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Internet roundtable
The Appellate Body's GSP decision[1]

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CHARNOVITZ: The Appellate Body's decision in the *Tariff Preferences* case demonstrates the value of a second-level review of panel decisions. Notwithstanding the composition of the panel – which was as highly qualified, balanced, and diverse as any panel could possibly be – the panel issued a decision that met widespread disapproval. In what is probably a record for third-party support of the plaintiff, eight countries asked the Appellate Body to reverse key points. Happily, the Appellate Body did reverse many of the troubling holdings in the panel report. Unhappily for the world community, the Appellate Body did not have an opportunity to review the panel's interpretation of GATT Article XX, which (like many previous panels) has chiseled away at vital exceptions.

Although this case is named 'Conditions for the Granting of Tariff Preferences to Developing Countries', the actual subject matter of the dispute was not conditions, because India dropped those (labor and environmental) claims before the panel began its work. No conditions exist in the European Communities' Drug Arrangements. Rather, as the Appellate Body keenly discerned (paras. 182, 183, 188), the Drug Arrangements lack any clear prerequisites for becoming a beneficiary or for losing beneficiary status. Instead, the EC has simply named 12 predetermined beneficiaries in its Regulation, which sits as far away from the meaning of 'non-discriminatory' as can possibly be imagined. Thus, because the Drug Arrangements are not 'non-discriminatory', they are a violation of the Enabling

1 European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, AB-2004-1, Report of the Appellate Body, 7 April 2004.

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Clause, and the Appellate Body quite properly held that. In doing so, the Appellate Body reversed two troublesome holdings of the panel, but not the panel's ultimate conclusion that the EC was in violation. I will not discuss these two reversals because they are well crafted by the Appellate Body in language that speaks for itself. Several possible implications of the Appellate Body's reasoning are worth discussing, however, and I address three of them below.

First, what is the implication of the Appellate Body's analysis of the term 'non-discriminatory' in Footnote 3 of the Enabling Clause for the interpretation of various WTO Agreements where that term is used – such as the GATT, the General Agreement on Trade in Services, the Antidumping Agreement, and several others? The Appellate Body notes that there are two ways to understand the non-discrimination requirement – one based on making distinctions per se, and the other based on improper distinctions (para. 153). The Appellate Body did not find it necessary to choose between them however, because the Drug Arrangements fail both meanings. Yet it seems likely in the future that the Appellate Body will be asked to choose between them, and litigants will surely ponder Footnote 318 of the Appellate Body decision, which refers to the definition of discrimination in general international law. The meaning of 'non-discriminatory' may also be relevant for WTO provisions that do not mention the term, but that are widely perceived as embodying that principle, such as the most-favored-nation (MFN) requirement in GATT Article I, and in many other WTO MFN provisions.

Second, what is the implication of the Appellate Body's analysis of the Enabling Clause for provisions in the Generalized System of Preferences (GSP) that truly are conditional, such as the worker rights provision in the United States program or the environmental provision in the EC program? These two provisions operate differently. In the US GSP, a failure to afford internationally recognized worker rights could 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.

As a preface to its interpretation of Paragraph 3(c) of the Enabling Clause, the Appellate Body notes that there is an obligation of the donor to 'respond positively' to the development, financial or trade needs of developing countries (para. 158). How the Appellate Body interprets this obligation is extremely interesting. In an important holding, the Appellate Body states that the existence of such a need is to be judged according to an objective standard, and could be influenced by recognition of that need in the WTO Agreement or in a multilateral instrument adopted by an international organization (para. 163). Those who want international law norms to be considered in WTO adjudication will appreciate that holding. Then the Appellate Body states that the only way a preference-granting country can meet Paragraph 3(c) is if it acts in a positive manner in response to a

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widely recognized need, taking into account the nexus between the preferential treatment and the likelihood of alleviating the national need (paras. 164 and 165). To restate this, the Appellate Body seems to be saying that a GSP preference condition will be WTO-legal only if it addresses a widely recognized need in a 'positive' manner, and will be effective in alleviating the need (see paras. 164, 169). That is a tough set of requirements that may be much more difficult for negative conditionality (the US approach) than for positive conditionality.

Third, what are we to make of assorted statements by the Appellate Body about the 'rights' of WTO Members? I have long held the view that the reference to the 'rights and obligations' of the Members stated in many WTO agreements (e.g., DSU art. 3) is misleading, because the WTO treaty does not accord substantive rights to Members, and could not possibly do so. Rather, what the WTO treaty does is to convey substantive obligations, and to specify the availability of certain procedural rights. The States that join the WTO bring with them the rights of statehood that inure in sovereignty, but these rights are not directly enhanced by WTO membership.

Yet when one reads WTO Appellate Body decisions, rights of Members often materialize. In Paragraph 98 of *Tariff Preferences*, the Appellate Body suggests that Members of the WTO may have a 'right' to provide or to receive differential tariff treatment. I find that holding perplexing. Then in Paragraph 166, the Appellate Body suggests that there is a 'right' to MFN treatment, but that this right cannot be invoked by a GSP beneficiary *vis-à-vis* other GSP beneficiaries in the context of GSP schemes that are consistent with the Enabling Clause. I think what the Appellate Body meant to say there was that a GSP *non*-beneficiary could not invoke its MFN right because of the Enabling Clause. Yet this seems an inaccurate statement of law. What is really going on is that there is no MFN right, but instead an MFN obligation that does not apply when the Enabling Clause is met. Furthermore, a complaining country *can* 'invoke' GATT Article I (MFN), but if so, will lose on that claim because the Enabling Clause trumps Article I.

BARTELS: In its report on *EC–GSP*, the Appellate Body ruled that the EC's regime of special tariff preferences for developing countries engaged in combating drug production and trafficking was discriminatory, and therefore in violation of the 1979 Enabling Clause. Paragraph 2(a) of the Enabling Clause, which forms part of the GATT 1994, requires that any GSP tariff preferences granted by developed countries (and some developing countries) to developing countries be 'generalized, non-reciprocal and non-discriminatory'.

The problem with the EC's 'drugs regime' was not that it differentiated between developing countries *per se*, but that it was only available to a 'closed list' of 12 beneficiaries. As the Appellate Body noted, the only way of altering the list of beneficiaries of the drugs regime was by amending the EC's GSP regulation itself. The Appellate Body was also unimpressed that the regulation contained no objective criteria for determining whether any given developing country could be

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added or removed from this list of beneficiaries, and quoted in this context an admission by the EC that '[t]he criteria [for designating beneficiary countries] are not set out in the GSP Regulation [and] are not contained in a public document'.

Given these substantive and procedural failings, the EC's drugs regime was a relatively easy target. However, the Appellate Body also made valuable legal findings on the possibility of differentiating between GSP beneficiaries, with serious implications for the survival of other conditions which the EC (and the US impose) on GSP trade preferences.

Paragraph 3(c) and the right (or obligation) to differentiate

An important provision in this respect is paragraph 3(c) of the Enabling Clause, which states that:

> Any differential and more favorable treatment provided under this clause … shall … be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

The EC had argued that this paragraph granted it a *right* to differentiate between developing countries for the purpose of responding to their individual development, financial and trade needs. India argued that if this were true, then paragraph 3(c) must also impose an *obligation* to differentiate according to these individual needs. This was unlikely, according to India, given that no GSP donors currently modulate their preferences in accordance with the individual development needs of the beneficiaries of their GSP programs. Consequently, said India, paragraph 3(c) could not possibly permit any differentiation between developing countries. The Appellate Body rejected this argument, and accepted the EC's position that there was a right to differentiate according to the individual needs of developing countries. But it reached this result on the basis of a finding that paragraph 3(c) does impose an obligation of some kind. The Appellate Body stated as follows:

> At the outset, we note that the use of the word 'shall' in para. 3(c) suggests that paragraph 3(c) sets out an obligation for developed-country Members in providing preferential treatment under a GSP scheme to 'respond positively' to the 'needs of developing countries.[2]

Reinforcing the point, the Appellate Body noted in a footnote that 'the European Communities agreed before the Panel that para. 3(c) of the Enabling Clause sets forth a "requirement"'.[3] On this basis, the Appellate Body turned its attention to the content of the obligation (or requirement) to respond positively to the needs of developing countries. It looked first at whether these 'needs' were to be understood as the *collective* needs of all developing countries (as decided by the panel), or as the *individual* needs of any given developing country (as argued by the EC). In opting for the former interpretation, the panel had relied largely on the fact that

2 Para. 158.
3 Para. 158, fn 325.

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para. 3(c) did not refer to the needs of *individual* developing countries. Consequently, the panel decided that 'the only appropriate way … of responding to the differing development needs of developing countries is for preference-giving countries to ensure that their [GSP] schemes have sufficient breadth of product coverage and depth of tariff cuts to respond positively to those differing needs'.[4] The Appellate Body disagreed with this interpretation, stating that the absence of the word 'individual' in the text of para. 3(c) cannot be taken as a *prohibition* of differential treatment in response to the needs of individual developing countries.

