

BEFORE THE PANEL
OF THE
WORLD TRADE ORGANIZATION
ON

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

WT/DS246

SECOND SUBMISSION OF INDIA

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I. INTRODUCTION

1. Under the "special arrangements to combat drug production and trafficking" (the "Drug Arrangements") provided for under Council Regulation (EC) No. 2501/2001 of 10 December 2001 (the "Regulation"), the European Communities ("EC") grants preferential tariff treatment to certain products ("covered products") originating in twelve developing country beneficiaries (the "Preferred Members") without according the same treatment to all other Members.

2. India's claim in this dispute is that the Drug Arrangements are inconsistent with Article I:1 of the GATT because the advantages granted to certain products originating in the Preferred Members are not accorded immediately and unconditionally to the like products originating in all other Members.

3. In its defence, the EC contends that any Member may grant advantages to any other country meeting certain conditions; that if those conditions do not entail some form of compensation to the Member granting those advantages, then those advantages should then be deemed to have been granted "unconditionally"; by implication, the Member granting those advantages need not grant those advantages to all other Members not meeting those conditions and the failure to grant those advantages to all other Members is not inconsistent with the most-favoured-nation treatment obligation ("MFN") under Article I:1 of the GATT. This is the EC's position on unconditional MFN.

4. The EC likewise contends that under paragraph 2(a) of the Enabling Clause, a developed country Member granting preferential tariff treatment under the Generalized System of Preferences ("GSP") may treat developing countries differently, depending on their individual needs, and that this differentiation in treatment is not "non-discriminatory". An implied element of this contention is that those individual needs are determined solely by the Member granting preferential tariff treatment.

5. On the other hand, India submits that under paragraph 2(a) of the Enabling Clause, while a developed country Member may, under the GSP, grant preferential tariff treatment to products originating in developing countries without according the same treatment to like products originating in all developed country Members, the developed country Member granting preferential tariff treatment is not absolved from its obligation to accord the same treatment to like products originating in developing countries, as between the developing countries.

6. The legal arguments are discussed in detail herein.

7. If India's claim under Article I:1 of the GATT were to be upheld and if the EC's defence under paragraph 2(a) the Enabling Clause were to be rejected, there would be no serious adverse implications to the rules-based multilateral trading system. In effect, all that the Panel would be doing would be merely to reaffirm the rights and obligations of Members under the WTO Agreement.

8. On the other hand, the EC's defence has potential implications not only on the rights and obligations of Members as they subsist, but on the current process of multilateral trade negotiations under the Doha Work Programme.

9. When Members conclude agreements on the reduction of tariffs, it is to assure that tariffs (i) will not be applied beyond the bound rates and (ii) will be applied on an MFN basis immediately and unconditionally.

10. If the EC's position on unconditional MFN were to be validated, then no Member, whether developed or developing, would have the assurance that the applied tariffs under the concessions it had previously obtained and could obtain under the Doha Work Programme will be applied on an MFN basis.

11. In the same manner, if the EC's position on the meaning of "non-discriminatory" under paragraph 2(a) of the Enabling Clause were to be similarly validated, no developing country Member would have the assurance that the applied tariffs under the concessions it had previously obtained and could obtain under the Doha Work Programme will be applied in a "non-discriminatory" MFN basis as between developing countries. In this regard, pursuant to the Enabling Clause, each developed country Member had given its consent, and thus has advance knowledge that it is not entitled to MFN treatment *vis-à-vis* developing countries in respect of preferential tariff treatment granted by other developed country Members to developing countries under the GSP. But developing country Members have not given their consent that their MFN rights as between themselves could be derogated from by developed country Members. If the EC's position were then to be validated, each developing country Member will be pursuing the Doha Work Programme without the assurance that the tariffs applied by developed country Members under the concessions it obtains will be applied in a "non-discriminatory" MFN basis as between developing countries in the context of the GSP.

12. The EC had requested a waiver for the Drug Arrangements. WTO Members have thus far not consented to the waiver. Consent to the waiver is the prerogative of Members, acting collectively in the appropriate process. The WTO dispute settlement system is not the appropriate process.

13. Without any risk of exaggeration, validating the EC's defence under Article I:1 of the GATT or under the Enabling Clause will have serious and extremely adverse consequences, perhaps irrevocable, on the rules-based multilateral trading system.

II. ISSUES OF FACT

14. To establish its claim under Article I:1 of the GATT, the only material factual element which India has to prove is that the EC grants an advantage to products originating in any other country and does not accord the same treatment immediately and unconditionally to like products originating in all other Members. In this regard, the best evidence is the Regulation itself. Under the Drug Arrangements, preferential tariff treatment is granted to certain products originating in the Preferred Members and that treatment is not accorded immediately and unconditionally to the like products originating in all other Members. The EC itself does not dispute this. Thus, India has established the material factual element of its claim under Article I:1 of the GATT.

15. In its defence, the EC invokes paragraph 2(a) of the Enabling Clause. The EC has the burden of establishing that defence. Thus, it is incumbent on the EC to prove that the Drug Arrangements are consistent with the Enabling Clause.

16. In this dispute however, regardless of which party has the burden of proof, the following factual elements are not disputed:

- the Preferred Members are developing countries;
- preferential tariff treatment is accorded to certain products originating in the Preferred Members, and;
- that treatment is not granted to like products originating in other Members, including developing country Members.

17. Should the Panel agree with India that the Enabling Clause does not permit a developed country Member to differentiate between developing countries as between themselves in the context of preferential tariff treatment to developing countries under the GSP, the relevant material factual elements not being in dispute, the Panel could find that the Drug Arrangements are not justified under the Enabling Clause.

18. Should the Panel uphold the EC's contention that paragraph 2(a) of the Enabling Clause allows a developed country Member to differentiate between developing countries in the context of the GSP, it is incumbent on the EC to do all of the following:

- identify the criteria on the basis of which paragraph 2(a) of the Enabling Clause permits such differentiation;
- present its own criteria on the basis of which it applies differential treatment between developing countries;
- establish that its own criteria is consistent with the criteria, if any, under paragraph 2(a) of the Enabling Clause, and;
- establish that it has applied differentiation in treatment consistent with that criteria.

19. In this regard, the EC has conceded:

"The criteria are not set out in the GSP Regulation. They are not contained in a public document ..."¹

III. LEGAL ARGUMENT

A. THE DRUG ARRANGEMENTS ARE INCONSISTENT WITH ARTICLE I:1 OF THE GATT

1. THE TARIFF PREFERENCES GRANTED TO COVERED PRODUCTS ORIGINATING IN THE PREFERRED MEMBERS UNDER THE DRUG ARRANGEMENTS CONSTITUTE AN "ADVANTAGE"

20. 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. This accords an advantage² 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.³ Furthermore, the tariff preferences accorded to covered products originating in

¹ EC, *Replies to Questions from the India after the First Substantive Meeting*, para. 5.

² 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.

³ 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, DSR 1998:VI, 2201, at. 2612; Panel

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 ("EC – Bananas III")*, the panel held that if a measure affects the competitive relationship between products with different origins, the measure confers an "advantage".⁴

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

2. THE EC FAILS TO ACCORD THE ADVANTAGE OF THE TARIFF PREFERENCES UNDER THE DRUG ARRANGEMENTS TO LIKE PRODUCTS ORIGINATING IN THE TERRITORIES OF ALL OTHER MEMBERS

22. The advantages under the Drug Arrangements are available only to the 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.

3. THE EC FAILS TO ACCORD THE ADVANTAGE OF THE TARIFF PREFERENCES UNDER THE DRUG ARRANGEMENTS IMMEDIATELY AND UNCONDITIONALLY TO ALL OTHER MEMBERS

23. The adjective corresponding to the adverb "unconditionally" is "unconditional", which is defined as: "Not subject to or limited by conditions; absolute, complete."⁵ 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".⁶ The panel had found that:

... The purpose of Article I:1 is to ensure unconditional MFN treatment.
In this context, we consider that the obligation to accord "unconditionally"

Report, *Canada – Certain Measures Affecting the Automotive Industry ("Canada – Autos")*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, para. 10.16.

⁴ 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, DSR 1997:VII, 692, at 785.

⁵ *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. II, p. 3465.

⁶ Appellate Body Report, *Canada – Autos*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2995, at 3008.

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.⁷ (emphasis added)

24. 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*.

25. The EC attempts to justify the Drug Arrangements by arguing that the tariff preferences under the Drug Arrangements are granted "unconditionally" to the Preferred Members. The EC links the meaning of "condition" in the context of MFN clauses to that of "unconditionally" in the context of Article I:1 of the GATT.⁸ The EC states:

"The above discussion shows that, in the context of MFN clauses, including Article I:1 of the GATT, the term 'condition' alludes to a requirement to provide some compensation for the benefits received from another party. It is beyond dispute, however, that the beneficiaries of the Drug Arrangements are not required to grant any trade concessions or to provide any other compensation of any kind to the EC. Therefore, the Drug Arrangements are clearly "unconditional" within the meaning of that term in the context of MFN clauses and, in particular, of Article I:1 of the GATT."⁹

26. Even assuming that the EC is correct – that in the context of *conditional* MFN clauses, the term "condition" alludes to a requirement to provide some compensation for the benefits received from another party – the EC is not correct when it concludes that "the 'Drug Arrangements' are clearly 'unconditional' *within the meaning of that term in the context of MFN clauses*. (italics supplied)

27. The meaning of "condition" in the context of a conditional MFN clause is not determinative of the meaning of "unconditionally" in an unconditional MFN clause. "Unconditional" simply means the absence of conditions, regardless of the technical meaning of "condition" in the context of conditional MFN clauses. If black is the

⁷ Panel Report, *Canada – Autos*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, para. 10.23.

⁸ The EC had also presented an alternative interpretation of "unconditionally" (See *First Written Submission* ("EC, FWS") paras. 43, 45) however in response to a specific question from India about this alternative interpretation the EC indicated that it relies only on the interpretation put forth in EC, FWS, paras. 49-56, hence India only addresses this latter interpretation in this submission. See EC, *Replies to Questions from the India after the First Substantive Meeting*, para. 4.

⁹ EC, FWS, para. 56.

opposite of white and "conditional" is the opposite of "unconditional", what is not black is not necessarily white, and what is not "conditional" is not necessarily "unconditional".

28. Under an MFN clause, any other party has the *opportunity* to avail itself of the advantages offered under the MFN clause. If the MFN clause is conditional, that other party may avail of those advantages by fulfilling the conditions specified. If the MFN clause is unconditional, - as in the case of Article I:1 of the GATT – then any other party may immediately – again, as in the case of Article 1:1 of the GATT – avail of those advantages without fulfilling *any condition*. Under the Drug Arrangements, no other Member has the opportunity to avail of the tariff preferences under the Drug Arrangements.

29. Article I:1 of the GATT does not prohibit any Member from granting an advantage to any other Member; neither does it regulate the reasons for the granting of such advantage. However, Article I:1 of the GATT imposes on the Member granting any advantage to any other Member the obligation to accord the same advantage immediately and unconditionally to all other Members. This dispute is therefore not about the EC's reasons for granting the tariff preferences under the Drug Arrangements to the Preferred Members; rather, regardless of those reasons, this dispute is about the failure of the EC to grant those tariff preferences immediately and unconditionally to all other Members.

