

**“Imposing Conditions on Developing Countries’ Tariff Preferences:
A Legitimate Tactic Under WTO Law?”
by Jennifer S. Jones**

I/ INTRODUCTION

This paper examines whether imposing conditions on the tariff preferences accorded to developing countries under the world trading system’s generalized system of preferences (the “GSP”) is a legitimate tactic of developed members of the World Trade Organization (WTO). More specifically, it examines the WTO-legality of the conditions the European Communities (EC) and the United States (US) impose on the tariff preferences they accord to developing countries under their individual GSP schemes (the “EC GSP Scheme” and the “US GSP Scheme”, respectively).

Part II reviews the events which led to the establishment of the GSP that permits developed WTO members to accord tariff preferences to developing countries without according the same to other WTO members. Part III: (i) generally discusses the establishment of individual GSP schemes and the emergence of conditional tariff preferences and (ii) specifically discusses the establishment of the GSP schemes of the EC and the US and the emergence of conditional tariff preferences in those schemes. Part IV summarizes the WTO Appellate Body’s decision in *EC – Tariff Preferences* and illustrates the implications that decision has for conditional tariff preferences.¹ Part V outlines the changes that were made to the EC GSP Scheme in response to the Appellate Body’s decision in *EC – Tariff Preferences*. Part VI assesses the WTO-legality of those conditions in the GSP schemes of the EC and the US which are based on developing countries’ compliance with certain labour standards (the “labour standards conditions”). Finally,

¹ *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (Complaint by India)* (2004), WTO Doc. WT/DS246/AB/R (Appellate Body Report) [*EC – Tariff Preferences*].

Part VII concludes that, while the conditions in the current EC GSP Scheme might withstand a WTO challenge, the conditions in the current US GSP Scheme would not.

II/ THE CREATION OF THE GSP

The history presented in this Part takes the signing of the *General Agreement on Tariffs and Trade (GATT)* as its starting point.² In 1947, the contracting parties to the *GATT* agreed, *inter alia*, that:

[w]ith respect to customs duties and charges of any kind imposed on or in connection with importation or exportation ... any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.³

This agreement, which is contained in Article I:1 and commonly referred to as the most-favoured nation (MFN) treatment clause, obliges contracting parties to the *GATT* to extend any benefit they grant to the products of another contracting party to the like products of all contracting parties (the “MFN obligation”). In simple terms, it prohibits contracting parties to the *GATT* from discriminating between the like products of other contracting parties.⁴ It is well-recognized that the MFN obligation in Article I:1 has been a cornerstone of the world trading system since the *GATT* came into force in 1948.⁵

In the early 1960s, developing countries began to express their discontent with the world trading system established by the *GATT*.⁶ Among other things, they took issue with the MFN obligation in Article I:1 and argued that, in order to advance their economic prospects, they

² *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187, Can. T.S. 1947 No. 27.

³ *Ibid.*, art. I:1.

⁴ Gregory Shaffer & Yvonne Apea, “Institutional Choices in the Generalized System of Preferences Case: Who Decides the Conditions for Trade Preferences? The Law and Politics of Rights” (2005) 39:6 J. World Trade 977 at 978.

⁵ *United States – Section 211 Omnibus Appropriations Act of 1998 (Complaint by the European Communities)* (2002), WTO Doc. WT/DS176/AB/R (Appellate Body Report) at para. 297.

⁶ “A Brief History of UNCTAD”, online: UNCTAD <<http://www.unctad.org/Templates/Page.asp?intItemID=3358&lang=1>> (accessed on March 2, 2006).

needed their exports to receive generalized preferential treatment.⁷ The collective efforts of a group of 77 developing countries (i.e. the Group of 77) led to the establishment of the United Nations Conference on Trade and Development (UNCTAD) – an organization which seeks to promote “the development-friendly integration of developing countries into the world economy”.⁸ At the second UNCTAD conference, which took place in New Delhi in 1968, it was agreed that a “system of generalized non-reciprocal and non-discriminatory preferences” would be instituted for the benefit of developing countries.⁹ It was further agreed that the objectives of the GSP would be to increase developing countries’ export earnings, promote their industrialization, and accelerate their rates of economic growth.¹⁰ A Special Committee on Preferences was established by the UNCTAD to settle the details of the GSP arrangements.¹¹

Once the details of the GSP arrangements were settled, a limited waiver of the provisions of Article I:1 had to be obtained from the contracting parties to the *GATT*.¹² This was necessary because the contemplated GSP was inconsistent with the MFN obligation in Article I:1 (i.e. it permitted developed contracting parties to the *GATT* to discriminate between the like products of developed and developing contracting parties).¹³ The requisite waiver was obtained in 1971. The contracting parties to the *GATT* agreed that, for a period of 10 years, the provisions of Article I:1 would be waived “to the extent necessary to permit developed contracting parties ... to accord preferential tariff treatment to products originating in developing countries ... without according

⁷ Shaffer & Apea, *supra* note 4 at 979.

⁸ *Ibid.*; “About UNCTAD”, online: UNCTAD

<<http://www.unctad.org/Templates/Page.asp?intItemID=1530&lang=1>> (accessed on March 2, 2006).

⁹ *Expansion and Diversification of Exports of Manufacturers and Semi-Manufacturers of Developing Countries*, UNCTAD Res. 21(II), 2d Sess. (1968) at Preamble, reprinted in Annex D-3 to *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (Complaint by India)* (2003), WTO Doc. WT/DS246/R (Panel Report).

¹⁰ *Ibid.* at para. 1.

¹¹ *Ibid.* at paras. 2 and 4.

¹² Lorland Bartels, “The Appellate Body Report in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* and its Implications for Conditionality in GSP Programmes” in Thomas Cottier et al., eds. *Human Rights and International Trade* (Oxford: Oxford University Press, 2005) 463 at 463.

¹³ *Ibid.*

such treatment to like products of other contracting parties” (the “1971 Waiver”).¹⁴ The 1971 Waiver was subject to the proviso that any preferential tariff treatment provided under it would have to “be designed to facilitate trade from developing countries ... and not to raise barriers to the trade of other contracting parties”.¹⁵

Shortly before the expiry of the 1971 Waiver, the contracting parties to the *GATT* agreed that, notwithstanding the provisions of Article I:1, they would be permitted to “accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties”.¹⁶ This agreement, which is commonly referred to as the Enabling Clause, permanently authorizes the GSP described in the 1971 Waiver.¹⁷ It also, *inter alia*, authorizes developed contracting parties to the *GATT* to accord special preferential tariff treatment to the products of the least developed of the developing countries.¹⁸ The Enabling Clause includes the proviso that any preferential tariff treatment provided under it must: (i) “be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties”; (ii) “not constitute an impediment to the reduction or elimination of tariffs ... on a most-favoured nation basis”; and, (iii) “be designed ... to respond positively to the development, financial and trade needs of developing countries”.¹⁹

¹⁴ *Generalized System of Preferences*, 25 June 1971, GATT C.P. Dec. L/3545 at para. (a), reprinted in Annex D-2 to *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (Complaint by India)* (2003), WTO Doc. WT/DS246/R (Panel Report) [1971 Waiver].

