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# EUROPEAN COMMUNITIES – CONDITIONS FOR THE GRANTING OF TARIFF PREFERENCES TO DEVELOPING COUNTRIES

***Report of the Panel***

# TABLE OF CONTENTS

Page

**I. INTRODUCTION ..... 1**

**II. FACTUAL ASPECTS ..... 3**

A. THE SCHEME OF GENERALIZED TARIFF PREFERENCES ADOPTED BY THE EUROPEAN COMMUNITIES ..... 3

B. THE GENERAL ARRANGEMENTS ..... 3

C. THE DRUG ARRANGEMENTS ..... 4

**III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS ..... 4**

**IV. ARGUMENTS OF THE PARTIES ..... 6**

A. FIRST WRITTEN SUBMISSION OF INDIA ..... 6

*1. Factual background ..... 6*

*2. Legal arguments ..... 7*

(a) The Drug Arrangements are inconsistent with Article I:1 of GATT 1994 ..... 7

(b) The European Communities requested a waiver and implemented the Drug Arrangements without obtaining a waiver ..... 9

(c) The European Communities bears the burden of justifying its Drug Arrangements under the Enabling Clause ..... 10

(d) The Drug Arrangements cannot be justified under the Enabling Clause ..... 11

B. FIRST WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES ..... 14

*1. The Enabling Clause ..... 14*

(a) The Enabling Clause excludes the application of Article I:1 of the GATT ..... 14

(b) The Enabling Clause does not impose an obligation to accord unconditional MFN treatment to the developing countries ..... 14

(i) The Enabling Clause does not impose an obliation to grant "differential and more favourable treatment" to all developing countries on an MFN basis ..... 14

(ii) The Enabling Clause does not impose an obligation to grant differential and more favourable treatment "unconditionally" ..... 15

(iii) In any event, the Drug Arrangements are "unconditional" ..... 15

The case law on the interpretation of the term "unconditionally" ..... 15

The ordinary meaning of "unconditionally" ..... 16

The meaning of "unconditionally" in the context of MFN clauses ..... 16

(c) The Drug Arrangements are consistent with the Enabling Clause ..... 17

(i) The Drug Arrangements are "non-discriminatory" ..... 17

The interpretation of the term "non-discriminatory" in paragraph 2(a) ..... 17

Treating differently the developing countries that are particularly affected by the drug problem is not "discriminatory" ..... 18

The application of the Drug Arrangements is "non-discriminatory" ..... 19

(ii) The Drug Arrangements are "beneficial to the developing countries" ..... 21

(iii) The Drug Arrangements respond positively to the needs of developing countries ..... 22

*2. Article XX(b) of GATT 1994 ..... 23*

(a) Introduction ..... 23

(b) The Drug Arrangements are necessary for the protection of human life or health ..... 23

(i) Drugs pose a risk to human life or health ..... 23

(ii) The Drug Arrangements are "necessary" to fight drug production and trafficking ..... 23

The "values" pursued by the Drug Arrangements ..... 23

Contribution of the Drug Arrangements to the protection of human life and health ..... 24

Trade impact of the Drug Arrangements ..... 24

(c) The Drug Arrangements are applied consistently with the chapeau ..... 24

(i) Arbitrary or unjustifiable discrimination ..... 25

(ii) Disguised restriction ..... 25

C. ORAL STATEMENT OF INDIA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL ..... 25

*1. Procedural arguments ..... 25*

(a) Joint representation of India and Paraguay by the same staff of the Advisory Centre on WTO Law ..... 25

*2. Substantive arguments ..... 26*

D. ORAL STATEMENT OF THE EUROPEAN COMMUNITIES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL ..... 31

*1. Procedural arguments ..... 31*

(a) Joint representation of India and Paraguay by the same staff of the Advisory Centre on WTO Law ..... 31

*2. Substantive arguments* ..... *32*
(a) The implications of this dispute ..... 32
(b) The Enabling Clause ..... 33
(c) Article XX of GATT 1994 ..... 34
E. SECOND WRITTEN SUBMISSION OF INDIA ..... 34
*1. The Drug Arrangements are inconsistent with Article I:1 and the European Communities bears the burden of proof under the Enabling Clause* ..... *34*
*2. The Enabling Clause does not exclude the application of Article I:1 but authorizes limited derogation* ..... *37*
*3. "non-discriminatory"* ..... *39*
(a) Introduction ..... 39
(b) GATT 1994 as context ..... 39
(c) Paragraph 2(d) and 2(b) as context ..... 39
(d) "the developing countries" in paragraph 2(a) as context ..... 40
(e) UNCTAD instruments as context and drafting history ..... 40
(f) Paragraph 3(c) as context ..... 41
(g) "Generalized" as context ..... 42
(h) Implications for the WTO multilateral system ..... 42
*4. The application of the Drug Arrangements is not "non-discriminatory"* ..... *43*
*5. The Drug Arrangements are not justified under Article XX* ..... *44*
(a) The Drug Arrangements do not constitute a measure under Article XX(b) ..... 44
(b) Drug Arrangements are not "necessary" within the meaning of Article XX(b) ..... 44
(c) Drug Arrangements do not meet the requirements of the chapeau of Article XX ..... 45
F. SECOND WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES ..... 46
*1. Relationship between GATT Article I:1 and the Enabling Clause* ..... *46*
(a) Special and differential treatment ..... 46
(b) Drafting history of the 1971 Decision ..... 46
(c) "Positive rights"/"exceptions" ..... 46
(d) "Autonomous right"/"affirmative defence" ..... 47
*2. The Enabling Clause* ..... *47*
(a) Paragraph 1 ..... 47
(i) "Other Members" ..... 47
(ii) "Unconditionally" ..... 48
(b) "Non-discriminatory" in paragraph 2(a) ..... 48
(i) The ordinary meaning ..... 48
(ii) The context ..... 48
(iii) The object and purpose ..... 49
(iv) Drafting history ..... 49
(v) The Appellate Body report in EC – Bananas III ..... 50
(c) "Non-reciprocal" in paragraph 2(a) ..... 51
(d) "Beneficial" in paragraph 2(a) ..... 51
(e) Paragraph 3(c) ..... 51
*3. Article XX of GATT 1994* ..... *52*
(a) Drugs pose a risk to human life or health ..... 52
(b) The Drug Arrangements are necessary to fight drug production and trafficking ..... 52
(i) The values pursued by the Drug Arrangements ..... 52
(ii) Contribution of the Drug Arrangements to the protection of human life and health ..... 52
Tariff preferences are an appropriate response to the drug problem ..... 52
The Drug Arrangements apply to all developing countries affected by the drug problem which do not benefit from more favourable tariff treatment under other arrangements ..... 52
The inclusion of developed countries in the Drug Arrangements would be unnecessary ..... 53
The countries not included in the Drug Arrangements do not pose a threat to the sanitary situation within the European Communities ..... 53
It is unnecessary to require that the beneficiaries implement certain anti-drug policies ..... 53
(iii) There are no less restrictive alternatives ..... 54
(c) The Drug Arrangements are applied consistently with the chapeau ..... 54
G. ORAL STATEMENT OF INDIA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL ..... 54
*1. Introduction* ..... *54*
*2. The allocation of the burden of proof* ..... *55*
*3. The relationship between the Enabling Clause and Article I:1 of GATT 1994* ..... *56*

*4. The legal interpretation of the term "non-discriminatory" and the UNCTAD arrangements* ..... *56*
*5. Paragraph 3(c) of the Enabling Clause* ..... *57*
*6. Alternative arguments on non-discrimination* ..... *59*
H. ORAL STATEMENT OF THE EUROPEAN COMMUNITIES AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL ..... 60
*1. Relationship between Article I:1 of the GATT and the Enabling Clause* ..... *60*
(a) The Enabling Clause is not an "affirmative defence" ..... 60
(i) The Enabling Clause recognizes an "autonomous right" ..... 60
(ii) The Enabling Clause imposes "positive obligations" ..... 60
(iii) Previous panels have not treated the Enabling Clause as an affirmative defence ..... 60
(iv) The report of the Appellate Body in Brazil – Aircraft supports the European Communities position ..... 61
(b) India has the burden to prove that Article I:1 of the GATT applies to the Drug Arrangements ..... 61
(c) The Enabling Clause excludes the application of Article I:1 of the GATT ..... 61
(d) The meaning of "unconditionally" in Article I:1 of the GATT ..... 62
*2. The Enabling Clause* ..... *62*
(a) The meaning of "non-discriminatory" in paragraph 2(a) ..... 62
(i) The GATT context ..... 62
(ii) Paragraph 2(d) ..... 62
(iii) The use of "the" before "developing countries" ..... 63
(iv) The UNCTAD Arrangements ..... 63
(v) Paragraph 3(c) and policy arguments ..... 63
(b) The Drug Arrangements are "non-discriminatory" ..... 63
*3. Article XX of GATT 1994* ..... *64*
(a) The Drug Arrangements are "necessary" for the protection of human life and health ..... 64
(b) The Drug Arrangements are applied consistently with the chapeau ..... 64

**V. ARGUMENTS OF THE THIRD PARTIES ..... 65**
A. THE ANDEAN COMMUNITY ..... 65
*1. Introduction* ..... *65*
*2. The important implications of this dispute for the Andean Community* ..... *65*
*3. The pivotal role of the Enabling Clause as part of the GATT/WTO regime for developing countries and as a self-standing regime* ..... *68*
*4. "Other contracting parties" in paragraph 1* ..... *70*
*5. Paragraph 3(c) of the Enabling Clause* ..... *70*
*6. The interpretation of the term "non-discriminatory" in footnote 3 of the Enabling Clause* ..... *71*
B. COSTA RICA ..... 72
*1. Introduction* ..... *72*
*2. The important implications of this dispute for Costa Rica* ..... *73*
*3. The Enabling Clause does not prohibit the granting of preferential tariff treatment to some developing countries* ..... *73*
*4. The Enabling Clause requires donor countries to differentiate between developing countries* ..... *74*
*5. The Drug Arrangements provided by the European Communities are non-discriminatory* ..... *75*
*6. Paragraph 3(b) of the Enabling Clause precludes preferential treatment from constituting an impediment to the reduction or elimination of tariffs and other restrictions to trade on an MFN basis* ..... *76*
C. THE CENTRAL AMERICAN COUNTRIES OF EL SALVADOR, GUATEMALA, HONDURAS AND NICARAGUA ..... 76
*1. Introduction* ..... *76*
*2. The designation of the beneficiaries of the Drug Arrangements and the assessment of the gravity of the drug problem in Central America* ..... *77*
*3. The Enabling Clause is applicable to the Drug Arrangements* ..... *77*
*4. The Drug Arrangements are a positive response to the needs of developing countries* ..... *78*
D. MAURITIUS ..... 78
*1. Introduction* ..... *78*
*2. India bears the burden of proof* ..... *79*
*3. The Drug Arrangements are non-discriminatory* ..... *79*

*4. The Drug Arrangements are justified through recourse to Article XX(b) of GATT 1994 ..... 80*
E. PAKISTAN ..... 80
*1. Introduction ..... 80*
*2. Article I:1 of the GATT 1994 does not apply to the Enabling Clause ..... 80*
*3. The Drug Arrangements do not require a waiver ..... 80*
*4. The inclusion of Pakistan in the Drug Arrangements is not to further the policy objectives of the European Communities ..... 80*
F. PANAMA ..... 81
*1. Introduction ..... 81*
*2. The important implications of this dispute for Panama ..... 81*
*3. The Enabling Clause is drafted as a statute separate and distinct from the provisions of Article I:1 of GATT 1994 ..... 82*
*4. The Drug Arrangements are not in contravention of Article I:1 of GATT 1994, and paragraph 2(a) of the Enabling Clause ..... 82*
*5. The Enabling Clause authorizes differentiation between beneficiaries without establishing discrimination ..... 83*
*6. The Drug Arrangements are a positive response to the development needs of Panama and are supported by paragraph 3(c) of the Enabling Clause ..... 83*
G. PARAGUAY ..... 84
*1. Introduction ..... 84*
*2. Preliminary issue of joint representation ..... 84*
*3. Systemic concerns ..... 85*
(a) The elimination of discrimination is a primary objective of the multilateral trading system ..... 85
(b) The issue of discrimination on the basis of "objective criteria" is not a matter before the Panel ..... 86
(c) The Enabling Clause in any case does not permit differentiation in treatment between developing countries in the context of GSP schemes ..... 86
(d) The waiver mechanism provides the required flexibility ..... 89
*4. Concerns specific to the situation of Paraguay ..... 89*
*5. Conclusion ..... 90*
H. UNITED STATES ..... 91
*1. Introduction ..... 91*
*2. The preliminary issue of legal representation ..... 91*
*3. The Enabling Clause excludes the application of Article I:1 of GATT 1994 ..... 91*
*4. "All" developing countries ..... 93*
*5. The Enabling Clause reference to "non-discriminatory" ..... 93*
*6. Article XX of GATT 1994 ..... 95*

**VI. INTERIM REVIEW ..... 95**
A. INTRODUCTION ..... 95
B. COMMENTS BY THE EUROPEAN COMMUNITIES ..... 96
*1. Joint Representation of India and Paraguay ..... 96*
*2. Paragraph 3(c) ..... 97*
*3. "Non-discriminatory" in footnote 3 ..... 99*
*4. Paragraph 2(a) ..... 100*
*5. Dissenting Opinion ..... 101*

**VII. FINDINGS ..... 103**
A. PROCEDURAL ISSUES ..... 103
*1. Joint representation of India and Paraguay ..... 103*
(a) Introduction ..... 103
(b) Conflict of interest ..... 104
(c) Confidentiality ..... 105
(d) Blurring the distinction between parties and third parties ..... 106
B. CLAIMS OF THE PARTIES ..... 106
C. THE NATURE OF THE ENABLING CLAUSE AND ITS RELATIONSHIP TO ARTICLE I:1 OF GATT 1994 ..... 107
*1. Introduction ..... 107*
*2. Arguments of the parties ..... 107*
*3. Panel's analysis ..... 109*
(a) Nature of the Enabling Clause ..... 109
(b) Burden of proof under the Enabling Clause ..... 111

(c) Applicability of Article I:1 ..... 111
(d) Relevant jurisprudence ..... 113
(e) Relevance of the importance of the policy objective pursued ..... 114
*4. Summary of findings on the nature of the Enabling Clause and its relationship to Article I:1* ..... *114*
D. WHETHER THE DRUG ARRANGEMENTS ARE INCONSISTENT WITH ARTICLE I:1 ..... 115
E. WHETHER THE DRUG ARRANGEMENTS ARE JUSTIFIED UNDER THE ENABLING CLAUSE ..... 116
*1. Introduction* ..... *116*
*2. Paragraph 3(c)* ..... *118*
(a) Arguments of the parties ..... 118
(b) Panel's analysis ..... 120
(i) Introduction ..... 120
(ii) Status of the Agreed Conclusions for the interpretation of the Enabling Clause ..... 121
(iii) Product coverage and depth of tariff cuts as part of the Agreed Conclusions ..... 122
(iv) Responding positively to development needs of developing countries ..... 124
(v) Whether a GSP scheme can be accorded to less than all developing countries ..... 124
(vi) Safeguard mechanisms ..... 125
(vii) Paragraph 2(d) ..... 126
(c) Summary of findings on the interpretation of paragraph 3(c) ..... 127
*3. "Non-discriminatory" in footnote 3* ..... *127*
(a) Arguments of the parties ..... 127
(b) Panel's analysis ..... 129
(i) Introduction ..... 129
(ii) Resolution 21(II) ..... 130
(iii) Agreed Conclusions ..... 131
(iv) Recommendation A.II.1 of the First Session of UNCTAD ..... 132
(v) Paragraph 2(d) ..... 133
(vi) Paragraph 3(c) ..... 134
(vii) Relevance of Article I:1 of GATT 1994 ..... 134
(viii) Relevance of other GATT provisions ..... 134
(ix) Object and purpose ..... 135
(x) Practice of preference-giving countries ..... 135
(c) Summary of findings as to the meaning of "non-discriminatory" ..... 136
*4. Paragraph 2(a)* ..... *136*
(a) Arguments of the parties ..... 136
(b) Panel's analysis ..... 137
*5. Conclusion on the Enabling Clause* ..... *138*
F. ARTICLE XX(B) OF GATT 1994 AS A JUSTIFICATION FOR THE DRUG ARRANGEMENTS ..... 138
*1. Introduction* ..... *138*
*2. Arguments of the parties* ..... *139*
*3. Panel's analysis* ..... *142*
(a) Whether the Drug Arrangements constitute a measure under Article XX(b) ..... 142
(b) Necessity of the measure ..... 145
(c) "Chapeau" ..... 147
*4. Summary of findings on Article XX* ..... *149*
**VIII. CONCLUSIONS AND RECOMMENDATIONS ..... 150**
**IX. DISSENTING OPINION BY ONE MEMBER OF THE PANEL ..... 151**

## TABLE OF CASES CITED IN THIS REPORT

| Short Title | Full Case Title and Citation |
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## LIST OF ANNEXES


| | | Page |
|---|---|---|
| **ANNEX A** | | |
| **Annex A** | Decision of the Panel on the Request for Enhanced Third Party Rights | A-2 |
| **ANNEX B** | | |
| **Parties** | | |
| **Annex B-1** | Replies of India to Questions from the Panel after the First Panel Meeting | B-2 |
| **Annex B-2** | Replies of the European Communities to Questions from the Panel after the First Panel Meeting | B-36 |
| **Annex B-3** | Replies of the European Communities to Questions from India after the First Panel Meeting | B-68 |
| **Annex B-4** | Replies of India to Questions from the Panel after the Second Panel Meeting | B-83 |
| **Annex B-5** | Replies of the European Communities to Questions from the Panel after the Second Panel Meeting | B-111 |
| **Annex B-6** | Comments of India to the Replies of the European Communities to Question from the Panel after the Second Panel Meeting | B-141 |
| **Annex B-7** | Comments of the European Communities to the Replies of India to Questions from the Panel after the Second Panel Meeting | B-159 |
| **ANNEX C** | | |
| **Third Parties** | | |
| **Annex C-1** | Replies of the Andean Community Collectively to Questions from the Panel and from India after the First Panel Meeting | C-2 |
| **Annex C-2** | Replies of Members of the Andean Community Separately to Questions from the Panel and from India after the First Panel Meeting | C-9 |
| **Annex C-3** | Reply of Brazil to the Question from India after the First Panel Meeting | C-14 |
| **Annex C-4** | Replies of Costa Rica to Questions from the Panel and from India after the First Panel Meeting | C-15 |
| **Annex C-5** | Replies of El Salvador, Guatemala, Honduras and Nicaragua to Questions from the Panel after the First Panel Meeting | C-20 |
| **Annex C-6** | Replies of Panama to Questions from the Panel and from India after the First Panel Meeting | C-21 |
| **Annex C-7** | Replies of Paraguay to Questions from the Panel and from India after the First Panel Meeting | C-27 |
| **Annex C-8** | Replies of the United States to Questions from the Panel and from India after the First Panel Meeting | C-40 |
| **ANNEX D** | | |
| **Annex D-1** | Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the "Enabling Clause") | D-2 |
| **Annex D-2** | Decision on Generalized System of Preferences (the "1971 Waiver Decision") | D-4 |
| **Annex D-3** | Resolution of the Second Session of UNCTAD on the Expansion and Diversification of Exports of Manufactures and Semi-Manufactures of developing countries ("Resolution 21 (II)) | D-6 |
| **Annex D-4** | Agreed Conclusions of the Special Committee on Preferences ("Agreed Conclusions") | D-8 |
| **ANNEX E** | | |
| **Annex E** | List of Waivers for Preferences | E-I |

# I. INTRODUCTION

1.1 On 5 March 2002, pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter the "DSU"), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (hereafter the "GATT 1994") and paragraph 4(b) of the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of the Developing Countries[1], (hereafter the "Enabling Clause"), India requested consultations with the European Communities regarding the conditions under which the European Communities accords tariff preferences to developing countries under the scheme of generalized tariff preferences formulated under Council Regulation (EC) No.. 2501/2001. The request was circulated to Members on 12 March 2002.[2]

1.2 Consultations were held on 25 March 2002, but did not lead to a mutually satisfactory resolution of this matter.

1.3 On 6 December 2002, India requested the Dispute Settlement Body ("DSB") to establish a panel pursuant to Articles 4.7 and 6 of the DSU and Article XXIII:2 of GATT 1994.[3] On 16 January 2003, India requested the establishment of a panel for the second time. On 27 January 2003, the DSB established the Panel with the following terms of reference:

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

1.4 On 24 February 2003, India requested the Director-General to determine the composition of the Panel pursuant to Article 8.7 of the DSU.

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

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[1] GATT Document, L/4903, BISD 26S/203.

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

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

[4] WT/DS246/5, 6 March 2003, para. 2.

1.6 On 6 March 2003, the Director-General determined the composition of the Panel as follows:

Chairman: Mr Julio Lacarte-Muró

Members: Professor Marsha A. Echols
Professor Akio Shimizu[5]

1.7 Bolivia, Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mauritius, Nicaragua, Pakistan, Panama, Paraguay, Peru, Sri Lanka, the United States and Venezuela reserved their respective right to participate in the panel proceedings as third parties.[6]

1.8 On 31 March 2003, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Peru and Venezuela requested the Panel's permission to attend all the Panel meetings, to present arguments at such meetings, to receive copies of all submissions to the Panel, to make submissions to the Panel at its second meeting and to review the draft summary of arguments in the descriptive part of the Panel Report.

1.9 On 8 April 2003, the Panel asked for comments from the parties and third parties regarding the above request. On 17 April 2003, Pakistan also joined in the request for additional third-party rights. Brazil, Cuba, Mauritius, Paraguay and the United States stated that all third parties should be given the same treatment in the event that the Panel decides to grant such additional rights to third parties.

1.10 On 7 May 2003, the Panel decided to provide the following additional rights to all third parties:

- observe the first substantive meeting with the parties;
- receive the second submissions of the parties;
- observe the second substantive meetings with the parties;
- make a brief oral statement during the second substantive meetings with the parties;
- review the summary of their respective arguments in the draft descriptive part of the Panel Report.[7]

1.11 The Panel met with the parties on 14 and 16 May 2003 as well as on 8 and 9 July 2003. The Panel met with the third parties on 15 May 2003. Further to the decision of 7 May 2003, third parties were given the opportunity to observe the meeting of the Panel with the parties on 14 and 16 May 2003 and on 8 and 9 July 2003 as well as make brief statements on 9 July 2003.

1.12 The Andean Community consisting of Bolivia, Colombia, Ecuador, Peru and Venezuela, the Central America countries of El Salvador, Guatemala, Honduras and Nicaragua, forming respective groups for the purposes of this dispute, as well as Costa Rica, Mauritius, Panama, Paraguay and the United States presented third-party submissions at the first substantive meeting of the Panel. These countries/groups, as well as Bolivia, Colombia, Ecuador, Peru and Venezuela individually, and Pakistan, made oral statements during the first substantive meeting of the Panel. Only the Andean Community, Colombia, Panama, Paraguay and the United States made oral statements during the second substantive meeting of the Panel.

1.13 The Panel issued its interim report to the parties on 5 September 2003. The Panel issued its final report to the parties on 28 October 2003.

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[5] Ibid.
[6] Ibid.
[7] See Annex 1 to this Report.

## II. FACTUAL ASPECTS

2.1 This dispute concerns the special arrangements to combat drug production and trafficking (the Drug Arrangements) as provided in Council Regulation (EC) No. 2501/2001 of 10 December 2001, applying a scheme of generalized tariff preferences for the period from 1 January 2002 to 31 December 2004, as well as the implementation of the Drug Arrangements.

### A. THE SCHEME OF GENERALIZED TARIFF PREFERENCES ADOPTED BY THE EUROPEAN COMMUNITIES

2.2 The European Communities applies a scheme of tariff preferences for certain goods from developing countries and economies in transition under Council Regulation (EC) No. 2501/2001[8] ("the Regulation"). The Regulation provides for five different tariff preference arrangements:

(i) the General Arrangements;

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

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

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

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

2.3 Tariff preferences under the General Arrangements are accorded to the countries listed in Annex I to the Regulation. The additional preferences under the Special Incentive Arrangements for the protection of labour rights and the protection of the environment are accorded exclusively to countries which are determined by the European Communities to comply with certain labour and environmental policy standards. The additional preferences under the Special Arrangements for least-developed countries are limited to the least-developed countries listed in Annex I to the Regulation. The Drug Arrangements currently apply to 12 countries. These various arrangements differ in the depth of the tariff cuts provided, the products covered and the requirements that must be met by eligible countries.

### B. THE GENERAL ARRANGEMENTS

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

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

[8] [2001] OJ L346/1 (Exhibit India-6).

C. THE DRUG ARRANGEMENTS

2.6 Article 10 of the Regulation states:

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

2.7 The benefits under the Drug Arrangements currently apply to 12 named countries: Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru and Venezuela. The products included under the Drug Arrangements are listed in column D of Annex IV to the Regulation (the "covered products"). This list comprises products that are included in the General Arrangements as well as several products which are not included under the General Arrangements. The covered products enjoy duty-free access to the European Communities' market, except for products of CN codes 0306 13, 1704 10 91 and 1704 10 99, for which Article 10 of the Regulation prescribes different tariff cuts.[9]

2.8 The result of the Regulation is that the tariff reductions accorded under the Drug Arrangements to the 12 beneficiary countries are greater than the tariff reductions granted under the General Arrangements to other developing countries. In respect of products that are included in the Drug Arrangements but not in the General Arrangements, the 12 beneficiary countries are granted *duty free* access to the European Communities' market, while all other developing countries must pay the *full duties applicable under the Common Customs Tariff*. In respect of products that are included in both the Drug Arrangements and the General Arrangements and that are deemed "sensitive" under column G of Annex IV to the Regulation with the exception for products of CN codes 0306 13, 1704 10 91 and 1704 10 99, the 12 beneficiary countries are granted *duty-free* access to the European Communities' market, while all other developing countries are entitled only to *reductions in the duties applicable under the Common Customs Tariff*.

## III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 India requests the Panel to find that the Drug Arrangements set out in Article 10 of Council Regulation No 2501/2001 are inconsistent with Article I:1 of GATT 1994 and are not justified by the Enabling Clause.[10]

3.2 India requests the Panel to find that the Drug Arrangements have nullified or impaired benefits accruing to India under the GATT 1994. India argues that 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.[11]

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

[10] First written submission of India, para. 67.

[11] First written submission of India, para. 68.

3.3 India states that 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 European Communities to bring the measure at issue into conformity with the GATT 1994.

3.4 India also indicates that according to the second sentence of Article 19.1 of the DSU, the Panel may suggest ways in which the European Communities could implement the Panel's recommendation. For the reasons set out in the introduction in its first submission, India requests the Panel to suggest that the European Communities brings 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 GATT 1994 on terms and conditions satisfactory to Members.[12]

3.5 The European Communities maintains that the Enabling Clause is an autonomous right not an affirmative defence and it excludes the application of Article I. Consequently, in order to establish a violation of Article I:1 of GATT 1994 or a violation of the Enabling Clause, India bears the burden to establish the following:

(a) the Drug Arrangements are not covered by paragraph 2(a) of the Enabling Clause but covered by Article I:1 of GATT 1994; or that,

(b) the Drug Arrangements are covered by paragraph 2(a) of the Enabling Clause but are inconsistent with paragraph 3(c).[13]

3.6 In light of its position on the issue of allocation of burden of proof in this dispute, the European Communities requests the Panel to find:

(a) that the Drug Arrangements fall within the scope of paragraph 2(a) of the Enabling Clause, not within that of Article I:1, and therefore dismiss India's claim under that provision;[14]

(b) that since India asserts that it is not making any claim under the Enabling Clause, the Panel should refrain from further examining whether the Drug Arrangements are consistent with paragraph 3(c) of the Enabling Clause;[15] and,

(c) that all the claims brought by India in this disputes should be dismissed based on reasons given by the European Communities in the proceedings.[16]

3.7 If the Panel were to find that the Drug Arrangements fall within Article I:1of GATT 1994, and that they are *prima facie* inconsistent with that provision, the European Communities requests the

[12] First written submission of India, para. 70.
[13] First written submission of the European Communities, para.19.
[14] First written submission of the European Communities, para.20 and 217; second oral statement of the European Communities, para.81.
[15] Second oral statement of the European Communities, para.25.
[16] First written submission of the European Communities, para. 217.

Panel to find that they are justified under Article XX(b) of GATT 1994 and therefore dismiss all the claims brought by India in this disputes.[17]

## IV. ARGUMENTS OF THE PARTIES

### A. FIRST WRITTEN SUBMISSION OF INDIA

### 1. Factual background

4.1 The European Communities applies a scheme of tariff preferences for certain goods from developing countries and economies in transition under Council Regulation (EC) No. 2501/2001 of 10 December 2001 applying a scheme of generalized tariff preferences for the period from 1 January 2002 to 31 December 2004.[18] The Regulation provides for five different tariff preference arrangements:

(a) the General Arrangements;

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

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

(d) the Special Arrangements for least-developed countries; and

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

4.2 Tariff preferences under the General Arrangements are accorded to the countries listed in Annex I to the Regulation. The additional preferences under the Special Incentive Arrangements for the protection of the labour rights and the protection of the environment are accorded exclusively to countries that are determined by the European Communities to comply with certain labour and environmental policy standards. The additional preferences under the Special Arrangements for least-developed countries are limited to the least-developed countries listed in Annex I to the Regulation. The Drug Arrangements are limited to Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru and Venezuela (the "preferred Members"). These various arrangements differ in the depth of the tariff cuts provided, the products covered, the requirements that must be met by eligible countries and the grounds on which tariff preferences can be reduced or removed.

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

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

[17] Second oral statement of the European Communities, para. 81.
[18] [2001] OJ L346/1 (Exhibit India-6).

4.5 Article 10 of the Regulation states:

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

4.6 The benefits under the Drug Arrangements are limited to the preferred Members. The products included under the Drug Arrangements are listed in Column D of Annex IV to the Regulation (the "covered products"). This list comprises products that are included in the General Arrangements as well as several products which are not included under the General Arrangements. The covered products enjoy duty-free access to the European Communities' market, except where specifically provided in Article 10 of the Regulation.

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

**2. Legal arguments**

(a) The Drug Arrangements are inconsistent with Article I:1 of GATT 1994

4.8 The tariff preferences granted under the Drug Arrangements are inconsistent with Article I:1 of the GATT, which requires the European Communities to accord unconditional MFN treatment to products originating in the territories of all Members. The MFN principle is a fundamental norm of the rules-based multilateral trading system of the WTO. As pointed out by the Appellate Body, this principle has "long been a cornerstone of the GATT and is one of the pillars of the WTO trading system". Embodying this principle, Article I:1 of GATT 1994 provides in relevant part:

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

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

4.10 The corresponding adjective of the adverb "unconditionally" is "unconditional", which is defined as: "Not subject to or limited by conditions; absolute, complete."[19] 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".[20] 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' 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."[21] (emphasis added)

4.11 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.*

4.12 The tariff preferences granted to covered products originating in the preferred Members constitute an "advantage". Under the Drug Arrangements, the European Communities 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.[22] This accords an advantage[23] to covered products originating in the preferred Members.

4.13 The advantages under the Drug Arrangements are available only to the 12 preferred Members. The tariff preferences granted to the covered products originating in the preferred Members are consequently not accorded to like products originating in the territories of all other Members.

4.14 The European Communities fails to accord the advantage of the tariff preferences to like products originating in the territories of other Members unconditionally. The EC Regulation establishing the current GSP scheme does not indicate on the basis of which criteria the preferred Members were selected. The 1998 Regulation extending the previous GSP scheme indicates that the Drug Arrangements were intended to benefit "countries undertaking effective programmes to combat drug production and trafficking".[24] Whether or not the European Communities has in fact applied this criterion uniformly to all Members is legally irrelevant because Article I:1 of GATT 1994 does not permit the European Communities to make the extension of the advantages under the Drug Arrangements conditional upon the *situation or conduct of* the exporting countries.

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[19] *The New Shorter Oxford English Dictionary*, 4th Edition, p. 3465.

[20] Appellate Body Report, *Canada – Autos*, para. 76.

[21] Panel Report, *Canada – Autos*, para. 10.23.

[22] With the exception of like products from least-developed countries covered under the Special Arrangements for least-developed countries. Hereinafter (as regards First written submission of India), unless the context otherwise requires, "all other Members" excludes least-developed country Members.

[23] 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*, 4th Edition, p. 31.

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

(b) The European Communities requested a waiver and implemented the Drug Arrangements without obtaining a waiver

4.15 Under Article IX:3 of the Marrakesh Agreement Establishing the World Trade Organization, a Member may apply for a waiver from its obligations under that Agreement or any of the multilateral trade agreements, including the obligations under Article I:1 of GATT 1994 .

4.16 The European Communities itself acknowledges that a waiver from its obligations under Article I:1 of GATT 1994 was required before it could apply the tariff preferences under the Drug Arrangements. On 24 October 2001, the European Communities submitted a request for a waiver with the following explanation:

> "The revised special arrangements to combat drug production and trafficking that should apply from 1 January 2002 will be open to eligible products listed in Annex I originating in Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru and Venezuela.
>
> Because the special arrangements are only available to imports originating in those Members, a waiver from the provisions of paragraph 1 of Article I of GATT 1994 appears necessary *before they can effectively enter into force* for reasons of legal certainty."[25] (emphasis added)

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

> "In this context the CAN [Andean Community] pointed out the need for the EC to obtain a waiver in order to continue granting preferences to the drug-related regime in the face of pressure brought to bear by countries that consider themselves affected by that regime."[26]

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

4.19 As noted by the Appellate Body, "[T]he prohibition of discrimination in Article 1:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis".[27] Any derogation from the obligation under Article I:1 of GATT 1994 upsets the balance of rights and obligations resulting from market access negotiations. It is therefore essential that any derogation from the MFN obligation is based on conditions that maintain that balance. By implementing the Drug Arrangements without the benefit of a waiver, the European Communities unilaterally upset the balance of right and obligations under the GATT 1994 and deprived all other Members, particularly the developing countries excluded from these arrangements, of their right to compensation for the trade diversion to which they are subjected.

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

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

[27] Appellate Body Report, *Canada – Autos*, footnote 4, para. 84.

(c) The European Communities bears the burden of justifying its Drug Arrangements under the Enabling Clause

4.20 The European Communities bears the burden of demonstrating that the Drug Arrangements are consistent with the Enabling Clause. The Enabling Clause allows Members to derogate from their obligations under Article I:1 of GATT 1994. The Enabling Clause therefore constitutes an affirmative defence that the European Communities might invoke to justify an inconsistency with Article I:1 of GATT 1994. The Member invoking an affirmative defence has the burden of proving that defence.[28] Thus, should the European Communities invoke the Enabling Clause as a defence, it bears the burden of establishing that the Drug Arrangements are justified under the Enabling Clause.

4.21 For the sake of procedural efficiency, India will present its views on this issue in this first submission.

4.22 The Enabling Clause does not absolve developed country Members from their obligation to accord MFN treatment to products originating in developing countries. Paragraph 1 of the Enabling Clause allows Members, notwithstanding Article I of GATT 1994, to accord differential and more favourable treatment to developing countries without according such treatment to other Members under the situations enumerated in paragraph 2. In this dispute, the relevant situation is that described under paragraph 2(a), i.e., preferential tariff treatment accorded by developed country Members to products originating in developing countries in accordance with the GSP. Paragraphs 1 and 2(a) can be paraphrased as follows:

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

4.23 Under Article I:1 of GATT 1994, any advantage, favour, privilege or immunity granted to a product originating in any country shall be granted immediately and unconditionally to the like product originating in all *other* Members. "Other Members" include both developed and developing country Members. Thus, under this rule there can be no discrimination between like products of both developed and developing countries.

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

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

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

4.26 There would be no need to permit in paragraph 2(d) special treatment of the least-developed countries within the category of "developing countries receiving favourable treatment" if

[28] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:1; 323, at 337; Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 133.

paragraph 2(a) of the Enabling Clause permitted developed country Members to accord advantages to a selected group of developing countries

4.27 As pointed out above, the MFN principle embodied in Article I:1 of GATT 1994 comprises two equally important requirements: First, advantages related to customs duties must be extended to *all other Members* and, second, the extension must be unconditional, that is *independent of the situation or conduct of the exporting country*. The only 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.

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

4.29 The Appellate Body has stated that panels should base their interpretations on the terms of the WTO agreements and has ruled that the process of interpretation cannot be used to introduce concepts into an agreement that are simply not there.[29] The Enabling Clause establishes a carefully negotiated exception from a fundamental norm of the rules-based multilateral trading system. This requires the Panel to apply the principles of interpretation developed by the Appellate Body with particular care. If the Panel were to interpret the Enabling Clause to permit developed countries to discriminate between developing countries by making the extension of tariff preferences subject to conditions with respect to the situation or conduct of those countries, it would introduce a concept that the drafters of this Clause never contemplated. The Enabling Clause would then no longer be the legal basis for GSP schemes beneficial to all developing countries but for tariff preferences under which market access benefits are diverted from some to other developing countries to realize the foreign policy objectives of the developed countries. There is no clear and explicit wording on which the Panel could base an interpretation with such serious consequences. Furthermore, the Panel cannot adopt an interpretation that promotes discrimination. The Preamble to the Marrakesh Agreement Establishing the World Trade Organization, which forms part of the "context … object and purpose"[30] of the WTO Agreement, provides, *inter alia*:

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

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

(d) The Drug Arrangements cannot be justified under the Enabling Clause

4.31 The Enabling Clause justifies only preferences that do not discriminate between developing countries. Paragraph 2(a) of the Enabling Clause authorizes preferential treatment "in accordance with the Generalized System of Preferences". Footnote 3 defines the term "Generalized System of Preferences" as the system described in the 1971 Waiver relating to the establishment of "generalized,

[29] Appellate Body Report, *India – Patents (US)*, para. 45.
[30] As used in Article 31.1 of the Vienna Convention on the Law of Treaties.

non-reciprocal and *non-discriminatory* preferences beneficial to the developing countries." (emphasis added)

4.32 While the Enabling Clause does not establish the obligation to grant preferences, it does not permit *any* preference under *any* scheme called GSP but only preferences accorded in the framework of GSP schemes as described in the 1971 Waiver. This means, *inter alia*, that the preferences must be non-discriminatory between developing countries. Developed country Members applying preferential schemes that do not meet this requirement have often obtained a waiver.[31]

4.33 The preferences under the Drug Arrangements discriminate between developing countries because they are not extended to all developing countries. The benefits under the Drugs Arrangements are limited to the 12 preferred Members specifically designated by the European Communities. 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".[32] Hence, "non-discriminatory" preferential treatment of developing countries means treatment that does not make a distinction between different categories of developing countries. Preferential tariff schemes limited to a named group of developing countries cannot be characterized as "non-discriminatory" on any reasonable construction of this term. By limiting the Drug Arrangements to the 12 preferred Members, the European Communities discriminates between developing countries.

4.34 Even if the European Communities were to establish that the preferred Members are the only developing countries that are undertaking effective programmes to combat drug production and trafficking, the Drug Arrangements would still not be consistent with the requirement of non-discrimination set out in the Enabling Clause. As pointed out above, there is nothing in the Enabling Clause that exempts the European Communities from the obligation under Article I:1 of GATT 1994 to extend the tariff preferences accorded under the Drug Arrangements unconditionally to all developing countries. GSP preferences conditional upon the beneficiaries' drug-related situation and conduct are therefore not covered by the Enabling Clause. Furthermore, making a distinction in the treatment of developing countries on the basis of their drug-related situation is discriminatory.

4.35 The Enabling Clause covers only preferences that are beneficial to all developing countries and are designed to respond positively to their needs. As pointed out above, paragraph 2(a) of the Enabling Clause covers only preferences that are "beneficial to *the* developing countries".[33] The use of the definite article "the" with reference to "developing countries" makes clear that the GSP schemes must benefit *all* developing countries.

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

[32] *The New Shorter Oxford English Dictionary*, 4th Edition, p. 689.

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

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

> "3. Any differential and more favourable treatment provided under this clause:
>
> (c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified to respond positively to the development, financial and trade needs of developing countries."

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

4.38 The Drug Arrangements are not beneficial to all developing countries. As pointed out in the introductory section of this submission, the tariff preferences accorded by the European Communities to the 12 beneficiary countries do not involve a transfer of resources from the European Communities to those countries. The main effect of the preferences is to shift market access opportunities from the developing countries that are excluded from the regime to the countries selected by the European Communities. To that extent, the true "donor" under the Drug Arrangements is not the European Communities but each of the countries in the Americas, Africa and Asia that suffers from the trade diversion caused by the preferences. For example, in the case of the tariff preferences accorded to textiles and clothing products from Pakistan, the true "donor" countries are India and other developing countries that compete directly with Pakistan's exports to the European Communities. The tariff preferences under the Drug Arrangements are beneficial to some developing countries and detrimental to others and consequently do not comply with paragraph 2(a) of the Enabling Clause.

4.39 The Drug Arrangements are not designed to respond positively to the development, financial and trade needs of developing countries. The Drug Arrangements cover countries that are a source of production and export of illegal drugs consumed in the European Communities. The European Communities depends on the cooperation of these countries to resolve its own drug problems. The preferences accorded under the Drug Arrangements have therefore been designed to respond positively to the needs of the European Communities rather than those of developing countries.

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

4.41 The Drug Arrangements do not meet any of these conditions. They discriminate between developing countries because they apply only to 12 developing countries. They are not beneficial to the developing countries because they create market access opportunities for some of them at the expense of others. And, finally, they are not designed to respond positively to the needs of developing countries but those of the European Communities. The Drug Arrangements have for these reasons no resemblance with the GSP schemes authorized under the Enabling Clause.

B. FIRST WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

## 1. The Enabling Clause

(a) The Enabling Clause excludes the application of Article I:1 of the GATT

4.42 The Enabling Clause is not an "affirmative defence" justifying a violation of Article I:1. It is a self-standing regime which excludes the application of Article I:1. Unlike its predecessor, the Decision of the CONTRACTING PARTIES of 25 June 1971 (the "1971 Waiver"), the Enabling Clause is a not a temporary waiver from Article I:1 of GATT 1994. The Enabling Clause confers an autonomous and permanent right to grant certain types of "differential and more favourable treatment" to developing countries "notwithstanding Article I:1 of the GATT". This right is one of the most important and tangible expressions of the principle of "special and differential treatment" for developing countries included in the WTO Agreement.

4.43 Similarly, in *Brazil – Aircraft* the Appellate Body held that Article 27 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), a provision granting "special and differential treatment" to developing countries with respect to export subsidies, was not an "affirmative defence", but rather excluded the application of Article 3.1(a) of the same Agreement. Like Article 27 of the SCM Agreement, the Enabling Clause provides "special and differential treatment" to developing countries by conferring to all Members the right to accord certain types of "differential and more favourable treatment" to developing countries.

4.44 The fact that the Enabling Clause is not an "affirmative defence" but an autonomous right has two important implications for this dispute, namely, first, in order to establish a violation of Article I:1 of GATT 1994, India must establish first that the Drug Arrangements are not covered by paragraph 2(a) of the Enabling Clause; and 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).

(b) The Enabling Clause does not impose an obligation to accord unconditional MFN treatment to the developing countries

*(i) The Enabling Clause does not impose an obliation to grant "differential and more favourable treatment" to* all *developing countries on an MFN basis*

4.45 In paragraph 1 the term "developing countries" is not preceded by any qualifying term suggesting that "differential and more favourable treatment" must be granted necessarily to *all* developing countries. If a Member grants "differential and more favourable" treatment to *some* developing countries, such treatment falls within the ordinary meaning of the phrase "differential and more favourable treatment to developing countries".

4.46 India's reading whereby the term "other Members" in paragraph 1 refers to "developed countries" is not warranted by the ordinary meaning of that term. If a Member grants preferences to *some* developing countries, any Member that does not receive such preferences (whether developed or developing) falls within the ordinary meaning of the term "other Members". Contextually, this is confirmed in particular by footnote 3 to paragraph 2(a), as well as by paragraphs 2(c) and 2(d) of the Enabling Clause.

4.47 Footnote 3 provides that the preferences granted under paragraph 2(a) must be "non-discriminatory". This does not imply that *all* developing countries must be granted identical preferences and it does not prevent developed countries from treating differently developing countries which, according to objective criteria, have different development needs.

4.48 Paragraph 2(d) allows developed Members to give "special treatment" to the "least developed among the developing countries". This is not an "exception" to paragraph 1 but one of the types of measures authorized by paragraph 1 as evidenced by the introductory clause of Paragraph 2. The "following" includes letter (d) of Paragraph 2. Therefore, Paragraph 1 "applies" also to that letter. If paragraph 1 prohibited differentiation between developing countries, it would be impossible to reconcile paragraph 2(d), which expressly envisages such differentiation, with paragraph 1.

4.49 Paragraph 2(d) would not become redundant if paragraph 2(a) allowed differentiation among developing countries. While paragraph 2(a) is concerned exclusively with "preferential tariff treatment", paragraph 2(d) covers any kind of "special treatment", including therefore non-tariff preferences. Furthermore, paragraph 2(d) applies in the context of "any general or specific measures" in favour of developing countries, while the preferences envisaged in paragraph 2(a) must be part of a generalized system of preferences.

4.50 Finally, paragraph 2(c) allows developing countries to enter into "regional or global arrangements" for the "mutual reduction or elimination of tariffs". By definition, these "regional" arrangements do not include all developing countries. Thus, if paragraph 1 did not allow the granting of "differential and more favourable treatment" to *some* developing countries, the regional arrangements mentioned in paragraph 2(c) would fall outside the scope of paragraph 1.

*(ii) The Enabling Clause does not impose an obligation to grant differential and more favourable treatment "unconditionally"*

4.51 Nothing in paragraphs 1, 2 or 3 imposes an obligation to grant preferential treatment "unconditionally". Quite to the contrary, such requirement could not be reconciled with footnote 3 to paragraph 2(a) and paragraph 2(c) of the Enabling Clause.

4.52 A tariff preference is "conditional" within the meaning of Article I:1 of GATT 1994 when it is provided in exchange for some form of compensation. On the other hand, the notion of "reciprocity" involves a mutual exchange of the same or similar benefits. Thus, in the specific context of a trade agreement such as the WTO Agreement, the term "reciprocal" refers to those conditions which require the granting of equivalent trade concessions by way of compensation for the trade benefits received from another Member.

4.53 Footnote 3 to paragraph 2(a) of the Enabling Clause only prohibits conditions of reciprocity. It does not prohibit other conditions providing for non-reciprocal compensation. If the preferences granted under the Enabling Clause had to be "unconditional" in any event by virtue of Article I:1 GATT 1994, it would have been superfluous to specify in paragraph 2(a) that the preferences granted as part of a GSP scheme must be "non-reciprocal".

4.54 Additionally, "regional or global arrangements" for the "mutual reduction or elimination of tariffs" under paragraph 2(c) are, by definition, "conditional" because they consist of a reciprocal exchange of tariff concessions. If any preferences granted to developing countries under the Enabling Clause had to be "unconditional", any "global" or "regional" arrangement entered into under paragraph 2(c) would be in breach of Article I:1 of GATT 1994.

*(iii) In any event, the Drug Arrangements are "unconditional"*

The case law on the interpretation of the term "unconditionally"

4.55 The term "unconditionally" has not been interpreted yet by the Appellate Body. It has been addressed in two panel reports, *Indonesia – Autos* and *Canada – Autos*, which have reached different and conflicting interpretations. Both interpretations are incorrect. In *Indonesia – Autos*, the panel cited a 1952 panel report, *Belgian Family Allowances*, which is notoriously unclear. *Belgian Family*

*Allowances* is not relevant for the interpretation of "unconditionally" but instead for the interpretation of the term "like". It stands for the proposition that differences in treatment of imports cannot be based on differences in characteristics of the exporting country which do not result in differences in the goods themselves, because such differences do not make the goods "unlike".

4.56 The interpretation made in *Indonesia – Autos* was effectively rejected in *Canada – Autos*. However, the Panel also failed in this case to give meaning to the term "unconditionally" because Article I:1 does not say that conditions must be imposed on an MFN basis, but instead that MFN treatment must be accorded "unconditionally". This means that certain "conditions" are prohibited *per se*, irrespective of whether they are applied discriminatorily. However, contrary to the findings of the panel in *Indonesia – Autos*, the prohibited conditions are not those which are unrelated to the imported goods, but instead those which require providing some form of compensation for receiving the MFN treatment.

The ordinary meaning of "unconditionally"

4.57 An obligation or a right is "conditional" when its existence is dependent upon the occurrence of a certain event as evidenced by various dictionary definitions. Legal classifications that distinguish among persons, things or countries based on inherent or relatively permanent characteristics are not, properly speaking, "conditions". Indeed, if such distinctions were considered as "conditions", all laws or regulations would have to be characterized as "conditional" because it is in the nature of laws or regulations to draw that kind of distinction.

4.58 The selection of the beneficiary countries of the Drug Arrangements is made by the European Communities' authorities on the basis of an overall assessment of the gravity of the drug problem in each developing country. Whether or not a developing country is particularly affected by the drug problem at the time when the selection of the beneficiaries is made is not a "future" or "uncertain" event. It is an existing and relatively permanent situation which is both certain and known to the European Communities authorities and, therefore, cannot be considered as a "condition".

4.59 India's view that treating differently, Members which are in a different "situation", amounts to a "condition", together with India's contention that paragraph 1 of the Enabling Clause does not "exempt" from the obligation to accord the preferences "unconditionally", leads to an absurd result when applied to paragraph 2(d) of the Enabling Clause. The distinction between least-developed countries and other developing countries envisaged by paragraph 2(d), like the distinction between developing countries particularly affected by the drug problem and other developing countries, is also related to the "situation" of those countries. Thus, on India's construction, any preferences granted to the least-developed countries would be "conditional" and, therefore, prohibited by Article I:1 of GATT 1994.

4.60 India's interpretation of the term "unconditionally" is based upon a passage included in the panel report in *Canada – Autos*, which is a mere *obiter dictum* insofar as it alludes to the *situation* of countries. Moreover, the Appellate Body did not endorse the *dictum* but neither did it address at all the meaning of "unconditionally".

The meaning of "unconditionally" in the context of MFN clauses

4.61 In the context of MFN clauses, the term "unconditionally" alludes to a specific type of "condition", namely to those conditions that require providing some concession by way of compensation for receiving MFN treatment. Article I:1 of GATT 1994 was modelled on the standard MFN clause of the League of Nations, which in turn derived from similar clauses included in bilateral trade agreements. This was preceded by various "conditional" and "unconditional" treaties which were concluded by the United States and European countries. The difference between the "unconditional" and "conditional" form of the MFN clause was already explained by the U.S.

Department of State and in the reports of the Economic Committee of the League of Nations. Additionally, the same notion of conditional MFN is reflected in the *Draft Articles on the Most-Favoured-Nation Clause* of the International Law Commission. They distinguish between, on the one hand, MFN clauses that are "not made subject to compensation" and, on the other hand, two types of conditional MFN clauses: those "subject to reciprocal treatment" and those "subject to a condition of compensation" other than a condition of reciprocity. The term "condition of compensation" is defined as a "condition providing for compensation of any kind", whereas "condition of reciprocal treatment" is defined as "condition of compensation providing for the same or, as the case may be, equivalent treatment".

