

ELSA MOOT COURT COMPETITION ON WTO LAW 2004/2005

BENCH MEMORANDUM

“Dispute Concerning Conditions for the Granting of Tariff Preferences to Developing Countries”

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Introduction

All of the issues in this problem concern the structure and operations of Paradise’s GSP scheme — i.e. its programme to grant tariff preferences to *developing* countries. In characterizing the programme in question as a GSP programme, the problem indicates that the way in which Paradise grants better than *most-favourable-nation* (MFN) rate tariff treatment to *developing* countries, including the complainant Arachnia has to be evaluated, as a matter of WTO law, under the legal instruments that apply to GSP’s. It goes without saying that any grant of preferential tariff treatment — by the very definition of “preferential” — is a *prima facie* violation of MFN treatment, in the sense that the preferences in question provide better tariff treatment to *developing* countries than to *developed* country WTO Members. Thus, *any* GSP programme requires a justification under WTO law that would cure, as it were, the *prima facie* violation of GATT Article I:1 of GATT. This justification could occur under some special legal instrument or under the GATT General Exceptions or National Security exception (GATT Article XX or XXI).

The special legal instrument invoked in this case is the so-called Enabling Clause, which provides for the granting of preferences to *developing* countries under a GSP scheme under certain conditions, which are set out in this instrument. In addition to these conditions, the Appellate Body held in the *EC-Tariff Preferences* case that elements of the *definition* of a GSP scheme incorporated into the Enabling Clause by reference to the 1971 GSP waiver — an earlier GATT legal instrument that established the basis in GATT law for GSP in the first place — most notably that a GSP scheme is “non-discriminatory”, also constituted legal conditions that must be met in the structure and operation of a GSP scheme, in order to cure the *prima facie* MFN violation.

Given that the Enabling Clause and its references to the 1971 waiver are crucial legal texts for the moot problem, I reproduce them here:

**WAIVER
GENERALIZED SYSTEM OF PREFERENCES
Decision of 25 June 1971, BISD 18S/24**

The CONTRACTING PARTIES to the General Agreement on Tariffs and Trade,

Recognizing that a principal aim of the CONTRACTING PARTIES is promotion of the trade and export earnings of developing countries for the furtherance of their economic development;

Recognizing further that individual and joint action is essential to further the development of the economies of developing countries;

Recalling that at the Second UNCTAD, unanimous agreement was reached in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries;

Considering that mutually acceptable arrangements have been drawn up in the UNCTAD concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries;

Noting the statement of developed contracting parties that the grant of tariff preferences does not constitute a binding commitment and that they are temporary in nature;

Recognizing fully that the proposed preferential arrangements do not constitute an impediment to the reduction of tariffs on a most-favoured-nation basis,

Decide:

- (a) That without prejudice to any other Article of the General Agreement, the provisions of Article shall be waived for a period of ten years to the extent necessary to permit developed contracting parties, subject to the procedures set out hereunder, to accord preferential tariff treatment to products originating in developing countries and territories with a view to extending to such countries and territories generally the preferential tariff treatment referred to in the Preamble to this Decision, without according such treatment to like products of other contracting parties *Provided that* any such preferential tariff arrangements shall be designed to facilitate trade from developing countries and territories and not to raise barriers to the trade of other contracting parties;
- (b) That they will, without duplicating the work of other international organizations, keep under review the operation of this Decision and decide, before its expiry and in the light of the considerations outlined in the Preamble, whether the Decision should be renewed and if so, what its terms should be;
- (c) That any contracting party which introduces a preferential tariff arrangement under the terms of the present Decision or later modifies such arrangement, shall notify the CONTRACTING PARTIES and furnish them with all useful information relating to the actions taken pursuant to the present Decision;
- (d) That such contracting party shall afford adequate opportunity for consultations at the request of any other contracting party which considers that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the preferential arrangement;
- (e) That any contracting party which considers that the arrangement or its later extension is not consistent with the present Decision or that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the arrangement or its subsequent extension and that consultations have proved unsatisfactory, may

bring the matter before the CONTRACTING PARTIES which will examine it promptly and will formulate any recommendations that they judge appropriate.

**DIFFERENTIAL AND MORE FAVOURABLE TREATMENT RECIPROCITY AND
FULLER PARTICIPATION OF DEVELOPING COUNTRIES**
("Enabling Clause")
Decision of 28 November 1979 (L/4903)

Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES *decide* as follows:

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries¹, without according such treatment to other contracting parties.
2. The provisions of paragraph 1 apply to the following:²
 - (a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,³
 - (b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;
 - (c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another;
 - (d) Special treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.
3. Any differential and more favourable treatment provided under this clause:
 - (a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;
 - (b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;
 - (c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.
4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:⁴
 - (a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;
 - (b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.
5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs.
6. Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade

of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

7. The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.
8. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.
9. The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to meet the development needs of developing countries and the objectives of the General Agreement.