¹⁵ *Ibid.*

¹⁶ *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, 28 November 1979, GATT C.P. Dec. L/4903 at para. 1, reprinted in Annex D-1 to *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (Complaint by India)* (2003), WTO Doc. WT/DS246/R (Panel Report) [Enabling Clause].

¹⁷ *Ibid.* at para. 2(a) and footnote 3; Bartels, *supra* note 12 at 464.

¹⁸ Enabling Clause, *supra* note 16 at para. 2(d).

¹⁹ *Ibid.* at para. 3.

It is worth noting at this point that both Article I:1 of the *GATT* and the Enabling Clause were incorporated into the *General Agreement on Tariffs and Trade 1994 (GATT 1994)*, which forms part of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*").²⁰ Accordingly, while WTO members are generally prohibited from discriminating between the like products of other WTO members, developed WTO members are permitted to accord preferential tariff treatment to the products of developing countries (and special preferential tariff treatment to the products of the least developed of the developing countries) without according such treatment to the like products of other WTO members.

III/ THE ESTABLISHMENT OF INDIVIDUAL GSP SCHEMES & THE EMERGENCE OF CONDITIONAL TARIFF PREFERENCES

(A) General Comments

Because a number of developed countries, including the EC and the US, were opposed to the establishment of a multilaterally-coordinated GSP scheme, the GSP described in the 1971 Waiver (and expanded by the Enabling Clause) was implemented by developed contracting parties to the *GATT* on an individual basis.²¹ Without exception, the developed countries that established GSP schemes imposed conditions on the tariff preferences they accorded to developing countries.²² Initially, the conditions imposed were based solely on the competitiveness of the products of developing countries.²³ It was thus typical for a GSP scheme to: (i) limit the types of products that were eligible for tariff preferences; (ii) permit tariff preferences relating to a given product sector to be withdrawn once a beneficiary country reached a certain level of competitiveness in that sector; (iii) allow for the exclusion of a

²⁰ *General Agreement on Tariffs and Trade 1994*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 1867 U.N.T.S. 187; 33 I.L.M. 1153 at paras. 1(a) and (b); *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144, art. II:2; *EC – Tariff Preferences*, *supra* note 1 at para. 90.

²¹ Shaffer & Apea, *supra* note 4 at 980.

²² *Ibid.*

²³ *Ibid.*

beneficiary country once it reached a certain level of development; and, (iv) permit tariff preferences that caused, or threatened to cause, injury to a domestic industry to be withdrawn from a beneficiary country (collectively “competitiveness conditions”).²⁴ As time went on, however, some developed countries, including the EC and the US, began to tie the tariff preferences they accorded to developing countries under their GSP schemes to other types of conditions, including labour standards conditions.²⁵

(B) The EC GSP Scheme

The EC was the first contracting party to the *GATT* to implement the GSP described in the 1971 Waiver.²⁶ It established the EC GSP Scheme in 1971.²⁷ The EC has always imposed competitiveness conditions on the tariff preferences it has accorded to developing countries.²⁸ It was not until the 1990s, however, that the EC began to tie those tariff preferences to other types of conditions.²⁹ In 1994, a provision which allows the EC to withdraw tariff preferences on labour standards grounds was added to the EC GSP Scheme.³⁰ And, in 1998, the EC began to accord additional tariff preferences to developing countries which enforced certain labour, environmental and anti-drug trafficking standards.³¹

When *EC – Tariff Preferences* came before the WTO Appellate Body in 2004, the EC GSP Scheme consisted of 5 arrangements: (i) the general arrangements, under which all developing countries were eligible to receive the same tariff preferences (the “General Arrangements”); (ii) the special incentive arrangements for the protection of labour rights, under

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ “User’s Guide to the European Union’s Scheme of Generalised Tariff Preferences” (February 2003), online: Europa <<http://europa.eu.int/comm/trade/issues/global/gsp/gspguide.htm>> (accessed on March 2, 2006) [“EU User’s Guide”].

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Shaffer & Apea, *supra* note 4 at 981.

³⁰ *Ibid.*

³¹ *Ibid.* at 981-982

which those developing countries that effectively applied national legislation incorporating the standards laid down in 8 International Labour Organization (ILO) conventions were eligible for additional tariff preferences (the “Labour Arrangements”); (iii) the special incentive arrangements for the protection of the environment, under which those developing countries that effectively applied national legislation incorporating internationally-recognized standards relating to the sustainable management of tropical forests were eligible for additional tariff preferences (the “Environmental Arrangements”); (iv) the special arrangements for least-developed countries (LDCs), under which those developing countries identified as LDCs by the United Nations were eligible for additional tariff preferences (the “LDC Arrangements”); and, (v) the special arrangements to combat drug production and trafficking, under which 12 developing countries deemed by the EC to be making efforts to fight the cultivation and trafficking of illegal drugs were eligible to receive additional tariff preferences (the “Drug Arrangements”).³² The tariff preferences accorded to developing countries under all 5 arrangements were subject to competitiveness conditions.³³

When *EC – Tariff Preferences* was heard, the EC GSP Scheme also contained a provision which allowed the Commission of the EC (the “Commission”) to temporarily withdraw a developing country’s tariff preferences if that country, *inter alia*: (i) practiced any form of slavery or forced labour; (ii) used child labour; (iii) was responsible for any serious and systematic violations of the freedom of association, the right to collective bargaining or the principle of non-discrimination in respect of employment and occupation; (iv) exported goods

³² EC, *Council Regulation 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004*, [2001] O.J. L. 346/1, arts. 7-25 and Preamble [*EC Council Regulation 2501/2001*]; *EC – Tariff Preferences*, *supra* note 1 at paras. 2 and 3; “Generalised System of Preferences: EU ‘GSP+’ Granted to an Additional 15 Developing Countries” (21 December 2005), online: Europa <http://www.europa.eu.int/comm/trade/issues/global/gsp/pr211205_en.htm> (accessed on March 2, 2006) [“GSP:EU”].

