

**DRAGGING OUT OF OR DEEPER INTO
ANOTHER IMPASSE OF THE POLITICAL
ECONOMY OF THE WORLD TRADE
ORGANIZATION? A CRITIC OF THE FINDINGS
OF THE DISPUTE SETTLEMENT BODY IN
EUROPEAN COMMUNITIES-CONDITIONS FOR
THE GRANTING OF TARIFF PREFERENCES TO
DEVELOPING COUNTRIES¹**

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ABSTRACT

The recent findings of the Appellate Body in EC-GSP highlights several inherent questions of the GSP which trigger a deeper reflection as to how S&D to developing countries may further be improved within the WTO and elsewhere. Apart from exposing issues inherent in GSP itself, the case also highlights the dilemma facing the Appellate Body. Like many other cases brought before it, the Appellate Body attempted once again to strike a delicate balance between competing interests, as well as endeavoured in reconciling law and politics. This paper discusses the dilemma facing the Appellate Body and by examining the evidence which comprises the context in the evolutionary history of the Enabling Clause, this paper argues that the Appellate Body erred in law in its findings, and the legal as well as political implications which flow from its findings not only failed in dismantling the current

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¹ Appellate Body Report, *European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (Apr. 7, 2004) [hereinafter *EC-GSP*].

impasse of GSP but dragging deeper into it.

KEYWORDS: *trade and development; most-favoured-nation; preferences; generalized; non-reciprocal; non-discriminatory; special & differential treatment*

I. INTRODUCTION

No one may likely question the proposition that one of the most fundamental and successful innovations of the World Trade Organization is the creation of a judicial body for settling disputes between Members. Unlike its predecessor, the GATT *ad hoc* Panels which members comprised predominantly of trade diplomats or retired officials of national governments and assisted by legal and professional staff of the Secretariat, members of the WTO dispute settlement Panels are widely chosen from academics and experts of different fields. More importantly, the Dispute Settlement Understanding now imposes upon the dispute settlement process a new judicial power, the Appellate Body, a standing corpus of eminent jurists which operates rather independently of the WTO political organs and the Secretariat. This newly created judicial body backed by the automatic adoption of Panel reports² significantly improves the effectiveness and credibility of the dispute settlement process of the WTO and, as rightly commented by Jackson in the incipient years of the Dispute Settlement Body, is ‘one of the most important, and perhaps even watershed, developments of international economic relations in the twentieth century.’³

Along with the creation of the judicial body, the “single package” negotiated during the Uruguay Round carried with it to the eventually established World Trade Organization a full range of non-economic public values which inevitably will challenge the traditional trade liberalism value

² Understanding on Rules and Procedures Governing the Settlement of Dispute Article 16, Apr.15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, http://www.wto.org/english/doc_e/legal_e.htm. [hereinafter DSU]. The negative consensus for the adoption of Panel reports as provided in this provision (to the extent not modified or reversed on appeal by the Appellate Body) contrasts significantly with the previous GATT practices whereby Panel reports would have to be adopted by consensus, which means that the losing party would always be in a position to block the report not in its favour.

³ John H. Jackson, *Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement: Appraisal and Prospects*, in *THE WTO AS AN INTERNATIONAL ORGANIZATION* 161, 175 (Ann O Krueger ed., 1998).