BEFORE THE PANEL
OF THE
WORLD TRADE ORGANIZATION
ON

European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries

WT/DS246

FIRST SUBMISSION OF INDIA

Prepared with the cooperation of the Advisory Centre on WTO Law

21 March 2003

TABLE OF CONTENTS

I. INTRODUCTION 4

II. PROCEDURAL BACKGROUND 9

III. FACTUAL BACKGROUND 10

A. THE SCHEME OF GENERALISED TARIFF PREFERENCES ADOPTED BY THE EUROPEAN COMMUNITIES 10

B. THE GENERAL ARRANGEMENTS 11

C. THE DRUG ARRANGEMENTS 12

IV. LEGAL ARGUMENT 13

A. THE TARIFF PREFERENCES GRANTED UNDER THE DRUG ARRANGEMENTS ARE INCONSISTENT WITH ARTICLE I:1 OF THE GATT 13

1. Article I:1 of the GATT requires the EC to accord unconditional MFN treatment to all Members 13

2. The tariff preferences granted to covered products originating in the Preferred Members constitute an "advantage" 14

3. The EC fails to accord the advantage of the tariff preferences to like products originating in the territories of all other Members 15

4. The EC fails to accord the advantage of the tariff preferences to like products originating in the territories of all other Members unconditionally 15

B. THE DRUG ARRANGEMENTS ARE NOT JUSTIFIED IN THE ABSENCE OF A WAIVER 15

1. The EC sought a waiver 15

2. The EC failed to obtain a waiver 16

C. THE DRUG ARRANGEMENTS ARE NOT JUSTIFIED BY THE ENABLING CLAUSE 16

1. The EC bears the burden of demonstrating that the Drug Arrangements are consistent with the Enabling Clause 16

2. The Enabling Clause does not absolve developed country Members from their obligation to accord MFN treatment to products originating in developing countries 17

3. The Enabling Clause justifies only preferences that do not discriminate between developing countries 20

(a) The preferences under the Drug Arrangements discriminate between developing countries because they are not extended to all developing countries 20

(b) The preferences under the Drug Arrangements discriminate between developing countries because they are not extended unconditionally to all developing countries 21

4. The Enabling Clause covers only preferences that are beneficial to all developing countries and are designed to respond positively to their needs 21

(a) The Drug Arrangements are not beneficial to all developing countries 22

(b) The Drug Arrangements are not designed to respond positively to the development, financial and trade needs of developing countries 22

5. Summary 23

V. CONCLUSIONS 23

A. FINDINGS REQUESTED BY INDIA 23

B. RECOMMENDATION REQUESTED BY INDIA 24

C. SUGGESTION ON IMPLEMENTATION REQUESTED BY INDIA 24

VI. LIST OF EXHIBITS SUBMITTED BY INDIA...25

I. INTRODUCTION

1. This complaint concerns the tariff preferences that the European Communities (the "EC") accords under its "Special Arrangements to Combat Drug Production and Trafficking" (the "Drug Arrangements"). The Drug Arrangements form part of the EC's scheme of generalised tariff preferences for the period 1 January 2002 to 31 December 2004 (the "GSP scheme"). Under the previous GSP scheme of the EC, the Drug Arrangements applied exclusively to (i) the member countries of the Andean Community (Bolivia, Colombia, Ecuador, Peru and Venezuela), (ii) the member countries of the Central American Common Market (Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua), and (iii) Panama. The EC decided to add Pakistan to the list of beneficiaries under its current GSP scheme because, "as a consequence of the events of 11 September, Pakistan is facing problems which are particularly serious".[1] The countries that have been selected by the EC as beneficiaries of the Drug Arrangements will be referred to in this submission as the "Preferred Members".

2. Under the most-favoured-nation ("MFN") principle embodied in Article I:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT"), each member of the WTO ("Member") has the obligation to accord immediately and unconditionally any advantage with respect to customs duties that it grants to any product originating in any other country to the like product originating in all other Members. The decision on "Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries"[2] (the "Enabling Clause") establishes an exception from this obligation. It permits, *inter alia*, developed country Members to accord differential and more favourable treatment to developing countries within the framework of the Generalized System of Preferences (the "GSP") described in the Decision of the GATT CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries"[3] (the "1971 Waiver").

3. The Enabling Clause was adopted for the benefit of *all* developing countries and does not permit developed country Members to discriminate *between* developing countries. Members have challenged tariff preferences that are not "generalized, non-reciprocal and non-discriminatory" in the context of dispute settlement proceedings,[4] trade policy reviews[5]

---

[1]Commission of the European Communities, Amended Proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period 1 January 2002 to 31 December 2004, COM (2001) 688 final, dated 14 November 2001.

[2]L/4903, adopted 28 November 1979 (BISD 26S/203).

[3]L/3545, adopted 25 June 1971(BISD 18S/24).

[4]See Request for Consultations by Brazil, *European Communities-Measures Affecting Differential and Favourable Treatment of Coffee*, 11 December 1998 (WT/DS154/1); Request for Consultations by Thailand, *European Communities-Generalized System of Preferences,* 12 December 2001 (WT/DS242/1).

and elsewhere.[6] Developed country Members applying tariff preferences at variance with these criteria have sought a waiver.[7]

4. The EC correctly described the legal effect of the Enabling Clause as follows: "While discrimination in favour of developing countries is allowed, there should be no discrimination between them, except for the benefit of least developed countries."[8] Consistent with that position, the EC has requested a waiver from its obligations under Article I:1 of the GATT that would have permitted it to implement the Drug Arrangements.[9] The Andean Community, whose member countries are beneficiaries under the Drug Arrangements, has pointed out "the need for the EC to obtain a waiver in order to continue granting preferences to the drug-related regime".[10]

---

[5]See e.g., Draft Minutes of Trade Policy Review Body Meeting held on 24 and 26 July, 2002 (WT/TPR/M/102) p. 37 (comments by Indonesia, Philippines and Thailand regarding the EC), Minutes of Trade Policy Review Body Meeting held on 14 and 17 September 2001 (WT7TPR/M/88) pp.18,35 (comments by India regarding the United States); Minutes of Trade Policy Review Meeting held on 12 and 14 July 2000 (WT/TRP/M/72/Add. 1) pp. 77-78, 88 (comments by Brazil and India regarding the EC); Minutes of Trade Policy Review Body Meeting held on 12 and 14 July 1999 (WT/TPR/M/56)p. 22 (comments by India regarding the United States) Minutes of Trade Policy Review Body Meeting held on 25-26 November 1997 (WT/TPR/M/30)pp. 6,9,10, 11,12, 17, 26 (comments by Brazil, Pakistan and Venezuela regarding the EC); Minutes of Trade Policy Review Meeting held on 11-12 November 1996 (WT/TPR/M/16) pp. 9,25, 28, 53 (comments by Brazil, Morocco and Pakistan regarding the United States); Minutes of Trade Policy Review Meeting held on 24-25 July 1995 (WT/TPR/M/3) pp. 7, 11,15, 19 (comments by ASEAN countries, Chile and India regarding the EC).