4.62 Contrary to this traditional understanding of "conditionality" 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 European Communities.

(c) The Drug Arrangements are consistent with the Enabling Clause

*(i) The Drug Arrangements are "non-discriminatory"*

4.63 The "non-discrimination" standard set out in paragraph 2(a) is different from the MFN standard in Article I:1 of GATT 1994. While Article I:1 of GATT 1994 is concerned with providing equal conditions of competition for imports from all Members, the purpose of the Enabling Clause is to promote the trade of all developing country Members commensurately with their respective development needs.

4.64 Paragraph 2(a) does not prevent Members from treating differently developing countries which, according to objective criteria, have different development needs. Treating differently situations that are objectively different is not discriminatory. Different treatment may even be necessary in order to avoid indirect discrimination, as well as to comply with the requirement in paragraph 3(c) of the Enabling Clause that the preferences must respond positively to the development needs of developing countries.

The interpretation of the term "non-discriminatory" in paragraph 2(a)

4.65 In the English language, the verb "discriminate" has a neutral and a "negative" meaning with the latter the most common when used in a legal context. This is evidenced by relevant literature and jurisprudence of international and municipal tribunals. "Discrimination" only occurs if equal situations are treated unequally (or if unequal situations are treated equally). This requires considering whether the distinction pursues a legitimate aim and whether there is a "sufficient" connection between that objective, the nature of the distinction and the differences between the situations concerned on which the distinction is based.

4.66 Contextually, paragraph 3(c) of the Enabling Clause refers to "development, financial and trade needs of developing countries" which are the individual needs of those countries. Those needs may vary between different categories of developing countries, as well as over time. In fact, the provision that the preferences shall be "modified, if necessary", assumes that those needs will vary.

4.67 Additional contextual guidance is provided by Article III:4 as interpreted by *US – Section 337* and *Korea – Various Measures on Beef*. Equally, Article XVII of the General Agreement on Trade in Services ("GATS") provides that the national treatment standard in that provision does not require formally equal treatment. These provisions illustrate that in some cases formally unequal treatment may be required in order to achieve a given standard of equality. The chapeau of Article XX of GATT 1994 also confirms that in assessing the existence of "discrimination" between countries it must be taken into account whether the same conditions prevail in the countries concerned. It is implicit in the chapeau that there is no "discrimination" if two countries are treated differently because

different conditions prevail in each of them and, by the same token, that equal treatment of unequal conditions may amount to discrimination. This was recognized by the Appellate Body in *US – Shrimp*.

4.68 Finally, Article XIII shows that in the context of the GATT formal inequality is not synonymous with "discrimination". The existence of discrimination must be established having regard to the specific objective of each provision where the non-discrimination requirement is found. The objective of the Enabling Clause is to promote the exports from the developing countries commensurately with their respective development needs. Having regard to that objective, it is not discriminatory to grant additional preferences to those developing countries that have special development needs.

4.69 The object and purpose of paragraph 2(a) the Enabling Clause is expressed in the first recital of the 1971 Waiver, to which footnote 3 of the Enabling Clause refers as corroborated by Paragraph 3 of Article XXXVI of GATT 1994 and the Preamble to the WTO Agreement. The above provisions set forth the objective of promoting the trade of *all* developing countries, and not just of the most "competitive" amongst them. Furthermore, the growth in trade must be *commensurate* with their development needs. That objective is best achieved if tariff preferences are designed so as to take into account that some developing countries have special development needs.

4.70 The European Communities' interpretation of the term "non-discriminatory" furthers the above objectives of the Enabling Clause and the WTO Agreement because it allows providing 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.

Treating differently the developing countries that are particularly affected by the drug problem is not "discriminatory"

4.71 The General Assembly of the United Nations recognized that the drug problem is often related to development problems and that those links and the promotion of the economic development of countries affected by the illicit drug trade require, within the context of shared responsibility, strengthened international cooperation in support of alternative and sustainable development activities. The International Narcotics Control Board (INCB) also concludes that illicit drug production and trafficking prevents long-term growth in the developing countries affected by that problem. It destabilises the economy and the political system as well as the civil society. Finally, the United Nations International Drug Control Programme ("UNDCP") concluded that the short-term gains of illicit drug production and trafficking "are far outweighed by the social and economic ills ushered in by illicit drugs", such as lower productivity, the spread of AIDS, environmental decay and the increased risk of armed conflicts.

4.72 In order to fight effectively the drug problem it is necessary to apply a balanced approach, which combines initiatives to reduce the illicit demand for drugs with those to reduce their illicit supply. In turn, the latter requires complementing the actions to eradicate illicit production and suppress illicit trafficking with the promotion of alternative economic activities. Trade preferences support those alternative activities and, therefore, constitute an appropriate response to the special development needs of those developing countries which are particularly affected by the drug problem.

4.73 This strategy is in line with the relevant UN Conventions, in particular with the 1988 *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, which envisages expressly that the parties may cooperate to increase the effectiveness of efforts to control the supply of drugs by supporting alternative economic activities. It is also in line with the guidelines adopted by the *International Conference on Drug Abuse and Illicit Trafficking* held in Vienna in 1987 or the Political Declaration adopted by the General Assembly of the United Nations on 23 February 1990. Of particular importance is the *Action Plan on International Co-operation on the Eradication of Illicit*

*Drug Crops and on Alternative Development* adopted by the General Assembly of the United Nations in 1998 (the "1998 Action Plan"). This plan provides that the States concerned should adopt national crop reduction and elimination strategies and that such strategies should include "comprehensive measures such as programmes in alternative development, law enforcement and eradication". According to the 1998 Action Plan, "the development and implementation of alternative development is primarily the responsibility of the State in which illicit cultivation takes place". Nevertheless, the 1998 Action Plan recognizes that the success of alternative development depends on the support of the international community. Accordingly, other States and the UN organizations are encouraged to provide adequate financial and technical assistance. As a complementary measure, other States are also encouraged to provide greater access to their markets.

4.74 The call to provide greater market access was renewed by the General Assembly of the United Nations in its resolution of 19 December 2001 and the resolution of the UN Commission on Narcotic Drugs of 15 March 2002. The importance of providing greater access to international markets has also been acknowledged in the preamble of the Agreement on Agriculture. Finally, the European Communities recalls that another WTO Member, the United States, grants trade preferences to the Andean countries under the Andean Trade Preference Act ("ATPA") with the same objective as the European Communities under the Drug Arrangements. The ATPA was granted a waiver in 1992, that was renewed in 1996.

The application of the Drug Arrangements is "non-discriminatory"

4.75 The designation of the beneficiary countries of the Drug Arrangements is based on an overall assessment of the gravity of the drug problem in each developing country made in accordance with objective, non-discriminatory criteria. That assessment takes into account the importance of the production and/or trafficking of drugs in each country, as measured on the basis of available statistics, as well as their effects. In this regard, it is recalled that the implications of the drug problem are multifaceted. The selection of beneficiary countries thus aims at taking into account all relevant circumstances, including in particular: the impact on the economic situation; the health and environmental impact; and the impact on the stability of the State and the civil society.

4.76 Coca products (coca leaf, coca paste, cocaine, crack, free base) and opium products (opium, morphine, heroin) account for the bulk of the global illicit drug trade in monetary terms and are the illicit drugs that have the most socio-economic impact world-wide. Accordingly, the selection of the beneficiaries is based on data relating two those types of narcotic drugs.

4.77 The geographical patterns of drug trafficking are less stable than those of drug production. Nevertheless, the amount of drug seizures in the various countries allows charting of certain trafficking routes. Thus, opiates come mainly from Afghanistan via Pakistan and Iran into the European Union, while cocaine is shipped from the Andean countries to North America and the European Union via Central America and the Caribbean. Seizures of cocaine are concentrated in the Americas, with the Central American and Andean countries playing a preponderant role.

4.78 The selection of the 12 beneficiary countries of the Drug Arrangements is non-discriminatory. The relevant statistics on the production and seizures of drugs support European Communities' contention.[34]

[34] First written submission of the European Communities, paras. 120-124.

(a) The main opium production figures are as follows:[35]

Fig. 1 Production of opium (in metric tonnes)

| | 1999 | 2000 | 2001 | 2002 (estim.) | Average |
|---|---|---|---|---|---|
| Afghanistan | 4,565 | 3,276 | 185 | 3,422 | 2,862 |
| Myanmar | 865 | 1,087 | 1,097 | 829 | 970 |
| Laos | 124 | 167 | 134 | 124 | 137 |
| Colombia | 88 (102) | 88 | 88 | n.a. | 88 (93) |

(b) The main coca leaf producers and their production figures are:[36]

Fig. 2 Production of coca leaf (in metric tons)

| | 1999 | 2000 | 2001 | Average |
|---|---|---|---|---|
| Colombia | 260,995 (195,000) | 266,161 | 236,035 | 254,397 (232,340) |
| Peru | 69,200 (72,500) | 54,400 | 49,260 | 54,903 (56,003) |
| Bolivia | 22,800 | 13,400 | 20,200 | 18,800 |

(c) The figures for the main opium seizures are:

Fig. 3 Seizures of opium (in kgs.)[37]

| | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 |
|---|---|---|---|---|---|---|---|
| Iran | 117,095 | 126,554 | 149,577 | 162,414 | 154,454 | 204,485 | 179,053 |
| Pakistan | 14,663 | 109,420 | 7,423 | 7,300 | 5,022 | 16,320 | 8,867 |

(d) The figures of the main seizures of heroin are shown as below:

Fig.4 Seizures of heroin and morphine (in kgs.)[38]

| | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 |
|---|---|---|---|---|---|---|---|
| Iran | 13,767 | 13,121 | 11,235 | 20,936 | 25,186 | 28,794 | 26,953 |
| Pakistan | 6,444 | 10,760 | 5,872 | 6,156 | 3,364 | 4,974 | 9,492 |

[35] UNDCP, *World Drug Report*, 2000, p. 160.; UNDCP, *Global Illicit Drug Trends* 2002, p. 45 *et seq.* (figure in bracket is based on the *World Drug Report*). The estimates for 2002 are found in UNODC, *The Opium Economy in Afghanistan*, p. 30.

[36] UNDCP, *World Drug Report*, 2000, p. 161; UNDCP, *Global Illicit Drug Trends* 2002, p. 55 *et seq.* (figures in brackets are based on the *World Drug Report*).

[37] Figures for 1994 to 1998 are from UNDCP, *World Drug Report*, 2000, p. 167; figures for 1999 from UNDCP, *Global Illicit Drug Trends*, 2001, p. 94; and figures for 2000 from UNDCP, *Global Illicit Drug Trends*, 2002, p. 80.

[38] Figures for 1994 to 1998 are from UNDCP, *World Drug Report*, 2000, p. 168; figures for 1999 from UNDCP, *Global Illicit Drug Trends 2001*, p. 107; and figures for 2000 from UNDCP, *Global Illicit Drug Trends*, 2002, p. 94.

(e) The figures for the main cocaine seizures are:

Fig.5 Seizures of cocaine (in kgs.)[39]

| | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 |
|---|---|---|---|---|---|---|---|
| Colombia | 69,592 | 59,030 | 45,779 | 42,044 | 107,480 | 63,945 | 110,428 |
| Mexico | 22,117 | 22,708 | 23,835 | 34,952 | 22,597 | 34,623 | 23,196 |
| Panama | 5,177 | 7,169 | 8,168 | 15,177 | 11,828 | 3,140 | 7,400 |
| Bolivia | 10,021 | 8,497 | 8,305 | 13,689 | 10,102 | 7,707 | 5,559 |
| Peru[40] | 10,634 | 22,661 | 19,695 | 8,796 | 9,937 | 11,307 | 11,848 |
| Guatemala | 1,900 | 956 | 3,951 | 5,098 | 9,217 | 9,965 | 1,518 |
| Venezuela | 6,035 | 6,650 | 5,906 | 16,741 | 8,159 | 12,149 | 14,771 |
| Costa Rica | 1,411 | 1,170 | 1,873 | 7,857 | 7,387 | 1,999 | 5,781 |
| Brazil | 12,028 | 5,815 | 4,071 | 4,309 | 6,560 | 7,646 | 5,517 |
| Nicaragua | 1,338 | 1,507 | 398 | 2,790 | 4,750 | 833 | 961 |
| Ecuador | 1,790 | 4,284 | 9,534 | 3,697 | 3,854 | 10,162 | 3,308 |
| El Salvador | No report | 65 | 99 | 234 | 45 | 38 | 432 |
| Honduras | 930 | 408 | 3,275 | 2,187 | 4,750 | 833 | 1,215 |

*(ii) The Drug Arrangements are "beneficial to the developing countries"*

4.79 India's argument that the use of the definite article *the* before the term "developing countries" in footnote 3 "makes clear that the GSP schemes must benefit *all* developing countries" is by no means required by the ordinary meaning of footnote 3. To say that the preferences must be "beneficial to *the* developing countries" is not the same as saying that they must be beneficial to *all* developing countries, let alone that they must be beneficial to *each and every* developing country. The phrase "beneficial to the developing countries" means simply that the preferences must be beneficial to *the* developing countries which receive them, rather than to *the* developed countries which grant them. The question of whether preferences may be granted to *some* developing countries is specifically addressed by the requirement that preferences must be "non-discriminatory". As shown above, that term does not require that the same preferences be granted to each and every developing country.

4.80 In the alternative, the European Communities submits that it would be entirely consistent with the ordinary meaning of the phrase "beneficial to the developing countries" to consider that this requirement is met if, overall, a preference is beneficial to all the developing countries taken together.

4.81 Furthermore, potentially, the Drug Arrangements are "beneficial" to each and every developing country because the list of beneficiaries may be extended to cover any developing country which, following a change of circumstances, qualifies as a country particularly affected by the production or trafficking of drugs.

4.82 Contextually, first, the requirement that the preferences must be "non-discriminatory" does not imply that identical preferences must be granted to all developing countries. Yet, if the preferences had to be "beneficial" to each and every developing country, it would be necessary to accord identical preferences to all developing countries. Thus, India's interpretation would render redundant the requirement that the preferences must be "non-discriminatory".

[39] Figures for 1994 to 1998 from UNDCP, *World Drug Report*, 2000, p. 169; figures for 1999 and 2000 from UNDCP, *Global Illicit Drug Trends* 2002, p. 119 *et seq*.

[40] According to the statistics of the Organization of American States, the figures for Peru are generally much higher. 1995: 29,147; 1996: 20,398; 1997: 11,111; 1998: 21,989; 1999: 32,846.

4.83 Second, footnote 3 is attached to paragraph 2(a) which refers to "preferential tariff treatment accorded … to products originating in developing countries", rather than "… in *the* developing countries". In turn, paragraph 2(a) applies within the framework of paragraph (1), which authorizes "differential and more favourable treatment to developing countries", and not to "*the* developing countries". By India's own logic, the omission of the word "*the*" before "developing countries" in paragraphs (1) and 2(a) would confirm that, as argued by the European Communities, developed countries are authorized to grant preferences to *some* developing countries. Thus, India's interpretation of the phrase "beneficial to the developing countries" would give rise to a conflict between footnote 3 and those two provisions.

4.84 Third, India's interpretation would prevent developed countries from responding to the individual development needs of developing countries, contrary to the requirement set forth in paragraph 3(c) of the Enabling Clause.

4.85 Finally, it is recalled that the Implementation Decision adopted by the WTO Ministerial Conference at Doha reaffirms that "preferences granted to developing countries pursuant to the Decision of the Contracting Parties of 28 November 1979 ('Enabling Clause') should be generalized, non-reciprocal and non-discriminatory." The fact that the Ministerial Conference did not deem it necessary to reaffirm that the preferences should be "beneficial to the developing countries" is evidence that this phrase cannot have the far-reaching implications asserted by India. Furthermore, by referring to "preferences granted to developing countries", rather than to "*the* developing countries" the Implementation Decision provides further confirmation that preferences do not have to be granted to each and every developing country.

4.86 India's interpretation of the phrase "beneficial to developing countries" would run contrary to the object and purpose of the Enabling Clause and the WTO Agreement to promote the exports of developing countries commensurately with their respective development needs.

*(iii) The Drug Arrangements respond positively to the needs of developing countries*

4.87 India's argument that the Drug Arrangements are not designed to respond positively to the needs of developing countries is manifestly unfounded and illogical. It amounts to saying that because drug abuse is a concern of the European Communities, drug production and trafficking can have no bearing on the development needs of the countries affected by that problem. This is an obvious *non-sequitur*.

4.88 There is a close link between drugs and development, with the consequence that the countries which are particularly affected by the drug problem have special development needs. As demonstrated above, the Drug Arrangements have been designed to respond to those needs by supporting alternative economic activities, a strategy which is in conformity with UN recommendations.

4.89 Furthermore, the European Communities recalls that the Agreement on Agriculture has recognized that providing greater access to the markets of the developed countries is an appropriate response to the particular development needs of the countries most affected by the drug problem.

4.90 It is recalled also that, when granting the ATPA waiver, the WTO recognized expressly that those preferences responded to the development needs of the beneficiary countries. There is no fundamental difference between the ATPA preferences and the European Communities' Drug Arrangements, other than the country coverage, and, therefore, no valid reason to consider that the Drug Arrangements, unlike the ATPA preferences, do not respond to the development needs of the beneficiaries.

## 2. Article XX(b) of GATT 1994

(a) Introduction

4.91 In the event that the Panel were to find that the Drug Arrangements fall outside the scope of paragraph 2(a) of the Enabling Clause, or that they are inconsistent with paragraph 3(c), the European Communities submits that the Drug Arrangements would be justified under Article XX(b) of GATT 1994 as being necessary for the protection of human life or health in the European Communities.

(b) The Drug Arrangements are necessary for the protection of human life or health

*(i) Drugs pose a risk to human life or health*

4.92 The European Communities considers to be beyond dispute that narcotic drugs pose a risk to human life or health in the European Communities. Indeed, as recognized by the General Assembly of United Nations, "drugs are a grave threat to the health and well-being of all mankind". The 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) and opium products (opium, morphine, heroin) pose particularly serious risks to human life and health as described by the United Nations Office on Drugs and Crime ("UNODC").

4.93 According to the European Monitoring Centre for Drugs and Drugs Addiction (the "EMCDDA"), between 7,000 and 8,000 direct or "acute" drug-related deaths are reported every year in the whole of the European Communities. To this must be added a much larger number of indirect drug related deaths, which are the consequence of associated risks, such as infectious diseases acquired through a drug using habit/way of life, e.g. HIV/AIDS, complications arising from an infection acquired through long-term drug misuse, e.g. hepatitis causing liver failure, violent deaths related to the supply and/or use of illegal drugs and accidents (including road traffic accidents) arising from impaired judgement as a result of the consumption of drugs.

4.94 The EMCDDA has estimated that, as a result of the direct and indirect risks posed by drugs, the overall mortality rate among problem drug users in the European Communities is up to 20 times higher than among the general population of the same age.

4.95 The concern with the health and other social problems caused by narcotic drugs is universal and has led to the adoption of a comprehensive system of international control of those substances. At present, that system is based on the Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol (the "1961 Convention") and the Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (the "1988 Convention"). As India is also a party to the 1961 and the 1988 Conventions, India would be estopped from arguing in this dispute that narcotic drugs do not pose a serious risk to human health or life for the purposes of Article XX(b).

*(ii) The Drug Arrangements are "necessary" to fight drug production and trafficking*

The "values" pursued by the Drug Arrangements

4.96 The Appellate Body held in *Korea – Various Measures on Beef* that "the more vital or important the common interests or values pursued, the easier it would be to accept as necessary the measures designed to achieve those ends". As emphasized by the Appellate Body in *EC – Asbestos*, the preservation of human life and health is "both vital and important in the highest degree". Accordingly, in the present case the term "necessary" should be interpreted by the Panel according to its broadest possible meaning.

Contribution of the Drug Arrangements to the protection of human life and health

4.97 The Drug Arrangements contribute to the objective of preserving the life and health of the European Communities' 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 European Communities.

4.98 There is a clear link between drug control and economic development as recognized by the General Assembly of United Nations and the INCB. The Drug Arrangements take account of that link. They seek to promote the development of alternative economic activities to replace illicit drug production and trafficking and, more generally, to raise the overall level of economic development of the countries concerned, so as that they can generate the resources and capacity required for enforcing an effective system of drug control.

4.99 The Drug Arrangements are embedded in a strategy that encompasses four different but related types of actions: (i) reducing the demand of drugs, through prevention, treatment and rehabilitation; (ii) preventing drug supply through law enforcement action; (iii) reducing illicit cultivation by actions such as the promotion of alternative development; and (iv) promoting international cooperation. Technical and financial assistance to the developing countries affected by drug production or trafficking does not render the Drug Arrangements unnecessary but rather the Drug Arrangements are a necessary complement to such technical and financial assistance.

Trade impact of the Drug Arrangements

4.100 As required by paragraph 3(a) of the Enabling Clause, the Drug Arrangements have been designed to promote trade from the beneficiary countries and not to raise barriers to the trade of other countries. There is no evidence that, in practice, the Drug Arrangements have displaced imports from other developing countries to any significant extent. The trade preferences granted under the Drug Arrangements are also subject to the general "graduation" mechanism provided for in the GSP Regulation.

(c) The Drug Arrangements are applied consistently with the chapeau

4.101 The chapeau of Article XX establishes three standards regarding the application of measures for which justification under Article XX may be sought. First, there must be no arbitrary discrimination between countries where the same conditions prevail; second, there must be no unjustifiable discrimination between countries where the same conditions prevail; and third, there must be no disguised restriction on international trade. These three standards, while distinct, must "be read side-by-side" and "impart meaning to one another".

4.102 The standards embodied in the chapeau are different from the standard used in determining whether a measure violates the substantive rules of the GATT (*in casu* the Enabling Clause) as observed by the Appellate Body in *US – Shrimp*. The standards embodied in the chapeau are also different from the standard used in determining whether the measure is provisionally justified under one of the particular exceptions listed in Article XX. As emphasized by the Appellate Body in *US – Gasoline*, the chapeau is not concerned with the measure for which justification is sought but instead with the *application* of such measure. According to the Appellate Body, the general structure and design of the measure and its declared policy objective must be examined under the exception listed in Article XX and not under the chapeau. In turn, when considering the chapeau, the treaty interpreter must determine whether the application of a measure provisionally justified under one of the exceptions listed in Article XX constitutes an abuse or misuse of such provisional justification.

*(i) Arbitrary or unjustifiable discrimination*

4.103 In this case, India's allegations do not relate to the "application" of the measure but it is the essential substantive feature of the "structure and design" of the measure in dispute. Therefore, the alleged discrimination between the two categories of developing countries is irrelevant for the purposes of the chapeau. In any case, however, the designation of the beneficiary countries of the Drug Arrangements is made according to objective, non discriminatory criteria. An inclusion of least-developed countries and other developing countries which are parties to the Cotonou Agreement or to bilateral free-trade agreements with the European Communities would have been pointless because they already benefit from duty-free access under these regimes. Equally, developed countries are not included because the "prevailing conditions" in developed countries are not the same as those prevailing in developing countries. Procedural aspects of granting and withdrawal of the special preferences are also non-discriminatory.

*(ii) Disguised restriction*

4.104 Any restriction on imports from developing countries not especially affected by the drug problem which are an inherent effect of the exclusion of that category of countries from the Drug Arrangements cannot be relied upon in order to establish that the *application* of the Drug Arrangements leads to a "disguised restriction" of trade. Instead, in order to establish that the Drug Arrangements fail to comply with that standard, it would have to be shown that imports from India are restricted because, as a matter of *application* of the Drug Arrangements, India has been unduly excluded from the list of beneficiaries of the Drug Arrangements even though it qualifies as a country that is especially affected by the drug problem. However, the selection of the beneficiaries of the Drug Arrangements has been made according to objective, non-discriminatory criteria.

## C. ORAL STATEMENT OF INDIA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

### 1. Procedural arguments

(a) Joint representation of India and Paraguay by the same staff of the Advisory Centre on WTO Law

4.105 On the issue raised by the European Communities on 14 May 2003 during the first substantive meeting of the Panel, whether India and Paraguay can be represented by the same staff of the Advisory Centre on WTO Law ("ACWL"), India and Paraguay submitted a joint statement on this issue to the Panel on the same day. India claims that it had full notice of the representation granted to Paraguay as a third party by the ACWL in this dispute. Likewise, Paraguay had full notice of the representation granted to India as a complaining party. India and Paraguay consider that by representing both parties, the ACWL does not compromise their individual interests in effective legal representation. India and Paraguay had both consented to simultaneous representation by the ACWL in this dispute.

4.106 India and Paraguay contend that the issue of exchange of information between parties and third parties to which the European Communities referred in its statement does not arise in the present case because the third parties were accorded enhanced rights.

4.107 India and Paraguay maintain that the dispute settlement procedures of the WTO establish rules of ethics for the members of panels and the Appellate Body but not for lawyers representing the Members of the WTO. Under the current law of the WTO, the request of the European Communities that the Panel rule on a matter of legal ethics therefore lacks any legal basis and should be rejected by the Panel.

4.108 India argues that according to Articles 2.2 and 6.1 of the Agreement Establishing the Advisory Centre on WTO Law, both India and Paraguay are entitled to the support of the ACWL in WTO dispute settlement proceedings, whether as parties or third parties. Citing the Appellate Body ruling in *EC – Bananas III* that it "can find nothing in the … WTO Agreement, the DSU or the Working Procedures, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body", India contends that this observation applies equally to the composition of the delegation in panel proceedings.

**2. Substantive arguments**

4.109 According to India, it was with extreme reluctance that it decided to invoke dispute settlement proceedings in this case. India made repeated attempts to settle the issue bilaterally with the European Communities, but its inability to reach a settlement and the considerable losses faced by its industry left India with no choice but to invoke these proceedings. India resorted to these procedures only after having exhausted all possibilities to reach a mutually agreed solution.

4.110 India recognizes the need for special financial assistance to developing countries to meet their individual development needs. However, it does not believe that tariff preferences discriminating between developing countries are the appropriate policy instrument to address the specific development needs of individual countries. Such preferences tend to help some poor countries at the expense of others, equally poor. The GSP was not created to shift market access opportunities between poor countries with different development needs, but to respond to the development needs of all of them.

4.111 India's textiles and clothing exporters started feeling the adverse effects of the Drug Arrangements in the year 2002, when Pakistan was included in these arrangements. These problems are not yet fully reflected in the trade statistics because only 16 months have lapsed since the inclusion of Pakistan. However, in India's view, the WTO legal system focuses on the conditions of competition for WTO Members, not trade results.

4.112 The European Communities, India and the beneficiary countries are in agreement that the GSP preferences that may be accorded under paragraph 2(a) of the Enabling Clause must be "*non-discriminatory* preferences beneficial to the developing countries". India submits that the Drug Arrangements do not meet this requirement because the preferences accorded under them are available only to products originating in specified countries. On the contrary, the European Communities contends that the term "non-discriminatory" does not prevent it from treating beneficiaries differently because, according to objective criteria, they have different development needs as a consequence of drug problems.

4.113 The European Communities' argument is based on two premises: first, that the term "non-discriminatory" in the Enabling Clause allows developed countries to distinguish between developing countries on the basis of objective criteria relating to specific development needs of individual countries; and second, that the European Communities in fact distributes the benefits accruing under the Drug Arrangements in accordance with objective criteria.

4.114 The meaning of the term "non-discriminatory" as used in paragraph 2(a) of the Enabling Clause must be determined in accordance with the ordinary terms of GATT 1994, in their context and in the light of its object and purpose. On the basis of these principles, the Appellate Body has found that: "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 imports of like

products, except when these obligations are specifically waived or are otherwise not applicable as a result of the operation of specific provisions of the GATT 1994."[41]

4.115 The Enabling Clause is an integral part of the GATT 1994, and 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 states otherwise. The basic legal issue before the Panel therefore is: does the Enabling Clause provide for a definition of the term "non-discrimination" that is different from the definition generally applicable in the GATT 1994?

4.116 The European Communities argues that an interpretation of paragraph 2(a) of the Enabling Clause permitting developed countries to treat countries differently that have different development needs is supported by paragraph 3(c) of the Enabling Clause, which obliges developed countries to "respond positively to the development, financial and trade needs of developing countries". The European Communities claims that the needs of developing countries needs referred to in this paragraph are "the *individual* needs of those countries". On this basis, it claims that the requirement to respond positively to the individual needs of each developing country would be rendered a nullity if "non-discriminatory" were interpreted as prohibiting any difference in treatment between developing countries.

4.117 There is nothing to support the contention that paragraph 3(c) refers to the *individual* needs of each of the developing countries, and the text of paragraph 3(c) does not express this idea. In the context of the requirements governing GSP preferences, the drafters of the Enabling Clause 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.

4.118 There is also nothing to support the European Communities contention that paragraph 3(c) would be rendered a nullity if differences in treatment between developing countries were prohibited. A GSP scheme can be non-discriminatory and nevertheless not respond positively to the needs of developing countries in general. It made perfect sense for the drafters to require that benefits to be accorded on a non-discriminatory basis to the developing countries respond positively to the needs of these countries.

4.119 The European Communities assertion that a scheme designed exclusively to address drug problems responds to the needs of developing countries as defined in paragraph 3(c) cannot also 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.

4.120 Finally, it must be recalled that paragraph 3(c), by its own terms, does not create a right but establishes an obligation. If the European Communities' interpretation were correct, this provision would *oblige* developed Members to design their GSP schemes to respond to the *individual* needs of each of the beneficiary countries. They would thus be under a legal obligation to modulate all benefits accruing under their GSP schemes to the individual needs of each of the beneficiaries.

[41] Appellate Body Report, *EC – Bananas III*, paras. 190-191.

However, most of the benefits accruing under the general GSP arrangements of the European Communities are equally available to all developing countries and consequently would not meet such an obligation. In its attempt to justify one of its special GSP arrangements, the European Communities therefore asks the Panel to adopt an interpretation of paragraph 3(c) that would render its general GSP arrangement inconsistent with the Enabling Clause.

4.121 The European Communities further asserts that various provisions of the GATT 1994 and the GATS that implement the principle of non-discrimination support its claim that the Drug Arrangements are "non-discriminatory" within the meaning of paragraph 2(a) of the Enabling Clause. This assertion also does not withstand scrutiny.

4.122 There are three basic provisions of the GATT that implement the principle of non-discrimination between products originating in different countries. Each of these provisions establishes a specific standard of non-discrimination for a specific policy instrument:

(a) Article I of the GATT subjects the use of tariffs to the most-favoured-nation standard. A WTO Member can meet this standard only if it applies the same tariff to like products of all other Members of the WTO. The standard of non-discrimination established by the GATT for tariffs is therefore *formally equal treatment.*

(b) Article XIII regulates the use of quotas, including the use of country-specific quotas. It requires Members that administer quotas to aim at a distribution of trade approaching as closely as possible the shares which the other Members might be expected to obtain in the absence of the quotas, for instance by basing the quota distribution on a previous representative period. The standard of non-discrimination is thus not formally equal treatment but treatment that ensures that the quotas do not modify each Member's trade share.

(c) Article XVII regulates imports and exports of state trading enterprises. It requires Members to ensure that such enterprises act in a manner consistent with the principles of non-discriminatory treatment. This is understood to require that these enterprises make their purchases and sales solely in accordance with commercial considerations.

4.123 While each of these three provisions sets a different standard, they all have one common objective, namely, to ensure that like products originating in different countries are accorded equal competitive opportunities. In the case of tariffs, this objective is achieved by requiring formally equal treatment; in the case of quotas, by stipulating a distribution of trade equal to the distribution that would prevail without the quotas; and in the case of state trading enterprises, by requiring that purchases and sales be based on considerations equal to those that private enterprises would apply.

4.124 Further, the non-discrimination rules also set out in the national treatment provisions of the GATT 1994 and GATS have equality of competitive opportunities as their fundamental objective. It is clear from the jurisprudence under the GATT 1994 and the text of the GATS that the national treatment requirement can be achieved through formally identical or formally different treatment. However, it is equally clear that either method must result in an effective equality of competitive opportunities.

4.125 The non-discrimination provisions of the GATT governing *tariffs* thus provide no contextual support for an interpretation of the term non-discrimination in paragraph 2(a) in the Enabling Clause that would justify the Drug Arrangements. This paragraph deals with the *tariff treatment* of products originating in developing countries. In respect of tariffs, non-discrimination means formally equal treatment of like products. The standard of non-discrimination that the European Communities invites the Panel to adopt in respect of tariff treatment of products originating in developing countries applies nowhere in WTO law to tariff treatment.

4.126 The European Communities' statement that the non-discrimination provisions of the GATT governing *non-tariff measures*, such as import quotas or internal regulations, permit or even require formally different treatment of like products is correct. However, the result of any difference in treatment must in all cases be an effective equality of conditions of competition between like products, irrespective of their origin. The preferential tariff treatment accorded under the Drug Arrangements establishes conditions of competition favouring products from the beneficiary countries over products from other countries, and is therefore also discriminatory within the meaning of the non-discrimination provisions governing non-tariff measures. In addition, these provisions cannot lead the Panel to the interpretation of paragraph 2(a) advanced by the European Communities.

4.127 Paragraph 2(a) defines the GSP schemes authorized by the Enabling Clause by referring to the 1971 Waiver, and the 1971 Waiver in turn refers to the Agreed Conclusions of the Special Committee on Preferences adopted at the Fourth Special Session of the Trade and Development Board of the UNCTAD. As India will further demonstrate in its rebuttal submission, the Agreed Conclusions clearly envisage that the benefits of the GSP schemes should be made available to all beneficiary countries. This understanding of the Agreed Conclusions is confirmed by the fact that, prior to the adoption of the Agreed Conclusions, the developed countries had agreed among themselves in the OECD that their preferences would not discriminate between developing countries, except to favour the least-developed countries.

4.128 As India noted at the beginning of its statement, according to the Appellate Body, non-discrimination means equal treatment of like products except if a specific provision states otherwise. The simple fact is that, except for the provisions governing preferences for least-developed countries, there is no provision in the Enabling Clause that lends any support to the conclusion that the terms "non-discriminatory preferences beneficial to the developing countries" in paragraph 2(a) of the Enabling Clause do not require equal treatment of like products from all developing countries.

4.129 Turning to the factual premises under the European Communities' argumentation. India strongly rejects the European Communities' claim that the Enabling Clause permits the developed countries to differentiate between developing countries, on the basis of objective criteria of their own choice which are allegedly vital to the development needs of developing countries. Nevertheless, assuming *arguendo* that differentiation between developing countries is permissible, the European Communities' argumentation could only succeed if its factual claim were correct – that the Drug Arrangements differentiate between developing countries on the basis of objective criteria reflecting their development needs.

4.130 The EC Regulation establishing the current European Communities' GSP scheme provides for two special arrangements to which the European Communities' factual claim might possibly apply: the labour arrangements and the environmental arrangements.[42] In respect of the Drug Arrangements, no criteria or procedures for inclusion as a beneficiary are set out in the Regulation. Instead, Article 10 of the Regulation merely provides that the preferences are granted to countries that are designated by the European Communities as beneficiaries in column I of Annex I. The beneficiaries therefore do not know what criteria they have to meet in order to continue to be beneficiaries. There are also no provisions establishing criteria to be met and procedures to be followed in order to be designated as a beneficiary. Countries excluded from the scheme consequently do not know why they are excluded and under what circumstances they would be included. The European Communities' claim that the measures at issue in these proceedings distinguish between developing countries according to objective criteria reflecting their individual development needs is therefore factually baseless.

[42] India fully reserves its position on the legal status and factual characterization of these special arrangements.

4.131 The measures at issue in this proceeding are the Drug Arrangements *as they presently operate*. The issue is therefore whether the Drug Arrangements *as set out in the current Regulation* establish "non-discriminatory preferences beneficial to the developing countries" within the meaning of paragraph 2(a) of the Enabling Clause. The motives of the European Communities in selecting the beneficiaries and the criteria that the European Communities might adopt in the future when adding further beneficiaries are consequently not relevant to the legal examination of the measures before the Panel.

4.132 India would nevertheless like to point out that the European Communities has provided no evidence that the selection of the current beneficiaries was based on objective criteria. Moreover, the European Communities submits no evidence whatsoever demonstrating that the countries excluded from the scheme do not have similar drug problems. In its submission, it describes the drug problems of the beneficiaries in general terms, partly by using statistics that became available after the beneficiaries had been selected. On the basis of the European Communities' explanations, it is impossible to determine why for instance Pakistan was included while India and Paraguay were excluded. Nor has the European Communities submitted any documentary evidence that it had in fact conducted an objective assessment of all countries' drug problems before establishing the list of beneficiaries. All it has submitted to the Panel is a lengthy *ex post* justification prepared with the help of UN documents that does not reveal a single objective criterion equally applied to all beneficiaries and non-beneficiaries.

4.133 India also notes that there are some fundamental contradictions between the alternative defences advanced by the European Communities in its written submission. The European Communities argues that the Drug Arrangements are entirely consistent with all of the requirements of the Enabling Clause, including presumably the requirement that any such arrangement must be non-reciprocal in nature. At the same time, however, the European Communities also argues that, in the event that the Panel finds the Drug Arrangements to be inconsistent with the Enabling Clause, it would like to defend it as being necessary to protect human life and health in the European Communities under Article XX(b) of GATT 1994. Thus, the European Communities in effect admits in its written submission that the Drug Arrangements are really intended to achieve a fundamental and important policy objective of its own, without reference to the development needs of the beneficiaries of the Drug Arrangements. Therefore, the design, architecture and structure of the Drug Arrangements contain an important element of reciprocity, which is clearly impermissible under the Enabling Clause. This is just one more instance of the contradictions inherent in the European Communities' arguments before the Panel.

4.134 The claims and arguments presented by the European Communities and the beneficiaries are legally and factually unfounded. The European Communities knew and acknowledged that the Drug Arrangements required a waiver. The European Communities failed to obtain the waiver and the Panel is now facing the most spurious arguments in support of a ruling that could only be described as preposterous, namely that the denial of tariff preferences to India does not constitute discrimination against India.

4.135 Both the European Communities and the beneficiary countries have permitted their lawyers to advance arguments on important systemic issues that run counter to the views that they have expressed on other occasions. It is difficult to believe that the arguments that the European Communities presented on the unconditional nature of the most-favoured-nation principle and on Article XX(b) represent the considered opinion of the European Communities as a whole. It is equally difficult to believe that the beneficiary countries took their long-term systemic interests into account when they invited the Panel to rule that developed countries may discriminate between developing countries in accordance with criteria selected by the developed countries.

4.136 India is profoundly disturbed by the European Communities' abuse of the WTO dispute settlement procedures in this case and the surprising support given by the beneficiary countries to the

European Communities' interpretation of the Enabling Clause. India urges the Panel to preserve the integrity of the dispute settlement process and to make quickly the required clear ruling so that the issues to which the Drug Arrangements give rise can be resolved within the framework of the proper WTO procedures.

4.137 In conclusion, India reiterates that it does not dispute the European Communities' right to give financial assistance to individual developing countries facing special development needs. India disputes the European Communities' right to do so at the expense of other developing countries facing different but equally pressing needs. The European Communities' claim that the Enabling Clause provides authority to shift market access opportunities from some poor countries to other poor countries in accordance with criteria selected by the developed countries is legally untenable. The GSP was intended to promote the development of all developing countries. It was not intended to permit developed countries to discriminate between developing countries, to destroy or adversely affect industry in one developing country to benefit another and to create poverty in one developing country in order to alleviate poverty in another. A confirmation of this obvious fact by the Panel will have a salutary effect on the entire multilateral trading system.

## D. ORAL STATEMENT OF THE EUROPEAN COMMUNITIES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

### 1. Procedural arguments

(a) Joint representation of India and Paraguay by the same staff of the Advisory Centre on WTO Law

4.138 During the first substantive meeting of the Panel, the European Communities raised the issue of joint representation of India, the complaining party and Paraguay, one of the third parties by the same staff of the ACWL. The European Communities requests the Panel to clarify the issue of whether, as a matter of principle, the same counsel can represent simultaneously a complaining party and a third party, and if so, under what conditions and whether these conditions are satisfied in this case.

4.139 While acknowledging that the Appellate Body ruled only on the issue of who should represent a Member at its oral hearing in *EC – Bananas III*, not on the issue of whether the same legal counsel may represent two Members with different positions, the European Communities considers that the joint representation of a party and a third party by the same legal counsel is unprecedented. This situation draws a number of concerns that deserve the attention of the Panel.

4.140 The European Communities contends that there is an obvious conflict of interest. The bar rules of many WTO Members prohibit lawyers from representing in litigation two clients with different interests. The absent of any agreed rules in the WTO concerning the representation of Members by external counsel does not mean that such counsel is not subject to any deontological rules. Under the existing WTO law, there is no requirement that the counsel appearing before a panel must be admitted to the bar of a WTO Member. In view of that, the European Communities considers that panels must take upon themselves the task of enforcing basic deontological standards, including the conflict of interest issue, as part of their inherent powers to organize and direct the proceedings.

4.141 The European Communities states that it is not suggesting that there is necessarily a conflict of interest in this case. Rather, the European Communities' view is that the situation where the same counsel represents the complaining party and a third party may give rise to such conflicts and that panels should satisfy themselves that the counsel and the Members concerned have done all that is necessary to avoid them.

4.142 The European Communities maintains that the situation where the same counsel represents two Members with different procedural positions may be incompatible with the DSU rules on confidentiality. The counsel for a complaining party will receive confidential submissions and panel documents which it would not be entitled to receive as the counsel for a third party. In this case, the problem is mitigated by the fact that third parties have been granted enhanced rights. But the European Communities is worried about creating a precedent for other cases where, in accordance with the general rule, the information rights of third parties are limited. In response to the argument that India and Paraguay submitted to the Panel that the issue of confidentiality does not arise in this dispute as the third parties have been accorded enhanced rights, the European Communities points out that India and Paraguay had already agreed to use the service of the same legal counsel long before third parties requested the enhanced third-party rights.

4.143 It is the view of the European Communities that generally speaking, allowing the same counsel to represent the complaining party and a third party would be a source of confusion and could effectively blur the distinction between the main parties and the third parties, which, as recently recalled by a panel, is still a basic feature of the DSU rules.

**2. Substantive arguments**

(a) The implications of this dispute

4.144 The European Communities points to the importance of this dispute. It is the first dispute involving the Enabling Clause, one of the most significant forms of "special and differential" treatment for developing countries under the WTO Agreement. At stake in this dispute is more than the Drug Arrangements, vital as they are for the beneficiary countries. From the Panel's answers to some of the issues raised in this dispute it could decide also the viability of the Generalized Systems of Preferences ("GSP") applied by many donor countries.

4.145 When considering those issues, the Panel should bear in mind the nature of the preferences granted under the GSP schemes. Those preferences are strictly voluntary. According to the European Communities, India's reading of the Enabling Clause would be detrimental to all Members. The likely result of India's interpretation would be *less*, rather than *more* preferences for the developing countries, contrary to India's misguided expectations in bringing this case. In fact, turning the Enabling Clause into the kind of strait-jacket devised by India could dissuade some donor countries from providing any preferences *at all*.

4.146 Beyond its systemic implications, the present dispute is important also because of its potential repercussions for the beneficiaries of the Drug Arrangements. The Drug Arrangements have allowed those countries to increase and diversify their exports to the European Communities. The ensuing beneficial effects are considerable. For example, it has been estimated that in the Andean Community alone, the Drug Arrangements sustain almost 160,000 jobs.

4.147 Removing the Drug Arrangements from the European Communities' GSP would have devastating economic and social consequences for the beneficiary countries. In contrast, India would derive very few benefits, if at all. As we have shown, India's allegations of trade diversion are unsubstantiated and groundless. Between 1990 and 2001, imports from India under the European Communities' GSP increased from two to more than five billion Euros. Further, during that period, India's share of all imports under the European Communities' GSP increased from 9 per cent to 12 per cent. This makes India the second largest beneficiary of the European Communities' GSP.

4.148 India can invoke no genuine trade concern as a justification for bringing this dispute. The European Communities, therefore, finds it very difficult to understand why India has resorted to an action that could undermine the efforts of other developing countries in their fight against drugs and endanger their social and political stability. India's gratuitous complaint is hardly what would be

expected from a Member which aspires, with good reason, to be one of the leaders of the developing country Members of this Organization.

(b) The Enabling Clause

4.149 India's complaint is built on a mistaken premise. India has misconceived the relationship between the Enabling Clause and Article I:1 of GATT 1994. The Enabling Clause is not an "affirmative defence". It is a self-standing regime. It confers an autonomous and permanent right to grant certain types of "special and more favourable treatment" to developing countries, subject to certain conditions. If a preference falls under the Enabling Clause, Article I:1 of GATT 1994 does not apply at all.

4.150 India is one of the main proponents of strengthening the provisions granting "special and differential treatment" to developing countries. It is therefore astonishing to see that in this dispute India takes a position that would erode considerably the value of such treatment. The European Communities invites India to reflect further on this issue in the light of its broader WTO interests.

4.151 The fact that the Enabling Clause is not an affirmative defence has two important implications:

(a) in order to establish a violation of Article I:1 of GATT 1994, India must establish first that the Drug Arrangements do not fall within the scope of paragraph 2(a) of the Enabling Clause; and

(b) 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).

4.152 The Enabling Clause has its own requirements, which are different from those of Article I:1 of GATT 1994. Unlike Article I:1, the Enabling Clause does not require granting identical tariff preferences to *all* the developing countries, on a MFN basis. Instead, paragraph 2(a) provides that the tariff preferences granted to developing countries as part of a GSP must be "non-discriminatory".

4.153 The "non-discrimination" standard included in paragraph 2(a) is different from the MFN standard of Article I:1. The term "non-discriminatory" must be interpreted in accordance with its own ordinary meaning, in its own context and in the light of the specific objective of the Enabling Clause, which is also one of the overall objectives of the WTO Agreement: to promote the trade of *all* developing countries *commensurately* with their respective development needs.

4.154 India's interpretation of the term "non-discriminatory" is based on little else than an incomplete dictionary definition. It is simplistic and incorrect. Treating differently developing countries which, according to objective criteria, have different development needs is not discriminatory. Quite to the contrary, it may be necessary to comply with paragraph 3(c) of the Enabling Clause, which provides that preferences must respond positively to the development needs of developing countries.

4.155 India's allegations that the Drug Arrangements have been designed in order to advance the European Communities' political agenda or to promote the European Communities' own trade interests are groundless. The purpose of the Drug Arrangements is to afford equal development opportunities to the developing countries which are handicapped as a result of being severely affected by the production or trafficking of drugs. That goal is both legitimate and consistent with the objectives of the Enabling Clause and of the WTO Agreement. Further, the European Communities has demonstrated that there is a reasonable and sufficient connection between that objective, the

unique development needs of the countries concerned, and the tariff preferences granted to those countries under the Drug Arrangements.

4.156 The links between economic development and the drug problem are well-established and have been recognized many times by the United Nations. Only last month the ministers participating in the 46th session of the UN Commission on Narcotic Drugs recalled once again that the drug problem "undermines socio-economic and political stability and sustainable development, including efforts to reduce poverty".

4.157 Likewise, the United Nations has said many times that the fight against drug production and trafficking is a shared responsibility of all members of the international community. Accordingly, the developed countries must provide assistance to the developing countries which are affected by that problem. The provision of financial and technical assistance is, of course, crucial. But it is not enough. According to the United Nations, the fight against drugs demands a balanced and comprehensive approach. Drug production and trafficking are fed by poverty and unemployment. Thus, in order to combat them successfully, it is necessary to replace them with licit alternative economic activities. Further, those activities must be sustainable. In turn, this requires providing markets for the products of those activities.

4.158 The concrete application of the Drug Arrangements made by the European Communities' authorities is also non-discriminatory. The designation of the beneficiaries of the Drug Arrangements is based on an overall assessment of the severity of the drug problem in each developing country, made in accordance with objective, non-discriminatory criteria. India does not qualify under those criteria. Indeed, India does not dispute this. Nor does India claim that any of the beneficiary countries fails to meet the relevant criteria.

(c) Article XX of GATT 1994

4.159 The primary goal of the Drug Arrangements is to promote the development of the countries affected by the production or trafficking of drugs. But in so doing, the Drug Arrangements also contribute to the objective of reducing the consumption of drugs within the European Communities.

4.160 It is beyond question that drugs pose a serious threat to human life and health. The Drug Arrangements are a necessary component of the European Communities' strategy against drug abuse. As just explained, the fight against drugs requires a balanced approach, which includes the promotion of sustainable alternative economic activities in order to reduce the illicit supply of drugs. In accordance with the principle of shared responsibility, the European Communities and its member States already provide substantial technical and financial assistance to the countries concerned. The Drug Arrangements are a necessary complement to such assistance.

4.161 Thus, even if the Panel were to find that the Drug Arrangements are not consistent with the Enabling Clause, they would be justified under Article XX(b) of the GATT as being necessary for the protection of the health and life of the European Communities' population.

## E. SECOND WRITTEN SUBMISSION OF INDIA

### 1. The Drug Arrangements are inconsistent with Article I:1 and the European Communities bears the burden of proof under the Enabling Clause

4.162 The tariff preferences granted under the Drug Arrangements to certain products originating in the preferred Members are advantages which are not granted immediately and unconditionally to like products originating in all other Members. Hence, the tariff preferences are inconsistent with Article I:1.

4.163 Article I:1 of GATT 1994 requires that the extension of an advantage cannot be made subject to *conditions with respect to the situation or conduct of a Member*. The European Communities 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 European Communities' view, the Article I:1 "unconditionally" requirement allows a Member to impose conditions falling outside of what could be deemed as "compensation". The European Communities bases this interpretation on the understanding of the term "conditional" in the context of conditional MFN clauses. Even if the European Communities 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 European Communities 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). 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 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".

4.164 The European Communities' limited interpretation of the term "unconditionally" should be rejected for the following additional reasons:

(a) The European Communities' interpretation is unsupported by the ordinary meaning of the term "unconditionally". 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 European Communities does not provide any justification for this restriction.

(b) Even on the selective "historical method" of interpretation followed by the European Communities, the material highlighted by the European Communities 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

(c) The European Communities' interpretation is contrary to WTO jurisprudence. The European Communities states that there is conflicting jurisprudence on the matter. Even assuming that there is such conflicting jurisprudence, the European Communities' interpretation is not supported by *any* jurisprudence.

4.165 The European Communities bears the burden of establishing that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause. The European Communities seeks to impose on India the burden of establishing the *negative* of the European Communities' defence – that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause – by the mere expedient of characterizing paragraph 2(a) as conferring an "autonomous right". India considers that the Enabling Clause is not an "autonomous right" as the European Communities alleges. The European Communities does not define "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 GATT 1994. India maintains that, on the contrary, the Enabling Clause is a derogation or deviation from the obligation stated in Article I:1 of GATT 1994. 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. Moreover, paragraph 2(a) of the Enabling Clause does not impose any positive obligation on developed country Members to establish GSP schemes.

4.166 The purpose of paragraph 2(a) of the Enabling Clause, in permitting developed country Members to grant preferential tariff treatment to developing countries under the GSP, is not to confer a *privilege* to developed country Members; rather, paragraph 2(a) was adopted for the benefit of developing countries. The European Communities claims 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 GATT 1994, even beyond the extent of what is necessary to provide differential and more favourable treatment to developing countries.

4.167 India notes that the phrase "to the extent necessary" was used in the 1971 Decision but it was not used in the Enabling Clause, however the explanation for this omission 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 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 GATT 1994 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."

