and Phytosanitary Measures (“SPS”)¹⁴ to be in the nature of “best efforts” obligations, where Members were being exhorted to achieve progressively a certain goal, but without a binding legal commitment to reach the goal to a particular extent or degree at a particular future point in time.¹⁵ The AB based that interpretation of the legal force or effect of Article 3.1 on a contextual analysis, pointing to wording in the Preamble of the SPS Agreement, as well as the impracticality and unreasonableness of an interpretation that would impose an immediate, absolute obligation on Members to base all of their regulations on international standards.

It is worth noting that the language “shall” appeared in Article 3.1 of the SPS; the AB’s ruling in *Beef Hormones* illustrates that even the presence of wording, which suggests a “hard” legal obligation, is not itself conclusive evidence of the nature and extent of the legal effect of a given provision, which must be considered contextually.¹⁶

More recently, in the *Corn Syrup*¹⁷ case, the Appellate Body considered the legal effect of certain provisions of the Dispute Settlement Understanding, including Article 3.7, which provides, in part, that “[b]efore bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful.”¹⁸ The AB interpreted the legal effect of this provision “to be largely self-regulating”: “Article 3.7 neither requires nor authorizes a panel to look behind that Member’s decision and to question its exercise of judgment.”¹⁹

¹³ World Trade Organization, Report of the Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc Nos WT/DS26/AB/R, WT/DS48/AB/R (Jan 16, 1998) (hereinafter *Beef Hormones*).

¹⁴ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round (1994), available online at <http://www.wto.org/english/docs_e/legal_e/15-sps.pdf> (visited Oct 11, 2003).

¹⁵ *Beef Hormones* at 64–65, ¶¶ 162–65 (cited in note 13) (referencing SPS Article 3.1).

¹⁶ For a similar analysis by a panel under the Canada-US Free Trade Agreement, see *In the Matter of Puerto Rico Regulations on the Import, Distribution and Sale of U.H.T. Milk from Quebec*, 1993 FTAPD LEXIS 18, *75–76, ¶ 5.23 (June 3, 1993).

¹⁷ World Trade Organization, Report of the Appellate Body, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States: Recourse to Article 21.5 of the DSU by the United States*, WTO Doc No WT/DS132/AB/RW (Oct 22, 2001), available online at <<http://docsonline.wto.org/DDFDocuments/t/WT/DS/132ABRW.doc>> (visited Oct 9, 2003) (hereinafter *Corn Syrup*).

¹⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes art 3.7, Apr 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, reprinted in 33 ILM 1226, 1227 (1994).

¹⁹ *Corn Syrup* at 23–24, ¶¶ 73–74 (cited in note 17).

But it is arguable that the Enabling Clause is a very different kind of legal provision than Article 3.7 of the DSU. For example, WTO law tends to regard the provisions of waivers from WTO obligations as strict conditions; a Member may only deviate from WTO obligations in reliance on a waiver if and to the extent that it meets such conditions.

Here what is important is that the Enabling Clause does not function as a waiver,²⁰ although it is often referred to by that term in general and non-technical discussions of GSP. Article XXV of GATT refers to waivers of an obligation “imposed upon a contracting party” (emphasis added) in “exceptional circumstances.”²¹ The Enabling Clause does not mention any exceptional circumstances, nor does it name any particular member state. It is not called a waiver on its face. It is not temporary, as the “exceptional circumstances” language would imply. It is not listed among the list of Article XXV waivers in the relevant GATT/WTO instruments.

The idea of the Enabling Clause is not simply forbearance of a particular member state’s non-compliance with the existing law of GATT; the Enabling Clause instead “enables” what has become a basic tenet of the international economic legal order, namely special and differential treatment of developing countries. It modifies the existing law of GATT to enable the concept already announced in Part IV and reflected in numerous declarations and other instruments of the United Nations Conference on Trade and Development (“UNCTAD”) and the United Nations Social and Economic Council. Rather than an exception to GATT, the Enabling Clause is an integral part of GATT legal system.

For these reasons, it would be inappropriate to apply to the interpretation of the Enabling Clause the narrow or strict reading of waivers that the Appellate Body promulgates in the *Bananas* case.²² This relates as well to the actual language in Paragraph 1 of the Enabling Clause. Unlike, for example, the Lome Waiver at issue in *Bananas*, Paragraph 1 does not use language such as “to the extent necessary”—rather the formula employed is “[n]otwithstanding the provisions of Article I.” A developed country WTO Member does not have to prove that each aspect of its deviation from the strictures of Article I is necessary in order to grant differential and more favorable treatment to developing countries. Rather, GSP operates “notwithstanding” Article I entirely.

²⁰ See John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* 164 (MIT 2d ed 1997).

²¹ General Agreement on Tariffs and Trade art XXV, 4 GATT BISD 44 (1969), 61 Stat pts 5, 6, TIAS 1700, 55 UN Treaty Ser 194 (1950).

²² World Trade Organization, Report of the Appellate Body, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc No WT/DS27/AB/R (Sept 9, 1997).