³³ See generally *EC Council Regulation 2501/2001*, *ibid.*

made by prison labour; (v) had shortcomings in its customs controls on the export or transit of illegal drugs; or, (vi) failed to comply with international conventions on money-laundering (collectively the “Withdrawal Criteria”).³⁴

(C) The US GSP Scheme

The US GSP Scheme was instituted in 1976.³⁵ Like the EC, the US has always imposed competitiveness conditions on the tariff preferences it has accorded to developing countries.³⁶ Unlike the EC, however, the US did not let any time pass before it began to tie those tariff preferences to other types of conditions.³⁷ The US excluded communist countries and members of the Organization of the Petroleum Exporting Countries (OPEC) from its GSP scheme from the start.³⁸ Less than a decade later, it began tying developing countries’ eligibility for tariff preferences to their intellectual property and worker rights protections.³⁹ Since that time, the US has packed its GSP scheme with a wide range of conditions.⁴⁰

Subject to some limited exceptions, the current US GSP Scheme provides that a developing country is ineligible for tariff preferences if it: (i) is a communist country; (ii) is part of an international cartel (such as OPEC); (iii) accords preferential treatment to the products of a developed country that has, or is likely to have, a significant adverse effect on US commerce; (iv) has nationalized, expropriated or otherwise seized property owned by a US citizen, corporation, partnership or association; (v) fails to recognize or enforce arbitral awards in favor of US citizens, corporations, partnerships or associations; (vi) grants sanctuary from prosecution

³⁴ *EC Council Regulation 2501/2001*, *supra* note 32, art. 26.

³⁵ *U.S. Generalized System of Preferences: Guidebook* (Washington: Office of the United States Trade Representative, January 2006) at 3 [*US GSP Guidebook*].

³⁶ See generally *ibid.*

³⁷ Kimberly A. Elliott, “Preferences for Workers? Worker Rights and the US Generalized System of Preferences” (May 2000), online: Institute for International Economics <<http://www.iie.com/publications/papers/paper.cfm?ResearchID=313>> (accessed on March 19, 2006).

³⁸ *Ibid.*

³⁹ Shaffer & Apea, *supra* note 4 at 980-981.

⁴⁰ *Ibid.* at 980.

to any individual or group that has committed an act of international terrorism; (vii) has not taken, or is not taking, steps to support the US' efforts to combat terrorism; (viii) has not taken, or is not taking, steps to accord internationally-recognized worker rights to its workers; or, (viii) has not implemented its commitments to eliminate the worst forms of child labour (collectively the "Mandatory Ineligibility Criteria").⁴¹

The current US GSP Scheme also provides that, in considering whether a developing country is eligible for tariff preferences, the President of the US (the "President") must consider, *inter alia*, the extent to which the country: (i) has assured the US that it will provide equitable and reasonable access to its markets and basic commodity resources and refrain from engaging in unreasonable export practices; (ii) is providing adequate and effective protection of intellectual property rights; and, (iii) has taken, or is taking steps to accord internationally-recognized worker rights to its workers (collectively the "Discretionary Ineligibility Criteria").⁴²

Once it is determined that a developing country is eligible for tariff preferences under the US GSP Scheme, the tariff preferences accorded to that country are subject to competitiveness conditions.⁴³ In addition, the US GSP Scheme provides that a developing country may lose its beneficiary status, or some or all of its tariff preferences, in certain circumstances. It provides, for example, that a developing country's beneficiary status will be suspended or withdrawn if, due to a change in circumstances, that country ends up falling within one of the Mandatory Ineligibility Criteria.⁴⁴ The US GSP Scheme also provides that, upon considering the

⁴¹ 19 U.S.C. § 2462(b)(2); *US GSP Guidebook*, *supra* note 35 at 19; Shaffer & Apea, *supra* note 4 at 981 (footnote 16).

⁴² 19 U.S.C. § 2462(c)(4), (5) and (7); *US GSP Guidebook*, *ibid.* at 20.

⁴³ See generally *US GSP Guidebook*, *supra* note 35.

⁴⁴ 19 U.S.C. § 2462(d)(2).

Discretionary Ineligibility Criteria, the President may exercise his discretion to withdraw, suspend or limit a developing country's tariff preferences at any time.⁴⁵

The WTO-legality of the conditions the EC and the US impose on the tariff preferences they accord to developing countries under their GSP schemes was called into question in *EC – Tariff Preferences*.

IV/ THE APPELLATE BODY'S DECISION IN *EC – TARIFF PREFERENCES*

(A) Facts

In March 2002, India requested WTO consultations with the EC regarding the conditions the EC was imposing on the additional tariff preferences it accorded to developing countries under its GSP scheme.⁴⁶ India, which was only eligible for tariff preferences under the General Arrangements, claimed that the additional tariff preferences the EC was according to other developing countries were: (i) creating undue difficulties for its exports to the EC and (ii) nullifying, or at least impairing, the benefits accruing to it under Article I:1 of the *GATT 1994* and the Enabling Clause.⁴⁷ India argued that the conditions the EC was imposing on the additional tariff preferences it made available to developing countries under the Drug, Labour and Environmental Arrangements were not WTO-legal as they could not be reconciled with the requirements of the Enabling Clause.⁴⁸ Not surprisingly, the EC disagreed.

When consultations failed to settle the dispute between India and the EC, India requested the establishment of a WTO panel. In its December 2002 request, India challenged the Drug, Labour and Environmental Arrangements.⁴⁹ Before a panel was established, however, India

⁴⁵ 19 U.S.C. § 2462(d)(1).

⁴⁶ “*European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries: Summary of the Dispute to Date*”, online: WTO <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm> (accessed on March 8, 2006) [“Summary of the Dispute”].

⁴⁷ *EC – Tariff Preferences*, *supra* note 1 at para. 4; “Summary of the Dispute”, *ibid.*

⁴⁸ “Summary of the Dispute”, *supra* note 46.

⁴⁹ *EC – Tariff Preferences*, *supra* note 1 at para. 4.

decided to limit its complaint to the Drug Arrangements and to reserve its right to bring additional complaints regarding the Labour and Environmental Arrangements.⁵⁰ Accordingly, only the Drug Arrangements were in issue in *EC – Tariff Preferences*.⁵¹

A panel was established to hear India’s complaint (the “Panel”) in March 2003.⁵² It met with the parties in May and July 2003.⁵³ In its submissions to the Panel, India argued that the Drug Arrangements were inconsistent with Article I:1 and not justified by the Enabling Clause.⁵⁴ The Panel issued its report in December 2003.⁵⁵ It concluded, *inter alia*, that: (i) India had demonstrated that the Drug Arrangements were inconsistent with Article I:1 and (ii) the EC had failed to demonstrate that the Drug Arrangements were justified by the Enabling Clause.⁵⁶ The EC appealed the Panel’s decision to the WTO Appellate Body.

(B) Appellate Body’s Decision

The EC’s appeal was heard in February 2004.⁵⁷ In its report of April 2004, the Appellate Body concluded, *inter alia*, that (i) it was unnecessary for it to rule on the Panel’s conclusion that the Drug Arrangements were inconsistent with Article I:1 and (ii) the Panel was correct in concluding that the Drug Arrangements were not justified by the Enabling Clause.⁵⁸

(i) Relationship Between Article I:1 and the Enabling Clause

The Appellate Body began its analysis of whether the Drug Arrangements were inconsistent with Article I:1 by examining the relationship between Article I:1 and the Enabling Clause. It determined that developed WTO members are excepted from complying with the

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² “Summary of the Dispute”, *supra* note 46.

