

THE PROPRIETY OF PREFERENCES: AN EVALUATION OF EC AND U.S. GSP SCHEMES IN THE WAKE OF EC-PREFERENCES

Omar Chaudhary*

I. INTRODUCTION

POLITICIANS HAVE USED "INTERNATIONAL LAW" to mask foreign policy maneuvers ever since global organizations made it possible for them to do so. Sometimes it is difficult to separate the legitimate machinations of international law from the "you scratch my back, I'll scratch yours" world of politicking. Such suspicions emerged, for instance, when the United States (U.S.) decided to grant special WTO-sanctioned trade incentives to Pakistan immediately after the South Asian country pledged its allegiance to the U.S. war on terror.¹ The Generalized System of Preferences (GSP) Schemes of the European Community (EC) and the United States have recently been the target of those who see international law as the hidden tool of foreign policy, and soon enough, challenges emerged.

India's recent challenge of special incentives in the European Community GSP system resulted in an influential decision by the World Trade Organization's (WTO) Appellate Body.² The EC-Preferences decision is not necessarily "influential" because it convinced trade scholars, but because it has already resulted in a proposal by the EC to alter significantly its GSP scheme. While the EC seems to have realized the potential impact of the decision, the United States retains essentially the same GSP system that has been in place for years. Although the future looks calm in Europe, legal storms are brewing across the Atlantic.

Not only does the EC-Preferences decision suggest that vast changes must be made in the U.S. system, it also raises a host of legal and policy questions that were not before the court. Doubts still linger whether GSP systems must contain some economic link when creating special incentives for developing countries. Broader questions concerning the role of human rights in the WTO and the role of unilateralism in trade law still

* B.A. (Middlebury College), M.A. (Michigan), J.D. (Michigan)

¹ Joseph Kahn "The Reward: U.S. is Planning an Aid Package for Pakistan That Is Worth Billions" *New York Times* (27 October 2001) B4.

² European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries (2004), WTO Doc.WT/DS246/AB/R (Appellate Body Report) [hereinafter "EC-Preferences"].

invite us to explore, analyse, and interpret. The EC-Preferences decision may act as a springboard that launches us to greater depths and forces us to explore the underlying theoretical currents of international law.

II. AN OVERVIEW OF THE EC AND U.S. GSP SCHEMES

THE COUNTRIES OF THE EUROPEAN community and the United States have granted trade preferences to developing countries for several decades.³ Although many countries had preferential trading agreements in place even at the inception of the General Agreement on Tariffs and Trade (GATT), the modern regime, which uses trade for the benefit of developing countries, emerged largely in the 1970s.⁴ GATT members passed a waiver of the Most Favored Nation (MFN) clause in 1971,⁵ allowing developing countries to receive more favourable treatment than others. In 1979, the waiver became a permanent exception to MFN treatment (the "Enabling Clause"), which was readopted by the WTO in 1994.⁶

In some ways, the GSP schemes of the EC and U.S. are surprisingly similar. Both grant lower tariffs to developing countries that comply with international labour standards and eschew the drug trade. Both schemes also contain a list of general exceptions, potentially denying all trade preferences to developing countries that do not comply.

Despite the fact that both systems emerged at the same time and look something alike, the EC and U.S. GSP schemes differ in important ways. First, the EC provides discounts to countries that meet certain environmental standards, while the U.S. does not.⁷ Second, the EC scheme is somewhat more detailed in defining the standards to which developing

³ Murray Gibbs, "Special and Differential Treatment in the Context of Globalization." UNCTAD Note presented to the G15 Symposium on Special and Differential Treatment in the WTO Agreements, New Delhi (10 December 1998).

⁴ Lance Compa & Jeffery S. Vogt, "Labor Rights in the Generalized System of Preferences: A 20-Year Review" (2001) 22 *Comp.Lab.L. & Pol'y J.* 199; Anthony N. Cole, "Labor Standards the Generalized System of Preferences: The European Labor Incentives" (2003) 25 *Mich. J. Int'l L.* 179 at 192.

⁵ *Waiver - Generalized System of Preferences* (1971), GATT Doc. (L/3545), B.I.S.D. 18S/24.

⁶ *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries* (1979), GATT Doc. L/4903 [hereinafter "Enabling Clause"].

⁷ EC, Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004. European Communities Council Regulation No. 2501/2001 (Dec. 10, 2001).

countries must adhere.⁸ Most importantly, while the EC grants additional tariff cuts for each and every condition met (e.g. compliance with international labour rights), the U.S. provides an all-or-nothing solution to developing countries, demanding that all conditions be met before any preferences are granted. This key difference between the EC scheme ("positive conditionality") and the U.S. scheme ("negative conditionality") has potentially vast legal consequences.⁹

A. The GSP Scheme of the European Community

The European Community regulation at the heart of the EC-Preferences dispute remains intact today;¹⁰ however, change is forthcoming. Although the EC has decided to extend the current legislation for another year (to December 31, 2005),¹¹ the WTO recently ordered the EC to alter its regulation (in accordance with the EC-Preferences Appellate Body decision) by July 1, 2005.¹² Only one month after the WTO's order, the European Commission released a new proposal to alter the GSP scheme.¹³ Most likely, the EC will use the proposal as a basis for a new GSP plan, which will replace the existing law by July 1, 2005.¹⁴

General Arrangements

The EC scheme grants preferences to imports based on four main considerations:

1. The product must be eligible;
2. The country must be eligible;
3. After discovering that a developing country and product are eligible for a particular tariff discount, the country

⁸ See "Generalized System of Preferences: Handbook on the Scheme of the European Community" UNCTAD (2002).

⁹ Lorand Bartels, "The WTO Enabling Clause and Positive Conditionality in the EC's GSP Program" (2003) *J. Int'l Econ. L.* 507.

¹⁰ *Supra* note 7.

¹¹ European Communities Council Regulation No. 2211/2003 (Dec. 15, 2003).

¹² *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc. WT/DS246/14 (2004) at para. 60.

¹³ Council of the European Union, *Proposal for a Council Regulation Applying a Scheme of Generalised Tariff Preferences*, 13931/04 (25 October 2004) [hereinafter "EC Proposal"].

¹⁴ See EC Proposal, *ibid.* The document itself proposes that the existing scheme be replaced by July 1, 2005. Moreover, the proposal requests that the articles concerning the special arrangements (at the heart of the EC-Preferences dispute) take effect immediately upon approval of the legislation.

- may receive additional discounts by complying with one or more of the EC's "Special Preferences;" and
4. The import must not be deemed ineligible according to the regulation's general exceptions.¹⁵

A small number of products are precluded entirely from consideration for special preferences - largely industrial, agricultural, and fishery products. Under the new proposal, certain agricultural and fishery products will no longer be precluded from consideration.¹⁶ Even under the new proposal, however, some categories of products are still dismissed *ex ante*. Once a product is considered, those that are deemed "sensitive" receive less preferential treatment than "non-sensitive" products. Under both the existing and proposed systems, "sensitive" imports receive a small decrease in tariffs, while the EC suspends tariffs entirely for "non-sensitive" imports from beneficiary countries.¹⁷

As mentioned above, not only must the product be eligible for preferential treatment, but the country must be eligible as well. Under the new proposal, a country will not be eligible if the World Bank has classified it as a "high-income" country for three years in a row and when that country's GSP-covered exports to the Community are moderately diversified.¹⁸ If a country is not a "high-income" country, or does not otherwise meet these criteria, the country may "graduate" from the program later on if it eventually becomes a high-income country and achieves export diversification.¹⁹ If an import is eligible and originates from an eligible country, then it generally receives a standard tariff deduction.

Special Arrangements

In addition to the standard deduction on tariffs, countries may receive "special incentive arrangements" by complying with certain international standards. Under the existing regulation, countries may qualify for three separate special preferences:

¹⁵ This particular feature of the EC regulation - the general exceptions - will most likely be altered to comply with the Appellate Body's ruling in EC-Preferences.

¹⁶ See EC Proposal, *supra* note 13, Explanatory Memorandum at para. 4.

¹⁷ See EC Proposal, *ibid.*, Art. 7.

¹⁸ EC Proposal, *ibid.*, Art. 3(1) (specifying that the condition is met "when the five largest sections of its GSP-covered imports to the Community represent less than 75% of the total GSP-covered imports of the beneficiary country to the Community").

¹⁹ Interestingly, both the existing and proposed GSP schemes begin with a list of countries that are eligible, and then discuss how countries are removed. Neither regulation discusses how new countries might be added to the pre-existing list of eligible countries.

1. Preferences for complying with certain International Labor Organization (ILO) conventions;
2. Preferences for complying with international environmental conventions; and
3. Preferences for preventing the production and export of illegal drugs.²⁰

These three special incentive arrangements provide separate but cumulative trade benefits. In other words, if a developing country complies with only one of the arrangements (e.g. compliance with labour standards), it will still receive a corresponding tariff cut. Later, if the country manages to comply with one or more of the remaining special arrangements, it shall receive additional tariff relief.²¹

Under the proposed scheme, there is *only one* special incentive arrangement. For the most part, the three separate arrangements in the existing system have been collapsed into a single arrangement.²² To qualify for the single arrangement, countries must essentially comply with all three of the existing arrangements.²³ Therefore, countries that today qualify for only one of three special preferences will, under the proposed scheme, most likely not qualify for any special preferences at all.