This is also different from Article XXIV of GATT, the MFN exception for customs unions and free trade areas. Article XXIV does not contain language that renders GATT Article I inapplicable to measures taken in the operation of customs unions and free trade areas; rather, Article XXIV, as the Appellate Body held in *Turkey-Textiles*,²³ provides only that Article I shall not be applied in such a manner as to prevent the formation of customs unions and free trade areas. Article XXIV does not authorize the operation of customs unions and free trade areas *notwithstanding* Article I. Instead, unlike GSP, the Article I framework still applies in the case of customs unions and free trade areas, to the extent consistent with their formation or existence. The Enabling Clause does not explicitly provide for enforcement or policing of its provisions through dispute settlement. Nor need it, of course, as a formal matter; as a decision pursuant to GATT 1947, the Clause is part of GATT 1994 and is, therefore, an integral part of the one of the Covered Agreements to which the DSU applies. But it *is* relevant to the question of *to what extent* the Clause is self-policing—that the drafters apparently did not consider the nature of its provisions to be such that it was important to stress or emphasize the availability of dispute settlement. Rather than a reference to dispute settlement in the Enabling Clause, one finds the formula that the “contracting parties will collaborate in arrangements for the review of the operation of these provisions.”²⁴

This approach contrasts significantly with that of the predecessor instrument to the Enabling Clause, the GSP Decision of 1971 (“Decision”).²⁵ The Decision contained detailed and explicit language concerning the availability of dispute settlement (Paragraph E). This may be related to the fact that, unlike the Enabling Clause, the Decision is, in legal structure, a waiver. The operative text of the Decision states: “the provisions of Article I shall be waived for a period of ten years *to the extent necessary* to permit developed [countries to provide to developing countries generalized, non-discriminatory, non-reciprocal preferential tariff treatment].”²⁶ Because, in 1971, the issue was conceived of in terms of waiver, it is not surprising that the expectation was that the provisions of the waiver would be viewed as strict conditions for deviation from Article I, which would be policed in dispute settlement.

Similarly, there is a Uruguay Round instrument that affirms explicitly the availability of dispute settlement in the case of “the failure of the Member to

²³ World Trade Organization, Report of the Appellate Body, *Turkey—Restrictions on Imports of Textile and Clothing Products* 18, ¶ 64, WTO Doc No WT/DS34/AB/R (Oct 22, 1999), available online at <<http://docsonline.wto.org/DDFDocuments/t/WT/DS/34ABR.doc>> (visited Oct 6, 2003).

²⁴ *Enabling Clause*, GATT BISD (26th Supp) at 205, ¶ 9 (cited in note 6).

²⁵ *Generalized System of Preferences*, GATT BISD (18th Supp) at 24 (cited in note 8).

²⁶ *Id.* at 25, ¶ a (cited in note 8) (emphasis added).

whom a waiver was granted to observe the terms or conditions of the waiver.”²⁷ Again, the issue is not justiciability as such, but rather the fact that this instrument suggests that provisions of a *waiver* may well be “terms and conditions” to be applied strictly by the dispute settlement organs. In contrast to these three Uruguay Round legal instruments, the Doha instrument²⁸ that addresses the Enabling Clause makes no mention or affirmation concerning the availability of dispute settlement to address violations of supposed terms and conditions of the Enabling Clause. Instead it merely reaffirms that preferences granted to developing countries under the Enabling Clause “*should* be generalized, non-reciprocal, and non-discriminatory.”²⁹

Another consideration to remember is that the Appellate Body noted in the *Beef Hormones* case the general international law principle of *in dubio mitius*. This principle requires that, where the extent of a legal obligation is unclear, a treaty interpreter adopts the reading that least restricts the sovereignty of the state that is bound:

We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating conformity or compliance with such standards, guidelines and recommendations. To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling . . . would be necessary.³⁰

In the *Beef Hormones* case, the Appellate Body was interpreting the expression “based on” in the SPS Agreement. The wording in Paragraph 2(a) of the Enabling Clause, namely that preferential treatment be *in accordance with* the notion of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences, certainly is not “specific and compelling” enough to suggest every aspect of a Member’s scheme of preferential treatment must *conform to* non-discrimination or non-discrimination as juridical norms or conditions.

One final general consideration is the role of UNCTAD in the implementation of the Generalized System of Preferences; this forms part of the “context” of the Enabling Clause and its provisions, within the meaning of the

²⁷ Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994 ¶ 3(a), Apr 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, reprinted in 33 ILM 1163 (1994).

²⁸ See World Trade Organization, Ministerial Conference, 4th Sess, *Implementation-Related Issues and Concerns*, WTO Doc No WT/MIN(01)/17 (Nov 20, 2001), available online at <<http://docsonline.wto.org/DDFDocuments/t/WT/min01/17.doc>> (visited Oct 6, 2003). Within the meaning of the Vienna Convention rules on treaty interpretation, this instrument would be relevant either as a subsequent agreement or subsequent practice of the Parties regarding the interpretation of the treaty.