⁵³ *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (Complaint by India)* (2003), WTO Doc. WT/DS246/R (Panel Report) at para. 1.11 [Panel Report].

⁵⁴ *EC – Tariff Preferences*, *supra* note 1 at para. 6.

⁵⁵ Panel Report, *supra* note 53.

⁵⁶ *EC – Tariff Preferences*, *supra* note 1 at para. 6.

⁵⁷ *Ibid.* at para. 8.

⁵⁸ *Ibid.* at para. 190.

MFN obligation in Article I:1 when they accord preferential tariff treatment to developing countries that is consistent with the requirements of the Enabling Clause.⁵⁹ The Appellate Body thus upheld the Panel's finding that the Enabling Clause operates as an exception to Article I:1.⁶⁰ The Appellate Body went on to uphold the Panel's finding that the Enabling Clause does not exclude the applicability of Article I:1.⁶¹ In other words, it agreed with the Panel that, when a measure which provides preferential tariff treatment to developing countries is challenged under Article I:1, the panel considering the challenge must: (i) examine whether the measure is consistent with Article I:1 and, if it considers the measure to be inconsistent with Article I:1, (ii) examine whether the measure is nevertheless justified by the Enabling Clause.⁶²

The Appellate Body did modify one of the Panel's findings with respect to the relationship between Article I:1 and the Enabling Clause. Although it upheld the Panel's finding that the onus was on the EC to prove that the Drug Arrangements were consistent with the Enabling Clause, the Appellate Body did not uphold the Panel's finding that it was up to the EC to raise the relevant provisions of the Enabling Clause.⁶³ Instead, the Appellate Body found that, in alleging that the Drug Arrangements were inconsistent with Article I:1, it was incumbent upon India to raise those provisions of the Enabling Clause that it alleged the Drug Arrangements were inconsistent with.⁶⁴ Fortunately for India, the Appellate Body found that it had sufficiently raised the relevant provisions of the Enabling Clause before the Panel.⁶⁵

The EC's appeal of the Panel's conclusion that the Drug Arrangements were inconsistent with Article I:1 was based upon its claim that the Panel erred in finding that (i) the Enabling

⁵⁹ *Ibid.* at para. 90.

⁶⁰ *Ibid.* at para. 99.

⁶¹ *Ibid.* at para. 103.

⁶² *Ibid.* at para. 101.

⁶³ *Ibid.* at para. 125.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

Clause is an exception to Article I:1; (ii) the Enabling Clause does not exclude the applicability of Article I:1; and, (iii) the onus was on the EC to prove that the Drug Arrangements were consistent with the Enabling Clause.⁶⁶ As the Appellate Body did not reverse any of these findings, it held that it did not need to rule on the Panel’s conclusion respecting Article I:1.⁶⁷

(ii) The Requirements of the Enabling Clause

The Appellate Body went on to consider what the provisions of the Enabling Clause require. It began its analysis by examining paragraph 2(a) of that Clause.⁶⁸ The Appellate Body determined that, in order to be justified by paragraph 2(a), tariff preferences provided under a GSP scheme must be “generalized”, “non-reciprocal” and “non-discriminatory”.⁶⁹ As the only issue before it was whether the Drug Arrangements were “non-discriminatory”, the Appellate Body only had to determine what that term requires.⁷⁰

The Appellate Body began its analysis of what the term “non-discriminatory” requires by examining the term’s ordinary meaning. It concluded that, while the ordinary meaning of the term “non-discriminatory” does not suggest that developed WTO members with GSP schemes must accord identical tariff preferences to all developing countries, it does suggest that they must accord identical tariff preferences to all similarly-situated developing countries.⁷¹

The Appellate Body went on to conduct a contextual analysis of what the term “non-discriminatory” requires. It began this analysis by examining paragraph 3(c) of the Enabling

⁶⁶ *Ibid.* at para. 124.

⁶⁷ *Ibid.*

⁶⁸ Paragraph 2(a) of the Enabling Clause, *supra* note 16, provides that “[p]referential tariff treatment accorded by developed contracting parties to products originating in developing countries [must be] in accordance with the Generalized System of Preferences”. A footnote to paragraph 2(a) clarifies that the relevant GSP is the one “described in ... [the 1971 Waiver], relating to the establishment of ‘generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries’”.

⁶⁹ *EC – Tariff Preferences*, *supra* note 1 at para. 147.

⁷⁰ *Ibid.* at para. 129.

⁷¹ *Ibid.* at para. 154.

Clause.⁷² The Appellate Body observed that, in order to be authorized by paragraph 3(c), tariff preferences provided under a GSP scheme must respond to a “development, financial or trade need” of developing countries.⁷³ It then held that the existence of a development, financial or trade need must be assessed according to an objective standard, like the wide-recognition of such a need in the *WTO Agreement* or in multilateral instruments.⁷⁴ The Appellate Body also observed that, in order to be authorized by paragraph 3(c), tariff preferences provided under a GSP scheme must be a “positive” response to a development, financial or trade need of developing countries.⁷⁵ It then held that a sufficient nexus must exist between such tariff preferences and their likelihood of alleviating the development, financial or trade need they are designed to respond to.⁷⁶

In light of its examination of the requirements of paragraph 3(c), the Appellate Body suggested that a GSP scheme might be “non-discriminatory” notwithstanding the fact that it does not accord identical tariff preferences to all developing countries.⁷⁷ It further suggested that additional tariff preferences provided under a GSP scheme might be “non-discriminatory” if they: (i) seek to address a particular development, financial or trade need and (ii) are made available to all developing countries that share that need.⁷⁸

⁷² Paragraph 3(c) of the Enabling Clause, *supra* note 16, provides that any preferential treatment “accorded by developed contracting parties to developing countries [must] be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries”.

⁷³ *EC – Tariff Preferences*, *supra* note 1 at para. 163.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.* at para. 164.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* at para. 165.

⁷⁸ *Ibid.*

The Appellate Body proceeded with its contextual analysis of what the term “non-discriminatory” requires by examining paragraph 3(a) of the Enabling Clause.⁷⁹ It concluded that, although a GSP scheme that accords different tariff preferences to different developing countries (according to their varying needs) might meet the requirements of the term “non-discriminatory”, paragraph 3(a) dictates that it will not meet the requirements of the Enabling Clause if it imposes “unjustifiable burdens” on other WTO members.⁸⁰

Ultimately, the Appellate Body concluded that the term “non-discriminatory” does not prohibit developed WTO members with GSP schemes from according different tariff preferences to different developing countries, as long as such differential tariff treatment complies with the Enabling Clause’s other requirements. The Appellate Body noted, however, that the term “non-discriminatory” does require developed WTO members with GSP schemes to accord identical tariff preferences to all similarly-situated developing countries (i.e. all developing countries that share the development, financial or trade need the tariff preferences are intended to respond to).⁸¹ In light of its conclusions, the Appellate Body reversed the Panel’s finding that the term “non-discriminatory” requires developed WTO members with GSP schemes to provide identical tariff preferences to all developing countries.⁸²

(iii) The Drug Arrangements’ Consistency with the Requirements of the Enabling Clause

The Appellate Body went on to consider whether the Drug Arrangements met the Enabling Clause’s non-discrimination requirement. It noted that the “need” the Drug Arrangements purported to address was the problem of illicit drug production and trafficking in

⁷⁹ Paragraph 3(a) of the Enabling Clause, *supra* note 16, provides that any preferential treatment provided under the Enabling Clause must “be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties”.