[6]See e.g., Statement by the Representative of Brazil at the Sixty-third Session of the Committee on Trade and Development, 19 April 1988: "… although preferential tariff concessions constituted a unilateral act of the donor country the exclusion of countries from GSP was *per se* a discrimination which was not based on the agreed principles… developed contracting parties acting individually had been authorized to grant such preferential treatment provided that the corresponding schemes were of a generalized, non-discriminatory and non-reciprocal nature. The fact that such schemes were of a voluntary character and did not constitute a binding obligation for the preference giving countries did not in his view give them the right to ignore the legal framework under which they had been authorized to implement such schemes"(COM.TD/127, p.5).

[7]United States Caribbean Basin Economic Recovery Act waiver adopted 15 February 1985 (L/5579, BISD 31S/20) (renewed 15 November 1995 [WT/L/104]); Canada CARIBCAN waiver adopted 26 November 1986 (L/6102, SR42/4) (renewed 14 October 1996 [WT/L/185]); United States Andean Trade Preference Act waiver adopted 19 May 1992 (L/6991) (renewed 14 October 1996 [WT/L/183 and WT/L/184]); European Communities Fourth ACP-EEC Convention of Lomé waiver adopted 9 December 1994 (L/7604) (renewed 14 October 1996 [WT/L/186 and WT/L/187]); European Communities – The ACP-EC Partnership Agreement waiver adopted 14 November 2001 (WT/MIN [01]/15).

[8]"User's Guide to the European Union's Scheme of Generalised Tariff Preferences -February 2003" <http://europa.eu.int/comm/trade/miti/devel/gspguide.htm> (last accessed on 6 March 2003) (EXHIBIT INDIA -1).

[9]Request for a WTO Waiver-New EC Special Tariff Arrangements to Combat Drug Production and Trafficking 24 October 2001 (G/C/W7328) (EXHIBIT INDIA-2[a]) as revised on 23 November 2001 (G/C/W/328/Add. 1) (EXHIBIT INDIA-2[b]).

[10]"Aide-Memoire of the Joint Andean Community-European Commission Technical Evaluation Meeting on the Profitable Use of the Andean GSP-November 21-22, 2002" <http://www.comunidadandina.org/ingles/common/europa_2.htm> (last accessed 6 March 2003) (EXHIBIT INDIA-3).

5. The EC has thus far not obtained a waiver on terms and conditions acceptable to Members concerned but nevertheless decided to accord the tariff preferences under the Drug Arrangements. India was therefore left with no option but to bring this complaint.

6. During the consultations preceding the establishment of this Panel, the EC refused to indicate the legal basis of the tariff preferences granted under the Drug Arrangements. The representative of the EC merely said that "the panel procedures are there to settle this issue". The EC cannot expect this Panel to accord the legal cover that it has so far failed to obtain from the membership of the WTO. The WTO's waiver procedures ensure that deviations from WTO obligations are permitted only on terms and conditions protecting the interests of the Members adversely affected by the deviation. If the Panel were to allow the EC to continue to implement the tariff preferences under the Drug Arrangements without the benefit of a waiver, it would in effect be allowing the EC to determine unilaterally what in fact needs to be negotiated and decided multilaterally. As a consequence, the adversely affected Members would be deprived of their right to safeguard their interests in the waiver negotiations.

7. For these reasons, it would be unjustified and unprecedented if the Panel were to absolve the EC of its obligation to adhere to the waiver procedures. The role of panels is to affirm the law,[11] and not to permit deviations from the MFN rule which the WTO membership has not authorized. The EC cannot legitimately expect the Panel to take any other course of action.

8. India welcomes the desire of the EC to assist developing countries in curtailing drug production and trafficking. This is a legitimate policy goal. India notes that during the period 1992-2000, the EC provided the Andean Community with financial assistance amounting to €72,783,519, *inter alia*, for projects designed to combat drug production and trafficking.[12] In India's view, this WTO-consistent response to the problem of drug production and trafficking achieves the EC's policy goal of assisting developing countries with drug problems more effectively than the grant of tariff preferences.

9. The tariff preferences accorded by the EC to the Preferred Members do not involve a transfer of resources from the EC to those countries. The main effect of the preferences is to shift market access opportunities from the developing countries that are excluded from the regime to the countries selected by the EC. To that extent, the true "donor" of the benefits

[11] Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes provides that "…the dispute settlement system of the WTO serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law", and that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

[12] "The EU's Relations with the Andean Community-March2003" <http://europa.eu.int/comm/external_relations/andean/intro/> (last accessed 6 March 2003) (EXHIBIT-INDIA 4).

accorded under the Drug Arrangements is not the EC but each of the countries in the Americas, Africa and Asia that suffers from the trade diversion caused by the preferences. This illustrates the importance of the principle of non-discrimination set out in the Enabling Clause. If the Enabling Clause had been drafted to permit preferences that discriminate between developing countries, developed countries would have been effectively accorded the right to pursue their own foreign policy goals at the expense of the developing countries by shifting market access opportunities from some to other developing countries.