1 The words "developing countries" as used in this text are to be understood to refer also to developing territories.

2 It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.

3 As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

4 Nothing in these provisions shall affect the rights of contracting parties under the General Agreement.

Dispute Concerning Conditions for the Granting of Tariff Preferences to Developing Countries

The problem states that “Arachnia files a dispute settlement complaint in the WTO against Paradise, claiming that:

- 1) the *additional margin of preference* (AMP) granted to imports that are “pesticide-free” violates Article I:1 of the GATT;
- 2) the *most-favoured-nation* (MFN) obligation, does not meet the conditions of the Enabling Clause; and
- 3) cannot be justified under Article XX of the GATT.”

I. The Relationship of Arachnia’s MFN claim to its Enabling Clause claim

There are two possible interpretations of the kind of MFN claim that Arachnia is making here:

- i) The first is that Arachnia must merely show that, like all other preferential measures in GSP’s, the measure violates MFN because it treats *developed* country WTO Members *less favourably* than *developing* countries; this is all that is necessary for the legal issues to be disposed of exclusively under the Enabling Clause
- ii) The second interpretation is that Arachnia should make a claim that the *additional margin of preference*, taken on its own, entails an *additional* MFN violation, i.e. between products originating from *some developing countries*, which *qualify* for the additional margin of preference **and** like products from *certain other developing countries* which *do not qualify* from the additional margin of preference.

In the *EC-Tariff Preferences* case, India claimed this *second sort* of MFN violation in respect of the EC’s drug preferences programme, based on the notion that some *developing* countries qualified for the additional preferences linked to their drug problem challenges, and others did not.

India further argued that the Enabling Clause *did not provide a means* by which MFN violations between *developing* countries could be justified, but rather only MFN violations of the first sort described above, i.e. those that of necessity arise in any programme that provides preferences for *developing* countries as a whole. The panel agreed with India’s claim concerning the second sort of MFN violation, i.e. *between developing* countries.

The Panel, however, did not reach the issue of whether, *if* the conditions of the Enabling Clause could be met, the Enabling Clause could be used to cure

a *prima facie* violation of MFN treatment *between developing* countries. However, the Appellate Body appears to have resolved this question in the following manner:

“we cannot agree with India that the right to MFN treatment can be invoked by a GSP beneficiary *vis-à-vis* other GSP beneficiaries in the context of GSP schemes that meet the conditions set out in the Enabling Clause.”(para. 166)

In other words, if a GSP scheme meets the conditions of the Enabling Clause, there is no surviving MFN claim of the second sort, i.e. discrimination *between developing* countries that are beneficiaries of GSP.

In these circumstances, Arachnia may as well leave it making the obvious and self-evident claim that Paradise’s GSP scheme is a *prima facie* violation of MFN, in extending preferences to *developing* countries *that are not extended* to all WTO Members i.e. *developed and developing*.

Paradise will gain nothing from making the additional or alternative claim of a violation of MFN treatment as between the *developing* countries covered by Paradise’s GSP scheme, because in either case, if the conditions of the Enabling Clause are met, Paradise’s measure will be justified, i.e. the *prima facie* violation will be cured.

What, however, if Arachnia were, despite the Appellate Body’s approach, nevertheless to make a claim of MFN violation as between different developing countries?

- i) An initial observation is that the MFN obligation applies to “like products”, and there is a serious issue as to whether a “pesticide-free” food is “like” one that has residues of pesticides on it.
- ii) Secondly, in granting an *additional margin of preferences* for “pesticide-free” food imports from *developing* countries, Paradise does not draw a facial distinction between imports based on the *country of origin*. This *distinguishes* Paradise’s programme from the kind of preferences at issue in the *EC-Tariff Preferences* case.

In arguing that, despite physical differences the two products are “like,” Arachnia may find some assistance in the GATT *Spanish Coffee* ruling, where two kinds of coffee that had perceptible physical differences (i.e. texture, smell etc.) were nevertheless found to be “like.”

Paradise, however, could point out that crucial to the *Spanish Coffee* ruling was the assumption of the Panel that *end consumers* could not detect these differences because the coffees in question were ultimately marketing in “blends.” Here, Paradise would note that it appears that Paradise’s

consumers do care about whether their food is “pesticide-free” or not, based on facts in both the **Case and the Clarifications (Q.50 to Q.53)**.

Given that there is no facial distinction based on *country of origin* in Paradise’s scheme, Arachnia will need to show that, nevertheless, there is *de facto* discrimination *between different developing* countries. The meaning of *de facto* MFN discrimination is dealt with in the *Canada-Autos* case **(this is a difficult issue)**.

Arachnia may well assert that there are some developing countries, including itself, which face inherent obstacles in creating a viable “pesticide-free” foods growing industry, such as climatic and geographical factors.