30. In accordance with the EC's interpretation of "unconditionally", any advantage conditioned on anything other than some form of compensation does not violate Article I:1. Thus, for example, a Member may grant exclusive advantages to other Members which had supported a particular United Nations General Assembly Resolution while yet another Member may grant exclusive advantages to other Members which opposed that Resolution, both without violating the obligation to grant advantages "unconditionally". There are an infinite number of "conditions" which do not fall within the technical meaning of "condition" in the context of conditional MFN clauses. If the EC's interpretation were to be accepted, the rules-based multilateral trading system would no longer be viable.

31. Based on *Canada - Autos*, Article I:1 requires that the extension of an advantage cannot be made subject to *conditions with respect to the situation or conduct of a Member*. The EC argues that Article I:1 only requires that the extension of an advantage cannot be made subject to *conditions which require a Member to provide some form of compensation*. In the EC's view, the Article I:1 "unconditionally" requirement allows a

Member to impose conditions falling outside of what could be deemed as "compensation".¹⁰

32. The EC's limited interpretation of the term "unconditionally" should be rejected for the following additional reasons:

- a. As stated above, the EC's interpretation is unsupported by the ordinary meaning of the term "unconditionally". The adjective corresponding to the adverb "unconditionally" is "unconditional", which is defined as: "Not subject to or limited by conditions; absolute, complete."¹¹ From the ordinary meaning, there emerges no basis to restrict the scope of this term to a specified category of "conditions which require a Member to provide some form of compensation." The EC's interpretation is a selective definition. The EC does not provide any justification for the exclusion of the ordinary meaning of "unconditional".
- b. Even on the selective "historical method" of interpretation followed by the EC, the material highlighted by the EC is irrelevant. The relevant comparison is not the historical usage of the term "condition" in the context of conditional MFN clauses, but, rather, the usage of "unconditional" in the context of unconditional MFN clauses. In this regard, the EC itself cites the difference between the "unconditional" and the "conditional" form of MFN, as explained by the U.S. Department of State, as follows:

"Under the most-favored nation clause in a bilateral treaty or agreement concerning commerce, each of the parties undertakes to extend to the goods of the country of the other party treatment no less favourable than the treatment which it accords to like goods originating in any third country. The unconditional form of the most-favoured-nation clause provides that any advantage, favor, privilege, or immunity which one of the parties may accord to the goods of any third country shall be extended immediately and unconditionally to the like goods originating in the country of the other party. **In this form only does the clause provide complete and continuous non-discriminatory treatment.** Under the conditional form of the clause, neither party is obligated to extend immediately and unconditionally to the like products of the other party the advantages which it may accord to products of third countries in return for reciprocal concessions; it is obligated to extend such advantages only if and when the other party

¹⁰ EC, *Replies to Questions from the India after the First Substantive Meeting*, para. 41.

¹¹ *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. II, p. 3465.

grants concessions “equivalent” to the concessions made by such third countries.¹² (emphasis added)

c. The EC's interpretation is contrary to WTO jurisprudence. The EC states that there is conflicting jurisprudence on the matter. Even assuming that there is such conflicting jurisprudence, the EC's interpretation is not supported by *any* jurisprudence:

- (i) In *Canada-Autos*, conditioning the grant of advantages on the situation or conduct of countries violates the unconditionality requirement
- (ii) In the broader ruling in *Indonesia-Autos*, conditioning the grant of advantages on criteria which are not related to the imported product itself violates the unconditionality requirement.

On both of these formulations, the Drug Arrangements are not granted "unconditionally". Under *Canada - Autos*, the advantage is conditioned on the drugs-related situation of the Preferred Members; under *Indonesia-Autos*, the advantages are conditioned on criteria (if any) which are not related to the product itself.

India cites the formulation adopted in *Canada-Autos*. The EC does not provide any reason why this formulation should not be accepted. Instead, it makes observations about other parts of the Panel report, namely that the Panel wrongly limited the scope of "unconditionally" to the *application* of conditions and implies that the scope of "conditionally" is drawn *too narrowly*.¹³ These defects, even if true, do not provide a reason to depart from the conclusion that advantages cannot be conditioned on the situation or conduct of a country.

Similarly, the EC states¹⁴ that the broader formulation in *Indonesia-Auto* should not be accepted because (i) there is no precedential basis in the 1952 Panel Report *Belgian Family Allowances* for this formulation as that earlier case did not deal with the "unconditionally" requirement, and (ii) the term "unconditionally" refers to conditions which require to provide some sort of compensation for receiving MFN treatment. Firstly, *Belgian Family Allowances*¹⁵ deals squarely with the unconditionality requirement, as a perusal of paragraph 3 of the report makes clear:

¹² EC, FWS, para. 53.

¹³ EC, FWS, para 42.

¹⁴ *Ibid.*, para.40,42.

¹⁵ Panel Report, *Belgian Family Allowances (allocations familiales)* ("Belgium – Family Allowances"), adopted 7 November 1952, BISD 1S/59, at 60.

"...If the General Agreement were definitively in force in accordance with Article XXVI, it is clear that that exemption would have to be granted unconditionally to all contracting parties (including Denmark and Norway). The consistency or otherwise of the system of family allowances in force in the territory of a given contracting party with the requirements of Belgian law would be irrelevant in this respect, and the Belgian legislation would have to be amended insofar as it introduced a discrimination between countries having a given system of family allowances and those which had a different system or no system at all, **and made the granting of the exemption dependent on certain conditions**" (emphasis added)

33. For these reasons, the interpretation of "unconditionally" proposed by the EC should be rejected. The Panel does not even need to delve into which of the two – *Canada Autos* or *Indonesia Autos* is more appropriate or applicable under the circumstances. Under both, the tariff preferences under the Drug Arrangements cannot be regarded as being granted "unconditionally".

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

1. THE EC BEARS THE BURDEN OF ESTABLISHING THAT THE DRUG ARRANGEMENTS ARE JUSTIFIED UNDER PARAGRAPH 2(A) OF THE ENABLING CLAUSE

34. India submits that the EC bears the burden of establishing that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause.

1.1 Paragraph 2(a) of the Enabling Clause does not confer an "autonomous right"

35. The EC states that " ... the Enabling Clause grants an autonomous right to certain types of preferences."¹⁶ The EC asserts that

"the fact that the Enabling Clause is 'an autonomous right' rather than an 'affirmative defence', has two important implications for this dispute:

- first, in order to establish a violation of Article I:1 of the GATT, India must establish first that the Drug Arrangements are not covered by Paragraph 2(a) of the Enabling Clause; and

¹⁶ EC, FWS, para. 22.

- second, as the complaining party, India bears the burden of proving that the Drug Arrangements are not covered by Paragraph 2(a) and, if covered, that they are inconsistent with Paragraph 3(c)."¹⁷

36. The EC also states that:

"[t]he Enabling Clause is an 'autonomous right' in the sense that it is not a derogation or deviation from the obligation stated in Article I:1 of the GATT. Rather, as explained, the Enabling Clause provides for alternative rules, which co-exist, side-by-side and on the same level, with those applicable among the developed countries pursuant to Article I:1 of the GATT."¹⁸

37. Thus, the EC seeks to impose on India the burden of establishing the *negative* of the EC's assertion, which constitutes its defence, that the Drug Arrangements are justified under the paragraph 2(a) of the Enabling Clause by the mere expedient of characterising paragraph 2(a) as conferring an "autonomous right".

38. India considers that the Enabling Clause is not an "autonomous right" in the context alleged by the EC. The EC does not even provide a definition of "autonomous right". Instead, it merely asserts a conclusion of law, i.e., that the "Enabling Clause is not a derogation or deviation from the obligation stated in Article I:1 of the GATT."

39. Contrary to the EC's assertion, the Enabling Clause is a derogation or deviation from the obligation stated in Article I:1 of the GATT. Paragraph 2(a) of the Enabling Clause permits or "enables" developed country Members to take certain measures which Article I:1 otherwise prohibits, subject to certain conditions. It does not operate as a substituting regime to regulate all aspects of trade relations between developed and developing countries. However, paragraph 2(a) of the Enabling Clause does not impose any positive obligation on developed country Members to establish GSP schemes.

40. The purpose of the Enabling Clause is to permit special and differential treatment in favour of *developing country Members* subject to clearly-defined conditions; it is not to confer "autonomous rights" on *developed country Members* to establish just any kind of preferential tariff treatment in accordance with conditions of its own choice. Although developed country Members are provided exemptions from Article I:1 of the GATT in respect of specific measures, the purpose of paragraph 2(a) of the Enabling Clause is not

¹⁷ *Ibid.*, para 19.

¹⁸ EC, *Replies to Questions from the Panel after the First Substantive Meeting*, para. 116.

to confer these exemptions on developed country Members as a *privilege*; rather, these are granted as a means to provide preferential tariff treatment for the benefit of developing countries.

41. In this context, it should be noted that the term "autonomous right" was used by the Appellate Body in *EC-Hormones* in the context of the SPS Agreement, which provides specifically in Article 2.1, that "Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health provided that such measures are not inconsistent with the provisions of this Agreement". The Enabling Clause does contain any analogous provision expressly conferring rights on developed country Members.

42. The EC further explains its claim that the Enabling Clause confers an "autonomous right" when it states:

“ ... the Enabling Clause operates by excluding *a priori* from the scope of application of Article I:1 of the GATT certain types of preferential treatment for developing countries. If a preference falls under the Enabling Clause, it is not subject to Article I:1 of the GATT and, therefore, cannot be inconsistent with that provision.”¹⁹

"The Enabling Clause does not say that Members may derogate from Article I:1 only “to the extent necessary” in order to grant “differential and more favourable treatment to developing countries”. Rather, Paragraph 1 of the Enabling Clause provides that Members may grant such treatment “notwithstanding Article I:1 of the GATT”. If a preference falls within the scope of the Enabling Clause, Article I:1 of the GATT does not apply at all.”²⁰

43. The EC's reasoning seems to be that the absence of the phrase "to the extent necessary" allows developed country Members to be absolved from all of their obligations under Article I:1 of the GATT, even beyond the extent of what is necessary to provide differential and more favourable treatment to developing countries. Furthermore, it would seem that the EC argues that the phrase "notwithstanding Article I:1 of the GATT" totally excludes the application of that article.

44. The phrase "to the extent necessary" was used in the 1971 Decision. It is not used in the Enabling Clause. The explanation is simple. The 1971 Decision was a waiver. Thus the formulation was "... the provisions of Article I shall be waived ... to the extent necessary..." In the context of a waiver, the phrase "to the extent necessary" is not

¹⁹ EC, FWS, para. 16.

²⁰ *Ibid.*, para 22.

redundant, as it circumscribes the extent to which obligations are waived. However, the Enabling Clause was adopted as a decision, not as a waiver. Therefore the corresponding formulation is "notwithstanding the provisions of Article I of the General Agreement, [Members] may accord differential and more favourable treatment to developing countries without according such treatment to other Members". The Enabling Clause thus permits certain acts which Article I:1 of the GATT otherwise prohibits. In this type of formulation, it would have been redundant to state that "Members may accord differential and more favourable treatment to developing countries without according such treatment to other Members ...to the extent necessary to accord differential and more favourable treatment to developing countries."