⁸⁰ *EC – Tariff Preferences*, *supra* note 1 at para. 167.

⁸¹ *Ibid.*

⁸² *Ibid.* at para. 174.

certain developing countries (the “Drug Problem”).⁸³ It then held that, in order to meet the Enabling Clause’s non-discrimination requirement, the Drug Arrangements would, *inter alia*, have to be available to all developing countries similarly affected by the Drug Problem.⁸⁴ The Appellate Body concluded that the Drug Arrangements failed to meet this criterion because: (i) only the 12 developing countries deemed by the EC to be making efforts to fight the Drug Problem were beneficiaries of the Drug Arrangements; (ii) there was no mechanism (short of an amendment) under which additional developing countries similarly affected by the Drug Problem could be added to the Drug Arrangements’ list of beneficiaries; (iii) the EC’s decision to distinguish between the beneficiaries of the Drug Arrangements and other developing countries was not based upon any clear prerequisites or objective criteria; and, (iv) there was no criteria according to which a developing country could lose its status as a beneficiary of the Drug Arrangements when it ceased to be similarly affected by the Drug Problem.⁸⁵ Accordingly, the Appellate Body upheld (albeit for different reasons) the Panel’s conclusion that the Drug Arrangements were not justified by the Enabling Clause.⁸⁶

In April 2004, the WTO Dispute Settlement Body adopted both the Appellate Body’s report and the Panel’s report, as modified by the Appellate Body’s report.⁸⁷ The EC was thus requested to bring the Drug Arrangements into conformity with its obligations under the *GATT 1994* (i.e. into conformity with the rulings in the Appellate Body’s report and the modified report of the Panel).⁸⁸

⁸³ *Ibid.* at para. 180.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.* at paras. 181-183 and 187-188.

⁸⁶ *Ibid.* at para. 189.

⁸⁷ “Summary of the Dispute”, *supra* note 46.

⁸⁸ *EC – Tariff Preferences*, *supra* note 1 at para. 191.

(C) Implications of the Appellate Body's Decision

The Appellate Body's decision in *EC – Tariff Preferences* has “clear implications” for the conditions the EC and the US impose on the tariff preferences they accord to developing countries under their GSP schemes.⁸⁹ Although it contemplates that conditions can be imposed on tariff preferences provided under GSP schemes, the Appellate Body's decision dictates that such conditions must, *inter alia*: (i) seek to address an objective development, financial or trade need of developing countries and (ii) be made available to all similarly-situated developing countries.⁹⁰ It is well-recognized that only a couple of the conditions described in Sections (B) and (C) of Part III would “have a good chance” of meeting these requirements and being declared WTO-legal.⁹¹

VI/ THE EC'S RESPONSE TO THE APPELLATE BODY'S DECISION IN *EC – TARIFF PREFERENCES*

It did not take long for the EC to recognize that the WTO-legality of a number of the conditions it imposed on the tariff preferences it made available to developing countries under its GSP scheme had been called into question by the Appellate Body's decision in *EC – Tariff Preferences*. Accordingly, in 2005, the EC made significant changes to its GSP scheme in an attempt to bring its conditions into conformity with the Appellate Body's rulings.⁹² Although the General Arrangements and the LDC Arrangements remain intact under the new EC GSP Scheme, the Labour, Environmental and Drug Arrangements have been merged into a single

⁸⁹ Steve Charnovitz *et al.*, “Internet Roundtable: The Appellate Body's GSP Decision” (2004) 3:2 World Trade Review 239 at 244.

⁹⁰ *Ibid.* at 244-246; UNCTAD, “UNCTAD GSP Newsletter No. 6” (November 2005) at 4 [“UNCTAD Newsletter”].

⁹¹ Charnovitz *et al.*, *supra* note 89 at 246; Shaffer & Apea, *supra* note 4 at 1003.

⁹² “UNCTAD Newsletter”, *supra* note 90 at 2 and 4; Gracia Marín Durán & Elisa Morgera, “WTO *India-EC* GSP Dispute: The Future of Unilateral Trade Incentives Linked to Multilateral Environmental Agreements” (2005) 14:2 R.E.C.I.E.L. 173 at 177.

arrangement.⁹³ The new arrangement, which is commonly referred to as the GSP-Plus, purports to be a “special incentive arrangement for sustainable development and good governance”.⁹⁴

In order to be eligible for additional tariff preferences under the GSP-Plus, a developing country must: (i) have ratified and effectively implemented 16 core human and labour rights conventions (the “Core Conventions”) and 11 conventions related to the environment and governance principles (collectively the “Relevant Conventions”); (ii) give an undertaking to maintain the ratification of the Relevant Conventions and their implementing national legislation and measures; (iii) accept regular monitoring and review of its implementation record in accordance with the implementation provisions of the Relevant Conventions; and, (iv) be a vulnerable country.⁹⁵ For the purposes of the GSP-Plus, a developing country is “vulnerable” if: (i) it is not classified by the World Bank as a high income country; (ii) its 5 largest GSP-covered exports to the EC represent more than 75 percent of its total GSP-covered exports; and, (iii) its GSP-covered exports to the EC represent less than 1 percent of all GSP-covered exports to the EC.⁹⁶ In other words, additional tariff preferences under the GSP-Plus are only accorded to developing countries that can demonstrate “that their economies are ‘dependent and vulnerable’”.⁹⁷ Like the tariff preferences that are accorded to developing countries under the General Arrangements and the LDC Arrangements, the tariff preferences the EC makes available to developing countries under the GSP-Plus are subject to competitiveness conditions.⁹⁸

When determining a developing country’s eligibility for additional tariff preferences under the GSP-Plus, the Commission is required to consider the findings of the international

⁹³ “GSP:EU”, *supra* note 32; Durán & Morgera, *ibid.*

⁹⁴ EC, *Council Regulation 980/2005 of 27 June 2005 applying a scheme of generalized tariff preferences* [2005] O.J. L. 169/1, Preamble [*EC Council Regulation 980/2005*].

⁹⁵ *Ibid.*, art. 9(1) and Annex III.

⁹⁶ *Ibid.*, art. 9(3).

⁹⁷ “GSP:EU”, *supra* note 32.