10. All of the developing countries participating in this proceeding as third parties, including those that benefit from the Drug Arrangements, may wish to consider whether it would be in their interest to argue before this Panel that the Enabling Clause authorises discrimination between developing countries. The circumstances surrounding the inclusion of Pakistan in the Drug Arrangements demonstrate the adverse consequences of rendering inoperative the principle of non-discrimination between developing countries. These circumstances have been described by the EC as follows:

> *In recognition of Pakistan's changed position on the Taliban regim*e … the Commission has stepped up the EU's assistance to Pakistan …A new Cooperation Agreement was signed at the occasion of the visit of President Prodi and PM Verhofstadt to Pakistan on the 24 November 2001, where they also met with President Musharraf. On 16 October, the Commission presented a package of trade measures designed to significantly improve access for Pakistani exports to the EU… *The proposed package has been specifically tailored to target clothing and textiles accounting for three-quarters of Pakistan's exports to the EU.* It removes all tariffs on clothing and increases quotas for Pakistan textiles and clothing by 15%. *In return, Pakistan will improve access to its market for EU clothing and textile exporters*. The package gives Pakistan the best possible access to the EU short of a Free Trade Agreement by making it eligible for the new Special Generalised System of Preferences Scheme for countries combating drugs. This package was approved by the General Affairs Council on 10 December 2001.[13] (emphasis added)

11. Thus, in order to obtain the tariff preferences for its textiles and clothing exports to the EC, Pakistan had to align its foreign policy to that of the EC and make trade concessions. In commercial terms, these benefits were not provided by the EC but by India and other developing countries that compete directly with Pakistan in the EC's clothing and textiles market. The case illustrates that once the principle of non-discrimination between developing countries is rendered inoperative, the GSP is no longer an instrument to respond positively to the needs of developing countries. It is then perverted into an instrument to shift market access opportunities from some to other developing countries for the purpose of promoting

[13] "EU Response to 11 September - Latest update on European Commission Action- Briefing on 12 March 2002" <http://europa.eu.int/comm/110901/memo120302_en.htm> (last accessed 6 March 2003) (EXHIBIT INDIA-5).

the foreign policy objectives and trade interests of developed countries. In short, it becomes an instrument for developed country Members to conduct foreign policy towards developing countries at the expense of developing countries. The Enabling Clause was drafted carefully to prevent this.

12. It is in the interest of all developing countries that the issues arising from the implementation of the Drug Arrangements be resolved in accordance with the principle of non-discrimination set out in the Enabling Clause or under conditions set out in a waiver approved by Members, including the developing country Members excluded from the Drug Arrangements. It is not in the interest of developing countries that the EC obtain from the Panel *carte blanche* to continue to act unilaterally in this and similar future cases. Bolivia, Colombia, Ecuador, Peru and Venezuela have already urged the EC to seek a waiver.[14] This demonstrates that not only India but also developing countries benefiting from the Drug Arrangements recognise the requirement of non-discrimination set out in the Enabling Clause.

13. India further notes that the tariff preferences under the Drug Arrangements cannot be reconciled with the fundamental requirements set forth in Article XX of the GATT, including the requirement that the measure must be necessary and that it must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination. The benefits arising from the Drug Arrangements are allocated in a manner completely unrelated to the policy goal that the EC declares to pursue with them. There are no specific procedures or criteria under the GSP Scheme permitting the extension of the preferences to countries with drug problems similar to those of the twelve selected countries. There are also no specific procedures or criteria providing for the withdrawal of the preferences if the drug policies of the selected countries were to change. For these reasons, the Drug Arrangements operate in effect as straightforward preferential-trade arrangements.

14. Even if such specific procedures or criteria related to drug policies were created, the benefits arising from the Drug Arrangements would not be distributed in a manner consistent with the EC's goal of assisting developing countries with drug problems. The tariff preferences under the Drug Arrangements cannot create benefits for (i) the least-developed countries, (ii) the parties to the Cotonou Agreement,[15] (iii) the EC's partners in regional trade agreements (which are in any case accorded duty-free access to the EC market) and, (iv) the developed countries (to which GSP benefits may not be granted). As long as the EC uses GSP benefits to pursue its drug policy objective, the EC will therefore arbitrarily discriminate between WTO Members where the same drug problems prevail.

[14] "Aide-Memoire of the Joint Andean Community-European Commission Technical Evaluation Meeting on the Profitable Use of the Andean GSP-November 21-22, 2002", *supra*, footnote 10.

[15] Partnership Agreement between the Members of the African Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part (ACP-EC Partnership Agreement).G/C/W/204 (circulated to Members 4 May 2000).

15. By financing drug-related projects in the countries of the Andean Community and maintaining a policy dialogue on drug matters with them, the EC has demonstrated that there are other policy instruments at its disposal that help curtail drug production and trafficking and that do not entail trade discrimination. There is consequently no need for the EC to continue to pursue the right policy with the wrong policy instrument.

16. India requests the Panel to find that the Drug Arrangements are inconsistent with Article I:1 of the GATT and not justified by the Enabling Clause and to recommend, in accordance with the first sentence of with Article 19:1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), that the EC bring the Drug Arrangements into conformity with its obligations under the GATT.

17. India believes that the most constructive way for the EC to bring the Drug Arrangements into conformity with its obligations would be to extend the tariff preferences provided therein to all developing country Members, or, if this is not feasible, to apply them pursuant to a waiver granted on conditions that take into account the trade interests of Members, particularly the developing country Members that are adversely affected by the preferences. India therefore requests the Panel to suggest in accordance with the second sentence of Article 19.1 of the DSU that the EC either (i) extend the tariff preferences under the Drug Arrangements to all developing country Members or (ii) obtain a waiver from its obligations under Article I:1 of the GATT on terms and conditions satisfactory to all Members, including the developing country Members excluded from the Drug Arrangements.

II. PROCEDURAL BACKGROUND

18. On 5 March 2002, pursuant to Article 4 of DSU, Article XXIII:1 of the GATT and paragraph 4(b) of the Enabling Clause, India requested consultations with the EC regarding the conditions under which the EC accords tariff preferences to developing countries under the scheme of generalized tariff preferences formulated under Council Regulation (EC) No. 2501/2001. The request was circulated to Members on 12 March 2002.[16] Consultations were held on 25 March 2002 but failed to resolve the dispute.

19. On 6 December 2002, India requested the Dispute Settlement Body ("DSB") to establish a panel pursuant to Articles 4.7 and 6 of the DSU and Article XXIII:2 of the GATT.[17] On 16 January 2003, India requested the establishment of a panel for the second time. On 27 January 2003, the DSB established the Panel with the following terms of reference:

---

[16]Request for Consultations by India, *European Communities-Conditions for the granting of Tariff Preferences to Developing Countries* 12 December 2002 (WT/DS246/1).