Paradise may well respond that such obstacles can be overcome by technology and industrial restructuring, as is demonstrated by the fact that, although with difficulty, Arachnia has at least met the Codex standards. Paradise may further note that the *additional margin of preference* is aimed at *facilitating* just such developments, through offering preferential market access. Paradise will also want to argue that *it cannot be* the meaning of Article I:1 that every facially neutral distinction drawn between like products violates Article I:1, just because it happens that there is *some disparate impact on imports* depending on the inherent conditions of the countries they come from.

Thus understood, Article I:1 would seem to operate to neutralize important elements of comparative advantage (i.e. *location of production*) which would be contrary to one of the purposes of the WTO as stated in the Preamble to the WTO Agreement (i.e. *optimal allocation of the world’s resources*).

On the other hand, Arachnia will point to the fact that in *Canada-Autos* the Panel and the Appellate Body did find the Canadian measures violated Article I:1 on a *de facto* discrimination theory, based on the interaction of the explicit (*non-facially discriminatory*) criteria in the Canadian scheme, with various structural constraints that affected the global location of production in the automobile industry.

It is to be noted that Arachnia also brings a claim of MFN violation in respect of the failure of Paradise to provide the *basic* GSP treatment to pesticides with 50% or more of the Codex allowable maximum.

As the **Clarifications** indicate, this only matters to the extent that some imports have exactly 50% of the Codex maximum, since **above** 50% there is *an across the board ban on all imports*, whether from *developed or developing* countries.

Does the Appellate Body observation that: “we cannot agree with India that the right to MFN treatment can be invoked by a GSP beneficiary *vis-à-vis* other GSP beneficiaries in the context of GSP schemes that meet the conditions set out in the Enabling Clause” apply to a separate claim with respect to denial of *basic* GSP treatment to the imports in question?

Arachnia may cite *para.* 129 of the Appellate Body’s ruling in *EC-Tariff Preferences*:

“in this Report, we do not rule on whether the Enabling Clause permits *ab initio* exclusions from GSP schemes of countries claiming developing country status, or the partial or total withdrawal of GSP benefits from certain developing countries under certain conditions.”

Based on this passage, Arachnia may argue that where Paradise is withdrawing GSP treatment altogether under certain conditions, the Appellate Body’s statement in *para.* 166 doesn’t apply by virtue of the restriction of the ambit of the Appellate Body ruling in *para.* 129.

Paradise on the other hand would argue, in all likelihood, that the language in *para.* 129 limiting the ambit of the Appellate Body’s ruling apply only to those parts of the ruling interpreting what the conditions of the Enabling Clause permit, and *do not apply* to the Appellate Body’s observations about the fate of MFN claims as between *developing* countries *if* the conditions of the Enabling Clause are *fulfilled*.

II. The Conditions of the Enabling Clause

1. *The Structure and Operation of a GSP Programme must be non-discriminatory.*

As already noted, in the *EC-Tariff Preferences* case, the Appellate Body held that the incorporation into the Enabling Clause of the 1971 Waiver description of a GSP scheme as “generalized, non-reciprocal, and non-discriminatory” had the effect, at least in the case of “non-discriminatory” of creating an additional legal condition in the Enabling Clause that a WTO Member must meet in order to be able to operate a GSP scheme “notwithstanding” Article I:1 of GATT. Given that jurisprudence already exists with respect to this condition (**one would anticipate that it will be the focus of much argument in the memorials**).

In *EC-Tariff Preferences*, the Appellate Body crafted a conception of the requirement of “non-discrimination” in the Enabling Clause *that is quite autonomous* from the concepts in GATT Article I:1, but rather relies on the context of the Enabling Clause itself.

The conception of the Appellate Body is that “non-discrimination” entails *treating like developing countries alike*. Thus, a deviation from identical treatment has to be justified by relevant differences of conditions in the non-identically treated countries.

In order to determine what differences are relevant in this sense, the Appellate Body looked to the Enabling Clause itself, in particular Article 3(c), which requires that GSP treatment “be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.” Based on this provision, the Appellate Body held that non-identical GSP treatment of different developing countries could be justified where the difference in treatment was needed to allow a positive response to different “development, financial and trade needs” of the countries concerned. As the Appellate Body summarized in *para.* 173 of its ruling, the Enabling Clause requires that:

“identical treatment is available to all similarly-situated GSP ... beneficiaries, that is, to all GSP beneficiaries that have the "development, financial and trade needs" to which the treatment in question is intended to respond.”