45. Similarly, the use of the term "notwithstanding" (or synonymous terms) in a provision does not necessarily mean that the provision confers a "self-standing autonomous right". For instance, Article XX uses the formulation "nothing in this agreement shall be construed to prevent", and yet it is beyond doubt that Article XX is an exception and an affirmative defence.

1.2 Paragraph 2(a) of the Enabling Clause is a material element of the EC's defence, and hence, the EC bears the burden of proof

46. The assertion by the EC "that the Drug Arrangements fall within the scope of Paragraph 2(a) of the Enabling Clause and, therefore, are not subject to Article I:1 of the GATT" is the EC's "defence" against India's "claim" that the Drug Arrangements are inconsistent with Article I:1 of the GATT.

47. India agrees with the United States that the party who asserts the affirmative of a "claim" or "defence" has the burden to prove its assertion.²¹ In affirming this principle, the Appellate Body has stated:

it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that *the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative* of a particular claim or defence.²² [emphasis added]

²¹ Cited by the United States, Reply to Question 1, Replies of the United States to the questions from the Panel, para. 2.

²² 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, at. 335.

48. Burden of proof must be assessed in relation to the material elements of the plaintiff's claim and the material elements of the defendant's defence. In this dispute, India's claim is that the Drug Arrangements are inconsistent with Article I:1 of the GATT. To establish that claim, all that India has to do is to assert, and by virtue of that assertion, prove, that: (i) the EC grants an advantage by way of tariff preferences to products originating in one or some countries, and (ii) the EC does not accord the same advantage immediately and unconditionally to products originating in other Members. India has so asserted and proven. With this, India has established that the Drug Arrangements are inconsistent with Article I:1 of the GATT. India's claim in these proceedings, as expressed in its First Written Submission, is based on Article I:1 of the GATT and not on paragraph 2(a) of the Enabling Clause. Paragraph 2(a) of the Enabling Clause is therefore not a material element of India's claim.

49. To defeat India's claim, the EC *may* assert, and it has chosen to so assert, that the tariff preferences under the Drug Arrangements are justified under the Enabling Clause. It is thus incumbent on the EC to prove the affirmative of its defence – that the Drug Arrangements are in fact covered by that Clause. The EC's mere assertion that the Drug Arrangements are covered by the Enabling Clause does not in itself constitute proof of the affirmative of the EC's defence. The mere assertion therefore does not shift the burden of proof to India to establish the negative of the EC's defence.

50. Moreover, a complainant is not in a position to anticipate a respondent's defence. Thus, a complainant has no obligation to establish that a respondent is not entitled to invoke every possible defence which it may raise.

51. It follows from the above that the Panel could determine that the EC has the burden of proof in respect of its defence – that the Drug Arrangements are covered by Paragraph 2(a) of the Enabling Clause.

52. Paragraph 2(a) of the Enabling Clause is an affirmative defence. It has legal functions and characteristics similar to other provisions of the GATT that the Appellate Body has recognised as "affirmative defences".

53. "Affirmative defence" is "a defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true."²³

²³ *Black's Law Dictionary*, 7th ed., B.A. Garner (ed.) (West Group, 1999), p.430.

54. In *India- Shirts and Blouses*, the Appellate Body found that "Articles XX and XI: (2) (c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences."²⁴ In *Turkey – Textiles*, the Appellate Body recognised that Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain GATT provisions, and may be invoked as a possible "defence" to a finding of inconsistency.²⁵ In the latter case, the Appellate Body likewise noted that "legal scholars have long considered Article XXIV to be an 'exception' or a possible 'defence' to claims of violation of GATT provisions".²⁶

55. There are no positive obligations under Articles XI: (2) (c)(i), XX, and Article XXIV of the GATT in the sense that no Member can be compelled to impose quantitative restrictions, to adopt measures under Article XX or to establish customs unions or free trade areas, respectively. Similarly, under paragraph 2(a) of the Enabling Clause, no Member may compel a developed country Member to grant preferential tariff treatment to the developing countries. In the same manner that Articles XI: (2) (c)(i), XX, and Article XXIV are exceptions and at the same time "defences", the Enabling Clause is likewise an exception to certain aspects of Article I:1 of the GATT and could be invoked, in the proper case, as a defence in a claim of violation of that article. In all of these cases, even assuming that it is established that the measure at issue violates the provision to which the exception applies, the Member adopting the measure at issue may still invoke the exceptions as (affirmative) defences. This falls squarely within the definition of "affirmative defence".

56. In a dispute involving a claim which is subject to a potential affirmative defence, the claim is first examined in relation to the provision to which it is inconsistent, as claimed by the complainant. If the claim is found to be meritorious, then the next step is the examination of the affirmative defence put forward by the respondent. This is precisely how the Enabling Clause as an affirmative defence has been dealt with in GATT jurisprudence:

- a. In *United States Customs User Fee*, the Panel found that the measure at issue (i.e. the merchandise processing fee of the United States) fell within the category of "advantage, favour, privilege or immunity" which Article I:1 required to be

²⁴ Appellate Body Report, *US – Wool Shirts and Blouses*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323, at. 337.

²⁵ Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products* ("*Turkey – Textiles*"), WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, 2345, at 2345.

²⁶ *Ibid.*, footnote 13.

extended unconditionally to all other contracting parties. Therefore, the Panel found that the measure at issue constituted a breach of the obligation of non-discrimination of Article I:1. Having so found, the Panel moved on to assess whether the merchandise processing fee was *authorized* by the Enabling Clause.²⁷

- b. In *United States – Denial of Most-Favoured Nation Treatment as to Non-rubber Footwear from Brazil*, the Panel found that the measure at issue (i.e. rules and formalities applicable to countervailing duties) fell within the scope of Article I:1 as a "non-tariff advantage" denied to dutiable products originating in the territory of a Subsidies Agreement signatory. The Panel found that it was accorded in a manner inconsistent with the most-favoured-nation provision of Article I:1 of the GATT. Then, the Panel examined whether the measure at issue could be permitted under any decision of the CONTRACTING PARTIES, namely the Enabling Clause. The Panel found that the Enabling Clause could not justify the given inconsistency with Article I:1 of the non-tariff advantage accorded to duty-free products originating in countries beneficiaries of the United States GSP programme.²⁸

57. The EC cites *Brazil – Export Financing Programme for Aircraft ("Brazil – Aircraft")*, to support its assertion that India bears the burden of proving that the EC Drug Arrangements are inconsistent with Paragraph 2(a) of the Enabling Clause. In *Brazil – Aircraft*, Article 27.4 of the Agreement on Subsidies and Countervailing Duties (SCM Agreement), in connection with Article 27.2, were found by the Panel to exclude certain developing countries from the application of the obligations contained in Article 3.1(a) of the SCM Agreement; that Article 27.4 and Article 27.2 are part of a claim under Article 3.1(a) when a developing country which has to comply with certain obligations under Article 27.4 is involved.

58. The Appellate Body upheld the Panel Report in this respect as it considered that in contrast to "affirmative defences" contained in several GATT provisions (which do not impose positive obligations), notably Article XX, Article 27.4 sets forth "*positive obligations* for developing country Members, not *affirmative defences*."²⁹ The Appellate Body upheld the Panel's finding on the basis that Article 27.4 of the SCM

²⁷ Panel Report, *United States – Customs User Fee ("US – Customs User Fee")*, adopted 2 February 1988, BISD 35S/245, at 289-290.

²⁸ Panel Report, *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil ("US – MFN Footwear")*, adopted 19 June 1992, BISD 39S/128, at 153.

²⁹ Appellate Body Report, *Brazil – Export Financing Programme for Aircraft ("Brazil – Aircraft")*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161, at 1200-1201.

Agreement imposes positive obligations on a certain category of developing country Members as condition for their exemption under Article 3.1 (a).

59. In contrast, paragraph 2(a) of the Enabling Clause does not impose positive obligations or *positive rules* establishing obligations in themselves. Rather, it is a limited exception to Article I:1 of the GATT, which could be invoked as an affirmative defence.

60. The EC appears to contend that because Article 27 of the SCM Agreement is listed in a document of the WTO Secretariat as a Special and Differential Treatment (S&D) provision along with the Enabling Clause, the Enabling Clause has automatically the same legal function and characteristics as Article 27.4; that, as a consequence, the burden of proof when a defendant invokes the Enabling Clause shifts to the complainant claiming a violation of the relevant substantive provision.³⁰ This argument of the EC is not correct. In *Brazil-Aircraft*, Articles 27.2 and 27.4 were indeed considered part of S&D. But the Panel and the Appellate Body decided that it was for the complainant to bear the burden of proof of Article 27.4 in a substantive claim on Article 3.1(a) of the SCM Agreement *not because Article 27.4 is an S&D provision*, as the Enabling Clause may be, but rather because that provision in itself establishes positive obligations that a defendant would have to comply with.

61. Finally, India notes that in *Brazil-Aircraft*, the S&D provision was invoked by a developing country. In this dispute, it is invoked by a developed country. S&D provisions are established for the benefit of developing countries, and not developed countries. Accepting the EC's contention, in this case, would impose the burden of proof on developing countries seeking to ensure that discriminatory measures taken by developed countries are covered by paragraph 2(a) of the Enabling Clause. In practical terms this would have the effect of imposing procedural burdens on developing countries seeking to safeguard their rights *vis-à-vis* developed countries.

2. PARAGRAPH 2(A) OF THE ENABLING CLAUSE ESTABLISHES A LIMITED EXCEPTION FROM THE OBLIGATIONS UNDER ARTICLE I OF THE GATT

2.1 The Enabling Clause does not exclude the application of Article I:1 of the GATT in all circumstances.

62. "Exception" is "something that is excluded from a rule's operation".³¹ "[Statutory] exception" is "a provision in a statute exempting certain persons or conduct from the

³⁰ EC, FWS, paras. 16-19.

³¹ *Black's Law Dictionary*, 7th ed., B.A. Garner (ed.) (West Group, 1999), p. 584.

statute's operation."³² In the context of the GSP, the Enabling Clause lays down an exception as it excludes developed country Members granting GSP preferences from the operation of certain aspects of Article I:1 of the GATT.

63. Any examination of the scope of the exception under the Enabling Clause must be undertaken with particular care. Article I:1 is a cornerstone of the world trading system and permitting deviations from its guarantees cannot be assumed lightly.³³ Indeed, it must be noted that because of the fundamental and basic nature of Article I, it is the only provision along with Article II, in the context of GATT, which requires acceptance by all Members to be amended.³⁴

64. The Enabling Clause cannot be interpreted in clinical isolation from Article I:1 of the GATT. In particular, the Panel should scrutinize what *types of derogations from obligations* under Article I:1 are authorised by the Enabling Clause. Derogations from Article I:1 can differ in terms of the type of country whose rights are derogated from (developed or developing); the type of country which derogates from the right (developed or developing) the type of obligation ("failure to extend" or "failure to extend immediately" or "failure to extend unconditionally") and the type of country to which an advantage is extended (developed or developing or least developed). Panels should not lightly assume that a derogation from a *developing country's* rights under Article I:1 is authorised under the Enabling Clause. The Enabling Clause is after all meant to be for the benefit of developing countries.