4.168 Furthermore, it would seem that the European Communities argues that the phrase "notwithstanding Article I:1 of GATT 1994 totally excludes the application of that Article. 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.

4.169 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. India's claim in these proceedings, as expressed in its first written submission, is based on Article I:1 of GATT 1994 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. To defeat India's claim, the European Communities *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 European Communities to prove the affirmative of its defence – that the Drug Arrangements are in fact covered by that Clause. The European Communities' mere assertion that the Drug Arrangements are covered by the Enabling Clause does not in itself constitute proof of the affirmative of the European Communities' defence. The mere assertion therefore does not shift the burden of proof to India to establish the negative of the European Communities' defence.

4.170 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 recognized as "affirmative defences". There are no positive obligations under Articles XI:(2)(c)(i), XX and 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 XXIV are exceptions and at the same time "defences", the Enabling Clause is likewise an exception to certain aspects of Article I:1 of GATT 1994 and could be invoked, in the proper case, as a defence in a claim of violation of that Article.

4.171 Under each of these provisions, even assuming that it is established that the measure at issue violates the provision to which the exception applies, the Member adopting the measure may still

invoke the exceptions as (affirmative) defences. This falls squarely within the definition of "affirmative defence". 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 prior GATT jurisprudence.[43]

4.172 The European Communities cites *Brazil – Aircraft,* to support its assertion that India bears the burden of proving that the European Communities' Drug Arrangements are inconsistent with paragraph 2(a) of the Enabling Clause. The Appellate Body upheld the Panel finding on the issue of burden of proof as it considered that- in contrast to "affirmative defences" contained in several GATT provisions – the provision concerned (Article 27.4 of the SCM Agreement) set forth *"positive obligations* for developing country Members, not *affirmative defences*." 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 GATT 1994, which could be invoked as an affirmative defence. The European Communities appears to contend that because Article 27 of the SCM Agreement is listed in a WTO Secretariat document 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 and 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. This argument of the European Communities is incorrect. 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. 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.

### 2. The Enabling Clause does not exclude the application of Article I:1 but authorizes limited derogation

4.173 The Enabling Clause does not exclude the application of Article I:1 of GATT 1994 in all circumstances. Any examination of the scope of the exception under the Enabling Clause must be undertaken with particular care. Panels should not lightly assume that a derogation from a *developing country's* rights under Article I:1 is authorized under the Enabling Clause. The Enabling Clause is after all meant to be for the benefit of developing countries. 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.

4.174 In a case involving Article XXIV of GATT 1994, another provision which may be characterized 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 GATT 1994. 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.* 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.*[44]

4.175 India maintains that respecting the MFN rights of developing countries as between themselves does not make impossible the granting of preferential tariff treatment to developing

[43] Panel Report, *US – Customs User Fee*, at 289-290; Panel Report, *US – MFN Footwear*, at 153.
[44] Appellate Body Report, *Turkey – Textiles*, DSR 1999:VI, 2345 at p. 2354.

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

4.176 There is no wording in paragraph 2(a) reflecting the agreement of developing country Members to forego their rights under Article I:1 of GATT 1994 in respect of benefits accorded to all other Members, including to other developing countries in the context of the GSP. India contends 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*. The European Communities 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 authorized under the Enabling Clause. The European Communities, 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), or prevent special measures in favour of the least-developed countries under paragraph 2(d) or run counter to the broad terms of paragraph 1 of the Enabling Clause. However, these arguments are simply beside the point, as India has not advanced any such broad contention. In India's view, a conjunctive reading of paragraphs 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".[45] It has been emphasized by Costa Rica and the Andean Community that the 1971 Waiver uses the term "other contracting parties" as opposed to the term "other developed countries" deliberately. The Minutes of the Council meeting which adopted the 1971 Waiver uses the term "other contracting parties" as opposed to the term "other developed countries" deliberately. The Minutes of the Council meeting that adopted the 1971 Waiver[46] indicate 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, India points out that "… since there was no precise and acceptable list of developed countries it did not see any merit in the proposal" 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".

4.177 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 authorizes preferential tariff treatment granted by a developed country to developing countries in the context of the GSP. Thus, the European Communities must find unambiguous authority for its violation of the Article I:1 rights of developing countries in paragraph 2(a) of the Enabling Clause.

4.178 There is no language in paragraph 2(a) which expressly authorizes developed countries to derogate from the unconditional MFN rights of developing countries. The European Communities relies on the term "non-discriminatory" in footnote 3 for justification to derogate from the

[45] Second written submission of India, para. 70 and footnote 42.
[46] C/M/69.

unconditional rights MFN rights of developing countries in respect of benefits accorded to a limited group of developing countries. However, such reliance is misplaced. As elaborated below, the term "non-discriminatory" does not authorize differentiation in the treatment of developing countries; on the contrary, it is used precisely to ensure that differentiation between developing countries is prohibited.

**3. "non-discriminatory"**

(a) Introduction

4.179 The European Communities 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. India and the European Communities 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'") The European Communities contends that "the term 'non-discriminatory' does not prevent Members from treating differently developing countries which, according to objective criteria, have different development needs" ("negative meaning of 'non-discriminatory'").

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

(b) GATT 1994 as context

4.181 First, 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. 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. It follows 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.

(c) Paragraph 2(d) and 2(b) as context

4.182 Second, 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. 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 European Communities' 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.

4.183 The European Communities 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. The European Communities' 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 European Communities 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.

4.184 The European Communities 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 European Communities' 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 European Communities' reading of paragraph 2(d) renders this provision ineffective.

(d) "the developing countries" in paragraph 2(a) as context

4.185 Third, 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 this also supports India's interpretation. The term "the" developing countries appears in four instances in authentic versions of the Enabling Clause. This indicates 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.

4.186 It would 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 European Communities' interpretation that "non-discriminatory" does not entail equal competitive opportunities renders the requirement that "the" (all) developing countries must benefit from preferential tariff treatment ineffective.

(e) UNCTAD instruments as context and drafting history

4.187 Fourth, the texts which established the generalized system of preferences ("GSP") under the auspices of the UNCTAD support India's interpretation of the term "non-discriminatory". The term "non-discriminatory" in the Enabling Clause reflects the meaning of that term as understood in the texts accepted at the UNCTAD. 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. 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 recognized to be developing countries on the basis that they have different development needs. 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".

4.188 This meaning of "non-discriminatory" is also confirmed by the drafting history of Resolution 21(II) of the Second UNCTAD and the Agreed Conclusions. Indeed, the Agreed Conclusions do not even authorize developed countries to provide tariff reductions limited to least-developed countries to the exclusion of other developing countries. 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.

4.189 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." By permitting differentiation between developing countries, the European Communities' interpretation of "non-discriminatory", would render the requirement that "all developing countries should participate as beneficiaries from the outset" meaningless.

(f) Paragraph 3(c) as context

4.190 Moreover, 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 European Communities. The European Communities 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)". The European Communities' argument is based on a wrong premise, namely that the term "development, financial and trade needs of [the] 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.

4.191 The European Communities 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.

4.192 The European Communities' assertion that a scheme designed to address exclusively drug problems responds to the development 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.

4.193 Accepting the European Communities' 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 European Communities' 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.

4.194 In according tariff preferences to the developing countries, the European Communities' general GSP arrangement does not make distinctions between developing countries as to their individual development, financial and trade needs. Therefore, if the European Communities' reading 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 European Communities providing tariff preferences to the developing countries would be inconsistent with paragraph 3(c) of the Enabling Clause.

(g) "Generalized" as context

4.195 The term "generalized" in footnote 3 also does not lend contextual support for the interpretation of the term "non-discriminatory" advanced by the European Communities. The European Communities 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 European Communities' argument fails to recognize that the term "generalized" refers to the range of countries that would accord and receive preferences 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.

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

(h) Implications for the WTO multilateral system

4.197 India also contends that the European Communities' interpretation of the term "non-discriminatory" should be rejected on two further systemic grounds. First, the GATT could not fulfil the function of providing the legal framework of market access negotiations between developed and developing countries if the European Communities' interpretation of the term "non-discriminatory" were accepted. One of the main functions of the GATT is 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. 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. 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.

4.198 The developing countries compete mainly with other developing countries in the markets of the GSP donor countries. If the European Communities' interpretation of the Enabling Clause were endorsed, the developing countries would therefore never have any assurance that the tariffs they have negotiated with developed countries will be applied on an MFN basis as between developing countries. This would have radical implications on the ability of developing countries to participate in multilateral tariff negotiations.

4.199 The second implication of European Communities' interpretation of the term "non-discriminatory" is that the panels would be drawn into distribution conflicts between developing countries without any normative guidance from the WTO Membership if the European Communities' interpretation of the term "non-discriminatory" were accepted. The European Communities' 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 European Communities' definition will result in leaving the developed countries free to differentiate as they see fit or involve panels in adjudicating distribution 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.

**4. The application of the Drug Arrangements is not "non-discriminatory"**

4.200 As a subsidiary argument, India maintains that the preferences accorded under the Drug Arrangements would be "discriminatory" even if the European Communities' interpretation of the term "non-discriminatory" were accepted. The European Communities accords preferential tariff treatment based on drug-related problems and fails to accord preferential tariff treatment based on more severe problems of developing countries. Even assuming that "non-discrimination" has the negative meaning attributed to it by the European Communities, the Drug Arrangements would not be "non-discriminatory".

4.201 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. There is no basis for the European Communities 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 European Communities 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.

4.202 Moreover, the Drug Arrangements do not contemplate any objective criteria for determining beneficiary status. The European Communities asserts that in order to determine the beneficiaries of the Drug Arrangements, it applies objective criteria that potential developing country beneficiaries must meet. As set out in the Regulation, the Drug Arrangements contain no criteria or procedures for inclusion as a beneficiary. The European Communities' claim that the measures at issue in these proceedings distinguish between developing countries according to objective criteria reflecting their individual development needs is therefore factually baseless. The European Communities has also failed to demonstrate that selection of the beneficiaries was based on an objective assessment of the drug-related needs of all developing countries.

4.203 The European Communities has provided no evidence that the selection of the current beneficiaries was based on objective criteria. Moreover, the European Communities has submitted no evidence whatsoever demonstrating that the countries excluded from the scheme do not have similar drug problems. In its submission, it describes the drug problems of the beneficiaries in general terms, partly by using statistics that became available after the beneficiaries had been selected. On the basis of the European Communities' explanations, it is impossible to determine why for instance, Pakistan was included while India and Paraguay were excluded. Neither has the European Communities submitted any evidence that it had in fact conducted an objective assessment of all countries' drug problems before establishing the list of beneficiaries, despite requests from the Panel and India. All it has submitted to the Panel is a lengthy *ex post* justification prepared on the basis of UN documents and quantitative data that do not reveal a single objective criterion or any benchmark for inclusion or exclusion equally applied to all potential beneficiaries.

## 5. The Drug Arrangements are not justified under Article XX

4.204 The Drug Arrangements are not justified by Article XX(b) of GATT 1994 as the European Communities has not demonstrated that the Drug Arrangements are *necessary to protect human life or health* within the meaning of Article XX(b).

(a) The Drug Arrangements do not constitute a measure under Article XX(b)

4.205 First, the Drug Arrangements "are not designed to achieve" the protection of human life and health in the European Communities. The European Communities only states that the measure at issue is designed to protect the life and health in the European Communities, but it fails to substantiate its assertion. Mere assertion does not amount to proof. 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 European Communities; and (ii) how the granting of tariff preferences equally to all developing countries would exacerbate those risks. 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 European Communities 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 European Communities' population nor in the explanatory memorandum leading to this regulation.

(b) Drug Arrangements are not "necessary" within the meaning of Article XX(b)

4.206 Second, the Drug Arrangements are not "necessary" to protect human life or health of the European Communities' population. The European Communities argues that it is necessary for the health of the European Communities' population to impose the Drug Arrangements. In other words, if the tariff preferences were removed, the health of European Communities' citizens would worsen because a greater amount of illicit drugs would be produced and trafficked into the European Communities and then consumed by European Communities' citizens. The relationship between tariff preferences and the health of the European Communities' population is remote, if at all there is such a relationship. The necessary link that the European Communities draws between preferential tariff treatment and the health of the European Communities' 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 European Communities to be "necessary" ends up becoming a measure rather "contingent" upon several external factors that do not depend on the European Communities. These external factors, include, 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 render the policy *sought* (i.e. the protection of life and health of the European Communities' population) uncertain. Conversely, in making the link between preferential tariff treatment and the health of the European Communities' population, it 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 European Communities is not the reason why law-abiding citizens keep out of the drug trade.

4.207 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 European Communities 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 the European Communities if the drug problem in a given beneficiary country improves.

4.208 The European Communities also contends that the Drug Arrangements are necessary to protect the health of the its 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. Along the extended chain of causality posited by the European Communities, there are many alternative less trade restrictive measures that could be taken by the European Communities 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.

4.209 The European Communities 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. The Drug Arrangements restrict both the present and future trade of excluded Members. If this were not the case, then the European Communities could have included India and other developing countries in the Drug Arrangements without any converse impact on the trade of the beneficiary countries. India has also provided evidence of trade losses suffered by Indian enterprises on account of the Drug Arrangements. To illustrate, the inclusion of Pakistan in the Drug Arrangements has already resulted in adverse effects on Indian imports into the European Community 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 the European Communities of products from India under these categories declined during 2002 as compared to 2001 while those from Pakistan showed a significant increase during the corresponding period. Letters from importers in the European Communities cancelling orders from India on account of these tariff preferences are a concrete manifestation of the trade restrictive nature of the Drug Arrangements.[47]

4.210 India also argues that 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. According to the European Communities' interpretation of Article XX(b) of GATT 1994, 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 European Communities 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 European Communities' argument therefore is that the European Communities 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.

(c) Drug Arrangements do not meet the requirements of the chapeau of Article XX

4.211 Moreover, the European Communities 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). The invocation of Article XX(b) by the European Communities is essentially to justify the violation of Article I:1 of GATT 1994 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.

[47] Reply of India to question No. 13 from the Panel to India.

Article I:1 applies equally to all Members. It is incumbent on the European Communities to show that the preferential tariff preferences granted under the Drug Arrangements only to 12 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 European Communities has not demonstrated it.

F. SECOND WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

**1. Relationship between GATT Article I:1 and the Enabling Clause**

(a) Special and differential treatment

4.212 India does not contest that the Enabling Clause is one of the main forms of "special and differential treatment" for developing countries, which in turn is the main instrument to achieve one of the fundamental objectives of the WTO Agreement. Yet, India has nowhere addressed the European Communities' argument that, in view of that, "special and differential treatment" provisions cannot be considered as "affirmative defences", as illustrated by the ruling of the Appellate Body in *Brazil – Aircraft.*

(b) Drafting history of the 1971 Decision

4.213 India's account of the drafting history of the 1971 Decision does not support its contention that the Enabling Clause is merely the "renewal" of the 1971 Decision. The note of the GATT Secretariat cited by India presented the adoption of a waiver under Article XXV:5 and of a declaration "in order to promote the objectives set out in Article XXXVI." as distinct options with different consequences. A passage of that note explained that "The adoption of a declaration outside the session of the CONTRACTING PARTIES would be a positive and constructive step for the benefit of developing countries, whereas a full waiver would have a rather negative effect".

4.214 Despite this advice, the waiver option was preferred over the declaration option. In 1979, however, the developed countries accepted a formula similar to the declaration option rejected in 1971 as part of the new balance of rights and obligations agreed in the Tokyo Round.

(c) "Positive rights"/"exceptions"

4.215 India argues that the Enabling Clause is not a "positive right", but instead an "exception", by referring to a definition of "positive right" included in the Black's Law Dictionary. However, this definition does not oppose the term "positive right" to the term "exception". Rather, the Black's Law Dictionary draws a distinction between "positive rights" and "negative rights", which it defines as "A right entitling a person to have another refrain from doing an act that might harm the person entitled".

4.216 A "negative right" is still a right and not an "exception". Thus, for example, according to Black's Law Dictionary, property rights would have to be classified as "negative" rather than "positive". Yet, it would be absurd to characterize those rights as "exceptions".

4.217 The Enabling Clause recognizes a "negative right" to grant preferences to developing countries and, at the same time, confers a "positive right" to the developing countries to compel the donor countries to grant such preferences in accordance with certain requirements, including the requirement that the preferences must be "non-discriminatory".

4.218 It is true that the developing countries do not have a "positive right" to compel the developed countries to apply a GSP. But from this it does not follow that the Enabling Clause is an "exception". By the same token, Article I:1 of GATT 1994 does not confer a positive right to compel other Members to lower their tariffs. The only obligation under Article I:1 is that whatever level of duties is

chosen by the Member concerned, it should be applied to all other Members on an MFN basis. Similarly, while developed countries are free to decide whether or not to apply a GSP, if they chose to do so they must apply it on a "non-discriminatory" basis.

(d) "Autonomous right"/"affirmative defence"

4.219 India contends that whether or not a treaty provision is an "affirmative defence" depends on whether it is asserted in each particular case by the complaining party or by the defendant and that a provision conferring an "autonomous right" can be also an "affirmative defence" if it is invoked by the defending party. This position is manifestly wrong. A WTO provision *is* or *is not* an "affirmative defence". It cannot be both at the same time, depending on which party invokes it. Certain provisions are in the nature of "affirmative defences" and can be raised only by the defending party in response to a claim of violation of another provision. For example, a complaining party may not bring a claim based on Article XX of GATT 1994. That provision is always an "affirmative defence" with respect to the alleged violation of another provision.

4.220 If India's thesis were correct, the Appellate Body should have decided in *Brazil – Aircraft* that Article 27.4 of the SCM Agreement was an "affirmative defence", since it had been invoked by Brazil and not by Canada. Likewise, in *EC – Hormones*, the Appellate Body should have decided that Article 3.3 of the Agreement on Sanitary and Phytosanitary Measures ("SPS Agreement") was an "affirmative defence", since it was the European Communities that relied on that provision.

**2. The Enabling Clause**

(a) Paragraph 1

*(i) "Other Members"*

4.221 The European Communities has thoroughly refuted India's reading of the term "other Members" as meaning "developed Member". India's response is that the term "other Members" has different meanings depending on whether paragraph 1 is read together with paragraphs 2(a), 2(b) or 2(c). The European Communities would agree that the same words may have different meaning in the context of different treaty provisions. However, India's position that one and the same provision (Paragraph 1) has simultaneously three different and conflicting meanings is contrary to basic principles of legal interpretation and indeed of elementary logic.

4.222 India also argues that, since the Enabling Clause was adopted "for the benefit of developing countries", it cannot be interpreted as restricting the MFN rights of some developing countries vis-à-vis other developing countries. Yet it is beyond dispute that both paragraphs 2(c) and 2(d) do precisely that. They limit the MFN rights of some developing countries in order to provide additional benefits to other developing countries. India's contention that paragraphs 2(c) and 2(d) are "exceptions" has no textual basis. Paragraph 1 "applies" equally to all the subparagraphs included in paragraph 2. There is no reason to assume that, when read together with paragraph 2(a), paragraph 1 does not allow differentiation between developing countries. Furthermore, as explained by the European Communities, such differentiation is consistent with the object and purpose of the Enabling Clause.

4.223 In response to a question from the Panel, India has been forced to admit that its reading of the term "other Members" in paragraph 1 would render redundant the requirement in footnote 3 that the preferences must be "non-discriminatory". India argues that this requirement is mentioned as part of a "compound phrase". However, India's interpretation of the term "other Members" would also render redundant the term "generalized". Furthermore, India's position that paragraph 1 does not exempt the donor countries from the obligation under Article I:1 of GATT 1994 to grant the preferences "unconditionally", would render superfluous also the requirement that the preferences must be "non-

reciprocal". Thus, ultimately, India's interpretation of paragraph 1 would render completely redundant the whole of footnote 3.

*(ii) "Unconditionally"*

4.224 In its first written submission, India seemed to argue that paragraph 1 does not "exempt" developed countries from the "unconditionally" requirement in Article I:1 of GATT 1994, with the consequence that any preferences granted under a GSP remain subject to that requirement. The European Communities, and some third parties, have refuted that thesis. India has submitted no further arguments.

4.225 In its first written submission, the European Communities also argued that, in any event, the Drug Arrangements were not "conditional", because the beneficiaries are not required to provide any compensation to the European Communities. In response to a Panel's question on the meaning of "unconditionally", India refers once again to the panel report in *Canada – Autos*, without addressing any of the arguments submitted by the European Communities, including with respect to that report.

(b) "Non-discriminatory" in paragraph 2(a)

*(i) The ordinary meaning*

4.226 India does not contest the analysis of the ordinary meaning of the term "discrimination" made by the European Communities in its first written submission. Nevertheless, India argues that such meaning is not relevant for the interpretation of the term "non-discriminatory" in paragraph 2(a) in view of the specific context of the Enabling Clause, the "basic purpose of the WTO legal system", certain UNCTAD texts, and a passage of the Appellate Body report in *EC –- Bananas III*.

*(ii) The context*

4.227 In response to the questions from the Panel, India has identified several contextual elements as relevant for the interpretation of the term "non-discriminatory". However, first, India's arguments with respect to paragraph 1 have already been addressed in the preceding section of this submission. Second, from the fact that paragraph 2(a) refers to "products" rather than to "services", or "persons" as the object of preferential treatment, it does not follow logically that the same treatment must be granted to all "like products" originating in all developing countries. In any event, India's assumption that other GATT provisions where the term "like product" is used impose an obligation not to "discriminate" between like products, rather than between countries, is incorrect. Third, the European Communities has addressed India's reading of the phrase "beneficial to *the* developing countries" in its first written submission. Here, the European Communities will limit itself to observe that India's argument has the *a contrario* implication that the absence of the article *the* before "developing countries" in paragraph 1 and paragraph 2(a) means that, as argued by the European Communities, those provisions do not require granting preferences to *all* developing countries. Thus, this argument undermines rather than supports India's position. The same is true of India's argument based on the presence of the articles *los* and *des* in the Spanish and French versions, respectively, of the title of the Enabling Clause. Fourth, the European Communities has responded to India's argument based on Article 2(d) in its first written submission. The European Communities' rebuttal remains unanswered. Finally, the Enabling Clause excludes expressly the application of the requirements of Article I:1 of GATT 1994 ("notwithstanding Article I:1"). Accordingly, it would be entirely inappropriate to introduce those requirements into the Enabling Clause by way of a purportedly "contextual" interpretation.

4.228 India also refers to certain passages included in some UNCTAD texts. However, as discussed below, those texts are neither part of the Enabling Clause nor context for the interpretation of the Enabling Clause. They may become relevant only as supplementary means of interpretation.

*(iii) The object and purpose*

4.229 India argues that the term "non-discriminatory" should be interpreted in the light of the "basic purpose" of the WTO legal system, which according to India is "to protect conditions of competition". The European Communities disagrees. The "protection of conditions of competition" is indeed one of the basic objectives of the WTO Agreement, but it is not the only one. The Enabling Clause, like all the other provisions granting "special and differential treatment" does not seek to provide equal competitive opportunities for like products. To the contrary, "special and differential treatment" provisions seek to create unequal conditions of competition in order to respond to the special needs of developing countries.

4.230 "Special and differential treatment" is the main instrument to achieve one of the fundamental objectives of the WTO Agreement, which is expressed in:

(a) the second recital of the Preamble to the WTO Agreement;

(b) Article XXXVI of the GATT, including in particular paragraph 3;

(c) the first recital of the 1971 Waiver, to which footnote 3 of the Enabling Clause refers.

4.231 When the term "non-discriminatory" is interpreted in the light of the above object and purpose of the WTO Agreement, differentiating between developing countries according to their development needs is no more "discriminatory" than differentiating between developed and developing countries.

4.232 India has nowhere addressed the European Communities' arguments regarding the object and purpose of the Enabling Clause. Instead, it persists in the error of interpreting the term "non-discriminatory" as if the "protection of competitive opportunities" were the sole objective of the WTO Agreement.

*(iv) Drafting history*

4.233 India appears to imply that, through the reference made in footnote 3 of the Enabling Clause to the 1971 Decision, the UNCTAD texts which it cites have become part of the Enabling Clause. The European Communities takes issue with that interpretation. By its own terms, the reference made in footnote 3 covers only the "description" of the Generalized System of Preferences which is contained in the 1971 Decision itself (more precisely, in the third and fourth recitals). It does not extend to the UNCTAD arrangements alluded to in those recitals.

4.234 The two UNCTAD resolutions cited by India (General Principle Eight of Recommendation A:I:1 adopted by UNCTAD at its first session and Conference Resolution 21(II) adopted by UNCTAD at its second session) are not legally binding instruments. They are drafted in purely hortatory language and, in accordance with their own terms, make only "recommendations". It would be illogical and unacceptable to read footnote 3 as conferring upon them legally binding effects within the WTO which they do not have within UNCTAD.

4.235 The Agreed Conclusions do not even reach the status of a formal UNCTAD resolution or decision. Contrary to India's assertion, they were not "adopted" by the Trade and Development Board of UNCTAD. Rather, that body "took note" of the conclusions reached within the Special Committee on Preferences, an ad hoc body established by UNCTAD in order to allow consultations among all the countries concerned. Like the UNCTAD resolutions, the Agreed Conclusions use hortatory language and do not purport to be legally binding. They take note of the statements made by the prospective donor countries and record the agreement (and sometimes the lack of agreement) of all the participants in the consultations with respect to certain objectives.

4.236 For the above reasons, the European Communities submits that General Principle Eight, Conference Resolution 21(II) and the Agreed Conclusions are not part of the Enabling Clause. Instead, they may be considered as part of the "preparatory work" of the 1971 Decision and as such a "supplementary means of interpretation", to which the Panel may resort in the circumstances specified in Article 32 of the Vienna Convention.

4.237 In any event, there is nothing in General Principle Eight, Conference Resolution 21(II) and the Agreed Conclusions which supports India's interpretation of the term "non-discriminatory". In the European Communities' view:

(a) The phrase "new preferential concessions … should be made to developing countries *as a whole*" included in General Principle Eight means that no developing country should be excluded *a priori* from the GSP and not that the same preferences should be granted to all Members.

(b) The phrase "in favour of *the* developing countries" included in paragraph 1 of Resolution 21(II) is equivalent to the phrase "beneficial to the developing countries" included in the fourth recital of that Resolution and reproduced in the 1971 Decision. The European Communities has already commented upon the meaning of that phrase;

(c) The passage of the Agreed Conclusions reproduced by India does not address the meaning of the term "non-discriminatory", but rather the different issue of whether the donor countries can deny *a priori* the condition of beneficiary to a country on the grounds that it is not a "developing country". As noted by India, the conclusion of the Special Committee was that "there is agreement with the *objective* that *in principle* all developing countries *should* participate as beneficiaries from the outset".

(d) Likewise, the passage of document TD/56 cited by India is concerned with the issue of what countries qualify as a "developing country", rather than with the interpretation of the term "non-discriminatory". In any event, TD/56 is not part of the Agreed Conclusions.

4.238 India also cites a document of the UNCTAD Secretariat of 1979 entitled "Review and evaluation of the generalized system of preferences". This document, which does not reflect the views of the donor countries, is a technical document with no legal status. Clearly, it is not "context" within the meaning of Article 31 of the Vienna Convention. Nor is it part of the "preparatory work" of the 1971 Decision within the meaning of Article 32 of the Vienna Convention. Thus, it is of little, if any, relevance for the interpretation of the Enabling Clause.

*(v) The Appellate Body report in EC – Bananas III*

4.239 In support of its contention that "non-discrimination" means always equality of competitive opportunities for like products, India cites a passage of the Appellate Body report in *EC – Bananas III*. That passage, however, addresses an entirely different legal issue and does not constitute a relevant precedent for this dispute.

4.240 The question before the Appellate Body in *EC – Bananas III* was not the meaning of the "non-discrimination" obligations at issue, which was not in dispute between the parties, but rather whether such "non-discrimination" obligations applied only within each of the tariff regimes established by the European Communities. As noted by the Appellate Body, the essence of the specific "non-discrimination obligations" at issue in *EC – Bananas III* is that like products should be treated equally, irrespective of their origin. Whether or not other non-discrimination obligations have

the same meaning was not a relevant issue in order to decide the matter before the Appellate Body. Therefore, it cannot be assumed that the Appellate Body also considered those other obligations. In particular, there is no indication that the Appellate Body had in mind the "non-discrimination" requirement in footnote 3 of the Enabling Clause, which was never at issue in *EC – Bananas III*.

(c) "Non-reciprocal" in paragraph 2(a)

4.241 India has confirmed that it does not claim that the Drug Arrangements are non-reciprocal. The European Communities disagrees with India's interpretation of the term "non-reciprocal" but does not consider it necessary to pursue this issue.

(d) "Beneficial" in paragraph 2(a)

4.242 India has submitted no new arguments in connection with this claim.

(e) Paragraph 3(c)

4.243 In its oral statement, India argued that the "needs" referred in paragraph 3(c) are those of all the developing countries "in general". The European Communities has provided a comprehensive rebuttal to India's arguments as part of its response to the Panel's questions. In its own response to the Panel's questions, India introduces the new argument that in the French and Spanish versions, the equivalent of the words "developing countries" is preceded by the article *des* and *los*, respectively. India contends that the presence of that article means that, in the French and Spanish versions, the relevant needs are "the needs of all developing countries". Quite remarkably, India reaches this conclusion by consulting a dictionary definition of the English term *the*, thus assuming that the uses of that article in English are identical to those of the French article *des* and the Spanish article *los*.

4.244 In any event, if India is correct about the implications of the presence of the articles *des* and *los* in the French and Spanish versions, respectively, it would follow *a contrario* that the absence of the article *the* in the equally authentic English version means that, as argued by the European Communities, developed countries must respond to the individual needs of developing countries. It is difficult, therefore, to see how this argument advances India's position.

4.245 The European Communities had pointed out that India's interpretation of paragraph 3(c) would have the absurd result that developed countries could grant preferences only with respect to products which are of common interest to all developing countries. India admits now that the developed countries may also respond to the individual needs of one or more developing countries by granting concessions with respect to products which are of particular export interest to those countries. However, according to India, this response is only permissible provided that those preferences apply equally to all like products originating in all developing countries. This qualification, however, has no basis in the text of paragraph 3(c). Rather, it is premised on India's mistaken interpretation of footnote 3.

4.246 Moreover, as emphasized elsewhere by India, paragraph 3(c) is not a permissive provision. It does not say that developed countries *may* respond to the needs of developing countries, but rather that they *shall* respond to such needs. If paragraph 3(c) covers the individual "development, financial and trade needs" of developing countries, and not only their "common" needs, as India appears to concede now, then all such individual needs must be taken into account and not only those which consist of a trade interest in exporting a certain item which is not of interest to other developing countries.

## 3. Article XX of GATT 1994

(a) Drugs pose a risk to human life or health

4.247 India does not contest that narcotic drugs pose a serious risk to human life and health in the European Communities.

(b) The Drug Arrangements are necessary to fight drug production and trafficking

*(i) The values pursued by the Drug Arrangements*

4.248 India does not contest that, since the preservation of human life and health is "both vital and important in the highest degree", the term "necessary" must be interpreted by the Panel according to its broadest possible meaning.

*(ii) Contribution of the Drug Arrangements to the protection of human life and health*

Tariff preferences are an appropriate response to the drug problem

4.249 India argues that drug production and trafficking are criminal activities and that, for that reason, it cannot be assumed that tariff preferences will contribute to the objective of replacing those activities with licit alternative economic activities. India thus appears to suggest that the only appropriate and necessary response to the drug problem is the enforcement of criminal laws.

4.250 This contention, which is not supported by any evidence or authority, disregards the most basic principles of the anti-drug policy agreed within the United Nations over the last 30 years. As explained at length in the European Communities' first written submission, the United Nations have resolved on many occasions that the fight against drugs requires a "comprehensive and balanced approach" which includes initiatives to reduce both illicit demand and illicit supply. The United Nations also have resolved that, in order to reduce the illicit supply of drugs, the countries concerned must adopt comprehensive measures, including not only crop eradication and law enforcement, but also the development of alternative economic activities. The United Nations have further recommended that, in order to support those alternative activities, other countries should provide not only financial assistance, but also greater market access. Only a few weeks ago, the ministers participating in the 46$^{th}$ session of the Commission on Narcotic Drugs held in Vienna renewed this recommendation.

4.251 As explained in the European Communities' first written submission, the WTO Agreement recognizes in the preamble to the Agreement on Agriculture that the countries affected by the drug problem have particular needs and that providing greater market access is an appropriate response to such needs. The same recognition was cited as a justification for the waiver adopted with respect to the APTA preferences.

The Drug Arrangements apply to all developing countries affected by the drug problem which do not benefit from more favourable tariff treatment under other arrangements

4.252 India alleges that the Drug Arrangements are not "necessary" because they do not include all developing countries affected by the drug problem. Specifically, India argues that Myanmar and Thailand "are excluded even though they have serious drug problems".

4.253 For reasons already explained, the European Communities considers that Thailand does not qualify as a country seriously affected by drug production or trafficking.

4.254 Myanmar is a least-developed country and, as such, is covered by the special GSP arrangements for LDCs, which provide greater preferences than the Drug Arrangements. In view of that, the inclusion of the LDCs affected by the drug problem in the Drug Arrangements is unnecessary in order to protect the life and health of the European Communities' population.

4.255 In any event, the European Communities considers that the exclusion of other developing countries allegedly affected by the drug problem from the Drug Arrangements is not part of the "design and structure" of the Drug Arrangements, but rather of its "application" and, therefore, should be examined under the chapeau of Article XX. The European Communities would note that India appeared to share that view in its first written submission.

The inclusion of developed countries in the Drug Arrangements would be unnecessary

4.256 The Drug Arrangements reflect the recognition that, as noted by the United Nations, "the problem of the illicit production of and trafficking in narcotic drugs … is often related to development problems".

4.257 In the developed countries, drug production and trafficking have different causes and require different responses. Moreover, developed countries have the necessary resources to fight drug production and trafficking on their own and do not require assistance from other developed countries in the form of trade preferences. For those reasons, granting trade preferences to the developed countries is not "necessary" to protect the life and health of the European Communities' population.

4.258 Moreover, the European Communities is not aware of any developed country which is as affected by the drug problem as the developing countries included in the Drug Arrangements. India has identified no such developed country.

The countries not included in the Drug Arrangements do not pose a threat to the sanitary situation within the European Communities

4.259 As explained, the criteria used in order to select the beneficiaries of the Drug Arrangements ensure that the excluded developing countries are not a significant source of supply of drugs to the European Communities and, therefore, do not pose a serious threat to the life or health of the European Communities' population.

4.260 India argues that that there may be transit countries covered by the Drug Arrangements where "the trafficked drugs do not flow to the EC". This argument is purely theoretical and does not take into account the actual geographical patterns of drug production and trafficking. The European Communities, together with the United States, are, by far, the largest markets for drugs. The production of opium and coca products is concentrated in a few countries, all of which supply the European Communities' market. The main transit countries surround those producing countries and are located on the trafficking routes to the European Communities.

It is unnecessary to require that the beneficiaries implement certain anti-drug policies

4.261 In order to ensure that the Drug Arrangements are effective in achieving the objective of protecting the life and health of the European Communities' population it is not necessary to require that beneficiaries apply certain anti-drug policies. The beneficiaries are already subject to a legally binding obligation to take all appropriate measures to fight against drug production and trafficking under the relevant UN conventions. Furthermore, it is in the beneficiaries' own interest to combat drug production and trafficking of drugs.

*(iii) There are no less restrictive alternatives*

4.262 India alleges that, instead of granting trade preferences, the European Communities should provide financial assistance or conclude arrangements for administrative cooperation. Again, India cites no evidence or authority in support of this contention.

4.263 The European Communities considers that, in accordance with the "balanced and comprehensive" approach recommended by the United Nations, the measures suggested by India are complementary rather than alternative to the Drug Arrangements.

4.264 More specifically, the European Communities considers that financial assistance cannot ensure the sustainability of alternative development activities For that, it is indispensable to provide greater market access to the products of such activities. The UN recommendations cited above, as well as the Preamble to the *Agreement on Agriculture* and the justification for the APTA waiver support that approach.

4.265 The European Communities considers that, for the above reasons, there is no alternative to providing greater access to the European Communities' market. The only issue before the Panel is whether such access can be provided in a less trade restrictive manner.

4.266 The European Communities is not aware of any alternatives which would be equally effective and less trade restrictive in order to provide effective market access to the products from the beneficiaries. In its first submission, India suggested that the European Communities should grant the same tariff preferences to all developing countries. However, this would be much less effective because those countries which are not handicapped by the drug problem would capture most of the additional market opportunities created by the tariff preferences.

(c) The Drug Arrangements are applied consistently with the chapeau

4.267 India argued in its first written submission that the Drug Arrangements are not applied consistently with the chapeau. The European Communities has addressed those arguments in its first written submission. India has not presented any new arguments in its Oral Statement or in its replies to the Panel's questions.

## G. ORAL STATEMENT OF INDIA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

### 1. Introduction

4.268 The European Communities makes a number of arguments which if accepted would have considerable systemic consequences.

4.269 According to the European Communities, a tariff advantage is accorded "conditionally" if it is accorded as compensation for benefits received from another party. India would like to emphasize that, if the grant of tariff preferences conditional upon the situation or policies of exporting countries were regarded as being consistent with the most-favoured-nation requirement of Article I:1 of GATT 1994, this fundamental provision of the world trade order would be rendered inoperative.

4.270 The European Communities further invokes paragraph 2(a) of the Enabling Clause in its defence and argues that the term "non-discriminatory" in footnote 3 to the Enabling Clause allows developed country Members to differentiate between like products originating in developing countries under the Generalized System of Preferences ("GSP"). The European Communities' interpretation of the term "non-discriminatory" would have consequences as far-reaching as its interpretation of the term "unconditional". The WTO provides a forum and a legal framework for the negotiation of 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 trade relations. The application of tariffs on an MFN basis is a crucial factor in providing security and predictability to the multilateral trading system. If tariff reductions could be made conditional upon the situation or policies of the exporting country, the WTO legal system would no longer provide the required security and predictability and the WTO would lose its attraction as a forum for trade negotiations.

4.271 The GSP was negotiated and adopted at the UNCTAD for the benefit of developing countries. It was incorporated into the law of the GATT and the WTO through the 1971 Waiver and the Enabling Clause. The developed country Members knew, and accepted in advance, that any developed country Member may grant, under the GSP, preferential tariff treatment to products originating in developing countries without according the same treatment to like products originating in other developed country Members. That is why developed country Members are referred to as "donors" in the context of the GSP. However, the Enabling Clause reflects no similar acceptance on the part of developing countries that any developed country Member may grant preferential tariff treatment to products originating in some developing countries without according the same treatment to like products originating in other developing countries. If the arguments of the European Communities were accepted, developing countries would have to sacrifice market access opportunities in developed countries for the benefit of other developing countries and would therefore also become "donors" in the context of the GSP. Moreover, they would have to make these sacrifices on conditions determined by developed countries. The 1971 Waiver and the corresponding part of the Enabling Clause were never meant to bring about such consequences and there is no accepted principle of interpretation that would justify attaching a meaning to the term "non-discriminatory" that would entail such consequences.

4.272 If the European Communities' defence under paragraph 2(a) of the Enabling Clause were to be upheld, in the current tariff negotiations under the Doha Work Programme, developed country Members will continue to have the assurance that any advantage granted by any developing country Member to any product originating in any developed country will be accorded immediately and unconditionally to any like product of any other Member. However, developing country Members will not have the converse assurance. The creation of such a lop-sided legal framework would not merely be a disadvantage to developing country Members. The WTO's legal framework for tariff negotiations would be fundamentally altered as far as developing countries are concerned.

4.273 Thus, if the European Communities' defence under paragraph 2(a) of the Enabling Clause were to be upheld, the damage caused to the rules-based multilateral trading system would be serious and far-reaching – and most likely, irreparable.

### 2. The allocation of the burden of proof

4.274 The issue of the allocation of burden of proof has been rendered unnecessarily complex in the present case. The European Communities has at various times construed the Enabling Clause as conferring an "autonomous right", as conferring "a positive right", now as conferring "a negative right *and* a positive right". It alleges that the burden of proof should not be placed on the European Communities, *a group of developed countries*, because the Enabling Clause was adopted for the benefit of *developing countries.* The European Communities has occasionally drawn implications beyond the allocation of the burden of proof. For instance, by characterizing the Enabling Clause as an "autonomous right", it has attempted to characterize the Enabling Clause as part of the elements of a claim under Article I:1 of GATT 1994.

4.275 Paragraph 2(a) of the Enabling Clause is an affirmative defence because it does not impose any independent obligations. The requirements under paragraph 2(a) arise only after a Member has chosen to implement a GSP scheme. India has cited prior GATT cases that have treated the Enabling

Clause as an affirmative defence.[48] As India has explained, the allocation of burden of proof depends on whether the affirmative of a proposition is an essential element of a claim or a defence.[49] The Enabling Clause is not an essential element of India's claim under Article I:1 of GATT 1994. Rather, it is an essential element of the European Communities' defence. Alternatively, in India's view, the material facts for the resolution of this dispute are uncontested. Therefore, the Panel need not even delve into the issue of allocation of burden of proof.

### 3. The relationship between the Enabling Clause and Article I:1 of GATT 1994

4.276 The European Communities argues that the phrase "notwithstanding the provisions of the General Agreement" in paragraph 1 of the Enabling Clause precludes the application of Article I:1 of GATT 1994 altogether. India has responded by explaining that the Enabling Clause provides only a limited exception to Article I:1 of GATT 1994, and that, in granting differential and more favourable treatment to the developing countries in the context of the GSP, it is not necessary that developed country Members be absolved from their obligation to accord MFN treatment to like products originating in developing countries. India notes that the European Communities has not responded to these arguments.

### 4. The legal interpretation of the term "non-discriminatory" and the UNCTAD arrangements

4.277 The interpretation of the term "non-discriminatory" in footnote 3 to the Enabling Clause is crucial to the European Communities' defence. The European Communities argues that, in the context of the GSP, the term "non-discriminatory" permits differentiation between developing countries that have different development needs (according to objective criteria). India is of the view that the term "non-discriminatory" in the context of preferential tariff treatment under the GSP means that there cannot be any differentiation between like products originating in developing countries.

4.278 The textual basis for India's interpretation of the term "non-discriminatory" is the following:

- Paragraph 2(a) of the Enabling Clause refers to "preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences".

- Footnote 3 refers to the GSP as that which is "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'".

- The GSP as described in the 1971 Waiver is therefore incorporated into the Enabling Clause by way of reference.

- Paragraph (a) of the 1971 Waiver refers to "the preferential tariff treatment referred to in the "Preamble to this Decision …". Thus, the preferential tariff treatment referred to in the Preamble to the 1971 Waiver was incorporated by reference into the Enabling Clause.

- The Preamble to the 1971 Waiver refers to the "mutually acceptable arrangements" … that "have been drawn up in the UNCTAD concerning the establishment of generalized, non-discriminatory and non-reciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries".

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[48] Panel Report, *US – Customs User Fee*, and Panel Report, *US – MFN Footwear*, see second written submission of India, para. 56.

[49] Ibid., para. 48.

- The term "non-discriminatory" in footnote 3 to the Enabling Clause therefore has the same meaning as that attributed to it in the arrangements that had been drawn up in the UNCTAD.

- As evidence of those arrangements at the UNCTAD, India has presented the Agreed Conclusions, particularly that portion thereof which states that "there is agreement with the objective that in principle all developing countries should participate as beneficiaries from the outset".

- As context to this agreement, India has likewise cited the statements of the developing countries and of the preference-giving countries that are annexed or referred to in the Agreed Conclusions which support its interpretation.

4.279 The European Communities dismisses the legal relevance of the UNCTAD arrangements, characterizing UNCTAD resolutions as "not legally binding". The European Communities likewise refers to the Agreed Conclusions as not reaching "the status of a formal UNCTAD resolution or decision". The Panel need not resolve the issue of the legal status of the UNCTAD resolutions and the Agreed Conclusions *within the law of the UN*. It is sufficient for the Panel to note that the Enabling Clause refers to the GSP referred to in the 1971 Waiver and that the 1971 Waiver in turn refers to the "mutually acceptable arrangements" that "have been drawn up in the UNCTAD". Regardless of the formal status of those mutually acceptable arrangements under the law of the UN, those arrangements define the legal scope of the Enabling Clause. The European Communities' dismissal of the legal relevance of the Agreed Conclusions renders footnote 3 incoherent or inoperative as it would be impossible to determine the nature of the "preferential tariff treatment" described in the preamble to the 1971 Decision without referring to the Agreed Conclusions. It is further noteworthy that the European Communities has not provided any evidence as to any mutually acceptable arrangements drawn up in the UNCTAD that support its position. In particular, the European Communities has not provided any evidence that the term "non-discriminatory" in the context of the GSP, as referred to in footnote 3 to the Enabling Clause and the 1971 Decision, was meant to permit developed country Members to differentiate between developing countries.

### 5. Paragraph 3(c) of the Enabling Clause

4.280 The European Communities argues that, if developing countries could not be treated differently, paragraph 3(c) of the Enabling Clause could not be complied with. The European Communities' understanding of paragraph 3(c) and its relationship with paragraph 2(a) is erroneous. As India has demonstrated in detail in its second written submission, the legal function of paragraph 2(a) is to permit tariff preferences under the GSP, and that of paragraph 3(c) is to ensure that the depth of tariff cuts and product coverage under GSP schemes are responsive to the needs of developing countries. A developed country can therefore perfectly well comply with the obligation to accord the same tariff cuts to all developing countries and the obligation to respond to the needs of developing countries.

4.281 The European Communities' argument depends on a reading of paragraph 3(c) as referring to the needs of "individual" developing countries. India has pointed out that neither the text nor the context of paragraph 3(c) supports such a reading. India pointed out in particular that other provisions of the Enabling Clause explicitly refer to "individual" needs of developing countries while paragraph 3(c) does not. The European Communities has not rebutted any of these arguments. India further pointed out that that the European Communities' reading of paragraph 3(c) would render most of its own GSP and that of all other developed countries inconsistent with this provision. In response, the European Communities argues that paragraph 3(c) "does not require that each preference must be responsive at the same time to the *individual* development needs of each and every developing

country" and that "indeed that would be a logical impossibility".[50] India submits that the European Communities is contradicting itself by claiming at the same time that paragraph 3(c) requires a positive response to the individual needs of developing countries *and* that this requirement would be a logical impossibility.

4.282 The European Communities contends that India has conceded that paragraph 3(c) refers to individual needs.[51] India has not done so. In response to a specific question from the Panel, India merely pointed out that even *if* paragraph 3(c) were interpreted to refer to individual needs, this could be reconciled with the India's interpretation of the term "non-discriminatory" by variations in the choice of products so as to benefit particularly needy counties.[52]

4.283 The European Communities characterizes paragraph 3(c) in its second submission as "worded in rather imprecise terms", and it claims that "it may be argued that its is a purposive provision, which informs the interpretation of the other provisions of the Enabling Clause, but does not, of itself, impose any legally binding obligation".[53] The European Communities thus relies on a provision which it characterizes as "worded in imprecise terms" that "does not impose any legally binding obligation" to justify an interpretation of "non-discriminatory" according to which the developing countries would loose their rights under Article I:1 of GATT 1994. The European Communities uses paragraph 3(c) as contextual support for an interpretation that expands the rights of developed countries but at the same time declares that this provision establishes no obligation for developed countries. The Panel should reject this attempt to have the cake and eat it.

4.284 The inclusion of paragraph 3(c) in the Enabling Clause cannot have the far reaching consequences that the European Communities assumes. Ultimately, the arguments of the European Communities for its negative conception of "non-discrimination" have no firm basis in paragraph 3(c). Instead, the European Communities' conception is based on a *policy* argument that a unilateral power to differentiate between developing countries would be beneficial.

4.285 The European Communities contends that there are considerable difficulties which result from accepting India's interpretation of "non-discriminatory" because it would "effectively deprive the developing countries with special needs from equal development opportunities".[54]

4.286 This policy argument is without merit. The neediest of the developing countries are already accommodated by the special provision for least-developed countries in paragraph 2(d). Moreover, in respect of other developing countries, where there is a good case for differentiation, the waiver mechanism is available. In fact, the WTO Members have granted waivers for measures similar to the Drug Arrangements and for trade measures benefiting the ACP countries. Thus, India's interpretation does not prevent accommodating differences between developing countries in accordance with the collective will of the Members. What India's interpretation merely prevents is that special needs of particular countries be unilaterally determined by developed countries. The question is thus not whether special needs can be accommodated through trade preferences, but (i) whether the developed countries should be able to do this unilaterally and in complete disregard of the legitimate interests of other countries with different but equally pressing needs or (ii) whether they should do so by resorting to the proper WTO procedures.

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[50] Replies of the European Communities to questions from the Panel to both parties and third parties, para. 167.

[51] Second written submission of the European Communities, paras. 51-52.

[52] Reply of India to question No. 15 from the Panel to both parties. The European Communities cites India's replies to questions Nos. 16 and 17 from the Panel to both parties which do not record any concession on this point.

[53] Replies of the European Communities to questions from the Panel to both parties and third parties, para. 57.

[54] First written submission of the European Communities, para. 84.

### 6. Alternative arguments on non-discrimination

4.287 The European Communities has so far failed to demonstrate that the Drug Arrangements are consistent with the concept of non-discrimination that it attempts to introduce into WTO law. Under the European Communities' interpretation, objective criteria have to be established by the preference-giving country, and the preferential tariff treatment must be granted equally to all developing countries meeting those criteria. The European Communities contends that the designation of the beneficiary countries under the Drug Arrangements is made in accordance with "objective, non-discriminatory criteria".[55] The European Communities claims that these criteria capture the possibility of trafficking to the European Communities, as well as the effects of the drug problem on individual countries. However, the European Communities states that the criteria are not contained in a public document[56] and that it is not necessary to publish the relevant criteria.[57] The European Communities has not furnished these criteria to the Panel.

4.288 India would further like to note that:

- The European Communities has not made available to India or to the Panel any documentation reflecting an evaluation of all developing countries' drug profiles for inclusion into the Drug Arrangements. It contends that this documentation is not public.[58] However, elsewhere, the European Communities states that this evaluation is based on publicly available information.[59]

- The European Communities has failed to furnish India with document 15083/01 concerning the inclusion of Pakistan as a beneficiary under the Drug Arrangements and has failed to furnish any document demonstrating why India was excluded from the Drug Arrangements.[60]

- The European Communities states that its authorities do not utilize any "quantitative or qualitative threshold."[61] The absence of a quantitative or qualitative threshold conclusively indicates that no objective criteria were applied.

4.289 The European Communities' concept of "non-discrimination" logically implies that there is a criterion equally applicable to all developing countries and justifying the more favourable treatment of some of them. In other words, its concept implies a right to rank the needs of developing countries in accordance with objective criteria. Yet, the European Communities has so far failed to indicate the criteria that it applied when deciding that the needs of the beneficiary countries rank higher than the needs of India and other developing countries. All that has been heard so far from the European Communities is that the needs of the beneficiary countries are different from those of India. However, the European Communities has not explained why the needs of the 12 beneficiaries deserve special preferences, while those of India and other developing countries do not.