²⁹ Id at 8, ¶ 12.2 (emphasis added).

³⁰ *Beef Hormones* at 66, ¶ 165 (cited in note 13) (emphasis and internal citations omitted).

Vienna Convention Article 31. By virtue of *Trade and Development Board Resolution 75(S-IV)*, of October 12, 1970,³¹ a special committee within UNCTAD was established to review annually the implementation of the GSP, with more in-depth studies to be conducted on a less frequent basis. By the time the Enabling Clause was negotiated, this committee had issued numerous detailed reports on the functioning of the GSP, often with detailed recommendations. These reports and various resolutions and other UNCTAD instruments suggest that UNCTAD conceived of itself as having a lead role in the oversight of the GSP. This view may account in some measure for the lack of more explicit or detailed institutional arrangements in the text of the Enabling Clause itself.

If we look at the history of the GSP, the relevant legal texts, and subsequent state practice in light of these general considerations, it becomes clear that the idea of non-discrimination in the description of the GSP has a largely, though not entirely, aspirational legal effect.

From the outset, developed countries were not willing to provide preferential treatment that applied to all countries and all products. For example, one might view the notion of preferences having to be “generalized” and “non-discriminatory” as requiring that every element of a Member’s scheme of preferences fully conform to that description in order to take advantage of waiver treatment under the 1971 Decision or the override of the Enabling Clause. Under this view, however, the GSP would never have gotten off the ground. Developed countries would have been prevented from offering preferences on terms that were acceptable to them. In this respect, the language “mutually acceptable” informs and conditions the entire description of the Generalized System of Preferences in the Preamble of the 1971 GSP Decision. That description cannot impose conditions or limitations on the manner in which GSP treatment is granted or withdrawn if those conditions are not “mutually acceptable” to both developed and developing countries.³²

³¹ UN Trade and Development Board Res No 75 (S IV), Terms of Reference of the Special Committee on Preferences (Oct 12, 1970), available online at <<http://r0.unctad.org/en/subsites/archiv/leg29.htm>> (visited Oct 11, 2003).

³² According to Juan Carlos Sánchez Arnau, Ambassador, Permanent Mission of Argentina and former Chair of the Committee on Trade and Environment of the WTO, from the inception of GSP, “it was tacitly agreed that any donor country would have the powers to extend the preferential treatment to any other country or to withdraw this treatment if there should be any valid reason for this in the opinion of the preference-giving country,” despite the fact that “the developing countries’ stance was that preferential treatment should be given to all countries coming under this category, whatever their political system” Juan C. Sánchez Arnau, *The Generalized System of Preferences and the World Trade Organization* 205 (Cameron May 2002). See also Georges Abi-Saab, *Analytical Study*, in United Nations, *Report of the Secretary-General on the Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order*, UN Doc No A/39/504 at 78, ¶ 146 (1984) (hereinafter the Report), concluding that, while the GSP notions of “preferential” and “non-reciprocal” . . . “have been crystallized and are generally accepted [as international law], the same cannot be

The aspirational character of the notion of preferences being generalized, non-discriminatory and non-reciprocal is reflected as recently as the Doha Decision on Implementation in 2001. The Doha Decision, as noted above, “reaffirms” that preferences granted under the Enabling Clause *should* have these characteristics but does not provide any defined timetable for the achievement of this goal, or any clear guidelines as to how fully it must be achieved at a given future point in time.

The *Comprehensive Review of the Generalized System of Preferences* by the UNCTAD Secretariat, issued April 9, 1979, noted that:

For various reasons, some preference-giving countries have not recognized as beneficiaries all those developing countries which claim developing status. Furthermore, in the administration of their schemes, certain preference-giving countries differentiate among beneficiaries with regard to the product coverage, the depth of tariff cut and/or the level of preferential imports admitted. Strictly speaking, such differentiation and selectivity contravenes the principle of non-discrimination. . . .

The principles on which generalized, non-reciprocal and non-discriminatory preferences should be based need to be reaffirmed, and the preference-giving countries should agree to take appropriate measures for the full observance of these principles. To this effect, they should extend generalized tariff preferences to all developing countries without discrimination, reciprocity or any other conditions.³³

Here, the language “should” and “should *agree*” displays the understanding that developed countries are, not strictly speaking, *bound* to take the action in question. Non-discrimination and non-reciprocity are “principles” that developed countries need to agree *in the future* to take measures that will result in “full observance”; that is, they are not yet bound by any agreement to such full observance.

But the UNCTAD Membership has not been prepared to go even this far; the relevant language in the Declaration at UNCTAD IX in 1996 merely states: “There is concern among the beneficiaries that the enlargement of the scope of the GSP by linking eligibility to non-trade considerations may detract value from its original principles, namely non-discrimination, universality, burden sharing and non-reciprocity.”³⁴ This language is obviously a far cry from a claim that such linkages are sufficient to deprive a GSP scheme of its character as a *mutually*

said of the ‘generalized’ and ‘non-discriminatory’ elements.” According to Abi-Saab, the selective “individual schemes” of the GSP that have existed from the outset are a result of the fact that “developed countries could not agree on a single uniform system of preferences.” Id at 77, ¶ 144.