Since nothing on the face of the Paradise programme, or in its operation (as described in the Case and the Clarifications), explicitly differentiates between the treatment of different GSP beneficiaries, i.e. *different developing* countries, Arachnia will need to make an argument that the concept of discrimination developed by the Appellate Body in *EC-Tariff Preferences* includes a concept of *de facto* discrimination, such that differential treatment of products based on distinctions not directly or facially related to the *developing* country of origin of the product, or some condition or conduct in that country, nevertheless is “discriminatory” because certain features of *particular developing* countries render it systematically more difficult for products originating in those countries to receive the most favourable treatment, in comparison to features of other *developing* countries.

In making this argument, Arachnia may want to observe certain similarities between the concept of “non-discrimination” that the Appellate Body crafted in *EC-Tariff Preferences* and the concept developed by the Appellate Body in its reading of the “chapeau” of Article XX of the GATT in the *Shrimp/Turtle* case.

In the latter (*Shrimp/Turtle*) instance, the Appellate Body seemed to consider treating countries where *different conditions prevail* all the same *violated* the notion of relevant notion of “discrimination” just as much as treating countries where the same conditions prevail *differently*. Under this theory, the Paradise programme is “discriminatory” because it does not take into account the fact that there may be conditions in different *developing* countries that will make it much more difficult for producers of those countries to meet the “pesticide-free” requirement than the case of other GSP beneficiaries.

The facts in the Case and Clarifications *are intentionally vague or ambiguous* in this regard, allowing for arguments on both sides: some *developing* countries have had some products certified “pesticide-free”; the number does not appear to be great; on the other hand, the scheme is relatively new; it is unclear that fixed conditions such as climate and soil cannot be overcome by technological innovations, etc.; and we have the fact that Arachnia itself was able to bring itself up eventually to the Codex maximum as an obligatory national standard.

If every producer in Arachnia can be brought up that far, then is it really the case that some efficient, innovating producers won’t be able, based on the incentive provided by the GSP preference, to go further and meet the “pesticide-free” condition for the *additional margin of preference*?

Paradise will likely try and counter the argument that the concept of “non-discriminatory” in Article 2(a) of the Enabling Clause includes a prohibition on *de facto* discrimination.

First, Paradise may note that there is no explicit wording in the Appellate Body report that suggests such an extension. Paradise might also cite the Appellate Body’s general observation that:

“Exposing preference schemes to open-ended challenges would be inconsistent, in our view, with the intention of Members, as reflected in the Enabling Clause, to “encourage” the adoption of preferential treatment for developing countries and to provide a practical means of doing so within the legal framework of the covered agreements.” (*para.* 114)

Paradise could argue that introducing a broad notion of *de facto* discrimination into the Enabling Clause would allow open-ended challenges to any conditions in GSP schemes, because these conditions would always or almost always have some *disparate impact* in that location-related comparative advantage is likely at the margin to affect the cost to producers of meeting the conditions, however much they are not directly or intentionally related to country of origin.

Arachnia might also argue, based on certain language in the Appellate Body ruling in *EC-Tariff Preferences*, that even where a scheme on its face provides identical treatment to different *developing* countries, the scheme must meet certain requirements of substantive and procedural due process, in order to ensure that discrimination does not occur in the manner in which it is applied.

Paradise would likely counter that the substantive (*objective criteria for application*) and procedural due process requirements mentioned by the

Appellate Body *only kick-in* where a *developed* country WTO Member is seeking to make a distinction in its GSP scheme based upon the situation or conduct of different GSP beneficiaries (*in the EC-Preference case a distinction based on the drug situations in those countries*). Paradise would claim that, unlike the EC drug measures, its measures do not call for any element of non-identical treatment of *different developing* countries based on different situations or conduct of those countries, and therefore the Appellate Body requirements of substantive and procedural due process do not apply.

On the basis of its claim that the substantive and procedural due process apply under the Enabling Clause, even where there is facially identical treatment of all GSP beneficiaries, Arachnia might well argue that Paradise's scheme violates such norms. It is to be observed that Paradise's scheme involves very different treatment of *developing* country imports depending on whether they are:

- 1) "pesticide free";
- 2) "have less than 50% of the Codex maximum"; and
- 3) "have exactly 50% of the Codex maximum."

The determinations in question are made in the first place on the basis of certifications or declaration by producers/exporters from the *developing* country in question/and or their government (*see Clarifications*), with the possibility that officials of Paradise may verify the truth of these certifications or declarations. The wide scope of "self-regulation" here and the virtually unstructured discretion of Paradise officials either to defer to such "self-regulation" or seek to verify, with no apparent appeal mechanisms or guidelines, provides ample scope for hidden administrative discrimination between *different developing* countries. Moreover, without *de minimus* rules, use of independent labs, and so forth, categories such as "pesticide free" are inherently manipulable that so much turns on what is above or below "50%" or exactly at 50% also allows for considerable manipulability, without further guidelines and specifications.