[17]Request for the Establishment of a Panel by India, *European Communities-Conditions for the granting of Tariff Preferences to Developing Countries* 9 December 2002 (WT/DS246/4).

> To examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS246/4, the matter referred to the DSB by India in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[18]

20. Bolivia, Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mauritius, Nicaragua, Pakistan, Panama, Paraguay, Peru, Sri Lanka, the United States and Venezuela have reserved their right to participate in the panel proceedings as third parties.[19] Pursuant to Article 8.7 of the DSU, on 24 February 2003, India requested the Director-General to determine the composition of the Panel. On 6 March 2003, the Director-General determined the composition of the Panel.[20]

21. In its request for the establishment of a panel, India made claims not only with respect to the Drug Arrangements but also with respect to the EC's special incentive arrangements for the protection of the environment and labour rights. On the occasion of the meeting with the Director-General held on 28 February 2003 regarding the composition of the Panel, India informed the EC and the Director-General that it had decided to limit the present complaint to the tariff concessions applied by the EC under the Drug Arrangements. India noted that no preferences had so far been granted under the special incentive arrangements for the protection of the environment and that only one country, Moldova, had thus far been accorded preferences under the special incentive arrangements for the protection of labour rights. India made clear that it reserved its right to bring separate new complaint(s) on the environmental and labour arrangements if the EC were to apply them in a manner detrimental to India's trade interests or if the EC were to renew them after the lapse of its current GSP scheme on 31 December 2004. India confirmed the above in writing in a communication to the EC dated 3 March 2003.

III. FACTUAL BACKGROUND

A. THE SCHEME OF GENERALISED TARIFF PREFERENCES ADOPTED BY THE EUROPEAN COMMUNITIES

22. The EC applies a scheme of tariff preferences for certain goods from developing countries and economies in transition under Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1

---

[18] Note by the Secretariat *European Communities-Conditions for the granting of Tariff Preferences to Developing Countries*, WT/DS246/5, 6 March 2003.

[19] *Ibid.*

[20] *Ibid.*

January 2002 to 31 December 2004[21] ("the Regulation"). The Regulation provides for five different tariff preference arrangements:

(i) the General Arrangements;

(ii) the Special Incentive Arrangements for the protection of labour rights;

(iii) the Special Incentive Arrangements for the protection of the environment;

(iv) the Special Arrangements for least developed countries; and

(v) the Special Arrangements to combat drug production and trafficking (the "Drug Arrangements").

23. Tariff preferences under the General Arrangements are accorded to the countries listed in Annex I to the Regulation. The additional preferences under the Special Incentive Arrangements for the protection of the labour rights and the protection of the environment are accorded exclusively to countries which are determined by the EC to comply with certain labour and environmental policy standards. The additional preferences under the Special Arrangements for Least Developed Countries are limited to the least developed countries listed in Annex I to the Regulation. The Drug Arrangements are limited to the Preferred Members. These various arrangements differ in the depth of the tariff cuts provided, the products covered, the requirements that must be met by eligible countries and the grounds on which tariff preferences can be reduced or removed.

B. THE GENERAL ARRANGEMENTS

24. Under the General Arrangements, *all* the countries and territories listed in Annex I to the Regulation are eligible to receive tariff preferences. The products covered are listed in Annex IV to the Regulation. These products are divided into two categories: non-sensitive and sensitive.

25. Article 7 of the Regulation specifies that non-sensitive products will enjoy duty-free access while sensitive products are subject to reduced tariffs. For sensitive products, the customs tariff reduction is calculated by applying (i) a flat rate reduction of 3.5 percentage points to the Common Customs tariff in the case of *ad valorem* duties (except for products of Chapters 50 to 63 where the *ad valorem* duty is reduced by 20 percent), or (ii) a 30 percent reduction to the Common Customs tariff if that tariff is expressed as a specific duty (except for products of CN code 2207 where the specific duty is reduced by 15 percent). Wherever

[21] [2001] OJ L346/1 (EXHIBIT INDIA-6).

the Common Customs tariff is expressed as a combination of an *ad valorem* duty and a specific duty, the preferential reduction is limited to the *ad valorem* duty.

C. THE DRUG ARRANGEMENTS

26. Article 10 of the Regulation states:

> 1. Common Customs Tariff *ad valorem* duties on products, which according to Annex IV, are included in the special arrangements to combat drug production and trafficking referred to in Title IV and which originate in a country that according to Column I of Annex I benefits from those arrangements, shall be entirely suspended. For products of CN code 0306 13, the duty shall be reduced to a rate of 3.6%.
>
> 2. Common Customs Tariff specific duties on products referred to in paragraph 1 shall be entirely suspended, except for products for which Common Customs Tariff duties also include *ad valorem* duties. For products of CN codes 1704 10 91 and 1704 10 99 the specific duty shall be limited to 16% of the customs value.

27. The benefits under the Drug Arrangement are limited to twelve named countries: Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru and Venezuela. The products included under the Drug Arrangements are listed in Column D of Annex IV to the Regulation (the "covered products"). This list comprises products which are included in the General Arrangements as well as several products which are not included under the General Arrangements. The covered products enjoy duty-free access to the EC market, except where specifically provided in Article 10 of the Regulation.[22]

28. It follows from the above that the tariff reductions accorded under the Drug Arrangements to the Preferred Members are greater than the tariff reductions granted under the General Arrangements. In respect of products that are included in the Drug Arrangements but not in the General Arrangements, the Preferred Members are granted *duty free* access to the EC market, while all other developing countries must pay the *full duties applicable under the Common Customs Tariff*. Furthermore, in respect of products that are included in both the Drug Arrangements and the General Arrangements and that are deemed "sensitive" under Column G of Annex IV to the Regulation, the Preferred Members are granted *duty free* access to the EC market, while all other developing countries are entitled only to *reductions in the duties applicable under the Common Customs Tariff*.

[22] Additionally, covered products do not enjoy duty-free access where they are subject to exceptions external to the Drug Arrangements, e.g., sector graduation under Article 12 of the Regulation and temporary withdrawal under Article 26 of the Regulation.