4.290 The European Communities' concept of non-discrimination further implies that the increased market access opportunities accorded under the Drug Arrangements are in effect targeted to resolve the drug-related problems of the 12 beneficiaries. The factual underpinning of the European

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[55] Ibid., para. 116.
[56] Replies of the European Communities to questions from India, para. 5.
[57] Replies of the European Communities to questions from the Panel to both parties and third parties, para. 136.
[58] Replies of the European Communities to questions from India, para. 12
[59] Replies of the European Communities to questions from the Panel to both parties and third parties, para. 144.
[60] Replies of the European Communities to questions from India, para. 21.
[61] Replies of the European Communities to questions from the Panel to both parties and third parties, para. 145.

Communities' claim, on which it justifies the exclusion of India and other developing countries, is that Drug Arrangements resolve problems that India and other developing countries do not have. In fact however, the increased market access opportunities help resolve a large variety of development needs of the beneficiaries, including the need to reduce unemployment, the need to attract investments and the need to improve their external financial position. The Drug Arrangements thus help resolve to a large extent problems of the beneficiaries that are identical to those of India and other developing countries. The factual unpinning of the European Communities' claim is therefore baseless.

## H. ORAL STATEMENT OF THE EUROPEAN COMMUNITIES AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

### 1. Relationship between Article I:1 of the GATT and the Enabling Clause

(a) The Enabling Clause is not an "affirmative defence"

*(i) The Enabling Clause recognizes an "autonomous right"*

4.291 According to India, the Enabling Clause is not an "autonomous right" because the measures falling within its scope would otherwise be prohibited by Article I:1 of GATT 1994. However, the same is true of Article 27.2 of the SCM Agreement and Article 3.3 of the SPS Agreement. Yet, this did not prevent the Appellate Body from concluding that these two provisions are not affirmative defences. Rather, according to the Appellate Body, Article 27.2 of the SCM Agreement and Article 3.3 of the SPS Agreement exclude *a priori* the application of Articles 3.2 of the SCM Agreement and 3.1 of the SPS Agreement, respectively. Likewise, the Enabling Clause excludes the application of Article I:1 of GATT 1994 and, therefore, cannot be characterized as an affirmative defence justifying a violation of that provision.

4.292 India's argumentation with regard to Article 2.1 of the SPS Agreement falls short because Members have the right to apply customs duties consistently with their WTO obligations. Moreover, the Appellate Body nowhere referred to Article 2.1 but to Article 3.3 whose wording is equivalent to that of paragraph 1 of the Enabling Clause.

*(ii) The Enabling Clause imposes "positive obligations"*

4.293 According to India, the Enabling Clause does not impose "positive obligations" because developing countries cannot "compel" developed countries to establish a GSP scheme. However, the same could be said of many other WTO provisions, including Article I:1 of GATT 1994, which are not "affirmative defences" because Members are free to decide whether or not to levy customs duties on imports and, if so, at which level. Similarly, under the Enabling Clause, the right to grant differential and more favourable tariff treatment is subject to certain "positive obligations" set out in paragraphs 2 and 3 of the Enabling Clause, including the obligation that the preferences granted as part of a GSP scheme must be "non-discriminatory".

4.294 On India's interpretation, other WTO provisions which have been recognized not to be "affirmative defences" would be found to impose no "positive obligations" such as Article 27.4 of the SCM Agreement, Article 3.3 SPS Agreement, Article 6 of the Agreement on Textiles and Clothing or Articles VI and XIX of GATT 1994. Yet, in all these cases although they are not compelling they have been recognized by the Appellate Body as "positive obligation".

*(iii) Previous panels have not treated the Enabling Clause as an affirmative defence*

4.295 India's argument that previous disputes panels (*US – Customs User Fee* and *US – MFN Footwear*) have treated the Enabling Clause as an affirmative defence is not correct either because the Panel made no respective finding or because it was not invoked by the defendant.

*(iv) The report of the Appellate Body in Brazil – Aircraft supports the European Communities position*

4.296 India's interpretation on Article 27.4 falls short because the Appellate Body relied on the fact that Article 27 is intended to provide Special and Differential Treatment and in any event, like Article 27.4 of the SCM Agreement, the Enabling Clause does impose positive obligations. Finally, contrary to India's assertion, whether or not the Enabling Clause is an affirmative defence, cannot depend on the identity of the complaining party in each particular case. India's suggestion that the violation of the Enabling Clause will always be invoked by a developing country vis-à-vis a developed country is incorrect. The Enabling Clause also accords to developing countries the right to grant certain forms of differential and more favourable treatment. Thus, a developed country, or another developing country, could invoke a violation of the Enabling Clause by a developing country.

(b) India has the burden to prove that Article I:1 of the GATT applies to the Drug Arrangements

4.297 India further misinterprets that the burden of proof "must be assessed in relation to the material elements of the plaintiff's claim" and that since India's only claim in this dispute is that the Drug Arrangements are inconsistent with Article I:1 of GATT 1994, and not with paragraph 2(a), it is for the European Communities to prove that the Drug Arrangements fall within paragraph 2(a). A provision of the WTO Agreement either *is* or *is not* "in the nature of" an affirmative defence. The Enabling Clause is not "in the nature" of an affirmative defence, and it does not become one simply because it is invoked by the defendant in a particular dispute. This is evident from the cases *Brazil – Aircraft* and *EC – Hormones.*

4.298 Regarding the burden of proof, India's reference to the Appellate Body report in *US – Wool Shirts and Blouses* does not address the issue of what is an "affirmative defence", as opposed to the negative of the claim asserted by the complaining party. Based on the jurisprudence in *Brazil – Aircraft* India bears the burden of proving that Article I:1 of GATT 1994, and not the Enabling Clause, *apply* to the measure in dispute. India's interpretation would have other unacceptable consequences. For example, a Member complaining against an anti-dumping or a countervailing measure could limit itself to assert a claim based on Articles I or II of GATT 1994, and then it would be for the defendant to prove that such measure is consistent with Article VI of GATT 1994 and the Anti-Dumping Agreement or the SCM Agreement, respectively.

4.299 Finally, in view of India's assertion that it is not making any claims under the Enabling Clause, the European Communities would submit that, if the Panel were to agree that the Drug Arrangements fall within paragraph 2(a) of the Enabling Clause, rather than within Article I:1 of GATT 1994, it should refrain from examining whether the Drug Arrangements are consistent with paragraph 3(c) of the Enabling Clause.

(c) The Enabling Clause excludes the application of Article I:1 of the GATT

4.300 India's contention that the Enabling Clause excludes the application of Article I:1 "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" has no basis on the text of the Enabling Clause. Accordingly, the only issue before the Panel is whether the Drug Arrangements fall within paragraph 2(a). India's thesis is also contradicted by paragraphs 2(c) and 2(d) as these two subparagraphs allow differentiation between developing countries, even though such differentiation is no more "necessary" to provide differential and more favourable treatment to developing countries than it would be within the context of a GSP.

4.301 The European Communities would underline that the Enabling Clause is not an "exception" but one of the main forms of Special and Differential Treatment, which in turn is one of the pillars of the WTO Agreement. The purpose of Special and Differential Treatment is to respond to the special

needs of developing countries. Differentiating between developing countries with different development needs is fully consistent with such an objective. In any event, the Appellate Body has made it clear that there is no presumption that "exceptions" should be interpreted "strictly" or "narrowly".

(d) The meaning of "unconditionally" in Article I:1 of the GATT

4.302 In its second written submission India limits itself to arguing that the Drug Arrangements are not covered by the Enabling Clause and, as a result, are inconsistent with Article I:1, *inter alia* because they are "not unconditional". Since the Drug Arrangements fall within the Enabling Clause, the Panel does not need not to reach the issue of whether they are "conditional" for the purposes of Article I:1.

4.303 In this respect, India's argument on the ordinary meaning of "unconditional" is of little value because it leaves undefined the meaning of "condition". As to the context, it is clear that MFN clauses can be either "conditional" or "unconditional". And that this notion must have identical meaning in relation to both types of clauses. Thus, the *Draft Articles on the MFN Clause* of the International Law Commission give a single definition of condition which applies to both conditional and unconditional MFN clauses. Finally, Article I:1 of GATT 1994 contains two different obligations, which are: first, to grant MFN treatment; and, second, to do so "immediately and unconditionally". To say that a distinction based on the "situation" of a country is not a "condition" is not the same as saying that such distinction is consistent with Article I:1.

**2. The Enabling Clause**

(a) The meaning of "non-discriminatory" in paragraph 2(a)

*(i) The GATT context*

4.304 Contrary to India's assertion, no *definition* of the term "non-discrimination" in the sense of equal competitive opportunities to like products originating in different countries exists under the GATT. India's quotation from the Appellate Body report in *EC – Bananas III* is not relevant here as emphasized in the same report by the Appellate Body. The term "discrimination" may have different meanings in different WTO contexts as noted by the panel in *Canada – Pharmaceutical Patents*. The Enabling Clause, like all the other provisions granting Special and Differential Treatment, does not seek to provide equal competitive opportunities for like products of different origins but it intends to create unequal competitive opportunities in order to respond to the special needs of developing countries.

*(ii) Paragraph 2(d)*

4.305 Contrary to India's argument, paragraph 2(d) is not an "exception" but is one of the forms of differential and more favourable treatment to which paragraph 1 "applies" and, therefore, stands on the same level as paragraph 2(a) with respect to paragraph 1. This does not render paragraph 2(d) "redundant and meaningless" but while the two provisions overlap, the scope of paragraph 2(d) is broader in some significant respects than that of paragraph 2(a), for example, with regard to "preferences/special treatment" and the context in which measure is provided. As for paragraph 2(b), it has a more limited scope than paragraph 2(d) and is intended to cover the Special and Differential Treatment provisions contained in the Tokyo Round plurilateral agreements while paragraph 2(d) covers any "special treatment" with regard to any non-tariff measure.

*(iii) The use of "the" before "developing countries"*

4.306 India's argument in this regard has the immediate *a contrario* implication that whenever the term "developing countries" is not preceded by *the* it means that the preferences may be granted to some developing countries. The use of the word "the" in the English, Spanish and French versions of the Enabling Clause is very disperse. Moreover, both in French and in Spanish, articles are more frequently used than in English and India's interpretation would render the Spanish and French versions internally inconsistent, in particular in view of paragraph 1, 2(c) and 2(d). In addition, India's interpretation of the term "other Members" in paragraph 1 as meaning "the developed Members" would lead to conflicting meanings when read in conjunction with each of the subparagraphs of paragraph 2.

*(iv) The UNCTAD Arrangements*

4.307 The Agreed Conclusions do not prohibit expressly such differentiation. The only provision in the Agreed Conclusions which is relevant to the issue of differentiation between developing countries is that the preferences should be "non-discriminatory". Thus, on the issue before the Panel, the Agreed Conclusions add nothing to what is already said in the Enabling Clause. The Agreed Conclusions do no purport to establish an exhaustive regulation of the GSP's but they take note of the statements of intentions made by the prospective donors and record the agreement (and sometimes the lack of agreement) of all the participants in the consultations sponsored by UNCTAD with regard to certain basic objectives. For that reason, the silence of the Agreed Conclusions on a certain issue can never be considered as dispositive.

4.308 As to the least-developed countries, Part V of the Agreed Conclusions records a series of agreed objectives and statements of intention by the prospective donor countries with a view to responding to the special needs of the least-developed countries. The donor countries are free to go beyond those objectives and statements of intentions, subject to the general requirement that preferences must be *inter alia* "non-discriminatory".

4.309 India's reference to the Agreed Conclusions that "in principle all developing countries should participate as beneficiaries from the outset" does not address the different question of whether the developing countries already designated as beneficiaries of a GSP should be granted the same preferences. The objective cited by India was aimed at preventing donor countries from excluding *a priori* certain developing countries from their GSPs on grounds unrelated to their development needs (namely, the fact that they granted reverse preferences to certain developed countries). The European Communities' interpretation of "non-discriminatory" does not allow differentiation on such grounds because under the European Communities' GSP all developing countries are recognized as beneficiaries and all of them benefit from preferences.

*(v) Paragraph 3(c) and policy arguments*

4.310 India has not provided new arguments on paragraph 3(c) and it has produced a series of unwarranted trade policy concerns. The European Communities, therefore, refers to its previous responses.

(b) The Drug Arrangements are "non-discriminatory"

4.311 The European Communities has explained what are the criteria used in order to select the beneficiaries of the Drug Arrangements. India does not address the adequacy as such of those criteria. Nonetheless, it argues that they are not "objective" because they are not set out in the GSP Regulation. Yet, the fact that the selection criteria are not stated in the GSP Regulation does not prejudge of their objectivity. The European Communities has already explained why it is not necessary to publish the selection criteria or to lay down procedures to apply for inclusion or for removing countries from the

Drug Arrangements. As to the selection of the beneficiary countries, the burden of proof is on India. Yet, the European Communities has explained why India, Indonesia, the Philippines, Thailand and Paraguay are not included in the Drug Arrangements.

### 3. Article XX of GATT 1994

(a) The Drug Arrangements are "necessary" for the protection of human life and health

4.312 By suggesting that a measure must be specifically designed to protect human life and health, India is introducing a requirement which is nowhere stated in Article XX(b). All that is required by that provision is that a measure must be "necessary" to protect human life or health. Article XX(b) does not require that the protection of human life or health must be the only, or even the main objective of the measure concerned. In any event, to the extent India refers to the Explanatory Memorandum, this is a preparatory document with no legal status. Yet, achieving the objective of combating drugs would have the necessary consequence of also achieving the objective of protecting the life and health of the European Communities' population.

4.313 As to the relevance of the "contribution", the European Communities has already explained that the Drug Arrangements are an "important" component of the European Communities' drug policy and, more specifically, that they are a "necessary complement" to the financial and technical assistance provided to the beneficiaries. India's assumption that the fight against drug production and trafficking is simply a matter of law enforcement is at odds with the relevant United Nations recommendations. These recommendations were recognized by the Indian delegation at the occasion of the adoption of the 1998 Action Plan.

4.314 In this context, it is important to develop other economic alternatives besides crop substitution in order to absorb the excess manpower generated by the eradication of drug cultivation in rural areas, as well to prevent the unemployed of the urban and transit areas from joining the drug industry. Finally, India's suggestion that the Drug Arrangements would provide an incentive for the beneficiaries to refrain from combating drug production and trafficking is as absurd as suggesting that the general GSP arrangements provide an incentive for India to refrain from adopting appropriate development policies. Finally, as for technical and financial assistance it is important that trade preferences are a necessary complement to such assistance, rather than an alternative. Licit alternative activities cannot be dependent indefinitely on foreign subsidies. They must be sustainable, and this requires the opening of foreign markets for the output of such activities.

(b) The Drug Arrangements are applied consistently with the chapeau

4.315 With respect to the chapeau of Article XX, the European Communities recalls that the essential substantive feature of the measure in dispute, and the one which, according to India, makes it inconsistent with Article I:1 of GATT 1994, is the tariff differentiation between the beneficiaries and other countries which are not affected by the drug problem. The European Communities argues that such differentiation is "necessary" in order to protect the life and health of its population. If the Panel were to agree that such differentiation is "necessary" for that purpose and, therefore, that the measure is prima facie justified under Article XX(b), it would be illogical to examine again such differentiation under the chapeau. Rather, the issue to be examined under the chapeau is whether the *application* of such differentiation is discriminatory.

# V. ARGUMENTS OF THE THIRD PARTIES

## A. THE ANDEAN COMMUNITY

### 1. Introduction

5.1 The Governments of Bolivia, Colombia, Ecuador, Peru and Venezuela (referred to jointly as the Andean Community) submit that the Drug Arrangements do not constitute a violation of the European Communities' WTO obligations. The Enabling Clause must be seen as a self-standing regime which affirmatively establishes how developed countries are to assist developing countries. The Enabling Clause and the GSP that it authorizes are the most concrete and relevant forms of special and differential treatment granted by developed countries in favour of developing countries. As such, GSP schemes are key to the participation of developing countries in the world trading system. It is impermissible to see the Enabling Clause as just an exception.

5.2 The Andean Community contends that the European Communities system of tariff preferences, including the Drug Arrangements, *does* fall within the scope of the Enabling Clause. The Drug Arrangements do not violate the Enabling Clause; rather, they are a proper application of it.

5.3 The Andean Community argues that preference-giving countries can differentiate between developing countries, and the Drug Arrangements, in so differentiating, do not violate the Enabling Clause. The term "non-discriminatory" should not be equated with the most-favoured-nation (MFN) principle, rather, it should be interpreted in a way that allows for differentiation that addresses the drug-related development needs.

5.4 The Andean Community believes that drug problems are an internationally recognized problem and that the international community shoulder shared responsibility for the war on drugs. The European Communities' Drug Arrangements represent a positive response that contributes to alleviating the enormous burden of the drug problem by fostering the development of agriculture and industrial alternatives to drug production and trafficking.

### 2. The important implications of this dispute for the Andean Community

5.5 The Andean Community argues that it has a vital interest in the preservation of the Drug Arrangements and in the outcome of this case. The destabilizing effects of the production and trafficking of illicit drugs on economic and legal institutions, civil societies and political systems of countries of the Andean Community are notorious. The Drug Arrangements are intended to provide assistance to beneficiary countries with severe drug production and trafficking problems in their efforts to create alternatives to drug activities, while fostering sustainable development. Accordingly, Bolivia, Colombia, Ecuador, Peru and Venezuela are all beneficiaries of the Drug Arrangements and are all countries with severe drug-related problems.[62]

5.6 The Andean Community claims that the international community has recognized the multiple negative effects of drugs in Bolivia, Colombia, Ecuador, Peru and Venezuela. As the 2002 annual report of the International Narcotics Control Board (INCB) put it: *"the drug problem in South America, particularly in the countries in the Andean sub-region has increasingly been linked to political issues and national security issues"*.[63] The Andean Community states that the Andean region has very particular developmental challenges brought about by the continued cultivation and

[62] Joint third-party submission of Bolivia, Colombia, Ecuador, Peru and Venezuela, para. 5, where in footnote 3 it refers to the paras. 126-131of the First written submission of the European Communities.

[63] [emphasis original] Joint third-party submission of Bolivia, Colombia, Ecuador, Peru and Venezuela And, para. 7, where in footnote 4 it refers to the para. 316 of the First written submission of the European Communities and the INCB 2002 Annual Report, annexed thereto as Exhibit (EC-5).

trafficking of illegal drugs. The degree of harm caused to the region's social and economic development by drug cultivation and trafficking is unparalleled in any other region of the world. The drug trade has been the root-cause of many of these problems. It has for many years, and continues today, to fuel activities aimed at destabilizing the region.

5.7 The Andean Community further notes that the negative impact of drug production and trafficking on the economic growth of Andean countries has been the subject of numerous studies[64], pointing out that the sources-of-growth decomposition shows that this reversal can be accounted entirely by changes in productivity. The time series analysis suggests that the implosion of productivity is related to the increase in criminality which has diverted capital and labour to unproductive activities. In turn, the rise in crime has been the result of rapid expansion in drug trafficking activities, which erupted around 1980.

5.8 The Andean Community contends that the huge cost of the "War on Drugs" represents billions of dollars to the Andean countries in financial terms and prevents adequate and much needed spending on education, healthcare, environmental, infrastructure and other development-focused programmes. In addition to this heavy financial burden, the cost of the 'War on Drugs' to social and economic development may be unquantifiable. Over the years, the fight has cost countless lives and has led to the displacement of hundreds of thousands of people. According to the Andean Community, these and other adverse socio-economic consequences have all been well-documented by the world's major international aid donors, development agencies and human rights organizations.

5.9 The Andean Community further argues that shared responsibility for the problem of illicit drugs production and trafficking has been recognized by the General Assembly of the United Nations.[65] According to the Andean Community, the Drug Arrangements were explicitly a response to a plea for support from countries comprising the Andean Community, which stressed to the European Communities that drug production and trafficking seriously undermines social integrity and impairs economies to the point of jeopardizing development.[66] As such, the preferences are a positive response that alleviate the enormous cost to its economies and societies of this plague by fostering the development of alternatives (agricultural and industrial) to drug production and trafficking.

5.10 The Andean Community contends that the Drug Arrangements are meaningful to its members. In 2000, the Andean Community's exports to the European Communities under this special regime amounted to US$1.275 billion (22.8 per cent of the total exports of the Andean Community to the European Communities). Likewise, the gross value of the production under this regime was US$2.532 billion, generating around 159,000 jobs.[67] More specifically, the gross value of the production under the GSP special regime represented in 2000, US$1 billion for Venezuela, US$678 million for Peru, US$494.5 million for Colombia, US$245 million for Ecuador, and US$78 million in the case of Bolivia. Likewise, the benefits of this regime in terms of direct and indirect employment in 2000 reached 53,100 jobs for Ecuador, 45,700 for Colombia 33,600 for Venezuela, 23,900 for Peru and around 3,000 for Bolivia .[68]

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[64] Joint third-party submission of Bolivia, Colombia, Ecuador, Peru and Venezuela, para. 11, where in footnote 5 it refers to Exhibit (EC-7) annexed to the First written submission of the European Communities.

[65] Joint third-party submission of Bolivia, Colombia, Ecuador, Peru and Venezuela, para. 15, where in footnote 9 it cites the General Assembly of the United Nations, A/RES/56/124 of 19 December 2001.

[66] Joint third-party submission of Bolivia, Colombia, Ecuador, Peru and Venezuela, para. 12, where in footnote 6 it refers to the preamble of Council Regulation 3835/90 of 20 December 1990 amending Regulations (EEC) No 3831/90, (EEC) No 3832/90 and (EEC) No 3833/90 in respect of the system of generalized tariff preferences applied to certain products, OJ L 370/126.

[67] Joint third-party submission of Bolivia, Colombia, Ecuador, Peru and Venezuela, para. 13, where in footnote 7 it cites SG/di 416; 6 June 2002; Andean Community: The Advantages of the GSP Special Regime.

[68] Ibid.

5.11 The Andean Community concludes that the removal of GSP benefits would not only have a detrimental impact on the economic and social development of Andean Community, but it will also impair the "War on Drugs". It jeopardizes vital tools for the economic and social development of the countries that comprise the Andean Community.

5.12 Bolivia states in its separate oral statement that from 1989 to 2002, there was an 80 per cent reduction in coca production in Bolivia from 40,000 hectares to 8,000 hectares. Meanwhile, a number of large cartels in Bolivian territory were dismantled, and 16,439 production plants and laboratories together with 25,579 maceration pits were destroyed. These results were obtained through the implementation of a series of programmes which could not have been financed by the National Treasury – indeed, 79 per cent is covered by international cooperation. Territories that were under illicit crops have now been replaced by alternative development product cultivation zones, and Bolivia has become a pioneer in the sustainable management of resources.[69]

5.13 Bolivia claims that a large proportion of the measures implemented to combat drug problem have been made possible through mechanisms such as the Drug Arrangements. Poverty and the lack of opportunities and alternatives have led a portion of its rural population to cultivate coca leaves. Without the alternative development programmes, the "New Commitment to Fight Drugs 2003-2008" that Bolivia presented at the 46th session of the Commission on Narcotic Drugs would be more difficult to implement.[70]

5.14 Colombia argues that drug production and trafficking takes on a particular and special form in each country and varies according to the geographical region. In Colombia, the combined problem of drugs and terrorism in recent years has evolved to such an extent that it presents a medium- and long-term threat not only to Colombia but also to the entire world. Drug trafficking has resulted in loss of productivity over the last ten years as well as many lives.[71]

5.15 Colombia considers that the principle of shared responsibility endorsed by the United Nations is an expression of the world's commitment to tackle this grave problem on a collective basis. This principle recognizes the situation of Colombia as having a special development need and links market access to the fight against the production and distribution of illicit substances. The practice of providing special preferences has existed for more than ten years. The preferences are of considerable significance in the fight against drug production and distribution. To deny the European Communities the possibility to respond positively to the needs of these developing countries would result in the loss of approximately 40,000 jobs in Colombia.[72]

5.16 Ecuador claims that as a poor country, the temptation of easy and much higher gains from drug trafficking compared to low profits from producing coffee or cacao is an important factor behind its drug problems. Government spending on eradication of illicit drug production has reduced financial input for other development-related programmes, such as poverty reduction, education, health, infrastructure and environment. The extent of damage caused by drug trafficking to Ecuador's social and economic development is unparalleled in any other part of the world.[73]

5.17 Ecuador points out that the Drug Arrangements have created a broader opportunity for diversifying its export production and generated greater income and more employment in the country. Nonetheless, the Drug Arrangements are only part of the response to the immense complications

[69] Oral statement of Bolivia, paras. 12, 13 and 15.
[70] Oral statement of Bolivia, paras. 14 and 17.
[71] Oral statement of Colombia, paras. 5, 7 and 12.
[72] Oral statement of Colombia, paras. 9, 10, 13 and 15.
[73] Oral statement of Ecuador, pp.1-2.

posed by drug trafficking. It is Ecuador's view that dismantling the Drug Arrangements would have adverse consequences for Ecuador's more vulnerable population.[74]

5.18 Peru contends that the harmful effects of the drug problem include the loss of export opportunities and the diversion of production efforts to illicit activities. Technical and financial assistance is not sufficient in the combat against drugs. Peru maintains that the Drug Arrangements regime is a key tool for the economic development of the beneficiary countries by helping them to diversify their crops and generate alternative and lawful economic activities. The dismantling of the preferences would obviously have undesirable effects on Peru's economy. In this regard, it has not been satisfactorily shown that the cost of these benefits is being assumed by other countries not benefiting from the Drug Arrangements.[75]

5.19 Venezuela states that it is facing a serious drug trafficking problem. Venezuela has been a beneficiary of the Drug Arrangements since 1995. The Drug Arrangements contribute to moderating the high economic and social costs that these drug-affected countries have had to assume, notably due to unemployment resulting from the reduction of illicit crops. The elimination of these preferences would have a negative impact on Venezuela's economic and social development and would aggravate underdevelopment and poverty.[76]

5.20 Venezuela argues that paragraph 3(c) of the Enabling Clause permits differentiation among developing countries and does not require that developed countries extend the preferences under the scheme to all developing countries in responding positively to the different development, financial and trade needs of a particular group of developing countries.[77]

### 3. The pivotal role of the Enabling Clause as part of the GATT/WTO regime for developing countries and as a self-standing regime

5.21 The Andean Community notes that the Enabling Clause was adopted during the Tokyo Round. The Enabling Clause replaced the 1971 waiver which permitted developed contracting parties to accord, for ten years, preferential tariff treatment to products originating in developing countries. By contrast, the duration of the Enabling Clause is not limited.

5.22 The Andean Community argues that the Enabling Clause is the centrepiece of the GATT/WTO framework for special and differential treatment to developing countries. The first effort was the amendment in 1955 of Article XVIII of the GATT, providing developing countries with tools to protect domestic industries. The addition in 1965 of Part IV of the GATT also marked an important step in the evolution of this framework.

5.23 According to the Andean Community, the GSP scheme was created under the auspices of the United Nations Conference on Trade and Development (UNCTAD) to address the concerns of developing countries. UNCTAD reached a final agreement to establish a "mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences" in 1968.[78] Subsequent work in both UNCTAD and the Organization of Economic Co-operation and Development (OECD) ensured

[74] Oral statement of Ecuador, p. 2.
[75] Oral statement of Peru, paras. 5, 9 and 12.
[76] Oral statement of Venezuela, pp. 1 and 2.
[77] Oral statement of Venezuela, p. 2.
[78] Joint third-party submission of Bolivia, Colombia, Ecuador, Peru and Venezuela, para. 24, where in footnote 15 it cites Resolution 21(II), 'Preferential or free entry of exports of manufactures and semi-manufactures of developing countries to the developed countries', adopted at UNCTAD II, 1968, reprinted in H.D. Shourie, *UNCTAD II – A Step Forward*, New Delhi (1968), 343-344.

that developing countries and developed nations respectively agreed on the principles and the particulars of the GSP.[79]

5.24 The Andean Community notes that in 1971, the CONTRACTING PARTIES of the GATT adopted a waiver decision in order to 'enable' GSP regimes to coexist with the GATT rules.[80] The 1971 Waiver Decision authorized the GSP schemes for a period of ten years. This waiver was transformed into a permanent regime by the 1979 Enabling Clause. The Enabling Clause thus put in place the cornerstone of the special and differential treatment for developing countries in the GATT/WTO regime. The GSP is the most concrete and relevant form of "special and differential" treatment that developed countries offer the developing countries. As such, GSP systems are key to the participation of developing countries in the world trading system.

5.25 The Andean Community is of the view that the evolution of the framework for special and differential treatment to developing countries is still an ongoing process. Development has been recognized explicitly as a prime concern for the WTO system. The preamble to the WTO Agreements highlight its importance. Ongoing negotiations are also dedicated to development issues[81], and have been referred to as the "The Doha Development Round". While it is impossible to envisage what the "special and differential treatment" construction will be at the end of "The Doha Development Round", there has been no suggestion that the Enabling Clause should be removed.[82] The Enabling Clause is indeed one of the very few elements that is generally accepted by both developing and developed countries. All recognize that the Enabling Clause and the existence of GSP schemes are fundamental to the continued participation of developing countries in the WTO.

5.26 The Andean Community disagrees with India's argument that the Enabling Clause is merely an exception to the MFN principle. According to the Andean Community, the Enabling Clause is a self-standing regime, affirmatively establishing the manner in which developed countries are to assist developing countries. Because the Enabling Clause is self-standing and has requirements and a terminology of its own, the MFN principle is not part of the Enabling Clause. Without express articulation, it cannot be taken for granted that the requirements and terms of the Enabling Clause are subservient to other WTO principles. The Enabling Clause contains no language to that effect.

5.27 The Andean Community argues that according to the ordinary meaning of the term "notwithstanding" set out in paragraph 1 of the Enabling Clause, Article I:1 of GATT 1994 simply does not apply when developed contracting parties grant preferences to developing countries. The Oxford dictionary defines "notwithstanding" as "*without regard to or prevention by*".[83] In other words, when preferential treatment falls under the Enabling Clause, Article I:1 of GATT 1994 does not apply at all.

5.28 The Andean Community also contends that Article I:1 of GATT 1994 does not offer any useful 'context' in interpreting the Enabling Clause because there is no comparable language in the Enabling Clause to that of Article I:1 of GATT 1994. Particularly, the requirement of providing "unconditional" MFN treatment to all other Members does not appear in the text of the Enabling Clause.

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[79] Joint third-party submission of Bolivia, Colombia, Ecuador, Peru and Venezuela, para. 24, where in footnote 16 it refers to statements made in: GATT, Minutes of meeting of the Council, C/M/69, 28 May 1971.

[80] Joint third-party submission of Bolivia, Colombia, Ecuador, Peru and Venezuela, para. 125, where in footnote 17 it cites the Decision of the Contracting Parties of 25 June 1971 (BISD 18S/24).

[81] Joint third-party submission of Bolivia, Colombia, Ecuador, Peru and Venezuela, para. 30, where in footnote 19 it cites the Doha WTO Ministerial 2001: Ministerial Declaration of 20 November 2001, WT/MIN(01)/DEC/1, at para. 2.

[82] Joint third-party submission of Bolivia, Colombia, Ecuador, Peru and Venezuela, para. 32, where in footnote 21 it refers to the re-affirmation of the Enabling Clause in the Doha Implementation decision, § 12.2.

[83] [emphasis original] Joint third-party submission of Bolivia, Colombia, Ecuador, Peru and Venezuela, para. 37, where in footnote 24 it cites: The Concise Oxford Dictionary of Current English, 7th Edition.

5.29 In its oral statement made at the first substantive meeting of the Panel, the Andean Community argues that the non-discrimination requirement in the Enabling Clause is different from the MFN principle. Citing the 1978 Report on the Most Favored Nations Clause of the International Law Commission, it concludes that the standards of non-discrimination generally permit distinction on the basis of certain objective criteria.[84]

5.30 According to the Andean Community, the issue in this case is not the MFN principle, but the requirements of the Enabling Clause itself.[85]

5.31 The Andean Community claims that the notion of non-discrimination in the Enabling Clause is understood as a command not to treat equal situations differently or different situations equally, whereas the MFN principle requires treating like products from all exporting countries in the same way. Under the Enabling Clause, providing different treatment to developing countries with different economic position does not necessarily constitute discrimination.

5.32 The Andean Community further argues that the Enabling Clause is not a waiver from Article I:1 of GATT 1994. Unlike its predecessor – the 1971 Decision – the Enabling Clause is not described on its face as a waiver. Moreover, Article XXV of GATT 1994 refers to waivers of an obligation "imposed on a contracting party" [emphasis original] in "exceptional circumstances". The Enabling Clause does not refer to any exceptional circumstances, nor is it temporary. According to the Andean Community, it goes without saying that it would be inappropriate to apply a narrow or strict reading of exceptions or waivers that the Appellate Body promulgates when interpreting the Enabling Clause. The Enabling Clause is therefore a self-standing regime rather than an exception to Article I:1 of GATT 1994.

### 4. "Other contracting parties" in paragraph 1

5.33 The Andean Community considers that the phrase "other contracting parties" in paragraph 1 of the Enabling Clause refers to any other contracting parties, whether developed or developing countries. The text of the Enabling Clause is clear in that GSP donors are permitted to differentiate between developing countries. Paragraph 1 provides that the contracting parties may accord differential and more favorable treatment to some developing countries without according such treatment to "other contracting parties". The Enabling Clause allowed developing countries to offer them to *any* other contracting parties, whether developed or developing.

5.34 The Andean Community argues that this reading is confirmed by the fact that the request to add "developed" between "other" and "contracting parties" in paragraph 1 was not accepted in the GATT Council meeting adopting the 1971 waiver Decision.[86]

### 5. Paragraph 3(c) of the Enabling Clause

5.35 The Andean Community contends that paragraph 3(c) allows and requires developed countries to make distinctions between developing countries in their GSP schemes. It requires developed countries to "design" GSP schemes in such a way as to "facilitate and promote the trade of developing countries" and to "respond positively" to the development, financial and trade needs of developing countries. The developing country membership of the WTO is vast, and it is beyond doubt that not all developing countries have the same needs. In "designing" their GSP regimes, developed country Members have a positive obligation to take this into account. The European Communities' Drug Arrangements do exactly that.

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[84] First oral statement on behalf of Bolivia, Colombia, Ecuador, Peru and Venezuela, para. 3.

[85] Joint third-party submission of Bolivia, Colombia, Ecuador, Peru and Venezuela, para. 41.

[86] Joint third-party submission of Bolivia, Colombia, Ecuador, Peru and Venezuela, para. 51, where in footnote 31 it cites the GATT, Minutes of meeting of the Council, C/M/69, 28 May 1971.

5.36 The Andean Community submits that the European Communities' GSP regime properly acknowledges drug-related problems. The Andean Community points out that the production and trafficking of illicit drugs have far-reaching, unparalleled implications and compromise the economic and social development of the affected countries in a unique way. These unique development needs have been recognized internationally.[87] The kind of increased market access provided by the Drug Arrangements has been internationally recognized as an effective tool to alleviate the special development needs of countries affected by drug production and trafficking. These unique problems have been recognized within the WTO as well. For instance, the preamble to the *Agreement on Agriculture* recognizes that increased market access is an effective response to drug-related development problems.[88]

5.37 The Andean Community claims that additional preferences granted to these countries by the European Communities is not only permissible, but also desirable under the Enabling Clause because they recognize the unique development needs and provide a response tailored to specific needs of these countries. The Drug Arrangements seek to displace or reduce the importance of drugs as an economic activity in the affected countries. Increased market access encourages the production of alternative agricultural crops, as well as the allocation of resources to industrial goods. Likewise, by raising standards of living, the Drug Arrangements help strengthen civil institutions, which in turn, further reduces the influence of the "drug economy" in these countries.

### 6. The interpretation of the term "non-discriminatory" in footnote 3 of the Enabling Clause

5.38 For the Andean Community, it goes without saying that enabling discrimination was not the intention of the Enabling Clause. The Andean Community contends that differentiating between developing countries – taking into account their different situations – does not constitute discrimination. In other words, different treatment of situations which are objectively different is not discriminatory. Contrarily, the Andean Community argues that discrimination can be found when treating "like" situations differently and in treating different situations the same. To follow India's theory of non-discrimination – making no distinction between different categories of developing countries – would actually institute a discrimination which would undermine the Enabling Clause.

5.39 The Andean Community posits that in order to comply with the requirements of paragraph 3 of the Enabling Clause, preferences must be designed to facilitate and promote the trade of individual or groups of developing countries and respond positively to their development needs. In other words, the standard of non-discrimination generally permits distinctions on the basis of certain objective criteria. Making no distinction between different categories of developing countries as India argues would actually institute discrimination, thus undermining the Enabling Clause.

5.40 In its oral statement at the first substantive meeting of the Panel, the Andean Community contends that paragraphs 3(a) and 3(c) inform the interpretation of the term "non-discriminatory". Both these subparagraphs require that the design of GSP scheme be fashioned "to promote the trade of developing countries" and "to respond positively to development, financial and trade needs of developing countries". These phrases can be seen to guide and limit the discretion of donor countries when designing their respective GSP schemes.[89]

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[87] As mentioned above, by the General Assembly of the United Nations. See also the 2002 annual report of the International Narcotics Control Board mentioned above, which specifically noted the enormity of the drug problem in South America.

[88] Joint third-party submission of Bolivia, Colombia, Ecuador, Peru and Venezuela, para. 63, where in footnote 37 it refers to para. 112 of first written submission of the European Communities.

[89] First oral statement of Bolivia, Colombia, Ecuador, Peru and Venezuela, para. 4.

5.41 The Andean Community disagrees with Paraguay's argument that discrimination is only envisaged for the benefit of the least-developed countries, as set out in paragraph 2(d) of the Enabling Clause and that differentiation between developing countries is not permitted by the Enabling Clause. The Andean Community argues that paragraph 2(d) refers to another field of application of the Enabling Clause unrelated to GSP. Paragraph 2(d) relates both to tariff and non-tariff measures, whereas paragraph 2(a) of the Enabling Clause only relates to preferential tariff treatment.[90]

5.42 The Andean Community takes issue with Paraguay's suggestion that it is not necessary for a donor like the European Communities to first establish objective criteria in the abstract – in this case, related to drug problems – then establish a separate procedure or criteria pursuant to which it would decide which developing countries would qualify for such preferences.[91] The Andean Community argues that nothing suggests that a donor like the European Communities could not conduct a selection process and include the results of this process in its GSP regulation. What matters is that the choice of beneficiary countries reflected in the regulation corresponds with the criteria of the Enabling Clause, notably paragraphs 3(a) and 3(c). In other words, and contrary to Paraguay's assertion, the question of whether the Enabling Clause permits the European Communities to differentiate between developing countries on the basis of drug-related problems is appropriately before the Panel.

## B. COSTA RICA

### 1. Introduction

5.43 Costa Rica submits that the European Communities' Drug Arrangements are fully consistent with the provisions of the Enabling Clause. Consequently, Costa Rica further submits that the Drug Arrangements are in conformity with the WTO Agreement, including the MFN principle set out in Article I:1 of GATT 1994.[92]

5.44 Costa Rica notes that one of several forms of preferential treatment authorized by the Enabling Clause is preferential tariff treatment granted by developed countries to products originating from developing countries pursuant to paragraph 2(a) and footnote 3 of the Enabling Clause. Costa Rica maintains that the Decision of the Contracting Parties of 25 June 1971, mentioned in footnote 3 of the Enabling Clause, exempted developed countries from Article I:1 of GATT 1947 to the extent necessary to accord generalized, non-reciprocal, non-discriminatory and beneficial preferential tariff treatment.[93]

5.45 Costa Rica submits that the Enabling Clause does not prohibit a developed country from granting preferential tariff treatment to some, but not all, developing countries. The European Communities fulfils its obligation under the Enabling Clause by designing its preferential tariff scheme in a way that responds to the different development and trade needs of beneficiary countries. The European Communities' Drug Arrangements comply with terms of the Enabling Clause because eligibility is determined based on objective and non-discriminatory criteria. Furthermore, Costa Rica argues that duty-free market access granted under these arrangements is necessary to respond to the different development needs of those countries whose economic, trade and financial development is hindered by drug production and/or trafficking.[94]

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[90] First oral statement of Bolivia, Colombia, Ecuador, Peru and Venezuela, paras. 8-9.

[91] Joint third-party submission of Bolivia, Colombia, Ecuador, Peru and Venezuela, para. 6, where in footnote 2, it cites paragraph 9 of Paraguay's third party submission.

[92] Third-party submission of Costa Rica, para. 1.

[93] Third-party submission of Costa Rica, para. 13.

[94] Third-party submission of Costa Rica, paras. 1 and 2.

### 2. The important implications of this dispute for Costa Rica

5.46 Costa Rica emphasizes that it has a substantial interest in the outcome of this dispute since it is a beneficiary developing country under the European Communities' Drug Arrangements.[95] Costa Rica reiterates its request for additional third-party rights in this dispute and submits that panels in the past have granted enhanced third-party rights on the basis of, *inter alia*, the economic effect that the measures in dispute can have on third parties.[96] Accordingly, Costa Rica states that the extent of the dire economic and social consequences that could result from the modification of the European Communities' Drug Arrangements, especially in the absence of substantial tariff reduction or elimination on an MFN basis by developed countries, justify the granting of additional third-party rights to Costa Rica.[97]

5.47 Costa Rica points out that agricultural products that are included in the European Communities' special tariff arrangements comprise 30 per cent of its agricultural sector and Costa Rican exports to the European Communities in 2001 exceeded US$169 million (20 per cent of total exports to the European Communities) under the Drug Arrangements.[98]

### 3. The Enabling Clause does not prohibit the granting of preferential tariff treatment to some developing countries

5.48 According to Costa Rica, India's argument that developed countries are required to extend any advantage accorded under GSP schemes to all developing countries is based on a flawed interpretation of paragraph 1 of the Enabling Clause, since there is nothing in the Enabling Clause requiring that preferential treatment must be accorded to all developing countries or none.[99] India's claim that the Enabling Clause excuses donor countries from according MFN treatment to other developed countries, but not to developing countries is mistaken.[100] Costa Rica further dismisses India's interpretation that the words "other contracting parties" in paragraph 1 of the Enabling Clause means *only* developed countries.

5.49 In countering India's argument, Costa Rica argues that unlike Article I:1 of GATT 1994, which specifies that the advantage, favour, privilege, or immunity shall be accorded to the like products of "*all* other contracting parties", paragraph 1 of the Enabling Clause does not specify the number or category of contracting parties to which the donor country must accord preferential treatment. Costa Rica maintains that the drafters of the Enabling Clause would have simply added the word "developed" before "contracting party" if they had intended that developed countries extend preferential treatment to developing countries as a whole.[101]

5.50 Costa Rica posits that India's argument that tariff preferences must be granted to *all* developing countries lacks legal basis and is contrary to the object and purpose of the Enabling Clause. In this regard, Costa Rica notes that the Enabling Clause is a fundamental part of the rights and obligations of WTO members, which allows developed countries the right to grant preferential treatment to the developing countries. The Enabling Clause clarifies the scope of Article I:1 of GATT 1994 and as such, it does not require developed countries to grant preferential treatment to the "other contracting parties". According to Costa Rica, this means that those countries not benefiting from preferential treatment have no right to demand such treatment be granted to them on the basis of Article I:1 of GATT 1994.[102] Costa Rica points out that the phrase "[n]otwithstanding the provisions

[95] Third-party submission of Costa Rica, para. 9.
[96] Third-party submission of Costa Rica, paras. 7 and 11.
[97] Third-party submission of Costa Rica, para. 9.
[98] Third-party submission of Costa Rica, para. 9.
[99] Third-party submission of Costa Rica, para. 16; Oral statement of Costa Rica, paras. 6 and 9.
[100] Oral statement of Costa Rica, para. 3.
[101] Third-party submission of Costa Rica, para. 18.
[102] Oral statement of Costa Rica, para. 4.

of Article I of the General Agreement" in paragraph 1 of the Enabling Clause, clearly indicates that Article I:1 of GATT 1994 does not apply to preferential treatment accorded to developing countries under the terms of the Enabling Clause.[103]

5.51 Costa Rica states that India adopts an unjustifiably rigid interpretation of "developing countries" in paragraph 1 of the Enabling Clause. If the words "developing countries" require that the whole class of developing countries be included, then it would follow that in paragraph 2(a), where it states that paragraph 1 applies to "products originating in developing countries", it also refers to this whole class. According to Costa Rica, this would lead to an absurd interpretation insofar as developed countries would be able to grant preferential treatment only to products that originate in *all* developing countries without exception.[104]

5.52 According to Costa Rica, the issue of whether the GSP requires donor countries to accord the same preferential treatment to *all* developing countries was extensively discussed in 1971.[105] Costa Rica argues that the negotiating history of the Decision of the Contracting Parties of 25 June 1971[106] confirms that the Contracting Parties purposefully agreed to leave open the possibility of allowing developed contracting parties to accord preferential treatment to some, but not all countries. In this regard, Costa Rica refers to a failed amendment to the Decision of 1971, which proposed to add the word "developed" to paragraph (a) of the Decision of 1971. The proposal would have permitted developed contracting parties to accord preferential treatment to developing countries, "without according such treatment to the products of other *developed* contracting parties."[107] Costa Rica construes the rejection of this proposal – limiting the category of contracting parties that can be deprived of preferential treatment – as a clear indication that the final text agreed upon allows donor countries to exclude both developed and developing countries.[108] Costa Rica maintains, had the amendment been adopted, it would have meant that developed countries were still subject to the MFN obligation under Article I:1 of GATT 1994 and consequently would be obliged to grant MFN treatment to developing countries even under the GSP.[109]

5.53 In light of the negotiating history of the Decision of 1971, Costa Rica claims that India and other countries surely knew that the GSP would allow donor countries to grant preferential treatment to *certain* developing countries without needing to satisfy Article I:1 of GATT 1994 with respect to other *developing* countries.[110]

### 4. The Enabling Clause requires donor countries to differentiate between developing countries

5.54 Costa Rica contends that the word "shall" in paragraph 3(c) of the Enabling Clause requires affirmative action on the part of donor countries. As such, it is not merely a best endeavours clause

[103] Oral statement of Costa Rica, para. 5.
[104] Third-party submission of Costa Rica, para. 19
[105] Oral statement of Costa Rica, para. 9.
[106] Third-party submission of Costa Rica, para. 20, where in footnote 15 Costa Rica states: "The Decision of 1971 still possesses legal authority, albeit limited. It is incorporated, by direct reference, into the Enabling Clause. It defines and sets the parameters of the GSP pursuant to which the developed countries may grant preferential tariff treatment to developing countries notwithstanding the provisions of Article I of GATT."
[107] [emphasis original] See third-party submission of Costa Rica, para. 20, where in footnote 16 Costa Rica cites: Council of the GATT, Minutes of Meeting held in the Palais des Nations, Geneva, on 25 May 1971, C/M/69, 28 May 1971 (Exhibit CR –1).
[108] Third-party submission of Costa Rica, para. 20.
[109] Oral statement of Costa Rica, para. 14.
[110] Oral statement of Costa Rica, para. 17.

that asks developed countries to take into account the different conditions prevailing in individual developing countries.[111]

5.55 According to Costa Rica, paragraph 3(c) of the Enabling Clause imposes on donor countries the obligation to design and, if necessary, modify the differential and more favourable treatment accorded, "to respond positively to the development, financial and trade needs of the developing countries."[112] Costa Rica argues that paragraph 3(c) of the Enabling Clause constitutes irrefutable evidence that paragraphs 1 and 2(a) should not be interpreted as prohibiting donor countries from differentiating between developing countries when according preferential tariff treatment on the basis of objective criteria that recognizes and take into account the particular economic realities of potential beneficiary countries.[113]

5.56 Costa Rica argues that paragraphs 3(c) and 7 illustrate how India's interpretation of paragraphs 1 and 2(a) is inconsistent with the object and purpose of the Enabling Clause.[114] Like paragraph 3(c), paragraph 7 of the Enabling Clause recognizes that the economic development of the less-developed contracting parties will proceed at a different pace, and as their economic situation improve, so too will their participation in the multilateral trading system.[115] In dismissing India's premise that the Enabling Clause requires donor countries to accord identical treatment to all developing countries irrespective of the latters' particular level of development, Costa Rica questions how a donor country could comply with its obligation under paragraph 3(c) if it is prohibited from providing additional market access to those developing countries whose particular economic situation demand such preferential treatment.[116]

5.57 Costa Rica further alleges that India's inflexible and flawed interpretation of paragraph 3(c) of the Enabling Clause would result in pernicious practical consequences for developing countries. Accordingly, requiring developed countries to accord preferential treatment either to *all* developing countries or to none would discourage donors from extending preferential market access to the developing countries which require it the most. Consequently, these consequences would frustrate *a priori* the object and purpose of the Enabling Clause.[117]

5.58 According to Costa Rica, the European Communities' Drug Arrangements are without a doubt consistent with paragraph 3(c) of the Enabling Clause, as they allow farmers the opportunity to substitute illicit crops with duty-free eligible products, as well as providing the necessary resources and incentives to those countries faced with the problem of combatting drug trafficking.[118]

### 5. The Drug Arrangements provided by the European Communities are non-discriminatory

5.59 Costa Rica argues that the Enabling Clause also requires that the selection of eligible beneficiaries be based on objective, non-discriminatory criteria in accordance with the GSP, as described in the decision of 1971. Costa Rica is of the view that the European Communities' Drug Arrangements are based on this criteria and therefore are non-discriminatory.[119]

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[111] Third-party submission of Costa Rica, para. 22.
[112] Oral statement of Costa Rica, para. 20.
[113] Third-party submission of Costa Rica, para. 21.
[114] Third-party submission of Costa Rica, para. 25.
[115] Third-party submission of Costa Rica, para. 24.
[116] Third-party submission of Costa Rica, para. 25.
[117] Third-party submission of Costa Rica, para. 26.
[118] Third-party submission of Costa Rica, para. 23.
[119] Third-party submission of Costa Rica, para. 27.

5.60 Costa Rica agrees with the European Communities that the principle of non-discrimination must not be equated to the MFN principle set out in Article I:1 of GATT 1994.[120] Costa Rica notes that the European Communities interprets the term "non-discrimination" set out in footnote 3 of paragraph 2(a) of the Enabling Clause, as allowing donor countries to treat developing countries differently according to their developing needs based on objective criteria.[121]

5.61 Costa Rica reasserts that the evidence tendered by the European Communities demonstrates that duty-free access granted to the 12 beneficiaries under the Drug Arrangements is a necessary response to the different development needs of those developing countries whose economic, trade and financial development is hindered by drug production and/or trafficking.[122]

### 6. Paragraph 3(b) of the Enabling Clause precludes preferential treatment from constituting an impediment to the reduction or elimination of tariffs and other restrictions to trade on an MFN basis

5.62 Costa Rica urges the Panel to take notice of the fundamental obligation set out in paragraph 3(b) of the Enabling Clause. This obligation not to design or use preferential arrangements under the GSP as an impediment to multilateral trade liberalization formed part of the original decision creating the GSP.[123] Costa Rica states the purpose of allowing developed countries to grant preferential tariff treatment by virtue of the Enabling Clause is simply to accelerate the process of tariff elimination and the integration of developing countries in the multilateral trading system, as reflected by UNCTAD Resolution 21 (II). Therefore, preferential tariff treatment should not substitute or undermine the objective of tariff elimination on an MFN basis.[124]

## C. THE CENTRAL AMERICAN COUNTRIES OF EL SALVADOR, GUATEMALA, HONDURAS AND NICARAGUA

### 1. Introduction

5.63 The Central American countries of El Salvador, Guatemala, Honduras and Nicaragua, participating as third parties in this dispute present a joint third-party written submission and a joint oral statement to the Panel.