³³ *Comprehensive Review of the Generalized System of Preferences, Report by the UNCTAD Secretariat* 39, ¶¶ 153–54, UN Doc No TD/B/C.5/63 (Apr 9, 1979), in UN TDBOR, *Operation and Effects of the Generalized System of Preferences* 19, UN Doc No TD/b/C.5/71 (1981).

³⁴ UN Conference on Trade and Development, 9th Sess, *Midrand Declaration and a Partnership for Growth and Development* 12, ¶ 27, UN DOC TD/377 (May 24, 1996).

acceptable generalized, non-reciprocal, and non-discriminatory system of preferences. And the reference to “beneficiaries” in this declaration is a reminder that the entire description of GSP in these terms is informed by the notion that the system is to be “mutually acceptable” to both developed and developing countries; developed countries have *never* accepted that they are only able to operate a GSP scheme where the scheme is completely unconditional and non-selective.

Just prior to the coming into force of the Uruguay Round Agreements, and the incorporation of the Enabling Clause into GATT 1994, the 1994 Joint Declaration of the EC and the Association of Southeast Asian Nations (“ASEAN”) shows that concerns about labor conditionality in the EC’s new GSP scheme were not understood to involve a claim of WTO illegality. The language of the Declaration is as follows:

The Ministers recognized that the General System of Preferences (GSP) has contributed to the growth in exports from ASEAN to the EU. More than one third of ASEAN's exports to the EU enjoy tariff concessions under the GSP. The Ministers noted that the EU envisages a revision and updating of the GSP for the next decade. In this context, the Ministers recognised that the Cumulative Rules of Origin (CRO) provision has contributed to ASEAN's regional integration and would further assist ASEAN in achieving its objectives of an ASEAN Free Trade Area. [] The ASEAN Ministers stressed their concerns about certain elements such as “Social Incentives” in the Commission proposals on the review of the GSP.³⁵

It is clear that although the ASEAN Ministers had “concerns” about some conditions in GSP that differentiated between different developing countries, these concerns did not lead to the least hint of questioning the legality of the EC GSP scheme under the GATT Enabling Clause. Moreover, it is clear that there was no agreement between the EC and the ASEAN Ministers that such incentives were disciplined in any legal sense by WTO rules.

In sum, the subsequent practice of member states strongly points to an interpretation of the notion of a “non-discriminatory” and “non-reciprocal” system of preferences as aspirational. Despite persistent concern by developing countries about conditionality and selectivity in GSP schemes over a period of almost 30 years, no legal instrument has ever been promulgated that elevates the elements of non-discrimination or non-reciprocity to a legal condition precedent for the granting of preferences that would otherwise be inconsistent with Article I.

The policy basis for continuing to treat these elements as, at most, basic principles which developed countries are exhorted to reflect in their GSP

³⁵ Association of Southeast Asian Nations, *Joint Declaration: The Eleventh ASEAN-EU Ministerial Meeting Karlsruhe, 22–23 September 1994* at ¶ 10, available online at <<http://www.aseansec.org/5642.htm>> (visited Oct 11, 2003).

schemes, is expressed in the judgment of a 1998 report to the Economic and Social Council (“ECOSOC”) by the Secretariats of UNCTAD and the WTO: “[despite, *inter alia*, selectivity and conditionality in some GSP schemes,] the GSP remains a valuable tool for promoting developing-country exports.”³⁶ When balanced against various “improvements” in GSP treatment, including “a substantial extension of product coverage for all GSP recipients,”³⁷ the remaining or new elements of selectivity and conditionality did not justify moving to a stricter approach, enforcing the elements of non-discrimination and non-reciprocity as legal conditions precedent. Leaving aside whether it could ever be part of “mutually acceptable” GSP arrangements, such a stricter approach might lead to waning enthusiasm on the part of developed countries to further extend and improve their GSP schemes to the benefit of developing countries. Thus, the repeated reaffirmations of non-discrimination and non-reciprocity as principles of the GSP, up to and including the Doha Decision on Implementation, have never been accompanied by requirements that aspects of WTO Members’ GSP schemes that detract from those principles be removed or modified within a definite time frame.³⁸

In the *Brazil Rubber Footwear* case, in determining whether preferences fall within Paragraph 2(a), the panel noted that “[t]he GSP programme of the United States, both in its nature and its design, accords duty-free status to only certain products originating in only certain developing countries.”³⁹ The panel further noted that this entailed *both* a tariff and a non-tariff advantage to the selected beneficiaries. The panel made it very clear that selective duty-free treatment under the US GSP scheme was excluded from the Article I override in the Enabling Clause, *only* to the extent that such duty free treatment results in the conferral of an additional, *non*-tariff preference on the beneficiary; while tariff preferences that are provided on a selective basis, both in respect of products and countries, are protected by the Enabling Clause Paragraph 2(a), non-tariff preferences are not.⁴⁰

³⁶ UN Conference on Trade and Development, *Market Access: Developments since the Uruguay Round, Implications, Opportunities and Challenges, in Particular for the Developing Countries and the Least Developed among Them, in the Context of Globalization and Liberalization*, 1998 Sess at 11, ¶¶ 39–40, UN Doc No E/1998/55 (1998), available online at <<http://www.unctad.org/en/docs/e1998d55.en.pdf>> (visited Oct 10, 2003).