65. As the Enabling Clause is an "exception", the phrase "notwithstanding the provisions of Article I of the General Agreement" in the Enabling Clause does not necessarily exclude the application of that article in all circumstances. In a case involving Article XXIV of the GATT, another provision which may be characterised as an "exception", the Appellate Body had the opportunity to examine the meaning of the phrase "the provisions of this Agreement shall not prevent ... the formation of a customs union" in Article XXIV:5 of the GATT. The Appellate Body found:

First, in examining the text of the chapeau to establish its ordinary meaning, we note that the chapeau states that the provisions of the GATT 1994 "*shall not prevent*" the formation of a customs union. We read this to mean that the provisions of the GATT 1994 *shall not make impossible* the formation of a customs union. Thus, the chapeau makes it clear that

³² *Ibid.*

³³ Appellate Body Report, *Canada – Autos*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2995, at 3006.

³⁴ Article X:2 of the Agreement Establishing the World Trade Organization.

Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible "defence" to a finding of inconsistency.

Second, in examining the text of the chapeau, we observe also that it states that the provisions of the GATT 1994 shall not prevent "*the formation of a customs union*". This wording indicates that Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions only if the measure is introduced upon the formation of a customs union, and **only to the extent that the formation of the customs union would be prevented** if the introduction of the measure were not allowed. .³⁵ (footnotes omitted, emphasis added)

66. The Appellate Body cited the meaning of "prevent" as follows: "Prevent" is defined as 'make impracticable or impossible by anticipatory action; stop from happening'.³⁶ With this definition the Appellate Body then proceeded to affirm that the phrase "nothing shall prevent" means that nothing in the GATT shall make impossible the formation of a customs union but *only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed*.

67. The ordinary meaning of the word "notwithstanding" is "[i]n spite of, *without regard to or prevention by* (Before or after the governed n. or pron.)"³⁷(emphasis added). Similarly therefore, the phrase "notwithstanding the provisions of Article I of the General Agreement" in paragraph 1 of the Enabling Clause, in relation to paragraph 2 (a) means that nothing in Article I shall make impossible the granting of preferential tariff treatment to developing countries under the GSP. But by virtue thereof, the application of Article I:1 is not totally excluded, but, rather, *only to the extent that the granting of tariff preferences under the GSP would be prevented if the introduction of a measure were not allowed*.

68. Respecting the MFN rights of developing countries as between themselves does not make impossible the granting of preferential tariff treatment to developing countries in the context of the GSP; neither would the granting of preferential tariff treatment to developing countries under the GSP be prevented if the granting of tariff preferences to some developing countries but not to all developing countries were not allowed. In the

³⁵ Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products* ("*Turkey – Textiles*"), WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, 2345, at. 2354.

³⁶ *Ibid.*, footnote 12 at 2354.

³⁷ *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. II, p. 1947.

context of the GSP therefore, only the MFN rights of developed countries need to be derogated from.

2.2 There is no wording in Paragraph 2(a) reflecting an agreement of the developing country Members to forego their rights under Article I:1 in respect of benefits accorded to all other Members, including to other developing countries in the context of the GSP

69. The EC violates the rights of developing countries under Article I:1 of the GATT by not granting the tariff preferences under the Drug Arrangements (i) unconditionally (ii) to all other Members, including developing countries.

70. India has contended that *in the context of preferential tariff treatment under paragraph 2(a)*, the Enabling Clause does not exempt violations of MFN rights of developing countries in respect of preferential tariff treatment accorded to *other developing countries*.³⁸ The EC and the United States have misunderstood this limited contention to be a far broader contention that *any* derogation from the MFN rights of developing countries under Article I:1 cannot be authorised under the Enabling Clause. The EC, the Andean Community and the United States advance a set of arguments which seek to establish that this broader contention is erroneous. For instance, according to them, if such a broad contention were to be accepted, it would prevent regional arrangements between developing countries under paragraph 2(c)³⁹, or prevent special measures in favour the least developed countries under paragraph 2(d)⁴⁰ or run counter to

³⁸ See India, *First Written Submission* (FWS), para. 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." emphasis added), para. 51 ("**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." emphasis added), para. 52 (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" emphasis added).

³⁹ EC, FWS, paras. 31, 35; United States, *Third Party Oral Statement of the United States (May 15, 2003)* paras. 5,6.

⁴⁰ EC, FWS, para. 29; United States, *Third Party Oral Statement of the United States (May 15, 2003)* para. 6.

the broad terms of paragraph 1 of the Enabling Clause⁴¹. However, these arguments are simply beside the point, as India has not advanced any such broad contention.⁴²

71. India's limited contention derives from the starting point that there must be unambiguous authority within the Enabling Clause to exempt a violation of the MFN rights of a *developing country*. As the opening phrase of paragraph 2 of the Enabling Clause makes clear, any measure taken under the Enabling Clause must fall under one of the sub-clauses of paragraph 2. Paragraph 2(d) and paragraph 2(c) do provide authority to adopt measures otherwise in violation of the MFN rights of a developing country, but this dispute does not deal with those types of measures. What is relevant in this dispute is that paragraph 2(a), the only sub-clause which authorises preferential tariff treatment granted by a developed country to developing countries in the context of the GSP. Thus, the EC must find unambiguous authority for its violation of the Article I:1 rights of developing countries in paragraph 2(a) of the Enabling Clause.

72. Paragraph 2(a) does not provide any wording which indicates that the developing countries have given up their MFN rights in respect of preferential tariff treatment accorded to other developing countries. Footnote 3 to paragraph 2(a) uses the term "the developing countries". As elaborated below, this implies that preferential tariff treatment is to be extended to all developing countries. Paragraph 2(a) itself, in relation to footnote 3, refers to the GSP as described in the 1971 Waiver relating to the establishment of "generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries." Therefore, preferential tariff treatment must be granted on a *non-discriminatory* basis to the collective category of "developing countries".

73. There is no language in paragraph 2(a) which expressly authorizes developed countries to derogate from the unconditional MFN rights of developing countries.

74. The EC relies on the term "non-discriminatory" in footnote 3 for justification to derogate from the unconditional rights MFN rights of developing countries in respect of benefits accorded to a limited group of developing countries. However, such reliance is

⁴¹ EC, FWS, paras. 25,26; United States, *Third Party Oral Statement of the United States (May 15, 2003)* para. 5; Costa Rica, *Third Party Submission of Costa Rica*, para. 18; Andean Community, *Third Party Submission of Bolivia, Colombia, Ecuador, Peru and Venezuela*, paras. 49,50.

⁴² In this context, a conjunctive reading of paragraph 1 and 2(a) of the Enabling Clause would entail that the term "other contracting parties" in the *context of measures taken under paragraph 2(a)*, refers to "other developed country Members". India notes that the content of the term "other Members" in paragraph 1 of the Enabling Clause must be understood in conjunction with the specific sub-clause of paragraph 2 involved. India does not contend that the term "other Members" in paragraph 1 of the Enabling Clause invariably refers to "other developed country Members".

misplaced. As elaborated below, the term "non-discriminatory" does not authorise differentiation in the treatment of developing countries; on the contrary, it is used precisely to ensure that differentiation between developing countries is prohibited.

75. The EC claims that India's construction would make the term "non-discriminatory" redundant. The EC ignores the fact that the term "non-discriminatory" in Footnote 3 is descriptive, referring to the GSP as described in the 1971 Waiver which, in turn, refers to the "mutually acceptable arrangements [that] have been drawn up in the UNCTAD."⁴³ Thus, the meaning of "non-discriminatory" must be construed in the context of those "mutually acceptable arrangements". As elaborated further below, nothing in those arrangements could be construed as envisaging derogation from the unconditional MFN rights of developing countries.

76. In light of the foregoing, it is clear that there is no wording in paragraph 2(a) reflecting clearly the consent of the developing country Members to forego their unconditional MFN rights under Article I:1 in respect of advantages accorded to other developing countries, including preferential tariff treatment granted to developing countries under the GSP.

3. THE EC HAS FAILED TO DEMONSTRATE THAT UNDER THE DRUG ARRANGEMENTS IT ACCORDS TARIFF TREATMENT THAT IS "NON-DISCRIMINATORY" WITHIN THE MEANING OF PARAGRAPH 2(A) OF THE ENABLING CLAUSE.

77. Paragraph 2(a) of the Enabling Clause provides:

[The provisions of paragraph 1 apply to the following:*

(a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,³

⁴³ Similarly, it has been emphasized by Costa Rica (Costa Rica, *Third Party Submission of Costa Rica*, para. 20) and the Andean Community (Andean Community, *Third Party Submission of Bolivia, Colombia, Ecuador, Peru and Venezuela*, para. 51) that the 1971 Waiver uses the term "other contracting parties" as opposed to the term "other developed countries" deliberately. This is correct, however a close study of the Minutes of the General Council meeting which adopted the 1971 Waiver (C/M/69, 28 May 1971) indicates that the use of this terminology does not in any way imply that differentiation between developing countries recognized as beneficiaries is permitted, instead this terminology was endorsed for a variety of reasons, for instance the Indian representative pointed out that "...since there was no precise and acceptable list of developed countries he did not see any merit in the proposal" (page 15) and that "... several aspects as the schemes as agreed to within UNCTAD were inter-connected and no effort should be made to re-open any aspect, for example the question of beneficiaries" (page 14).

³As 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)

78. In turn, the Paragraph 1 provides:

Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.

79. India and the EC agree that preferential tariff treatment accorded by developed countries to products originating in developing countries must be "non-discriminatory".⁴⁴ There is no dispute that this is a binding requirement.

80. Nonetheless, India and the EC differ in their respective interpretations of the term "non-discriminatory". India has defined "non-discriminatory" treatment in the context of Paragraph 2(a) of the Enabling Clause as referring to "treatment that does not make a distinction between different categories of developing countries." ("neutral meaning of 'non-discriminatory')⁴⁵ The EC contends that "the term "non-discriminatory" does not prevent Members from treating differently developing countries which, according to objective criteria, have different development needs".⁴⁶ ("negative meaning of 'non-discriminatory') Thus on India's interpretation, differentiation between developing countries is impermissible, while on the EC's interpretation, differentiation between developing countries is possible as long as those countries have different development needs.

81. India is of the view that the ordinary meaning of "non-discriminatory", in the context of Paragraph 2(a), and in the light of the object and purpose of the GATT upholds India's interpretation.

⁴⁴ EC, FWS, para. 6.

⁴⁵ India, FWS, para. 57.

⁴⁶ EC, FWS, para. 85.

3.1 *The appropriate meaning of "non-discriminatory" as used in the Enabling Clause is its neutral meaning*

3.1.1 *The ordinary meaning of "non-discriminatory"*

82. The ordinary meaning of the verb "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."⁴⁷

83. The EC contends that one of the meanings of the verb "discriminate" is "to make an *unjust* or *prejudicial* distinction in the treatment of different categories of people or things"⁴⁸. The EC concludes that the ordinary meaning of the term "non-discriminatory" does not require to consider all kinds of distinctions as "discriminatory"⁴⁹

84. India does not deny that the meaning of "non-discriminatory" put forward by the EC is one that could be applicable depending on the particular context. However, Paragraph 2(a) applies to preferential tariff treatment. In that specific context, a "discriminatory tariff" refers to "a tariff containing duties that are applied *unequally* to different countries"⁵⁰. A "non-discriminatory tariff" would therefore be "a tariff containing duties that are applied *equally* to different countries". The interpretation put forward by India is thus based on the ordinary meaning of the term "non-discriminatory" when applied to tariff treatment.