Paradise may respond that the criteria on their face are in fact entirely objective, based on ascertainable quantities of a substance whose presence can be detected using normal scientific techniques. The facts *do not disclose* that Arachnia's producer/exporters have been subject to any unfavorable treatment under the Paradise programme (*for instance, having their certifications subject to verification or question by Paradise officials more often than other developing country producer/exporters*). Indeed, it does not appear that Arachnia's producer/exporters have yet tried to take advantage of the programme.

Paradise should point out the well established principle that *good faith* implementation of WTO treaties is presumed; a presumption that Paradise would apply its programme in a discriminatory way to Arachnia's

producer/exporters is unwarranted, absence any evidence to the contrary. There is no reason to believe that if controversies concerning whether a certification was valid or corresponded to the exact levels of residue in question were to occur, that they would not be resolved objectively and transparently, in accordance with the norms of administrative fairness and the rule of law. **Above all, this is entirely different from the situation in EC-Tariff Preferences, where Indian products were *per se* excluded from participation in the additional preferences, by virtue of a list generated by the EC authorities.**

In addition to the substantive and procedural due process criteria, Arachnia will also probably argue that there are other respects in which the Paradise programme does not meet the Appellate Body requirements for non-discrimination. For example, the Appellate Body emphasizes the importance of identifying relevant needs of *developing* countries within the meaning of Article 3 (c) of the Enabling Clause. According to the Appellate Body:

“when a claim of inconsistency with paragraph 3(c) is made, the existence of a "development, financial [or] trade need" must be assessed according to an *objective* standard. Broad-based recognition of a particular need, set out in the *WTO Agreement* or in multilateral instruments adopted by international organizations, could serve as such a standard. In our view, the 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 provided under the respective measure authorized by paragraph 2, and, on the other hand, the likelihood of alleviating the relevant "development, financial [or] trade need". In the context of a GSP scheme, the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences. . . .”(paras. 163-164).

Of course here also, as with the substantive and procedural due process requirements, Paradise will claim that these do not apply because there is simply no non-identical treatment of different GSP beneficiaries. Arachnia may assert a broader application, based upon the Appellate Body’s reading of the Enabling Clause as a whole and in particular the nature of Article 3 (c) as an independent condition.

Paradise *would counter* that precisely because Article 3 (c) is an independent condition, any consideration of whether *identical* treatment violates Article 3 (c) would have to be adjudicated as a violation of Article 3 (c) not Article 2 (a). **(I shall discuss the claim of an independent Article 3 (c) violation below.)**

Most of the above discussion applies solely to Arachnia’s claim concerning the *additional margin of preference* for “pesticide-free” imports.

With respect to the denial of GSP treatment *as such* to products with 50% or more of the Codex Maximum Residue, there is, as already noted, the question as to **whether and to what extent the Appellate Body's analysis of the Enabling Clause applies with respect to that kind of measure (see *para.* 129, discussed briefly above)?**

Arachnia, as already suggested, may interpret *para.* 129 to mean that with respect to the non-granting of MFN treatment as such to particular products, Paradise does not have a defence on the Enabling Clause even if its provisions are met. Furthermore, Paradise's refusal to grant GSP treatment on the products in question must be assessed as an independent violation of Article I:1 of the GATT, which could only be "saved" if Article XX were to apply.

Paradise may counter that the exclusion of exceptions to GSP treatment *as such* from the Appellate Body reasoning on the meaning of the Enabling Clause with respect to "non-discrimination" reflects, on the contrary, longstanding state practice that *developed* country Members have a political prerogative to make such exceptions or eligibility determinations—a political prerogative on which the current system of GSP depends (**see in this regard my own articles on the EC-India dispute**).

2. Generalized and Non-Reciprocal

Arachnia might claim that Paradise's programme does not meet the additional requirements, *not adjudicated* in *EC-Tariff Preferences*, that a GSP programme be "generalized" and "non-reciprocal." Arachnia could argue that a "Generalized" programme cannot contain conditions that distinguish between different products from *developing* countries based on characteristics of the products, either with respect to additional preferences or to whether GSP is granted or not to those imports. Arachnia could rely in this respect on dictionary definitions of the meaning of "general" or "generalized."

Paradise would claim, however, that in dicta in *EC-Tariff Preferences*, the Appellate Body closed the door to this line of argument, holding this was a term of art, which referred to a programme that didn't limit the eligibility for GSP treatment to some sub-set of *developing* country Members, such as a regional grouping of *developing* countries, or former colonies of the GSP-granting *developed* country Member in question (*para.* 155).

Arachnia might come back noting that the language in *para.* 155 suggests that the specialized meaning of the term "generalized" in the Enabling Clause is additive to the ordinary meaning, not a replacement for it. Arachnia could argue that Paradise's programme is not "non-reciprocal" in the sense that it imposes conditions on *developing* countries in return for the grant of additional preferences and of GSP treatment as such in respect to the products in question.