So far, the reasoning of the Appellate Body is clear. However, the Appellate Body then said the following:

> The absence of an explicit requirement in the text of paragraph 3(c) to respond to the needs of 'all' developing countries, or to the needs of 'each and every' developing country, suggests to us that, in fact, that provision imposes no such obligation.[5]

This statement is difficult to interpret. Why, all of a sudden, is the Appellate Body referring to the absence of an explicit requirement to respond to the needs of 'all' developing countries, when its main point is to criticize the panel for having read too much into the absence of an explicit requirement to respond to the needs of 'individual' developing countries? And what is the mysterious 'obligation' that, because of these absences, does not exist?

It is difficult, and perhaps not all that fruitful, to try to answer these questions. What can be said is that if the absence of any explicit requirement to respond to the needs of 'all' developing countries means that there is no *obligation* to respond to these collective needs (for instance, in the way suggested by the panel), then it should also follow that the absence of any explicit requirement to respond to the needs of 'individual' developing countries means that there is similarly no *obligation* to respond to these individual needs.

If this is correct, we are left with the following conclusions. First, paragraph 3(c) contains an obligation 'to respond positively to the development, financial and trade needs of developing countries'. Second, this does not mean that there is no *right* to differentiate according to the needs of individual developing countries. And, third, this does not mean that there is any *obligation* to differentiate on this basis.

Fortunately, perhaps, given the ambiguity of the text from which they were derived, these conclusions are borne out in the remainder of the report. In what appear to be clear references to the right to differentiate under paragraph 3(c), the Appellate Body goes on in the report to describe paragraph 3(c) 'as *authorizing* preference-granting countries to ''respond positively'' to ''needs'' that are not necessarily common or shared by all developing countries',[6] and elsewhere

4 Para. 159 (as summarized by the Appellate Body).
5 Para. 159.
6 Para. 162 (emphasis added).

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describes paragraph 3(c) as containing 'the *expectation* that developed countries will "respond positively" to the "needs of developing countries"'.[7] Finally, the Appellate Body sets out what seems to be its definitive statement on the matter:

> Having examined the text and context of footnote 3 to paragraph 2(a) of the Enabling Clause, and the object and purpose of the WTO Agreement and the Enabling Clause, we conclude that the term 'non-discriminatory' in footnote 3 *does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries*, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause.[8]

How far does the right to differentiate extend? Here the Appellate Body is quite clear. First, differentiation is only possible in response to a 'need' defined according to an objective standard, perhaps drawn from international treaties.[9] Second, the 'positive response' must only 'be taken with a view to improving the development, financial, or trade situation of a beneficiary country, based on the particular need at issue'.[10] The Appellate Body added, significantly, that '[i]n the context of a GSP scheme, the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences'.[11] Finally, the Appellate Body emphasized that:

> In granting such differential tariff treatment, however, preference-granting countries are required, by virtue of the term 'nondiscriminatory', to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the 'development, financial and trade needs' to which the treatment in question is intended to respond.[12]

Based on these statements, one may conclude that, while the Appellate Body does not oblige GSP programs to differentiate between developing countries according to their individual needs, it allows them to do so. However, any such differentiation will be subject to two limitations: first, it must have the *purpose* of improving the development of responding to the development, financial, and trade needs of developing country GSP beneficiaries, and, second, it must be *applied equally* to similarly situated beneficiaries, seen in terms of their development, financial, and trade needs.

Effects on conditionality in the EC and US GSP programs

This ruling has clear implications for the existing conditions in the EC and US GSP programs, as these conditions provide for differentiation on grounds that are very difficult to justify on the basis of the development, financial, and trade needs of

7 Para. 164 (emphasis added). In fact, this is too weak even for the obligation identified earlier.
8 Para. 173 (emphasis added).
9 Para. 163.
10 Para. 164.
11 Para. 164.
12 Para. 173 (emphasis added).

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developing countries (either individually or collectively), and they are usually applied in a manner that differentiates between similarly situated GSP beneficiaries.

These conditions may be briefly set out as follows. First, in a program of what has been described as 'positive conditionality', the EC offers the possibility for developing countries to apply for additional preferences on all products, as long as they comply with core labor standards, as well as the possibility to apply for additional preferences on tropical timber products, if they comply with international standards concerning sustainable management of tropical forests. Second, both the EC and the US apply 'negative' conditionality by reserving the right to withdraw GSP preferences from beneficiary countries for various reasons.

The negative conditions applied by the EC include involvement in slavery or forced labor, violation of core labor standards, export of goods made by prison labor, ineffective customs controls on drugs, money laundering, fraud in rules of origin, unfair trading practices, or infringement of the objectives of international fishery conventions. For the US, a developing country will be ineligible for GSP beneficiary status for reasons ranging from communism (with exceptions), membership of an international cartel causing damage to the world economy, reverse preferences, expropriation, failure to enforce arbitral awards, involvement in terrorism, to violation of worker rights and child labor standards.

In light of the Appellate Body report, it does not seem likely that many of these conditions can survive. It could probably be argued that the EC's additional preferences for labor and the environment are justified on the basis that these preferences contribute to the 'development needs' of countries benefiting form these preferences. And, unlike the EC's drugs regime, these additional preferences are granted on reasonably objective and transparent criteria. On the other hand, it is much more difficult to argue that a withdrawal of preferences, for whatever reason, is an appropriate means of responding to the development of the target country, especially if one recalls the Appellate Body's warning that '[i]n the context of a GSP scheme, the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences'.[13] And even where a withdrawal of preferences can be justified on development grounds, it will be necessary to ensure that any such differentiation is applied equally to similarly situated developing countries, which has not always been the case in the past.

Conclusion

The Appellate Body Report in *EC–GSP* will have important practical implications for conditionality in the EC and US GSP programs. In holding that GSP donor countries are entitled to apply differential treatment to GSP beneficiaries based on their development, trade and financial needs, the Appellate Body allows for the possibility that GSP preferences can be granted on a conditional basis. However, the Appellate Body also requires any such conditions to have development

13 Para. 164.

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objectives, and to be non-discriminatory with regard to similarly situated GSP beneficiary countries. The only type of conditions currently in existence that have a good chance of meeting these conditions are the EC's additional preferences for countries complying with labor and environmental standards, which means that the existing 'negative' conditions in the GSP schemes of the EC and the US will probably now have to fall into abeyance.