5.64 The Central American countries stress that their countries have suffered greatly from drug trafficking. The efforts and costs associated with combatting this problem jeopardize their development agenda.[125] The Central American countries submit that in accordance with the principle of shared responsibility, the European Communities is doing its part to eradicate the international problem of drugs through its Drug Arrangements. In light of their geographical location as a hub for drug trafficking, their designation as beneficiaries under the Drug Arrangements is objectively warranted. The Central American countries claim that the Enabling Clause does not annul the principle contained in Article I:1 of GATT 1994; simply it does not apply in this particular case because the Drug Arrangements are covered by the Enabling Clause. The Central American countries assert that the Drug Arrangements are a positive response to their development needs.[126]

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[120] Oral statement of Costa Rica, para. 20.

[121] Third-party submission of Costa Rica, para. 28, where in footnotes 19, 20 and 21, Costa Rica refers to and cites paras. 28, 61 and 75 respectively of the First written submission of the European Communities.

[122] Oral statement of Costa Rica, para. 29.

[123] Third-party submission of Costa Rica, paras. 30-31, where Costa Rica refers to the "Agreed Conclusions of the Special Committee on Preferences", UNCTAD, Document TD/B/330, p. 7 at para. 2 (ii) (b) of Part IX (Exhibit CR-2).

[124] Third-party submission of Costa Rica, para. 32.

[125] Joint third-party submission of El Salvador, Guatemala, Honduras and Nicaragua, para. 2.

[126] Joint oral statement of El Salvador, Guatemala, Honduras and Nicaragua, p. 1.

### 2. The designation of the beneficiaries of the Drug Arrangements and the assessment of the gravity of the drug problem in Central America

5.65 The Central American countries state that Central America is a major transit route for drug traffickers transporting drugs from South America to the markets of North America.[127] Accordingly, due to their geographical position, geomorphologic features and socio-economic and cultural situation, the Central American countries have been a target of international drug activities. The Central American countries emphasize that drug trafficking is a very deep-rooted problem and leads to instability, mainly in the areas of security, the economy and health..[128]

5.66 The Central American countries emphasize that the by-products that emerge from drug production and trafficking have afflicted their countries and have also hampered the development of the region. Accordingly, the region has experienced a significant increase in firearms trade along the trafficking routes, as well as other related crimes such as; trade in persons, stolen vehicles, money laundering and organized gangs. The substantial amount of resources allocated by the Central American countries to combat drug trafficking have been diverted away from vital development needs such as health and education.[129] In this regard, the Central American countries point out that their respective poverty and illiteracy rates are alarming.[130]

5.67 The Central American countries argue that the determination of which developing countries are eligible under the European Communities' Drug Arrangements is based on objective criteria. The designation as a beneficiary also includes an assessment of the seriousness of the drug problem in each developing country and what efforts are made to combat against the problem.[131] The conditions of those countries with drug production and trafficking problems differ from other countries not afflicted with such problems. Consequently, in light of the human, economic and social cost of drug trafficking in their countries, the Central American countries submit that they are eligible to benefit from the Drug Arrangements.[132]

### 3. The Enabling Clause is applicable to the Drug Arrangements

5.68 The Central American countries argue that consistent with the objective of the Enabling Clause of granting special and more favourable treatment, the Drug Arrangements have given

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[127] Joint third-party submission of El Salvador, Guatemala, Honduras and Nicaragua, para. 8 and para. 9, where an excerpt of the 2001 Report of the International Narcotics Control Board is cited stating that almost 50 per cent of cocaine arriving into the Unites States annually transits through Central America and Mexico.

[128] Joint third-party submission of El Salvador, Guatemala, Honduras and Nicaragua, para. 10.

[129] Joint third-party submission of El Salvador, Guatemala, Honduras and Nicaragua, paras. 11-15.

[130] Joint third-party submission of El Salvador, Guatemala, Honduras and Nicaragua, para. 16, where in footnote 4 the following poverty and illiteracy figures are provided for each of the four countries: In El Salvador, 39 per cent of the population lives in poverty and 16 per centin extreme poverty. As regards education, the illiteracy rate for those aged over 15 years is 15 per cent (2001 data). In Guatemala, 79.9 per cent of the population and 75.5 per cent of households live in conditions of poverty; 59.3 per cent of them in conditions of extreme poverty. As regards education, the rate of illiteracy among the population aged over 15 is 32.7 per cent. In Honduras, 64 per cent of households live in poverty. Regarding education, in 2001, the rate of illiteracy among the population aged over 15 years was 20 per cent. In Nicaragua, 75 per cent of the population lives in conditions of poverty, according to the index of unsatisfied basic needs. Almost one third (31.2 per cent) lives in some degree of poverty, while the remaining households live in extreme poverty (43.6 per cent) because they lack from two to four basic needs. Only one quarter of households (25 per cent) are not in the poverty category. Sixty per cent of the population is in urban areas and 40 per cent in rural areas, but 75 per cent of poor people are in rural areas. As regards education, the urban rate of school attendance is 79, whereas in rural areas it is 69 per cent.

[131] Joint third-party submission of El Salvador, Guatemala, Honduras and Nicaragua, para. 6.

[132] Joint third-party submission of El Salvador, Guatemala, Honduras and Nicaragua, para. 7.

developing countries an opportunity to expand and diversify exports and to eradicate the drug problem.[133]

5.69 The Central American countries note that the Enabling Clause authorizes special and more favourable treatment, "[n]otwithstanding the provisions of Article I".[134] Therefore, since the Drug Arrangements are covered by the Enabling Clause, Article I:1 of GATT 1994 finds no application in this dispute.[135]

### 4. The Drug Arrangements are a positive response to the needs of developing countries

5.70 The Central American countries argue that paragraph 3(c) of the Enabling Clause suggests that special and differential treatment should be granted on a proactive basis, taking into account changes in the levels of development and the development, financial and trade needs of developing countries. Accordingly, the Drug Arrangements constitute a positive way of implementing special and differential treatment in accordance with the specific needs of developing countries. The Drug Arrangements have been designed to meet the special needs of countries whose performance and development has been jeopardized by drug problems.[136]

5.71 The Central American countries claim that the Drug Arrangements are a positive response to the needs of their countries pursuant to paragraph 3(c) of the Enabling Clause. The Central American countries assert that the Drug Arrangements have fostered the creation of alternative development programmes as well as the creation of licit jobs, this is testimony of the benefits accruing from the Drug Arrangements. Additionally, the Central American countries have witnessed a notable increase in exports of non-traditional products to the European Community as a result of the Drug Arrangements. Moreover, the market opportunities under the Drug Arrangements has helped to offset losses sustained as a result of the fall in prices of traditional exports. The Central American countries also emphasize how the spin-offs from the Drug Arrangements have led to economic benefits and better services for farmers and enterprises, which complement the efforts of their respective governments in these areas. Lastly, the Central American countries claim that the fiscal revenue gained as a result of the increase in production makes it possible to strengthen development programmes and government institutions.[137] The Central American countries therefore consider that the social and economic benefits derived from the Drug Arrangements should be taken into account by the Panel.[138]

## D. MAURITIUS

### 1. Introduction

5.72 Mauritius submits that the Panel should find no inconsistency with the European Communities' administration of its GPS scheme to the extent that it is consistent with the Enabling Clause, which Mauritius believes provides for differential treatment to developing countries based on their development, financial and trade needs.[139] Mauritius is of the view that India bears the burden of proof in light of WTO jurisprudence on this issue. Also, the Drug Arrangements are consistent with the provisions of the Enabling Clause, as they provide for non-discriminatory treatment to products originating from developing countries where the same conditions prevail. Alternatively, the Drug Arrangements are justified under Article XX(b) of GATT 1994.

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[133] Joint third-party submission of El Salvador, Guatemala, Honduras and Nicaragua, para. 21.
[134] Joint oral statement of El Salvador, Guatemala, Honduras and Nicaragua, p. 2.
[135] Joint third-party submission of El Salvador, Guatemala, Honduras and Nicaragua, para. 22.
[136] Joint third-party submission of El Salvador, Guatemala, Honduras and Nicaragua, paras. 23-27.
[137] Joint third-party submission of El Salvador, Guatemala, Honduras and Nicaragua, paras. 28.
[138] Joint oral statement of El Salvador, Guatemala, Honduras and Nicaragua, p. 2.
[139] Third-party submission of Mauritius, p. 1.

### 2. India bears the burden of proof

5.73 Mauritius argues that the complainant party bears the burden of proving that the respondent has acted inconsistently in light of the Appellate Body's ruling in *US – Wool Shirts and Blouses*. Mauritius also cites the Appellate Body's ruling in *EC – Hormones* as further support that there should be no presumption that a WTO Member has acted inconsistently with the covered agreements.[140]

5.74 Mauritius claims that even if one assumes that the Enabling Clause is an exception to Article I:1 of GATT 1994, the maxim "*quinque exceptio invokat, ejusdem probare debet*" (i.e. the burden of proof stays with the party invoking the exception) would not apply because what is at issue is not the Enabling Clause *per se*, but rather the conditions under which access to the Drug Arrangements is regulated. Accordingly, since India is claiming that the European Communities' Drug Arrangements violate the obligation of non-discrimination set out in the Enabling Clause by not extending such preferential treatment to all developing countries, India bears the burden of proof. In light of the *EC – Hormones* case, there is no reason to presume that the European Communities has not respected the obligation of non-discrimination.[141]

### 3. The Drug Arrangements are non-discriminatory

5.75 Mauritius submits that India's interpretation that paragraph 2(a) of the Enabling Clause precludes the European Communities from distinguishing between products originating from the beneficiaries of the Drug Arrangements and products originating from other developing countries is incorrect. From the onset of the analysis of "non-discriminatory", Mauritius notes that the GATT/WTO case law has not had the opportunity until now to rule on the interpretation of paragraph 2(a) of the Enabling Clause and asserts that the Panel will have to address whether India's interpretation is supported by a proper reading of the Vienna Convention on the Law of Treaties.[142]

5.76 Mauritius argues that paragraph 1 and footnote 3 of the Enabling Clause clearly indicate that the obligation of "non-discrimination" differs from the MFN obligation in Article I:1 of GATT 1994. Mauritius highlights that the terms "automatically" and "unconditionally" in Article I:1 of GATT 1994 are not found in the Enabling Clause and that only a footnote refers to "non-discriminatory". Mauritius is of the view that differentiation between countries does not automatically imply "discrimination" as long as such differentiation is based on objective and reasonable grounds. According to Mauritius, the concept of "discrimination" is elaborated in the chapeau of Article XX of GATT 1994, where it is unambiguously stated that discrimination is unjustifiable if it does not account for differences among countries. The chapeau calls for non-discrimination between products originating in countries "where the same conditions prevail". Mauritius claims that the foregoing should provide useful guidance when interpreting the principle of non-discrimination. Thus, Mauritius submits that the Drug Arrangements are consistent with the provisions of the Enabling Clause as they provide for non-discriminatory treatment to products originating from developing countries where the same conditions prevail.[143]

5.77 Mauritius argues that the Drug Arrangements grant more preferential treatment to some developing countries that are willing to make an extra effort and take positive measures to combat the serious drug problem the world is currently facing. Mauritius submits that the Enabling Clause allows donor countries to grant more preferential treatment to some developing countries. Firstly, the text of the Enabling Clause explicitly permits distinctions to be drawn between developing and least-developing countries. Secondly, since paragraph 3(c) clearly allows modifying a GSP scheme in order to "respond positively to the development, financial, and trade needs of developing countries", it

[140] Third-party submission of Mauritius, p. 1.
[141] Third-party submission of Mauritius, pp. 1-2.
[142] Third-party submission of Mauritius, p. 3.
[143] Third-party submission of Mauritius, pp. 4-5.

follows that these needs are not the same for a heterogeneous group such as the developing countries. Thirdly, further support is found in paragraph 3(a) of the Enabling Clause.[144]

### 4. The Drug Arrangements are justified through recourse to Article XX(b) of GATT 1994

5.78 Mauritius submits that even if the Panel disagrees with the foregoing and reaches the opposite conclusion, the Drug Arrangements in any event are justified under Article XX(b) of GATT 1994 because they are a necessary means to help human health.[145]

## E. PAKISTAN

### 1. Introduction

5.79 Pakistan states that it fully endorses the arguments advanced by the European Communities. In this regard, Pakistan disagrees with the following three points raised by India: (1) the Enabling Clause does not permit developed countries to discriminate between developing countries; (2) the Drug Arrangements required a waiver; and (3) Pakistan's inclusion in the Drug Arrangements is designed to respond to the policy objectives of the European Communities rather than the needs of the developing countries.

### 2. Article I:1 of the GATT 1994 does not apply to the Enabling Clause

5.80 Pakistan argues that Article I:1 of GATT 1994 is inapplicable to the Enabling Clause in light of the wording of paragraph 1 of the Enabling Clause. Pakistan contends that the Enabling Clause does not require that the same preferential treatment be granted to <u>all</u> developing countries since the entire GSP scheme is based on the granting of preferential treatment to different developing countries, taking into account their development needs. Accordingly, the Enabling Clause <u>enables</u> special and differential treatment of developing countries. Therefore, if preferential treatment is covered by any subparagraph of paragraph 2, then Article I:1 of GATT 1994 does not apply.[146]

### 3. The Drug Arrangements do not require a waiver

5.81 Pakistan rejects India's claim that the Drug Arrangements are not justified without a waiver. Pakistan argues that unlike Article XXV of GATT 1994 and Article IX of the WTO Agreement, which refer to waivers of obligations imposed on a Member in <u>exceptional circumstances</u>, the Enabling Clause does not mention exceptional circumstances nor is it temporary. Therefore, Pakistan submits that there is no need for the European Communities to obtain a waiver for its Drug Arrangements.[147]

### 4. The inclusion of Pakistan in the Drug Arrangements is not to further the policy objectives of the European Communities

5.82 Pakistan contends that India's claim that the circumstances in which Pakistan was included in the Drug Arrangements indicates that the Drug Arrangements are designed to respond to the policy objectives of the European Communities is not borne out by the facts. Pakistan argues that like the other beneficiaries of the Drug Arrangements, Pakistan is also particularly affected by drug trafficking, as it lies on a popular route for drug smuggling. With the increase of poppy cultivation in Afghanistan, Pakistan faces a continuous drug trafficking problem. According to Pakistan, in 2002, it

[144] Third-party submission of Mauritius, pp. 5-6.
[145] Third-party submission of Mauritius, p. 6.
[146] [emphasis original] Oral statement of Pakistan, para. 2.
[147] [emphasis original] Oral statement of Pakistan, para. 3.

seized a total of 9.5 tons of heroin – the largest annual seizure of heroin by any country in the world.[148]

5.83 According to Pakistan, the European Communities recognized at the time it included Pakistan, that the instability in Afghanistan invariably led to greater drug trafficking through Pakistan. Most of the poppy cultivation in Afghanistan is located in areas contiguous to the tribal belt of Pakistan. In this area of the country, Pakistan point out that poppy had been eliminated through sustained efforts. However, Pakistan states that without strong measures, poppy cultivation in the tribal belt may re-emerge. Pakistan asserts that its efforts to address drug production and trafficking have been acknowledged by the UNDCP, declaring Pakistan poppy-free and a role model in the region.[149]

5.84 Pakistan claims that the increase of exports is worth approximately US$300 million as a result of the Drug Arrangements, and has led to the creation of 60,000 job opportunities. Consequently, a vast majority of those possibly tempted by drug trafficking have been provided with alternative sources of income. In light of the foregoing, Pakistan submits its inclusion in the Drug Arrangements was not designed exclusively to respond to the policy objectives of the European Communities.[150]

## F. PANAMA

### 1. Introduction

5.85 Panama asserts that it is necessary to maintain the preferential tariff treatment granted under the Drug Arrangements because it is a crucial instrument of support in the current struggle it is waging to combat drug trafficking.[151]

5.86 Panama disagrees with India's claim that paragraph 1 of the Enabling Clause requires developed countries to grant preferential treatment to all developing countries in conformity with Article I:1 of GATT 1994. Moreover, Panama argues that the Enabling Clause allows preferential treatment to be granted to developing countries on a selective basis, despite the MFN obligation.

### 2. The important implications of this dispute for Panama

5.87 Panama states that the following features of the country make it conducive for the trafficking of drugs: (1) geographical position; (2) inter-ocean canal; (3) international financial centre; (4) airport infrastructure; (5) maritime efficiency; (6) free circulation of the dollar as legal tender; and (7) the largest free-trade zone in the hemisphere.[152]

5.88 Panama points out that its authorities have made notable efforts in curbing drug trafficking. Accordingly, there has been a noteworthy increase in seizures of heroin in recent years. Panama points out that in 2001 the highest drug seizures were for cocaine followed by those for heroin and crack.[153]

5.89 Panama states that between 2000 and 2003 the primary destinations for these drugs were Spain (39 per cent), Mexico (34 per cent) and the United States (21 per cent).[154]

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[148] Oral statement of Pakistan, para. 4.
[149] Oral statement of Pakistan, paras. 4-5.
[150] Oral statement of Pakistan, paras. 6-8.
[151] First oral statement of Panama, p. 3.
[152] Third-party submission of Panama, p. 7.
[153] Third-party submission of Panama, p. 7, where Panama provides the following data: Seizures in 2001 of cocaine, heroin, and crack were 2,655,984.49, 87,231.32 and 4 434.55 grams respectively.
[154] Third-party submission of Panama, p. 7

5.90 Panama is of the view that the Drug Arrangements send a strong message from the developed countries to Panama and the region that it is possible to emerge from poverty by undertaking modest, yet lawful activities.[155]

5.91 Panama states that in 2001 Panamanian exports to the European Community totalled US$162.9 million. Approximately 20 per cent of Panama's exports are directed to the European Community. Panama asserts that the tariff preferences under the GSP promote Panamanian exports to the European Community and have a direct impact on development in Panama.[156] Consequently, the Drug Arrangements also diminish the degree of interdependence between Panama and the United States; Panama's traditional trading partner and accounting for more than 50 per cent of its exports.[157]

### 3. The Enabling Clause is drafted as a statute separate and distinct from the provisions of Article I:1 of GATT 1994

5.92 Panama argues that the Enabling Clause is special legislation governing the general legislation of the GATT 1994 with respect to differential and more favourable treatment of developing countries in accordance with the arrangements outlined in paragraph 2. Panama emphasizes that paragraph 1 begins by pointing out that the rules of Article I:1 of GATT 1994 have no bearing on the granting of differential and more favourable treatment to developing countries.[158]

5.93 Panama argues that paragraph 2 clearly identifies which schemes of preferences will be excluded from the provisions of Article I:1 of GATT 1994. Also, Panama contends that footnote 2 clearly establishes the right of Members to reserve their position in cases not covered by the Enabling Clause. According to Panama, India's interpretation seeks to confuse the cases explicitly cited in the Enabling clause with other schemes to which Article I:1 of GATT 1994 is applicable.[159]

5.94 Panama contends that paragraph 3 unambiguously states that the granting of "differential and more favourable treatment" is consistent with the Enabling Clause and proceeds to give an exhaustive list of requirements governing such treatment. Consequently, the fact of stating that preferential treatment shall be granted under the Clause [*sic*] itself and listing the relevant requirements clearly removes such treatment set out in paragraph 2 of the Enabling Clause from the scope of Article I:1 of GATT 1994.[160]

5.95 Panama submits that to disavow the status of the Enabling Clause as a separate and distinct statute is to disregard its special character by subsuming it within the very same provision from which it was excluded.[161]

### 4. The Drug Arrangements are not in contravention of Article I:1 of GATT 1994, and paragraph 2(a) of the Enabling Clause

5.96 Panama argues that the Enabling Clause allows preferential treatment to be granted to developing countries on a selective basis, despite Article I:1 of GATT 1994. Panama dismisses India's argument that the principle of unconditional MFN treatment found in Article I:1 of the GATT 1994 applies equally to the GSP schemes under the Enabling Clause. According to Panama, the MFN principle has been made subject to the special mechanism of the Enabling Clause.[162]

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[155] First oral statement of Panama, p. 3.
[156] Third-party submission of Panama, p. 6.
[157] First oral statement of Panama, p. 3.
[158] Third-party submission of Panama, p. 3.
[159] Third-party submission of Panama, p. 3.
[160] Third-party submission of Panama, p. 3.
[161] First oral statement of Panama, p. 2.
[162] Third-party submission of Panama, p. 3.

5.97 Panama contends that the discrimination alleged by India is based on an erroneous approach. The unilateral nature of the GSP allows donors the possibility of applying objective criteria in selecting the beneficiaries of preferential treatment. Panama states the criteria are determined on the basis of an overall assessment of the seriousness of the drug problem in each developing country. The selection of beneficiaries pursuant to paragraph 2(a) of the Enabling Clause should be interpreted as the exercise of the right of donor countries to grant preferential tariff treatment in the specific case, rather than being discriminatory. Panama contends that for India to claim that special and more favourable treatment covered by paragraph 1 should be accorded to all developing countries is to add an interpretative qualification not found in the text of the Enabling Clause.[163]

**5. The Enabling Clause authorizes differentiation between beneficiaries without establishing discrimination**

5.98 Panama disagrees with India's argument that the Drug Arrangements discriminate between developing countries because they do not extend to all developing countries. According to Panama, this flawed interpretation is based on the extension of Article I:1 of GATT 1994 to the Enabling Clause and would result in legal uncertainty and frustrate the offering of positive incentives. It would also undermine the purposes for which the Enabling Clause was established. Panama further contends that India's interpretation of extending preferences to all as opposed to the principle of generalization (to a number of beneficiaries) embodied in the Enabling Clause, would cause donor countries to considerably limit the scope of their GSP schemes in terms of the number of programmes as well as the coverage of benefits.[164]

5.99 Panama further argues that it is unable to agree with India's interpretation in light of paragraph 3(c) of the Enabling Clause. According to Panama, the provisions of paragraph 3(c) can never be complied with if India's interpretation that any differential benefit automatically constitutes discrimination is accepted. The needs of developing countries vary considerably from one region to another or even between countries of the same region. Panama claims that if paragraph 3(c) did not provide flexibility in designing incentive schemes, we would face inflexible schemes which might not be advantageous to those developing countries that derive no benefits from more generic schemes. Moreover, there would be no way of preventing more advanced developing countries from receiving benefits to the detriment of schemes designed for those developing countries whose size, capacities and infrastructure are infinitely less advanced. Therefore, Panama submits that paragraph 3(c) of the Enabling Clause provides for the possibility of designing different schemes of preferences and modifying them in accordance with the developments observed.[165]

**6. The Drug Arrangements are a positive response to the development needs of Panama and are supported by paragraph 3(c) of the Enabling Clause**

5.100 Panama states that a major obstacle in accelerating economic growth and development of developing countries is the inability to compete on equal terms with the markets of developed countries. This impediment is compounded when a country must devote significant manpower and financial resources to combat drug trafficking and its many related nefarious by-products.[166]

5.101 Following an exhaustive analysis of the Drug Arrangements, it is Panama's position that they do not violate Article I:1 of GATT 1994 since they are fully covered by paragraphs 2(a) and 3(c) of the Enabling Clause.[167]

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[163] Third-party submission of Panama, p. 4.
[164] Third-party submission of Panama, pp. 4-5.
[165] Third-party submission of Panama, p. 5.
[166] Third-party submission of Panama, p. 5.
[167] Third-party submission of Panama, p. 5.

5.102 According to Panama, the Drug Arrangements also promote industrial development which simultaneously triggers a chain of social benefits, culminating in an improved quality of life as well as boosting commercial growth. This is reflected in improved production capacity which should lead to an increased land area being devoted to sowing, as well as the establishment of new domestic export firms, flows of investment capital, better employment conditions and a sooner than expected decline in criminal opportunities.[168]

5.103 Panama asserts that the positive effects of the Drug Arrangements in promoting local development can be witnessed by the fact that the majority of the more than 140 companies engaged in non-traditional export products that were registered in Panama in 2001 are located in rural areas.[169]

5.104 Panama states that the European Communities has directed this special stimulus scheme to those countries traditionally susceptible to drug trafficking problems in any of their criminal forms. Accordingly, Panama is of the view that the Drug Arrangements are consistent with the spirit of tariff preference schemes insofar as any additional favourable and differential treatment has trade and development objectives.[170]

## G. PARAGUAY

### 1. Introduction

5.105 Paraguay states it has a substantial interest in this matter from two distinct standpoints. First, the matter before the Panel involves systemic issues that have a significant bearing on the interpretation and application of basic principles of the multilateral trading system, particularly the most-favoured-nation-treatment obligation ("MFN") and the proper application of the provisions concerning Special and Differential Treatment (S&D) to developing countries. It is in Paraguay's interest that the Panel does not create exceptions from the MFN principle that have not been negotiated among Members and preserves the rights and obligations of Members as stipulated in Article 3.2 of DSU.

5.106 On a more specific level, Paraguay states it has a particular interest in this dispute as one of the developing country Members adversely affected by the Drug Arrangements. Tariff preferences granted to some developing countries adversely affect the exports of all developing countries excluded from the tariff preferences. To that extent, the "cost" of the preferences granted to a limited group of developing countries is borne by the developing countries excluded from the Drug Arrangements, including Paraguay.

5.107 Paraguay states that it has suffered and continues to suffer from the discriminatory treatment accorded by the European Communities. Paraguay has consistently maintained in various fora of the WTO that tariff preferences accorded to developing countries under the Enabling Clause must, in accordance with its terms, be formulated and applied in a "generalized, non-reciprocal and non-discriminatory" manner.

### 2. Preliminary issue of joint representation

5.108 With respect to the preliminary issue of joint representation raised by the European Communities during the first panel meeting, Paraguay and India submitted a joint statement to the

[168] Third-party submission of Panama, p. 6.

[169] Third-party submission of Panama, p. 6 and footnote 8 where is stated: The basic exports of these companies were melons, watermelons, leather etc. Panamanian plant product exports amounted to B 173.7 million in 2001. The final destination of 85.5 per cent of those exports (B 139.4 million) was the European Union, from which it must be concluded that the emergence of those companies was due to the development of Panama's relations with the market concerned during that period.

[170] Third-party submission of Panama, p. 6.

Panel on 14 May confirming that both India and Paraguay had consented to be represented simultaneously by the ACWL in this dispute.

5.109 In a communication to the Panel dated 28 May 2003 regarding this preliminary issue[171], Paraguay stated that in light of the fact they are both developing countries, India and Paraguay are entitled to the support of the ACWL, whether as parties or as third parties. Paraguay also recalls the Appellate Body statement in *EC – Bananas III* that it, "can find nothing in the … WTO Agreement, the DSU or the Working Procedures, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body". Paraguay claims that the same observation applies equally to the composition of the delegation in panel proceedings.

5.110 Paraguay contends that the WTO dispute settlement procedures establish rules of ethics for panelists and members of the Appellate Body but not for lawyers representing the Members of the WTO, whether they are lawyers of a Member's legal service or lawyers engaged for a particular dispute. Paraguay is of the view that conflicts of interest concerns would normally be the primary concern of the individual Members involved. For these reasons, Paraguay believes that the request of the European Communities for the Panel to rule on the matter of legal ethics lacks basis and should be rejected.

**3. Systemic concerns**

(a) The elimination of discrimination is a primary objective of the multilateral trading system

5.111 Paraguay states that one of the primary objectives of the WTO Agreement, as stated in its preamble, is "the elimination of discriminatory treatment in international relations".

5.112 Paraguay argues the elimination of discriminatory treatment is a fundamental element of the rules of the multilateral trading system. The interpreter of the WTO Agreement must therefore assume that the principle of non-discrimination applies unless the Members of the WTO have explicitly and clearly agreed otherwise. Any departure from the MFN principle entails trade benefits for some and trade losses for others, and thereby modifies the negotiated balance of rights and obligations. Any departure from this principle can therefore only result from negotiations among Members. The Members of the WTO have never agreed that the developed countries may grant tariff preferences to a selected group of developing countries. The European Communities has sought the required agreement by requesting a waiver but has failed to obtain it. The Drug Arrangements have therefore remained unilateral and consequently are WTO-inconsistent departures from the MFN principle.

5.113 Paraguay also argues that developing countries had never given their consent that developed countries could discriminate between developing countries, except in favour of least-developed countries.[172] Paraguay states that to its recollection, no developed country had ever taken the position that developed countries could differentiate between developing countries under the GSP during the Uruguay Round negotiations. Accordingly, Paraguay claims that there may have been violations of the Enabling Clause at the time the Uruguay Round negotiations were taking place, but Members had chosen to tolerate those violations then.[173]

[171] Letter of 28 May 2003 from the Permanent Mission of Paraguay to the Panel regarding the role of the Advisory Centre on WTO Law as counsel to both India and Paraguay.

[172] Second oral statement of Paraguay, para. 6.

[173] Second oral statement of Paraguay, para. 7.

(b) The issue of discrimination on the basis of "objective criteria" is not a matter before the Panel

5.114 The European Communities and India agree that under the Enabling Clause, preferential tariff treatment under the GSP must be "non-discriminatory"; however they differ in their interpretations of this term. The European Communities alleges that the Enabling Clause permits developed countries to treat differently "developing countries which, according to objective criteria have different development needs.[174]

5.115 According to Paraguay, this argument is not pertinent to the measures India decided to submit to the Panel.

5.116 Paraguay asserts the measures at issue are the Drug Arrangements as set out in the Regulation. Unlike the provisions governing the special incentive arrangements for the protection of labour rights or the special incentive arrangements for the protection of the environment, the provisions of the Regulation establishing the Drug Arrangements do not establish: (i) any "objective criteria" for the inclusion of developing countries in the Drug Arrangements; nor (ii) any procedure or criteria for their inclusion. The provisions simply state that a group of named countries are entitled to special preferences. Paraguay is not part of that group and nowhere does the Regulation state which "objective criteria" Paraguay would have to meet to become part of that group. Paraguay argues that the plain fact is that the incentives under the Drug Arrangements are confined to specific beneficiaries pre-designated by the European Communities, not to countries meeting certain criteria.

5.117 Paraguay argues that the measures at issue thus discriminate in favour of specified countries, not in favour of countries meeting defined criteria. The question of whether the Enabling Clause permits the European Communities to adopt GSP schemes that discriminate between developing countries on the basis of objective criteria is therefore not a matter before the Panel for purposes of Article 11 of the DSU. In any case, as elaborated below, the Enabling Clause does not authorize differentiation in treatment between developing countries.

5.118 Paraguay argues that the European Communities' interpretation of non-discrimination based on criteria of "legitimate objectives" and "reasonable means" is too open-ended to provide any assurances that abuses will not occur and that such abuses can be legally disciplined by panels in a consistent manner.[175]

(c) The Enabling Clause in any case does not permit differentiation in treatment between developing countries in the context of GSP schemes

5.119 Paraguay states that all developing countries have different development needs. The Enabling Clause does not permit developed countries to grant differential treatment to some developing countries on the basis that they have "different development needs". If this were the case, there would be no need to explicitly provide for paragraph 2(d) of the Enabling Clause, which specifically authorizes "*special treatment* of *the least developed* among the developing countries in the context of any general or specific measures in favour of developing countries". Thus, discrimination between developing countries is envisaged only for the least-developed countries, not for any group of developing countries having "different development needs", whether least developed or not. It is not sufficient for the European Communities to assert that its criterion for differentiation is "justified", it must show that the criterion for differentiation used by it is expressly envisaged under the Enabling Clause. Paraguay claims that it has manifestly failed to do so in the present case.

5.120 Paraguay contends that not only is the European Communities' interpretation contradicted by paragraph 2(d) of the Enabling Clause, it also runs contrary to the agreement reached between

[174] First written submission of the European Communities, para. 84.
[175] Second oral statement of Paraguay, para. 17.

developing and developed countries in the context of the UNCTAD, as reflected in paragraph 2(a) of the Enabling Clause. Paragraph 2(a) limits the scope of departure from Article I:1 of GATT 1994 solely to preferential tariff treatment which is in accordance with the "Generalized System of Preferences" as described in the "Decision of the Contracting Parties of 25 June 1971" (the 1971 Waiver"). The 1971 Waiver authorizes a waiver from Article I:1 of GATT 1994 to allow "developed contracting parties … to accord preferential treatment to products originating in developing countries and territories *generally the preferential tariff treatment referred to in the Preamble to this Decision*". The preamble in turn states:

> "… *Recalling* that at the Second UNCTAD, unanimous agreement was reached in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth in these countries;
>
> *Considering* that mutually acceptable arrangements have been drawn up in the UNCTAD concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries " (emphasis added)

5.121 Paraguay notes that the mutually acceptable arrangements drawn up in UNCTAD are contained in the "Agreed Conclusions of the Special Committee on Preferences"[176] ("Agreed Conclusions") adopted by the Trade and Development Board on 13 October 1970. The Agreed Conclusions represent the outcome of negotiations held over a period of over two years pursuant to Resolution 21 (II) of the Second Conference held in New Delhi.

5.122 According to Paraguay, under the European Communities' interpretation, subgroups of developing countries can be singled out for preferential treatment as long as, "according to objective criteria they have different development needs", which implies that developed country Members can unilaterally determine those criteria. However, under the Agreed Conclusions, no such flexibility was envisaged. They merely envisaged that the developed countries could: (i) utilize "safeguard mechanisms"[177]; and (ii) arguably, exclude certain countries from beneficiary status altogether.[178] However, Paraguay claims there is absolutely no reference to the notion that the developed countries should be able to distinguish between the countries that they have recognized to be developing countries. This is also clear from Part V of the Agreed Conclusions which expressly refers to "Special Measures in Favour of the Least Developed Among the Developing Countries". No further basis for differential treatment between developing countries was envisaged.

5.123 Paraguay submits that following the European Communities' reading of the Enabling Clause, it is possible to grant tariff preferences to a set of developing countries without granting the same tariff preferences to least-developed countries, as long as the set of developing countries have distinct development needs. This illustrates the difficulty with the standard proposed by the European Communities. According to Paraguay, least-developed countries could experience trade diversion to developing countries merely because these favoured developing countries have a "developmental need" considered to be especially pressing by a developed country. In the present case, it is difficulties faced on account of drug production and trafficking; but in others it could be, for example, "transition from military rule", "high population growth", "literacy rate", "high levels of corruption", or "degree of rural electrification". While developing countries have a variety of developmental needs; the Enabling Clause does not allow developed country Members to pick and choose amongst

[176] Report of the Special Committee on Preferences on the second part of its fourth session, 21 September – 12 October 1970 ( TD/B/ 329/ Rev.1).

[177] Part III of the Agreed Conclusions.

[178] Part IV of the Agreed Conclusions.

these needs in granting tariff preferences. Instead, it envisages one uncontroversial category of permissible differentiation in favour of the countries determined by the United Nations to be the most needy – special treatment for least-developed countries. Paraguay submits that the European Communities fails to explain how the developmental problems of countries confronting drug production and trafficking are unique and more pressing than the developmental problems faced by other developing countries on account of a host of other factors.

5.124 Paraguay further argues that if the European Communities' interpretation of the Enabling Clause is upheld, the GSP would be an instrument to exercise undue influence towards developing countries by granting tariff preferences selectively. This in turn would transform the GSP from an instrument of generosity of developed countries into a perversion of the GSP that is detrimental to the developing countries.[179]

5.125 Paraguay posits that the implication of the European Communities' approach is that developed countries could manipulate the GSP system so as to pursue their own political agenda and that the rule-based character of the multilateral trading system would be completely undermined. In this context, Paraguay emphasizes that the rules-based multilateral trading system was established precisely to ensure a level playing field in which all Members, regardless of their level of economic development or political power, conduct their trade relations in accordance with rules and norms established by the Members themselves acting through the WTO. Paraguay argues that the European Communities' approach further exacerbates the intrinsic disadvantages of developing countries.

5.126 Paraguay submits it is clear that the discriminatory nature of the Drug Arrangements results in obstacles to exports of the developing countries discriminated against. The Drug Arrangements have pernicious effects on current exports and also impede the creation of future trade opportunities. Any assessment of the measures before the Panel must take into account the need of investors and traders for clear and predictable rules permitting them to plan their activities. Paraguay asserts that creating the possibility for developed countries to distinguish between the developing countries on the basis of unilaterally determined criteria would remove all predictability in the trade relations between developed and developing countries.

5.127 Paraguay is of the view that the European Communities' interpretation of the concept of non-discrimination cannot therefore be reconciled with paragraph 3(a) of the Enabling Clause, which mandates that GSP schemes "shall be designed to facilitate and *promote* the trade of developing countries". Nor can it be reconciled with the requirements of paragraph 3(c) of the Enabling Clause which stipulates that GSP schemes shall be designed to respond positively to the "trade needs" of developing countries.

5.128 Paraguay rejects the European Communities' argument that paragraph 3(c) of the Enabling Clause provides a basis for it to effectively determine what the developing needs of developing countries are and consequently to provide differential treatment between developing countries on that basis.[180] Accordingly, Paraguay argues that in *EC – Bananas III* the Appellate Body affirmed that the non-discrimination obligation of the GATT 1994 such as Article I:1 thereof, apply to imports of like products, except when these obligations are specifically waived. Therefore, Paraguay submits that the term "non-discrimination" pursuant to the Enabling Clause is the same as "non-discrimination" under Article I:1 of GATT 1994, since the Enabling Clause is part of the GATT 1994.[181] Paraguay states that paragraph 3(c) deals with the *design* of the tariff preferences (e.g. product coverage, depth of

[179] First oral statement of Paraguay, para. 9.
[180] First oral statement of Paraguay, para. 16.
[181] First oral statement of Paraguay, para. 18.

tariff cuts) and not the principle of non-discriminatory treatment in the context of Article I:1 of GATT 1994.[182]

(d) The waiver mechanism provides the required flexibility

5.129 Paraguay argues that if Members wish to implement discriminatory measures inconsistent with their obligations under the WTO Agreement, they may do so only by resorting to Article IX of the WTO Agreement. Article IX of the WTO Agreement provides them with the flexibility to deviate from their WTO obligations. The waiver procedures give potentially affected Members the opportunity to redress any adverse effect of preferences favouring a group of countries by negotiating compensatory market access commitments. In this way, Article IX limits the damage caused to other Members by measures which are not consistent with the provisions of the WTO Agreement.

5.130 Paraguay states that in 1976 it was affected by the special and differential treatment granted only to ACP Countries under the Lomé Convention. Nonetheless, the European Communities resorted to the waiver mechanism in order to obtain the consent of the membership and redress the damage to the affected developing countries. As a result, other Members, including Paraguay, were given the opportunity to request compensatory concessions from the European Communities.

5.131 Paraguay maintains that the present situation is completely different. By unilaterally proceeding to implement the Drug Arrangements without the benefit of a waiver, the European Communities has disregarded the multilateral nature of the WTO system and has deprived Paraguay and other developing country Members of the opportunity to mitigate the damage created by the discriminatory character of the Drug Arrangements.

**4. Concerns specific to the situation of Paraguay**

5.132 Paraguay states that many developing countries which face drug problems are excluded from the coverage of the Drug Arrangements. The European Communities has even referred to some of these countries in paragraph 140 of its submission. As far as Paraguay is concerned, due to its specific geographical location, it faces severe drug trafficking problems. Paraguay points out that its government and society are engaged in combating this problem. Considerable resources have had to be reallocated from other social endeavours in order to deal with it. The situation of Paraguay in terms of drug trafficking is comparable to that of some of the countries included as beneficiaries under the Drug Arrangements. Yet, Paraguay recalls that it has not been included in the Drug Arrangements, which calls into question the European Communities' claim that the designation of beneficiary countries of the Drug Arrangements is "made in accordance with objective, non-discriminatory criteria".[183]

5.133 Paraguay states that it also is severely affected by drug-related problems. Paraguay's problems have been acknowledges by other countries in the region including some of the beneficiaries, which have signed various cooperation agreements with Paraguay in the fight against drug production and trafficking.[184] However, despite its drug-related problems, Paraguay does not seek to benefit from measures which undermine the right of developing countries to MFN treatment.[185] Paraguay states that it believes that the long-term interests of all the developing countries are better served by a secure and predictable trading system where the rules are consistently applied.[186]

[182] First oral statement of Paraguay, para. 19.
[183] First written submission of the European Communities, para. 116.
[184] First oral statement of Paraguay, para. 19.
[185] First oral statement of Paraguay, para. 20.
[186] First oral statement of Paraguay, para. 21.

5.134 Paraguay claims that the Drug Arrangements have caused trade diversion since its first inception in 1990. Prior to 1990, several Paraguayan goods were competitive export commodities to the European Communities. Paraguay states that after the introduction of the Drug Arrangements, exports of these products from Paraguay to the European Communities considerably declined. In contrast, exports of like products from some of the beneficiary countries have risen. Thus, Paraguay restates that the implementation of the Drug Arrangements has resulted in trade diversion in favour of the beneficiary countries.

5.135 Paraguay asserts that its enterprises are at a competitive disadvantage *vis-à-vis* their competitors in the beneficiary countries not only because they are denied equivalent market access opportunities. Paraguayan enterprises also have to bear the cost of combating drug trafficking (through internal taxes). Even within Paraguay's domestic market, the negative effects of the tariff preferences are felt. While several of Paraguay's products cannot enter the European Communities because of the competitive disadvantages resulting from the tariff preferences under the Drug Arrangements, producers in the beneficiary countries are able to enhance their export capacity and thereby attain economies of scale in production. Paraguayan producers are unable to attain similar economies of scale. As a result, Paraguay argues that producers in other beneficiary countries have enhanced their competitive position *vis-à-vis* Paraguayan producers even in the Paraguayan domestic market.

5.136 Paraguay states that 90 per cent of its exports are agricultural and that the discriminatory barriers encountered by Paraguayan exports in the European Community market have had a detrimental effect on its economy.[187]

5.137 Paraguay states that not only is there trade diversion both in the European Community market and in the Paraguayan domestic market. As a result of the discriminatory tariff preferences under the Drug Arrangements, there has also been an "investment diversion". The proximity between Paraguay and some of the beneficiary countries creates the incentive to shift investments away from Paraguay and towards these countries. Moreover, international investment flows in sectors benefiting from the Drug Arrangements are diverted away from Paraguay. Paraguay notes that in instance, three major industries which had previously invested in Paraguay had to transfer these investments to other developing countries enjoying preferential tariff treatment.[188]

5.138 Paraguay claims the damage that the implementation of the Drug Arrangements has caused to it is exacerbated by the particularities of the geographical location of Paraguay. As a land-locked nation, Paraguay has to bear higher transport costs in order to export its products to the European Communities. The development of Paraguay is critically affected by this factor. On the European Communities reading of the Enabling Clause, a GSP truly responsive to the needs of development can therefore not focus exclusively on the problems specific to a selected group of countries. Paraguay argues that it must take into account the considerable variety of problems facing the developing countries and therefore create benefits for all of them.

### 5. Conclusion

5.139 Paraguay submits that the Drug Arrangements are inconsistent with the requirements of the MFN obligation under Article I:1 of GATT 1994 and are not justified under the Enabling Clause. As a result, Paraguay has suffered from trade and investment diversions.

5.140 Paraguay requests the Panel to find that the measures at issue are inconsistent with the European Communities' obligations under the WTO Agreement. In the absence of a waiver agreed upon by the membership, Paraguay respectfully requests the Panel to suggest to the European

[187] First oral statement of Paraguay, para. 26.
[188] First oral statement of Paraguay, para. 24.

Communities to apply the tariff preferences under the Drug Arrangements to all developing countries, as contemplated under the Enabling Clause.

## H. UNITED STATES

### 1. Introduction

5.141 The United States asserts that it is participating in this dispute because of the systemic importance of the issues presented, and the potential implications of any recommendations and rulings by the DSB. The United States asserts that it takes no position on whether the Drug Arrangements are consistent with the European Communities' WTO obligations. The United States urges the Panel to adopt a careful, prudent approach in resolving this dispute, one which is confined to the specific facts in this case and which takes care to avoid going beyond the particular circumstances of this dispute.[189]

5.142 The United States is of the view that the Enabling Clause is not an affirmative defence, but rather a positive rule that authorizes Members to grant trade preferences to developing countries under certain circumstances.[190] The United States disagrees with India that the wording of paragraph 1 of the Enabling Clause requires developed countries to extend any advantage accorded under a GSP scheme to all developing countries.[191] The United States also disagrees with India's interpretation of "non-discriminatory" under the Enabling Clause.[192] In addition, the United States addresses various issues regarding Article XX of GATT 1994[193], as well as, the preliminary issue of legal representation raised by the European Communities during the first substantive meeting of the Panel.[194]

### 2. The preliminary issue of legal representation

5.143 The United States notes that the preliminary issue raised by the European Communities involves the common legal representation of a party to the dispute and a third party. The United States indicates that it would agree with the European Communities if its argument is that, as a general matter, third parties could not use common representation as a way to enhance their rights, role, or status in a dispute. However, the United States emphasizes that there is no indication that this is the case in this dispute. To address this concern, it should be made clear when the ACWL is speaking on behalf of India, and when it is speaking for other delegations. The United States asserts that it does not see a bar in principle to the ACWL representing more than one party in this particular dispute. The United States notes that conflicts of interest concerns would normally be the primary concern of the individual Members involved. The United States also states that given the decision on expanded third-party rights, it is not clear that there is a confidentiality issue in this case.[195]

### 3. The Enabling Clause excludes the application of Article I:1 of GATT 1994

5.144 The United States agrees with the European Communities that the Enabling Clause is not an affirmative defence justifying a violation of Article I:1 of GATT 1994. According to the United States, the Enabling Clause forms part of the GATT 1994 as an "other decision" pursuant to paragraph (1)(b)(iv) of GATT 1994. Therefore, the Enabling Clause has co-equal status with the GATT 1947 (part of the GATT 1994 pursuant to paragraph 1(a) thereof). In this regard, the Enabling

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[189] Third-party submission of the United States, para. 2; first oral statement of the United States, para. 14.

[190] Third-party submission of the United States, paras. 4-9; second oral statement of the United States, paras. 2-4.

[191] First oral statement of the United States, paras. 2-6.

[192] First oral statement of the United States, paras. 7-14.

[193] Third-party submission of the United States, para. 10; second oral statement of the United States, paras. 6-8.

[194] First oral statement of the United States, para. 15.

[195] First oral statement of the United States, para. 15.

Clause is part of the overall balance of rights and obligations agreed to in the GATT 1994 and the WTO Agreement, and is not merely an "affirmative defense" to Article I:1 of the GATT 1947.[196]

5.145 The United States points to the phrase, "*[n]otwithstanding* the provisions of Article I of the General Agreement" as excluding the application of Article I:1 of GATT 1994. The United States points out that the dictionary definition of the word "notwithstanding" is "in spite of", which in turn denotes that Members may grant preferential treatment under the Enabling Clause "in spite of" the obligation to extend MFN treatment unconditionally.[197]

5.146 The United States asserts that unlike the 1971 Waiver, the Enabling Clause contemplates a general, permanent and separate authorization that is available "notwithstanding" Article I:1 of GATT 1994. In this respect, there is no need to determine whether a measure is inconsistent with Article I:1 of GATT 1994 before applying the Enabling Clause. The Enabling Clause is a positive rule providing authorization and establishing obligations in itself.[198]

5.147 The United States likens the situation in this dispute with that of *US – Wool Shirts and Blouses*, where the Appellate Body held that a provision described by a party as an "exception" was not an affirmative defence, but rather was "an integral part" of the arrangement under the Agreement on Textiles and Clothing that "reflects an equally carefully drawn balance of rights and obligations."[199]

5.148 According to the United States, not only is India's legal position incorrect, but the consequences of its interpretation would be unfortunate. In this regard, the United States asserts that placing the burden on developed countries to defend actions that benefit developing countries would create a disincentive for developed countries to voluntarily grant preferential treatment under the Enabling Clause. Additionally, this would have the unfortunate effect of making treatment more difficult to defend. Accordingly, India would have the Panel conclude that preferential tariff treatment should be presumed *not* to be covered under the Enabling Clause, and that it is incumbent upon the developed country to prove otherwise.[200]

5.149 The United States claims that India's argumentation also suffers from internal contradictions. On the one hand, regarding the "affirmative defence" claim, India asserts that paragraph 2(a) does not impose positive obligations or positive rules establishing obligations in themselves, while on the other hand, India claims that preferential tariff treatment must be non-discriminatory and states, "[t]here is no dispute that this is a binding requirement."[201] According to the United States, India cannot have it both ways, seeing legal requirements in the text when they benefit India, while denying the existence of obligations when it wants the European Communities to bear the burden of proof.[202]

5.150 In light of the foregoing, the United States rejects India's claim that the European Communities bears the burden of proving that the Drug Arrangements are consistent with the Enabling Clause because it is an "affirmative defence". The United States asserts that India's argument that the Drug Arrangements are inconsistent with Article I:1 of GATT 1994 is irrelevant,

[196] Third-party submission of the United States, paras. 4-5.
[197] [emphasis original] Third-party submission of the United States, para. 6.
[198] Third-party submission of the United States, para. 7.
[199] Third-party submission of the United States, para. 8, where in footnote 5 it cites, *US – Wool Shirts and Blouses*, DSR 1997:1, 323, at 337 .
[200] [emphasis original] Second oral statement of the United States, para. 3.
[201] Second oral statement of the United States, para. 4, where in footnote 4 it refers to para. 79 of India's second submission.
[202] Second oral statement of the United States, para. 4

unless India can first establish that the Drug Arrangements are inconsistent with the Enabling Clause.[203]

**4. "All" developing countries**

5.151 The United States disagrees with India that the wording of paragraph 1 of the Enabling Clause requires developed countries to extend any advantage accorded under a GSP scheme to all developing countries. The text of the Enabling Clause leads to the opposite conclusion.[204]

5.152 According to the United States, India's argument that "developing countries" in paragraph 1 must be read as though the term "all" had been inserted before "developing countries" is groundless because the Enabling Clause refers in all cases either to "developing countries" or "the developing countries" and never to "*all* developing countries". Moreover, India's interpretative approach does not work in other parts of the Enabling Clause. The United States argues that India would certainly not support the parallel argument that the use of the word "parties" in "developed contracting parties" of paragraph 2(a) means that "all developed countries" must accord preferential tariff treatment in order for any developing country to take advantage of it.[205]

5.153 The United States agrees with the European Communities and other third parties that the reference in paragraph 1 of the Enabling Clause to "other contracting parties" cannot be limited to "other *developed* contracting parties", as India suggests. According to the United States, the Enabling Clause allows India and other developing countries to grant differential and more favourable treatment to other developing countries. The Enabling Clause specifically provides for developing countries to grant preferential treatment to other developing countries, as in the case of paragraph 2 (c).[206]

5.154 The United States contends that if India's interpretation of paragraph 1 were correct, it would render paragraph 2(c) a nullity, as less-developed countries that had entered into an arrangement under paragraph 2(c) would have to extend preferential treatment to all developing counties, including those that had not entered into such arrangement. In addition, the United States contends that paragraph 2(d) of the Enabling Clause is also directly at odds with India's argument that all developing countries must be treated the same. Lastly, the United States agrees with other parties in this dispute that paragraphs 3(c) and 7 of the Enabling Clause demonstrate that India's "one size fits all" approach is incompatible with the Enabling Clause.[207]

**5. The Enabling Clause reference to "non-discriminatory"**

5.155 The United States notes that paragraph (a) of the 1971 Decision permits developed country contracting parties to accord preferential tariff treatment to products originating in developing countries and territories "with a view to extending to such countries and territories generally the preferential tariff treatment referred to in the Preamble to this Decision." The 1971 Decision does not elaborate on the significance of the use of the term "with a view to", but rather simply requires that the treatment must be that referred to in the preamble. The preamble notes unanimous UNCTAD agreement on establishment of a (1) mutually acceptable system of (2) generalized, (3) non-reciprocal and (4) non-discriminatory preferences beneficial to the developing countries.[208] The United States claims that India's arguments ignore the elements other than non-discriminatory.[209]

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[203] Third-party submission of the United States, para. 9.
[204] First oral statement of the United States, para. 3.
[205] [emphasis original] First oral statement of the United States, para. 4.
[206] [emphasis original] First oral statement of the United States, para. 5.
[207] [emphasis original] First oral statement of the United States, para. 6.
[208] First oral statement of the United States, para. 8.
[209] First oral statement of the United States, para. 9.