The recent report of Consultative Board to the Director-General of the WTO, "The Future of the WTP: Addressing institutional challenges in the new millennium", suggests that conditions that "burdened [GSP Recipients] with conditions unrelated to trade, which are expressed as conditions to receiving preferences" result in the "preferences being "no longer unreciprocated" (*para. 94*).

Paradise, would point out, however, that this interpretation of "unreciprocated" is inconsistent within the context of the Enabling Clause, where reciprocity means making GSP conditional on the granting of *trade* concessions from *developing* to *developed* countries. Thus, Article 5 of the Enabling Clause reads:

"The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs." (Emphasis added).

The repeated use of the formula "in trade negotiations" and the use of the expression "concessions" make it abundantly clear that reciprocity refers to reciprocal trade concessions not to "obligations unrelated to trade, which are expressed as conditions." Article 3 (a) of the Enabling Clause reads:

"shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties"

This requirement, like the others in Article 3 of the Enabling Clause, applies to *any* preferential treatment granted in a GSP scheme. The requirement, on its terms, has not been the subject of interpretation in dispute settlement.

Arachnia may argue that Paradise's measures are not "designed to facilitate and promote trade of developing countries" but are instead a reflection of the concern of its own citizens about pesticide use.

Paradise may counter that, in Paradise at least, there is a market for "pesticide free" food products, and in providing incentives to developing countries to compete actively in that market, Paradise's *additional margin of preference* is "designed to facilitate and promote the trade of developing countries."

With respect to the non-granting of GSP treatment per se to imports that contain exactly 50% of the Codex maximum, Arachnia may argue that it is

hard to see how this *denial* of preferential market access is “designed to facilitate and promote the trade of developing countries.”

Paradise may counter that Paradise’s measure must be understood *in tandem* with the regulatory controls that are discussed in the Clarifications: because developed country imports are banned if they have 50% of the Codex maximum, even though at 50% Paradise is denying GSP treatment, it is still providing advantageous treatment to developing countries, because in this situation their imports are *permitted* — albeit at the MFN rate of tariff — while those of *developed* countries are *banned*.

Arachnia may counter that it is precisely the interaction of Paradise’s GSP programme with its regulatory scheme that produces a situation where “undue difficulties for the trade of . . . “other” contracting parties” is created, namely in this case developed countries; Paradise is giving developing country producers incentives to get below 50% while at 50% simply excluding *developed* country products from competition altogether in Paradise’s market.

Paradise may counter that its regulatory controls are not included in the Panel’s terms of reference (see Clarifications), and that in any case Arachnia *does not have Standing* to invoke the Enabling Clause on behalf of “other” i.e. *developed* contracting parties.

Arachnia might counter with the broad view of *Standing* suggested by the Appellate Body in the *Bananas* and *Havana Club* (MFN issue in *Havana Club*) cases. Article 3 (c) of the Enabling Clause reads:

“shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.”

Arachnia will very likely argue that Paradise’s measures are not consistent with Article 3 (c) of the Enabling Clause. As already discussed, in *EC-Tariff Preferences*, the Appellate Body used the concept of “needs” of developing countries in Article 3 (c) as a comparator for its concept of discrimination under Article 2 (a) of the Enabling Clause. The Appellate Body held that Article 3 (c) *authorized* non-identical treatment of *different developing* countries, where necessary to “respond positively to the development, financial and trade needs” of those countries.

A threshold issue is the extent to which the Appellate Body’s analysis of what Article 3 (c) requires, applies not only where Article 3 (c) is being relied on to *authorize* non-identical treatment of *different developing* countries that would otherwise be “discriminatory” within the meaning of Article 2 (a), *but also* where Article 3 (c) is being invoked as a *self-standing obligation*.

Paradise may well argue that the kind of *self-standing obligation* created by Article 3 (c) is a very different matter than the functioning of Article 3 (c) in authorizing non-identical treatment as “non-discriminatory.” In the latter case, the Appellate Body was creating a set of conditions that might reverse a presumption, as it were, that facially non-identical treatment is “discriminatory”; since such a presumption is generally quite strong in WTO jurisprudence, it is understandable that the Appellate Body took a strict view of what Article 3 (c) requires in order to function as an authorization or overcoming of a presumption of discrimination. What Article 3 (c) means as a *stand alone obligation*, Paradise might argue, involves a very different set of considerations. For instance, if the desideratum that *developed* countries modify their GSP programmes whenever the needs of particular *developing* countries happened to change or evolve were taken literally, it would be very difficult for *developed* countries to have any legal security over time concerning the compatibility of their GSP programmes with the Enabling Clause.

Given that the concept of “needs” is open ended, a strict view of Article 3 (c) as a *stand-alone obligation* could result in open-ended challenges to GSP schemes, based on one particular aspect of the scheme happening to be arguably not consistent with positively addressing one particular need of one particular *developing* country at one moment in time. In order to run a GSP scheme, a *developed* country would have to have comprehensive knowledge of every individual development, etc. need of a *developing* country at a particular point in time. This is clearly unreasonable.