³⁷ Id at 11, ¶ 39.

³⁸ Contrast this with the Uruguay Round Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994 (“Balance of Payments Understanding”), which re-affirms the commitment “to announce publicly, as soon as possible, time-schedules for the removal of restrictive import measures taken for balance-of-payments purposes.” Balance of Payments Understanding ¶ 1, Apr 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, reprinted in 33 ILM 1158 (1994).

³⁹ GATT BISD (39th Supp) at 152, ¶ 6.14 (cited in note 10).

⁴⁰ See id at 152–53, ¶¶ 6.14–6.15.

The wisdom of this interpretive approach is strongly confirmed if we consider the jurisprudential challenge for the dispute settlement organs if, under Paragraph 2(a), non-discrimination or non-reciprocity were considered to be legal conditions that determined whether GATT Article I override was applicable to a given case of preferential treatment.

In the GATT/WTO legal framework, non-discrimination is a complex and varied concept. One need only contrast, to use a single example, the notion of discrimination in Article I of GATT, which involves a comparison of the treatment of *like products* with the concept in the *chapeau* (preambular paragraph) of Article XX, which entails a comparison of the treatment of *countries* “where the same conditions prevail.” The concept of non-discrimination in Article III of GATT is different yet again, informed as it is by the objective of avoiding protection of domestic production.⁴¹

Neither the Enabling Clause nor the GSP Decision of 1971, to which the Clause refers, provides the dispute settlement organs of the WTO with a textual anchor in articulating an appropriate concept of discrimination to apply to these complex legal and administrative facts. An appropriate comparator is not even specified.

If they were to regard each element of a Member's GSP scheme as reviewable against independent (but undefined) legal norms of non-discrimination and non-reciprocity, the dispute settlement organs would be throwing into profound uncertainty the operation of the GSP as it now stands; all of these schemes contain elements of selectivity and conditionality that could, on some conception of discrimination or other, be viewed as discriminatory. This uncertainty would in the short term make the preferences in question even more precarious and uncertain from the perspective of developing countries, and in the longer term perhaps erode the viability of any “mutually acceptable” system of preferences.⁴² These consequentialist concerns would not matter if the dispute settlement organs were explicitly directed to adjudicate non-discrimination as a legal condition of the Enabling Clause (as was the case with Article XXIV of GATT in *Turkey-Textiles*), but they do certainly go to whether

⁴¹ See World Trade Organization, Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* 37, ¶¶ 97–98, WTO Doc No WT/DS135/AB/R (Mar 12, 2001), available online at <<http://docsonline.wto.org/DDFDocuments/t/WT/DS/135ABR.doc>> (visited Oct 10, 2003).

⁴² On the difficulties of drawing a line between permissible and impermissible differential treatment *within* a preferential, and thus inherently discriminatory scheme, see Robert E. Hudec, *The Structure of South-South Trade Preferences in the 1988 GSP Agreement: Learning to Say MFMFN*, in John Whalley, ed, 1 *Developing Countries and the Global Trading System: Thematic Studies from a Ford Foundation Project* 210 (Michigan 1989).

such a directive or mandate should be inferred, in the absence of explicit language.⁴³

India seeks to avoid these difficulties by arguing that the concept of “non-discrimination” in the description of GSP, as incorporated in the Enabling Clause, refers to the requirement of MFN treatment between developing countries; in other words, India selects Article I:1 of the GATT as the appropriate concept of non-discrimination—this despite the fact that, according to the very language of the Enabling Clause, the system of preferences that the Clause authorizes may operate “notwithstanding” the MFN obligation in Article I:1 of the GATT.

According to India, “[i]n all GATT provisions and in GATT and WTO jurisprudence, the term ‘discriminatory’ has been used to describe the denial of equal competitive opportunities to like products originating in different countries.”⁴⁴ This is manifestly false: as already noted, the *chapeau* of Article XX, the general exceptions provision of the GATT, refers to the concept that when invoking Article XX as a justification for their measures, state parties must not apply those measures in such a manner as to constitute “unjustifiable” or “arbitrary” discrimination between countries where the same conditions prevail. Contra India, the concept of “products” or “like products” does not even appear in the *chapeau* of Article XX. Ironically, India, in its pleadings, insists that the Enabling Clause should be treated as a kind of exception to GATT obligations. If this is true, then one would think that the most relevant reference to discrimination in the GATT would indeed be a reference in another exceptions provision, which (albeit in a different way from the Enabling Clause) also permits states parties to derogate from MFN. The language of “arbitrary” and “unjustifiable discrimination” is explicitly qualified by the notion that such discrimination only matters if it concerns countries “where the same conditions prevail.” This notion therefore would clearly permit differential treatment of different developing countries if there are different conditions in those countries.