HOWSE: Both Steve's and Lorand's comments rightly focus on the key finding of the Appellate Body that a donor country may provide different levels of GSP tariff preferences to different developing countries, without necessarily engaging in 'discrimination'. I wish to step back for a moment and start off by commenting on the Appellate Body's treatment of the threshold issue of whether, in the first place, the reference in the Enabling Clause to the description of GSP as non-discriminatory, creates a legal condition that preferences be non-discriminatory. (As you know, 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: non-discriminatory states at most an aspirational, soft-law norm). This threshold issue was never forthrightly raised by the EC in its written pleadings, and only obliquely raised by two Third Parties, the US and the Andean Group. The Appellate Body at least recognized the issue. The AB disposed of it by comparing the English with the French and Spanish texts of the Enabling Clause and observing: 'In our view the stronger, more obligatory language in both the French and Spanish texts … lends support to our view that only preferential tariff treatment that is ''generalized, non-reciprocal and non-discriminatory'' is covered under paragraph 2(a) of the Enabling Clause.' However, Article 33 of the Vienna Convention specifies a particular procedure where the ordinary meaning of one linguistic version of a treaty appears to be different from that of another, equally authentic linguistic version. The treaty interpreter must attempt to reconcile the difference by recourse to all the interpretative sources in Article 31 and 32 of the Vienna Convention; at the end of the day, what is to be decisive in the presence of ambiguity is the purpose and object of the treaty. Thus, in the recent Lagrande case (*Germany* v. *US*), the ICJ (International Court of Justice) was faced with the issue of whether provisional measures of the Court were binding on the party to which they were directed: having found that the English text of the ICJ Statute pointed to a lesser degree of obligatoriness than the French text, the ICJ did not stop there and simply choose the version that corresponded to its own intuition, but rather went on to consider the object and purpose of the treaty provision in question. In sum, I think the AB erred in viewing its comparison of the English with the Spanish and French texts of the Enabling Clause as the end rather than the beginning of an inquiry into the nature of the obligation of non-discrimination, which would inter alia have had to consider state practice and the object and purpose of the Enabling Clause.

If the AB's approach was legally incorrect, it was politically correct, however. Whatever the lex lata, to deny obligatory force to the notion of non-discrimination

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in the Enabling Clause in an explicit judicial ruling would be a provocation to developing countries at a very difficult time in the history of their relationship to the multilateral trading system – this especially so since the structure of the drug preferences, as both Lorand and Steve have rightly described it, highlights the possibility of arbitrary conduct of donors towards beneficiaries, and therewith the need for some kind of legal discipline. This being said, the AB might have better reconciled law and politics, through at least attempting to support its view of the non-discrimination norm with the kind of teleological interpretation explicitly endorsed in cases of linguistic divergence by Vienna Convention 33.

On to the central finding of the AB. Having discerned that non-discrimination is a hard law requirement of the Enabling Clause, the AB resorted to what it considered to be a general concept of non-discrimination, namely that those similarly situated should not be treated differently. The AB went on to apply this general concept of non-discrimination to the situation where different levels of preference are accorded to different developing countries. Since in this situation, different developing countries are being treated differently on the face of the scheme, the AB not illogically suggested that a non-discrimination requirement entails the donor being able to show that this differential treatment flows from the fact that the countries accorded more preferences are not in the relevant sense 'similarly situated' to those accorded lesser preferences.

Now Steve raises a different kind of design feature in US GSP (that also exists to some extent in the basic EC scheme). Under this design feature, a developing country must meet certain conditions (not country specific but in principle attainable by any developing country) in order to receive the level of preferences offered to all developing countries alike. Steve suggests that this kind of design feature would be hard to defend under the interpretation of the AB of the non-discrimination requirement in the Enabling Clause. However, I do not believe the AB has even addressed itself directly to this type of situation. The issue of discrimination arises for the AB when different countries are being treated differently; it is unclear that any issue of discrimination arises when the same level of tariff preferences is accorded to all developing countries, but they have to fulfill certain minimum conditions – objective, origin-neutral, transparent – in order to receive that general level of preferences. Nevertheless, these conditions, however objective, origin-neutral, and transparent – could well offend the requirement of 3(c) of the Enabling Clause: for example the use of GSP conditionality to induce a developing country to increase further levels of intellectual property protection might well be contrary to development needs in a manner that runs afoul of 3(c).

But, returning to the situation to which the AB did address itself it seems to me that there are four things that a donor country must now show in order to defend a GSP program that provides different levels of preferences to different developing countries: (1) that the different countries are not similarly situated, in the sense that the countries receiving the greater preferences have special development needs; (2) that tariff preferences are an effective means of addressing those special

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needs: (3) that all developing countries who have those special needs are offered the greater preferences; (4) that any conditions or performance requirements imposed on the eligible countries be objective, transparent and non-discriminatory. With respect to (1), as Steve has already noted, the benchmark for development needs is a multilateral one, and therefore will import sustainable development law as it has evolved in UNCTAD, Rio etc. into the legal analysis; in a case dealing with labor, the ILO (International Labor Organization) would also be relevant. With respect to (2), Steve raises the question of whether 'effectiveness' presents a high hurdle to the defendant. It is difficult to know, but my assumption is that the AB has in mind a rational connection, and as it emphasized in the *Shrimp–Turtle* ruling, there would not be a requirement of empirical proof of effectiveness. With respect to (4), it is encouraging that the AB cited the conditions in the EC's environmental and labor preferences as examples of objective and transparent criteria. This could be a message as well that it would be unwise for India to follow up its drugs claim with a challenge to those other preferences (that it had, at the very beginning included in its claim along with drugs, but then withdrawn).

BARTELS: I think Rob makes a very good point on Article 33. I have a couple of comments on the model of providing additional preferences to all developing countries if they meet certain standards, which I suppose is exemplified by the EC's environmental and labor conditions. First, while this sort of condition is in principle non-discriminatory, a question of *de facto* discrimination could arise if for some factual reason a developing country is unable to comply with the standards (e.g. if it can't afford to). Second, any such *de facto* discrimination could be overridden by saying that all countries are *deemed* to be able to comply with these standards, insofar as they are bound to respect them under customary international law. Another point: If I read Rob's email correctly, he refers to para. 3(c) as a *condition* on differential treatment (i.e. 'the use of GSP conditionality to induce a developing country to increase further levels of intellectual property protection might well be contrary to development needs in a manner that runs afoul of 2(c)'), whereas I think the Appellate Body read this as an *objective* of differential treatment, which is much more restrictive. Personally, I think it should be a condition, not an objective, but I am not sure this is what they said.

CHARNOVITZ: I agree with Rob Howse's statement that the AB's reference to the additional EC preferences related to environment and labor is encouraging, and I presume that he means that it is encouraging for those who believe that such preferences are good policy. I am not sure that the AB necessarily meant that these preferences were objective and transparent (see para. 182), yet that is a reasonable inference from what the AB said. It was not necessary for the AB to refer at all to those labor and environmental provisions, and yet the AB did so, and so may have been signaling.

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In my brief comments, I did not consider whether the AB was right about what Howse calls 'hard law' on a non-discrimination requirement. I suspect he is correct that the donor states, or at least the United States and the EC, never accepted that their ability to modify or withdraw GSP preferences would be constrained. In this episode, as in many previous disputes, we see the WTO Appellate Body and panels interpreting/developing law in ways that the authoring states never agreed upon or perhaps never even imagined. His point about the incompleteness of the AB's analysis also seems sound.

Bartels very usefully calls our attention to the last sentence in para. 159 of the AB's report and I agree with his assessment that it is difficult to interpret. The phrase 'each and every' appeared in the panel report (para. 7.105) and the AB is specifically referring to it. I don't think the AB is saying that there is no obligation to respond to the needs of each developing country. Nor do I think that the AB is saying that there is no obligation to respond to the needs of any developing country.

I agree with Bartels that GSP donor governments that withdraw preferences may have a difficult argument to carry following the AB decision. Nevertheless, I can easily imagine scenarios in which withdrawing GSP benefits from a country that is egregiously violating internationally recognized worker rights could be a 'positive' response to the problem and a useful fillip in favor of meeting the development, financial, and trade needs of the people living within the recipient developing country. I certainly agree with Bartels, however, that it would be appropriate for a panel to inquire as to whether a donor government considers the affordability of compliance with a GSP standard. Or in other words, a GSP donor country that refuses to consider the income level of a GSP beneficiary in administering its GSP conditions may be subject to challenge in the WTO regarding that inflexibility.