The EC's new special preference only extends to certain products. Some products are precluded from consideration if they originate from certain pre-specified countries.²⁴ For example, the proposal states summarily that "vehicles, aircraft, vessels and associated transport equipment" from South Africa are not part of the GSP program.

To qualify for the special arrangement under the new proposal, a country must:²⁵

²⁰ *Supra* note 7.

²¹ European Communities Council Regulation No. 2501/2001 Art. 8(4) (Dec. 10, 2001).

²² EC Proposal, *supra* note 13, Art. 9.

²³ To clarify an earlier point, the proposed EC plan may still be seen as an example of "positive conditionality." Beneficiary countries receive a standard deduction under the EC's general arrangements, and then may qualify for an additional tariff decrease under the proposed special incentive arrangement.

²⁴ This preclusion occurs on top of the general preclusion of some products from the overall GSP scheme. For instance, even if a product is eligible to receive regular import preferences under the GSP, it may still be precluded from receiving "special" preferences if it originates from certain pre-specified countries.

²⁵ See EC Proposal, *supra* note 13, Arts. 8 & 9.

- ratify and "effectively implement" sixteen specific UN and ILO conventions relating to human and labour rights;
- ratify and "effectively implement" at least seven of eleven specific conventions relating to the environment, drugs and corruption;²⁶
- commit itself to ratify and implement the rest of the eleven conventions which it has not yet ratified and implemented;²⁷
- undertake to continue supporting the aforementioned conventions and must accept regular monitoring and review of their ratification and implementation; and
- be considered a "vulnerable country."²⁸

The proposal's special incentive arrangements differ from the existing arrangements in a number of ways. First, as mentioned previously, there is only one arrangement as opposed to three. Second, the proposed scheme offers additional requirements. The new scheme now promotes "good governance" by requiring countries to adopt, for instance, the Mexico UN Convention against Corruption.²⁹ Third, more explicit reference is made to particular conventions that beneficiary countries must adopt before receiving special treatment. Fourth, the regulation provides more guidance for the EC's determination about who shall receive the special preference. Fifth, the proposed regulation requires countries to be "vulnerable," which differs from the existing regulation. Finally, even if an import fulfills all of the proposal's aforementioned requirements, it may still be denied all preferential treatment under the entire GSP scheme if it does not meet a series of general prerequisites. Specifically, a developing country's exports may be denied preferences for any of the following reasons:

- serious shortcomings in customs controls on export or transit of drugs (illicit substances or precursors);³⁰

²⁶ The subjects of drugs and corruption are referred to collectively in the regulation with the term "good governance."

²⁷ By 2008, the country must ratify and implement *all* of the 27 total conventions.

²⁸ The regulation defines a "vulnerable country" as one which is either 1) not a "high income" country *and* which is not very diversified in its GSP-covered imports to the EC, or 2) whose GSP-covered imports to the EC represent less than 1% of all total GSP-covered imports to the EC. EC Proposal, *supra* note 13, Art. 9.

²⁹ EC Proposal, *supra* note 13, Annex III.

³⁰ *Ibid.*, Art. 15.

- failure to comply with international conventions on money laundering;³¹
- failure to comply with rules of origin,³² if the product threatens to cause "serious difficulties" to a Community producer of a like product;³³ or
- "serious disturbance" to Community markets,³⁴ among other reasons.

B. The GSP Scheme of the United States

Although the United States' GSP scheme remains similar to the scheme it had in place during EC-Preferences, the U.S. does not promise any drastic alterations to its legislation. In some ways, it does not make sense to speak of "special arrangements" when considering U.S. incentives for labour rights and drug curtailment. Instead, those incentives should be discussed as part of a larger category of "general exceptions." The U.S. scheme is therefore defined by three main characteristics: product eligibility, country eligibility, and general exclusions (which include exclusions for failure to uphold labour standards or curtail drug production or trafficking).

Product Eligibility

The U.S. scheme limits the number of eligible products in four ways:

1. The product must be designated by the President of the United States as an "eligible article."³⁵ Although certain items are definitely ineligible, scant criteria govern what items are definitely eligible;
2. It precludes certain specific products from consideration;³⁶

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*, Art. 20.

³⁴ *Ibid.*, Art. 21.

³⁵ A procedural note: if, upon application to the GSP scheme, a product has been denied entry, it will not be considered for another three years. 19 U.S.C. §2463(a)(1)(C).

³⁶ These products include textiles, watches, footwear, handbags, luggage, flat goods, work gloves and other wearing apparel. See *Generalized System of Preferences: Handbook on the Scheme of the United States of America*, UNCTAD, (June 2000).

3. Any product deemed "import-sensitive" is ineligible;³⁷ and
4. A product from a particular country may be "graduated" from the GSP scheme if it exceeds a "competitive need limitation."³⁸ Although there are "upper" and "lower" competitive need limitations, a product may be at least temporarily removed from the program if the imports of that product from a particular country account for more than 25% of U.S. imports for that product in a given year.³⁹

The President (usually acting through the U.S. Trade Representative) may grant waivers to competitive need limitations in several ways. Under one method, the President must make a determination that the waiver is in the "national economic interest" of the United States.⁴⁰ In doing so, the President must give great weight to the following:

[T]he extent to which the beneficiary developing country has assured the United States that such country will provide equitable and reasonable access to the markets and basic commodity resources of such country, and the extent to which such country provides adequate and effective protection of intellectual property rights.⁴¹

Country Eligibility

The U.S. scheme also limits the countries that are eligible to receive preferences for their products. GSP benefits are only available to "beneficiary developing countries," which are not deemed "high-income" countries by the World Bank.⁴²

The President of the United States retains ultimate authority to designate countries as "beneficiary developing countries."⁴³ When determining whether to designate a country as a beneficiary developing country, the President "shall take into account" a number of factors.⁴⁴ As might

³⁷ 19 U.S.C. §2463(b)(1).

³⁸ 19 U.S.C. §2463(c).

³⁹ See UNCTAD *supra* note 36 at 12.

⁴⁰ 19 U.S.C. §2463(d).

⁴¹ 19 U.S.C. §2463(d).

⁴² 19 U.S.C. §2461. Least-developed countries receive additional tariff cuts. Interestingly, the term "developing countries" is nowhere defined in the legislation.

⁴³ 19 U.S.C. §2462(a)(1).

⁴⁴ 19 U.S.C. §2642(c).

be expected, one of these factors is the "level of economic development of such country."⁴⁵ The President must also take into consideration a number of other, rather unexpected factors. These other factors include "whether or not other major developed countries are extending generalized preferential tariff treatment to such country"⁴⁶ and "the extent to which such country is providing adequate and effective protection of intellectual property rights."⁴⁷ The U.S. provisions, like the EC regulation, make a distinction between "developing" and "least-developed countries." However, the U.S. provisions go further, granting special status to not only "least-developed countries," but also "sub-Saharan" beneficiary developing countries.⁴⁸

General Exclusions

There are also a number of general exceptions for potential beneficiary countries that may prevent them from receiving GSP benefits altogether. Many of the exclusionary grounds, which are mentioned below, may be waived by the President if he deems such action to be "in the national economic interest of the United States."⁴⁹

Communist countries are excluded, except for communist WTO members.⁵⁰ Although worded in generalized language, exclusion exists for The Organization of Petroleum Exporting Countries (OPEC).⁵¹ Countries that seize property of the U.S. or its citizens (including intellectual property), or break contracts with the U.S. or its citizens may be excluded.⁵² Countries that aid or shelter terrorists or have not "taken steps to support the efforts of the United States to combat terrorism" are similarly ineligible.⁵³

⁴⁵ 19 U.S.C. §2642(c)(2).

⁴⁶ 19 U.S.C. §2642(c)(3). Presumably, countries that are receiving preferential treatment from other countries are more likely to receive special treatment from the United States. Though the rationale for this provision is somewhat obscure, it can be best explained by the historical context of the U.S. and EC GSP schemes. See Anthony N. Cole, *supra* note 4 at 179, which discusses competition between the U.S. and Europe over trade preferences to developing countries.

⁴⁷ 19 U.S.C. §2642(c)(5).

⁴⁸ See *e.g.* 19 U.S.C. §2463 (c)(2)(D).

⁴⁹ 19 U.S.C. §2462(b).

⁵⁰ *Ibid.*

⁵¹ "Such country is a party to an arrangement of countries and participates in any action pursuant to such arrangement, the effect of which is -- (i) to withhold supplies of vital commodity resources from international trade or to raise the price of such commodities to an unreasonable level, and (ii) to cause serious disruption of the world economy." *Ibid.*

⁵² 19 U.S.C. §2462(b)(2)(D).

⁵³ 19 U.S.C. §2462(b)(2)(F).

Countries that do not comply with certain labour or drug standards are excluded from the GSP program altogether. The labour exclusions apply to any country that "has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country (including any designated zone in that country)"⁵⁴ or any country that has not "implemented its commitments to eliminate the worst forms of child labor."⁵⁵ The President may also deny all GSP benefits to "major drug producing" countries or "major drug-transit" countries.⁵⁶ These drug-involved countries may avoid losing benefits if they cooperate with the United States to fight drugs, or, alternatively, if the "vital national interests of the United States require that" their preferences be maintained.⁵⁷

⁵⁴ 19 U.S.C. §2462(b)(2)(G). The regulation later expands on what it means by "internationally recognized worker rights":

- (A) the right of association;
- (B) the right to organize and bargain collectively;
- (C) a prohibition on the use of any form of forced or compulsory labor;
- (D) a minimum age for the employment of children, and a prohibition on the worst forms of child labor, as defined in paragraph (6); and
- (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. 19 U.S.C. §2467(4).