3.1.2 *The context of paragraph 2(a)*

a Within the context of the GATT, the term "discrimination" is consistently used to describe the denial of equal competitive opportunities to like products irrespective of the origin.

85. The Enabling Clause is an integral part of the GATT 1994. The definition of the term "non-discrimination" in the GATT 1994 consistently refers to affording equal competitive opportunities to like products originating in different countries. As stated by the Appellate Body:

The essence of the non-discrimination obligations is that like products should be treated equally irrespective of their origin ... Non-discrimination obligations apply to all

⁴⁷ *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 66.

⁴⁸ EC, FWS, para. 66.

⁴⁹ *Ibid.*, para. 69.

⁵⁰ *Black's Law Dictionary*, 7th ed., B.A. Garner (ed.) (West Group, 1999), p. 1468.

imports of like products except when these obligations are waived or are otherwise not applicable as a result of the operation of specific provisions of the GATT 1994.⁵¹

86. It therefore follows from this finding of the Appellate Body that, in the context of the Enabling Clause, non-discrimination means equal treatment of like products, except if a specific provision of the Enabling Clause provides otherwise.

87. In respect of tariff measures, equality of competitive opportunities is assured by requiring that equal tariff treatment be applied to all like products irrespective of their origin. Therefore, in respect of preferential tariff treatment under the Enabling Clause, tariff preferences for "the" developing countries must apply to all like products originating in developing countries, irrespective of which developing country they originate in.

88. This is consistent with the wording of paragraph 2(a) of the Enabling Clause, which, without making any distinction as to the origin of "products originating in developing countries", provides in its footnote (footnote 3) for "non-discriminatory" tariff preferences.

b The express reference to special and differential treatment for least-developed among the developing countries in paragraph 2(d) of the Enabling Clause supports India's interpretation of the term "non-discriminatory"

89. Paragraph 2(d) provides for "special treatment for the least-developed" among the developing countries in the context of any general or specific measures in favour of developing countries.

90. The need to establish an explicit exception for the least-developed countries confirms India's interpretation of the term non-discriminatory. If developed countries could differentiate between developing countries based on the EC's interpretation of "non-discriminatory", then clearly developed countries could differentiate between developing countries in favour of least-developed countries. Therefore, the permission to favour least-developed countries among developing countries in paragraph 2(d) would become redundant and meaningless. This cannot be reconciled with the principle of effectiveness in treaty interpretation upheld in many cases by the Appellate Body.

⁵¹ Appellate Body Report, *European Communities – EC – Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, at. 669.

91. The EC contends that paragraph 2(d) is not redundant because it covers "special treatment" for least-developed countries, including measures not covered by paragraph 2(a) (non-tariff measures). A similar argument is made by the countries of the Andean Community.

92. The EC's argument overlooks the language of paragraph 2(d) which refers to "any general or specific measures" without distinguishing between tariff and non-tariff measures. Paragraph 2(d) does not exclude tariff measures from its scope, as the EC and the Andean Community imply. On the contrary, had the intention of the drafters been to limit the scope of paragraph 2(d) to non-tariff measures, it would not have been difficult to import the language of paragraph 2(d) into 2(b), the only provision which explicitly covers only that category of measures.

93. The EC's arguments also overlook the fact that unlike Paragraph 2(a), there is no explicit non-discrimination requirement in respect of non-tariff measures in paragraph 2(b). Under the EC's reading of the Enabling Clause, nothing would prevent a developed country from discriminating in favour of least-developed countries based solely on paragraph 2(b). If this were the case, the question that arises is why would it be necessary to explicitly provide for permission to differentiate in favour of least-developed countries under paragraph 2(d)? Therefore, the EC's reading of paragraph 2(d) renders this provision ineffective.

c The use of the definite article "the" with reference to "developing countries" indicates that the GSP must be beneficial to *all* developing countries, and excludes the selective grant of tariff preferences

94. The term "the" developing countries appears in four instances in authentic versions of the Enabling Clause:

- i) Footnote 3 refers to the "establishment of 'generalized, non-reciprocal and non-discriminatory preferences beneficial to **the** developing countries". (emphasis added). The use of the definite article "the" with reference to "developing countries" indicates that the GSP must be beneficial to *all* developing countries. The dictionary meaning of "the" is ..."used preceding a (sing.) noun used generically or as a type of its class; (with a pl. noun) all those described as _____"⁵². Thus, in this instance, the phrase "the developing countries" means "all those described as developing countries". Preferential tariff treatment to

⁵² *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. II, p. 3270.

products originating in some developing country beneficiaries to the exclusion of like products originating in other developing country beneficiaries is not beneficial to **the** (all) developing countries.⁵³

- ii) In their titles, the equally authentic Spanish and French texts of the Enabling Clause likewise use the phrase "of *the*", with reference to "differential and more favourable treatment ..." – "TRATO DIFERENCIADO Y MAS FAVORABLE, RECIPROCIDAD Y MAYOR PARTICIPACION **DE LOS PAISES EN DESARROLLO**" and "TRAITEMENT DIFFERENCIE ET PLUS FAVORABLE, RECIPROCITE ET PARTICIPATION PLUS COMPLETE **DES PAYS EN VOIE DE DEVELOPPEMENT**".
- iii) In Paragraph 1, the word "the" preceding "developing countries" does not appear in the English text. However, it appears in the equally authentic Spanish and French texts, which read as follows: "no obstante las disposiciones del artículo primero del Acuerdo General, las partes contratantes podrán conceder un trato diferenciado y más favorable a **los países en desarrollo**" and "nonobstant les dispositions de l'article premier de l'Accord general, les parties contractantes peuvent accorder un traitement différencié et plus favorable **aux** pays en voie de développement, sans l'accorder à d'autres parties contractantes." (emphasis added).
- iv) In Paragraph 3(c), the word "the" preceding "developing countries" does not appear in the English text. However, it appears in the equally authentic Spanish and French texts. Thus, "responda positivamente a las necesidades de desarrollo, financieras y comerciales **de los países en desarrollo**" and "répondre de manière positive aux besoins du développement, des finances et du commerce **des pays en voie de développement**." (emphasis added). The word "the" preceding "developing countries" in the phrase "shall respond positively to the ... needs of **the** developing countries" therefore refers to the needs of **all** developing countries.

95. These provisions indicate that the paragraph 2(a) of the Enabling Clause was meant to ensure that benefits under the GSP are extended to *all* developing countries, as opposed to some developing countries. Paragraph 2(a) of the Enabling Clause does not envisage selectivity. Instead, it requires that preferential tariff treatment is accorded to all developing countries. Further, as indicated above, non-discriminatory treatment in the context of the GATT involves conferring equality of competitive opportunities. It would

⁵³ The equally authentic Spanish and French texts likewise use the definite article "the" – "en beneficio de **los** países en desarrollo" and "avantageux pour **les** pays en voie de développement".

be meaningless to impose a requirement that *all* developing countries must be included in preferential tariff arrangements without a corresponding obligation of "non-discriminatory" tariff treatment in order to ensure equal competitive opportunities for products originating in all developing countries. Consequently, following the EC's interpretation that "non-discriminatory" does not entail equal competitive opportunities renders the requirement that "the" (all) developing countries must benefit from preferential tariff treatment meaningless.

d The mutually acceptable arrangements drawn up in the UNCTAD establish the meaning of "non-discriminatory".

96. The texts which established the generalized system of preferences ("GSP") under the auspices of the UNCTAD provide contextual support for India's interpretation of the term "non-discriminatory".

97. The term "non-discriminatory" in the Enabling Clause reflects the meaning of that term as understood in the texts accepted at the UNCTAD. The precise function of footnote 3 is to limit the protection of the Enabling Clause to preferential tariff treatment which conforms to the "mutually acceptable arrangements that have been drawn up in UNCTAD concerning the establishment of generalized, non-discriminatory and non-reciprocal preferential tariff treatment" (vide the Preamble of the 1971 waiver). The "mutually acceptable arrangements" drawn up in UNCTAD are contained in the "Agreed Conclusions of the Special Committee on Preferences" ("Agreed Conclusions") implementing Resolution 21(II) of the Second UNCTAD⁵⁴, adopted by the Trade and Development Board on 13 October 1970. Hence, the meaning of the term "non-discriminatory" as used in footnote 3 to the Enabling Clause is identical to its meaning in the context of the Agreed Conclusions.

⁵⁴ Resolution 21 (II) of the Second UNCTAD provides, among others:

"Recognizing the unanimous agreement in favour of the early establishment of mutually acceptable system of generalized non-reciprocal and **non-discriminatory** preferences which would be beneficial to developing countries
...

Agrees that the objectives of the generalized non-reciprocal, **non-discriminatory** system of preferences in favour of the developing countries, including special measures in favour of the least advanced among the developing countries, should be:

- (a) To increase their export earnings;
- (b) To promote their industrialization;
- (c) To accelerate their rates of economic growth"(emphasis added

98. Within the Agreed Conclusions, there is no reference to the notion that the developed countries should be able to distinguish between the countries that they have recognised to be developing countries on the basis that they have different development needs

99. Indeed, the Agreed Conclusions do not even authorise developed countries to provide tariff reductions limited to least developed countries to the exclusion of other developing countries. Instead, the relevant portion of Part V of the Agreed Conclusions dealing with "Special Measures in favour of least developed among the developing countries" states that:

" the preference giving countries will consider... the inclusion in the generalized system of preferences of products of export interest mainly to the least developed among the developing countries, and as appropriate greater tariff reductions **on such products**" (emphasis added) ⁵⁵.

100. Thus, the Agreed Conclusions permit developed countries to vary the tariff reductions granted on different products. But in respect of the same product, developed countries could not vary the tariff reduction granted, even to favour the least-developed countries. The same preferential treatment had to be given to products originating in all developing countries. This clearly reinforces India's interpretation of "non-discriminatory" as prohibiting any differentiation between developing countries.

101. Further, the Agreed Conclusions contemplated the participation of *all* developing countries as beneficiaries of the GSP and selective schemes were not envisaged. The Agreed Conclusions state that "there is agreement with the objective that in principle all developing countries should participate as beneficiaries from the outset." As pointed out above,⁵⁶ by permitting differentiation between developing countries, the EC's interpretation of "non-discriminatory", would render the requirement that "all developing countries should participate as beneficiaries from the outset" meaningless.

102. The term "non-discriminatory" as understood in the context of the UNCTAD arrangements does not envisage differentiation between developing countries on the basis that they have differing development needs; instead, any differentiation between developing countries was considered "discriminatory". This meaning of "non-

⁵⁵ In this context it is worth noting that resolution 24(II) of the Second UNCTAD, referred to in V(1) of the Agreed Conclusions, requires that special measures taken in favour of least-developed countries do not "...create discrimination among the developing countries...".