BARTELS: Does para 2(a) of the Enabling Clause contain an implied obligation to differentiate? The Appellate Body seems to have interpreted paragraph 3(c) of the Enabling Clause as amounting to a *right*, rather than an *obligation*, to differentiate according to the needs of individual developing countries. Consequently, it allowed for GSP programs that do not differentiate between developing countries on this basis. However, it is possible that an obligation could still arise by necessary implication from the term non-discriminatory in para 2(a). This could be argued by analogy with a passage in *US–Shrimp*, in which the Appellate Body noted that, in certain circumstances, a failure to differentiate between unequal situations could itself be discriminatory. It said, in a well-known sentence, that:

> We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries (at para 165).

Could this statement apply by analogy to the non-discrimination condition in para 2(a) of the Enabling Clause? Against the analogy is the fact that this passage

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occurred in the context of the question whether a measure constituted *unjustifiable* discrimination under the Chapeau, which is a condition not replicated in the Enabling Clause. On the other hand, in this passage the Appellate Body was not considering the unjustifiable nature of the discrimination; it was simply identifying the discrimination itself. The fact that it never actually went on to analyze the unjustifiable nature of *this* particular discrimination (the rigidity of the US program) is possibly a failing in the reasoning of the report, but does not destroy the basis for the analogy.

In other respects the analogy also seems to hold. As we now know, both Art XX and the Enabling Clause have the same *status* as exceptions to the GATT. Their *functions* are also similar. Article XX permits, but does not require, WTO Members to adopt measures for a variety of policy purposes, so long as these are not applied in a manner constituting, *inter alia*, unjustifiable discrimination between countries where the same conditions prevail. Likewise, the Enabling Clause permits, but does not require, WTO Members to adopt measures for particular policy purposes (economic development, para 92) so long as these do not discriminate between similarly situated GSP beneficiaries.

The test of 'where the same conditions prevail' should arguably be determined with reference to the purpose of the measure (despite the AB's statement at para 149 of *Shrimp* that '[t]he policy goal of a measure at issue cannot provide its rationale or justification under the standards of the chapeau of Article XX'), and the test of 'similarly situated' should be defined in terms of the purpose of the Enabling Clause.

If the analogy holds, then a failure to differentiate between similarly situated GSP beneficiaries could amount to discrimination, despite what the AB seems to have held. This, perversely, would be a vindication of the argument made by India when it sought to demonstrate that para 3(c) could not grant even a right to differentiate, an argument that (one has the impression) the AB was trying hard to avoid. And, if this were true, it would have serious implications for the future administration of GSP programs, which would now have to be tailored specifically to the circumstances of each GSP beneficiary.

HOWSE: Lorand, you are pointing to a genuine problem. The AB's answer to the conundrum problem that the concept of non-discrimination as it bears on 2(a) lacks any comparator to define who is and who isn't similarly situated is to find the comparator in 3(c), a different provision that contains a sui generis requirement. But by making the notion of positive response to development needs the comparator for non-discrimination, the AB has opened the door to the kind of claim you describe, i.e. that a GSP program that treats non-similarly situated developing countries the same as far as level of preferences go would itself be discriminatory. This in turn increases the level of legal uncertainty flowing from the ruling, even beyond what one might have imagined. You will recall that in my articles on the dispute one reason I put forward against finding that non-discrimination as a

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'requirement' of 2(a) is a hard law obligation or condition, is that 2(a) and the description of non-discrimination that it references lacks any comparator, and there are problems with the adjudicator inventing a comparator out of thin air. Here the AB was too clever by half.

CHARNOVITZ: As I noted earlier in the exchange, I am puzzled by the frequent use of 'rights' talk in relation to the obligations of WTO Members under WTO rules. Lorand argues that the Appellate Body sees Enabling Clause paragraph 3(c) as a right rather than an obligation. I don't know if that is true, but, even if it is, I don't know what it means to say that the Appellate Body views paragraph 3(c) as a 'right.' Does that mean that without paragraph 3(c) that the behavior described therein would be prohibited by the WTO? This decision is filled with such loose statements by the AB. Another example is paragraph 162 of the decision where the AB sees paragraph 3(c) as 'authorizing' the described action. Yet paragraph 3(c) to me hardly reads as an authorization.

In paragraph 158, the Appellate Body suggests that Enabling Clause Paragraph 3(c), sets out an 'obligation'. In paragraph 179, the AB says that Paragraph 3(c) 'imposes requirements'. It was those statements (and others such as in para. 164) that were the premise of the tentative conclusions I offered at the beginning of the exchange that negative GSP conditionality seems more legally vulnerable now (after the Tariff Preferences case) than it did a year ago.

BARTELS: I agree that it is extremely confusing. In my earlier note, I tried to work out exactly what the AB was saying. My conclusion was that it interpreted para 3(c) as an *obligation*, but one that did not prohibit differentiation (of a particular type and subject to various conditions). This is equivalent, I think, to saying that there is a *right* to differentiate; though this is actually the result of absence of a prohibition. The legal technique is similar to the AB's treatment of Art 13 DSU, which was not, in my view, an interpretation of the word 'seek' (as some said), but rather a statement that there was no prohibition in this provision on accepting amicus briefs. One difference, though, is that the result there was not a *right* of a WTO Member, but a *power* of a panel.

On the issue of 'rights', it is true that sometimes these are merely the flip-side of obligations (a point that Joost made in other correspondence), and therefore it may be more appropriate to speak of the obligations. But is it never appropriate to speak of rights? Is Art XX not a conditional 'right' to take unilateral action? Does a WTO Member not have a 'right' to seek authorization to suspend concessions? In these matters, as in other areas of international law, the rules consist of more than prohibitions, do they not?

HOWSE: This is an important issue that goes way beyond this case. Conceptually, I would trace this back to the subtle way in which the AB articulated its view of Article XX of the GATT, and particularly the chapeau, as speaking to a balance

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of Member's rights and obligations. Part of the problem is that describing a particular provision of a WTO instrument as conferring 'rights' could have two distinct meanings, indeed in some sense opposite meanings. In the case of an *exceptions* provision such as Art. XX, it could mean that WTO obligations are not absolute or plenary but rather are subject to certain or sovereign rights of Members, which are themselves bounded so as not to gut or undermine the core of the *obligations* in question. This is what I understand the AB to be saying in Shrimp/Turtle. On the other hand, 'rights' can be used a la Petersmann to bootstrap *obligations* that constrain sovereignty into 'rights' of market access. I am very uneasy about the characterization of provisions as 'rights' in the second sense, as it seems to me to be a rhetorical sleight of hand that puts us almost unconsciously on the path towards direct effect and 'constitutionalization'. Nevertheless, I am probably guilty of sloppiness in this respect in some of my own writing.

CHARNOVITZ: I agree with Rob's two categories. I would add some others relating to the provisions in the Agreement where the term 'right' is used. Some of these are historical, such as GATT Article XXVIII:5, and I don't have a problem with those. Most others are new. The typical ones in TRIPS relate to the rights of the individual and I am the first to agree that treaty references to individual rights are quite useful. Some of them are procedural, such as Marrakesh Agreement Article IX:1 and I have no problem with those. Many others are in agreements where they are often pointed out as having substantive content, but I have often pondered what that content was, and whether the overuse of the term 'right' was helpful or harmful to a rule-based system. For example, see DSU art. 3.3, 3.4 or SPS art. 1.4, 2.1. In the Tariff Preferences case, I believe that the AB encouraged further use of rights talk, and that feature of the decision makes it hard to understand and to apply in future disputes.

Lorand has raised some good questions. In an earlier email, I listed some uses of 'right' in the WTO thought, which I thought were appropriate, and procedural rights are included. So I have no problem with the idea that Article 22 gives Members procedural rights to use the Article 22 procedures.