⁵⁵ 19 U.S.C. §2462(b)(2)(H). According to the regulation, the "worst forms of child labor" are considered the following:

- (A) all forms of slavery or practices similar to slavery, such as the sale or trafficking of children, debt bondage and serfdom, or forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict;
- (B) the use, procuring, or offering of a child for prostitution, for the production of pornography or for pornographic purposes;
- (C) the use, procuring, or offering of a child for illicit activities in particular for the production and trafficking of drugs; and

(D) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety, or morals of children.

The work referred to in subparagraph (D) shall be determined by the laws, regulations, or competent authority of the beneficiary developing country involved. 19 U.S.C. §2467(6).

⁵⁶ 19 U.S.C. §2492(a)(1). A "major drug-transit country" is defined as a country that, among other things, "is a significant direct source of illicit narcotic or psychotropic drugs or other controlled substances significantly affecting the United States" at 19 U.S.C. §2495(3)(A).

⁵⁷ 19 U.S.C. §2492(b)(1)(A)(ii).

III. COMPLIANCE OF THE EC AND U.S. GSP SCHEMES WITH THE EC-PREFERENCES RULING

SOME COMMENTATORS HAVE SPECULATED that the Appellate Body's (AB) decision in EC-Preferences threatens many aspects of the EC and U.S. GSP schemes.⁵⁸ Although the AB's decision was limited to the EC's drug arrangements and answered only a handful of specific legal issues, its holdings apply generally to arrangements for labour and the environment. Furthermore, the AB examined some legal issues that were tangential (or arguably unrelated)⁵⁹ to the case at hand. Although some of the EC-Preferences decision might be considered *obiter dictum*,⁶⁰ it helps to predict how unchallenged provisions of the GSP schemes would fare under closer scrutiny. The EC's new proposal certainly incorporates much of the AB's reasoning and therefore avoids most potential disputes, but the U.S. scheme appears exceedingly ripe for legal challenge.

A. A Brief Summary of the EC-Preferences Dispute

Before evaluating potential challenges to the EC and U.S. GSP systems, it makes sense to observe the scope and basic holdings of the AB's decision in EC-Preferences. India initiated the dispute by challenging all of the special incentive arrangements in the EC scheme (drugs, labour and the environment). Over time, however, India retracted its challenges to the labour and environmental incentives, focusing solely on whether the EC's drug preferences were legal.

The AB began by stating that the Enabling Clause - the WTO agreement that makes GSP schemes possible - must be considered an exception to Most Favoured Nation (MFN) treatment.⁶¹ Because the Enabling Clause was considered an exception, the party challenging conditional preferences must first prove noncompliance with Article I:1 of GATT 1994 and point to the specific provisions of the Enabling Clause that are being violated. To avoid an MFN violation, the respondent must then justify its incentives⁶² with "sufficient evidence to substantiate its assertion that the

⁵⁸ Steve Charnovitz *et al.*, "Internet Roundtable: The Appellate Body's GSP Decision" (2004) 3:2 World Trade Review 239, 244-45.

⁵⁹ *Ibid.* at 254. From a factual standpoint, the present drug arrangement is drastically different from the proposed special incentive arrangement.

⁶⁰ Despite the tenuous legal force of dictum in EC-Preferences, it may still be valuable for its predictive value. In any event, the existence of *stare decisis* (upon which the concept of *obiter dictum* rests) in the WTO system remains dubious.

⁶¹ EC-Preferences, *supra* note 2 at para. 99.

⁶² *Ibid.* at para. 104.

[inducements] comply with the requirements of the Enabling Clause."⁶³

The AB then analysed the Enabling Clause's requirement that preferences be "generalized, non-reciprocal and non-discriminatory."⁶⁴ The "generalized" requirement is met if the GSP schemes "remain generally applicable."⁶⁵ The AB focused most closely on the term "non-discriminatory," which according to India's argument, required identical treatment to *all* developing countries in the GSP scheme. The AB disagreed, holding that a preference system need not treat all developing countries identically *per se*, but instead must treat all "similarly situated" developing countries identically.⁶⁶ For example, if the EC is addressing the need for sustainable development throughout the world by creating a trade preference for certain labour rights, all developing countries who uphold those labour rights should be given the preference.

Despite the small victory for the EC, its GSP scheme was ultimately ruled GATT-illegal for two largely procedural reasons. The first procedural reason was that inclusion or removal of the preference was not possible and would require an amendment to the EC regulation. The EC drug preferences simply stated a closed list of twelve countries that could receive the benefit, and did not allow new countries to be added or removed from the list. Since "similarly situated" countries (those meeting the drug requirements) could easily be left off the list (for instance, if they only recently began meeting the drug requirements), and since there would be no way to grant them the preference except via amendment, the regulation was impermissible.

The second procedural reason for the EC's failure was the lack of any "objective criteria" governing inclusion or removal from the special preferences. The Enabling Clause requires that preferences be "designed, and if necessary modified, to respond positively to the development, financial and trade needs of developing countries."⁶⁷ In order to address those "needs" in a "non-discriminatory" way, developed countries must establish "objective criteria" to determine the following:⁶⁸ how a beneficiary is chosen,⁶⁹ the existence of a need in a particular country,⁷⁰ and the effectiveness of alleviating a need in a particular country.⁷¹ Moreover,

⁶³ *Ibid.* at para. 105.

⁶⁴ Enabling Clause, *supra* note 6, FN 3.

⁶⁵ EC-Preferences, *supra* note 2 at para. 156.

⁶⁶ *Ibid.* at para. 154.

⁶⁷ Enabling Clause, *supra* note 6, Art. 3(c).

⁶⁸ EC-Preferences, *supra* note 2 at para. 183.

⁶⁹ "[T]he Regulation itself gives no indication as to how the beneficiaries under the Drug Arrangements were chosen or what kind of considerations would or could be used to determine the effect of the 'drug problem' on a particular country." *Ibid.*

⁷⁰ *Ibid.*

⁷¹ "[T]he Regulation does not, for instance, provide any indication as to how the

the AB suggested that it might be impermissible to grant preferences based, in part, on criteria that do not relate to the purported need being addressed, such as "failure to comply with international conventions on money laundering."⁷²

B. Compliance of the Proposed EC GSP Scheme with the EC-Preferences Ruling

Areas of Compliance

The European Commission assuredly had the EC-Preferences decision in mind when it wrote its proposal for a new system of generalized tariff preferences. "Experience has shown," it writes in its opening lines, "that some of [the GSP's] features work well in practice and should be continued while, on the other hand, it would seem necessary to adjust some of the measures *in light of experience gained*."⁷³ The Commission's intent to respond to the EC ruling is apparent from the many amendments, as well as the fact that the proposal intends to take effect on July 1, 2005 (the same date by which the WTO has requested the EC to alter its scheme in accordance with the AB's decision).⁷⁴ Despite responding to most of the AB's criticisms, however, the Commission's proposal still defies the EC-Preferences ruling in minor ways.

The proposal manages to incorporate some of the legal conclusions of the Appellate Body. In particular, the EC complies with the first procedural fault of its former drug arrangements: that the drug arrangements did not have a process of inclusion or removal of beneficiary countries without recourse to amendment. Even before the proposal, in fact, the AB stated in EC-Preferences that labour and environmental preferences were procedurally superior to the drug arrangements,⁷⁵ possibly hinting that they would withstand a legal challenge. Under the new proposal, the former drug incentives have essentially been folded into the same single arrangement as the labour and environmental incentives, with all of the

European Communities would assess whether the Drug Arrangements provide an 'adequate and proportionate response' to the needs of developing countries suffering from the drug problem." *Ibid*.

⁷² *Ibid.* at para. 184.

⁷³ *Ibid.*, Explanatory Memorandum, §1 [emphasis added].

⁷⁴ EC Proposal, *supra* note 13, Art. 30.

⁷⁵ Both incentive arrangements were said to "include detailed provisions setting out the procedure and substantive criteria that apply to a request by a beneficiary under the general arrangements described in Article 7 of the Regulation (the 'General Arrangements') to become a beneficiary under either of those special incentive arrangements." EC-Preferences, *supra* note 2 at para. 182.

same rigorous procedural mechanisms. Despite any lingering doubts about inclusion or removal processes,⁷⁶ the EC proposal should be able to clear this first procedural hurdle.