⁵⁶ See para. 95.

discriminatory" is also confirmed by the drafting history of Resolution 21(II) of the Second UNCTAD and the Agreed Conclusions.⁵⁷

e The requirement to respond positively to the needs of developing countries set out in paragraph 3(c) of the Enabling Clause does not lend contextual support for the interpretation of the term "non-discriminatory" advanced by the EC.

103. The EC argues that the term "non-discriminatory" in footnote 3 of the Enabling Clause cannot mean treating all developing countries in the same way, because developed countries would be effectively precluded from responding positively to the individual needs of developing countries "thus rendering a nullity the requirement set forth in Paragraph 3(c)".⁵⁸ However elsewhere the EC states that paragraph 3(c) "is worded in rather imprecise terms... it might be argued that it is a purposive provision, which informs the interpretation of other provisions of the Enabling Clause, but does not, of itself, *impose any legally binding obligation*"(emphasis added).⁵⁹

104. The EC's argument is based on a wrong premise, namely that the term "development, financial and trade needs of [the]⁶⁰ developing countries" refers to the *individual* needs of those countries. In fact, however, the terms of paragraph 3(c) do not refer to "individual" needs. The text of paragraph 3(c) does not express this idea. Where the drafters of the Enabling Clause had the needs of individual countries or groups of countries in mind, they referred to those needs explicitly. Paragraphs 5 and 6 of the Enabling Clause, which modify the reciprocity principle governing trade negotiations in

⁵⁷ For e.g., The Agreed Conclusions implement Resolution 21(II) of the Second UNCTAD which in turn confirms Principle 8 of Recommendation A:I:1 of the First UNCTAD. Principle 8 states:

"International trade should be conducted to mutual advantage on the basis of the most-favoured-nation-treatment and should be free from measures detrimental to the trading interests of other countries. **However, developed countries should grant concessions to all developing countries and extend to developing countries all concessions they grant to one another** and should not, in granting these or other concessions, require any concessions in return from developing countries. New preferential concessions, both tariff and non-tariff, should be made to developing countries as a whole and such preferences should not be extended to developed countries. Developing countries need not extend to developed countries preferential treatment in operation amongst them. Special preferences at present enjoyed by certain developing countries in certain developed countries should be regarded as transitional and subject to progressive reduction. They should be eliminated as and when effective international measures guaranteeing at least equivalent advantages to the countries concerned come into operation"(emphasis added)

⁵⁸ EC, FWS, para. 71.

⁵⁹ EC, *Replies to Questions from the Panel after the First Substantive Meeting*, para. 57

⁶⁰ Please see reply to question 9 addressed by the Panel to both parties on the inclusion of "the" in the equally-authentic Spanish and French texts.

favour the developing countries refer to the "*individual* development, financial and trade needs" of the developing countries and to the "*particular* development, financial and trade needs of the least-developed countries". In the context of the requirements governing GSP preferences, the drafters of the Enabling Clause thus referred to the needs of developing countries in general. In the context of the reciprocity principle governing trade negotiations, they referred to the "individual" or "particular" needs of developing countries. This comparison leaves no doubt that the drafters intended to stipulate that GSP schemes respond to the needs of developing countries in general and that each developing country's individual needs would be taken into account in determining the degree of reciprocity in trade negotiations.

105. The EC is correct in that the collective needs of developing countries can vary from time to time and therefore paragraph 3(c) mandates that preferences should be modified if necessary. However, it does not follow that they must be modified by differentiating between developing countries. Instead, paragraph 3(c) refers to modification of the product scope of GSP schemes and the depth of tariff cuts provided under GSP schemes. India's interpretation of "non-discriminatory" does not make paragraph 3(c) a nullity precisely because it operates to ensure that the product scope and depth of tariff cuts in GSP schemes respond positively to the collective needs of developing countries. For example, preferential tariff treatment on nuclear reactors would not respond positively to the needs of developing countries; a reduction of 10% on a tariff of 300% applied to products produced in developing countries does not respond positively to the needs of the developing countries.

- (i) *The text of Paragraph 3(c) does not provide for the option to respond to either to development needs or financial needs or trade needs and a fortiori also not the option to respond to one specific development need.*

106. The EC's assertion that a scheme designed to address exclusively drug problems responds to the needs of developing countries as defined in paragraph 3(c) can also not be reconciled with the fact that, throughout the Enabling Clause, the needs of developing countries are defined as the "development, financial *and* trade needs". The conjunctive term "and" makes clear that, when evaluating the consistency of a GSP scheme with paragraph 3(c) or the degree of non-reciprocity to be accorded to a developing country under paragraphs 5 and 6, the development, financial and the trade needs have to be assessed collectively. The drafters did not create the option of responding *either* to development *or* to financial *or* to trade needs because they did not use the term "or". This logically implies that they also did not create the option of responding to one specific development need, such as the need to fight drug production and trafficking.

107. In addition, it must be noted that, irrespective of whether the needs are individual or collective, in all instances throughout the Enabling Clause these three combined needs are formulated in a conjunctive manner. Thus, Paragraphs 5 and 8 both refer to "development, financial *and* trade needs".

108. Had the drafters intended that "development", "financial" and "trade" needs could be considered separately, they could have easily so done by using "or". In this regard, where each of these needs are considered separately, the Enabling Clause refers to them separately. Thus, for instance paragraph 9 refers to "the development needs of developing countries" without making any reference to their "trade" or "financial" needs.

(ii) *The purpose of Paragraph 3(c) could not be achieved if it were interpreted to require preference-giving countries to respond to the needs of individual countries*

109. Accepting the EC's construction of paragraph 3(c) as referring to the "individual" needs of developing countries could have perverse consequences. For instance, a WTO Member that decides to reduce its tariffs on products from all developing countries to zero would find its GSP scheme inconsistent with paragraph 3(c) of the Enabling Clause. Paragraph 3(c) would mandate that the obligation of that Member to "modify if necessary" its GSP scheme to respond to *individual* countries' needs constitutes in this circumstance an obligation to reintroduce tariffs on products from developing countries that have lesser needs. Thus, the EC's interpretation of paragraph 3(c) implies that it would be illegal for a developed country to adopt the most constructive response to the developing countries' needs that can be conceived - the elimination of all duties on products from all developing countries.

(iii) *The EC's general GSP arrangement would be inconsistent with paragraph 3(c) if it were interpreted as suggested by the EC.*

110. In according tariff preferences to the developing countries, the EC general GSP arrangement does not make distinctions between developing countries as to their individual development, financial and trade needs. Therefore, if the reading of the EC of Paragraph 3(c) were deemed to be appropriate, its general GSP scheme which applies equally to all developing country beneficiaries would not be responsive to the individual needs of each and every beneficiary developing country. This would lead to the conclusion that the main scheme of the EC providing tariff preferences to the developing countries would be inconsistent with paragraph 3(c) of the Enabling Clause. Putting into

conformity such a scheme with the suggested EC's reading of Paragraph 3(c) would create as many differential tariff rates as there are developing countries. It would be an understatement to merely say that this would lead to instability and unpredictability in the rules-based multilateral trading system and render tariff bindings and concessions valueless.

111. In this context, if the EC's interpretation were to be accepted, the tariff preferences granted equally to the Preferred Members would be inconsistent with paragraph 3(c) as they, too, have different individual needs.

112. If the EC's interpretation of Paragraph 3(c) were correct, the EC would find itself in a situation in which the Drug Arrangements that it tries to justify by way of this particular reading of Paragraph 3(c), would have to be found to be inconsistent with the Enabling Clause, paradoxically, on the basis of paragraph 3 (c). The EC seeks to avoid this inconvenient result by, on one hand contending that compliance with paragraph 3(c) would be prevented on India's interpretation of "non-discriminatory" while simultaneously contending that paragraph 3(c) does not need to be complied with at all because it may not "...impose any legally binding obligation".

f The term "generalized" in footnote 3 does not lend contextual support for the interpretation of the term "non-discriminatory" advanced by the EC

113. The EC argues, in its replies to questions from the Panel, that the term "generalized" would be redundant if India's interpretation of "non-discriminatory" were accepted. The EC's argument fails to recognize that the term "generalized" refers to the range of countries that would accord and receive preferences⁶¹ while the term "non-discriminatory" refers to the degree of differentiation between the countries selected as beneficiaries. Thus a GSP scheme could be "generalized" in the sense that all developing countries are beneficiaries, while at the same time violate the requirement that GSP schemes be "non-discriminatory" because the beneficiary countries are treated differently. It is apparent that India's interpretation does not render the term "generalized" redundant.

⁶¹ See Report of the UNCTAD secretariat, *Review and evaluation of the generalized system of preferences* (TD/232) dated 9 January 1979 stating "Generalized preferences imply that preferences would be granted by all developed countries to all developing countries under a common system" (para 10). The drafting history reveals that "generalized" in relation to the GSP may be construed in several senses. As to the GSP donor countries, the intention was that all developed countries should grant preferential tariff treatment to the developing countries. As to the beneficiaries, it was the intention that all developing countries will be beneficiaries. In relation to the then special preferences enjoyed by some developing countries in some developed countries, it was the intention that those special preferences would be replaced by the "generalized" preferences under the GSP.

114. Indeed, the EC interprets "generalized" as a requirement that "preferences should be "generalized" to all the developing countries with similar development needs".⁶² The requirement to treat countries with similar development needs alike and countries with different development needs differently is the core of the EC's negative definition of "non-discriminatory". Thus it is the EC's interpretation of "non-discriminatory" which would make the term "generalized"(as that term is understood by the EC) redundant.

g The GATT could not fulfil the function of providing the legal framework of market access negotiations between developed and developing countries if the EC's interpretation of the term "non-discriminatory" were accepted.

115. The Preamble of the GATT states:

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce;

116. The preamble of the GATT makes clear that "the substantial reduction of tariffs and ... the elimination of discriminatory treatment in international commerce" through international negotiations is one of the main objectives of the GATT. One of the main functions of the GATT is therefore to provide a legal framework for the exchange of market access concessions which may ensure the value of substantial reduction of tariffs and the elimination of discriminatory treatment that undermines those reductions. In particular, Article I of the GATT is the cornerstone of this framework because it ensures that Members can exchange tariff concessions without having to fear that preferential treatment subsequently accorded to third countries effectively eliminates the negotiated competitive opportunities, except when a provision of the GATT states otherwise or, stated differently, except when Members have explicitly agreed otherwise. Thus, in market access negotiations, there are two important elements: (i) the level of bound tariffs and (ii) the assurance that tariffs applied within the bound levels are applied on an MFN basis.

117. The developing countries compete mainly with other developing countries in the markets of the GSP donor countries. If the EC's interpretation of the Enabling Clause were endorsed, the developing countries would therefore never have any assurance that

⁶² EC, *Replies to Questions from the Panel after the First Substantive Meeting*, para. 42.

the tariffs they have negotiated with developed countries will be applied on an MFN basis as between developing countries. Should the Panel decide this dispute in favour of the EC, it is therefore not unlikely that Members will spend the next few years renegotiating the provisions of Article I:1 of the GATT and the Enabling Clause, rather than negotiating further tariff reductions.