The fact remains that this notion of discrimination is not explicitly incorporated into the Enabling Clause, and even less plausibly, the idea of MFN

⁴³ It is true that ¶ 2(d) of the Enabling Clause, in *explicitly* allowing additional margins of preferences to be granted to least-developed countries, could be interpreted as *implicitly* prohibiting the granting of additional margins of preferences to any select group of countries within a GSP scheme except on grounds that they are “least developed.” In this sense, it could be argued that there is one permitted comparator for differential treatment within GSP schemes, whether a country is “least developed,” with all other comparators prohibited. But given the enormous consequences described above in the text, it would seem to be judicial overreaching to derive a prohibition on other distinctions within GSP schemes by implication alone of what is *permitted* in ¶ 2(d).

⁴⁴ World Trade Organization, Panel’s Questions to the Parties and Third Parties, *European Communities—Tariff Preferences* 11–12 (May 20, 2003) (on file with author).

discrimination. That the idea of non-discrimination in the Enabling Clause is not defined in terms of the way non-discrimination appears anywhere else in the GATT simply illustrates that the reference to a non-discriminatory and nonreciprocal system of preferences that is incorporated into the Enabling Clause is of an aspirational nature, and is not determinate enough to create enforceable conditions, without the adjudicator being forced to invent, or weave from whole cloth, a legal test for discrimination. However, just as subsequent practice sustains this conclusion as a general matter, subsequent practice, including adopted GATT panel reports and the existence of waivers such as the Lome Waiver, also suggests that there are some kinds of discriminatory preferential relations clearly understood by both developed and developing countries in general, to fall outside the ambit of the Enabling Clause. In particular, preference schemes confined to regional or other specific and exclusive groupings of countries are outside the scope of the Enabling Clause.

As the panel held in the *Brazil Rubber Footwear* case, preferential treatment must fall within Paragraph 2 of the Enabling Clause to benefit from the MFN override. The WTO adjudicator must consider whether, overall or generally, the preferential treatment at issue is in “accordance” with the description imported from the 1971 GSP Decision. This is the very limited extent, in fact, to which one can say that there is some discernable mutually acceptable meaning to the idea of non-discrimination in relation to GSP: there are certain kinds of discriminatory preferential schemes that are agreed to fall outside the idea or concept of GSP. But, whatever criticisms have been made of elements of policy conditionality in developed countries’ GSP programmes, such as in UNCTAD, these criticisms have never been couched in terms that suggest in any way that the programmes, by virtue of those elements of conditionality, fall outside the GSP rubric altogether.

III. THE EC’S WEAK DEFENSE OF GSP CONDITIONALITY

The European Community, in its first submission to the WTO panel,⁴⁵ essentially concedes to India that the Enabling Clause contains a hard legal obligation of “non-discrimination” that applies to all aspects of a WTO Member’s GSP scheme. This despite the overwhelming cumulative evidence (mustered above) that “non-discrimination” is incorporated into the enabling clause as a largely aspirational norm or objective.

The EC instead argues that it may nevertheless impose conditions on the granting of GSP treatment, provided those conditions are non-discriminatory.

⁴⁵ World Trade Organization, First Written Submission of the European Communities, *EC—Conditions for the Granting of Trade Preferences to Developing Countries*, WTO Doc No WT/DS246 (Apr 17, 2003) (on file with CJIL) (hereinafter EC Submission).

The EC claims that not all differences in treatment amount to discrimination; it depends upon whether the distinctions are considered unjust or illegitimate.

But as I have argued above, the Enabling Clause lacks *any explicit statement or indication* of what grounds are permissible for distinguishing between different developing countries, and what grounds are not permissible. The Enabling Clause is silent on this crucial question.

The argument of the EC is that it can infer from the economic development goal of the Enabling Clause the notion that one ground on which it is permissible to distinguish between different developing countries is drug enforcement. According to the EC, developing countries with drug enforcement challenges have different development needs than countries without those challenges, and therefore it is not “discriminatory” to give these countries an additional margin of preference over other developing countries without a drug problem.⁴⁶

The EC claims that non-discrimination in WTO law need not mean formal equality. Sometimes different treatment is what produces equality.⁴⁷ The problem with this line of argument is that, in singling out developing countries with drug enforcement challenges, the EC treats them *better*—not just differently—than other developing countries without those challenges.

The nub of the EC claim seems to be that this is not *really* better treatment, since the extra margin of preference merely compensates for the drug enforcement burden that other developing countries, without drug enforcement challenges, do not have to bear. This notion, however, turns out to be a sham, once one considers that drug enforcement challenges are just one kind of burden out of many that a particular group of developing countries may have to bear. If the EC is willing to compensate for this kind of burden, is it not true that the EC discriminates when it fails to provide an extra margin of preferences for those developing countries that, for example, have a particularly severe AIDS problem, or complicated issues of ethnic and religious diversity, or have suffered from climatic disasters? In all such instances, increased export opportunities might well provide more economic resources with which to address such burdens, and therefore lighten them.