As for the second procedural requirement - using "objective criteria" in various determinations regarding preferences - the EC proposal responds to some possible concerns, but also encounters some problems. The good news for the EC is that, unlike the existing drug arrangements, there are at least *some* criteria involved for the new special arrangements.⁷⁷ As mentioned before, the AB suggested three determinations for which "objective criteria" might be used.⁷⁸ Actually, a close reading of the AB decision suggests that the first two determinations must use objective criteria, while not using objective criteria for the third determination would at least cast doubt upon a special incentive.⁷⁹

First, "objective criteria" must be used to determine how beneficiaries are chosen.⁸⁰ The EC proposal manages this task well. Beneficiaries are chosen if they comply with a series of international conventions relating to "sustainable development" and if they are "vulnerable" countries (which essentially involves economic number crunching). Furthermore, the EC determines compliance with the international conventions primarily by looking to the determinations of related international organizations. For instance, in deciding whether the Republic of Moldova has "effectively implemented" the Abolition of Forced Labour Convention, it will turn first to International Labour Organization (ILO) reports. Although the ultimate

⁷⁶ Both the existing and proposed regulations state that only countries "listed in Annex I" are even considered. The regulations then proceed to make a determination whether the countries listed in Annex I may receive general or special preferences. There are very thorough processes relating to the granting or the loss of general and special preferences to countries listed in Annex I (i.e. what the AB refers to as "inclusion" and "removal"), although the regulation never states how someone that is not currently listed in Annex I may be added. This may be a moot point, especially if Annex I already contains all potential developing countries in the world, or at least all developing countries in the WTO (there are dozens of countries listed). Such an issue, however, may arise if a currently developed country undergoes economic collapse and should then be classified as a "developing" country. How would such a country apply to be included in Annex I? The answer is that no procedural mechanism exists for inclusion in Annex I. Luckily, the scenario outlined here is highly unlikely.

⁷⁷ Trade law scholar, Steve Charnovitz, has joked that the title of the AB decision, "Conditions for the Granting of Tariff Preferences to Developing Countries," is actually a misnomer, since the drug incentives did not contain any "conditions" at all; rather, it simply provided benefits for a closed list of 12 countries. *Supra* note 58 at 239.

⁷⁸ EC-Preferences, *supra* note 2 at para. 183.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

determination rests with the EC, great weight is put upon the opinions of the organizations related to the relevant conventions.⁸¹

Second, the existence of a "development, financial [or] trade need must be 'widely-recognized'"⁸² and determined by using "objective criteria."⁸³ The EC proposal also appears to pass this test. Discussing Article 3(c), the AB noted, "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."⁸⁴ The EC proposal specifically links the need for "sustainable development" with both the WTO and the instruments of international organizations, establishing that it uses "objective criteria" in determining the existence of developing countries' needs.⁸⁵

Finally, the EC may fail to use objective criteria to determine the effectiveness of its GSP program, but it appears that this might not be a fatal mistake. It seems the AB highly recommends the use of "objective criteria" when determining whether the special incentive constitutes an "adequate and proportionate response" to a developing country's need.⁸⁶ One might read this rather ambiguous language from the AB to mean that GSP schemes use objective methods of determining whether their special incentives are *effective*.⁸⁷ If indeed that is the case, then the EC proposal is in trouble; the new regulation offers no guidance for evaluating the effectiveness of its special incentives. One must note, however, that the Appellate Body did not clarify exactly how important it is to use objective criteria for determining the effectiveness of a measure.

Areas of Potential Noncompliance

Despite responding to much of the AB's criticism, the proposed GSP scheme potentially conflicts with EC-Preferences in several ways:

⁸¹ EC Proposal, *supra* note 13, Preamble at para. 8.

⁸² EC-Preferences, *supra* note 2 at para. 164.

⁸³ See *ibid.* at para. 183. Although the AB did not precisely use this language, it required the use of objective criteria when evaluating "the effect of the 'drug problem' on a particular country." If one considers the "drug problem" as creating a "need," then the "effect of the 'drug problem'" correlates roughly to "the existence of a need." See *ibid.*

⁸⁴ *Ibid.* at para. 163.

⁸⁵ See EC Proposal, *supra* note 13, Explanatory Memorandum at para. 4 (noting the recognition of the need for "sustainable development" in the *WTO Agreement* as well as "multiple international conventions and instruments").

⁸⁶ EC-Preferences, *supra* note 2 at para. 183.

⁸⁷ Such a reading would make sense since some scholars view the AB as creating an "effectiveness" requirement, which is discussed above. *Supra* note 58 at 240.

- The EC fails to rid itself of certain general exclusionary grounds noted disapprovingly by the AB.
- The *ex ante* exclusion of certain products from particular countries potentially violates the principle of non-discrimination.
- The proposal's special incentives may not be effective in addressing the needs of developing countries.

Only the first of these challenges, however, boasts much chance of success.

The new EC proposal maintains certain "Temporary Withdrawal and Safeguard Provisions," which were openly criticized by the Appellate Body. The AB singled out the EC's withdrawal and safeguard provisions when discussing the need for objective criteria that, "if met, would allow for other developing countries 'that are similarly affected'" to be removed from the program.⁸⁸ It criticized the provisions because "a country may be removed as a beneficiary under Annex I, either altogether or in respect of certain product sectors, for reasons that are not specific to the Drug Arrangements."⁸⁹ Finally, the AB stated the following:

Although one reason for which the [drug] arrangements may be temporarily withdrawn is "shortcomings in customs controls on export or transit of drugs (illicit substances or precursors), or failure to comply with international conventions on money laundering," this reason applies equally to the General Arrangements, the Drug Arrangements, and the other special incentive arrangements. Moreover, as the Panel appeared to recognize, this condition is not connected to the question of whether the beneficiary is a "seriously drug-affected country."⁹⁰

The Appellate Body's logic is that in order for a conditional preference to remain "non-discriminatory," it may only utilize conditions that relate to the need of the developing country being addressed. For example, if you are using preferences to help solve a developing country's need for stronger labour rights, you may not attach a condition that excludes all Buddhist countries from consideration because there is no meaningful connection between the need and the condition.

⁸⁸ EC-Preferences, *supra* note 2 at para. 183.

⁸⁹ EC-Preferences, *supra* note 2 at para. 184.

⁹⁰ *Ibid.*

In determining whether the proposal's "Temporary Withdrawal and Safeguard" provisions are suspect,⁹¹ one must determine whether the exclusion (for countries with poor customs controls for drugs or who fail to stop money laundering) is connected to the need for "sustainable development." At certain points, the proposed regulation mentions the importance of "good governance" in relation to its special arrangements.⁹² It is at least plausible that stringent customs control of drugs and measures against money laundering would operate to decrease levels of corruption and promote good governance. In fact, one of the conventions that the proposal incorporates into its special arrangement is the Mexico UN Convention against Corruption.⁹³ From this standpoint, there appears to be a logical connection between the exclusion and the need for sustainable development.

At the same time, there are reasons to doubt the connection between, on the one hand, the temporary withdrawal and safeguard provisions, and on the other, the need for sustainable development. First, if the exclusion is important for the needs of developing countries, then why does it reside in a different part of the regulation's structure - for instance, in the section on special arrangements? Why does the concern for customs and money laundering in developing countries not appear in the section on "Special Arrangements," rather than in the section on "Temporary Withdrawal and Safeguard Provisions?" In fact, the very idea of "safeguarding" is inwardly-focused, which leads to a more important point. Since the exclusion seems more oriented toward the protection of developed countries than the development of the countries it targets, it might be deemed to have little connection to the purported need. Finally, how vague may a purported "need" be? Can the need for "sustainable development" be expanded to include nearly any possible special incentive? Could the EC go even further, merely citing the need for "development?" Therefore, while the proposed regulation deals with the Temporary Withdrawal and Safeguard issue much better, it is still vulnerable to attack.

The second potential problem for the EC's proposal concerns the *ex ante* exclusion of certain products from particular countries in its special

⁹¹ See EC Proposal, *supra* note 13, Art. 15.

⁹² The proposal's notion of "good governance" is somewhat unclear. The explanatory memorandum preceding the regulation speaks of "good governance" as being a component of "sustainable development." However, the name of the section dealing with special preferences reads, "Special Incentive for Sustainable Development and Good Governance," implying that the two concepts are separate and possibly coequal. One potential problem is that, while "sustainable development" is recognized in the WTO and many multilateral treaties (the importance of which is mentioned above), the same may not be true for "good governance" if indeed it is treated as a separate concept.

⁹³ EC Proposal, *supra* note 13 Annex III.

preference program. For instance, although imported imitation jewelry from most countries is eligible to receive special preferences, imitation jewelry from India is ineligible.⁹⁴ Granted, some of the countries involved are not WTO members and many of the articles mentioned are agricultural or textile products (which would thus not be covered by GATT Article I:1 to which the Enabling Clause is an exception), still, the unequal treatment of agricultural and textile products may result in a violation of related WTO agreements, depending on the circumstances.

The final potential challenge to the proposal is that it is not effective in promoting "sustainable development." The purported requirement of effectiveness is rooted in Article 3(c) of the Enabling Clause, which states that special incentives must "respond positively" to the development, financial or trade needs of developing countries.⁹⁵ The AB noted:

[T]he expectation that developed countries will "respond positively" to the "needs of developing countries" suggests that a sufficient nexus should exist between, on the one hand, the preferential treatment . . . 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.⁹⁶

The proposal's special incentives are therefore only permissible if "sustainable development" is the type of need that can be effectively addressed with tariff preferences. At least one study has claimed to discover a perverse phenomenon in which GSP schemes actually raise trade barriers in developing countries, thereby injuring global trade liberalization.⁹⁷ The issue here is "sustainable development" and not trade liberalization, and few, if any, studies have examined this precise question. It is possible, however, to compare this situation to one where a country *imposes* (rather than decreases) tariffs to achieve a policy objective protected under Article XX. The effectiveness of tariffs as a policy tool has been considered

⁹⁴ *Ibid.*, Art. 8(3).

⁹⁵ See *supra* note 58 (debating the subject throughout).

⁹⁶ EC-Preferences, *supra* note 2 at para. 164 [emphasis added].