I think it is an interesting question (from Lorand) whether international rules generally consist of more than prohibitions. Certainly, there is rhetoric that the WTO is a balance of rights and obligations, and that states have rights and duties. And some treaties, like boundary treaties or LOS perhaps, do convey rights from one country to another, or from no one to specific countries. Still, I am unconvinced on the idea that in international law, rights of states are the flip side of duties.

With respect to Article XX, and harking back to Rob's earlier comment, I am doubtful that the expression of Article XX being a limited or conditional right has been good for the WTO or for the community and national values listed in Article XX. As Rob has suggested, Article XX might be viewed as space that has been reserved by States or sovereign rights that have been retained and not contracted

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away in the WTO. Where the GATT and to some extent WTO jurisprudence has gone wrong on Article XX, in my opinion, is in suggesting that the right to use Article XX measures comes from the WTO and has been kept limited to avoid abuse, and that otherwise countries would not have those rights because of GATT Article I and III which took away those sovereign rights.

This point of view was also a problem with the Panel decision in Tariff Preferences, which we have not yet discussed. I understand that Jane Bradley might have some important thoughts about the panel.

BRADLEY: Another interesting aspect of this case is what the Panel and the Appellate Body treated as *context* for the purpose of interpreting the Enabling Clause.

When I read the Panel report, I was struck by the extent to which the Panel relied on the preparatory work in UNCTAD, both for the context of the Enabling Clause language (in accordance with Article 31 of the Vienna Convention), as well as for supplementary means of interpretation (in accordance with Article 32 of the Vienna Convention).[14]

Before the Panel, the EC disputed the Panel's treatment of the UNCTAD Agreed Conclusions and other documents as context for interpreting the Enabling Clause under Article 31, asserting that the UNCTAD documents were preparatory work for the 1971 Waiver Decision and thus could only serve as supplementary means to confirm an interpretation resulting from application of Article 31.[15]

Before the Appellate Body, the EC cogently claimed that the Panel had made a selective and incorrect reading of the UNCTAD texts which it cited.[16] I believe the EC made a persuasive argument that those texts supported its interpretation of footnote 3 to paragraph 2(a), including its argument that the Enabling Clause does not preclude GSP donors from excluding certain developing countries from GSP benefits for reasons that donors consider compelling (which was not before the Panel in this case).[17] The UNCTAD documents and the minutes of the 1971 GATT Council meeting quoted in the EC Appellant Submission also lend credence to Rob Howse's view that GSP donors did not accept that their ability to modify or withdraw GSP preferences would be subject to such a hard-law constraint.[18]

At the same time, by citing passages from the UNCTAD documents that reflected the OECD countries' position, as contrasted with the position of the Group of 77, the EC demonstrated one of the pitfalls of relying on such preparatory work for context. Such documents usually reflect all the various views expressed, and simply take note of them without attempting to reconcile the differences.

The Appellate Body added another dimension to the contextual examination. Recognizing that the EC had not appealed the Panel's interpretation of Enabling

14 Panel Report, para. 7.88.
15 Panel Report, para. 7.76.
16 EC Appellant Submission, para. 78.
17 EC Appellant Submission, paras. 85–95.
18 *See* EC Appellant Submission, para. 92.

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Clause paragraph 3(c), but had cited it as contextual support for its interpretation of 'non-discriminatory' in footnote 3, the Appellate Body declared that it would examine paragraph 3(c) as *context* for its interpretation of the footnote.[19] However, the Appellate Body's discussion of paragraph 3(c) certainly reads like an interpretation of paragraph 3(c) itself, which was not within the Appellate Body's mandate. For example:

> In sum, we read paragraph 3(c) as authorizing preference-granting countries to respond positively to needs that are not necessarily common or shared by all developing countries. Responding to the needs of developing countries may thus entail treating different developing-country beneficiaries differently.[20]
>
> … when a claim of inconsistency with paragraph 3(c) is made, the existence of a development, financial [or] trade need must be assessed according to an objective standard. Broad-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations, could serve as such a standard.[21]
>
> … 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. Therefore, only if a preference-granting country acts in the positive manner suggested, in respon[se] to a widely-recognized development, financial [or] trade need, can such action satisfy the requirements of paragraph 3(c).[22]

I found this 'contextual examination' particularly interesting in light of the Appellate Body's statement that: 'we do not rule on whether the Enabling Clause permits *ab initio* exclusions from GSP schemes of countries claiming developing country status, or the partial or total withdrawal of GSP benefits from certain developing countries under certain conditions'.[23]

CHARNOVITZ: Jane has taken note of an interesting feature of the AB report, the way in which they use Paragraph 3(c) as context (see paras. 130, 157) for an interpretation of a footnote (no. 3) to Paragraph 2(a). I would have to assume that the authors did not intend to locate the key context for the footnote in an unrelated paragraph.

In para. 179, the AB notes that it is not applying 3(c) only using it for interpretation.

19 AB Report, para. 130.
20 AB Report, para. 162.
21 AB Report, para. 163.
22 AB Report, para. 165.
23 AB Report, para. 129.

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PAUWELYN: To my mind, the most striking feature of this AB report is how ambitious and self-confident it is laid out.

Based literally on a couple of words (whose meaning was hotly contested ever since they were written), the AB built a more or less coherent legal scheme for GSP preferences (very much a civil law approach, a background which is, no surprise, common to all three judges on the division!). As important, at the apex of this new legal scheme is the AB itself whose task it now is to decide (1) what the 'development, financial and trade needs' are of individual developing countries (para. 163); (2) whether rich country tariff preferences sufficiently 'alleviate' those needs (para. 164); and (3) whether, in the process, other WTO members are not bearing any 'unjustifiable burdens' (para. 167).

All of this gives a lot of discretion to the AB. The question remains, however, whether WTO members are ready for this (benign) form of judicial activism. If members do not respond appropriately (in this case, by drastically reviewing their GSP schemes), the AB's courage may well undermine its very legitimacy.

On to some specific findings then.

A legal obligation not to discriminate

For me, the most crucial one remains the conclusion that the words 'non-discriminatory' in footnote 3 impose a *legal obligation* not to discriminate between GSP beneficiaries (apart from Jane, the others have not really paid much attention to this). As Jane pointed out, the panel reached that conclusion with extended references to the 1971 GSP decision and the Second UNCTAD. The AB, on the other hand, comes to that conclusion in ONE SINGLE PARAGRAPH! (para. 147) This paragraph is essentially a smoke screen referring to subtle (but in my view inconsequential) differences between the English and French/Spanish versions of footnote 3 ('as defined in' *versus* 'as described in' the GSP decision). The AB does not even look at the actual content of the GSP decision thus referred to. If it had done so, it would have noticed that the words 'non-discriminatory' in the GSP decision itself are only set out in the preamble to the 1971 decision, are conditioned by the prefix 'mutually acceptable' system of … non-discriminatory preferences and are given meaning only with reference to the Second UNCTAD. Unlike the panel, I am not convinced, however, that this Second UNCTAD unambiguously confirms a legal obligation not to discriminate. The fact that the AB never referred to it may confirm this hunch.

At the same time, one must admire the strategic sense of the panel members. Here is what may have gone through their minds: They considered it unthinkable that GSP would be left completely in the hands of donor countries (on policy grounds, correctly so). Hence, they went to great lengths to confirm the existence of an obligation not to discriminate (on, one must admit, rather shaky legal grounds). The panel did not, however, feel comfortable to take on the role of deciding which GSP conditions would be acceptable and which ones not (not enough treaty text and perhaps a fear of upsetting the membership with judicial

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activism). Hence, they took the rather categorical decision that NO conditions can be linked to GSP (other than the two explicitly permitted). This 'extremism' put the ball in the camp of the AB: it made it easier for the AB to confirm the obligation not to discriminate, and also gave the opportunity to the AB to be somewhat more 'politically correct' by drawing a line between acceptable and non-acceptable GSP conditions, thereby pleasing the donor countries (on policy grounds, rightly so, since it would not make sense to force all donors to give the same preferences to, for example, North Korea and Botswana). The end result: the Enabling Clause now has teeth (esp. through the prohibition to discriminate) and it is for the WTO judiciary to decide when to use them!