3.1.3 Panels would be drawn into distributional conflicts between developing countries without any normative guidance from the WTO Membership if the EC's interpretation of the term "non-discriminatory" were accepted.

118. The EC's notion of "non-discriminatory" as referring to *prejudicial* or *unjust* discrimination is too vague to provide a basis for policing differentiation in the context of GSP schemes. There is no further multilaterally-accepted standard within the Enabling Clause for determining what makes differentiation "unjust". Thus, adopting the EC's definition will result in leaving the developed countries free to differentiate as they see fit or involve Panels in adjudicating distributional conflicts without any guidance from the WTO Membership, such as whether difficulties faced on account of serious public health problems are more pressing than difficulties faced on account of drug production and trafficking. This uncertainty will have radical implications on the institutional balance between political and judicial bodies of the WTO, and would engage the adjudicating bodies in a law-making process which is the exclusive prerogative of the Membership. In addition, the ability of developing countries to participate in multilateral trade negotiations would be radically hampered.

3.2 The preferences accorded under the Drug Arrangements would be "discriminatory" even if the EC's interpretation of the term "non-discriminatory" applied to tariff treatment accorded under Paragraph 2(a) of the Enabling Clause.

3.2.1 The EC accords preferential tariff treatment based on drug-related problems and fails to accord preferential tariff treatment based on more severe problems of developing countries

119. Even assuming that "non-discrimination" has the negative meaning attributed to it by the EC, the Drug Arrangements would not be "non-discriminatory".

120. The EC argues that the Drug Arrangements are justified under its own construction of the term "non-discriminatory" because of the need "to provide additional preferences to the developing countries with special development needs, so that they can

secure a share of international trade which is *commensurate* with those special needs".⁶³ India submits that the differentiation between beneficiary countries and other developing countries is "discriminatory", as that term is understood by the EC.

121. Even assuming that the Drug Arrangements respond to development needs resulting from problems related to drug production and trafficking, the EC contends that the selection of beneficiary countries is based exclusively on the drug situation in a given developing country; no further evaluation of the *overall development needs* of prospective beneficiaries is envisaged. The Drug Arrangements are not concerned with the *relative* development needs as between developing countries. They are exclusively concerned with a single category of development need - the need arising from the production and trafficking of drugs.

122. It follows that a country with far more severe developmental needs, perhaps on account of poverty, low per capita GNP, malnutrition, illiteracy or natural disasters, could be provided less favourable tariff treatment than that provided under the Drug Arrangements. For instance, certain Preferred Members have a GDP per-capita many times greater than India. There is no basis for the EC to conclude that the development needs faced by beneficiary countries under the Drug Arrangements are "special" relative to the development needs of other developing countries. The EC does not even make such a contention in its submission; it merely contends that drug problems are linked with development. At best, this can establish that countries particularly affected by drug production or trafficking have one type of development need, but crucially, it does not establish that they have a "*special*" development need which entitles them to a greater "*commensurate*" share of international trade than that granted to other developing countries.

123. It would be inconsistent even with the negative meaning of non-discrimination to treat countries with drug problems more favourably than developing countries with more severe and pressing developmental needs. At a minimum, the EC must explain what makes problems faced on account of drug production and trafficking "special" relative to the other types of problems faced by developing countries.

⁶³ EC, FWS, paras. 83-84.

"The EC authorities do not apply any quantitative or qualitative threshold. Rather the designation is based on an overall assessment of the situation of the countries concerned." ⁶⁴

127. India also notes that the data presented in the EC's First Written Submission is insufficient to draw complete and accurate conclusions about the drug-related problems suffered within the beneficiary countries. For instance, data submitted by the EC in respect of the volume of drug seizures indicate the official records of drug seizures in a given year. However, this does not reflect the magnitude of the problem as drug trafficking and production are illicit activities; the statistics only reflect the portion of the drug trade actually intercepted by national enforcement authorities. A low volume of seizures does not necessarily reflect low levels of production and trafficking. It may only reflect deficient national enforcement.

3.2.4 The countries included as beneficiaries under the Drug Arrangements continue to enjoy the preferences accorded under the Drug Arrangements irrespective of whether or not they continue to have drug-related needs

128. There are no procedures set out under the Drug Arrangements which afford other developing countries similarly confronting drug production and trafficking the opportunity to apply for inclusion as a beneficiary. Consequently, inclusion is left to the absolute discretion of the EC. Conversely, during the period of operation of the current regulation there are no procedures set out for removing a beneficiary country no longer affected by drug-related problems from the list of beneficiaries. Hence, both inclusion and exclusion from the Drug Arrangements depends on a formal amendment to the Regulation made at the absolute discretion of EC authorities.

C. THE DRUG ARRANGEMENTS ARE NOT JUSTIFIED BY ARTICLE XX(B) OF THE GATT

129. As an alternative defence the EC seeks to justify the Drug Arrangements under Article XX (b) of the GATT.

1. THE EC BEARS THE BURDEN OF PROOF

130. As the respondent asserting the affirmative of a defence, the EC bears the burden of establishing that defence.

131. The EC contends that the Drug Arrangements:

⁶⁴ EC, *Replies to Questions from the Panel after the First Substantive Meeting*, para. 145.

- i) are necessary to protect human life or health of the EC population; and,
- ii) are applied consistently with the requirements of the *chapeau* of Article XX.

2. THE EC HAS NOT DEMONSTRATED THAT THE DRUG ARRANGEMENTS ARE NECESSARY TO PROTECT HUMAN LIFE OR HEALTH WITHIN THE MEANING OF ARTICLE XX(B)

132. The EC contends that the Drug Arrangements are "provisionally justified" under Article XX(b) of the GATT because:

- i) drugs pose a risk to human life or health; and,
- ii) the Drug Arrangements are "necessary" to protect the EC population from such risk.⁶⁵

133. In assessing whether a measure is provisionally justified under the respective subparagraphs of Article XX, the Appellate Body has endorsed the a two-fold analysis: a) determining whether the measure at issue is designed to achieve the objectives envisaged under the subparagraph concerned and, b) determining whether the measure at issue "responds" to the *degree of connection or relationship* (e.g. necessary, essential, relation) with the state interest or policy sought to be promoted or realized.⁶⁶

134. India submits that the EC has failed to demonstrate that the measure at issue is a measure intended to pursue the protection of human life and a measure "necessary" to achieve that objective.

2.1 The Drug Arrangements "are not designed to achieve" the protection of human life and health of the EC population

135. The EC contends that "narcotic drugs pose a risk to human health in the EC" and "narcotic drugs which are produced in, or which transit through, the territories of the beneficiary countries, i.e. coca products (coca leaf, coca paste, cocaine, crack, free base)

⁶⁵ EC, FWS, para. 165.

⁶⁶ Panel Report, *United States – Standards for Reformulated and Conventional Gasoline* ("US – Gasoline"), WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R, DSR 1996:I, 29, at 76-77; Appellate Body Report, *United States – Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, at 12-20; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("EC – Asbestos"), WT/DS135/AB/R, adopted 5 April 2001, para. 155-163; Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* ("Korea – Beef"), WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, para 157.

and opium products (opium, morphine, heroine) pose particularly serious risks to human life and health."⁶⁷

136. In addition, the EC contends that " the Drug Arrangements contribute to the objective of preserving the life and health of the EC population by limiting the supply of narcotic drugs to the EC"; that "[t]he Drug Arrangements contribute to the objective of preserving the life and health of the EC population against the risks from the consumption of narcotic drugs by supporting the measures taken by other countries against the illicit production and trafficking of those substances, thereby reducing their supply to the EC."⁶⁸

137. The EC only states that the measure at issue is designed to protect the life and health of the EC population, but it fails to substantiate its assertion. Mere assertion does not amount to proof.

138. In *EC – Asbestos*, based on the existence of health risks in connection with the use of a harmful substance (chrysotile-cement products), the Panel found that " ... the policy of prohibiting chrysotile asbestos ... [fell] within the range of policies designed to protect human life or health ...".⁶⁹ In *US – Gasoline*, the Panel found that air pollution presents health risks to humans, animals and plants. The Panel therefore found that the measure at issue (the "Gasoline Rule") was within the range of policy goals described in Article XX(b), agreeing that "a policy to reduce air pollution from the consumption of gasoline" is a policy within the range of those concerning the protection of human, animal and plant life or health.⁷⁰ In both cases, the measures at issue, found to be otherwise WTO-inconsistent, were deemed justified under Article XX because they were designed to protect human health and that the measures at issue were necessary to pursue that objective.

139. In the case at hand, it is difficult to see how (i) the Drug Arrangements could be regarded as having been designed to protect human life or health from the risks posed by the consumption of illicit drugs in the EC and (ii) how the granting of tariff preferences equally to all developing countries would exacerbate those risks.

⁶⁷ EC, FWS, para. 166-167.

⁶⁸ EC, FWS, para. 183- 185.

⁶⁹Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products ("EC – Asbestos ")*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R, para. 8.194

⁷⁰ Panel Report, *US – Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R, DSR 1996:I, 29, at. 77.

140. The Appellate Body made clear in *Chile – Alcoholic Beverages* that the mere statement of objectives does not constitute effective rebuttal by a respondent. There must be a clear relationship between the stated objectives and the *design, structure and architecture* of the contested measure.⁷¹

141. *Post facto*, the EC identifies the following objectives:

1. Limiting the production and transit through, the territories of the beneficiary countries, of narcotic drugs and opium products, which pose particularly serious risks to human life and health.⁷²
2. Limiting the supply of narcotic drugs to the EC in order to preserve the life and health of the EC population.⁷³
3. Decreasing the risks from the consumption of narcotic drugs by the EC population⁷⁴
4. Supporting the measures taken by other countries against the illicit production and trafficking of drug substances⁷⁵; in particular, substitution of illicit crops.⁷⁶

142. However, an examination of the design, structure and architecture of the Drug Arrangements shows that there is no express relationship between the objectives stated by the EC and the Drug Arrangements. There is no stated objective in Council Regulation 2501/2001 relating to the protection of the life or health of the EC population. In relation to the Drug Arrangements, the Preamble of the Regulation merely states:

"The special arrangements to combat drug production and trafficking should be closely monitored."

143. The Explanatory Memorandum of the Commission presented to the Council of the European Union along with the "Amended proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period 1 January 2002 to 31 December 1999" refers to the objectives of the Drug Arrangements as follows:

⁷¹ Appellate Body Report, *Chile – Taxes on Alcoholic Beverages* ("Chile – Alcoholic Beverages"), WT/DS87/AB, WT/DS110/AB, adopted 12 January 2000, para. 71.

⁷² EC, FWS, para. 166-167.

⁷³ EC, FWS, para. 183- 185.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

" ... It is indeed necessary to establish some kind of assessment monitoring ensuring that the drug regime *achieves the objectives for which it is granted*. These objectives are to favour sustainable development, so as to improve the conditions under which the beneficiary countries are combating drug production and trafficking. Sustainable development requires, first, the creation of new jobs in all sectors of the economy, including industry, for which the GSP had been established initially. This implies improving the supply side and diversifying exports; secondly, solid development through the effective implementation of ILO core labour standards; and thirdly, the protection of the environment, including in particular the sustainable management of the tropical forest.