⁹⁷ See Caglar Ozden & Eric Reinhardt, *The Perversity of Preferences: The Generalized System of Preferences and Developing Country Trade Policies, 1976-2000*, The World Bank, Policy Research Working Paper Series 2955 (2003); But see UNCTAD, *Trade Preferences for LDCs: An Early Assessment of Benefits and Possible Improvements* (2003); Raymond Torres, "Labour Standards and Trade" (1996) Special Edition of the OECD Observer for the WTO Ministerial Conference in Singapore.

as part of the analysis of the word "necessary" found in certain Article XX exceptions. The word "necessary" in the context of Article XX has been "understood to imply a strict justification of the measures undertaken as the least trade-restrictive measure available to achieve the policy goal."⁹⁸ Although little empirical evidence exists concerning the effectiveness of non-trade measures to affect labour practices in other countries, there is strong statistical proof that trade-based measures are effective.⁹⁹ Moreover, one scholar has noted that "effectiveness" in the context of the Enabling Clause probably means no more than a "rational connection" and would not require any sort of "empirical proof."¹⁰⁰

In sum, only one challenge to the EC's new proposal - questioning the legality of its "Temporary Withdrawal and Safeguard" provisions - warrants close attention. All in all, the new version of the GSP settles most, if not all, of the Appellate Body's criticisms. Unfortunately, the same cannot be said of the current U.S. scheme.

C. Compliance of the U.S. GSP Scheme with the EC-Preferences Ruling

The U.S. special incentive schemes for labour and drugs clash directly with the EC-Preferences decision. There are some general aspects of the U.S. regulation that cast suspicion on the labour and drug incentives. Furthermore, each special incentive possesses characteristics that conflict with the decision in EC-Preferences.

Overall, the U.S. special incentives for labour and drugs fail because they impose general conditions that have nothing to do with labour or drugs. This is essentially the same issue as the one previously addressed concerning the EC's "Temporary Withdrawal and Safeguard" provisions. Under the U.S. system, if two developing countries fully comply with the necessary labour and drug provisions (i.e. they are "similarly situated"), one may still be treated differently than the other for any of the following reasons: (1) because that country does not provide "adequate and effective protection of intellectual property rights;"¹⁰¹ (2) such country is located in sub-Saharan Africa;¹⁰² (3) that country has seized property of the U.S. or its citizens (including intellectual property) or broken contracts with the U.S. or its citizens;¹⁰³ (4) it is a communist country;¹⁰⁴

⁹⁸ Robert Howse, "The World Trade Organization and the Protection of Workers' Rights" (1999), 3 *J. Small & Emerging Bus. L.* 131, 140.

⁹⁹ *Ibid.* at 151.

¹⁰⁰ *Supra* note 58 at 248 (quoting Professor Robert Howse).

¹⁰¹ 19 U.S.C. §2463(d).

¹⁰² See *e.g.* 19 U.S.C. §2643(c)(2)(D).

¹⁰³ 19 U.S.C. §2462(b)(2)(D).

¹⁰⁴ 19 U.S.C. §2462(b). There is arguably no potential violation with this condition,

and (5) if that country has aided or sheltered terrorists, or has not "taken steps to support the efforts of the United States to combat terrorism."¹⁰⁵ Few of these exclusionary grounds could be said to have a "rational connection" to the need for labour rights or the need to curtail drug activities.¹⁰⁶ Only the last, concerning terrorism, may have some relevance to drug incentives since some terrorist organizations have allegedly been using the drug trade as a source of income.¹⁰⁷ Furthermore, since compliance with the labour and drug provisions are both conclusive factors in the granting of preferences, this poses a problem: no readily apparent rational connection exists between fulfilling the need for labour rights and the need for attacking drug production.

The drug arrangements have problems of their own. The U.S. regulation bans all trade preferences to "major drug producing" countries or "major drug-transit" countries.¹⁰⁸ While the EC regulation hints that the need being addressed is for "sustainable development," the need for the U.S. drug arrangements is not as clear. One can only guess that the "development, financial or trade need" being addressed is somehow related to the "development" of the beneficiary country. Still, the regulation does not establish the existence of a need (i.e. "the effect of the 'drug problem'")¹⁰⁹ with "objective criteria" set out in the WTO or international instruments. Also, the drug provisions do not seem focused on the needs of developing countries, but rather the needs of the United States. For example, in order to be classified as a "major drug-transit" country (and thus lose benefits), one of the requirements is that the country "is a significant direct source of illicit narcotic or psychotropic drugs or other controlled substances *significantly affecting the United States*."¹¹⁰ Is it not conceivable that a developing country may have problems with drug activities even though it is not a "significant direct source" of drugs to the United States? The rational connection between the need of developing countries [to curtail drug activities] and the U.S.-centric condition is tenuous at best.

Furthermore, the drug provisions can be waived for a violating country (thus preserving the developing country's preferences) for reasons that also have little to do with the need to curtail drug activities. Specifically,

since the condition only affects non-WTO member communist countries.

¹⁰⁵ 19 U.S.C. §2462(b)(2)(F).

¹⁰⁶ *Supra* note 58 at 248 (quoting Professor Robert Howse).

¹⁰⁷ "Afghanistan Plea in War on Opium" BBC News (9 February 2004), online: BBC News <http://news.bbc.co.uk/2/hi/south_asia/3471585.stm> (reporting that the opium trade helps fund terrorists in Afghanistan).

¹⁰⁸ *Supra* note 56.

¹⁰⁹ EC-Preferences, *supra* note 2 at para. 183.

¹¹⁰ 19 USC §2495(3)(A) [emphasis added].

the U.S. can ignore drug production or transit in beneficiary countries if the "vital national interests of the United States require that" the preferences be maintained.¹¹¹ As a result, if two developing countries fail to prevent drug problems, one may still receive trade benefits from the U.S. if required by America's "vital national interests" - a reason that may have no connection to the need being addressed.

Were it not for the use of general exclusions/negative conditionality, then the U.S. labour incentives might actually comply with EC-Preferences. Although they do not refer specifically to ILO conventions, the U.S. essentially lists the ILO's "fundamental" labour rights as the applicable criteria for determining the compliance of developing countries. The U.S. leaves out one of the fundamental labour rights (the right to equality) and adds an additional criterion.¹¹² In addition to the ILO fundamental rights listed, the U.S. regulation will consider how much a developing country respects "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."¹¹³ This final factor in determining whether a developing country meets the GSP's labour standards does not reference any one or two specific conventions on labour rights. Instead, "minimum wages, hours of work, and occupational safety and health" could refer to scores of ILO conventions. As such, the U.S. scheme's criteria for labour incentives may be too vague to be capable of objectivity.

Finally, while the EC proposal imposes an evidentiary standard ("sufficient evidence") in making its own determinations¹¹⁴ and grants considerable weight to the reports and analyses of the international organizations related to the conventions,¹¹⁵ the U.S. regulation does neither. Although America's labour incentives are probably more immune to attack than its drug incentives, both are considerably more exposed to legal challenge than the proposed European incentive arrangement.

¹¹¹ *Supra* note 57.

¹¹² See Philip Alston, "Labor Rights Provisions in US Trade Law - Aggressive Unilateralism?" (1993) 15:1 Human Rights Quarterly 1 at 7.

¹¹³ See *ibid.*

¹¹⁴ See EC Proposal, *supra* note 13, Art. 19(1)(a) (applying some semblance of an evidentiary standard to the "Temporary Withdrawal and Safeguard" provisions).

¹¹⁵ See EC Proposal, *supra* note 13 Preamble at para. 8 and Art. 17(3).

IV. THE UNTOUCHED ISSUE: ENABLING CLAUSE ARTICLE 3(C) AND THE ECONOMIC NEXUS REQUIREMENT

THE APPELLATE BODY'S DECISION in EC-Preferences did not cover all the potential issues that critics have raised with GSP systems at large. The AB defined its mandate specifically,¹¹⁶ and even discussed matters arguably outside that mandate,¹¹⁷ but still did not touch upon one of the most divisive issues that might arise in the next GSP challenge. The most vexing legal question that remains is whether Article 3(c) of the Enabling Clause requires an economic nexus. In other words, does Article 3(c) require special incentives to ultimately aim at improving the economic situation of developing countries? The answer could have profound implications for how countries approach the enforcement of human rights. Most likely, however, *no such nexus is required*. Furthermore, even if the Enabling Clause requires a nexus between special incentives and economic improvement, this requirement will not be very difficult to fulfill.

A. An Initial Vienna Convention-Style Analysis

A traditional Vienna Convention-style analysis of Article 3(c) does not yield any simple results. The plain text of Article 3(c) remains ambiguous as to whether an economic nexus is required: trade preferences must "respond positively to the 'development, financial and trade' needs of developing countries." To begin, the Appellate Body has already essentially interpreted the "and" in Article 3(c) as an "or." Therefore, as long as a need responds to a "development, financial [or] trade" need, it can survive Article 3(c).¹¹⁸ Since the words "financial" and "trade" are both decidedly economic in nature, the only potential way to address a non-economic need in a developing country is by labeling it a "development" need. "Development," however, is a sufficiently ambiguous term. While it could refer to economic development, it may also refer to the development of human rights. The words "financial" and "trade" comprise the immediate context for the word "development," but, as will be explained later, this alone does not sufficiently clarify its meaning.

Since many parts of Vienna Convention Article 32 are not helpful with this question, at least one commentator has turned to the *travaux* to help interpret the meaning of "development."¹¹⁹ For answering other questions

¹¹⁶ EC-Preferences, *supra* note 2 at paras. 129-130.