⁹⁸ See generally *EC Council Regulation 980/2005* *supra* note 94.

organizations and agencies that monitor the implementation of the Relevant Conventions.⁹⁹ Once a developing country acquires beneficiary status under the GSP-Plus, it stands to lose some or all its additional tariff preferences if: (i) its national legislation no longer incorporates the Relevant Conventions or (ii) it fails to effectively implement its national legislation incorporating the Relevant Conventions.¹⁰⁰ At present, the EC is according additional tariff preferences to 15 developing countries under the GSP-Plus.¹⁰¹

In addition to the General Arrangements, the LDC Arrangements and the GSP-Plus, the new EC GSP Scheme contains a modified version of the Withdrawal Criteria. The modified Withdrawal Criteria provide that a developing country may have some or all of its tariff preferences withdrawn if, *inter alia*, it is responsible for any serious and systematic violations of the principles laid down in the Core Conventions.¹⁰² The EC has suggested that this condition is necessary in order to promote the objectives of the Core Conventions and “to ensure that no beneficiary receives unfair advantage through continuous violation of those conventions”.¹⁰³ The new EC GSP Scheme mandates that, when determining whether a developing country is responsible for any serious and systematic violations of the principles laid down in the Core Conventions, the Commission must rely on the conclusions of the relevant international monitoring bodies.¹⁰⁴

⁹⁹ *Ibid.*, art. 11(1).

¹⁰⁰ *Ibid.*, art. 16(2).

¹⁰¹ EC, *Commission Decision 2005/924 of 21 December 2005 on the list of the beneficiary countries which qualify for the special incentive arrangement for sustainable development and good governance, provided by Article 26(e) of Council Regulation (EC) No 980/2005 applying a scheme of generalized tariff preferences*, [2005] O.J. L. 337/50 at 50.

¹⁰² EC Council Regulation 980/2005, *supra* note 94, art. 16(1)(a).

¹⁰³ *Ibid.*, Preamble.

¹⁰⁴ *Ibid.*, art. 16(1)(a).

Unlike the EC, the US did not reform its GSP scheme in response to the Appellate Body's decision in *EC – Tariff Preferences*. Accordingly, the US GSP Scheme remains as described in Section (C) of Part III.

VI/ WTO-LEGALITY OF THE LABOUR STANDARDS CONDITIONS IN THE GSP SCHEMES OF THE EC AND THE US

Although the WTO-legality of many of the conditions the EC and the US impose on the tariff preferences they accord to developing countries under their GSP schemes has been called into question by the Appellate Body's decision in *EC – Tariff Preferences*, this Part only examines the WTO-legality of the labour standards conditions in the current GSP schemes of the EC and the US.

(A) WTO-Legality of the Labour Standards Conditions in the EC GSP Scheme

This Section examines the WTO-legality of the labour standards conditions in the current EC GSP Scheme.

(i) WTO-Legality of the Labour Rights Component of the GSP-Plus

The GSP-Plus is based upon the premise that developing countries that implement certain international standards in: (i) human and labour rights, (ii) environmental protection, (iii) the fight against illegal drugs and (iv) the fight against corruption will be better equipped to achieve sustainable development.¹⁰⁵ This “integral concept of sustainable development” is recognized in a number of international conventions and instruments.¹⁰⁶ The specific problem the GSP-Plus purports to address is the “vulnerability” that some developing countries (i.e. those with dependent and vulnerable economies) experience while assuming the “special burdens and responsibilities” that come with their ratification and effective implementation of the Relevant

¹⁰⁵ “Generalised System of Preferences”, online: Europa <http://www.europa.eu.int/comm/trade/issues/global/gsp/index_en.htm> (accessed on March 17, 2006).

¹⁰⁶ *EC Council Regulation 980/2005*, *supra* note 94, Preamble.

Conventions.¹⁰⁷ It thus appears that the specific problem the labour rights component of the GSP-Plus is designed to address is the vulnerability that some developing countries experience while assuming the special burdens and responsibilities that come with their ratification and effective implementation of the core labour rights conventions that form part of the Relevant Conventions (the “Core Labour Rights Conventions”). In other words, it appears that the additional tariff preferences the EC accords to some developing countries pursuant to the labour rights component of the GSP-Plus are intended to alleviate the struggles those developing countries face in honouring their commitments under the Core Labour Rights Conventions (the “Labour Standards Commitments Problem”).¹⁰⁸

The Core Labour Rights Conventions are all ILO conventions.¹⁰⁹ In fact, they are the same ILO conventions that set out the standards developing countries were required to incorporate into their national legislation (and effectively apply) in order to be eligible for additional tariff preferences under the Labour Arrangements.¹¹⁰ They are also the ILO conventions that were used to develop the core labour standards that are set out in the *ILO Declaration of Fundamental Principles and Rights at Work* (the “*ILO Declaration*”).¹¹¹ The *ILO Declaration* obliges all ILO members to respect, promote, and realize the following fundamental principles and rights: (i) freedom of association and the effective recognition of the right to collective bargaining; (ii) the elimination of all forms of forced or compulsory labour; (iii) the effective abolition of child labour; and, (iv) the elimination of discrimination in respect of

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*; Durán & Morgera, *supra* note 92 at 178.

¹⁰⁹ See *EC Council Regulation 980/2005*, *supra* note 94, Annex III.

¹¹⁰ See *EC Council Regulation 2501/2001*, *supra* note 32, art. 14(2).

¹¹¹ *ILO Declaration on Fundamental Principles and Rights at Work*, 19 June 1998, 37 I.L.M. 1233, art. 1(b) [*ILO Declaration*]; Lee Swepston, “Introductory Note” (1998) 37 I.L.M. 1233 at 1234; *EC Council Regulation 2501/2001*, *ibid.*, Preamble.

employment and occupation (collectively the “ILO Core Labour Standards”).¹¹² It is acknowledged in the *ILO Declaration* that some ILO members (i.e. developing ILO members with dependent and vulnerable economies) will have difficulties: (i) implementing the ILO Core Labour Standards and (ii) ratifying and implementing the Core Labour Rights Conventions.¹¹³ It thus appears that the Labour Standards Commitments Problem is an objective development, financial or trade need of some developing countries.

There is little doubt that the additional tariff preferences that are accorded to developing countries under the GSP-Plus will generate extra financial resources for those countries.¹¹⁴ Extra financial resources are bound to help alleviate the struggles those countries face in honouring their commitments under the Core Labour Rights Conventions.¹¹⁵ It thus appears that the labour rights component of the GSP-Plus is a positive response to the Labour Standards Commitments Problem.

It also appears that the labour rights component of the GSP-Plus makes the same additional tariff preferences available to all similarly-situated developing countries (i.e. all developing countries with dependent and vulnerable economies that ratify and effectively implement the Core Labour Rights Conventions). The new EC GSP Scheme greatly limits the discretion the Commission can exercise when assessing a developing country’s eligibility for additional tariff preferences under the GSP-Plus.¹¹⁶ The fact that a developing country must have ratified and effectively implemented the Core Labour Rights Conventions provides a very specific (and objective) basis for the Commission’s assessment of a developing country’s

¹¹² *ILO Declaration, ibid.*, art. 2.