What does non-discrimination mean?

The neutral versus negative definition of discrimination has been discussed in other comments. I only want to confirm Steve's point here that the AB preference for the negative definition may say something also about its view of conditions under MFN Art. I. Does any condition necessarily mean a violation of MFN? Or must the condition be discriminatory? If so, some GSP conditions would not even violate MFN, hence there would be no need to resort to the Enabling Clause.

This tendency of the AB to narrowly describe WTO non-discrimination rules can be found also in the *Asbestos* case, especially at para. 100 (the statement that differential treatment between like products is not enough for a GATT Art. III:4 violation, one also needs less favorable treatment of the *group* of imports).

All of this relates to whether a distinction should be made between differential treatment, discrimination, and protectionism. Does GATT Art. III only prohibit protectionism, for example, or also discrimination or even simple differential treatment between like products? Although for Art. III we have elaborate case law, for MFN Art. I there is very little.

Obligation to maintain and modify GSP

Two other important findings are, in my mind:

(1) 'the term 'generalized' *requires* that the GSP scheme of preference-granting countries *remain generally applicable*' (para. 156). This negates the argument often heard that to implement a finding of violation of one's GSP system, one can simply withdraw GSP all together. Based on the word 'general', the AB found an obligation to generally maintain GSP programs.

(2) GSP schemes 'may *need to be modified* in order to ''respond positively'' to the needs of developing countries' (para. 160). As Lorand discussed, para. 3(c) is also a self-standing obligation. Hence, besides giving a 'right' to differentiate between beneficiaries, para. 3(c) also obliges donors to do so, albeit only in a 'positive' way.

Like many others, both of these findings were not really necessary. And yet, the AB chastised *the panel* for having 'made findings on issues that were not before it' (para. 128)!

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Enabling Clause as an Exception 'in conflict with' MFN Art. I

Another crucial element: the AB ruling that the Enabling Clause is an 'exception' to MFN, but that it is still up to India (the complainant!) to raise it. The AB thereby further complicated its case law on 'exceptions' and 'conditional rights'. 'Exceptions' or affirmative defenses are to be invoked by the defendant and the defendant bears the burden of proof (examples are GATT Art. XX, SCM footnote 59 and, now, the Enabling Clause). 'Conditional rights', in contrast, are essentially provisions that read as exceptions but which are given a self-standing status in that the conditional right carves out the general rule so that the general rule and the conditional right apply side by side, in a mutually exclusive manner (examples are SCM Art. 3 and SCM Art. 27; SPS Art. 3.1 and SPS Art. 3.3). As a result, for 'conditional rights', the complainant continues to bear the burden of proof (i.e., in *EC–Hormones*, it was for the US to prove a violation of SPS Art. 3.3).

What the GSP report adds is this: when it comes to 'exceptions', the general rule continues to be 'applicable' (here MFN Art. I), but because of the exception, and to the extent the exception 'conflicts' with the general rule, the general rule cannot be actually 'applied' and the exception must prevail (based on *lex specialis!*). This is a hugely complicated construct to basically say that a stated exception trumps the general rule (in my view, there is no conflict between an exception and a general rule, one simply carves out the application of the other; even if there is only a need to rely on the exception once the general rule has been violated). At the same time, by seeing conflict here between the MFN *prohibition* and a *right* to differentiate under the Enabling Clause, the AB has now officially confirmed that it takes a broad view of the notion of conflict, i.e., one that includes a prohibition versus a right (a definition that Lorand and I have long defended), thereby implicitly overruling its earlier strict definition of conflict in Guatemala Cement.

Lastly, the AB now also makes a distinction between 2 types of exceptions: those that the defendant must raise and proof (e.g. Art. XX) versus those that the complainant must raise but that the defendant must proof (e.g. the Enabling Clause). In my view, for all of these exceptions as well as for the so-called conditional rights, it should be for the defendant to raise and prove them. Since exceptions are not to be interpreted narrowly, this does not change much in substance. All the distinctions and complexities added by the AB give the impression that conditional rights are more important than exceptions, and that even amongst the exceptions some (e.g. the Enabling clause) are more important than others (e.g. Art. XX).

The AB in both its *Japan–Apples* decision and this GSP decision has, however, made important corrections to its earlier (flawed) burden of proof case law: in GSP it confirmed that burden of proof is essentially only about facts, for the law, jura novit curia applies; in *Apples*, the AB confirmed that the burden of proof does not really shift, but remains with the one relying on a fact (in that case, Japan, even if the fact was raised under an article under which the US claimed a violation).

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References to International Law

Finally, my pet topic, the AB's references to international law:

1. Albeit implicitly, lex specialis in para. 101 ('Enabling Clause, as the more specific rule, prevails').
2. The general principle of jura novit curia (footnote 220), quoting an ICJ judgment.
3. The definition of 'discrimination' in general international law (footnote 318), although one could have doubts whether there is such a generally accepted definition (the references are to Oppenheim's and Vierdag).
4. '[D]evelopment, financial and trade need', to be defined by an 'objective' standard: 'broad-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations, could serve as such a standard' (para. 163, and the reference to international conventions and resolutions on drugs in footnote 335).

Although I would be the first to applaud references to non-WTO law, these references to 'general international law' and 'broad-based' recognition in other international organizations may be oil on the fire of those who abhor such references. My preference would be for the AB to test the grounds with references to treaties or rules that have been explicitly consented to by, at least, the disputing parties. To draw too much, at this stage, on vague general definitions, custom or 'broad-based recognitions', risks to undermine the, in my view, legitimate attempts to construe WTO rules in the wider context of international law.

Implementation

How can the EC implement the ruling? It must only get rid of the non-transparency of the drug condition. In footnote 335 the AB seems to imply that it would accept drug needs as a valid para. 3(c) need (although the AB never explicitly said so, something that is regrettable since it may prolong the dispute, especially given all the other, unnecessary findings that the AB made!).

Recall also that 'the term "generalized" *requires* that the GSP scheme of preference-granting countries *remain generally applicable*' (para. 156). Hence, for the EC to simply abolish (even significant parts of) GSP is not an implementation option.

In summary, the GSP ruling is very much like the Shrimp case: a radical panel (finding an across-the-board violation), followed by a 'politically correct' AB (requiring only changes in the way the condition is set out in its details and how it is implemented). Both rulings also leave open the question of how other conditions would fare, be it under Art. XX (i.e. other PPMs?) or under the Enabling Clause (i.e. the EC labor and environment condition).

At the same time, it must be remembered that even if a condition does not alleviate a para. 3(c) need (and hence the Enabling Clause may not offer a justification for the MFN violation), it may still be justified under GATT XX, especially the health, environment, and public morals conditions therein. Or would the Enabling Clause prevail as *lex specialis* also over GATT Art. XX???

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HOWSE: There are many fascinating thoughts here, Joost.

A few quick reactions (*and more considered ones to come later*)

I think you are write to point out that here we are back to the kind of Appellate Body jurisprudence exemplified by *Shrimp* (and I'd say *Hormones* and *Asbestos* too); very politically and institutionally sensitive, and attempting cleverly to navigate between constituencies and draw lines at places that all constituencies may find tolerable, if not legitimate. But, like *Asbestos*, there is a great deal of artifice that shows, and the ruling at times seems more contrived than brilliant. Myself I am not against this kind of public law judicial activism, and courts need to be able to do it in order to adjudicate hard cases and preserve their own legitimacy in a context of political conflict (see Cass Sunstein, etc.). But doing it well is very, very hard.

One or two things I didn't understand that well. First, how you could have a preference scheme and not have an MFN violation. Even if the conditions are non-discriminatory as between *developing countries*, you are still by definition denying preferences to *developed country* WTO Members, and thus *but for* the Enabling Clause, you would be violating GATT I. In sum, if you want to have a GSP scheme at all there is no way you can get around the Enabling Clause except by a waiver.