¹¹⁷ *Supra* note 58 at 254. From a factual standpoint, the present drug arrangement is drastically different from the proposed special incentive arrangement.

¹¹⁸ EC-Preferences, *supra* note 2 at para. 164.

¹¹⁹Anthony N. Cole, *supra* note 4.

relating to the Enabling Clause, the Appellate Body showed little hesitation in using the preparatory work not only for the Enabling Clause itself (enacted in 1979), but also for agreements that served as precursors.¹²⁰ The *travaux* seem to indicate that prior to the enactment of the Enabling Clause, most countries saw GSP schemes as addressing purely economic needs of developing countries.¹²¹ Despite some evidence in the *travaux* linking the word "development" to economics, there is a possibility that the meaning of the word has changed over time. Specifically, the AB's holding in Shrimp-Turtle suggests that "development" could be an "evolutionary" term that now possesses non-economic connotations.¹²²

B. "Development" in Article 3(c) and Shrimp-Turtle

The AB's decision in Shrimp-Turtle may lead to a new meaning for "development" in the Enabling Clause. One issue in Shrimp-Turtle concerned whether the term "exhaustible natural resources," which is found in the language of GATT Article XX(g), extended to living beings.¹²³ Even though the term, as used by the drafters of GATT, only referred to non-living things, the Appellate Body adopted a more expansive interpretation. The AB scrutinized the preamble to the Agreement Establishing the WTO, focusing on the stated commitment to "sustainable development."¹²⁴ Since the members' approach to environmental protection had changed since 1947, it was justified to view "natural resources" in a different light.

The key to the AB's analysis, however, was finding that the term "natural resources" is "by definition, evolutionary."¹²⁵ The AB's interpretation has fueled some to question whether it is engaging in legal activism. As an entity that has quite often adhered to a highly textual analysis of the treaties, the AB's decision in this case was nothing short of shocking. Some wondered whether the AB was turning a treaty into a constitution, and whether several other parts of the text might be construed under modern circumstances. After examining the legal authority for the AB's interpretation, the reality, however, is that the "evolutionary" approach adopted in Shrimp-Turtle is more conservative than one might surmise at first glance.

¹²⁰ *Supra* note 58 at 253 (quoting Jane Bradley).

¹²¹ See Anthony N. Cole, *supra* note 4 at 179-193 (discussing the history of GSP schemes and the Enabling Clause).

¹²² *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, (1998) WTO Doc. WT/DS58/AB/R (Appellate Body Report) [hereinafter "Shrimp-Turtle I AB"].

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.* at para. 130.

The AB's language actually comes from a 1970 decision by the International Court of Justice - the "Legal Consequences" case. To begin, the recycling of the phrase "by definition, evolutionary" misleads the reader. The "Legal Consequences" case decided the propriety of South Africa's continued presence in Namibia, some decades after the League of Nations Covenant permitted such activity.¹²⁶ The Covenant provided that countries comprising the former territories of fallen empires, which are "inhabited by peoples *not yet able to stand by themselves under the strenuous conditions of the modern world*, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation," and that "the best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations."¹²⁷ Since the Covenant implied that the "strenuous conditions of the modern world" would become more agreeable over time, and furthermore, implied that those "not yet able to stand by themselves" would one day be able to do so, the International Court of Justice (ICJ) interpreted the language of Article 22 as "by definition, evolutionary."¹²⁸ The expectation of change was built into the explicit text of the treaty; however, the same principle cannot be applied as comfortably to the term "natural resources."

Despite the AB's misleading quotation in Shrimp-Turtle, one may still extract a coherent legal rule from the authorities cited. Also cited, for instance, is the ICJ's "Continental Shelf" case.¹²⁹ As in Shrimp-Turtle, both "Legal Consequences" and "Continental Shelf" interpret treaty language differently from its original meaning and the justification for a new interpretation rests heavily on the following: 1) developments in international law, 2) occurring after the completion of a treaty, which 3) have direct bearing on a specific issue or term in the treaty.¹³⁰ In "Legal

¹²⁶ *Legal consequences for States of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council resolution 276 (1970)*, Advisory Opinion, [1971] I.C.J. Rep. at 31.

¹²⁷ League of Nations Covenant 1919 with Amendments (1924) *Congressional Records*, 65 Congress, 3 Session, Senate Document No. 389, Art. 22 [emphasis added].

¹²⁸ *Supra* note 122.

¹²⁹ *Case concerning the Aegean Sea Continental Shelf (Greece v. Turkey)*, [1978] I.C.J. Rep. 3.

¹³⁰ While this rule, derived from the cases, may bear resemblance to a source noted in the Vienna Convention ("any relevant rules of international law applicable in the relations between the parties"), the cases make no mention of the Vienna Convention. If based on this Vienna Convention clause, then these cases did not require "the parties" to be all the same parties to the original treaty in question; some of the subsequent treaties mentioned in the cases did not include the parties to the original treaty.

Consequences," the ideal of "self-determination" became enshrined in international law, thus resulting in a new interpretation of the League of Nations Covenant. The ICJ similarly decided in "Continental Shelf" that although a treaty referring to the "territorial status of Greece" was made before the discovery of the Continental Shelf, the concept of "territorial status" should be reinterpreted to deal with the discovery of the Shelf. Shrimp-Turtle appears to follow the same pattern, and the term "natural resources" is reinterpreted following developments in how international law defines the term. Yet, has "development" been redefined more broadly to cover non-economic matters?

There is no doubt that in today's world "development" refers to more than mere economics. Perhaps envisaging this legal issue, the EC's proposal for a new GSP system addresses this point head-on when stating that development has been the subject of

multiple international conventions and instruments such as the UN Declaration on the Right to Development of 1986, the Rio Declaration on Environment and Development of 1992, the Vienna Declaration and Programme of Action of 1993, the UN Agenda for Development of 1997, the ILO Declaration on Fundamental Principles and Rights at Work of 1998, the UN Millennium Declaration of 2000 and the Johannesburg Declaration of Sustainable Development of 2002.¹³¹

The agreements mentioned recognize the broad scope that the word "development" encompasses. For instance, the UN Declaration on the Right to Development states, "development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population."¹³² Therefore, following the analysis laid out by the Appellate Body in Shrimp-Turtle, the word "development" might be reinterpreted to cover non-economic principles.

C. A Reinterpretation of Shrimp-Turtle: Article 31(3)(c) of the Vienna Convention and the Evolutionary Approach to "Development"

One could also read the AB's interpretation of "exhaustible natural resources" as silently following Article 31(3)(c) of the Vienna Convention. There is significant evidence that the Appellate Body used 31(3)(c) (which

¹³¹ EC Proposal, *supra* note 13, Explanatory Memorandum at para. 4.

¹³² *Declaration on the Right to Development*, GA Res. 41/128, UN, 1986, UN Doc. A/RES/41/128.

allows interpretation in light of "any relevant rules of international law applicable in the relations between the parties") as the underpinning of its "evolutionary" approach.¹³³ If indeed the Appellate Body based its decision on this provision of the Vienna Convention, then the implications are no different, and "development" in Article 3(c) of the Enabling Clause could still be interpreted in an "evolutionary" manner.

In order to qualify as a valid 31(3)(c) source, three circumstances must exist, all of which likely apply in the case of "development." First, the source must be "international law." Most agree that treaties fall under this category, and the AB used treaties to interpret XX(g) in Shrimp-Turtle. As discussed above, several treaties exist which relate in some way to "development."

Second, the rules must be "applicable in the relations between the parties." While some believe that "the parties" [to a treaty which is used as a 31(3)(c) source] must include all WTO members,¹³⁴ others believe that "the parties" only refers to the parties to a dispute.¹³⁵ In any event, if the AB was silently following Article 31(3)(c), then it implicitly adopted the latter interpretation.¹³⁶ The treaties discussed above (UN Declaration on the Right to Development of 1986, the Rio Declaration on Environment and Development of 1992, and the Vienna Declaration and Programme of Action of 1993) would not need to be signed by all WTO members, but only the parties to a dispute involving the meaning of "development."

Finally, the rule must be "relevant." Some interpret the word "relevant" to include only those laws in existence at the time the agreement being interpreted was concluded. In this case, the agreement being interpreted is the WTO (which readopted the Enabling Clause at the time of its inception), so only those "international rules" existing in 1994 would

¹³³ Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003) at 255. For instance, the AB makes explicit reference to 31(3)(c) in its interpretation of Article XX's chapeau. *Ibid.*; Article 31-type sources should be "taken into account, together with the context." *Vienna Convention on the Law of Treaties*, May 22, 1969, Article 31 United Nations, Treaty Series, vol. 1155, at 331.

¹³⁴ Joost Pauwelyn, *ibid.*, subscribes to this view.

¹³⁵ See e.g. David Palmeter & Petros Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (Boston: Kluwer Law International, 1999) at 57; Gabrielle Marceau, "Conflicts of norms and conflicts of jurisdictions: the relationship between the WTO Agreement and MEAs and other treaties" (2001) 35 J.W.T. 1081, 1087.