5.156 The United States disagrees with India's argument that "non-discriminatory" in the context of the Enabling Clause means "unconditionally" as the term is used in Article I:1 of GATT 1994. The United States notes, like other parties involved in this dispute, that the word "unconditionally" is simply not found in the text of the Enabling Clause. As previously mentioned, the United States asserts that the Enabling Clause excludes the application of Article I:1 altogether, including the "unconditionally" requirement of Article I:1 of GATT 1994. In light of the fact that the Enabling Clause excludes the application of Article I:1 of GATT 1994, and that the Enabling Clause does not include an "unconditionally" requirement, the United States claims it is not necessary for the Panel to address the European Communities' extended arguments on the meaning of the word "unconditionally."[210]

5.157 The United States contends that in the same way India seeks to import into the Enabling Clause the "unconditionally" requirement of Article I:1 of GATT 1994, it also seeks to import into the term "non-discriminatory" a "conditions of competition" test similar to that applied under some, but not all, of the provisions of Articles I and III of GATT 1994. However, the United States maintains that unlike Articles I and III of GATT 1994, the 1971 Decision simply employs the term "non-discriminatory," and there is no indication that the analysis of this term is intended to be the same as that under a "like product" analysis. The United States asserts that the Appellate Body has recognized that "discrimination" is not the same as the "national treatment" test under Article III of GATT 1994.[211]

5.158 The United States generally agrees with the European Communities that a GSP scheme may be described as "non-discriminatory" if it differentiates between unequal situations. As previously mentioned, paragraphs 3(c) and 7 of the Enabling Clause appear to contemplate explicitly that preferential treatment need not be granted on a "one size fits all" basis and that distinctions among developing countries tailored to their development, financial and trade needs are specifically contemplated. According to the United States, India's approach to "non-discriminatory" would appear to render "generalized" redundant or meaningless since "generalized" means "less than all".[212]

5.159 The United States does not disagree with the European Communities that a GSP scheme may be described as "non-discriminatory" if based on objective criteria and on an overall assessment of all relevant circumstances. The United States asserts that under India's approach, GSP schemes would have to be administered on a "lowest common denominator" basis. In this respect, a GSP scheme could be applied only to the extent it addressed needs that were identical among developing countries, and it could not be adapted with respect to particular needs of sub-sets of developing countries. The United States notes that the 1971 Decision calls for a "mutually acceptable system" of preferences, and that a Member has the right, *not* the obligation, to accord preferential treatment. Accordingly, the United States emphasizes that while a "one size fits all" obligation to grant any preferences to all developing countries may be acceptable to India for purposes of this dispute, it is doubtful that it would be acceptable to other beneficiary countries or to GSP donor countries, or even to India in a different dispute.[213]

5.160 The United States joins the many developing third party countries in this dispute that have pointed out the practical difficulty of reading legal obligations into the Enabling Clause not found in the text. The United States asserts that India is asking the Panel to read into the Enabling Clause an obligation that is not legally supported in the text and that, as a matter of trade policy, would, contrary

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[210] First oral statement of the United States, para. 10.

[211] First oral statement of the United States, para. 11 and footnote 12 where it cites the Appellate Body Report, *US – Gasoline*, p. 23.

[212] First oral statement of the United States, para. 12 and footnote 14 where it cites, *The New Shorter Oxford Dictionary*, 4th Edition, p. 1074 (defining "generalize" as "Bring into general use; make common, familiar, or generally known; spread or extend; apply more generally; become extended in application.").

[213] [emphasis original] First oral statement of the United States, para. 13.

to the purpose of the Enabling Clause, create a *disincentive* for Members to extend tariff preferences to developing countries.[214]

### 6. Article XX of GATT 1994

5.161 The United States asserts that it takes no position on whether the European Communities' measures are inconsistent with Article XX of GATT 1994. According to the United States, there is no need for the Panel to address this issue as the dispute should be decided on the basis of the Enabling Clause.[215] Nonetheless, the United States comments that both the European Communities and India err in their use of the phrase "least trade restrictive measure" in addressing whether the Drug Arrangements are "necessary" under Article XX(b) of GATT 1994.[216]

5.162 The United States submits that nowhere in the ordinary meaning of "necessary" is there a meaning of "least trade restrictive", nor does "necessary" take on the meaning of "least trade restrictive" from the context of Article XX or the object and purpose of the GATT 1994. The United States notes that the concept of "not more trade-restrictive" appears in both the Agreement on Technical Barriers to Trade and the Agreement on the Application of Sanitary and Phytosanitary Measures. Therefore, the fact that the WTO drafters did not use this phrase in the GATT 1994 demonstrates, according to the United States, that they did not intend to include this concept in Article XX(b).[217]

5.163 The United States notes that the Appellate Body addressed the applicable standard for evaluating whether a measure is "necessary" under Article XX(b) of GATT 1994 in *EC – Asbestos* and did not use the standard of "least trade restrictive". The issue before the Appellate Body was whether an alternative measure is reasonably available that is "not inconsistent with" other GATT provisions, or if no such alternative measure is reasonably available, whether the measure chosen "entails the least degree of inconsistency with other GATT provisions". The United States argues that "less inconsistent" would require one to examine the degree of inconsistency with the Agreement, whereas "less trade restrictive" would require one to examine the degree of trade effect of a measure.[218]

## VI. INTERIM REVIEW

### A. INTRODUCTION

6.1 The Panel issued the Draft Descriptive Part of its Report to the parties on 8 August 2003, in accordance with Article 15.1 of the DSU. Both parties offered written comments on the Draft Descriptive Part on 15 August 2003. The Panel noted all these comments and amended the draft descriptive sections where appropriate. The Panel issued its Interim Report to the parties on 5 September 2003, in accordance with Article 15.2 of the DSU. On 23 September 2003, both India and the European Communities requested that the Panel review certain precise aspects of the Interim Report. While the European Communities' request concerns certain paragraphs of the Findings section of the Report, India's request relates solely to certain paragraphs in the dissenting opinion section of the Report. Neither of the parties requested an interim review meeting. On 30 September, India and the European Communities provided written comments on each others' requests, as

[214] [emphasis original] First oral statement of the United States, para. 14.
[215] Third-party submission of the United States, para. 10; second oral statement of the United States, para. 6.
[216] Second oral statement of the United States, para. 6.
[217] Second oral statement of the United States, para. 7.
[218] Second oral statement of the United States, para. 8 and footnote 7 where it cites the Appellate Body Report, *EC – Asbestos*, paras. 170-171.

permitted by the Panel's working procedures. The Panel has carefully reviewed the arguments made by both parties and addresses them in this section in accordance with Article 15.3 of the DSU.[219]

## B. COMMENTS BY THE EUROPEAN COMMUNITIES

### 1. Joint Representation of India and Paraguay

6.2 The European Communities requested the Panel to change its wording in paragraphs 7.14 and 7.17 of the Interim Report so that instead of stating the European Communities "acknowledged" that the issue of confidentiality does not arise in this dispute due to the enhanced third party rights granted to all third parties, the Panel would describe the European Communities' position as being that the problem was "mitigated", but not entirely eliminated. The European Communities cited its letter of 4 June 2003 to the Panel on this issue in support of its request:

> "As noted in the EC's statement at the first meeting, the fact that third parties have been granted enhanced rights mitigates the problem, but does not dispose of it entirely. The enhanced rights accorded to third parties do not include the access to all procedural documents made available to the main parties. In particular, third parties have not been granted access to the Interim Report. Yet Paraguay's counsel will have access to the Interim Report, while the other third parties will not. Thus, by sharing its legal counsel with India, Paraguay will gain an advantage over all the other third parties. Given the considerable economic impact of this dispute for the third parties (one of the reasons invoked by the Panel to accord enhanced rights), this advantage seems particularly unfair."

The European Communities also requested the Panel to complete its findings by addressing the issue of whether the situation is compatible with the parties' obligation to maintain the confidentiality of the Interim Report and whether it is compatible with the principle that third parties should be treated equally.

6.3 India commented on this request that the fact that Paraguay and India share the same legal counsel does not mean that Paraguay is automatically given access to all the documents sent by the Panel to India. India argued that, in fact, the ACWL had not given the Interim Report to Paraguay and it would not do so. In India's view, it was completely unwarranted to accuse India of a violation of the confidentiality rules of the DSU merely because it used the same legal counsel as a third party. According to India, the ACWL had adopted rigorous regulations that obliged its staff to respect "the privileged and confidential nature with a Member in a specific case" and to "exercise the utmost discretion in regard to all matters of official business". India therefore indicated that it had the assurance that its confidentiality obligations under the DSU would be respected by the staff of the ACWL. India maintained that the Panel should reject the EC's claim that India violated its confidentiality obligations merely by engaging the same legal counsel as Paraguay.

6.4 India also maintained that the Panel should reject the EC's claim that Paraguay had an "unfair" litigation advantage over the other third parties simply because its legal counsel had access to the Interim Report while the legal advisor of the other third parties did not. India argued that there is no provision in WTO law on which the Panel could base a ruling that considerations of "fairness" of the kind invoked by the European Communities restricted India's right to choose its legal advisers. Also, India contended that it failed to see what litigation advantage Paraguay could possibly derive from the fact that its legal counsel had access to the Interim Report since neither Paraguay nor any other third parties were entitled to present comments on the Interim Report.

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[219] Section VI of this Report, entitled "Interim Review", forms part of the Findings of the Final Report of the Panel, in accordance with Article 15.3 of the DSU.

6.5 The Panel has considered both parties arguments on this issue and clarified its understanding of the European Communities' position on this issue as requested. Accordingly, it makes necessary adjustments to its analysis in paragraphs 7.14-7.17 as well as inserting a footnote to the same point in paragraph 7.18.

6.6 The European Communities also requested the Panel to change its wording in paragraph 7.12 which might lead to the understanding that the European Communities had not acted in good faith. The Panel accepted the proposal and adjusted the language in that paragraph accordingly.

**2. Paragraph 3(c)**

6.7 The European Communities requested the Panel to replace paragraphs 7.71-7.73 of the Interim Report with the following text, as a summary of the EC's arguments on this issue:

> "The European Communities argues that Paragraph 3(c) supports contextually its interpretation of the term 'non-discriminatory' in footnote 3. If donor countries could not differentiate among developing countries, they could not achieve the objective set out in that provision. India's view that Paragraph 3(c) only permits to take into account the needs of all the developing countries 'in general', and not their 'individual' interests, is not supported by the text[220] and would render Paragraph 3(c) irrelevant.[221] The omission of the terms 'individual' or 'particular' is not dispositive.[222] The Enabling Clause is not consistent when using those terms.[223] India overlooks that Paragraph 3(c) applies also with respect to the preferences for LDCs envisaged under Paragraph 2(d).[224] It is obvious that such preferences must respond to the specific needs of the LDCs, and not to those of all developing countries. Moreover, India's interpretation would have the result that any GSP would have to be administered on a 'lowest common denominator basis'.[225]
>
> The European Communities notes that Paragraph 3(c) is so broadly drafted that it might be arguable that it is a purposive provision.[226] To the extent that it imposes a binding obligation, it should be interpreted in a manner which is both workable and consistent with the requirements that the preferences be 'generalised' and 'non-discriminatory'.[227] Developed countries cannot take into account each and every difference between developing countries, but this does not mean that they should be prevented from approaching the objective of Paragraph 3(c) by applying horizontal 'graduation' criteria, and/or by defining subcategories of developing countries which capture the most significant differences between them on the basis of a comprehensive set of objective, non-discriminatory criteria.[228] The mere fact that two countries score differently with respect to a given indicator does not mean that they have different 'development needs' for the purposes of Paragraph 3(c).[229] Moreover,

[220] (footnote original) EC's reply to the Panel's question to India No. 8, para. 102.
[221] (footnote original) EC's reply to the Panel's question to India No. 8, para. 108.
[222] (footnote original) Ibid., paras. 103-106.
[223] (footnote original) Ibid., para. 105.
[224] (footnote original) Ibid., para. 107.
[225] (footnote original) Ibid., para. 111.
[226] (footnote original) EC's reply to the Panel's question to both parties No. 17, para. 57.
[227] (footnote original) Ibid., para. 62.
[228] (footnote original) Ibid., para. 63.
[229] (footnote original) EC's reply to the Panel's question to both parties No. 12, para 46.

> trade preferences are not always the most adequate response to differences in development needs.[230]
>
> The European Communities argues that developed countries are free to decide whether or not to apply a GSP. By the same token, they are also free to decide whether or not to grant preferences with respect to certain products, as well as to choose the depth of the tariff cuts. Paragraph 3(c) cannot change this basic premise. India's 'all or nothing' approach has no basis in the Enabling Clause, would greatly discourage donor countries and is clearly against the interest of the developing countries.[231]
>
> On the status of the Agreed Conclusions, the European Communities argues that footnote 3 refers only to the GSP system as described in the 1971 Decision and not to the Agreed Conclusions or other UNCTAD texts. The Agreed Conclusions are not context of the 1971 Decision because they are not binding, not all GATT members were parties to them, and they were not made in connection with the 1971 Decision. *A fortiori*, the Agreed Conclusions are not context of the Enabling Clause. The European Communities submits that the Agreed Conclusions and other UNCTAD texts are preparatory work for the 1971 Decision and, as such, just a supplementary mean of interpretation.[232] In any event, the European Communities is of the view that the Agreed Conclusions and the other UNCTAD texts cited by India do not support India's position.[233]"

6.8 India commented that since the European Communities had not explained why it considered the Panel's summary to be incomplete or incorrectly summarized, it could not reasonably expect the Panel to correct inaccuracies that it had not identify. India considered that the purpose of such summaries was to define the issue analyzed by the Panel, not to provide the reader with an abbreviated rendering of all of the arguments presented by the disputing parties. As a result, the mere fact that the summaries prepared by the Panel did not reproduce all the arguments made by the parties did not render them incomplete. For these reasons, India requested that the Panel reject the EC's request.

6.9 The Panel considers that the purpose of summarizing parties' arguments under the heading "Paragraph 3(c)" is to set out each party's interpretation or understanding of paragraph 3(c) and their views on the interpretative role of the Agreed Conclusions in relation to the Enabling Clause, including paragraph 3(c). The Panel needs to describe the basic positions of both parties submitted during the whole of the proceedings regarding the meaning of paragraph 3(c). The new paragraphs that the European Communities requested the Panel to use in place of paragraphs 7.71-7.73 focus mostly on the rebuttal of India's interpretation of paragraph 3(c), rather than on the European Communities' own interpretation of paragraph 3(c). Another problem with the proposed text is that certain parts of it do not address the issue of the meaning of paragraph 3(c), but rather, they address other paragraphs of the Enabling Clause.[234] Such replacement, in the Panel's view, would not be a

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[230] (footnote original) EC's reply to the Panel's question to both parties No. 12, para. 48. EC's reply to the Panel's question to the EC No. 18, paras. 165-168.

[231] (footnote original) EC's reply to the Panel's question to India No. 8, para. 111.

[232] (footnote original) Second written submission of the European Communities, paras. 34-37. EC's reply to the Panel's question No. 44 from the Panel to both Parties.

[233] (footnote original) EC's second written submission, para. 38; EC's reply to the Panel's question to both parties No. 52, para. 57; EC's comment on India's reply to the Questions to India No. 16.

[234] For example, the very last sentence of the proposed text stated that "[i]n any event, the European Communities is of the view that the Agreed Conclusions and the other UNCTAD texts cited by India do not support India's position". The original arguments made in the EC's second written submission and in its reply to questions from the Panel are related to the term "non-discriminatory" and to paragraph 2(a), rather than to paragraph 3(c). The first sentence of the proposed text stated "[t]he European Communities argues that

balanced assessment of the arguments made by the parties during the proceedings. On the other hand, the Panel considers it appropriate to make adjustments to paragraphs 7.71-7.73 so as to take note of other relevant arguments made by the European Communities during the proceedings, which the European Communities would like the Panel to set out in its Report. Noting that some of the arguments raised in the proposed texts are actually already covered by the text of paragraphs 7.71-7.73 of the Interim Report, the Panel has made a few adjustments by adding certain elements of the proposed text into those paragraphs. The adjustments are now reflected in paragraphs 7.72-7.76 of this Report. At the same time, the Panel has also made adjustments to paragraph 7.68 so as to set out the corresponding counter arguments that India presented in the proceedings.

### 3. "Non-discriminatory" in footnote 3

6.10 The European Communities requested the Panel to replace paragraphs 7.118-7.120 of the Interim Report with the following proposed text:

> "The European Communities argues that, in addition to the neutral meaning invoked by India, the word 'discriminate' has also a negative meaning. The full text of the dictionary definition quoted by India is 'to make a distinction in the treatment of different categories of people, or thing, esp. unjustly or prejudicially against the people on grounds of race, colour, sex, social status, etc'.[235] Referring to numerous definitions of authors and judicial decisions of international tribunals, the European Communities maintains that, in a legal context, 'non-discriminatory' is not synonymous with formally equal treatment. Rather, there is discrimination if equal situations are treated unequally or if unequal situations are treated equally.[236]
>
> For the European Communities, the term discrimination does not have a uniform meaning throughout the WTO Agreement. It notes the statement by the panel in *Canada – Pharmaceutical Patents* that the term 'discrimination' may have different meanings in different WTO contexts.. For example, the meaning of discrimination under Article III of GATT 1994 is different from the meaning of discrimination under the chapeau to Article XX of GATT 1994.[237]
>
> The European Communities maintains that the term 'non-discriminatory' must be interpreted in the specific context of the Enabling Clause (and in particular of paragraphs 2(a) and 3(c) and the term 'generalised' in footnote 3)[238] and in the light of its object and purpose. Article I:1 of the GATT is concerned with providing equal conditions of competition for imports of like products originating in all Members. In contrast, the Enabling Clause, like all Special and Differential Treatment provisions, seeks to create unequal competitive conditions in order to respond to the special needs of developing countries. Having regard to that objective, differentiating between developing countries according to their development needs is no more discriminatory than differentiating between developed and developing countries."[239]

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paragraph 3(c) supports contextually its interpretation of the term "non-discriminatory" in footnote 3". Again, this argument does not address the issue of the meaning of paragraph 3(c) but rather, it addresses the issue of the meaning of "non-discriminatory".

[235] (footnote original) First written submission of the European Communities, para. 66.

[236] (footnote original) Reply of the European Communities to question No. 9 from the Panel to both parties, paras. 31-32.

[237] (footnote original) Reply of the European Communities to question No. 10 from the Panel to both parties, paras. 38-40.

[238] (footnote original) EC's reply to the Panel's question to both parties No. 9, para. 27.

[239] (footnote original) EC's replies to the Panel's question to both parties No. 10 and EC's reply to the Panel's question to the EC No. 15.

> Accordingly, the EC considers that, in order to establish whether the Drug Arrangements are 'non-discriminatory' within the meaning of footnote 3, the Panel should address the following two issues: first, the Panel should establish whether the Drug Arrangements pursue an objective which is consistent with the object and purpose of the Enabling Clause, and more specifically with the objective stated in Paragraph 3(c); second, if so, the Panel should establish whether the Drug Preferences constitute a reasonable means to achieve that objective[240], i.e. whether they are both apt to achieve that objective and proportionate.[241]
>
> The European Communities argues that the UNCTAD texts relied upon by India are not context and in any event do not support India's position. They address the threshold question of whether all developing countries should be recognised as beneficiaries of the GSP, rather than the subsequent question of whether all recognised beneficiaries should be granted identical preferences. The first of these questions is addressed by the term 'generalised', while the second is addressed by the term 'non-discriminatory'. India confuses the two issues and renders the term 'non-discriminatory' redundant.[242]"

6.11 India requested the Panel to reject the European Communities' request for the same reason as described in paragraph 6.8, namely, that (i) the European Communities had not provided any reason why it considered these paragraphs to be incomplete or inaccurate, and (ii) the purpose of such summaries, in India's view, was not to set out all of the arguments presented by the parties, but to define the issues to be analyzed by the Panel. India contended that the mere fact that the summaries prepared by the Panel did not reproduce all the arguments made by the parties did not render them incomplete.

6.12 The Panel considers that a number of the arguments in the EC's proposed texts are already covered by paragraphs 7.118-7.120 of the Interim Report. In the Panel's view, there is no requirement that a Panel use the language that a party prefers to summarize its arguments unless the Panel's summary is inaccurate or incomplete as to the meaning of these arguments as originally made in the proceedings. The European Communities has not indicated whether the cited paragraphs contain inaccuracies or are incomplete, and where in these paragraphs such inaccuracies or incompleteness is to be found. Although the evaluation of the "completeness" of such summaries of parties' arguments depends upon the relevance of various arguments to the Panel's analysis of a relevant issue, the Panel could, in exercising its discretion, set out more arguments that a party would like the Panel to include, provided the Report would also set out the corresponding counter arguments made by the other party during the proceedings, so as to allow for an objective assessment. With this in mind, the Panel has made adjustments to paragraphs 7.118-7.120 of its Interim Report by adding certain elements of the proposed text into those paragraphs, as reflected in paragraphs 7.122-7.125 of the Report. Accordingly, the Panel also made adjustments to paragraph 7.117 of the Interim Report so as to reflect the corresponding counter arguments that India made during the proceedings, as reflected in paragraphs 7.120-7.121 of the Report.

### 4. Paragraph 2(a)

6.13 The European Communities requested that the Panel replace paragraphs 7.160-7.161 with the following text:

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[240] (footnote original) EC's reply to the Panel's question to both parties No. 9., para. 32.
[241] (footnote original) EC's reply to the Panel's question to both parties No. 32, para. 5.
[242] (footnote original) EC's second written submission, para. 38. EC's reply to the Panel's question to both parties No. 52, para. 57. EC's comment on India's reply to the Questions to India No. 16.

> "The European Communities, in contrast, argues that India's interpretation of 'developing countries' under paragraph 2(a) as meaning 'all developing countries' would render redundant the terms 'generalised' and 'non-discriminatory' in footnote 3. Also, according to the European Communities, India's interpretation would mean that the objective of paragraph 3(c) of responding positively to the development, financial and trade needs of developing countries could not be achieved.[243]"

6.14 For the same reason as set out earlier, instead of replacing the whole paragraph with the EC's proposed text, the Panel has made an adjustment to paragraph 7.160 of its Interim Report which is reflected in paragraph 7.165 of its Report.

## 5. Dissenting Opinion

6.15 India requested the dissenting member of the Panel to delete those parts of the dissenting opinion based on the assumption that India abandoned its claims with respect to paragraph 2(a) of the Enabling Clause, which in India's view, is an incorrect assumption. Citing paragraph 9.20 of the Interim Report, which states "[i]n arguing that the Enabling Clause is an affirmative defence, India must admit that it is not a claim and its reference to the Enabling Clause is an argument in response to an anticipated defence", India argued that this assertion failed to distinguish between the substantive legal claims and the procedural arguments that it presented in relation to the allocation of burden of proof. In India's view, a complainant presenting the procedural argument that the duty to invoke a provision and the burden of proof falls on the defendant did not thereby amount to a withdrawal of its substantive claim with respect to that provision. To put it in another way, India's argument that paragraph 2(a) of the Enabling Clause provided the European Communities with an affirmative defence did not imply that it was requesting the Panel not to rule on that provision in case such argument was not accepted.

6.16 India argued that, in fact, India clearly made the claim that the Drug Arrangements did not meet the requirements set out in paragraph 2(a) of the Enabling Clause, in its request for the establishment of the Panel, and it continued to make the claim during the proceedings and submitted the necessary evidence to support that claim.[244] India also argued that paragraph 48 of its second written submission states: "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". This statement when read in its context did not communicate that India no longer sought a ruling in respect of this provision. The purpose of this statement was to present the argument that, given that paragraph 2(a) of the Enabling Clause was an affirmative defence, it was not up to India but up to the European Communities to assert and prove that the Drug Arrangements were consistent with that provision.

6.17 India also argued that in all previous cases where panels rejected the complainants' argument that a particular provision constituted a defence, the panels nevertheless examined the complaint in light of that particular provision. Refusal to conduct the examination would result in the situation where the complainant would have to re-submit its case to a new panel, which would run counter to the objective of the DSU of prompt settlement of disputes, as provided in Article 3.3 thereof. It was

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[243] (footnote original) Reply of the European Communities to question No. 9 from the Panel to both parties; Second written submission of the European Communities, para. 16.

[244] India cited paragraphs. 24-26 of its Oral Statement at the Second meeting of the Panel to show that it has made a claim and provided evidence under the Enabling Clause during the proceedings: "The issue of the allocation of burden of proof has been rendered unnecessarily complex in the present case. ... As stated in India's second written submission, the following factual elements are not disputed … In India's view, these are the only material facts that need to be established to sustain a finding that the Drug Arrangements are inconsistent with Article I:1 of the GATT 1994 and are not justified under the Enabling Clause. Therefore, the Panel need not even delve into the issue of allocation of burden of proof".

also India's view that without seeking the parties' clarification on the scope of India's claim during the proceedings, the legal approach used was not compatible with the basic principle of due process.

6.18 The European Communities commented that although India's panel request mentioned some provisions of the Enabling Clause in rather ambiguous terms, India chose not to assert any claim under that Enabling Clause in its first written submission. Instead, India limited itself to respond to the "affirmative defence" which it anticipated would be raised be the European Communities under the Enabling Clause. Subsequently, India clarified several times in unequivocal terms that it was not making any claim under the Enabling Clause. The European Communities cited India's reply to question number 5 from the Panel to both parties, paragraph 48 of India's second written submission and India's second oral statement to demonstrate such fact. The European Communities argued that India could not use the interim review as an opportunity to correct the consequences of its own previous act. In the European Communities' view, there was no reason for the dissenting panelist to modify the dissenting opinion.

6.19 The dissenting member of the Panel considers that India's theory and claim are accurately described in paragraph 4.169 of this Report as follows: "India's claim in these proceedings, as expressed in its first written submission, is based on Article I:1 of GATT 1994 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. To defeat India's claim, the European Communities *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 European Communities to prove the affirmative of its defence – that the Drug Arrangements are in fact covered by that Clause." This theory was repeated by India, *e.g.*, in its executive summary of its first written submission[245] and in its second written submission.[246] The theory coincided with India's argument that the European Communities bore the burden of proof.[247] India's written and oral statements to the Panel and to the participants in the proceedings voluntarily clarified the meaning of the language of the terms of reference and narrowed the claim to be considered by the Panel[248], and defended against by the European Communities.

6.20 In the dissenting panelist's view, the burden of proof is a distinct legal issue. India argued consistently that the European Communities could not mount a successful defence under the Enabling Clause and that the European Communities bore the burden of proof. While the defence and the burden of proof are related to the claim procedurally, neither can determine the claim.

6.21 On India's remarks in paragraph 9 of its Comments that a procedural argument by a complainant about the respondent's duty to invoke a provision (*e.g.*, the Enabling Clause) and about the burden of proof does not withdraw a substantive claim about that provision, the dissenting panelist is of the view that India seems to argue that the Enabling Clause is both its claim and the European Communities' defence. However, as the dissenting panelist understands, that was not its argument before this Panel as explained above and was not the situation in *US –Wool Shirts and Blouses*, where India had made a claim under Article 6 of the Agreement on Textiles and Clothing.

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[245] Paragraph 20 categorically states that the Enabling Clause "constitutes an affirmative defence that the EC might invoke to justify an inconsistency with Article I:1 of the GATT." In paragraph 21, India explained that for the "sake of procedural efficiency" it presented its views on this issue.

[246] Paragraph 7 refers to "India's claim under Article I of the GATT… [and] … the EC's defence under paragraph 2(a) [of] the Enabling Clause".

[247] See, *e.g.*, paragraph 25 of the second oral statement of India (8 July 2003) for a statement of India's theory regarding claim and burden of proof.

[248] In a different context, the Appellate Body cautioned panels against introducing concepts into a WTO agreement that are simply not there. Appellate Body Report, *India – Patents (US)*. Here, the argument made by India in its comments was not there during the Panel proceedings.

6.22 Based on these reasons, the dissenting member of the Panel sees no reason to make any change to the Dissenting Opinion. The Panel, however, has inserted a footnote to paragraph 7.54 on a related point.

## VII. FINDINGS

### A. PROCEDURAL ISSUES

7.1 In this case, two procedural issues have been raised. The first relates to a request by certain third parties for enhanced rights of participation in the panel proceedings. The Panel issued its ruling on this matter on 17 April 2003, granting enhanced third-party rights to all third parties in this dispute. The decision is reproduced as Annex A to this report.

7.2 The second procedural issue relates to a matter raised by the European Communities concerning the joint representation of India and Paraguay by the ACWL. The Panel will now examine this issue.

#### 1. Joint representation of India and Paraguay

##### (a) Introduction

7.3 The Panel recalls that on 14 May 2003, at the first substantive meeting with the parties, the European Communities raised certain procedural issues concerning the joint representation of India and Paraguay by the ACWL. Specifically, the European Communities raised issues of: (i) potential conflict of interest; (ii) incompatibility with the DSU rules on confidentiality; and (iii) blurring the distinction between the main parties and third parties. The European Communities requested that the Panel clarify whether, as a matter of principle, the same legal counsel could represent simultaneously a complaining party and a third party and, if so, under what conditions. The European Communities also requested that, if the Panel considered that in principle the same counsel could represent simultaneously a party and a third party under certain conditions, the Panel should then examine whether the conditions for such simultaneous representation were satisfied in this case.

7.4 The Panel further recalls that on the same date, in response to the European Communities' request to the Panel, India and Paraguay submitted a Joint Statement, indicating that: (i) India and Paraguay each had full notice of the representation of the other by the ACWL; (ii) both India and Paraguay considered that, by representing both India and Paraguay, the ACWL did not compromise their individual interests in effective legal representation; (iii) India and Paraguay consented to simultaneous representation by the ACWL in this dispute; (iv) the issue of exchange of information between parties and third parties did not arise in the present case because third parties were accorded enhanced rights; and (v) the European Communities' request that the Panel rule on a matter of legal ethics lacked any legal basis. The above-referenced Joint Statement was followed by letters to the Panel from India and Paraguay, both dated 28 May 2003, restating India's and Paraguay's positions on this matter.

7.5 In addressing this set of procedural issues, the Panel first notes that the WTO has not itself elaborated any rules governing the ethical conduct of legal counsel representing WTO Members in particular disputes. Accordingly, the Panel considers there are no directly applicable legal provisions or guidelines to which it can have reference in order to resolve any issues raised in respect of the joint representation of a party and a third party.

7.6 Second, the Panel is not aware of any previous GATT or WTO case in which a panel or the Appellate Body has addressed the type of conflict of interest issue raised by the European Communities in the present dispute.

7.7 Third, whereas in two earlier proceedings before the Appellate Body[249], the issues of confidentiality and of measures necessary to maintain such confidentiality were addressed, the Panel considers that the factual settings and the rulings in those earlier cases are not apposite to the issues raised by the European Communities in this proceeding.

7.8 The Panel nonetheless considers that, flowing from its terms of reference and from the requirement, in Article 11 of the DSU, to "make an objective assessment of the matter before it … ", as well as the requirement, pursuant to Article 12 of the DSU, to determine and administer its Working Procedures, the Panel has the inherent authority – and, indeed, the duty – to manage the proceeding in a manner guaranteeing due process to all parties involved in the proceeding and to maintain the integrity of the dispute settlement system. With specific reference to issues raised in the instant case, it is incumbent on the Panel to clarify whether the ACWL's joint representation of India and Paraguay poses any ethical concerns of the kind raised by the European Communities. At the same time, and although the European Communities asks the Panel for a ruling whether, as a matter of principle, the same legal counsel can represent simultaneously a party and a third party and, if so, under what conditions, the Panel considers that it cannot rule on such issues in the abstract, but only as they relate to the specific case before it.

(b) Conflict of interest

7.9 As a general matter, the Panel considers that it is the responsibility of legal counsel to ensure that it is not placing itself in a position of actual or potential conflict of interest when agreeing to represent, and thereafter representing, one or more WTO Members in a dispute under the DSU. In this regard, the Panel notes that bar associations in many jurisdictions have elaborated rules of conduct dealing explicitly with conflicts of interest through joint representation.[250]

7.10 Common to all such ethical rules of conduct is the principle that counsel shall not accept or continue representation of more than one client in a matter in which the interests of the clients actually or potentially conflict. Underlying this principle is the fundamental notion that a client must have full confidence in the objectivity and independence of the professional advice provided to it by counsel. A second common element to all such ethical rules, however, is the possibility for clients, when faced with counsel being subject to actual or potential conflict of interest as the result of joint representation, to consent to such joint representation, but only following full disclosure by counsel. In other words, following disclosure of the actual or potential conflict of interest, clients may waive such conflict. Yet a third common element is that counsel shall nevertheless discontinue such joint representation at such time as counsel becomes aware that the interests of the two (or more) clients are directly adverse.

7.11 The Panel considers that the above-described common elements to ethical rules of conduct in many jurisdictions are equally appropriate to dealing with issues of representational conflict of interest in the WTO dispute settlement context.

7.12 The Panel agrees with India and Paraguay that the parties most likely to be concerned by any potential or actual conflict of interest are those agreeing to joint representation, here India and Paraguay. It would seem that the basis for raising concerns over such joint representation would be considerably less for other parties in the case, who would be unlikely to be prejudiced by any joint

[249] Appellate Body Report, *Canada – Aircraft*, para. 145; Appellate Body Report, *Thailand – H-Beams*, paras. 74-78.

[250] See, e.g., American Bar Association, Model Rules of Professional Conduct, Rule 1.7; State Bar of California, Rules of Conduct, Rule 3-310; New York State Bar Association, Lawyer's Code of Professional Responsibility, DR 5-105; Canadian Bar Association, Code of Professional Conduct, Chapter V; Law Society of Upper Canada, Rules of Professional Conduct, Rule 2.04; Council of the Bars and Law Societies of the European Union, Code of Conduct for Lawyers in the European Union, Rules 3.2; Barreau de Paris, Règles professionnelles, Article 155; Bar of England and Wales, Code of Conduct, Rules 603 and 608.

representation of India and Paraguay. While the Panel does not exclude that, in a different case, there could be concerns of a more systemic nature, that could be raised by parties other than those agreeing to joint representation, the Panel is of the view that the European Communities has not demonstrated the existence of a particular situation which gives rise to such concerns in the instant case. The Panel accordingly does not consider that it is faced with an issue of principle or one having systemic implications for the WTO dispute settlement system.

7.13 As stated in the Introduction, India and Paraguay claim to have been fully informed about their joint representation by the ACWL and have given their written consent to such joint representation. In these circumstances, the Panel considers that India and Paraguay, as well as counsel for this party and third party, have done everything necessary to allow for the continued joint representation of India and Paraguay by the ACWL.

(c) Confidentiality

7.14 On the issue of confidentiality between a party and its counsel, while noting that the European Communities states that the problem is mitigated in the instant case because of the enhanced rights granted to third parties, the European Communities nonetheless maintains that the problem has not been disposed of entirely and requests the Panel to consider whether the ACWL's joint representation of India and Paraguay may be inconsistent with DSU rules on confidentiality.

7.15 Although the European Communities does not specify which provision(s) of the DSU may be of concern, the Panel considers that the most relevant DSU rule that could be implicated is Article 18.2, whose first sentence states that "[w]ritten submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute". A related rule is Article 14.1 of the DSU which provides that "[p]anel deliberations shall be confidential". Article 10 of the DSU and paragraph 12 of the Working Procedures, Appendix 3 to the DSU, which set out steps of the panel's work, could also be implicated, as third parties are permitted limited participation at various stages of panel proceedings, as compared to the parties. In particular, third parties are not provided the right to participate in the interim review process under either Article 10 or the Working Procedures. In the view of the Panel, Article 18.2 of the DSU would be the more typical and relevant rule, where third parties only receive the first submissions of the parties to the Panel and only participate in a single, special third-party session.

7.16 As a general matter, the Panel considers that Members involved in the dispute settlement process have the obligation of ensuring confidentiality, as required by Article 18.2, Article 14.1[251] and the Working Procedures, regardless of who serves as their legal counsel. Needless to say, this obligation of Members involved in the dispute settlement process must be respected by all of their representatives, including legal counsel. In addition, as a general professional discipline, it is the responsibility of counsel to maintain the confidentiality of all communications between it and the party (or third party) it represents. In this regard, the Panel again notes that bar associations in many jurisdictions have elaborated rules of conduct dealing explicitly with confidentiality between clients and their legal counsel.[252]

7.17 In this dispute, India argues that the issue of confidentiality does not arise for India and Paraguay because of the enhanced rights granted to all third parties. On the other hand, the European Communities responds that the problem is mitigated but not totally disposed of, as there is still the

[251] It could be argued that the Interim Report of a panel constitutes part of its "deliberations" before it is finalized and issued to the parties.

[252] See, e.g., American Bar Association, Model Rules of Professional Conduct, Rule 1.6; New York State Bar Association, Lawyer's Code of Professional Responsibility, DR 4-101; Canadian Bar Association, Code of Professional Conduct, Chapter IV; Law Society of Upper Canada, Rules of Professional Conduct, Rule 2.03; Council of the Bars and Law Societies of the European Union, Code of Conduct for Lawyers in the European Union, Rules 2.3; Bar of England and Wales, Code of Conduct, Rules 603, 608 and 702.

possibility of access to Panel documents, including the Interim Report by third party Paraguay, due to the use of the same legal counsel.[253] However, the Panel considers that due to the enhanced third-party rights pursuant to which all third parties receive all submissions of the parties to the Panel and participate in all meetings of the Panel with the parties, Paraguay was actually accorded the right to share all submissions and Panel documents which were distributed before the end of the Second Substantive Meeting of the Panel. After the Panel's Second Substantive Meeting, no third party was given further enhanced right to participate in the process and, particularly, to influence the Panel's Findings. Paraguay has not gained any litigation advantage over other third parties in this dispute through its use of the same legal counsel as India. The Panel also notes that the European Communities has not provided any argument or evidence to indicate that in fact there is a disclosure of confidential information, including the Interim Report of the Panel, to Paraguay due to the joint representation of India and Paraguay by the same legal counsel. Under such circumstances, the Panel finds that the confidentiality issue has not arisen in this dispute.

(d) Blurring the distinction between parties and third parties

7.18 Whereas, in a procedurally more typical case, the joint representation of a party and a third party could potentially raise issues related to the blurring of the distinction between parties and third parties, the Panel considers that, as acknowledged by the European Communities[254], this issue does not arise in the present case in view of the enhanced third-party rights accorded to all third parties. In these circumstances, the Panel does not consider it either necessary or appropriate to pronounce upon the more general issue of blurring that could arise in a different case.

## B. CLAIMS OF THE PARTIES

7.19 In this case, India claims that the Drug Arrangements of the European Communities are inconsistent with Article I:1 of GATT 1994 and are not justified by the Enabling Clause. India states that should the European Communities invoke the Enabling Clause, the European Communities bears the burden of establishing that the Drug Arrangements are justified under the Enabling Clause. India also claims that the European Communities fails to demonstrate that the Drug Arrangements are "non-discriminatory" within the meaning of paragraph 2(a) of the Enabling Clause. India further claims that the European Communities has not demonstrated that the Drug Arrangements are justifiable under Article XX(b) of GATT 1994.

7.20 The European Communities claims that the Drug Arrangements fall within the scope of paragraph 2(a) of the Enabling Clause and that the Enabling Clause excludes the application of Article I:1 of GATT 1994. The European Communities states that it is for India to demonstrate that the Drug Arrangements are not consistent with paragraph 2(a) of the Enabling Clause. Since India has not claimed a violation of the Enabling Clause, the European Communities requests the Panel to refrain from examining whether the measure is consistent with the Enabling Clause. Should the Panel find that Article I:1 applies, and that the Drug Arrangements are inconsistent with that provision, the European Communities requests the Panel to find that the Drug Arrangements are justified under Article XX(b).

[253] Communication of the European Communities to the Panel on 4 June 2003.

[254] The European Communities states that the problem of confidentiality of submissions and of panel documents is mitigated by the fact that third parties have been granted enhanced rights. *See* Communication of the European Communities to the Panel on 16 May 2003.

## C. THE NATURE OF THE ENABLING CLAUSE AND ITS RELATIONSHIP TO ARTICLE I:1 OF GATT 1994

### 1. Introduction

7.21 India emphasizes that its material claim is that the Drug Arrangements constitute a violation of Article I:1 of GATT 1994, not a violation of the Enabling Clause. India notes that the European Communities requested a waiver for its Drug Arrangements and failed to obtain it. In these circumstances, India states that it had no knowledge, prior to the Panel request, what provision or provisions would be invoked to justify the Drug Arrangements.[255] India maintains that the Enabling Clause allows WTO Members to derogate from the obligations under Article I:1. The European Communities may invoke the Enabling Clause to justify the inconsistency of its measure with Article I:1 of GATT 1994. As such, the Enabling Clause constitutes an affirmative defence.[256] According to India, the European Communities bears the burden of proving that its measure is justified under the Enabling Clause. It is sufficient for India to make a prima facie case of violation of Article I:1 of GATT 1994.

7.22 The European Communities claims, however, that Article I:1 of GATT 1994 does not apply to a measure covered by the Enabling Clause because the Enabling Clause excludes the operation of Article I:1.[257] The European Communities considers that India bears the burden of establishing a prima facie case of violation of the Enabling Clause. Since India limits its claim to violation of Article I:1 of GATT 1994, the European Communities considers that India fails to meet that burden. The European Communities therefore requests the Panel to dismiss India's Article I:1 claim and to refrain from examining the consistency of the Drug Arrangements with the Enabling Clause.[258]

7.23 In order to determine whether the Panel should proceed with the examination of the consistency of the Drug Arrangements with Article I:1 of GATT 1994 or with the Enabling Clause, it is necessary for the Panel to determine: (i) whether Article I:1 of GATT 1994 applies to a measure falling under the Enabling Clause; (ii) whether it is sufficient for India to establish a claim of violation of Article I:1 of GATT 1994; and (iii) which party bears the burden of establishing inconsistency or consistency of the European Communities' measure with the Enabling Clause. The Panel considers that the resolution of all these issues depends on the relationship between Article I:1 of GATT 1994 and the Enabling Clause, which in turn depends on the correct characterization of the nature of the Enabling Clause, namely, whether it is in the nature of a positive rule establishing obligations or of an exception to Article I:1 of GATT 1994. Accordingly, the Panel will proceed with its analysis of the nature of the Enabling Clause and its relationship to Article I:1.

### 2. Arguments of the parties

7.24 The Panel recalls India's request for the establishment of this Panel in which India requests the Panel to examine, *inter alia*, whether the Drug Arrangements and their application "are consistent with Article I:1 of GATT 1994 and the requirements set out in paragraphs 2(a), 3(a) and 3(c) of the Enabling Clause".[259] In its first written submission, India requests the Panel to find that the Drug Arrangements are inconsistent with Article I:1 of GATT 1994 and not justified by the Enabling Clause.[260] India also argues that, even though it is unclear to India what the legal basis for the Drug Arrangements is, it may reasonably be assumed that the European Communities will invoke the

[255] First written submission of India, para. 44.
[256] First written submission of India, para. 43.
[257] First written submission of the European Communities, para. 20.
[258] Second oral statement of the European Communities, paras. 25 and 81.
[259] WT/DS246/4.
[260] First written submission of India, para. 67.

Enabling Clause as a defence. For the sake of procedural efficiency, India presents its views on the Enabling Clause in its first written submission.[261]

7.25 In its second written submission, India indicates that its material claim is that the Drug Arrangements violate Article I:1 and that paragraph 2(a) of the Enabling Clause is not a material element of its claim. India argues that, to defeat India's claim, the European Communities may assert, and it has chosen to assert, that the Drug Arrangements are justified under the Enabling Clause.[262] As such, India maintains, the Enabling Clause constitutes an affirmative defence.[263] India also argues that paragraph 2(a) of the Enabling Clause is an affirmative defence because it has legal functions and characteristics similar to other provisions of the GATT that the Appellate Body has recognized as affirmative defences.[264] While the Enabling Clause is not an essential element of India's claim, it is an essential element of the European Communities' defence.[265] In India's view, the European Communities bears the burden of proving that its measure is consistent with the Enabling Clause. It is sufficient for India to make a prima facie case of violation of Article I:1 of GATT 1994.

7.26 India argues that the legal functions of the 1971 Waiver Decision and the Enabling Clause are the same. Specifically, according to India, both permit a developed country to provide preferential tariff treatment to developing countries without according such treatment to other developed countries and the Enabling Clause is a renewal (and permanent embodiment) of the 1971 Decision, as contemplated in paragraph (b) of that Decision.[266]

7.27 India maintains that the Enabling Clause is an exception to Article I:1. India refers to the Black's Law Dictionary definition of that term: "exception is something that is excluded from a rule's operation" and that "statutory exception is a provision in a statute exempting certain persons or conduct from the statute's operation".[267] Citing the Appellate Body ruling in *US – Wool Shirts and Blouses* that "Articles XX and XI:2(c)(i) are limited exceptions from obligations under certain other provisions of GATT 1994, not positive rules establishing obligations in themselves" and the Appellate Body's comments on Article XXIV in *Turkey – Textiles*, it concludes that in the same way that Articles XI:2(c)(i), XX and XXIV are exceptions, the Enabling Clause is likewise an exception to certain aspects of Article I:1 and could be invoked as a defence in a claim of violation of that Article.[268]

7.28 India also argues that, although the European Communities asserts that the Enabling Clause confers an autonomous right, it has not provided a definition of "autonomous right"; it merely asserts the conclusion that the Enabling Clause is an autonomous right and not a derogation from Article I:1 of GATT 1994.[269]

7.29 The European Communities argues that the Enabling Clause is not a waiver but a *sui generis* decision and that it is the main instrument for achieving one of the basic objectives and purposes of the WTO Agreement – special and differential treatment. Citing the Appellate Body in *Brazil – Aircraft* to the effect that Article 27 of the SCM Agreement is not an affirmative defence, the European Communities concludes that "special and differential treatment" cannot be characterized as a mere "affirmative defence". The European Communities insists that the Enabling Clause exists,

[261] First written submission of India, para. 44.
[262] Second written submission of India, para. 48.
[263] First written submission of India, para. 43.
[264] First written submission of India, para. 52; second written submission of India, para. 52.
[265] Second oral statement of India, para. 25.
[266] Reply of India to question No. 2 from the Panel to both parties
[267] Second written submission of India, para. 62.
[268] Second written submission of India, paras. 54-55.
[269] Second written submission of India, para. 38.

side-by-side, with GATT Article I:1 and that the word "notwithstanding" in paragraph 1 of the Enabling Clause excludes completely the application of Article I:1.[270]

7.30 The European Communities maintains that the fact that the Enabling Clause is not an "affirmative defence" but an autonomous right has two important implications, namely, first, in order to establish a violation of Article I:1 of GATT 1994, India must first establish that the Drug Arrangements are not covered by paragraph 2(a) of the Enabling Clause; and second, if the Drug Arrangements are covered by the Enabling Clause, as the complaining party, India bears the burden of proving that the Drug Arrangements are inconsistent with paragraph 3(c).[271]

**3. Panel's analysis**

(a) Nature of the Enabling Clause

7.31 The Panel recognizes that the Enabling Clause is one of the most important instruments in the GATT and the WTO providing special and more favourable treatment for the developing countries. The Panel has no doubt that WTO developing country Members often draw significant benefits from the operation of GSP schemes of developed country Members. The Panel is well aware that the setting up of the GSP was greeted very positively by the GATT contracting parties as a whole. With the above in mind, the Panel considers that it is important to be particularly cautious in the interpretation of its provisions.

7.32 The parties disagree on whether the nature of the Enabling Clause is that of a positive rule setting out obligations or that of an exception. In examining this issue, the Panel considers that it is a common understanding that "exception" is a relative concept, in relation to the main rules of treaties, that is, those positive rules that set out obligations. In this regard, the Panel notes that the parties and third parties all agree that the Enabling Clause is a part of GATT 1994 as one of the "other decisions of the CONTRACTING PARTIES to GATT 1947" under paragraph 1(b)(iv) of GATT 1994.[272] As to the means to be used in identifying the nature of the Enabling Clause, both India and the European Communities also agree that it is necessary to examine its legal function in the context of the treaty as a whole[273], although they draw different conclusions after conducting their own analysis.

7.33 The Panel considers that the Enabling Clause forms a part of GATT 1994 and that in order to identify whether it is a positive rule establishing obligations or of an exception, it is necessary to examine its legal function in the context of the GATT 1994 as a whole.

7.34 The Panel also considers that a comparison of the legal function of the Enabling Clause with that of established exceptions provisions in GATT 1994 is necessary because the result of the legal characterization, in the Panel's view, should not be one that would undermine or otherwise adversely affect the proper functioning of GATT 1994 as a whole.

7.35 The Panel recalls the Appellate Body ruling in *US – Wool Shirts and Blouses*, where the Appellate Body stated 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". To this Panel, it follows that the legal function of authorizing limited derogations from positive rules establishing obligations is what is decisive in making Articles XX and XI:2(c)(i) exceptions. In *US – Wool Shirts and Blouses*, the Appellate Body effectively established two criteria for determining

[270] Replies of the European Communities to questions Nos.2 and 3 from the Panel to both parties. First written submission of the European Communities, paras. 17-18.

[271] First written submission of the European Communities, para. 19.

[272] Reply of India to question No. 4 from the Panel to both parties; reply of the European Communities to question No. 4 from the Panel to both parties.

[273] Reply of India to question No. 3 from the Panel to both parties; reply of the European Communities to question No. 3 from the Panel to both parties.

whether a rule constitutes an "exception": first, it must not be a rule establishing legal obligations in itself; and second, it must have the function of authorizing a limited derogation from one or more positive rules laying down obligations.

7.36 The wording of the Enabling Clause is similar to that of Articles XX, XXI and XXIV. Articles XX and XXI state "nothing in this Agreement shall be construed to prevent … ". Article XXIV:5 states "the provisions of this Agreement shall not prevent … ". The Enabling Clause provides "[n]otwithstanding the provisions of Article I of the General Agreement, contracting parties may ... ". The ordinary meaning of "notwithstanding" is "in spite of, without regard to or prevention by".[274] The meaning of each of these phrases is essentially the same, that of providing authorization for deviation from certain rules establishing obligations. Such deviations are not "prevented by" the existence and the application of positive rules establishing obligations. The use of a slightly different expression in the Enabling Clause, standing alone, does not make the nature or legal function of the Enabling Clause different from that of Articles XX, XXI and XXIV because the language used in the Enabling Clause is not substantively different from that used in these other provisions.