Therefore, Paradise may argue that Article 3 (c) should be understood as primarily a source of guidance where a GSP programme is being challenged as not being consistent with one of the conditions in the “description” of GSP (“generalized,” “non-reciprocal”, “non-discriminatory”) or, again in its character as a *stand-alone obligation*, Article 3 (c) should be understood as an obligation imposed on *developed* countries as a whole in their interaction with *developing* countries as a whole, such that an obligation on a *developed* country to modify its GSP scheme in response to changed needs of some particular *developing* country or countries would have to be triggered by some collective signal of *developing* countries (for example, in UNCTAD) of the imperative to make such an alternation.

Arachnia would come back with language in the Appellate Body ruling in *EC-Tariff Preferences* that suggests that the *stand-alone obligation* in Article 3 (c) is in fact *the very foundation* of the Appellate Body’s view *that differentiation of developing countries must in principle be possible*. There is nothing in the Appellate Body’s ruling, Arachnia will argue, that suggests Article 3 (c) as a *stand-alone obligation* is to be interpreted less strictly than when invoked in the context of determining whether non-identical treatment of *different developing* countries is nevertheless “non-discriminatory”.

Arachnia would go on, probably, to argue that far from responding to the needs of *developing* countries, the facts in the Case and Clarifications suggest that Paradise's measures reflect its own domestic priorities and preferences with respect to pesticides. Arachnia could point to the absence of any reference in Paradise's programme or in the legislative history etc. (*see Clarifications*) to any objective international standard on the basis of which the pesticide preferences could be justified as responding positively to development, trade or finance needs of *developing* countries.

Paradise will counter that "facilitating sustainable development" is the stated purpose of its measures, that it is common knowledge that pesticides create risks to health and the environment and that such risks obviously fall within the rubric of "sustainable development" concerns. Moreover, Paradise may argue, as is demonstrated by the tastes of its own consumers, there are *developed* country markets for "pesticide-free" food products, and Paradise's measure facilitates *developing* countries in adapting their industries to meet those market demands through an *additional margin* of market access, thereby responding positively to the trade needs of developing countries.

Arachnia may argue that the substantive and procedural due process norms discussed in *para. 182* of the Appellate Body report in *EC-Tariff Preferences* form part of the content of Article 3 (c) as a *stand-alone obligation*.

Paradise will counter that these norms were only discussed as part of the overall consideration of whether the non-identical treatment afforded different *developing* countries under the drug preference scheme was "discriminatory" or not, and the Appellate Body's discussion of such norms has no relevance to the interpretation of Article 3 (c) in a case such as this where there is no issue of non-identical treatment of different developing countries. **(How Paradise's programme would fare as judged against such norms is dealt with above in connection with the discussion of the "discrimination" claim.)**

Finally, the issue arises as to whether Article 3 (c) applies or how it applies to Paradise's *non-granting* of GSP treatment to *developing* country imports that have exactly 50% of the Codex Maximum Residue. This issue is discussed above in the context of the Enabling Clause "non-discrimination" requirement.

III. Article XX of the GATT

In *EC-Tariff Preferences*, the Panel below found that:

- 1) The EC drug preferences were a violation of MFN in that *this particular aspect* of the EC-GSP scheme discriminated *between* developing countries;

- 2) That such discrimination was *also contrary* to the requirements of the Enabling Clause; and
- 3) That the discrimination between *developing* countries *could not be justified* under Article XX(b) of the GATT. T

The Appellate Body, however, in taking a different tack, did not consider the question of whether the particular aspect of the EC-GSP scheme being challenged discriminated between *developing* countries as relevant and did not rule on it. Instead, the Appellate Body held that since *every GSP measure*, by definition, involves an MFN violation by virtue of the treatment of *developed country* WTO Members less favorably than *developing* country Members, once this obvious MFN violation is asserted, the essential question becomes whether *the particular aspect of the GSP scheme being challenged* can meet the conditions of the Enabling Clause.

The findings of the Panel below on Article XX were not appealed to the Appellate Body. Therefore, *it is unclear* how the Appellate Body would see a role for Article XX in challenges to aspects of GSP schemes. Apparently, the Appellate Body sees the MFN violation that triggers the application of the Enabling Clause as the operation of the GSP scheme *per se*, not the particular features being challenged by the complainant. This raises the issue of **what the defendant has to justify under Article XX (i.e. the particular aspect of the scheme that has been found not to meet the requirements of the Enabling Clause, or its GSP scheme *per se*)?**

The latter possibility makes little sense, yet it seems a logical consequence of 1) the MFN violation being the GSP scheme itself in all its aspects, which discriminate against *developed* countries; 2) the Enabling Clause being itself characterized as an “exception,” compliance to the conditions of which is necessary in order to operate a GSP scheme as such “notwithstanding” MFN.¹

An alternative approach would be to say that in cases that deal with GSP schemes Article XX should be viewed *as an exception to the exception*, as it were - that is, that Article XX *may* allow a Member to maintain some aspect of its GSP scheme that would otherwise not meet the conditions of the Enabling Clause.