¹¹³ *Ibid.*, art. 3.

¹¹⁴ Durán & Morgera, *supra* note 92 at 178.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

eligibility for additional tariff preferences under the labour rights component of the GSP-Plus.¹¹⁷ It is also notable that, when conducting such an eligibility assessment, the Commission is required to consider the findings of the ILO Committee of Experts (i.e. the international body that monitors the implementation of the Core Labour Rights Conventions).¹¹⁸ This suggests that a developing country's eligibility for additional tariff preferences under the labour rights component of the GSP-Plus is assessed on the basis of objective findings.¹¹⁹ There are also objective criteria pursuant to which a developing country can lose its status as a beneficiary of the labour rights component of the GSP-Plus when it ceases to be similarly affected by the Labour Standards Commitments Problem. As mentioned in Part V, the new EC GSP Scheme provides that a developing country may lose its beneficiary status if: (i) its national legislation no longer incorporates the Core Labour Rights Conventions or (ii) it no longer effectively implements its national legislation incorporating those conventions.¹²⁰

Finally, it does not appear that the labour rights component of the GSP-Plus imposes unjustifiable burdens on any WTO members. The ILO has taken the position that all its members, whatever their economic situation, are obliged to comply with the ILO Core Labour Standards.¹²¹ It would thus be difficult for any WTO member to claim that having to ratify and effectively implement the Core Labour Rights Conventions would impose unjustifiable burdens upon it.

¹¹⁷ *Ibid.*

¹¹⁸ *EC Council Regulation 980/2005*, *supra* note 94, art. 11(1); Charlotte Bynum, "ILO Research Guide", online: Cornell Law Library <<http://www.lawschool.cornell.edu/library/guides/ilo/rbottom.htm>> (accessed on March 12, 2006).

¹¹⁹ Durán & Morgera, *supra* note 92 at 178.

¹²⁰ *EC Council Regulation 980/2005*, *supra* note 94, art. 16(2).

¹²¹ Swebston, *supra* note 111 at 1233.

Based on the above analysis, it appears that the labour rights component of the GSP-Plus meets all of the requirements the Appellate Body laid down in *EC-Tariff Preferences*. Accordingly, it would likely be declared legal by a WTO adjudicating body.

(ii) WTO-Legality of the Labour Rights Component of the Withdrawal Criteria

In reaching its decision in *EC – Tariff Preferences*, the Appellate Body did “not rule on whether the Enabling Clause permits *ab initio* exclusions” of developing countries from GSP schemes “or the partial or total withdrawal of [tariff preferences] ... from certain developing countries under certain conditions”.¹²² In other words, it did not speak to the WTO-legality of GSP schemes which: (i) accord identical tariff preferences to all developing countries but provide that those countries must meet certain minimum conditions in order to be eligible for tariff preferences and/or (ii) provide for the withdrawal of tariff preferences from all developing countries that fail to meet certain minimum conditions.¹²³ Nevertheless, there has been much commentary on the ramifications the Appellate Body’s decision in *EC – Tariff Preferences* has for GSP schemes that employ these types of negative conditionality.¹²⁴ It has been suggested that the Appellate Body’s decision implies that the minimum conditions imposed by such GSP schemes will only be justified by the Enabling Clause if they: (i) can be linked to generally-recognized concepts of development and (ii) are non-discriminatory (i.e. based on objective

¹²² *EC – Tariff Preferences*, *supra* note 1 at para. 129.

¹²³ Robert Howse, “Appellate Body Ruling Saves the GSP, at Least for Now” *Bridges* Year 8: Number 4 (April 2004) 5 at 6.

¹²⁴ In “The Degeneralization of the Generalized System of Preferences (GSP): Questioning the Legitimacy of the U.S. GSP” (2004) 54 *Duke L.J.* 513 at 524, Amy M. Mason explains that: (i) the term “positive conditionality” is used to describe “the practice of granting additional concessions to developing countries that fulfill prescribed criteria” and (ii) the term “negative conditionality ... denotes the withdrawal of concessions from countries that fail to comply with prescribed criteria, or the refusal to grant concessions to such countries from the outset”.

criteria).¹²⁵ In the ensuing text, these hypothetical requirements will be referred to as the Predicted WTO Requirements.

The labour rights component of the new EC GSP Scheme's Withdrawal Criteria provides for the partial or total withdrawal of tariff preferences from developing countries that are responsible for serious and systematic violations of the principles laid down in the Core Labour Rights Conventions.¹²⁶ Developing countries are thus required to refrain from seriously and systematically violating the ILO Core Labour Standards in order to avoid losing the tariff preferences that have been accorded to them under the new EC GSP Scheme (the "Labour Rights Minimum Condition"). This minimum condition appears to meet the Predicted WTO Requirements. The fact that integral concepts of sustainable development acknowledge the need for countries to comply with the ILO Core Labour Standards suggests that the Labour Rights Minimum Condition is linked to well-recognized concepts of development.¹²⁷ Moreover, it appears that the Labour Rights Minimum Condition is non-discriminatory. The ILO Core Labour Standards upon which the Labour Rights Minimum Condition is based are objective criteria. In addition, in determining whether a developing country has breached the Labour Rights Minimum Condition, the Commission is required to rely on the conclusions of the ILO Committee of Experts.¹²⁸ In other words, it is required to rely on objective findings.

Based on the above analysis, and assuming that a WTO adjudicating body would determine its legality using the Predicted WTO Requirements, it appears that Labour Rights Minimum Condition would be declared WTO-legal.

¹²⁵ Howse, *supra* note 123 at 6.

¹²⁶ *EC Council Regulation 980/2005*, *supra* note 94, art. 16(1)(a).

¹²⁷ *Ibid.*, Preamble; *ILO Declaration*, *supra* note 111, Preamble.

¹²⁸ *EC Council Regulation 980/2005*, *supra* note 94, art. 16(1)(a).

(B) WTO-Legality of the Labour Standards Conditions in the US GSP Scheme

This Section illustrates that the WTO-legality of the labour standards conditions in the US GSP Scheme is much more questionable than that of the labour standards conditions in the new EC GSP Scheme.

(i) WTO-Legality of the Worker Rights Component of the Mandatory Ineligibility Criteria

Unlike the EC GSP Scheme, which relies heavily on positive conditionality (i.e. trade incentives), the US GSP Scheme relies exclusively on negative conditionality (i.e. trade restrictions).¹²⁹ The US GSP Scheme: (i) excludes *ab initio* developing countries that fail to meet certain minimum conditions and (ii) accords identical tariff preferences (subject to competitiveness conditions) to all those developing countries that acquire beneficiary status under it. Accordingly, the Predicted WTO Requirements, rather than the Appellate Body's decision in *EC – Tariff Preferences*, must be used to assess the WTO-legality of the minimum conditions the US imposes on the tariff preferences it accords to developing countries (i.e. the Mandatory Ineligibility Criteria).