IV. LEGAL ARGUMENT

A. THE TARIFF PREFERENCES GRANTED UNDER THE DRUG ARRANGEMENTS ARE INCONSISTENT WITH ARTICLE I:1 OF THE GATT

1. Article I:1 of the GATT requires the EC to accord unconditional MFN treatment to all Members

29. The MFN principle is a fundamental norm of the rules-based multilateral trading system of the WTO. As pointed out by the Appellate Body, this principle has "long been a cornerstone of the GATT and is one of the pillars of the WTO trading system".[23] Embodying this principle, Article I:1 of the GATT provides in relevant part:

> With respect to customs duties …, any advantage ... granted by any [Member] to any product originating in … any other country shall be accorded . . . immediately and *unconditionally* to the like product originating in … the territories of *all other [Members]*." (emphasis added)

30. The MFN principle embodied in the GATT thus comprises two equally important requirements: first, advantages related to customs duties must be extended to *all other Members* and, second, the extension must be immediate and *unconditional.*

31. The comprehensive nature of the MFN principle was emphasized by the Appellate Body when it stated that:

> … Article I:1 requires that " *any advantage,* favour, privilege or immunity granted by any Member to *any product* originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in … the territories of *all other Members*." … The words of Article I:1 refer… not to like products from *some* other Members, but to like products originating in or destined for "*all other*" Members.[24] (emphasis in the original)

32. The corresponding adjective of the adverb "unconditionally" is "unconditional", which is defined as: "Not subject to or limited by conditions; absolute, complete."[25] In applying Article I:1 of the GATT, in *Canada - Autos*, the Appellate Body referred to the undisputed finding of the panel that the "term 'unconditionally' refers to advantages conditioned on the 'situation or conduct' of exporting countries".[26] The panel had found that:

---

[23] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry ("Canada – Autos ")*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 69.

[24] *Ibid.*, para. 79.

[25] *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. II, p.3465.

[26] *Ibid.*, para. 76.

> … The purpose of Article I:1 is to ensure unconditional MFN treatment. In this context, we consider that the obligation to accord "unconditionally" to third countries which are WTO Members an advantage which has been granted to any country means that the extension of that advantage may not be made subject to conditions with respect to the *situation* or *conduct* of those countries. This means that an advantage granted to the product of any country must be accorded to the like product of all WTO Members without discrimination as to origin.[27] (emphasis added)

33. It follows from the above that a Member granting any advantage to any product originating in any other country has the obligation to accord that advantage to like products *of all other Members regardless of their situation or conduct.*

2. The tariff preferences granted to covered products originating in the Preferred Members constitute an "advantage"

34. Under the Drug Arrangements, the EC imposes customs duties on imports of covered products originating in the Preferred Members at rates lower than those imposed on like products originating in all other Members.[28] This accords an advantage[29] to covered products originating in the Preferred Members. In analogous circumstances, tariff preferences were found to be an "advantage" within the meaning of Article I:1 of the GATT.[30] Furthermore, the tariff preferences accorded to covered products originating in the Preferred Members create favourable competitive opportunities for those products, altering the conditions of competition between those products and like products originating in all other Members. In *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* the panel held that if a measure affects the competitive relationship between products with different origins, the measure confers an "advantage".[31]

35. It follows from the above that the Drug Arrangements confer an "advantage" to covered products originating in the Preferred Members.

---

[27]Panel Report, *Canada – Autos*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, para. 10.23.

[28]With the exception of like products from least developed countries covered under the Special Arrangements for least developed countries. Hereinafter, unless the context otherwise requires, "all other Members" excludes least developed country Members.

[29]The relevant ordinary meaning of "advantage" is "I. superior position 1. The position, state, or circumstance of being ahead of another, or having the better of him or her…2. A favouring circumstance; something which gives one a better position" *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 31.

[30]See e.g., Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry ("Indonesia – Autos ")*, WT/DS54/R and Corr.1,2,3,4, WT/DS55/R and Corr.1,2,3,4, WT/DS59/R and Corr.1,2,3,4, WT/DS64/R and Corr.1,2,3,4, adopted 23 July 1998, para. 14.139; Panel Report, *Canada – Certain Measures Affecting the Automotive Industry ("Canada – Autos ")*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, para. 10.16.

[31]Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaint by Guatemala and Honduras ("EC – Bananas III (Guatemala and Honduras) ")*, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, para 7.239.

3. The EC fails to accord the advantage of the tariff preferences to like products originating in the territories of all other Members

36. The advantages under the Drug Arrangements are available only to the twelve Preferred Members. The tariff preferences granted to the covered products originating in the Preferred Members are consequently not accorded to like products originating in the territories of all other Members.

4. The EC fails to accord the advantage of the tariff preferences to like products originating in the territories of all other Members unconditionally

37. The EC Regulation establishing the current GSP scheme does not indicate on the basis of which criteria the Preferred Members were selected. The 1998 Regulation extending the previous GSP scheme indicates that the Drug Arrangements were intended to benefit "countries undertaking effective programmes to combat drug production and trafficking".[32] Whether or not the EC has in fact applied this criterion uniformly to all Members is legally irrelevant because Article I:1 of the GATT does not permit the EC to make the extension of the advantages under the Drug Arrangements conditional upon the *situation or conduct of* the exporting countries.

B. THE DRUG ARRANGEMENTS ARE NOT JUSTIFIED IN THE ABSENCE OF A WAIVER

1. The EC sought a waiver

38. Under Article IX:3 of the Marrakesh Agreement Establishing the World Trade Organization, a Member may apply for a waiver from its obligations under the WTO Agreement or any of the multilateral trade agreements, including the obligations under Article I:1 of the GATT .

39. The EC itself acknowledges that a waiver from its obligations under Article I:1 of the GATT is required before it could apply the tariff preferences under the Drug Arrangements. On 24 October 2001, the EC submitted a request for a waiver with the following explanation:

> The revised special arrangements to combat drug production and trafficking that should apply from 1 January 2002 will be open to eligible products listed in Annex I originating in Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru and Venezuela.
>
> Because the special arrangements are only available to imports originating in those Members, a waiver from the provisions of paragraph 1 of Article I of the

[32] Introductory clause No. 17, Council Regulation (EC) No. 2820/1998 of 21 December 1998 applying a multiannual scheme of generalised tariff preferences for the period 1 July 1999 to 31 December 2001 [1998] OJ L367/1.