Secondly, your last point, albeit followed by three question marks. I just don't see the notion that a specific exception like the enabling clause would exclude the general exceptions in article XX, such that if you fail the enabling clause you can't use Art. XX. Is there any jurisprudence in the WTO that illustrates such an idea? It seems contrary to the language of Art. XX, '*nothing* in this Agreement shall prevent' (or words to that effect). Also the purposes stated in Art. XX exceptions go beyond and do not very perfectly overlap with those of the Enabling Clause. I realize you are only posing the question, but this sounds quite counterintuitive …

PAUWELYN: Yes, you're right, twice. Any GSP by definition violates MFN v-a-v developed countries so you always need the Enabling Clause *vis-à-vis* developed countries. But when it comes to developing countries that are not getting a certain preference (e.g. India), if conditionality as between developing countries is not necessarily a discrimination or MFN violation, then as between developing countries there may not even be an MFN violation in the first place; hence no need to go to the Enabling Clause. And this is what is important, in practice, since developed countries are unlikely to challenge GSP, only dis-advantaged developing countries will.

Yes, again, on your second point, I also think that XX should still operate as a fall-back to excuse GSP conditions not justified under the Enabling Clause. I only wanted to raise the question now that the AB itself set up the Enabling Clause as a lex specialis: one could, following that logic, argue that although XX permits a measure, the Enabling Clause prohibits it, hence one needs to decide which is the more specific rule. To me it shows that the AB was wrong in seeing 'conflict' here,

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with the related need to apply the lex specialis rule. As you implied, both the Enabling Clause and XX operate rather as exceptions that carve out the scope of application of Art I in the first place. If one sees it that way, XX and the Enabling Clause carve out different aspects of I and there is no conflict, hence a condition not justified under the Enabling Clause can still be justified under XX.

HOWSE: *Joost, On the second matter, we are as it turns out then in agreement.* On the first, think I know why may see things differently. That may be because of your view that essentially all WTO obligations are bilateral and not omne erges partes. You seem to be saying that in order for India to force let's say the EC to rely on the Enabling Clause, India would have to establish a violation of MFN *vis-à-vis India*. I don't think that's right. I think India can say that it has a legal interest in the EC's fulfillment of the conditions of the Enabling Clause, and that the EC has to fulfill those conditions, because otherwise its entire GSP scheme would be GATT illegal, because it discriminates against developed countries (and see Havana Club on MFN and National Treatment).

PAUWELYN: But if the Enabling Clause is an exception to MFN, then surely you must first prove a violation of MFN. What you are saying then, Rob, is that even if the EC does not violate MFN *vis-à-vis* India, India could still claim that any GSP necessarily violates MFN *vis-à-vis* developed countries. Therefore, also *vis-à-vis India* specific GSP conditions, even if fine under MFN as between developing countries, must still be justified under the Enabling Clause (or would you say that only the violation *vis-à-vis developed countries* must be justified?; if so, that is easy).

This does, indeed, go back to the question of whether WTO obligations are erga omnes partes. Yet, I do believe that depending on the complainant, the applicable rules and exceptions may be different. A violation *vis-à-vis* developed countries does not in itself trigger the need to justify a different aspect of the measure as it applies to developing countries. So in the end, we are talking about different aspects of the measure (not really about how one and the same measure affects different countries).

CHARNOVITZ: Joost's paper makes a number of interesting and valuable points. First, his analysis of the Appellate Body's ambitious civil law approach and the panel's strategic sense is the most convincing overall interpretation that I have heard of how this decision came about. Joost's approach to the case reminds me of some similar explanations by Bob Hudec that capture the reality of the jurisprudence. Second, Joost properly calls our attention to the thinness of the panel and AB decision that non-discrimination is required, and I remarked earlier that Rob had noted the incompleteness of that analysis. Third, Joost argues that terminating GSP is not an implementation option.

I am sure that Joost's third point is wrong. Granting GSP was not a GATT obligation, and cannot possibly be a WTO obligation. Joost cites paragraph 156

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for authority, but all the AB is saying there is that when a donor has a GSP scheme, that it has to be generally applicable. If the AB had meant to say that GSP was a requirement, why would they have used the language they did in para. 111 ('encouraged') and 106 ('authorizes'). The best support for Joost's proposition may be paragraph 98, which I took note of earlier, where the AB seems to posit a 'right' to receive differential treatment. Again, this is an example of how fuzzy thinking about WTO 'rights' can lead the AB in a dangerous direction. Also, I don't know what the state practice is with regard to providing GSP benefits (my guess is that most countries that could be donors are), but I don't think any of that practice was entered into under the assumption that GSP was an obligation. Certainly, none of the US Congressional consideration of GSP beginning in 1984 (the period in which I have followed it) ever contemplated that non-renewal of GSP would be a violation of international law.

Rob's recent note argues that even when non-discrimination is not a requirement of the Enabling Clause, that it is a requirement of MFN. Doesn't that take us back to the question of whether the Enabling Clause made Article I inapplicable, a conclusion that the Appellate Body did not reach, and may have gotten wrong?

On Joost's recent note, he alludes to the proposition that MFN might be interpreted to not prohibit conditionality as between developing countries. Yet if MFN can be interpreted that way, couldn't it also be interpreted to not prohibit non-extension of GSP to DEVELOPED countries. And, if so, then I wonder why Joost says that one would always need the Enabling Clause *vis-à-vis* developed countries.

PAUWEYLN: Steve, on whether the EC could simply terminate GSP, I think we must make a distinction between a general obligation to have a GSP (which, in my view, does not exist) and the obligation to 'generally maintain' a GSP once you installed one (which, I think, the AB confirmed in its report, although I agree with you that one may have doubts that this is what was intended). In other words, the AB seems to be referring rather to some kind of a standstill or minimum level of GSP that cannot fall below a certain threshold once you have GSP (para. 156: 'the term 'generalized' requires that GSP schemes … *remain generally applicable*'). The panel, more openly, confirmed that GSP can be expanded, but not be narrowed as compared with the UNCTAD Agreed Conclusions (although it did so under para. 3(c) and not, like the AB seems to do, under the word 'generalized' in footnote 3): para. 7.99: 'the Panel finds that paragraph 3(c) requires that, in designing and modifying GSP schemes, preference-giving countries provide product coverage and tariff cuts at levels in general no less than those offered and accepted in the Agreed Conclusions'.

On GSP's MFN violation *vis-à-vis* developed countries, you may be right: although, based on origin, all developed country goods will not get GSP preferences, you could, indeed, say that this condition of being a developing country is not discriminatory or based just on origin since it is essentially based on a country's

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level of development, hence all similarly situated countries are treated alike. If so then there would not even be a need for the Enabling Clause to waive Art. I!

CHARNOVITZ: Joost raises a very interesting issue as to whether once a donor country installs a GSP program, it has an obligation to keep it at some minimum level or threshold. In that regard, one point that the panel gave little consideration to, and that the AB did not at all, was what to make of the provisions in US GSP that drop countries (like Korea) or products that are import sensitive. If there is a standstill obligation, I would think that these exclusions from US GSP over the years would be legally questionable.

REGAN: I'm late joining this very interesting discussion, and you all seem to have said just about everything there is to say about the details of the Appellate Body's report. But since the report is likely to be regarded as an important statement about the nature of discrimination in WTO law, I want to offer some thoughts about discrimination, relevant to the GSP context but not limited to it.

(1) The Appellate Body, the parties, and the contributors to the present roundtable all distinguish between two sorts of discrimination: (1) 'neutral discrimination'any kind of differential treatment of entities covered by the law, and (2) 'negative discrimination'differential treatment that is somehow objectionable in regard to its purpose. I state (2) vaguely, because the first thing I want to do is to point out an important distinction within (2) that no one is focusing on.