¹³⁶ Not all WTO members were parties to all the treaties mentioned as sources. See also United States - Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 by Malaysia (2001), WTO Doc. WT/DS58/RW at para. 5.57 (Panel Report) (concerning itself only with the "parties to this dispute").

apply.¹³⁷ Even assuming that "development" does not pass this initial test for "relevance," it is likely that an exception exists to Article 31(3)(c)'s "principle of contemporaneity." The drafters of the Vienna Convention realized that "the content of a word, e.g. 'bay' or 'territorial waters,' may change with the evolution of the law if the parties used it in the treaty as a general concept and not as a word of fixed content."¹³⁸ In essence, the WTO can only be interpreted with "rules of international law" when those rules existed before the WTO, *except* when the drafters intended for the content of those rules to evolve over time.

If indeed the term "natural resources"¹³⁹ can be seen as intentionally dynamic (i.e. coined with the realization that its content will change over time), then "development" should be similarly interpreted. One method of determining the intention [of the drafters] is to look at the vagueness or specificity of the term used.¹⁴⁰ Vagueness suggests that the content of a term is susceptible to change; relative to "natural resources," the term "development" seems equally vague. In fact, one scholar has already applied this analysis to some classically vague terms in GATT, stating that "it could be submitted that the use of broad, unspecified terms - such as 'exhaustible natural resources,' 'public morals,' or 'essential security interests' in GATT Arts. XX and XXI - is an indication that the drafters intended these terms to be interpreted in an 'evolutionary' manner."¹⁴¹

If the logic of Shrimp-Turtle was actually based on Article 31(3)(c) of the Vienna Convention, then the AB should also interpret "development" in an "evolutionary" manner. According to the Appellate Body's implicit interpretation of Article 31(3)(c), the treaties relating to development meet all three criteria necessary to qualify as "other rules of international law," which are to be interpreted "together with the context." Since all other Article 31 sources remain ambiguous, 31(3)(c) should be sufficient to cement the meaning of "development" to include non-economic ideas. Furthermore, since *travaux* may only be used to "confirm" an Article 31 analysis or to supplement an Article 31 analysis that leads to ambigu-

¹³⁷ One might also consider 1979 as the appropriate baseline. Incidentally, all the treaties used to interpret "natural resources" were concluded before the creation of the WTO. This might suggest that the AB used the "principle of contemporaneity," although one can never be completely sure.

¹³⁸ Joost Pauwelyn, *supra* note 133, citing Observations and Proposals of the Special Rapporteur (quoted in Rauschnig, *Travaux*, 244).

¹³⁹ Note that the AB eliminates the word "exhaustible" from the term "natural resources" when proclaiming the term to be "by definition, evolutionary." Shrimp-Turtle I AB, *supra* note 122 at para. 130.

¹⁴⁰ Joost Pauwelyn, *supra* note 133.

¹⁴¹ *Ibid.*

ous, obscure, absurd or unreasonable results, the *travaux* need not be consulted on this matter.¹⁴²

D. The Consequences of Interpreting Enabling Clause Article 3(c) Incorrectly

Despite the rather forceful arguments for interpreting Article 3(c) to include non-economic needs, it is at least conceivable that the Appellate Body might interpret the clause differently. The practical result of an incorrect interpretation is that anytime a GSP scheme created an incentive for upholding labour rights, it would have to show that stronger labour rights in developing countries lead to greater economic development, financial health, or trade.

The requirement of an "economic nexus" is not catastrophic though. First, the connection between human/labour/environmental rights and economic growth will probably not have to be quantifiable. Most likely, the Dispute Settlement Body (DSB) will accept qualitative studies linking the two,¹⁴³ which will release the developed country from the time and effort it takes to produce quantitative reports. Second, the opinions offered in the studies need not embrace mainstream academic opinion.¹⁴⁴ Instead, the AB has said that "responsible and representative governments may act in good faith on the basis of what, at a given time, may be a *divergent* opinion coming from qualified and respected sources."¹⁴⁵ In the context of such permissive rules regarding scientific studies, very few (if any) rights will not be able to justify their economic worth.

Even if human, labour, and environmental rights will be able to retain their role in GSP systems, a more subtle danger lingers. Specifically, there is a danger that in attempting to justify human rights on economic rather than humanitarian grounds, one risks alienating human rights from their roots in predominantly moral concerns. Yet this is more of a policy concern than a legal one.

¹⁴² *Vienna Convention on the Law of Treaties*, May 22, 1969, Article 32 United Nations, *Treaty Series*, vol. 1155, at 331.

¹⁴³ See *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products* (2001), WTO Doc. WT/DS135/AB/R at para. 167 (Appellate Body Report). Although the AB was dealing with the SPS Agreement, its logic should apply equally to the Enabling Clause.

¹⁴⁴ See Anthony N. Cole, *supra* note 4 at 203.

¹⁴⁵ See *supra* note 143 (quoting WTO Appellate Body Report: *EC Measures Concerning Meat and Meat Products (Hormones)* (1998) WT/DS26/AB/R, WT/DS48/AB/R at para. 194 (Appellate Body Report).

From a policy perspective, there are at least two ways to prevent economization. First, WTO members could alter the meaning of the Enabling Clause through either amendment, interpretive declaration, or other means. Since such actions would require unanimous support of all WTO members, and since many developing countries do not like GSP schemes to focus on non-economic needs, any type of amendment would be nearly impossible. Second, developed countries could stop basing GSP schemes on human rights. At first, this option sounds somewhat drastic. However, GATT Article XX may be more suitable for addressing many of the rights-related concerns that are dealt with today through GSP schemes. For instance, the EC may be able to address human and labour rights under Article XX(a), environmental concerns under Article XX(b) and (g), and drug issues with Article XX(b). If the AB eventually interprets Enabling Clause Article 3(c) to require an economic nexus, then developed countries might consider running to the shelter of Article XX.¹⁴⁶

V. POLICY CONSIDERATIONS RELATING TO EC AND U.S. SPECIAL PREFERENCES

THE ECONOMIZATION OF HUMAN rights is only one among a host of policy issues raised by the recent GSP dispute. Even if the DSB does not require economization, is it wise to have the WTO making judgments about the content of human, labour, or environmental rights? Are GSP systems a form of coercion? Does the Enabling Clause justify unilateralism? Are GSP systems too capable of being abused by developed countries? Many of these questions form the basis of longstanding debates within the international law community. Interestingly, the new EC Proposal contains the makings of a solution to several of these GSP-related issues. However, it remains to be seen whether the Proposal is too stringent on developing countries to have any practical effect.

¹⁴⁶ See *e.g.*, Steve Charnovitz, "The Moral Exception in Trade Policy" (1998) 38 *Va. J. Int'l L.* 689; Christoph Feddersen, "Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation" (1998) 7 *Minn. J. Global Trade* 75; Robert Howse, "The World Trade Organization and the Protection of Workers' Rights" (1999) 3 *J. Small & Emerging Bus. L.* 131; Daniel S. Ehrenberg "The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor" (1995) 20 *Yale J. Int'l L.* 361. All of the foregoing discuss the possibility of justifying trade-restrictive measures under Article XX to uphold labour standards.

A. Human Rights under the WTO Framework

Is it preferable to have the Dispute Settlement Body of the WTO interpreting the content of human rights? Under the present state of the EC and U.S. GSP schemes, such a scenario is quite possible. While EC-Preferences focused primarily on the procedural shortcomings of the EC regulation, the next challenge could reach substantive issues. The next time around, for instance, the DSB may have to make a decision whether India has "effectively implemented" the right to bargain collectively. Such a decision would necessarily turn on what comprises the right to bargain collectively.

One theme that continues to recur in the literature surrounding the WTO's involvement in human rights is the tradeoff between the enforcement of rights on the one hand, and the dilution of rights on the other.¹⁴⁷ The WTO provides an avenue through which human rights have some sought-after teeth. Countries with poor human rights records generally respond better to financial incentives than to strongly worded, unenforceable manifestos. At the same time, there is a risk that pursuing human rights enforcement through the WTO will lead to the dilution of human rights. After all, those presiding over WTO disputes are not necessarily human rights scholars, but are, in fact, experts in the field of trade law.¹⁴⁸ Some contend that WTO adjudicators, when in doubt, tend to "err on the side of enabling trade rather than enabling trade-restricting social measures."¹⁴⁹ One counterargument would posit that WTO interpretation of human rights instruments does not change the obligations of states that have acceded to those instruments - that WTO decisions only change the relations of states *vis-à-vis* their WTO obligations.¹⁵⁰ Nevertheless, even a single opinion from the WTO could contribute to a body of judicial practice that generates a small but noticeable effect on international law, not to mention common perceptions. In addition to the threat of dilution, there is the possibility that the WTO's jurisprudence will economize human rights,¹⁵¹ thus alienating the rights regime from its moral fixtures.

Interestingly, the EC's proposal for the new GSP scheme offers one possible solution to the enforcement/dilution dilemma. According to the proposal, the EC "will monitor the effective implementation of the

¹⁴⁷ See Chantal Thomas, "Should the WTO Incorporate Labor and Environmental Standards?" (2004) 61 Wash. & Lee L. Rev. 347.

¹⁴⁸ Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13:4 E.J.I.L. 753.

¹⁴⁹ See Chantal Thomas, *supra* note 147 at 373.

¹⁵⁰ See Gabrielle Marceau, *supra* note 148.

¹⁵¹ See discussion, *supra* Section IV, on the potential "economization" of human rights through Article 3(c) of the Enabling Clause.

international conventions in accordance with the respective mechanisms thereunder."¹⁵² The "conventions" mentioned in this passage refer to the various international instruments that developing countries must "effectively implement" to receive special preferences. In essence, the EC proposal passes the bulk of the substantive determination about compliance with the conventions to the international organizations that oversee them.