> GATT 1994 appears necessary *before they can effectively enter into force* for reasons of legal certainty.[33] (emphasis added)

40. The need to obtain a waiver has also been acknowledged by the Preferred Members that are member countries of the Andean Community, namely Bolivia, Colombia, Ecuador, Peru, and Venezuela. This acknowledgment is recorded in the *Aide-Memoire of the Joint Andean Community-European Commission Technical Evaluation Meeting on the Profitable Use of the Andean GSP,* as follows:

> In this context the CAN [Andean Community] pointed out the need for the EC to obtain a waiver in order to continue granting preferences to the drug-related regime in the face of pressure brought to bear by countries that consider themselves affected by that regime.[34]

2. The EC failed to obtain a waiver

41. The EC has thus far failed to obtain the required waiver. Notwithstanding the absence of a waiver, the EC decided to implement the Drug Arrangements.

42. As noted by the Appellate Body, "[T]he prohibition of discrimination in Article 1:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis".[35] Any derogation from the obligation under Article I:1 of the GATT upsets the balance of rights and obligations resulting from market access negotiations. It is therefore essential that any derogation from the MFN obligation is based on conditions that maintain that balance. By implementing the Drug Arrangements without the benefit of a waiver, the EC unilaterally upset the balance of right and obligations under the GATT and deprived all other Members, particularly the developing countries excluded from these arrangements, of their right to compensation for the trade diversion that they are subjected to.

C. THE DRUG ARRANGEMENTS ARE NOT JUSTIFIED BY THE ENABLING CLAUSE

1. The EC bears the burden of demonstrating that the Drug Arrangements are consistent with the Enabling Clause

43. The Enabling Clause allows Members to derogate from their obligations under Article I:1 of the GATT. The Enabling Clause therefore constitutes an affirmative defence that the EC might invoke to justify an inconsistency with Article I:1 of the GATT. The

---

[33] Request for a WTO Waiver-New EC Special Tariff Arrangements to Combat Drug Production and Trafficking 24 October 2001 (G/C/W7328) (EXHIBIT INDIA-2[a]) as revised on 23 November 2001 (G/C/W/328/Add. 1) (EXHIBIT INDIA-2[b]).

[34] "Aide-Memoire of the Joint Andean Community-European Commission Technical Evaluation Meeting on the Profitable Use of the Andean GSP-21-22 November 2002" <http://www.comunidadandina.org/ingles/common/europa_2.htm> (last accessed 6 March 2003)(EXHIBIT INDIA-3).

[35] Appellate Body Report, *Canada-Autos, supra,* footnote 23, para.84.

Member invoking an affirmative defence has the burden of proving that defence.[36] Thus, should the EC invoke the Enabling Clause as a defence, it bears the burden of establishing that the Drug Arrangements are justified under the Enabling Clause.

44. During the consultations preceding the establishment of this Panel, the EC refused to indicate which exception to Article I:1 of the GATT justified the Drug Arrangements. However, since the Drug Arrangements are part of the EC's GSP scheme, it may reasonably be assumed that the EC will invoke the Enabling Clause as a defence. For the sake of procedural efficiency, India will present its views on this issue in this first submission.

2. The Enabling Clause does not absolve developed country Members from their obligation to accord MFN treatment to products originating in developing countries

45. The Enabling Clause provides in relevant part:

> 1. Notwithstanding the provisions of Article I of the General Agreement, [Members] may accord differential and more favourable treatment to developing countries[1], without according such treatment to other [Members] ...
>
> 2. The provisions of paragraph 1 apply to the following[2]:
>
> (a) Preferential tariff treatment accorded by developed [Members] 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;
>
> ….
>
> (d) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.
>
> ---
>
> 1 The word "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.

---

[36] See Appellate Body Report, United States – *Measure Affecting Imports of Woven Wool Shirts and Blouses from India ("US – Wool Shirts and Blouses ")*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323, p. 337; Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities ("US – FSC (Article 21.5 – EC)*", WT/DS108/AB/RW, adopted 29 January 2002, para. 133.

> 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).

46. Paragraph 1 of the Enabling Clause allows Members, notwithstanding Article I of the GATT, to accord differential and more favourable treatment to developing countries without according such treatment to other Members under the situations enumerated in paragraph 2. In this dispute, the relevant situation is that described under paragraph 2(a), i.e., preferential tariff treatment accorded by developed country Members to products originating in developing countries in accordance with the GSP. Paragraphs 1 and 2(a) can be paraphrased as follows:

> Notwithstanding the provisions of Article I of the GATT, developed country Members may accord preferential tariff treatment to products originating in developing countries in accordance with the GSP without according such treatment to *other Members.*

47. Under Article I:1 of the GATT, any advantage, favour, privilege or immunity granted to a product originating in any country shall be granted immediately and unconditionally to the like product originating in all *other* Members. "Other Members" include both developed and developing country Members. Thus, under this rule there can be no discrimination between like products of both developed and developing countries.

48. The Enabling Clause allows developed country Members to accord preferential tariff treatment to products originating in developing countries in accordance with the GSP without according such treatment to "other Members". The Enabling Clause distinguishes between "developing countries" and "other Members". The term "other Members" in this context thus refers to other developed country Members. The phrase "notwithstanding the provisions of Article I of the GATT" thus allows developed country Members to derogate from the obligation to grant MFN treatment to products originating in developed countries. However, nothing in the Enabling Clause modifies their obligation to extend to all developing countries any advantage accorded to one of them.

49. This reading of paragraph 2(a) of the Enabling Clause is confirmed by the exception made in paragraph 2(d) which permits:

> Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

50. There would be no need to permit in paragraph 2(d) special treatment of the least developed countries within the category of "developing countries receiving favourable treatment" if paragraph 2(a) of the Enabling Clause permitted developed country Members to accord advantages to a selected group of developing countries. As the Appellate Body has

made clear, interpretations that reduce whole clauses to inutility are inconsistent with the principles of interpretation that panels must apply.[37]

51. As pointed out above, the MFN principle embodied in Article I:1 of the GATT comprises two equally important requirements: First, advantages related to customs duties must be extended to *all other Members* and, second, the extension must be unconditional, that is *independent of the situation or conduct of the exporting country*. The sole function of paragraph 2(a) of the Enabling Clause is to provide a partial exemption from the first of these two requirements. There is nothing in the Enabling Clause that addresses the second requirement. There is consequently nothing in the terms of the Enabling Clause that provides a legal basis for preferences on conditions related to the situation or conduct of the beneficiary developing countries.