7.37 The Panel considers that Article I:1 of GATT 1994 is clearly a "positive rule establishing obligations". The obligations are for Members to accord to the like products of all Members, immediately and unconditionally, any advantage relating to, *inter alia*, custom duties accorded to products originating in any country. Articles II, III and XI:1 of GATT 1994 are, similarly, positive rules establishing obligations. In contrast, it is well established that Article XX is not such a rule establishing positive obligations, nor is Article XI:(2)(c)(i). The Panel is of the view that Articles XXI and XXIV are of the same nature as Article XX. There is no legal obligation under GATT 1994 requiring a Member, e.g., to take an Article XX measure, or to take a national security measure, or to form a free-trade area or customs union with other Members. Members are free to choose either to take these measures or to do nothing. If they decide to take such measures, they are authorized to do so by these provisions, subject to certain conditions. The fact that when Members choose to take such measures, they are also required to comply with certain conditions prescribed in these exceptions provisions, such as those in the chapeau of Article XX and in paragraphs 5 and 8 of Article XXIV, does not change the basic "non-obligatory" nature of these provisions. These conditions are only subsidiary obligations, dependent on the decision of the Member to take such measures. The existence of certain conditions relating to the application of an exception provision only signifies that the exception is "limited", not absolute, and that the authorization of derogation is tied to the fulfilment of certain conditions.

7.38 The Panel considers that the legal function of the Enabling Clause is to authorize derogation from Article I:1, a positive rule establishing obligations, so as to enable the developed countries, *inter alia*, to provide GSP to developing countries. There is no legal obligation in the Enabling Clause itself requiring the developed country Members to provide GSP to developing countries. The word "may" in paragraph 1 of the Enabling Clause makes the granting of GSP clearly an *option* rather than an obligation. The Panel considers that this is also a *limited* authorization of derogation in that the GSP has to be "generalized, non-discriminatory and non-reciprocal".

7.39 From the above analysis, the Panel considers that the Enabling Clause meets the two criteria that the Appellate Body established in *US – Wool Shirts and Blouses* for determining whether a particular provision is in the nature of an exception. It functions similarly to other GATT 1994 provisions that the Appellate Body has characterized as exceptions. Accordingly, the Panel finds that the Enabling Clause is in the nature of an exception to Article I:1 of GATT 1994.

[274] *The New Shorter Oxford English Dictionary*, 4th Edition, p. 1947.

(b) Burden of proof under the Enabling Clause

7.40 The Panel notes that there are a number of exceptions provisions in the GATT that a party may invoke in order to justify an inconsistency with Article I:1. A measure could well be for achieving legitimate objectives such as those under Article XX or Articles XXI or XXIV, or the Enabling Clause. Given that the specific purpose for a measure may not be always expressly set out in the measure itself, it may be difficult for the complaining party to know precisely which legitimate objective a measure is aimed to achieve. In this dispute, the European Communities actually invokes more than one objective and more than one legal basis for its measure, i.e., the Enabling Clause and Article XX(b). The Panel therefore considers that it is sufficient for India to demonstrate an inconsistency with Article I:1. It is not the task of India to establish further violations of possible exceptions provisions that could justify the inconsistency of the European Communities' measure with Article I:1.

7.41 To conclude otherwise could result in the situation where a complaining party could raise claims unrelated to the defending party's justification for a particular measure. Exceptions provisions should, accordingly, be invoked and justified by the defending party. For these reasons, the Panel finds that it is for the European Communities to invoke one or more particular provisions, including the Enabling Clause, as justification for the claimed inconsistency of its measure with Article I:1.

7.42 As the Appellate Body established in *US – Wool Shirts and Blouses* and in *Turkey – Textiles*, exceptions provisions can be invoked as affirmative defences to justify an inconsistency of a measure with positive rules setting out obligations. As previously noted, the Appellate Body stated in *US – Wool Shirts and Blouses* that "Article 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." It went on to state that "[t]hey are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the Party asserting it".[275] In *Turkey – Textiles*, the Appellate Body noted in a footnote that "legal scholars have long considered Article XXIV to be an 'exception' or a possible 'defence' to claims of violation of GATT provisions". At the same time, the Appellate Body stated: "Thus, the chapeau [of paragraph 5 of Article XXIV] makes it clear that 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".[276] The Panel considers that these rulings confirm that if the European Communities has recourse to the Enabling Clause as a defence, it is for the European Communities: (i) to raise the Enabling Clause as an affirmative defence to India's claim of violation of Article I:1; and (ii) to demonstrate the measure's consistency with that provision.

(c) Applicability of Article I:1

7.43 As to whether or not Article I:1 applies to a measure covered by the Enabling Clause, the Panel notes the European Communities' position that the Enabling Clause excludes the application of Article I, as well as India's position that the Enabling Clause authorizes a derogation from obligations under Article I:1 only to the extent necessary to implement GSP schemes, but does not exclude the operation of Article I:1 altogether. The Panel will examine this issue, taking into account the ordinary meaning of the term "notwithstanding" in paragraph 1 of the Enabling Clause, as well as relevant jurisprudence.

7.44 The ordinary meaning of "notwithstanding" in paragraph 1 of the Enabling Clause is "in spite of, without regard to or prevention by".[277] The Panel understands this to mean that the operation of the Enabling Clause is not prevented by Article I:1. That is, the Enabling Clause takes precedence to

[275] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:1, 323, at 337.
[276] Appellate Body Report, *Turkey – Textiles*, para. 45.
[277] *The New Shorter Oxford English Dictionary*, 4th Edition, p. 1947.

the extent of conflict between the two provisions. In any case, the dictionary definition itself is not dispositive as to whether the Enabling Clause excludes the application of Article I:1. Absent textual support suggesting that the Enabling Clause excludes Article I:1 of GATT 1994, the Panel cannot assume that this was the intent of contracting parties.[278] In the view of the Panel, the relationship between exceptions provisions and provisions setting out basic GATT obligations is not one that where the application of one provision excludes the application of the other.

7.45 Indeed, taking the example of the relationship between Article XX and Articles I, III or XI:1, the jurisprudence demonstrates that the two apply concurrently to a given measure. In *US – Gasoline*, *US – Shrimp*, *Korea – Various Measures on Beef* and *EC – Asbestos*, panels and the Appellate Body have consistently begun the examination of the consistency of the challenged measure with Articles I, III or XI:1. After finding violations under one of these provisions, the panels and the Appellate Body then went on to examine whether the measure could be justified under Article XX.[279] The same relationship also applies between Article XXIV and Article XI of GATT 1994. In *Turkey – Textiles*, the panel also first examined the consistency of Turkey's quantitative restrictions with Articles XI and XIII of GATT 1994 and, after finding inconsistency with these, it proceeded to examine whether the measure was justified by Article XXIV of GATT 1994. This order of examination is confirmed by the Appellate Body where it "upholds the Panel's conclusion that Article XXIV does not allow Turkey to adopt, upon the formation of the customs union with the European Communities, quantitative restrictions on imports of 19 categories of textile and clothing products which were found to be inconsistent with Articles XI and XIII of the GATT 1994 and Article 2.4 of the *ATC*".[280] Accordingly, the relationship between Article XX or Article XXIV, on the one hand, and Article I, Article III or Article XI:1, on the other, is one where both categories of provisions apply concurrently to the same measure, but where, in the case of conflict between these two categories of provisions, Article XX or Article XXIV prevails. The jurisprudence shows that there is no deviation from such a relationship. Had Article XX or Article XXIV excluded the application of Article I, Article III or Article XI, panels and the Appellate Body would never have been able to examine various measures under Article I, Article III or Article XI in all previous cases. Similarly, it is clear to the Panel that, as an exception provision, the Enabling Clause applies concurrently with Article I:1 and takes precedence to the extent of the conflict between the two provisions.

7.46 This prevailing status of the Enabling Clause over Article I:1 does not render Article I:1 inapplicable to a measure covered by the Enabling Clause. In the Panel's view, to decide otherwise would lead to an absurdity. For example, Article I:1 requires non-discrimination in domestic taxation

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[278] In many cases, the Appellate Body does not rely solely on the dictionary definitions of a term to interpret the precise legal meaning of that term. In *Japan – Alcoholic Beverages II*, when determining the meaning of the term "like" in Article III:2 of GATT 1994, the Appellate Body stated that "there can be no one precise and absolute definition of what is 'like'". The scope of likeness "must be determined by the particular provision in which the term 'like' is encountered". Appellate Body Report, *Japan – Alcoholic Beverages II*, p.114. Similarly, In *EC – Asbestos*, when addressing the meaning of the term "like" in Article III:4 of GATT 1994, the Appellate Body stated: "dictionary meanings leave many interpretive questions open". Accordingly, the Appellate Body interpreted the term "like" by examining it in the relevant context of Article III:4 of GATT 1994. Appellate Body Report, *EC – Asbestos*, paras. 92-93. In *Canada – Aircraft*, when analyzing the meaning of "benefit" under Article 1.1 (b) of the SCM Agreement, the Appellate Body also stated that there are a number of ordinary meanings for that term and that "[t]hese definitions also confirm that the Panel correctly stated that 'the ordinary meaning of 'benefit' clearly encompasses some form of advantage.' Clearly, however, dictionary meanings leave many interpretive questions open". Appellate Body Report, *Canada – Aircraft*, para. 153. In *US – Offset Act (Byrd Amendment)*, the Appellate Body stated that "[i]t should be remembered that dictionaries are important guides to, not dispositive statements of, definitions of words appearing in agreements and legal documents". Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 248.

[279] For instance, In *US – Gasoline*, that panel "proceeded to examine whether the aspect of the baseline establishment methods found inconsistent with Article III:4 could … be justified under paragraph (b) of Article XX", para. 6.20.

[280] Appellate Body Report, *Turkey – Textiles*, paras. 41 and 64.

of imported products. To say that Article I:1 does not apply to measures under the Enabling Clause would mean that GSP imports from different developing countries could be subject to different taxation levels in the importing country's domestic market. Such a result was clearly not intended by the drafters of the Enabling Clause.

(d) Relevant jurisprudence

7.47 The European Communities cites the Appellate Body ruling in *Brazil – Aircraft* on Article 27 of the SCM Agreement, to the effect that Article 27, relating to special and differential treatment for developing countries, is not an affirmative defence and that the burden is on the complaining party to demonstrate that the obligation under Article 27.4 is not met by a developing country invoking that provision. By analogy, the European Communities argues that the Enabling Clause, as the core instrument of special and more favourable treatment, should not be treated as an affirmative defence but rather as an autonomous right, and that the burden of proof should be on the party claiming a violation of this provision.

7.48 The Panel considers that the relationship between Article 3.1(a) and Article 27 of the SCM Agreement is different from that between Article I:1 of GATT 1994 and the Enabling Clause or that between Article III and Article XX of GATT 1994. Article 27.2(b) clearly excludes the application to developing countries of the prohibition on export subsidies in Article 3.1(a). It provides: "The prohibition of paragraph 1(a) of Article 3 shall not apply to... (b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to the compliance with the provisions in paragraph 4". Consequently, it would not be sufficient for a complaining party to only claim and demonstrate a violation of Article 3.1(a) by a developing country. The complaining party would have to claim and demonstrate a violation of an applicable provision governing export subsidies matters which, in the case of developing countries, is Article 27.

7.49 In contrast, the relationship between the Enabling Clause and Article I:1 is different. As the Panel found in paragraph 7.39, the Enabling Clause is an exception to Article I:1 and it does not exclude the application of Article I:1 but prevails over Article I:1 to the extent of a conflict between the two provisions. In such circumstances, the complaining party can claim and demonstrate a violation of Article I:1 and it is up to the defending party to decide what provisions to invoke in order to justify the inconsistency of its measure with Article I:1. And, by doing so, the defending party is invoking these provisions as affirmative defences and therefore bears the burden of proof for justification under the invoked provisions.

7.50 The European Communities also refers to the Appellate Body Report in *EC – Hormones*, where the Appellate Body characterizes Article 3.3 of the SPS Agreement as an autonomous right, rather than as an exception to Article 3.1, and concludes that the complaining parties bear the burden of proof under Article 3.3. The Panel notes that the underlying basis for this Appellate Body finding is that Article 3.3 excludes the application of Article 3.1 of the SPS Agreement. Where a Member has projected for itself a higher level of sanitary protection than would be achieved by a measure based on international standards, Article 3.3 applies and Article 3.1 does not apply at all. SPS measures based on international standards and those based on higher appropriate levels of protection may exist side-by-side. The complaining party is required to claim and make a prima facie case, showing violation of a relevant provision, either Article 3.3 or Article 3.1, not both. Again, the Panel is of the view that the relationship between Articles 3.1 and 3.3 of the SPS Agreement is different from that between Article I:1 of GATT 1994 and the Enabling Clause, because the Enabling Clause does not exclude the application of Article I:1, just as Articles XX and XXIV do not exclude the application of Articles I:1, III or XI:1 of GATT 1994.

7.51 The Panel is fully cognizant of the statement of the Appellate Body in *EC – Hormones* that merely describing a particular provision as an exception is not determinative of which party bears the

burden of proof.[281] The conclusion that a particular provision is in the nature of an exception has to be a well-reasoned determination supported by an examination of the provision's legal function in relation to positive rules establishing treaty obligations. In the case before it, the Panel has provided a detailed reasoning for its determination that the legal function of the Enabling Clause is that of an exception to Article I:1of GATT 1994, without prejudice to its unquestioned importance as a means of promoting the trade of developing country Members.

(e) Relevance of the importance of the policy objective pursued

7.52 The WTO Agreement contains multiple policy objectives and all of these objectives are important. As to the importance that a policy objective pursued may have for the characterization of a provision as an exception/affirmative defence or a positive rule establishing obligations, the Panel considers that the relative importance of policy objectives pursued is not decisive in determining whether a provision is an exception or a positive rule. For instance, a policy objective of conserving exhaustible natural resources pursued under Article XX(g), can well be linked directly with one of the purposes and objectives of the WTO Agreement, that of "seeking both to protect and preserve the environment", as set out in the Preamble to the WTO Agreement itself. This does not change the nature of Article XX as an exception provision in the GATT legal structure. Similarly, even though the policy objective of the Enabling Clause does reflect one of the basic purposes and objectives of the WTO Agreement, this fact does not change its legal function as an exception to Article I of GATT 1994. Likewise, the characterization of a particular provision as an exception does not diminish the importance of the policy objectives pursued by that provision. Indeed, the Panel well acknowledges the critical importance of the policy objectives pursued by the Enabling Clause. The Enabling Clause reflects a great effort on the part of both developing and developed countries to rebalance and improve trade benefits for developing countries through a carefully negotiated agreement that permits certain types of special and more favourable treatment. The Panel also notes that the importance of the protection of human life and health pursued under Article XX(b) is in no way reduced by the characterization of Article XX as an exception.

## 4. Summary of findings on the nature of the Enabling Clause and its relationship to Article I:1

7.53 In light of the above, the Panel finds that: (i) the Enabling Clause is an exception to Article I:1 of GATT 1994; (ii) the Enabling Clause does not exclude the applicability of Article I:1 but, rather, Article I:1 and the Enabling Clause apply concurrently, with the Enabling Clause prevailing to the extent of inconsistency between the two provisions; (iii) India bears the burden of claiming and demonstrating the inconsistency of the Drug Arrangements with Article I:1 of GATT 1994; and (iv) the European Communities bears the burden of invoking the Enabling Clause and justifying its Drug Arrangements under that provision. Therefore, it is sufficient for India to claim and make a prima facie showing of violation of Article I:1.

7.54 Having found that Article I:1 applies to the Drug Arrangements concurrently with the Enabling Clause and considering that India has made a claim and arguments under Article I:1, the Panel considers it appropriate to examine India's Article I:1 claim. Having found that the European Communities bears the burden of demonstrating that the Drug Arrangements are justified by the Enabling Clause, the Panel considers that the fact India has not made a material claim under the Enabling Clause[282] does not prevent the Panel from further examining whether the measure is justified under the Enabling Clause so long as the Enabling Clause is actually invoked by the defending party,

[281] Appellate Body Report, *EC – Hormones*, para. 104.

[282] The Panel recalls India's argument that the Enabling Clause is not an essential element of India's claim under Article I:1, but it is an essential element of the European Communities' defence. Second oral statement of India, para. 25.

which is the case in this dispute.[283] Accordingly, the Panel will proceed to examine India's claim that the Drug Arrangements are inconsistent with Article I:1.

## D. WHETHER THE DRUG ARRANGEMENTS ARE INCONSISTENT WITH ARTICLE I:1

7.55 The Panel recalls India's claim that the tariff preferences granted under the Drug Arrangements are inconsistent with Article I:1 of GATT 1994. India argues that the MFN principle embodied in Article I:1 requires that advantages related to customs duties be extended to all other Members and that the extension be immediate and unconditional. In India's view, the term "unconditionally" in Article I:1 means that any such advantage must be accorded to like products of all other Members regardless of their situation or conduct.[284]

7.56 The Panel further recalls the European Communities' position that the Enabling Clause excludes the application of Article I:1. In any case, the European Communities posits a different understanding of "unconditionally" in Article I:1. The European Communities' position is that "unconditionally" in Article I:1 means that any advantage granted may not be subject to conditions requiring compensation.[285] The Drug Arrangements are not conditional, according to the European Communities, because the beneficiaries are not required to provide any compensation to the European Communities.[286]

7.57 As the Panel understands it, the following facts are not in dispute: (i) the Drug Arrangements, as prescribed in the current Council Regulation (EC) No. 2501/2001[287], provide lower tariff rates than the MFN bound rates on certain products; and (ii) the treatment of lower tariff rates is only accorded to products originating in 12 beneficiary Members, not to like products originating in other Members.

7.58 Article I:1 requires that with respect to custom duties, any advantages granted to any product originating in any one Member shall be accorded immediately and unconditionally to the like products originating in all other Members. The fact is clear that the tariff preferences granted by the European Communities to the products originating in the 12 beneficiary countries are not accorded to the like products originating in all other Members, including those originating in India.

7.59 In the Panel's view, moreover, the term "unconditionally" in Article I:1 has a broader meaning than simply that of not requiring compensation. While the Panel acknowledges the European Communities' argument that conditionality in the context of traditional MFN clauses in bilateral treaties may relate to conditions of trade compensation for receiving MFN treatment, the Panel does not consider this to be the full meaning of "unconditionally" under Article I:1. Rather, the Panel sees no reason not to give that term its ordinary meaning under Article I:1, that is, "not limited by or subject to any conditions".[288]

7.60 Because the tariff preferences under the Drug Arrangements are accorded only on the condition that the receiving countries are experiencing a certain gravity of drug problems, these tariff preferences are not accorded "unconditionally" to the like products originating in all other WTO Members, as required by Article I:1. The Panel therefore finds that the tariff advantages under the Drug Arrangements are not consistent with Article I:1 of GATT 1994.

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[283] In paragraph 4 of its first written submission, the European Communities states: "The Drug Arrangements are granted in conformity with the 1979 Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries".

[284] Executive summary of India's first written submission, paras. 9-13, 27 and 34.

[285] Executive summary of the European Communities' first written submission, paras. 14-21.

[286] Executive summary of the European Communities' second written submission, para. 14.

[287] Exhibit India-6.

[288] *The New Shorter Oxford English Dictionary*, 4th Edition, p. 3465.

## E. WHETHER THE DRUG ARRANGEMENTS ARE JUSTIFIED UNDER THE ENABLING CLAUSE

### 1. Introduction

7.61 Even though the parties disagree as to which of them should invoke the Enabling Clause and which should bear the burden of demonstrating consistency/inconsistency of the measure with the Enabling Clause, the Panel notes that both parties have made claims and arguments in relation to the justification of the measure under the Enabling Clause. The European Communities has effectively invoked the Enabling Clause by arguing that the Drug Arrangements are consistent with the Enabling Clause.[289] Bearing in mind its finding that it is for the European Communities to invoke the Enabling Clause and to demonstrate consistency of its measure with that provision, and having found that the Drug Arrangements are inconsistent with Article I:1 of GATT 1994, the Panel will proceed to examine whether the measure is justified under the Enabling Clause.

7.62 Prior to entering into this detailed analysis, the Panel considers it useful to set out the text of the relevant portions of the Enabling Clause, as well as provide a brief description of the origins of this instrument.

7.63 The relevant text of the Enabling Clause provides:

> "1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries[1], without according such treatment to other contracting parties.
>
> 2. The provisions of paragraph 1 apply to the following:[2]
>
> (*a*) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,[3]
>
> (*b*) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;
>
> (*c*) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another
>
> (*d*) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.
>
> 3. Any differential and more favourable treatment provided under this clause:
>
> (*a*) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;

[289] First written submission of the European Communities, para. 4: "The Drug Arrangements are granted in conformity with … the Enabling Clause".

(*b*) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;

(*c*) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries".[290]

[1] (footnote original) The words "developing countries" as used in this text are to be understood to refer also to developing territories.

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

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

7.64 The Generalized System of Preferences ("GSP") has its origins in discussions that took place in the First Session of UNCTAD during the mid-1960s, as reflected in General Principle Eight and Recommendation A.II.1 in the Final Act of the First Session of UNCTAD. During the Second Session of UNCTAD, on 26 March 1968, a Resolution was adopted on "Expansion and Diversification of Exports of Manufactures and Semi-manufactures of Developing Countries" (Resolution 21(II)). In this Resolution, UNCTAD agreed to "the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences which would be beneficial to the developing countries" and established a Special Committee on Preferences as a subsidiary organ of the Trade and Development Board, with a mandate to settle the details of the GSP arrangements. In 1970, UNCTAD's Special Committee on Preferences adopted Agreed Conclusions which set up the agreed details of the GSP arrangement. UNCTAD's Trade and Development Board took note of these Agreed Conclusions on 13 October 1970. In accordance with the Agreed Conclusions, certain developed GATT contracting parties sought a waiver for the GSP from the GATT Council. The GATT granted a 10-year waiver on 25 June 1971. Before the expiry of this waiver, the CONTRACTING PARTIES adopted a decision on "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries" (the "Enabling Clause") on 28 November 1979.

7.65 The main issue disputed by the parties is whether the Drug Arrangements are consistent with paragraph 2(a) of the Enabling Clause, particularly the requirement of "non-discriminatory" in footnote 3 to this subparagraph. The interpretation of paragraph 2(a) and footnote 3 in turn depends upon the proper understanding of paragraph 3(c) in that the latter is an important context for paragraph 2(a). It is only possible to give a full meaning to paragraph 2(a) and footnote 3 after determining whether paragraph 3(c) allows differentiation among developing countries in "respond[ing] positively to the development, financial and trade needs of developing countries".[291] Accordingly, in order to determine whether the term "non-discriminatory" in footnote 3 is affected by the meaning of paragraph 3(c), the Panel will proceed, first, with the interpretation of paragraph 3(c).

[290] L/4903, BISD 26S/203-205.

[291] The European Communities argues that "if the term 'non-discriminatory' was interpreted as prohibiting any difference in treatment between developing countries, developed countries would be effectively precluded from responding positively to those needs, thus rendering a nullity the requirement set forth in paragraph 3(c)". First written submission of the European Communities, para. 71.

## 2. Paragraph 3(c)

(a) Arguments of the parties

7.66 India argues that paragraph 3(c) requires that developed countries "respond positively" to the development, financial and trade needs of developing counties by ensuring that the product coverage and depth of tariff cuts are of a nature and magnitude that respond to the development, financial and trade needs of developing countries as a whole, not individually or in terms of sub-groups.[292] According to India, the preferential tariff treatment must be applied without discrimination to like products originating in all developing countries.[293] India maintains that, through ensuring sufficient breadth of product coverage and depth of tariff cuts, developed countries are able to address the needs of individual developing countries.[294]

7.67 In India's view, there is nothing in the Enabling Clause that allows a developed country unilaterally to modify its scheme to take certain products off the scheme for individual developing countries.[295] The issue whether a developed country can take individual countries off the scheme altogether, India states, is an issue related to the concept of "beneficiaries" in the "Agreed Conclusions", which is not an issue in this dispute and need not be decided by the Panel.[296] In any case, it is India's view that preference-giving countries do not have a legal right to exclude any country claiming developing country status.[297]

7.68 India argues that the phrase "development, financial and trade needs" in paragraph 3(c) has to be considered in a comprehensive manner, as the conjunctive "and" has a different meaning from that of "or".[298] India goes on to say that paragraph 3(c) does not permit discrimination between developing countries. Rather, it merely mandates that "any differential and more favourable treatment … shall respond positively to … the needs of [the] developing countries". India points out that the French and Spanish versions of the Enabling Clause both use the article "the" before "developing countries". India posits that this means the category as a whole. India considers that when the drafters wanted to mean "individual … needs", they used the word "individual" expressly, such as in paragraph 5. In India's view, it was always the intention of the drafters that the benefits of GSP schemes be extended, without discrimination, to all developing countries.[299] Should paragraph 3(c) mandate that developed countries respond to the needs of *individual* developing countries, as suggested by the European Communities, then, India argues, a logical conclusion would be that a GSP scheme which eliminates all duties on products from *all* developing countries would be inconsistent with paragraph 3(c), as it would not respond to the different levels of *individual* needs of developing countries. Such interpretation would render GSP schemes which do not provide differentiation among developing countries illegal, an obviously perverse result.[300]

7.69 On the status of the Agreed Conclusions in relation to the Enabling Clause, India argues that the Enabling Clause incorporated the Agreed Conclusions through the 1971 Waiver Decision and that, therefore, the Agreed Conclusions are part of the terms of the Enabling Clause, because they were agreed by consensus in UNCTAD and the 1971 Waiver Decision refers to the mutually acceptable

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[292] Reply of India to question No. 47 from the Panel to both parties; second written submission of India, para. 105.
[293] Reply of India to question No. 12 from the Panel to both parties.
[294] Second written submission of India, para. 105; second oral statement of India, para. 13.
[295] Reply of India to question No. 14 from the Panel to both parties.
[296] Reply of India to question No. 14 from the Panel to both parties.
[297] Reply of India to question No. 18 from the Panel to both parties.
[298] Reply of India to question No. 16 from the Panel to both parties; second written submission of India, paras. 106-112
[299] Reply of India to question No. 19 from the Panel to both parties; second written submission of India, para. 104.
[300] Second written submission of India, paras. 109-112.

arrangement drawn up at UNCTAD. The Enabling Clause, in turn, incorporated the 1971 Waiver Decision by footnote 3.[301]

7.70 The European Communities, in contrast, argues that paragraph 3(c) permits developed countries to respond to the development needs of individual developing countries according to "objective criteria".[302] The European Communities maintains that this does not mean that any difference related to development needs should be taken into account; in the European Communities' view, this would be an impossible task. Rather, the European Communities proposes two criteria for responding to the development needs in a "non-discriminatory" manner: (i) the difference in treatment must pursue a legitimate aim; and (ii) the difference in treatment must be a reasonable means to achieve that aim. The Drug Arrangements, according to the European Communities, meet these criteria.[303]

7.71 The European Communities argues that, in designing GSP schemes, it is reasonable to take into account all relevant needs, including the individual needs of each country, as well as those which are common to all or to certain sub-categories of developing countries, but paragraph 3(c) does not require taking into account each developing country's special needs. In the European Communities' view, the argument that preferences must apply equally to all like products originating in all developing countries has no basis in paragraph 3(c) and stems from a wrong interpretation of footnote 3.[304]

7.72 The European Communities argues that India's view that paragraph 3(c) only permits taking into account the needs of all the developing countries in general, and not their individual interests, is not supported by the text since the term "developing countries" is not preceded by qualifying terms which might suggest that only collective needs of the developing countries must be taken into account. The omission of the term "individual" or "particular", the European Communities believes, is not dispositive, as the Enabling Clause is not consistent when using such terms.[305]

7.73 The European Communities also argues that India's interpretation of paragraph 3(c) would make it impossible for paragraph 3(c) to apply to paragraph 2(d) which allows for more favourable treatment to be provided to the least-developed countries. Moreover, the European Communities considers that if paragraph 3(c) required responding to the development needs of all developing countries in terms of appropriate product coverage and depth of tariff cuts, then a GSP scheme that provided a narrower product coverage and a smaller tariff margin would be illegal, an implication not intended by the drafters.[306]

7.74 The European Communities also states that it might be argued that paragraph 3(c) is a purposive provision, not setting out any specific legal obligations.[307] As such, it must be interpreted so as to make it workable for the developed countries. In particular, developed countries should not be prevented from taking into account the most important needs. They should not be prevented from applying, in their GSP schemes, horizontal graduation mechanisms or from defining sub-categories of

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[301] Second written submission of India, paras. 75 and 97; reply of India to question No. 44 from the Panel to both parties.

[302] Reply of the European Communities to question No. 12 from the Panel to both parties; second written submission of the European Communities, para. 51.

[303] Reply of the European Communities to question No. 12 from the Panel to both parties.

[304] Reply of the European Communities to question No. 17 from the Panel to both parties; reply of the European Communities to question No. 8 from the Panel to India, para. 106; second written submission of the European Communities, para. 51.

[305] Reply of the European Communities to question No. 8 from the Panel to India, paras 101, 102-106.

[306] Reply of the European Communities to question No. 17 from the Panel to both parties; reply of the European Communities to question No. 8 from the Panel to India, para. 109.

[307] Reply of the European Communities to question No. 17 from the Panel to both parties.

developing countries which capture the most significant differences between them, and providing special preferences to such sub-groups of developing countries.[308]

7.75 The European Communities also argues that since the developed countries are free to decide whether or not to provide GSP schemes, they are also free to decide whether or not to grant preferences with respect to certain products and to choose the depth of the tariff cuts that they wish to offer.[309]

7.76 On the status of the Agreed Conclusions, the European Communities argues that they are not context of either the 1971 Waiver Decision or the Enabling Clause, because the Agreed Conclusions are not a binding agreement and were not made "in connection with the conclusion of" the 1971 Waiver Decision or the Enabling Clause. Rather, in the European Communities' view, the Agreed Conclusions and other UNCTAD texts are preparatory work for the 1971 Decision and, as such, they are supplementary means of interpretation.[310]

7.77 The Andean Community argues that nothing in the Enabling Clause requires developed countries to respond to all or any particular development needs in establishing GSP.[311] The United States argues that, under paragraph 3(c), GSP schemes need not be extended on a "one size fits all" basis and that distinctions based on the unequal development situations of developing countries are permitted.[312] Otherwise, the United States argues, the term "generalized" would be redundant and paragraph 7 of the Enabling Clause would not work in practice.[313]

(b) Panel's analysis

*(i) Introduction*

7.78 The Panel notes that a textual reading of the language of paragraph 3(c) – whereby GSP schemes shall be designed and modified "to respond positively to the development, financial and trade needs of developing countries" – does not reveal whether the "needs of developing countries" refers to the needs of *all* developing countries or to the needs of *individual* developing countries. A simple textual reading does not divulge whether the scheme should respond to the needs of different developing countries in such a manner as to provide the same set of product coverage and the same level of preference margin to all developing countries, as India suggests, or, whether a scheme may respond to special development needs of certain developing countries based on objective criteria, as proposed by the European Communities. In the Panel's view, the understanding that India suggests cannot on first appearances be reconciled with paragraph 2(d), which permits special preferences to be provided to the least-developed countries. On the other hand, the interpretation that the European Communities proposes cannot be supported by the absence of the word "individual" in paragraph 3(c) whereas this word does appear in paragraph 5 of the Enabling Clause. The parties come out with very different readings of the meaning of paragraph 3.

7.79 Under these circumstances, the Panel considers it is necessary to have recourse to the context of paragraph 3(c) and other relevant means of interpretation, in line with Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention").

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[308] Reply of the European Communities to question No. 17 from the Panel to both parties, paras. 57, 62-64.

[309] Reply of the European Communities to question No. 8 from the Panel to India, para. 110.

[310] Second written submission of the European Communities, para. 37; reply of the European Communities to question No. 44 from the Panel to both parties.

[311] Reply of the Andean Community to question No. 10 from the Panel to all third parties.

[312] Reply of the United States to question No. 6 from the Panel to all third parties; first oral statement by the United States, para. 12.

[313] Reply of the United States to questions Nos. 6 and 10 from the Panel to all third parties.

7.80 The Panel notes that nothing exists in the GATT or the WTO relating to GSP arrangements, other than the 1971 Waiver Decision and the Enabling Clause. It notes, however, the GSP arrangements were initially drawn up in UNCTAD and transferred into the GATT through the 1971 Waiver Decision. The Panel therefore considers it helpful to review the drafting history in UNCTAD and to identify the intention of the drafters on issues relating to the GSP arrangements. In this regard, the Panel recalls that the parties disagree on whether or not the Agreed Conclusions are context for the Enabling Clause. The Panel is of the view that it should therefore consider the status of the Agreed Conclusions with respect to the interpretation of the Enabling Clause.

*(ii) Status of the Agreed Conclusions for the interpretation of the Enabling Clause*

7.81 The Enabling Clause, in its footnote 3, refers to the Generalized System of Preferences "[a]s described in [the 1971 Waiver Decision], relating to the establishment of 'generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries'". The 1971 Waiver Decision recalls that "unanimous agreement was reached in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries" and that "mutually acceptable arrangements have been drawn up in the UNCTAD concerning [GSP]". The mutually acceptable arrangements referred to in the 1971 Waiver Decision are the Agreed Conclusions. The Agreed Conclusions actually set out the details and institutional arrangements of GSP. Consequently, an analysis of the significance of the Agreed Conclusions for the interpretation of the Enabling Clause is of critical importance.

7.82 The Agreed Conclusions resulted from negotiations mandated by Resolution 21(II) of the Second Session of UNCTAD, passed on 26 March 1968. It was in this Resolution that UN member States agreed to "the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences which would be beneficial to the developing countries". It should be noted that Resolution 21(II) itself did not set up the details of the GSP arrangements although it did set out its objectives and principles. The Resolution established a Special Committee on Preferences as a subsidiary organ of the Trade and Development Board, with the express mandate to settle the details of the GSP arrangements.

7.83 The outcome was the Agreed Conclusions, mutually agreed in the Special Committee on Preferences, "recogniz[ing] that these preferential arrangements are mutually acceptable and represent a cooperative effort which has resulted from the detailed and intensive consultations between the developed and developing countries which have taken place in UNCTAD".[314] Included in these Agreed Conclusions was a recommendation "that the Trade and Development Board at its fourth special session adopt the report of the Special Committee on its fourth session, take note of these conclusions [and] approve the institutional arrangements proposed in section VIII … ".[315]

7.84 Thus, the details for the establishment of generalized, non-reciprocal and non-discriminatory preferences beneficial to developing countries were set out in the Agreed Conclusions and in related documents incorporated by reference in these Agreed Conclusions. The fact that the Agreed Conclusions themselves were noted, not adopted, by the Trade and Development Board does not change their legal status as an instrument containing the agreed detailed arrangements of the GSP.

7.85 The Agreed Conclusions also provide "that no country intends to invoke its rights to most-favoured-nation treatment … and that the contracting parties to the General Agreement on Tariffs and Trade intend to seek the required waiver or waivers as soon as possible". During the GATT Council meeting adopting the 1971 Waiver Decision, the countries requesting this waiver expressly mentioned (i) that, in Resolution 21(II) of the Second Session of UNCTAD, "there has been unanimous support for the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-

[314] Agreed Conclusions, Section 1, para. 9.
[315] Ibid., Section I, para. 11.

discriminatory preferences which would be beneficial to the developing countries"; (ii) that the Agreed Conclusions worked out in UNCTAD "were mutually acceptable to and represented a co-operative effort of both developing countries and developed countries"; (iii) that "it has been agreed that the prospective preference-giving countries would seek as rapidly as possible the necessary legislative or other sanctions with the aim of implementing the preferential arrangements"; and (iv) that "it was a part of this undertaking that the prospective preference-giving countries were now seeking a waiver in the GATT". The representative of the preference-giving countries emphasized that "the waiver was to cover the arrangements as set forth in the Agreed Conclusions reached in UNCTAD".[316] With the above considerations in mind, the Panel is of the view that the Agreed Conclusions were incorporated by reference into the 1971 Waiver Decision.

7.86 From the above factual review, the Panel considers that the 1971 Waiver Decision is intended to cover the Agreed Conclusions. According to Article 31.2(a) of the Vienna Convention, an "agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty" constitutes context of the treaty. The Panel considers that Resolution 21(II) and the Agreed Conclusions establish such an agreement relating to the conclusion of the 1971 Waiver Decision; therefore, they are context for the 1971 Waiver Decision in the sense of Article 31.2(a) of the Vienna Convention. This is confirmed by the fact that the 1971 Waiver Decision itself does not contain any specifics on GSP arrangements.

7.87 The fact that the Enabling Clause incorporates GSP "*as described in* the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of generalized, non-reciprocal and non-discriminatory preferences to developing countries", also strongly suggests that Resolution 21(II) and the Agreed Conclusions were carried over from the 1971 Waiver Decision into the 1979 Enabling Clause so as to constitute a context for the Enabling Clause in relation to GSP arrangements, and paragraphs 2(a) and 3(c) in particular. The Panel notes that on the occasion of the discussion and approval of the 1979 Enabling Clause, there was no discussion at all in the GATT as to the nature and characteristics of the GSP.

7.88 The Panel recalls that both India and the European Communities agree that Resolution 21(II) and the Agreed Conclusions can be considered as preparatory work for the 1971 Waiver Decision, but that India argues that the Agreed Conclusions are also context for the 1971 Waiver Decision and the Enabling Clause. The Panel recalls its finding in paragraphs 7.86 and 7.87 that Resolution 21(II) and the Agreed Conclusions are context for the 1971 Waiver Decision and the Enabling Clause. The Panel considers that, because Resolution 21(II) and the Agreed Conclusions record the history and results of the negotiations on GSP arrangements, they are also preparatory work for both the 1971 Waiver Decision and the Enabling Clause, in the sense of Article 32 of the Vienna Convention.

*(iii) Product coverage and depth of tariff cuts as part of the Agreed Conclusions*

7.89 In interpreting paragraph 3(c), the Panel considers that Section I of the Agreed Conclusions is particularly helpful in understanding the mechanisms in GSP arrangements relating to "responding to the development needs of developing countries". Paragraph 3 of Section I states that

> "[the Special Committee on Preferences] welcomes with appreciation the revised submissions by the developed market-economy countries[317], which should be read in conjunction with the preliminary submissions of November 1969.[318] These submissions represent an important success in the efforts and endeavours in UNCTAD in order to put a generalized system of preferences into operation and an important element in the fulfilment of the aims and objectives of Conference

[316] C/M/69, pp. 1-2.
[317] TD/B/AC.5/34.
[318] TD/B/AC.5/24.

> Resolution 21(II) mentioned above and in the international strategy for development in the 1970s".[319]

7.90 The submissions referred to above are the documents "Tariff Preferences for Developing Countries – Documentation Forwarded by OECD to UNCTAD"[320] (14 November 1969) and "Tariff Preferences for Developing Countries – Revised Documentation Forwarded by OECD to UNCTAD" (19 September 1970).[321] These submissions contain the principles and GSP schemes offered by preference-giving countries based on consultations with developing countries. Because these documents are expressly referenced in the Agreed Conclusions, the principles and offers expressed therein faithfully reflect the common understanding on GSP schemes between the developed and developing countries.

7.91 Of particular interest in these two documents are the sections providing agreed offers on the part of the developed countries with respect to the product coverage and the depth of tariff cuts. It was agreed that GSP schemes should apply in principle to all industrial semi-manufactured and manufactured products, as prescribed in chapters 25-99 of the Brussels Nomenclature; other products, including agricultural products in chapters 1-24, could be included on a case-by-case basis in the form of positive lists provided by donor countries; and donor countries could make limited exceptions, excluding from their GSP offers a limited number of products under chapters 25-99 or reserving their rights to make such limited exceptions.[322]

7.92 For products in chapters 25-99, it was also stated that preferences would take the form of exemptions from custom duties, but a few donor countries offered linear tariff reductions or variable preferential duties .[323] It was further stated by one donor country that preferential duties would in general be at the same levels as those existing in the special preferences that certain donor countries had been providing to certain developing countries.[324]

7.93 For those selected products in chapters 1-24 which would be included by donor countries in their GSP schemes, some donor countries offered duty-free preferences, while others offered variable tariff reductions at different depths of tariff cuts.[325]

7.94 The Panel notes: (i) that the Agreed Conclusions "welcomed" these submissions and referred to them as *an important element* in the fulfilment of the aims and objectives of Conference Resolution 21(II); and (ii) that the fact that the Agreed Conclusions did not repeat any "conclusions" on the product coverage and on the depth of tariff cuts, means that the offers proposed by developed countries in these submissions were acceptable to and *agreed* by all countries involved. The same arrangements were also covered by the 1971 Waiver Decision in view of the intention of Members, as expressed in the GATT Council, to cover in that instrument all arrangements set out in the Agreed Conclusions.

7.95 Further, the Panel notes that because the levels of product coverage and depth of tariff cuts contained in the GSP offers were negotiated and mutually agreed between developed and developing countries, it cannot be assumed that GSP schemes providing for lesser product coverage or depth of tariff cuts would have been acceptable to the developing countries. Also, in relation to future implementation of GSP schemes, the Panel sees no basis for concluding that the level of product coverage and depth of tariff cuts in general could be less than the level and depth offered and accepted in the Agreed Conclusions.

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[319] TD/B/330.
[320] TD/B/AC.5/24, 14 November 1969.
[321] TD/B/AC.5/34, 19 September 1970.
[322] TD/B/AC.5/24, para. 15.
[323] TD/B/AC.5/24, para. 18.
[324] TD/B/AC.5/24, para. 18.
[325] TD/B/AC.5/24, para. 19.

7.96 The Panel notes that the original negotiated offers also contained exceptions mechanisms where the preference-giving countries reserved their rights to exclude a limited number of products from their schemes.[326] But, as the Panel understands it, these limited exceptions did not change the basic requirements that the level of product coverage and depth of tariff cuts in general could not be less than those provided in the negotiated offers.

7.97 From the 1979 UNCTAD Review, the Panel notes that the arrangements on product coverage and depth of tariff cuts were implemented during the period 1971-1979 by Members in their respective GSP schemes. Improvements were also made voluntarily by certain donor countries with regard to the depth of tariff cuts in their respective schemes.[327] The Panel considers that the practice of Members in the implementation of GSP schemes confirms its understanding that the general level of product coverage and depth of tariff cuts should not be reduced.

(iv) *Responding positively to development needs of developing countries*

7.98 There is no express mention in the Enabling Clause of any change to the details of the GSP arrangements earlier agreed in the Agreed Conclusions and incorporated into the 1971 Waiver Decision, nor is there any other record in GATT or in the WTO of any action in connection therewith. Therefore, the Panel considers that the arrangements on product coverage and depth of tariff cuts agreed upon in the Agreed Conclusions are still valid elements dealing with the design of GSP schemes in the Enabling Clause.

7.99 Since paragraph 3(c) is the relevant provision in the Enabling Clause addressing the design and modification of GSP schemes, the Panel finds that paragraph 3(c) requires that, in designing and modifying GSP schemes, preference-giving countries provide product coverage and tariff cuts at levels in general no less than those offered and accepted in the Agreed Conclusions. In addition, the Panel considers that paragraph 3(c), by requiring preference-giving countries to "respond positively to the development, financial and trade needs of developing countries", does not exclude, but actually encourages, further improvements in the levels of product coverage and depth of tariff cuts, commensurate with development needs of developing countries.

*(v) Whether a GSP scheme can be accorded to less than all developing countries*

7.100 With respect to the issue of whether paragraph 3(c) allows GSP schemes to be extended to less than all developing countries, responding to the specific development needs of these countries, not the specific needs of other developing countries, the Panel finds nothing in the text of the Enabling Clause or in its drafting history to support the European Communities' argument that paragraph 3(c) permits developed countries to respond to similar development needs of *selected* developing countries "according to objective criteria". Moreover, if the Panel were to uphold the European Communities' argument, it would be faced with having to decide what constitutes "objective criteria" justifying the selective inclusion of only certain development needs, to the exclusion of others. The Panel notes that there has never been any collective guidance by GATT Contracting parties or the membership of the WTO in this respect.

7.101 The European Communities provides two elements as constituting the objective criteria for differentiating among developing countries. It indicates that: (i) the difference in treatment must pursue a legitimate aim; and (ii) the difference in treatment must be a reasonable means to achieve that aim. Should such criteria be used, however, then any differentiation favouring one or a few selected developing countries, not other developing countries, could be justified because, firstly, each developing country has its different development needs caused by different problems, for which any

[326] TD/B/AC.5/24, paras. 20-21.

[327] Review and evaluation of the generalized system of preferences, 9 January 1979, TD/232, paras. 19-20).

measure addressing such problem could be said to be for a legitimate aim and, secondly, any higher margin of tariff preferences (higher than that provided to other developing countries) on products of export interest to these favoured developing countries would serve the legitimate aim of supporting development in these favoured developing countries.

7.102 Tariff preferences would very often be a "reasonable means" to achieve that legitimate aim of promoting development. For example, providing tariff preferences would help to solve the development problem of some developing countries stemming from the size of population, by creating more jobs in labour-intensive industries. If the Panel were to uphold the European Communities' interpretation, the way would be open for the setting up of an unlimited number of special preferences favouring different selected developing countries. The end result would be the collapse of the whole GSP system and a return back to special preferences favouring selected developing countries, precisely the situation that negotiators aimed to eliminate back in the late 1960s.

7.103 Indeed, the Panel cannot discern any "objective criteria" according to which preference-giving countries may treat different developing countries differently under GSP schemes. There is no reasonable basis to distinguish between different types of development needs, whether they are caused by drug production and trafficking, or by poverty, natural disasters, political turmoil, poor education, the spread of epidemics, the magnitude of the population, or by other problems. There could be no reasonable explanation why certain causes of the problem of development should be addressed through GSP and why other causes of the same development problem should not be so addressed.

7.104 Given the practical difficulties in elaborating any reasonable "objective criteria", the Panel cannot assume that paragraph 3(c) envisages the existence of such "objective criteria" allowing for differentiation in GSP schemes. The only differentiation that is clearly understood to have been agreed among GATT Contracting parties is the special treatment to the least-developed countries, as set out in paragraph 2(d). Without explicit provision, agreed multilaterally, for other bases for differentiation among developing countries, the Panel does not think it can be assumed that Members intended to permit such differentiation.

7.105 The Panel considers that the appropriate way of responding to the development needs of developing countries is to take into account *each and every* developing countries' development needs by including, in the GSP schemes, a breadth of products of export interest to developing countries and by providing sufficient margins of preferences for such products. There is a requirement of responsiveness of GSP schemes, even if there are no specific criteria for measuring the responsiveness of individual GSP schemes.

7.106 The Panel, however, notes that GSP schemes contain mechanisms for differentiating among developing countries in certain prescribed situations, one being that of safeguard mechanisms and the other being special treatment of the least-developed countries.

*(vi) Safeguard mechanisms*

7.107 The safeguard mechanisms originated in the Agreed Conclusions which permits: (i) a priori limitations on imports from developing countries; and (ii) escape-clause type measures for the purpose of retaining a certain degree of control over the trade which may be generated by new tariff advantages.[328]

7.108 The a priori limitations are measures that set import ceilings so as to exclude certain imports originating in individual developing countries where the products concerned reach a certain competitive level in the market of the preference-giving country.

[328] TD/B/330, Section III.

7.109 From the very beginning of GSP implementation, the a priori measures were used by a number of countries on non-agricultural products covered under their respective GSP schemes. For example, the scheme offered in 1970 by the EEC stated that "preferential imports will be effected up to ceilings in value terms to be calculated for each product on a basis common to all products" and that "in order to limit the preferences granted to the more competitive developing country or countries and to reserve a substantial share for the less competitive, preferential imports of a given product from a single developing country should not as a general rule exceed 50 percent of the ceiling fixed for that product".[329] Thus, under this scheme, GSP benefits are available for any given product only up to a value that is no more than 50 per cent of the ceiling value.

7.110 With regard to safeguard mechanisms, the Agreed Conclusions also state that "the preference-giving countries reserve the right to make changes in the detailed application as in the scope of their measures (under safeguard mechanisms), and in particular, if deemed necessary, to limit or withdraw entirely or partly some of the tariff advantages granted".[330] Nevertheless, the preference-giving countries, in the Agreed Conclusions, also "declare that such measures would remain exceptional and would be decided on only after taking due account in so far as their legal provisions permit, of the aims of the generalized system and the general interests of developing countries".[331]

7.111 The Panel notes that these a priori limitations still exist today, in different forms, in the GSP schemes of a number of preference-giving countries.[332]

7.112 The Panel notes that the "escape-clause" type safeguard mechanisms are applicable to all beneficiaries without differentiation and therefore do not have any bearing on the interpretation of paragraph 3(c). What are relevant are the "a priori" limitations as provided for expressly in the Agreed Conclusions. The Panel accordingly only addresses how the a priori limitations impact the interpretation of paragraph 3(c).

7.113 Since: (i) the a priori limitations are mainly based upon notions of competitiveness of products or countries in particular export markets; (ii) paragraph 3(c) is the provision in the Enabling Clause that addresses how GSP schemes should respond to development needs; and (iii) nothing during the negotiations of the Enabling Clause suggests that the safeguard mechanisms were changed, the Panel considers that paragraph 3(c) incorporates the a priori limitations under the safeguard mechanisms section of the Agreed Conclusions into the Enabling Clause.

7.114 Whether a particular a priori limitation measure in a GSP scheme complies with the terms of paragraph 3(c) is a matter that can only be decided in light of the particular factual setting of the measure, and this is not a matter before this Panel.

(vii) *Paragraph 2(d)*

7.115 As required by the text of paragraph 3, "any differential and more favourable treatment provided under this clause" shall comply with, *inter alia*, subparagraph (c). Thus, paragraph 3(c) also applies to paragraph 2(d) which permits special treatment to the least-developed countries. Accordingly, the Panel considers that the interpretation of paragraph 3(c) has to accommodate the implementation of paragraph 2(d). The Panel is of the view that, in designing and modifying GSP schemes, paragraph 3(c) does allow for differentiation among developing countries, in the case of special treatment to the least-developed countries.

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[329] TD/B/AC.5/34/Add.1, Annex 1, Section I.
[330] Agreed Conclusions, Section III, para.1.
[331] Ibid.
[332] *See* "The Generalized System of Preferences", Note by the Secretariat, WT/COMTD/W/93. Several of the GSP schemes mentioned in this Note contain different forms of "graduation" mechanisms.

(c) Summary of findings on the interpretation of paragraph 3(c)

7.116 Based on the above analysis in paragraphs 7.89-7.115 above, the Panel finds that the elements relevant to "respond[ing] positively to the development, financial and trade needs of developing countries" under paragraph 3(c) include the following: (i) the level of product coverage and depth of tariff cuts in general should be no less than the level and depth offered and accepted in the Agreed Conclusions, with the possibility of providing further improvements[333]; (ii) the design and modification of a GSP scheme may not result in a differentiation in the treatment of different developing countries, except as provided in points (iii) and (iv); (iii) a priori limitations may be used to set import ceilings so as to exclude certain imports originating in individual developing countries where the products concerned reach a certain competitive level in the market of the preference-giving country; and (iv) differentiation is permitted among developing countries, in designing and modifying GSP schemes, in the case of special treatment to the least-developed countries, pursuant to paragraph 2(d). No other differentiation among developing countries is permitted by paragraph 3(c).