Whereas the AB might second-guess the EC's own determination whether India, for instance, has effectively implemented the ILO Right to Organize and Collective Bargaining Convention, it will probably be much more hesitant to do so if the ILO makes that determination.¹⁵³ After all, it is not only the ILO's instrument, but the ILO is presumably less biased than the EC in the context of an EC-versus-India dispute. In general, the more the EC relies upon the determinations of international organizations, the more WTO adjudication will focus on the procedural, rather than substantive aspects of the EC's conclusions on human rights compliance. Instead of analysing the content of the right (which the DSB will presume is covered by the ILO determination), the DSB will turn to procedural issues (e.g. whether the ILO determination was followed correctly).

The EC proposal's approach to human rights in the WTO is one potential solution to the enforcement/dilution tradeoff. It highlights the need to approach human rights from a multilateral perspective, building upon internationally recognized rights instruments. It also reveals the prudence of relying on international organizations related to those instruments to achieve more objective and less vulnerable determinations about countries' compliance with human rights standards.

B. GSP Schemes: Coercion, Abuse, and Unilateralism?

From the perspective of the developing world, the GSP schemes of the EC and U.S. may seem like merely tools of Western foreign policy, dangling a carrot in front of relatively powerless smaller countries while holding a stick in the other hand. This realist perspective is not isolated to the GSP system, but is part of a broader critique of the world trading system that has spawned followers across the world, fueled debate, and

¹⁵² EC Proposal, *supra* note 13 Preamble at para. 8.

¹⁵³ See Lance Compa, Monitoring International Labor Standards "Assessing Assessments: A Survey of Efforts to Measure Countries' Compliance with Freedom of Association Standards" (2003) 24 *Comp. Lab. L. & Pol'y J.* 283 (describing the difficulty of assessing compliance with labour standards).

sparked protests.¹⁵⁴

Protesters are not alone in thinking the WTO is capable of abuse. Some scholars, like Philip Alston, find the WTO context is far too capable of abuse by member states.¹⁵⁵ For instance, the United States sometimes attempts to enforce labour standards on other countries which it does not enforce at home, essentially "cherry-picking" the international laws that it finds most suitable to enforce domestically.¹⁵⁶ Particularly troublesome, notes Alston, is the fact that the United States' GSP promotes a series of labour standards that "mirrors" the core ILO rights, but selectively omits one of them - the right to non-discrimination in the workplace.¹⁵⁷ Furthermore, the GSP scheme allows so much wiggle-room in its choice of vague terminology that the U.S. can essentially enforce whatever labour standards seem fit at the time.¹⁵⁸ The result is a system that distorts international law through selective enforcement and appropriates the international trading system for the benefit of economically powerful countries.

On the other hand, there is a body of thought that focuses on the beneficial aspects of unilateralism in the trade context. Especially when multilateral action is not feasible or does not effectively enforce compliance, the actions of a single state may provide the surest route toward an eventual global system. Unilateral action can have the effect of establishing new international rules through the "repeated interactions between states and a variety of domestic and transnational actors, which produce interpretations of applicable global norms and ultimately the internalization of those norms into states' domestic values and processes."¹⁵⁹

Despite what may seem like a stark choice between unilateralism and multilateralism, the WTO (and in particular, WTO-permissible GSP schemes) offers something in between. It must be remembered that the WTO agreements, including the Enabling Clause, were perfected in a multilateral setting. As a result, any action taken in compliance with the Enabling Clause exception may be unilateral, but it is taken in compliance with multilateral consensus. Furthermore, just as unilateral efforts to enforce human rights are tempered in the WTO by such concepts as

¹⁵⁴ Greg Lefevre, Katharine Barrett, & the Associated Press, "Seattle mayor declares civil emergency as WTO unrest grows" *CNN* (30 November 1999) online: *CNN.com* <<http://edition.cnn.com/US/9911/30/wto.03/>>.

¹⁵⁵ See generally Philip Alston, *supra* note 112.

¹⁵⁶ See Philip Alston, *ibid.*

¹⁵⁷ See Philip Alston, *ibid.* at 7.

¹⁵⁸ See Philip Alston, *ibid.* at 8.

¹⁵⁹ Sarah H. Cleveland, "Norm Internalization and U.S. Economic Sanctions" (2001) 26 *Yale J. Int'l L.* 1 at 6.

"necessity,"¹⁶⁰ trade preferences pursued through the Enabling Clause are limited by its terms. Even Philip Alston would likely be pleased with the Appellate Body's recent insistence upon the use of "widely-recognized" standards from international organizations when constructing a GSP scheme.

Potential abuses of the GSP system are currently being curtailed through the insistence that unilateral action be based on popular international norms. The system is working. After the AB's decision in EC-Preferences, the European Commission has returned with a proposal that takes full advantage of international norms and international organizations. Not only are the new special incentives based solely upon international instruments, but compliance is also largely a question for the international organizations that act as caretakers to the various conventions. It is hoped that the EC and U.S. systems of trade preferences can reach a point where they can acquire various benefits from unilateralism, without violating the trust of the international community.

C. Negative versus Positive Conditionality: Law and Policy

While the distinction between negative and positive conditionality may have been useful to ponder GSP schemes in the past, that categorization no longer proves useful. From a legal perspective, negative conditionality may be suspect, but it is not *per se* impermissible under EC-Preferences. To begin with, a simple (rather imprecise) definition would suggest that negative conditionality means losing all GSP benefits (including those from general arrangements) if either the general conditions for GSP benefits, or the specific conditions for a special preference, are not fulfilled. This would be perfectly legal if the special need being addressed were related to all necessary conditions for GSP benefits. For instance, if a special incentive aims to strengthen labour rights in another country, and the GSP scheme creates a general exclusion (such as in its "Temporary Withdrawal" section) from all GSP benefits for countries that are not ILO members, then the general condition (ILO membership) relates to the need being addressed (labour rights). A more practical example, already mentioned, would be the potential connection between fighting terrorism (a general requirement in the U.S. system) and the drug arrangements. In practice, the problem is that under negative conditionality the special preferences often depend on too many general requirements that

¹⁶⁰ See Carlos Manuel Vázquez, "Trade Sanctions and Human Rights - Past, Present, and Future" (2003) 6 J. Int'l Econ. L. 797.

are unrelated to the developing country's need. One may consider, for example, America's general requirement for upholding intellectual property rights, which has nothing to do with combating drugs.

Another legal challenge to negative conditionality is that it does not "respond positively" to the needs of developing countries. Nevertheless, this argument ignores the fact that trade preferences, as a whole, qualify as "positive" incentives. One should not attach too much importance to such semantics, but should focus rather on a conceptual approach to the two systems.

More importantly, the distinction between positive and negative conditionality no longer makes sense in light of the EC's new proposal. The EC system is still technically an example of "positive conditionality," since fulfilling the special incentive requirements would grant a developing country additional preferences on top of the general arrangements. However, the previous EC system used three separate special incentive arrangements, and under the new scheme, they have been lumped into one single special incentive. Under the new special arrangement, the EC requires developing countries to sign, ratify, and "effectively implement" a dizzying multitude of conventions. Although the EC groups them all under the banner of "sustainable development," it could be argued that some are completely unrelated. For instance, what relationship exists between The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on Biological Diversity (CBD)?¹⁶¹ Even though the EC technically uses "positive conditionality," it still requires countries to comply with various [arguably] unrelated conditions to receive special preferences.

From a policy perspective, "positive conditionality" is presumably a way for developing countries to make important changes in governance, step by step. However, the new EC proposal offers a single package that is only available upon meeting innumerable requirements. Granted, the EC most likely constructed its new GSP scheme to comply with EC-Preferences. While it may be legal, is the EC proposal prudent? There are very few developing countries, much less developed countries, which would be able to commit themselves fully to the twenty-seven conventions listed. Regardless of whether its incentives are "positive" or "negative," the EC may be setting the bar too high for the rest of the world.

¹⁶¹ See EC Proposal, *supra* note 13 Annex III.

VI. CONCLUSION

THE DECISION IN EC-PREFERENCES raised serious questions about the legality of European and American GSP schemes. The EC's new GSP proposal, which responds to various issues in EC-Preferences, appears to meet most of the major challenges that developing countries may initiate. Unlike the EC, the U.S. has no apparent plans to amend its GSP program. Most likely, the U.S. scheme would be susceptible to many challenges by other WTO member states.

Those who fear an "economization" of the Enabling Clause, and by extension human rights at large, should rest assured that the threat is not severe. Article 3(c) of the Enabling Clause does not require an economic nexus, and should the AB rule otherwise, the burden of proof should be somewhat lax.

Similarly, those who fear human rights standards will experience dilution at the hands of WTO adjudicators will be pleased to know that the EC has quite possibly found a solution to the problem in the GSP context. By utilizing international instruments and by leveraging the judgment of international organizations in its GSP scheme, the EC GSP proposal takes substantive determinations about human rights out of the hands of WTO judges.

Despite this, scholars and activists should never stop worrying about the protection of human rights, even in the wake of a refreshing proposal from the EC. In particular, there is some concern that in trying to meet its legal requirements, the developed world is forgetting about the original goal of the preference system. By creating virtually insurmountable requirements for special preferences, we may be denying the precious hope for reform in the world's most deprived nations.