The worker rights component of the Mandatory Ineligibility Criteria provides that a developing country will not be eligible for tariff preferences under the US GSP Scheme if it has not taken, or is not taking, steps to accord internationally-recognized worker rights to its workers.¹³⁰ In other words, in order to be eligible for tariff preferences under the US GSP Scheme, a developing country must be able to demonstrate that it has taken, or is taking, steps to accord internationally-recognized worker rights to its workers (the “Worker Rights Minimum Condition”). For the purposes of the Mandatory Ineligibility Criteria, the term “internationally-recognized worker rights” includes: (i) the right of association; (ii) the right to organize and

¹²⁹ Durán & Morgera, *supra* note 92 at 175 (footnote 17); Mason, *supra* note 124 at 524.

¹³⁰ 19 U.S.C. § 2462(b)(2)(G).

bargain collectively; (iii) a prohibition of forced or compulsory labour; (iv) a minimum age for the employment of children; (v) a prohibition of the worst forms of child labour; and (vi) acceptable conditions of work (with respect to minimum wages, hours of work, and occupational safety and health).¹³¹

Unlike the Labour Rights Minimum Condition in the EC GSP Scheme, the Worker Rights Minimum Condition in the US GSP Scheme is not based solely on the ILO Core Labour Standards. Instead, the Worker Rights Minimum Condition is based partly on criteria that correspond to 3 of the 4 ILO Core Labour Standards – it does not include the right against discrimination in respect of employment and occupation – and partly on an “acceptable conditions of work” criterion.¹³² In addition to the fact that it does not correspond to the ILO Core Labour Standards, the “acceptable conditions of work” criterion is vague.¹³³ The conditions of work that the President might deem “acceptable” are not readily determinable from the legislation governing the US GSP Scheme.¹³⁴ Because the Worker Rights Minimum Condition is not based solely on the ILO Core Labour Standards, it is likely that it is not sufficiently linked to well-recognized concepts of development to meet the Predicted WTO Requirements. This is because integral concepts of sustainable development only acknowledge the need for countries to comply with the ILO Core Labour Standards.

It also appears that the Worker Rights Minimum Condition is discriminatory. It has already been illustrated that it is based, in part, on a subjective criterion (i.e. the “acceptable conditions of work” criterion). In addition, rather than requiring developing countries to implement the internationally-recognized worker rights it sets out, the Worker Rights Minimum

¹³¹ 19 U.S.C. § 2467(4).

¹³² Bob Heppel, *Labour Laws and Global Trade* (Oxford: Hart Publishing, 2005) at 94.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

Condition merely requires them to have taken, or be taking, steps to accord such rights to its workers.¹³⁵ This second subjective criterion ensures that the President has wide discretion in assessing whether a developing country has met the Worker Rights Minimum Condition.¹³⁶ It is thus possible (and perhaps even likely) that he could exercise his discretion in a discriminatory manner. He could, for example, require different developing countries to take different steps to accord internationally-recognized rights to their workers.¹³⁷ It is also problematic that, in assessing whether a developing country has met the Worker Rights Minimum Condition, the President is not required to consider the findings of any international worker rights monitoring body. This suggests that the President's assessment might not be based upon any objective findings.

The legislation governing the US GSP Scheme does contemplate that interested private parties can petition the office of the US Trade Representative (USTR) to review the worker rights performance of a developing country that is looking to acquire beneficiary status under the US GSP Scheme.¹³⁸ Accordingly, one can assume that, when such a review is conducted, and the results of the same are made available to the President, his assessment of whether a developing country has met the Worker Rights Minimum Condition will have some sort of objective basis.¹³⁹ Of course, when the office of the USTR conducts a review of the worker rights performance of a developing country, it uses the same subjective criterion (i.e. whether a developing country has taken, or is taking, steps to accord its workers international-recognized worker rights) as the President does when he applies the Worker Rights Minimum Condition.¹⁴⁰

¹³⁵ *Ibid.* at 96.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ Michael J. Trebilcock & Robert Howse, "Trade Policy & Labor Standards" (2005) 14 *Minn. J. Global Trade* 261 at 293-294.

¹³⁹ *Ibid.* at 294.

¹⁴⁰ Hepple, *supra* note 132 at 96.

The office of the USTR thus enjoys the same wide discretion as the President. Accordingly, it is possible that the Worker Rights Minimum Condition could be applied in a discriminatory manner even if it is applied in accordance with the findings of a review conducted by the office of the USTR.

Based on the above analysis, and assuming that a WTO adjudicating body would determine its legality using the Predicted WTO Requirements, it appears that the Worker Rights Minimum Condition would not be declared WTO-legal.

(ii) WTO-Legality of the Worker Rights Component of the Discretionary Ineligibility Criteria and the Withdrawal of Tariff Preferences on Worker Rights Grounds

In light of the above analysis, it can be assumed that the worker rights component of the Discretionary Ineligibility Criteria, which is virtually identical to the Worker Rights Minimum Condition, would not be declared WTO-legal. It can also be assumed that it is not WTO-legal for the US to withdraw tariff preferences from developing countries on the basis of: (i) the Worker Rights Minimum Condition or (ii) the worker rights component of the Discretionary Ineligibility Criteria.

VII/ CONCLUSION

Ironically, this paper has illustrated that, subject to certain conditions, developed WTO members may impose conditions on the tariff preferences they accord to developing countries under their GSP schemes. It has been concluded that, while the labour standards conditions in the current EC GSP Scheme would likely withstand a WTO challenge, those in the current US GSP Scheme would not. This conclusion can probably be extended to most, if not all, of the conditions in the GSP schemes of the EC and the US given that: (i) the EC has made significant efforts to bring its GSP scheme into compliance with the Appellate Body's decision in *EC –*

Tariff Preferences and (ii) the US GSP Scheme is based almost entirely on negative conditionality and subjective criteria. Accordingly, it appears that the WTO-legality of the entire US GSP Scheme has been called into question by the Appellate Body's decision in *EC – Tariff Preferences*. Notwithstanding this, it is unlikely that any significant reforms are in the US GSP Scheme's future. WTO dispute settlement is costly and, unlike India, most developing countries lack the necessary resources to bring WTO challenges.¹⁴¹ In any event, it may not even be in the best interests of developing countries to challenge the conditions the US imposes on the tariff preferences it makes available to them under its GSP Scheme. This is because developed WTO members are not obliged to have GSP schemes. As such, in the event that a WTO adjudicating body threatens to limit the US' discretion to accord tariff preferences to developing countries in any manner it sees fit, the US could simply collapse its GSP scheme.¹⁴² So, while the US' manner of imposing conditions on developing countries' tariff preferences is not compatible with WTO law, it is likely a tactic the US will continue to employ.

¹⁴¹ Shaffer & Apea, *supra* note 4 at 1004.

¹⁴² Charnovitz *et al.*, *supra* note 89 at 261.