The new distinction is between: (2a) [negative] discriminationdifferential treatment that has a specifically forbidden purpose, and (2b) [negative] discriminationdifferential treatment that is not justified by a specifically permitted purpose. This distinction is important. For example, it is at the core of disagreements about the relation between GATT Article III and Article XX. My own view is that with regard to origin-neutral measures, Article III embodies only the (2a) conception, with the forbidden purpose being protectionism; people who argue for a 'disparate impact' approach to III, expecting 'good' regulations to be saved under XX, are arguing in effect for applying the (2b) conception to origin-neutral regulations.

The Appellate Body in EC-GSP, insofar as it is concerned with 'negative discrimination', obviously takes the (2b) approach, so I am nervous about any commentary that treats this report as a general guide to the meaning of discrimination under the WTO. On the other hand, once they had found an obligation of non-discrimination, and once they had decided it was some version of negative discrimination that was forbidden, the Appellate Body were probably right to go with (2b) in this case, both because of the way 3(c) of the Enabling Clause is written and because the differentiation in the EC's GSP program is (inevitably) country-by-country. I think the WTO agreements plainly and with good reason include a strong presumption against country-by-country differentiation. Such

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differentiation may be justified under Article XX (see *Shrimp*, probably) or the Enabling Clause, but it is sufficiently disfavored so that it is plausible to say it can only be justified by reference to multilaterally endorsed goals, as those provisions require. In other words, it goes under (2b). That is also why in my view origin-specific discriminations under Article III go straight to XX (a conclusion for which there is also a good textual argument from the meaning of 'like products'). There is no comparable presumption against differentiation between products (even though 'like' products must be treated equally), which is why the text of Article III as I read it indicates that a regulation that is origin-neutral, that focuses on the product and not its origin, should be judged under (2a).

Joost suggests that maybe a law that distinguishes between countries, but for some announced 'generally applicable' reason, is not discriminatory at all and hence not an MFN violation. That seems to me at odds with the fundamental assumptions of the GATT. Suppose, e.g., Utopia (a WTO member) has a special low tariff rate for other countries that annually give at least 1% of their GNP in foreign aid. That's a general standard, and pretty benign, but surely there is no doubt that it is an MFN violation. We could even make the example involve a specifically favored WTO purpose: suppose the tariff break is given to countries that ratify the Kyoto Protocol ('sustainable development'), or suppose the break is given to all developing countries and to developed countries that have a GSP program, but not to developed counties that do not have a GSP program. Again, these are surely MFN violations. An argument could be made that they are justified under XX (not with much hope of success, to my mind), but it seems perfectly clear that Article I is violated.

In sum, we ought to distinguish between the (2a) and (2b) versions of negative discrimination. And we ought to distinguish between laws that differentiate between countries (explicitly or in covert intention) and laws that do not. (It is sometimes said that this distinction is not in the text, but I have explained elsewhere why it follows from the 'like product' language in Articles I and III.) And we ought to recognize that at least presumptively, differentiation between countries, which is specially suspect, is subject to a (2b) approach, while differentiation between products is subject, in the first instance at least, to a (2a) approach (which is a way of seeing whether it is country-based differentiation in disguise). In even briefer sum: under the WTO, member countries are *presumptively* 'like' (that is what one accepts in admitting them to MFN status), but products are not.

(2) Now to a different point, about a different aspect of the meaning of 'discrimination'. I am surprised and dismayed by the ease with which academics say that 'discrimination' includes not only (x) different treatment of entities similarly situated, but also (y) similar treatment of entities differently situated. (Sometimes the Appellate Body too, more on that later.) This sounds nice and symmetrical, and it might make sense in some idealized world. But in practice, in the actual world, there is a huge difference between (x) and (y), and (y) is much more troublesome.

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First of all, adding (y) to the definition of 'discrimination' requires that laws be made more complex. It requires the making of distinctions in the law and in its application, with attendant strain on law-making and administrative resources. Furthermore, as Joost points out, it means that if the anti-discrimination norm is judicially enforceable, then the courts must essentially generate a complete scheme of classification that all states must adopt. (Heaven forbid that the AB should really try to do this with regard to GSP.) One great advantage of limiting the anti-discrimination norm to (x) is that then there is a 'safe haven' for the legislature: give equal treatment, and you're home free. There is no 'safe haven' with (y). (Of course, we could rely on some notion of state responsibility to say that only egregious violations of (y) matter. That may help with the burdensomeness issue, but it still leaves a great deal to the courts and it provides no safe haven for the regulator.)

Notice also that negative discrimination interpreted as including (y) is potentially a more intrusive standard than 'neutral discrimination' (referring back to the definitions in Part I). As we stated the two main possibilities in Part I, any law that counted as negative discrimination had to also involve neutral discrimination, but not vice-versa. Hence the norm 'Avoid negative discrimination' forbade less than 'avoid neutral discrimination'. But if we now adopt (y) as our interpretation of 'negative discrimination', it is no longer true that any instance of negative discrimination must also be an instance of neutral discrimination (because differential treatment is no longer required for a violation of (y)). So we have converted what was intended to be a narrower prohibition (negative discrimination, narrowed by bringing in purpose) into a prohibition that is broader in some directions.

So, (y) ought to be treated with great care. It is remarkable that the Appellate Body introduced (y) into WTO jurisprudence in *Shrimp*, seemingly in flat disregard of the treaty text they had chosen to work with. In paragraph 160 of *Shrimp*, beginning its discussion of the specific application of the chapeau of Article XX to the US regime, and then again in paragraph 161, the Appellate Body quotes the chapeau's prohibition on 'unjustifiable discrimination between countries where the same conditions prevail'. In paragraph 165, they say 'those Members [the complainants] may be differently situated. We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.' Even if this is part of the meaning of 'discrimination', it is not part of the ordinary meaning of 'discrimination between countries where the same conditions prevail'. It might have been possible to explain why the text can support this seeming reversal of meaning, but the Appellate Body makes no attempt.

Of course their result in this case is sensible and desirable. But I would rather have got it from interpretation of 'relating to' in XX(g), a possibility they apparently cut themselves off from in *US–Gasoline*. The argument would be that

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excluding S*hrimp* from countries whose fleets, despite not having TED's, do not endanger turtles has nothing to do with the purpose of protecting turtles. They make an argument very like this in paragraph 165 itself. Notice that an argument of that form would be much harder to make about a GSP program that did not make all the distinctions the Appellate Body might think are appropriate. One still could not say that any of the preferences given by such a GSP program were unrelated to the purpose of promoting development. The program might not be 'ideally' related to promoting development, but no aspect of it would be simply unproductive by reference to the goal.

There is also a case from pre-WTO days that involves the (y) idea – the Canadian beer case, where the Panel invalidated a provincial uniform minimum price for beer that took away American producers' price advantage. But part of the objection here was that the minimum price had been set specifically by reference to Canadian producers' costs, rather than by reference to some neutral public goal. Notice that in both *Shrimp* and *Canada–Beer*, the similar treatment of differently situated entities suggests a forbidden purpose, as opposed to indicating merely imperfect adjustment of the regulations to some required purpose. So (y) may be acceptable when combined with (2a), but not when combined with (2b). Indeed, when (y) is associated with (2a), it does not raise the same problems of burdensomeness, judicial creativity, and lack of safe haven for the regulator that I pointed to above.

Why is (y) is so appealing? Its roots go back at least to Aristotle, and I think that is where the modern theorists got it. The place (y) appears in Aristotle is in his discussion of distributive justice. (I cannot swear that is the only place it appears, but that is the only place I am sure of offhand.) And that would explain why (y) is essential to Aristotle, but may not be to us. Aristotle's idea is that we should distribute P (honor, wealth) in proportion to Q (individual merit). This plainly requires that we distinguish between people with different levels of Q. In a society where Q is unequally distributed, if we just give everyone an equal amount of P, we obviously are not distributing P in proportion to Q. But it seems to me we still might claim that if we give everyone the same amount of P, we are not discriminating against anybody. The requirement 'Distribute P in proportion to Q' is much stronger than the requirement 'Make sure any differences in the distribution of P are justified by differences in Q.'

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