In other words, Article XX is not being viewed here as an exception to Article I, but rather an exception to the strictures in the Enabling Clause. In this respect, it is to be noted that the *chapeau* of Article XX uses the language “*nothing* in this Agreement shall prevent . . .” The expression “this Agreement” would be interpreted to include the Enabling Clause, which the

¹ This is not just logical games and semantics—the trade restrictive impact to be considered in Article XX analysis will be quite different depending on whether the “discrimination” that has to be justified is the discrimination against developed countries inherent in every GSP preference by definition, or discrimination between developing country beneficiaries of GSP.

Appellate Body held to have been incorporated into GATT 1994. In other words, Article XX not only modifies or suspends the operation of GATT obligations but it modifies as well the scope of *any other exceptions* to those obligations found within the GATT to the extent required so as to not prevent the measures in question.

With these preliminary “structural” issues in mind, I turn to the possible Article XX justifications for an exception to the “non-discrimination” requirement of the Enabling Clause.

Paradise may well argue that its measures are “necessary” for the protection of human and/or animal health within the meaning of Article XX(b). Following the approach to Article XX developed by the Appellate Body in *EC-Asbestos* and *Korea-Beef*, Paradise would first seek to establish that it has a *bona fide* health objective and then that either its measure is indispensable to attain that objective, *or* at least, the measure bears a close relationship to the objective, even if not indispensable *and* that the trade-restrictive effect of the measure is not *out of proportion* to the contribution of the measure to the health objective.

With respect to whether Paradise has a *bona fide* health objective, Paradise would doubtless point to the Codex as evidence of wide international recognition that pesticide residues in foods pose serious health risks.

Arachnia will counter that Paradise’s measure cannot be considered to address the health risks dealt with in the Codex, because the measure is aimed at residues that are implicitly “safe” under the Codex’s own standards.

Paradise will come back that the Codex Maximum Residues are merely minimum standards, and do not imply a legitimate health objective would be to have far smaller residues, and here Paradise might well invoke the precautionary principle.

Arachnia, however, will note that Paradise’s measure explicitly states its purpose, *not as the protection of the health of its citizens but rather as facilitating sustainable development* (here, there are close analogies to the way that the Panel below in *EC- Tariff Preferences* treated the EC claim in that case that its drug preferences were for a health objective).

With respect to whether the measure is “necessary”, assuming that it can be established that it has a *bona fide* health objective, Paradise’s best strategy is probably to emphasize that the measure merely extends an *additional margin of preference* to certain products, and thus is much less trade restrictive, almost by definition, than regulatory controls, such as the ban that Paradise imposes at (in the case of *developed* countries) and beyond (in the case of *developing* countries) 50%.

Arachnia will emphasize that Paradise has no mechanism for monitoring or determining the effectiveness of tariff preferences for achieving its health objectives, that in any case labeling is widespread in Paradise, so that consumers have an opportunity of taking a “precautionary” approach if they so desire. Furthermore, Arachnia might also point to the apparently bizarre distinctions in treatment accorded products with residues, respectively at 50%, less than 50% and more than 50% and at “0%” under Paradise’s scheme, posing the question: **If any rational strategy for control of health risks can be discerned in such a labyrinth?**

The Parties may well also address the “chapeau” of Article XX, especially the requirement to avoid unjustified and arbitrary discrimination in the application of a measure provisionally justified under Article XX. Here the substantive and procedural due process concerns canvassed above in relation to the Enabling Clause requirement of “non-discrimination” would again come into play, the relevant jurisprudence of course being the Appellate Body rulings in *Shrimp/Turtle*.

It is possible also that Paradise would make an environmental argument that goes beyond the concern of the health of its citizens under Article XX(b) to concerns about the effects of pesticides on the environmental commons (*an Article XX(g) claim*).

Here, the harm in question would not be just harm within Paradise *but harm to the global environmental commons*. However, there are no facts or materials given in the Case that would support this kind of claim; nevertheless, Paradise teams may have resort to evidence from the international environmental community to try and sustain it. Any argument of this kind would have to address whether any territorial nexus to Paradise is required under Article XX (g) and if so, what that nexus is and if it is met by the facts here (**this was, it will be recalled, an issue the Appellate Body left open in *Shrimp/Turtle***).

Finally, there may be some differences in the Article XX arguments as they apply to the *additional margin of preference* for “pesticide-free” imports on the one hand and on the other the denial of GSP treatment as such to imports that have exactly 50% residue.