The EC goes on to argue, in the alternative, that even if its drug preferences are found to be “discriminatory,” they are “necessary” for the protection of public health under the Article XX (b) exception in GATT.⁴⁸

⁴⁶ Id. ¶¶ 84–115.

⁴⁷ Id. ¶¶ 72–79.

⁴⁸ The Article XX(b) exception reads:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be

“The EC considers it beyond dispute that narcotic drugs pose a risk to human life or health in the EC.”⁴⁹

This very argument shows the sham involved in the EC claim that it is singling out developing countries with drug enforcement challenges in order to ensure that those countries are treated in accordance with their special development needs. The EC has in fact singled out drugs from other kinds of burdens particular developing countries might bear, not so as to treat all developing countries according to their own special development needs, but because of a desire to protect its *own* citizens from drugs.⁵⁰

Why would the EC make a weak and tendentious argument to defend its preferences as “non-discriminatory,” while conceding or not making the much stronger argument that the concept of “non-discrimination” in the Enabling Clause does not, in the first place, have the sort of strong legal effects India has attributed to it?

Certainly, the European Commission was aware of the considerations pointing to a different and much weaker legal effect, which have been developed earlier in this article.⁵¹

While thinking it could save its drug preferences through an Article XX exception on public health, if need be, perhaps the Commission wanted to make it more difficult for the United States to attach different kinds of political conditions to its own GSP, for example, conditions related to communist countries and to the war on terrorism—matters on which there are serious differences between Europe and America. By not challenging India's general view of “non-discrimination” in the Enabling Clause, making a weak argument about the “non-discriminatory” nature of the drug preferences in particular, and reserving its strong points for the Article XX justification, the Commission may indeed have had just this effect.

construed to prevent the adoption or enforcement by any contracting party of measures . . .

b) necessary to protect human, animal or plant life or health.

General Agreement on Tariffs and Trade art XX(b), 3 GATT BISD 43 (1958).

⁴⁹ EC Submission at ¶ 166 (cited in note 45).

⁵⁰ Thus, India pointedly observed in its written responses to questions from the panel, “The EC characterizes the drug arrangements as *both* ‘a measure to protect human health’ and ‘a measure providing special and differential treatment to developing countries.’ India believes that this simultaneous characterization of the drug arrangements is logically contradictory.” World Trade Organization, Panel's Questions to the Parties and Third Parties, *European Communities—Tariff Preferences* at 28 (cited in note 44).

⁵¹ Letter from Pascal Lamy, EC Commissioner for Trade, to the author (Feb 10, 2003) (on file with author) (acknowledging having received and read an earlier paper by the author that outlines these considerations).

IV. THE THIRD PARTY INTERVENTION OF THE ANDEAN GROUP OF COUNTRIES

In contrast to the EC, the Andean Group of countries (Bolivia, Columbia, Ecuador, Peru and Venezuela), in its Third Party Submission to the panel, raised the fundamental issues about the legal nature and effect of the Enabling Clause, which are discussed above in this article, and in earlier work by the author with which the Andean Group and their legal counsel were familiar.⁵² The Andean Group noted:

[T]he Enabling Clause is not a waiver from Article I:1 GATT. Unlike its predecessor, the 1971 Decision, the Enabling Clause is not described on its face as a waiver. Moreover, Article XXV GATT refers to waivers of an obligation ‘imposed on a contracting party.’ The Enabling Clause does not refer to any exceptional circumstances, nor is it temporary nor does it name any particular contracting party. It goes without saying that it would be inappropriate to apply to the interpretation of the Enabling Clause the idea of narrow or strict reading of exceptions or waivers⁵³

In addition to this and other considerations canvassed by the present author, the Third Party Submission of the Andean Group points to the negotiating history of the 1971 Decision, the predecessor instrument to the Enabling Clause. In these negotiations wording was proposed that would have *explicitly* prohibited differential preferential treatment as between different developing countries, but this wording was found unacceptable and therefore left out of the final text.⁵⁴ (I would further note that such wording was not reintroduced when the Enabling Clause itself was negotiated at the end of the 1970s.)

At the same time, the Andean Group does not explicitly address what precise legal effect, if any, flows from the description of GSP as non-discriminatory that is imported into the Enabling Clause from the 1971 Decision. It rejects the Indian argument that the Enabling Clause in effect requires MFN treatment between different developing countries in the granting of preferences, but does not explicitly disassociate itself from the EC position that there is a strict legal requirement of non-discrimination in the Enabling clause, albeit a different notion of “non-discrimination” than that promulgated by India. At the same time, in emphasizing, as just noted, that it would be inappropriate to interpret the Enabling Clause as a waiver with strict conditions,

⁵² Conversation with Claus-Dieter Ehlermann, counsel for the Andean Group in this matter, in Washington, DC (Apr 3, 2003). The earlier paper is Howse, *Back to Court after Shrimp/Turtle* (cited in note 1).