52. The sole purpose of the Enabling Clause is to permit Members to "accord differential and more favourable treatment to developing countries without according such treatment to [other Members]." The Enabling Clause provides for an exception from a fundamental principle of WTO law and can therefore not be interpreted to authorise measures that need not be taken to achieve that purpose. In order to accord treatment to developing countries that is more favourable than that accorded to developed countries, Members need not limit their GSP preferences to a few selected developing countries and need not accord GSP preferences conditional upon the situation or conduct of the developing countries.

53. The Appellate Body has stated that panels should base their interpretations on the terms of the WTO agreements and has ruled that the process of interpretation cannot be used to introduce concepts into an agreement that are simply not there.[38] The Enabling Clause establishes a carefully negotiated exception from a fundamental norm of the rules-based multilateral trading system. This requires the Panel to apply the principles of interpretation developed by the Appellate Body with particular care. If the Panel were to interpret the Enabling Clause to permit developed countries to discriminate between developing countries by making the extension of tariff preferences subject to conditions with respect to the situation or conduct of those countries, it would introduce a concept that the drafters of this Clause never contemplated. The Enabling Clause would then no longer be the legal basis for GSP schemes beneficial to all developing countries but for tariff preferences under which market access benefits are diverted from some to other developing countries to realise the

---

[37] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline ("US – Gasoline ")*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, p. 21, Appellate Body Report, *Japan – Taxes on Alcoholic Beverages ("Japan – Alcoholic Beverages II ")*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, p. 106; Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products ("Korea – Dairy ")*, WT/DS98/AB/R, adopted 12 January 2000, paras. 80-82.

[38] See Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products ("India – Patents (US) ")*, WT/DS50/AB/R, adopted 16 January 1998, para. 45.

foreign policy objectives of the developed countries. There is no clear and explicit wording on which the Panel could base an interpretation with such serious consequences. Furthermore, the Panel cannot adopt an interpretation which promotes discrimination. The Preamble to the Marrakesh Agreement Establishing the World Trade Organization, which forms part of the "context … object and purpose"[39] of the WTO Agreement, provides, among others:

> *Being desirous* of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed … to the elimination of discriminatory treatment in international trade relations, (emphasis added)

54. Consequently, the Enabling Clause does not absolve the EC from its obligation to accord MFN treatment to products originating in developing countries.

3. The Enabling Clause justifies only preferences that do not discriminate between developing countries

55. Paragraph 2(a) of the Enabling Clause authorizes preferential treatment "in accordance with the Generalized System of Preferences". Footnote 3 defines the term "Generalized System of Preferences" as the system described in the 1971 Waiver relating to the establishment of "generalized, non-reciprocal and *non-discriminatory* preferences beneficial to the developing countries." (emphasis added)

56. While the Enabling Clause does not establish the obligation to grant preferences, it does not permit *any* preference under *any* scheme called GSP but only preferences accorded in the framework of GSP schemes as described in the 1971 Waiver. This means, *inter alia*, that the preferences must be non-discriminatory between developing countries. Developed country members applying preferential schemes that do not meet this requirement have often obtained a waiver.[40]

(a) The preferences under the Drug Arrangements discriminate between developing countries because they are not extended to all developing countries

57. The benefits under the Drugs Arrangements are limited to the twelve Preferred Members specifically designated by the EC. The ordinary meaning of the verb

[39] As used in Article 31.1 of the Vienna Convention on the Law of Treaties.

[40] United States Caribbean Basin Economic Recovery Act waiver adopted 15 February 1985 (L/5579, BISD 31S/20) (renewed 15 November 1995 [WT/L/104]); Canada CARIBCAN waiver adopted 26 November 1986 (L/6102, SR42/4) (renewed 14 October 1996 [WT/L/185]); United States Andean Trade Preference Act waiver adopted 19 May 1992 (L/6991) (renewed 14 October 1996 [WT/L/183 and WT/L/184]); European Communities Fourth ACP-EEC Convention of Lomé waiver adopted 9 December 1994 (L/7604) (renewed 14 October 1996 [WT/L/186 and WT/L/187]); European Communities – The ACP-EC Partnership Agreement waiver adopted 14 November 2001 (WT/MIN [01]/15).

"discriminate" is "to make or constitute a difference in or between; distinguish; differentiate" and "to make a distinction in the treatment of different categories of people or things".[41] Hence, "non-discriminatory" preferential treatment of developing countries means treatment that does not make a distinction between different categories of developing countries. Preferential tariff schemes limited to a named group of developing countries cannot be characterized as "non-discriminatory" on any reasonable construction of this term. By limiting the Drug Arrangements to the twelve Preferred Members, the EC discriminates between developing countries.

(b) The preferences under the Drug Arrangements discriminate between developing countries because they are not extended unconditionally to all developing countries

58. Even if the EC were to establish that the Preferred Members are the only developing countries that are undertaking effective programmes to combat drug production and trafficking, the Drug Arrangements would still not be consistent with the requirement of non-discrimination set out in the Enabling Clause. As pointed out above, there is nothing in the Enabling Clause that exempts the EC from the obligation under Article I:1 of the GATT to extend the tariff preferences accorded under the Drug Arrangements unconditionally to all developing countries. GSP preferences conditional upon the beneficiaries' drug-related situation and conduct are therefore not covered by the Enabling Clause. Furthermore, making a distinction in the treatment of developing countries on the basis of their drug-related situation is discriminatory.

4. The Enabling Clause covers only preferences that are beneficial to all developing countries and are designed to respond positively to their needs

59. As pointed out above, paragraph 2(a) of the Enabling Clause covers only preferences that are "beneficial to *the* developing countries".[42] The use of the definite article "the" with reference to "developing countries" makes clear that the GSP schemes must benefit *all* developing countries.

60. Furthermore, paragraph 3(c) of the Enabling Clause provides:

> 3. Any differential and more favourable treatment provided under this clause:

[41] *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 68.

[42] The Spanish and French texts of Footnote 3 likewise use the definite article "the". The Spanish text provides: "Tal como lo define la Decisión de las PARTES CONTRATANTES de 25 de junio de 1971, relativa al establecimiento de un 'sistema generalizado de preferencias sin reciprocidad ni discriminación que redunde en beneficio de *los* países en desarrollo'" The French text provides: "Tel qu'il est défini dans la décision des PARTIES CONTRACTANTES en date du 25 juin 1971 concernant l'instauration d'un système généralisé de préférences, 'sans réciprocité ni discrimination, qui serait avantageux pour *les* pays en voie de développement'" (emphasis added).