The Commission should have a clear picture of the extent to which these arrangements actually achieve their objectives ... ⁷⁷

The declared objective thus does not relate to the protection of the life or health of the EC population; rather, it relates to "sustainable development".

144. Based on the foregoing, the Drug Arrangements are *not* designed to protect human life or health. .

2.2 The Drug Arrangements are not "necessary" to protect human life or health of the EC population

145. The EC relies on three aspects to submit that the Drug Arrangements are "necessary" within the meaning of Article XX(b):

- i) the importance of the "values" pursued by the Drug Arrangements,
- ii) the contribution of the Drug Arrangements to the protection of human life and health against the risks posed by drugs, and
- iii) the restrictive trade effects of the Drug Arrangements⁷⁸

146. In its First Submission, the EC states:

"In *Korea - Beef* the Appellate Body observed that, as used in the context of Article XX(d), "necessary" does not mean "indispensable":

The reach of the word "necessary" is not limited to that which is "indispensable" or "of absolute necessity" or "inevitable". Measures which are indispensable or of absolute necessity or inevitable to secure

⁷⁷ Council of the European Union, 14176/01, 19 November 1991, p. 7 (Exhibit INDIA- 7)

⁷⁸ EC, FWS, para. 182.

compliance certainly fulfil the requirements of Article XX (d). But other measures, too, may fall within the ambit of this exception."⁷⁹

147. The portion which the EC quoted states that "necessary" is not limited to that which is "indispensable or of "absolute necessity" or "inevitable". The EC then asserts:

"The Drug Arrangements **contribute to** the objective of preserving the life and health of the EC population against the risks from the consumption of narcotic drugs by supporting the measures taken by other countries against the illicit production and trafficking of those substances, thereby reducing their supply to the EC."⁸⁰ (emphasis added)

148. But the EC quoted merely a portion of the relevant finding of the Appellate Body in Korea-Beef. The paragraph a portion of which was quoted by the EC reads as follows:

We believe that, as used in the context of Article XX(d), the reach of the word "necessary" is not limited to that which is "indispensable" or "of absolute necessity" or "inevitable". Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." **We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".** (emphasis added)

149. The EC's own assertion indicates that the Drug Arrangements "contribute to" the preservation of the life and health of the EC population. Even assuming that indeed they do, in the continuum of "necessary", the Drug Arrangements are at the other end of the continuum opposite to that of "indispensable". The Drug Arrangements are not therefore "significantly closer to the pole of "indispensable"; hence applying the findings of the Appellate Body, by the EC's own admission, the Drug Arrangements are not "necessary".

150. Recalling a statement of the General Assembly of the United Nations that notes the relation between the problem of the illicit production of narcotic drugs and psychotropic substances and development problems, the EC contends that the Drug Arrangements seek to promote the development of alternative economic activities to replace drug production and trafficking and, more generally, to raise the overall level of

⁷⁹ EC, FWS, para. 176, citing Appellate Body Report, *Korea – Beef*, para. 161.

⁸⁰ EC, FWS, para. 185.

economic development of the countries concerned, in order to generate resources and capacity required for enforcing an effective system of drug control.⁸¹

151. The EC argues that it is necessary for the health of the EC population to impose the Drug Arrangements. In other words, if the tariff preferences were removed, the health of EC citizens would worsen because a greater amount of illicit drugs would be produced and trafficked into the EC and then consumed by EC citizens. The relationship between tariff preferences and the health of the EC population is remote, if at all there is such a relationship.

152. The necessary link that the EC draws between preferential tariff treatment and the health of the EC population is based on several assumptions, the principal assumption being that drug producers would ultimately switch to the production of products covered by the preferential tariffs, and that drug traffickers would ultimately switch to trading products covered by preferential tariffs. The measure considered by the EC to be "necessary" ends up becoming a measure rather "contingent" upon several external factors that do not depend on the EC (e.g. profitability of alternative economic activities, determination and effective action on the part of the beneficiary's government to implement crops substitution policies, improvement of law enforcement actions in the territory of the beneficiary) and which render the policy *sought* (i.e. the protection of life and health of the EC population) somehow uncertain.

153. Conversely, in making the link between preferential tariff treatment and the health of the EC population, the EC assumes, just as implausibly, that if the tariff preferences under the Drug Arrangements were to be accorded to all developing countries, producers and traders of legitimate products covered by the Drug Arrangements would switch to production and trafficking of illicit drugs. This assumption disregards the reality that drug production and trafficking are organized crimes, controlled by criminal syndicates motivated by profit alone, and that the preferential market access provided by the EC is not the reason why law-abiding citizens keep out of the drug trade.

154. In this regard, India notes that the Drug Arrangements are not limited to crops which could act as substitutes for the cultivation of narcotics; neither has the EC put forward evidence establishing that the Drug Arrangements cover agricultural crops which could substitute for narcotic crops. Furthermore, the Drug Arrangements are linked to the drug situation in a given country, not to the drug-related policies followed by a particular country. This may have the paradoxical effect of reducing market access opportunities to

⁸¹ EC, FWS, para. 188.

the EC if the drug problem in a given beneficiary country improves. Thus, it could even be said that the preferential tariff treatment under the Drug Arrangements might provide a disincentive for combating drug production and trafficking.

155. The EC also contends that the Drug Arrangements are necessary to protect the health of the EC population by increasing the overall level of development which, in turn increases the *capacity* of drug affected countries to enforce an effective system of drug control. This link between preferential tariff treatment and improved capacity to enforce is again remote. There is no proximate and clear relationship between preferential tariff treatment and the capacity to enforce. This link presumably operates in the following manner: tariff preferences encourage exports; the growth of exports in turn affects the overall level of development within a beneficiary country, a rise in development level results in better governance or a higher tax base, which improves capacities in general; this results in improvement of governmental drug control efforts, which reduces domestic production and trafficking, which then reduces the supply of illicit drugs into the EC and finally reduces consumption of drugs in the EC. Along this extended chain of causality, there are many alternative less trade restrictive measures that could be taken by the EC to achieve its objective. For instance, direct technical and financial assistance for the drug control efforts of affected countries or development aid and initiatives that do not involve the restriction of trade from other WTO Members.

156. The EC has failed to establish that the Drug Arrangements are the "least trade restrictive measure" available to pursue its health objective. Preferential tariff treatment necessarily reduces the competitive opportunities for products from excluded countries. As a matter of economic theory this is undeniable. Hence, the Drug Arrangements restrict both the present and future trade of excluded Members. If this were not the case, then the EC could have included India and other developing countries in the Drug Arrangements without any converse impact on the trade of the beneficiary countries.

157. To illustrate, the inclusion of Pakistan in the Drug Arrangements has already resulted in adverse effects on Indian imports into the EC in respect of various categories of textiles and clothing products including category 4 (shirts, t-shirts etc.), category 8 (men's or boy's shirts) and category 20 (bed linen). Imports into EU of products under these categories from India declined sharply during 2002 as compared to 2001 while those from Pakistan showed a significant increase during the corresponding period. Letters from importers in the EC cancelling orders from India on account of these tariff

preferences are a concrete manifestation of the trade restrictive nature of the Drug Arrangements. Some of those letters are attached.⁸²

158. Based on the foregoing, the Drug Arrangements cannot be provisionally justified as "measures necessary to the protection of human life and health".

3. THE EC HAS NOT DEMONSTRATED THAT THE DRUG ARRANGEMENTS ARE NOT APPLIED IN A MANNER WHICH WOULD CONSTITUTE A MEANS OF ARBITRARY OR UNJUSTIFIABLE DISCRIMINATION WITHIN THE MEANING OF THE CHAPEAU OF ARTICLE XX(B)

159. The EC fails to demonstrate that the discriminatory preferential tariff treatment granted under the Drug Arrangements is not arbitrary or unjustifiable discrimination under the chapeau of Article XX(b).

160. The EC asserts that the differentiation between developing countries which are especially affected by the drug problem and other developing countries which are less affected by the drug problem is irrelevant for the purposes of the *chapeau*. In making this argument, the EC disregards that India's claim is based on the inconsistency of the Drug Arrangements with Article I:1 of the GATT and not with Paragraph 2(a) of the Enabling Clause. Rather, the EC invokes Paragraph 2(a) as a defence to India's claim. Therefore, if the Panel were to find that the Drug Arrangements are not covered by the Enabling Clause, necessarily, the Panel would also have to find that the violation of Article I:1 is not justified by the Enabling Clause.

161. The invocation of Article XX(b) by the EC is essentially to justify the violation of Article I:1 of the GATT and not of the Enabling Clause. Thus the distinction between developing countries which are especially affected by the production or trafficking of drugs and other Members, including developing countries; which are less affected by that problem *does* arise from the "application" of the measure in dispute. Article I:1 applies equally to all Members. Therefore any factual differentiation in treatment relates to the "application" of the measure in terms of the chapeau of Article XX.

162. In any event, it is incumbent on the EC to show that the preferential tariff preferences granted under the Drug Arrangements only to twelve developing countries do not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade within the meaning of the chapeau of Article XX(b). So far, the EC has not demonstrated it.

⁸² See Exhibits INDIA 8(a) to 8(e)

4. THE GATT COULD NOT FULFIL ITS FUNCTION OF PROVIDING THE LEGAL FRAMEWORK FOR MULTILATERAL TRADE NEGOTIATIONS IF ARTICLE XX(B) COULD JUSTIFY PREFERENTIAL TRADING ARRANGEMENTS.

163. According to the EC's interpretation of Article XX(b) of the GATT, WTO Members may accord preferential tariff treatment to selected WTO Members if this makes a "necessary contribution" to the resolution of a health problem. The EC argues that the margins of preference enjoyed by the beneficiary countries under the Drug Arrangements are "necessary" within the meaning of Article XX(b) because they make such a contribution. The logical implication of the EC's argument therefore is that the EC would not be under an obligation to implement the market access concessions negotiated in the Doha Work Programme if the beneficiary countries' drug problems were to continue beyond the conclusion of that Round.

IV. CONCLUSIONS

164. In the light of the considerations set out above, India respectfully requests the Panel to find that the Drug Arrangements are inconsistent with Article I:1 of the GATT and are not justified under the Enabling Clause or under Article XX(b) of the GATT.

165. 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 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.

V. RECOMMENDATIONS REQUESTED BY INDIA

166. 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.

VI. SUGGESTIONS ON IMPLEMENTATION REQUESTED BY INDIA

167. 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. 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.

VII. LIST OF EXHIBITS SUBMITTED BY INDIA

Number of Exhibit	Exhibit ⁸³
INDIA-7	Council of the European Union, 14176/01, 19 November 1991, (Explanatory Memorandum)
INDIA-8(a)	Copy of e-mail from Bo L Scheja AB (Sweden) dated May 15, 2003
INDIA-8(b)	Letter from Tapani Tikanonja OY (Finland) dated April 28, 2003
INDIA-8(c)	Letter from Transform Fashion BV (Netherlands) dated April 10, 2002
INDIA-8(d)	Letter from Tex Planet (Italy) dated 15 April 2002
INDIA-8(e)	Letter from Gruppo Industrie Moda (Italy) dated 5 July 2002

⁸³The exhibits are submitted as hard copies only.