⁵³ World Trade Organization, Third Party Submissions of Bolivia, Columbia, Ecuador, Peru, and Venezuela, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries* ¶ 44, WTO Doc No WT/DS246 (Apr 30, 2003) (on file with author).

⁵⁴ *Id.*

the Andean Group seems to take the view that non-discrimination in the Enabling Clause should not be read in the manner of a condition present in the waiver, that is, a strict legal precondition to reliance on the override.

V. THE THIRD PARTY INTERVENTION OF THE UNITED STATES TRADE REPRESENTATIVE

Given the possibility that the European arguments against India would not adequately defend the United States's own interest in maintaining the prerogative to operate GSP in accordance with American policy objectives and political values, one would have expected, in this case, a very strong third country brief from the United States.

In fact, the US brief is a scant three pages long, and it confines itself largely to an arcane, technical argument that India has failed to meet its burden of proof to show that the EC has violated the Enabling Clause. The Brief makes no defense whatsoever of the general prerogative of United States lawmakers to grant or withdraw GSP treatment on the basis of "political" criteria. It merely urges the WTO dispute panel to "adopt a careful, prudent approach to resolving this dispute" and alludes to "the many nuances found in the GSP programs of various Members."⁵⁵

Curiously, however, in oral argument before the panel, the United States appears to have echoed or perhaps even endorsed the concerns raised by the Andean Group about the legal nature and effect of the provisions of the Enabling Clause, noting "the United States joins the many developing country third parties to this dispute that have pointed out the practical difficulty of reading legal obligations into the Enabling Clause that are not found in the text."⁵⁶

Later in its written answers to questions from the panel, the United States Trade Representative ("USTR") refers to the provisions of the Enabling Clause as "a guide for countries wishing to extend GSP preferences,"⁵⁷ thereby

⁵⁵ World Trade Organization, Third Party Submission of the United States, *European Communities—Conditions for the Granting of Trade Preferences to Developing Countries* ¶ 2, WTO Doc No WT/DS246 (Apr 30, 2003), available online at <<http://www.ustr.gov/enforcement/2003-04-30-eudeveloping-3rdpartysub.pdf>> (visited Oct 10, 2003).

⁵⁶ World Trade Organization, Third-Party Oral Statement of the United States, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries* 8, ¶ 14, WTO Doc No WT/DS246 (May 15, 2003), available online at <<http://www.ustr.gov/enforcement/2003-05-15-eudeveloping-3rdpartyoral.pdf>> (visited Oct 10, 2003).

⁵⁷ World Trade Organization, Answers from the United States to Questions from the Panel and India in Connection with the First Substantive Meeting of the Panel, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries* 9, ¶ 26, WTO Doc No WT/DS246 (June 4, 2003), available online at <<http://www.ustr.gov/enforcement/2003-06-04-eudeveloping-usanswers.pdf>> (visited Oct 10, 2003).

suggesting an obligatory force that falls short of hard legal conditions for the granting of GSP preferences.

These rather terse, albeit suggestive, statements fall short of a vigorous defense of the kind of interpretive approach to the Enabling Clause that would seem needed to sustain the various kinds of conditionality in the United States's own GSP scheme.

VI. CONCLUSION

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. They should be aware, however, that even though such a result is legally dubious at best, neither the European Commission (for its own reasons) nor (astoundingly) the USTR (except perhaps in oral argument), made a strong legal case *in favor of* conditionality under the applicable WTO law. According to reports in the Indian and Pakistani news media, the panel has in fact issued an interim ruling deciding in favor of India.⁵⁸ Given the weak arguments of the EC, this is not entirely a surprise. However, apparently one member of the panel, Marsha Echols, a highly respected American legal academic, dissented from that judgment, thus resulting in a 2-1 verdict in favor of India.

To what extent can and should judges, in an adversarial system like the WTO, compensate for the weak or strategic arguments of the litigants, and address broader and more foundational legal issues that the litigants have been unable or unwilling to raise?

The Appellate Body has been, in the past, willing to decide cases on legal grounds different from those urged by the party litigant in whose favor it is ruling. According to Article 3.2 of the WTO Dispute Settlement Understanding, WTO panels and the Appellate Body have a responsibility not only to settle individual disputes but also to clarify the law.

Assuming that the EC appeals (and that the EC feels precluded in putting before the AB arguments that it conceded to India at first instance), the India GSP challenge will be a vital test of how far the Appellate Body is prepared to go beyond the four corners of adversarial litigation in order to avoid an illegitimate result imposed by the inadequate arguments of parties to the dispute. In this connection, the AB should take particularly seriously the Andean

⁵⁸ It is WTO practice for the panel to issue an interim report to the parties in the dispute to allow them to submit comments before the panel ruling is finalized. This interim report generally remains confidential, although the verdict itself is typically leaked to the media. It would be essentially unprecedented, however, for a panel to change the verdict in the final report.

Group's arguments—the real issues engaged by this dispute are, at least, on the record thanks to the Andean Group Third Party Submission.