(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.

61. The requirement that the differential and more favourable treatment of developing countries be designed to respond positively to their needs is phrased as an obligation ("shall") that developed countries must observe when applying the preference schemes authorised under paragraph 2(a), that is GSP schemes as described in the 1971 Waiver.

(a) The Drug Arrangements are not beneficial to all developing countries

62. As pointed out in the introductory section of this submission, the tariff preferences accorded by the EC to the twelve beneficiary countries do not involve a transfer of resources from the EC to those countries. The main effect of the preferences is to shift market access opportunities from the developing countries that are excluded from the regime to the countries selected by the EC. To that extent, the true "donor" under the Drug Arrangements is not the EC but each of the countries in the Americas, Africa and Asia that suffers from the trade diversion caused by the preferences. For example, in the case of the tariff preferences accorded to textiles and clothing products from Pakistan, the true "donor" countries are India and other developing countries that compete directly with Pakistan's exports to the EC. The tariff preferences under the Drug Arrangements are beneficial to some developing countries and detrimental to others and consequently do not comply with paragraph 2(a) of the Enabling Clause.

(b) The Drug Arrangements are not designed to respond positively to the development, financial and trade needs of developing countries

63. The Drug Arrangements cover countries that are a source of production and export of illegal drugs consumed in the EC. The EC depends on the cooperation of these countries to resolve its own drug problems. The preferences accorded under the Drug Arrangements have therefore been designed to respond positively to the needs of the EC rather than those of developing countries.

64. The circumstances of the inclusion of Pakistan in the Drug Arrangements make it particularly clear that the arrangements are designed to respond to policy objectives of the EC rather than the needs of developing countries. As noted in the introductory section of this submission, these circumstances have been described by the EC as follows:

> *In recognition of Pakistan's changed position on the Taliban regim*e … the Commission has stepped up the EU's assistance to Pakistan …A new Cooperation Agreement was signed at the occasion of the visit of President Prodi and PM Verhofstadt to Pakistan on the 24 November 2001, where they also met with President Musharraf. On 16 October, the Commission presented a package of trade measures designed to significantly improve access for

> Pakistani exports to the EU… *The proposed package has been specifically tailored to target clothing and textiles accounting for three-quarters of Pakistan's exports to the EU.* It removes all tariffs on clothing and increases quotas for Pakistan textiles and clothing by 15%. *In return, Pakistan will improve access to its market for EU clothing and textile exporters.* The package gives Pakistan the best possible access to the EU short of a Free Trade Agreement by making it eligible for the new Special Generalised System of Preferences Scheme for countries combating drugs. This package was approved by the General Affairs Council on 10 December 2001.[43] (emphasis added)

5. Summary

65. There are three basic conditions that a developed country Member applying a GSP scheme must observe: first, the scheme must not discriminate between developing countries; second, it must be beneficial to all developing countries and, third, it must be designed to respond positively the needs of developing countries. These conditions all have the same basic function, namely to ensure that GSP schemes operate as instruments to promote development and not as instruments to promote the foreign or commercial policy objectives of the developed countries. It is therefore important that the provisions of the Enabling Clause establishing these conditions are observed by developed country Members that have decided to accord preferences to developing countries.

66. The Drug Arrangements do not meet any of these conditions. They discriminate between developing countries because they apply only to twelve developing countries. They are not beneficial to the developing countries because they create market access opportunities for some of them at the expense of others. And, finally, they are not designed to respond positively to the needs of developing countries but those of the EC. The Drug Arrangements have for these reasons no resemblance with the GSP schemes authorised under the Enabling Clause.

V. CONCLUSIONS

A. FINDINGS REQUESTED BY INDIA

67. In the light of the considerations set out above, India respectfully requests the Panel to find that the Drug Arrangements set out in Article 10 of Council Regulation No 2501/2001 are inconsistent with Article I:1 of the GATT and are not justified by the Enabling Clause.

68. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered to constitute a *prima*

---

[43] "EU Response to 11 September - Latest update on European Commission Action- Briefing on 12 March 2002" <http://europa.eu.int/comm/110901/memo120302_en.htm> (last accessed 6 March 2003) (EXHIBIT INDIA-5).

facie case of nullification or impairment of benefits under that agreement. Accordingly, India requests the Panel to find that the Drug Arrangements have nullified or impaired benefits accruing to India under the GATT.

B. RECOMMENDATION REQUESTED BY INDIA

69. According to Article 19.1 of the DSU, where a panel concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. Accordingly, India requests the Panel to recommend that the DSB request the EC to bring the measure at issue into conformity with the GATT.

C. SUGGESTION ON IMPLEMENTATION REQUESTED BY INDIA

70. According to the second sentence of Article 19.1 of the DSU, the Panel may suggest ways in which the EC could implement the Panel's recommendation. For the reasons set out in the introduction to this submission, India requests the Panel to suggest that the EC bring its measure into conformity with its obligations under the WTO Agreement by:

(a) extending the tariff preferences granted under the Drug Arrangements to all other developing country Members consistently with the Enabling Clause; or

(b) obtaining a waiver from its obligations under Article I:1 of the GATT 1994 on terms and conditions satisfactory to Members.

VI. LIST OF EXHIBITS SUBMITTED BY INDIA

Number of Exhibit	Exhibit[44]
INDIA-1	User's Guide to the European Union's Scheme of Generalised Tariff Preferences- February 2003
INDIA-2(a)	Request for a WTO Waiver-New EC Special Tariff Arrangements to Combat Drug Production and Trafficking- 24 October 2001 (G/C/W7328)
INDIA-2(b)	Request for a WTO Waiver-New EC Special Tariff Arrangements to Combat Drug Production and Trafficking- as revised on 23 November 2001 (G/C/W/328/Add. 1)
INDIA-3	Aide-Memoire of the Joint Andean Community-European Commission Technical Evaluation Meeting on the Profitable Use of the Andean GSP- November 21-22, 2002
INDIA-4	The EU's Relations with the Andean Community- March 2003
INDIA-5	EU Response to 11 September- Latest update on European Commission Action- Briefing on 12 March 2002
INDIA-6	Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004

[44] The exhibits are submitted as hard copies only.