**3. "Non-discriminatory" in footnote 3**

(a) Arguments of the parties

7.117 India states that the ordinary meaning of the term "discriminate" is "to make or constitute a difference in or between; distinguish" and "to make a distinction in the treatment of different categories of peoples or things". In India's reading, "non-discriminatory" does not allow for the making of distinctions between different categories of developing countries.[334]

7.118 India argues that the context of the term "non-discriminatory" in footnote 3 of the Enabling Clause is to be found in Article I:1 of GATT 1994 only, not in Articles III:4, X, XIII, XVII or XX of GATT 1994 or in Article XVII of GATS.[335] For India, the term "notwithstanding" in paragraph 1 of the Enabling Clause means that the developed countries waive their MFN rights vis-à-vis the developed country Member providing GSP to developing countries. However, India considers that there is nothing in paragraph 1 to indicate that developing countries also waive their MFN rights vis-à-vis other developing countries receiving GSP benefits from a developed country. According to India, the assumption that developing countries waive such MFN rights is inconsistent with the very purpose of the GSP.[336] Consequently, the notion of non-discrimination as used in Article I:1 of GATT 1994 – that of protecting equal competitive opportunities for like products originating in different countries – is relevant and is not waived.[337]

7.119 India also argues that use of the article "the" before "developing countries" in footnote 3 means "all" when defining a plural noun. India maintains that if "non-discrimination" in footnote 3 were not to refer to "all" developing countries, there would be no need to have paragraph 2(d) in addition to paragraph 2(a); the non-tariff measures implicated in paragraph 2(d) in favour of the least-developed countries could then have been included in paragraph 2(b).[338]

7.120 India maintains that unless the Enabling Clause expressly so provides, there can be no valid basis for differentiation among developing countries. To interpret it otherwise would curtail the benefits accruing to developing countries under Article I:1 and run counter to the very purpose of the

[333] However, according to paragraph 3(b) of the Enabling Clause, the requirement as to the general level of product coverage and the depth of tariff cuts shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on an MFN basis.
[334] First written submission of India, para. 57.
[335] Reply of India to question No. 10 from the Panel to both parties.
[336] Reply of India to question No. 9 from the Panel to both parties.
[337] Reply of India to question No. 9 from the Panel to both parties.
[338] Reply of India to question No. 9 from the Panel to both parties; second written submission of India.

GSP.[339] The meaning of the term "non-discriminatory" in the Enabling Clause, India believes, is identical to its meaning in the Agreed Conclusions. The Agreed Conclusions contains no reference to the notion that developed countries should be allowed to distinguish between developing countries. The Agreed Conclusions do not even authorize developed countries to provide more favorable tariff preferences to the least-developed countries to the exclusion of other developing countries.[340]

7.121 India also cites certain other texts from the UNCTAD documents to support its contention that the term "non-discrimination" in footnote 3 indicates a requirement to provide equal tariff preferences to all developing countries. The Agreed Conclusions state that "there is agreement with the objective that in principle all developing countries should participate as beneficiaries from the outset". General Principle Eight of the First UNCTAD Session calls for preferential treatment to "developing countries as a whole". Resolution 21(II) also states that the objective of the GSP is to set up a system "in favour of the developing countries" which, in India's understanding, means in favour of all developing countries.[341] With these supporting texts and other UNCTAD documents to the similar effect, India argues that Members intended that the benefits of GSP apply to all developing countries, not just to some developing countries.[342] For India, this conclusion is also confirmed by the 1979 UNCTAD GSP Review Report. On all matters relating to GSP, India maintains, the Enabling Clause does not change the 1971 Decision, with one exception that paragraph 2(d) permits special treatment be given to the least-developed countries.[343]

7.122 The European Communities argues that the word "discriminate" has a neutral meaning and a negative meaning. It notes the statement by the panel in *Canada – Pharmaceutical Patents* that the term "discrimination" may have different meanings in different WTO contexts. The full definition in the legal context, in the European Communities' view, is "to make a distinction in the treatment of different categories of people, or thing, esp. *unjustly* or *prejudicially* against the people on grounds of race, colour, sex, social status, etc".[344]

7.123 The European Communities also argues that the appropriate context of the term "non-discriminatory" in the Enabling Clause is found in paragraphs 1, 2 and 3 of the Enabling Clause, and particularly in paragraphs 2(a) and 3(c) and in the term "generalized" in footnote 3.[345] In the European Communities' view, Article I:1 and many other substantive provisions of GATT 1994 and GATS are concerned with providing equal conditions of competition for imports of like products originating in all Members. In contrast, the European Communities believes, the Enabling Clause, like other special and differential treatment provisions, seeks to create unequal competitive conditions in order to respond to the special needs of developing countries. Having regard to that objective, the European Communities argues that differential treatment between developing countries according to their development needs is no more discriminatory than differentiating between developed and developing countries.[346]

7.124 The European Communities maintains that "non-discriminatory" is not synonymous with formally equal treatment. Rather, in the European Communities' view, there is discrimination if equal situations are treated unequally or if unequal situations are treated equally. The European Communities also maintains that there is a two-part standard for measuring whether "non-

[339] Reply of India to question No. 9 from the Panel to both parties.
[340] Second written submission of India, paras. 97-100.
[341] Reply of India to question No. 9 from the Panel to both parties; Reply of India to question No. 16 from the Panel to India.
[342] Reply of India to question No. 9 from the Panel to both parties; Reply of India to question No. 16 from the Panel to India.
[343] Reply of India to question No. 9 from the Panel to both parties.
[344] First written submission of the European Communities, para. 66.
[345] Reply of the European Communities to question No. 9 from the Panel to both parties, paras. 26-27.
[346] Reply of the European Communities to question No. 10 from the Panel to both parties, paras. 36 and 39.

discrimination" exists: (i) whether the difference in treatment pursues a legitimate objective; and (ii) whether the distinction is a reasonable means to achieve the legitimate objective, i.e., whether the measure is both apt to achieve that objective and proportionate.[347] For the European Communities, the meaning of discrimination differs from provision to provision. The meaning of discrimination under Article III of GATT 1994 is different from the meaning of discrimination under the chapeau to Article XX of GATT 1994.[348] Under the Enabling Clause, the term "non-discriminatory" in paragraph 2(a) does not prevent Members from treating differently developing countries which, according to objective criteria, have different development needs.[349]

7.125 The European Communities maintains that General Principle Eight, Resolution 21(II) and the Agreed Conclusions themselves are not context of the Enabling Clause, but are "preparatory work" of the 1971 Decision and, as such, constitute supplementary means of interpretation, as specified in Article 32 of the Vienna Convention.[350] Moreover, the European Communities considers that the UNCTAD texts that India relies upon do not support India's position on the meaning of non-discrimination. Those texts, according to the European Communities, address the issue of whether all developing countries should be recognized as beneficiaries, which is linked to the meaning of the term "generalized", rather than the issue of whether all beneficiaries should be granted identical preferences, which is to be addressed by the term "non-discriminatory" in footnote 3. The European Communities considers that India's interpretation renders one of the terms "non-discriminatory" or "generalized" redundant.[351]

(b) Panel's analysis

*(i) Introduction*

7.126 The Panel considers that the ordinary meaning of "discriminate", depending on the context, can have either a *neutral* meaning of making a distinction or a *negative* meaning carrying the connotation of a distinction that is unjust or prejudicial. As India indicates, the neutral meaning is "to make or constitute a difference in or between; distinguish" and "to make a distinction in the treatment of different categories of peoples or things".[352] As the European Communities indicates, the negative meaning is "to make a distinction in the treatment of different categories of people or things, esp. *unjustly* or *prejudicially* against people on grounds of race, colour, sex, social status, age, etc."[353]

7.127 In order to determine the appropriate meaning of this term in footnote 3, it is necessary to consider the term in its context and in light of the object and purpose of the GATT.

7.128 The relevant context of "non-discriminatory" includes paragraphs 2(a), 2(d) and 3(c) in the text of the Enabling Clause. In paragraph 2(a), as the Panel has already found in paragraph 7.87, the most relevant elements of context are Resolution 21(II) and the Agreed Conclusions. Leading up to Resolution 21(II), there are two formal submissions from the OECD Group[354] and the Group of 77.[355]

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[347] Reply of the European Communities to question No. 9 from the Panel to both parties, paras. 31-32; Reply of the European Communities to question No. 33 from the Panel to both parties, para. 5.

[348] Reply of the European Communities to question No. 10 from the Panel to both parties, paras. 38-40.

[349] First written submission of the European Communities, para. 85.

[350] Second written submission of the European Communities, para. 37.

[351] Second written submission of the European Communities, para. 38; Reply of the European Communities to question No. 52 from the Panel to both parties, para. 57; European Communities' comment on India's reply to question No. 16 from the Panel to India; Reply of the European Communities to question No. 9 from the Panel to both parties, para. 27.

[352] *The New Shorter Oxford English Dictionary*, 4th Edition, p. 689.

[353] *The New Shorter Oxford English Dictionary*, 4th Edition, p. 689.

[354] Report by the Special Group on Trade with Developing Countries of the Organization for Economic Cooperation and Development, 29 January 1968, TD/56.

[355] Charter of Algiers, adopted on 24 October 1967, TD/38.

There is also the earlier Recommendation from the First Session of UNCTAD[356], which represents the first call for the establishment of GSP. The Panel considers that all these documents constitute preparatory work for the Agreed Conclusions and, therefore, also for the 1971 Waiver Decision, and for paragraph 2(a) of the Enabling Clause by virtue of footnote 3.

7.129 The Panel notes that it is in Resolution 21(II) of the Second Session of UNCTAD that the concept of establishing a "generalized, non-reciprocal and non-discriminatory" system of preferences is first set out. The details of GSP arrangements were decided in the Agreed Conclusions, which were carried over into the 1971 Waiver Decision and thereafter into paragraph 2(a) of the Enabling Clause by virtue of footnote 3. The Panel therefore will proceed with an analysis of Resolution 21(II) in order to explore the relevant context and preparatory work in UNCTAD.

*(ii) Resolution 21(II)*

7.130 The Panel notes that Resolution 21(II) indicates the "unanimous agreement in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences", and establishes the Special Committee on Preferences to elaborate the details of GSP. The "unanimous agreement" on these principles is evident from the documents annexed to Resolution 21(II), setting out the positions taken by the developing countries in the Charter of Algiers[357]and the positions taken by the developed countries in the Report of the Special Group on Trade with Developing Countries submitted by the OECD.[358] Resolution 21(II), by stating in its preamble that it "tak[es] cognizance of the Charter of Algiers and the Report of the Special Group on Trade with Developing Countries submitted by the Organization for Economic Cooperation and Development", effectively recognizes the relevant contents of these reports for the Resolution itself.

7.131 Both developed and developing countries set out certain principles for the establishment of GSP. Those stated by the developing countries in the Charter of Algiers include the following:

> "(a) … provide for unrestricted and duty-free access to the markets of all the developing countries for all manufactures and semi-manufactures from *all* developing countries;
>
> …
>
> (d) All developed countries should grant such preferences to *all* developing countries;
>
> …
>
> (g) The new system of generalized preferences should ensure at least equivalent advantages to developing countries enjoying preferences in certain developed countries to enable them to suspend their existing preferences on manufactures and semi-manufactures".[359]

7.132 The principles for the GSP system as stated in the Report by the Special Group on Trade with Developing Countries of the OECD[360], include, *inter alia*, the following:

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[356] First Session of UNCTAD, Final Act and Report, Rec. A.II.1.
[357] TD/38.
[358] TD/56.
[359] See Part Two, B. Expansion of Exports of Manufactures and Semi-manufactures, para. 1, Charter of Algiers, adopted on 24 October 1967, in: Proceedings of the Second Session of UNCTAD, Vol. I: Reports and Annexes, TD/38, p 434.
[360] TD/56.

> "(3) Such new arrangements should aim to accord broadly equivalent opportunities in all developed countries to *all* developing countries;
>
> (5) Any new arrangements for the grant of special tariff treatment cannot be put into effect without the support of developing countries, and their views should be taken into account in the formulation of any such arrangements".[361]

7.133 On the phasing out of existing special preferences, the OECD Special Group report states that

> "it is recognized that many countries would see as an important objective of the new arrangements a movement in the direction of *equality of treatment* for the exports of all developing countries in developed country markets. At the same time, developing countries at present receiving preferences in some such markets would expect the arrangements to provide them with increased export opportunities to compensate for their sharing of their present advantages".[362]

7.134 The Panel is of the view that the "unanimous agreement", as stated in Resolution 21(II) and emanating from the above-mentioned positions of developing and developed countries, is that the existing special preferences provided to a limited number of developing countries would be replaced by a generalized system of preferences which would be provided to *all* developing countries *equally*, without the possibility of differentiation in treatment among developing countries by preference-giving countries.

*(iii) Agreed Conclusions*

7.135 The Agreed Conclusions, addressing the issue of "Reverse Preferences and Special Preferences", states in Section II: "[T]he Special Committee notes that, consistent with Conference Resolution 21(II), there is agreement with the objective that in principle all developing countries should participate as beneficiaries from the outset". This statement addresses the issue of special preferences whereby some preference-giving countries were providing preferential tariff treatments only to certain designated developing countries, and not to others. Reading this sentence in that light, the Panel considers that the "agreement" refers to that of extending preferential tariff treatment to *all* developing countries.

7.136 In addressing the impact of the elimination of special preferences between certain developed countries and a limited number of developing countries, the Agreed Conclusions state: "[D]eveloping countries which will be sharing their existing tariff advantages in some developed countries as the result of the introduction of the generalized system of preferences will expect the new access in other developed countries to provide export opportunities at least to compensate them". In other words, for developing countries enjoying special preferences in the past, the possible loss of market share in one developed country, previously providing special preferences to them, would be compensated by the fact that other developed countries not previously providing special preferences to them, would provide preferential treatment to them upon the establishment of GSP.

7.137 There is little doubt that these statements implied that all special preferences existing before the establishment of GSP would thereafter be extended to *all* developing countries *without differentiation.* Logically, if differentiation in treatment among different developing countries were permitted in the Agreed Conclusions, such differentiation would have defeated the requirement of

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[361] See Part One, Report by the Special Group on Trade with Developing Countries submitted by the OECD on 29 January 1968 to UNCTAD, in: Proceedings of the Second Session of UNCTAD, Vol. I: Reports and Annexes, TD/56, p. 79.

[362] Ibid, Part One, "H – Preferences received by some developing countries in the markets of some developed countries", p. 79.

elimination of existing special preferences and would have caused the same problems as those caused by the existence of the special preferences prevailing before the establishment of the GSP, namely, discrimination among developing countries.[363]

7.138 In addressing the special measures in favour of the least-developed countries, Section V of the Agreed Conclusions states: "[T]he preference-giving country will consider, as far as possible, on a case-by-case basis, 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". At that time, there was no possibility of providing wider product coverage or deeper tariff cuts *only* for the *least-developed countries*.

7.139 The approach taken to ensuring benefits to the least-developed countries was to: (i) include products of export interest to these countries in the scope of product coverage of the GSP schemes; and (ii) provide greater tariff cuts on such products when appropriate. However, in its design, the scheme as a whole was to be provided to *all* developing countries so that although the GSP would provide *formally equal treatment* to all developing countries, it would respond to the needs of the least developing countries more effectively. Under the Agreed Conclusions, there was no possibility to provide formal differentiation in GSP schemes to favour the least-developed countries.

7.140 However, as the Panel concluded in its analysis under paragraph 3(c) of the Enabling Clause, the Agreed Conclusions permit a priori limitations. The Panel considers, accordingly, that the Agreed Conclusions do not provide a legal basis for differentiation among developing countries other than that for the implementation of a priori limitations.

*(iv) Recommendation A.II.1 of the First Session of UNCTAD*

7.141 It is worth noting that at the conclusion of the First Session of UNCTAD, Members adopted general principles and recommendations relating to the abolishment of special preferences and the establishment of GSP. These principles and recommendations directly led to the adoption of Resolution 21(II) in the Second Session of UNCTAD.

7.142 General Principle Eight of the First Session of UNCTAD provides:

> "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 trade interests of other 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. … 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".[364]

7.143 Recommendation A.II.1. provides:

> "Preferential arrangements between developed countries and developing countries which involve *discrimination* against other developing countries, and which are essential for the maintenance and growth of the export earnings and for the economic advancement of the less developed countries at present benefiting therefrom, should

[363] See "the Problems of special preferences – trade policy aspects, Reports by the secretariat of UNCTAD" on 12 January 1968, in Proceedings of the Second Session of UNCTAD, Vol. V, Special problems in world trade and development, pp. 39-49.

[364] Proceedings of UNCTAD, Vol.1, Final Act and Report adopted on 16 June 1964. (Emphasis added)

> be abolished *pari passu* with the effective application of international measures providing at least equivalent advantages for the said countries. These international measures should be introduced gradually in such a way that they become operative before the end of the United Nations Development Decade."[365]

7.144 From the above analysis of Resolution 21(II), the Agreed Conclusions and the relevant preparatory work leading to the establishment of GSP, the Panel considers that the clear intention of the negotiators was to provide GSP equally to all developing countries and to eliminate all differentiation in preferential treatment to developing countries, with the exception of the implementation of a priori limitations in GSP schemes. The Panel concludes, from its review of the context and preparatory work, that the requirement of non-discrimination, as a general principle formally set out in Resolution 21(II) and later carried over into the 1971 Waiver Decision and then into the Enabling Clause, obliges preference-giving countries to provide the GSP benefits to *all* developing countries without differentiation, except for the implementation of a priori limitations in GSP schemes.

*(v) Paragraph 2(d)*

7.145 The fact that the Enabling Clause expressly allows developed countries to provide special treatment to the least-developed countries in paragraph 2(d) also suggests that, in the context of GSP, it is only due to paragraph 2(d) that special treatment to the least-developed countries is permitted. If the Agreed Conclusions in themselves allowed such more preferential treatment, there would have been no need to include paragraph 2(d) in the Enabling Clause. Accordingly, it is clear that formally identical treatment is required to be given to all developing countries under the non-discrimination requirement of footnote 3, as applied to paragraph 2(a).

7.146 The Panel notes the European Communities' arguments that paragraph 2(d) covers both tariff and non-tariff measures, that the term "non-discriminatory" in paragraph 2(a) allows developed countries to differentiate between developing countries according to objective criteria, but that this provision only deals with tariff preferences, and that, accordingly, there is still a need to provide for special treatment in favour of least-developed countries through paragraph 2(d). The Panel also notes India's argument that if paragraph 2(a) allowed differentiation between developing countries, in the same way paragraph 2(b) would also allow differentiation among developing countries; it would thus have been more logical to combine paragraphs 2(b) and 2(d) into one paragraph rather than to have a separate paragraph 2(d) allowing for both tariff and non-tariff measures favouring the least-developed countries.

7.147 The Panel considers that if the term "non-discriminatory" in paragraph 2(a) allowed developed countries to differentiate between developing countries according to objective criteria, paragraph 2(a) would cover tariff measures favouring the least-developed countries. There might then still be a need to have a separate paragraph to permit special non-tariff measures in favour of the least-developed countries, beyond those "governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT" under paragraph 2(b). However, this separate paragraph would have excluded tariff preferences from its scope since these would have already been covered by paragraph 2(a). The fact that paragraph 2(d) does not exclude tariff preferences from its scope further confirms the understanding that the term "non-discriminatory" in paragraph 2(a) does not permit differentiation among developing countries. Therefore, paragraph 2(d) functions as an exception to paragraph 2(a), authorizing special treatment to the least-developed countries, *inter alia*, in GSP schemes.

[365] First Session of UNCTAD, Final Act and Report, Rec. A.II.1.II.A.6. (Emphasis added)

*(vi) Paragraph 3(c)*

7.148 In light of its findings in paragraph 7.116 in respect of paragraph 3(c), specifically, that the design and modification of a GSP scheme may not result in a differentiation in the treatment of developing countries, except for the implementation of a priori limitations, the Panel considers that paragraph 3(c) provides no basis to read "non-discriminatory" in footnote 3 in a way allowing for differentiation among developing countries, except for the implementation of a priori limitations.

7.149 The Panel recalls the argument of the United States to the effect that GSP schemes need not be extended on a "one size fits all" basis and that distinctions based on unequal development situations are permitted.[366] However, the Panel has previously found that the only appropriate way of responding to the differing development needs of developing countries is for preference-giving countries to ensure that their schemes have sufficient breadth of product coverage and depth of tariff cuts to respond positively to those differing needs.

*(vii) Relevance of Article I:1 of GATT 1994*

7.150 The Panel recalls India's arguments that: (i) there is nothing in the Enabling Clause that exempts the European Communities from the obligation under Article I:1 of GATT 1994 to extend tariff preferences accorded under the Drug Arrangements unconditionally to all developing countries; and (ii) the term "unconditional", as interpreted by the panel in *Canada – Autos*, means independent of the situation or conduct of the exporting country. The Panel further recalls the European Communities' arguments that: (i) the Enabling Clause does not require the granting of differential and more favourable treatment *unconditionally*; (ii) the meaning of "conditional" under Article I:1 is the granting of tariff preferences in exchange for some form of compensation; and (iii) the Enabling Clause only prohibits the *condition* of reciprocity, not other conditions providing for non-reciprocal compensation.

7.151 In addressing the relevance of Article I:1 for the interpretation of the Enabling Clause, the Panel recalls its earlier findings that: (i) the Enabling Clause is an exception to Article I of GATT 1994; and that (ii) the Enabling Clause does not exclude the applicability of Article I but rather Article I and the Enabling Clause apply concurrently, with the Enabling Clause prevailing to the extent of inconsistency between the two provisions. From these findings, the Panel considers that in the absence of express authorization, no further derogation from Article I:1 can be assumed. The Panel's approach to the interpretation of "non-discriminatory" follows this general consideration as to the relevance of Article I:1 in that the Panel has not interpreted this term to permit preferential treatment to less than all developing countries without an explicit authorization. Such explicit authorization is only provided for the benefit of the least-developed countries in paragraph 2(d) of the Enabling Clause and for the implementation of a priori limitations, as set out in the Agreed Conclusions.

7.152 The Panel considers that, following the rules of interpretation as provided in Articles 31 and 32 of the Vienna Convention, it has already found sufficient guidance to determine the meaning of "non-discriminatory" in footnote 3. There is no need at this stage to search for further interpretative guidance from Article I:1 of GATT 1994.

*(viii) Relevance of other GATT provisions*

7.153 The Panel recalls that both parties cite other GATT and GATS provisions to assist the understanding of the term "non-discriminatory" in footnote 3, including Articles III, XIII, XVII and XX of GATT 1994, as well as Article XVII of GATS. The European Communities also mentions the

[366] Reply of the United States to question No. 6 from the Panel to all third parties; first oral statement by the United States, para. 12.

panel statement in *Canada – Pharmaceutical Patents* that "discrimination" may have different meanings in different WTO contexts. While the Panel agrees that the term "discrimination" may have different meanings under different WTO provisions, the Panel does not consider that these different provisions contribute significantly to the understanding of the term "non-discriminatory" in GSP and, more particularly, in footnote 3 of the Enabling Clause.

*(ix) Object and purpose*

7.154 The Panel recalls the European Communities' arguments: (i) that the object and purpose of paragraph 2(a) of the Enabling Clause, that of promoting the trade of all developing countries commensurate with their development needs, is expressed in Article XXXVI:3 of GATT 1994 and in the preamble of the 1971 Waiver, as well as in the preamble of the WTO Agreement; and (ii) that the interpretation of the term "non-discriminatory" should further the objectives of the Enabling Clause and the WTO Agreement by allowing provision of additional preferences to developing countries with special development needs, so that they can secure a share of international trade commensurate with those special needs.

7.155 The Panel notes that one of the objectives recited in the preamble of the WTO Agreement is to secure, for the developing countries, a share in the growth in international trade commensurate with their development needs, and that the 1971 Waiver Decision and Article XXXVI:3 of GATT 1994 set out similar objectives. These objectives are directly reflected in the Enabling Clause.

7.156 At the same time, the Panel notes that other objectives in GATT 1994 and the WTO Agreement are also relevant, particularly since the Enabling Clause forms a part of GATT 1994. Both GATT 1994 and the WTO Agreement contain multiple objectives, none of which should be viewed in isolation.

7.157 For the purpose of interpreting the term "non-discriminatory" in footnote 3 of the Enabling Clause, the Panel considers that one of the most important objectives of GATT 1994, as stated in the preamble, is "expanding the production and exchange of goods". In order to achieve this objective, the preamble sets out the principle of "elimination of discriminatory treatment in international commerce". This principle is reflected mainly in Articles I and III of GATT 1994.

7.158 The Panel considers that the function of the term "non-discriminatory" in footnote 3 is to prevent abuse caused by discrimination in the granting of GSP among developing countries. While both the objective of promoting the trade of developing countries and that of promoting trade liberalization generally are relevant to the interpretation of the term "non-discriminatory", the Panel is of the view that the latter contributes more to guiding the interpretation of "non-discriminatory", given its function of preventing abuse in providing GSP.

*(x) Practice of preference-giving countries*

7.159 The Panel considers that the overall practice of preference-giving countries confirms the common and consistent understanding of Members as to the term "non-discriminatory". In UNCTAD, during the negotiation of the Agreed Conclusions of the Special Committee on Preferences, none of the GSP schemes offered by preference-giving countries actually contained any differentiation in treatment to different developing countries, except for a priori limitations.[367] This fact suggests that there was a common understanding of "equal" treatment to all developing countries except for a priori measures, and that it was on this basis that the 1971 Waiver Decision was adopted.

7.160 The Panel also notes that the practice of contracting parties after the 1971 Waiver Decision continued to reflect this common understanding, so that where a developed country wished to provide

[367] TD/B/AC.5/34.

more favourable treatment to a limited number of developing countries, a waiver was sought from the GATT or the WTO. If the 1971 Waiver Decision and the Enabling Clause, other than through paragraph 2(d) and the a priori limitation mechanism, allowed for differentiation among developing countries in GSP schemes, there clearly would not be such a large number of requests for waivers and grants of those waivers.[368]

(c) Summary of findings as to the meaning of "non-discriminatory"

7.161 For the reasons set out in paragraphs 7.126-7.160, the Panel finds that the term "non-discriminatory" in footnote 3 requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori limitations.

**4. Paragraph 2(a)**

(a) Arguments of the parties

7.162 India argues that nothing in the Enabling Clause indicates that developing countries have waived their MFN rights vis-à-vis other developing countries. Such an assumption, according to India, would be inconsistent with the very purpose of paragraph 2, which is to create additional benefits for the developing countries. India maintains that the drafting history of the GSP in UNCTAD indicates an intention that the GSP be provided to all developing countries, not just to some of them. India points out that the GSP was intended to replace special preferences which preceded the adoption of the 1971 Waiver Decision. India also argues that the article "the" appearing before "developing countries" in footnote 3 of the Enabling Clause makes clear that GSP is to be provided to all developing countries.[369]

7.163 India maintains that the term "discriminatory" refers to the denial of equal competitive opportunities to like products originating in different countries and that with regard to tariff matters in the context of the Enabling Clause, the meaning of "non-discriminatory" must refer to the identical application of duties to all countries.[370]

7.164 India states that the Enabling Clause did not change the GSP arrangement that existed under the 1971 Waiver Decision, with the one explicit exception of permitting special and more favorable treatment to the least-developed countries in accordance with paragraph 2(d).[371]

7.165 The European Communities, in contrast, argues that India's interpretation of "developing countries" under paragraph 2(a) as meaning "all developing countries" would render redundant the terms "generalized" and "non-discriminatory" in footnote 3. Also, according to the European Communities, India's interpretation would mean that the objective of paragraph 3(c) of responding positively to the development, financial and trade needs of developing countries could not be achieved without differentiation. The European Communities maintains further that the situation envisaged in paragraph 7, that of developing countries participating more fully in the GATT framework with the progressive development of their economies, would never be possible.[372]

[368] See Annex V.
[369] Reply of India to question No. 9 from the Panel to both parties.
[370] Reply of India to question No. 9 from the Panel to both parties.
[371] Reply of India to question No. 9 from the Panel to both parties.
[372] Reply of the European Communities to question No. 9from the Panel to both parties; second written submission of the European Communities, para.16.

7.166 The European Communities also argues that the concept of non-discrimination has different meanings under different provisions or covered agreements.[373]

(b) Panel's analysis

7.167 In order to determine whether the term "developing countries" in paragraph 2(a) means *all* developing countries, it is necessary to interpret this provision in the context of the Enabling Clause as a whole, including in particular the drafting history, footnote 3, paragraph 3(c) and paragraph 2(d). In giving meaning to this term in paragraph 2(a), it is important that this meaning be harmonized with the rest of the Enabling Clause so as to ensure that the GSP system as a whole can function effectively. In this connection, the Panel recalls the Appellate Body's statement that "it is the *duty* of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously'. An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole".[374]

7.168 As noted, the parties disagree as to whether a developed country may give preferential tariff treatment to less than all developing countries. They disagree in particular on whether the presence of the article "the" before "developing countries" in paragraph 2(a) and in footnote 3 makes a difference in this regard. The Panel considers, however, that the presence or absence of the article "the" before developing countries by itself does not provide sufficient guidance on the underlying question. More useful guidance can be found in the drafting history of the GSP system.

7.169 As the Panel previously discussed in relation to the relevant context and preparatory work leading to the Agreed Conclusions and the establishment of GSP, it considers that the intention of the negotiators was to provide GSP equally to all developing countries and to eliminate all differentiation in preferential treatment to developing countries, with the exception for the implementation of a priori limitations. Given this clear intention of the drafters of the GSP system, the Panel considers that it should not interpret "developing countries" or "the developing countries" in a manner contrary to this intention.

7.170 The Panel recalls its earlier finding on footnote 3 that the term "non-discriminatory" requires identical tariff preferences under GSP schemes to be provided to all developing countries without differentiation, with the exception of the implementation of a priori limitations. Thus, footnote 3 as context for paragraph 2(a) does not authorize preference-giving countries to differentiate among developing countries in their GSP schemes, with the exception of the implementation of a priori limitations.

7.171 Paragraph 3(c) provides additional context to the interpretation of paragraph 2(a). As previously found by the Panel in paragraph 7.116, the elements relevant to "respond[ing] positively to the development, financial and trade needs of developing countries" under paragraph 3(c) include, *inter alia*, that: " … (b) the design and modification of a GSP scheme may not result in a differentiation in the treatment of different developing countries; (c) a priori limitations may be used to set import ceilings so as to exclude certain imports originating in individual developing countries where the products concerned reach a certain competitive level in the market of the preference-giving country; and (d) differentiation is permitted among developing countries, in designing and modifying GSP schemes, in the case of special treatment to the least-developed countries, pursuant to paragraph 2(d). No other differentiation among developing countries is permitted by paragraph 3(c)".

7.172 Paragraph 3(c) thus allows for a priori limitations, as an exception to the general requirement of providing benefits to *all* developing countries. While, textually, this form of safeguard was negotiated and accepted in the Agreed Conclusions and carried over into the 1971 Waiver Decision,

[373] Reply of the European Communities to question No. 10 from the Panel to both parties, para. 10.
[374] Appellate Body Report, *Korea – Dairy*, para. 81.

nothing in the Enabling Clause suggests that there was any intention to change the legal status of such a safeguard. The a priori limitations contemplated in the GSP system and incorporated into paragraph 3(c) impart meaning to paragraph 2(a), allowing a priori limitations as an exception to the general prohibition on differentiation among developing countries. For the Panel, in order to read paragraphs 2(a) and 3(c) harmoniously, what is permitted under paragraph 3(c) cannot be prohibited by paragraph 2(a).

7.173 The Panel further notes that paragraph 2(d) permits developed countries to discriminate between developing and the least-developed countries, by authorizing developed countries to grant "special treatment" to the least-developed countries. This provision was negotiated during the Tokyo Round and agreed explicitly in the Enabling Clause. The Panel considers that the function of paragraph 2(d), reflecting the intention of negotiators, is to create an additional exception to the requirement in paragraph 2(a) of providing GSP to *all* developing countries.

7.174 Based on the above analysis, the Panel finds that the term "developing countries" in paragraph 2(a) should be interpreted to mean *all* developing countries, with the exception that where developed countries are implementing a priori limitations [375], "developing countries" may mean *less than all* developing countries.

7.175 The Panel does not agree with the European Communities' argument that if "developing countries" in paragraph 2(a) were to mean *all* developing countries, it would render the term "generalized" in footnote 3 redundant. Based on the context and the preparatory work of the Enabling Clause, the term "generalized" in footnote 3 has two meanings: (i) providing GSP to *all* developing countries; and (ii) ensuring sufficiently broad coverage of products in GSP. The fact that there may be at least a partial overlap in the meaning of "generalized" and the meaning of "developing countries" in paragraph 2(a) does not make either of these terms redundant.

### 5. Conclusion on the Enabling Clause

7.176 From the above analysis, the Panel finds that: (i) the European Communities has the burden of demonstrating that its Drug Arrangements are consistent with the Enabling Clause; (ii) the term "non-discriminatory" in footnote 3 requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori limitations; (iii) the term "developing countries" in paragraph 2(a) means all developing countries, with the exception that where developed countries are implementing a priori limitations, "developing countries" may mean less than all developing countries; and (iv) paragraph 2(d), as an exception to paragraph 2(a), allows developed countries to provide special treatment to the least-developed countries.

7.177 Accordingly, the Panel finds that the European Communities' Drug Arrangements, as a GSP scheme, do not provide identical tariff preferences to *all* developing countries and that the differentiation is neither for the purpose of special treatment to the least-developed countries, nor in the context of the implementation of a priori measures. Such differentiation is inconsistent with paragraph 2(a), particularly the term "non-discriminatory" in footnote 3, and cannot be justified by paragraph 3(c) of the Enabling Clause.

## F. ARTICLE XX(B) OF GATT 1994 AS A JUSTIFICATION FOR THE DRUG ARRANGEMENTS

### 1. Introduction

7.178 The Panel recalls its findings that the Drug Arrangements are not consistent with Article I:1 of GATT 1994 and are not justified under the Enabling Clause. The Panel further recalls the

[375] A detailed description of a priori limitations is provided in paras. 7.108 and 7.109.

European Communities claim that the Drug Arrangements are justified by Article XX(b) of GATT 1994. Accordingly, the Panel will proceed to examine whether the Drug Arrangements are justified under Article XX(b).

7.179 Three issues arise in relation to the European Communities' invocation of Article XX(b) of GATT 1994 as justification for its Drug Arrangements: (i) whether the tariff preferences under the Drug Arrangements constitute a measure to protect human life or health in the European Communities; (ii) whether the tariff preferences under the Drug Arrangements are "necessary" within the meaning of Article XX(b); and (iii) whether the Drug Arrangements are applied in a manner constituting arbitrary or unjustifiable discrimination in violation of the chapeau of Article XX.

## 2. Arguments of the parties

7.180 The European Communities maintains that it is beyond dispute that narcotic drugs pose a risk to human life and health in the European Communities and that tariff preferences contribute to the protection of human life and health by supporting the measures taken by other countries against the illicit production and trafficking of those substances, thereby reducing their supply to the European Communities.[376]

7.181 On the assessment of the necessity of the measure, the European Communities maintains that according to *Korea – Various Measures on Beef*, "the more vital or important the common interests or values pursued, the easier it would be to accept as necessary the measures designed to achieve those ends". It argues that the protection of human life and health is the most vital and important value, and that, accordingly, the test of "necessary" in such a case should be given the broadest possible meaning. [377]

7.182 The European Communities cites a number of UN conventions, resolutions and other texts in support of its claim that the United Nations has established a comprehensive and well-defined international strategy against the drug problem. The European Communities indicates that this UN strategy calls for the adoption of comprehensive measures, implemented in accordance with the principle of shared responsibility. The European Communities indicates that in order to fight the drug problem, it is necessary to combine initiatives to reduce illicit demand for drugs with those to reduce their illicit supply. The latter requires complementing eradication of drug production and trafficking with the promotion of alternative economic activities.[378] Providing greater market access is one of the components recommended.[379] The European Communities thus argues that the Drug Arrangements, along with financial aid and other means, are part of a comprehensive strategy to combat drug abuse, and are one of the indispensable means..[380]

7.183 The European Communities contends that tariff preferences under the Drug Arrangements contribute to the development of the beneficiary countries while also reducing the supply of drugs into the European Communities. Consequently, the European Communities maintains, these tariff preferences contribute to the health objective of combating drug abuse in the European Communities.[381] The European Communities also argues that other drug-affected developing countries do not need to be included under the Drug Arrangements because they receive the same or better tariff treatment under other European Communities' tariff schemes.[382] The European

[376] Executive summary of the first written submission of the European Communities, paras. 50 and 55.
[377] Executive summary of the first written submission of the European Communities, para. 54.
[378] Executive summary of the first written submission of the European Communities, paras. 30-33.
[379] Reply of the European Communities to question No. 25 from the Panel to both parties; first written submission of the European Communities, para. 192.
[380] Reply of the European Communities to question No. 25 from the Panel to both parties.
[381] Reply of the European Communities to question No. 21 from the Panel to both parties.
[382] Reply of the European Communities to question No. 24 from the Panel to both parties.

Communities states as well that other developed countries do not need the assistance of the European Communities in combating drugs, and that the battle against drugs is a shared responsibility.[383]

7.184 The European Communities also maintains that, as part of a balanced and comprehensive approach, as recommended by the United Nations, it is indispensable to provide greater market access to support the alternative development activities of the beneficiary countries. In this regard, the European Communities states that it is not aware of any alternatives that would be equally effective but yet less trade-restrictive to provide effective market access to the products from the beneficiary countries.[384]

7.185 On whether the European Communities' measure complies with the chapeau to Article XX, the European Communities argues that the exclusion of other developing countries is not part of the "design and structure" of the Drug Arrangements, but rather of its application and, therefore, should be examined under the chapeau of Article XX.[385]

7.186 The European Communities maintains that the countries excluded from the Drug Arrangements do not pose a threat to the health of European Communities' citizens because they are not a significant source of supply.[386]

7.187 The European Communities argues that the designation of the beneficiary countries under the Drug Arrangements is based on an overall assessment of the gravity of the drug problem in each developing country in accordance with objective, non-discriminatory criteria. The assessment takes into account the importance of the production and/or trafficking of drugs in each country, as measured on the basis of available statistics, as well as their effects.[387]

7.188 The European Communities also maintains that the procedure for granting and withdrawal of special preferences is also non-discriminatory. According to the European Communities, the exclusion of the least-developed and Cotonou countries, as well as the bilateral free-trade partners is because they already benefit from other preferential tariff arrangements. The exclusion of developed countries is because the prevailing conditions are different in those countries.[388]

7.189 India argues that the Drug Arrangements "are not designed to achieve" the protection of human life and health in the European Communities. The European Communities merely asserts this but fails to substantiate its assertion. 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 European Communities and the Drug Arrangements. India points to EC Council Regulation 2501/2001 and the Explanatory Memorandum of the Commission to the EC Council to illustrate that the declared objectives of the Drug Arrangements relate to "sustainable development" rather than the protection of health.[389] .

7.190 India maintains that if Article XX(b) could be used to justify preferential tariff arrangements, the multilateral framework of trade negotiation would be undermined. Members would be able to accord preferential tariff treatment to selected WTO Members if this made a necessary contribution to

[383] Second written submission of the European Communities, paras. 66-70.
[384] Executive summary of the second written submission of the European Communities, paras. 52-55.
[385] Executive summary of the first written submission of the European Communities, para. 60; executive summary of the second written submission of the European Communities, para. 44.
[386] Executive summary of the second written submission of the European Communities, para. 48; reply of the European Communities to question No. 15 from the Panel to the European Communities.
[387] Executive summary of the first written submission of the European Communities, para. 34.
[388] Executive summary of the first written submission of the European Communities, para. 61.
[389] Executive summary of second written submission of India, para. 27.

the resolution of a health problem. Such Members would not be under an obligation to implement the market access concessions multilaterally negotiated. [390]

7.191 On the "necessity" requirement, India contends that the link between the Drug Arrangements and Article XX(b) is remote. India also contends that the simultaneous characterization of the Drug Arrangements as a measure providing more favourable treatment to developing countries and as a measure to protect human health in the European Communities is logically contradictory and based on several flawed assumptions, specifically, that all drug-producing countries export their illegal crops to the European Communities, that preferential tariff treatment will lead drug producers to produce other products covered by the tariff preferences and that traffickers will switch to trading products covered by the preferences.[391] The effect of the measure, according to India, is contingent upon several external factors which are not in the control of the European Communities and which bring uncertainty. Furthermore, India contends that drug production and trafficking are organized crimes, motivated by profit alone, and preferential tariffs would not eradicate such crimes.[392]

7.192 In addition, India states that the Drug Arrangements cannot be deemed "necessary" because they are not granted to other developing countries affected with drug problems, such as Myanmar and Thailand, and other drug-affected developing countries and developed countries. India argues that the European Communities fails to demonstrate that tariff preferences under the Drug Arrangements are "necessary" for the 12 beneficiary countries but not "necessary" for other drug-affected countries.[393]

7.193 India also argues that the European Communities has not established that the Drug Arrangements are "the least trade restrictive measure" available to pursue its health objective. The Drug Arrangements restrict both the present and the future trade of excluded Members. India also submits that there are many alternative, less trade-restrictive measures that the European Communities could take to achieve its objective, for example, direct technical and financial assistance for the drug control efforts of affected countries or development aid and initiatives that do not restrict trade from other WTO Members.[394]

7.194 With regards to the chapeau, India argues that the European Communities fails to show how the tariff preferences do not constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade.[395] India contends that the fact that the Drug Arrangements are only limited to a closed set of 12 beneficiary countries is clear evidence of discrimination. Moreover, India maintains that the selection process for the Drug Arrangements is not transparent and that there is no published procedure for the application and selection of beneficiaries.[396] There is no evidence to show that the European Communities has in fact conducted an objective assessment based on objective criteria. In India's view, based on the European Communities' explanation, it is not possible to determine why, for instance, Pakistan was included while India and Paraguay were excluded. India mentions that, in the *ex post* justification that the European Communities presents to the Panel, it uses statistics that became available after the beneficiaries were selected.[397]

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[390] Executive summary of second written submission of India, para. 33.

[391] Second written submission of India, para. 155; reply of India to question No. 21 from the Panel to both parties.

[392] Executive summary of second written submission of India, para. 28.

[393] Reply of India to question No. 24 from the Panel to both parties.

[394] Executive summary of second written submission of India, paras. 30-31; reply of India to question No. 21 from the Panel to both parties.

[395] Second written submission of India, paras. 159-162.

[396] Ibid., para. 32.

[397] First oral statement of India, para. 24; Executive summary of second written submission of India, para. 25.

### 3. Panel's analysis

7.195 In considering the jurisprudence on the approach of analysing measures claimed to be justified under Article XX, the Panel recalls the following ruling of the Appellate Body in *Korea – Various Measures on Beef*:

> "For a measure … to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be designed to 'secure compliance' with laws and regulations that are not themselves inconsistent with some provisions of the GATT 1994. Second, the measure must be 'necessary' to secure such compliance". [398]

7.196 Although the Panel notes that the Appellate Body ruling in *Korea – Various Measures on Beef* was made in the context of the invocation of Article XX(d), not Article XX(b), the Panel is of the view that the same considerations apply to both these subparagraphs of Article XX because the structure of Articles XX(b) and XX(d) is very similar. The Panel considers that the approach of analysis followed by the Appellate Body in *Korea – Various Measures on Beef* is also appropriate for the analysis of a measure under Article XX(b).

7.197 Indeed, previous panels in the WTO have followed the same approach in their analysis of Article XX(b). In *US – Gasoline*, the panel stated that the United States had to establish three elements to demonstrate consistency of its measure with Article XX(b):

> "(1) that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human … life or health;
>
> (2) that the inconsistent measures for which the exception was being invoked were *necessary* to fulfil the policy objective; and
>
> (3) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX".[399]

7.198 In *EC – Asbestos*, the panel followed the same approach as used in *US – Gasoline*: "We must first establish whether the policy in respect of the measure for which the provisions of Article XX(b) were invoked falls within the range of policies designed to protect human life or health".[400]

7.199 Following this jurisprudence, the Panel considers that, in order to determine whether the Drug Arrangements are justified under Article XX(b), the Panel needs to examine: (i) whether the policy reflected in the measure falls within the range of policies designed to achieve the objective of or, put differently, or whether the policy objective is for the purpose of, "protect[ing] human … life or health". In other words, whether the measure is one designed to achieve that health policy objective; (ii) whether the measure is "necessary" to achieve said objective; and (iii) whether the measure is applied in a manner consistent with the chapeau of Article XX.

(a) Whether the Drug Arrangements constitute a measure under Article XX(b)

7.200 In examining whether the Drug Arrangements are designed to achieve the stated health objectives, the Panel needs to consider not only the express provisions of the EC Regulations, but also the design, architecture and structure of the measure, as set out by the Appellate Body's reasoning in *Japan – Alcoholic Beverages II*. There, the Appellate Body stated that "the aim of a measure may not

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[398] Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.
[399] Panel Report, *US – Gasoline*, para. 6.20.
[400] Panel Report, *EC – Asbestos*, para. 8.184.

be easily ascertained, nevertheless, its protective application can most often be discerned from the design, the architecture and the revealing structure of a measure".[401] The same analytical approach was followed by the Appellate Body under Article XX in *US – Shrimp*.[402]

7.201 Examining the design and structure of Council Regulation 2501/2001[403] and the Explanatory Memorandum of the Commission[404], the Panel finds nothing in either of these documents relating to a policy objective of protecting the health of European Communities citizens. The only objectives set out in the Council Regulation (in the second preambular paragraph) are "the objectives of development policy, in particular the eradication of poverty and the promotion of sustainable development in the developing countries". The Explanatory Memorandum states that "[t]hese objectives are to favour sustainable development, so as to improve the conditions under which the beneficiary countries are combatting drug production and trafficking.[405]

7.202 Examining the structure of the Regulation, the Panel notes that Title I provides definitions of "beneficiary countries" and the scope of product coverage for various categories of beneficiaries. Title II then specifies the methods and levels of tariff cuts for the various preference schemes set out in the Regulation, including for the General Arrangements, Special Incentive Arrangements, Special Arrangements for Least Developed Countries and Special Arrangements to Combat Drug Production and Trafficking. Title II also provides Common Provisions on graduation. Title III deals with conditions for eligibility for special arrangements on labour rights and the environment. Title IV provides only that the European Communities should monitor and evaluate the effects of the Drug Arrangements on drug production and trafficking in the beneficiary countries. There are other titles dealing with temporary withdrawal and safeguard provisions, as well as procedural requirements. From an examination of the whole design and structure of this Regulation, the Panel finds nothing linking the preferences to the protection of human life or health in the European Communities.

7.203 The Panel recalls the European Communities' argument that providing market access is a necessary component of the comprehensive international strategy to fight the drug problem. In this regard, the Panel notes in particular the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the "1988 Convention") submitted by the European Communities as Exhibit 8. Most of the provisions in this Convention relate to commitments on law enforcement against drug trafficking, and the obligation of international cooperation. For example, there are international obligations relating to extradition and technical assistance. At the same time, Article 14.3(a) of the Convention encourages – but does not require – cooperation in relation to drug eradication efforts. It provides that "[s]uch cooperation may, *inter alia*, include support, when appropriate, for integrated rural development leading to economically viable alternatives to illicit cultivation. Factors such as access to markets, the availability of resources and prevailing socio-economic conditions should be taken into account before such rural development programmes are implemented. The parties may agree on any other appropriate measures of co-operation".

7.204 The Panel also notes the 1998 UN Resolution on "Measures to Enhance International Cooperation to Counter the World Drug Problem", adopting the "1998 Action Plan".[406] In the preamble to the Action Plan, the General Assembly reaffirms that "the fight against illicit drugs must be pursued in accordance with the provisions of the international drug control treaties, on the basis of the principle of shared responsibility, and requires an integrated and balanced approach in full

[401] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29; see also Appellate Body Report, *Argentina – Textiles and Apparel*, para. 55.

[402] Appellate Body Report, *US – Shrimp*, para. 137. There the Appellate Body stated: "We must examine the relationship between the general structure and design of the measure here at stake, Section 609, and the policy goal it purports to serve, that is, the conservation of sea turtles".

[403] Exhibit India-6.

[404] Exhibit India-7.

[405] Explanatory Memorandum, para. 35, Exhibit India-7.

[406] Exhibit EC-9.

conformity with the purposes and principles of the Charter of the United Nations and international law". The preamble goes on to state that "effective crop control strategies can encompass a variety of approaches, including alternative development, law enforcement and eradication". "[A]lternative development" is defined in the preamble of the Action Plan as "a process to prevent and eliminate the illicit cultivation of plants containing narcotic drugs and psychotropic substances through specifically designed rural development measures in the context of sustained national economic growth and sustainable development efforts in countries taking action against drugs … ".[407]

7.205 The Panel notes that in the operative sections of the 1998 Action Plan, alternative development is stated to be an important component of the comprehensive strategy.[408] The international community is encouraged to provide adequate financial and technical assistance for alternative development, with the objective of reducing illicit drug crops. The international community is also encouraged to provide greater access to markets for alternative development products.[409]

7.206 From its examination of these international instruments, including the 1988 Convention and the 1998 Action Plan, the Panel understands that alternative development is one component of the comprehensive strategy of the UN to combat drugs. The Panel has no doubt that market access plays a supportive role in relation to alternative development, but considers that market access is not itself a significant component of this comprehensive strategy. As the Panel understands it, the alternative development set out in the Action Plan depends more on the long-term political and financial commitment of both the governments of the affected countries and the international community to supporting integrated rural development, than on improvements in market access.

7.207 Even assuming that market access is an important component of the international strategy to combat the drug problem, there was no evidence presented before the Panel to suggest that providing improved market access is aimed at protecting human life or health in drug importing countries. Rather, all the relevant international conventions and resolutions suggest that alternative development, including improved market access, is aimed at helping the countries seriously affected by drug production and trafficking to move to sustainable development alternatives.

7.208 The Panel recalls India's argument that Article XX(b) cannot be used to justify tariff preferences that burden the trade of Members that are not the source of a health problem. In other words, according to India, Article XX cannot be used to authorize measures that would have the effect of transferring resources from a country that is not the source of the health problem to countries that are actually the source of the problem.[410] India also contends that if the tariff preferences are necessary to protect the health of European Communities citizens, the logical implication is that the European Communities would not be able to implement the market access concessions negotiated in the Doha Work Programme.[411] For India, if the European Communities' Article XX(b) defence were to be upheld, it would be exempted from the obligations under Articles I and II, and other developing country Members would not have the assurance that the European Communities would apply tariffs on an MFN basis in the future. This would necessarily undermine the multilateral tariff reduction negotiation process of the WTO.[412]

7.209 The Panel is of the view that this issue needs to be assessed through a weighing and balancing of the level of contribution of such a measure in achieving the health objectives and the level of

[407] Ibid.
[408] Ibid., para. 8.
[409] Ibid.
[410] Reply of India to question No. 55 from the Panel to both parties.
[411] Second written submission of India, para. 163.
[412] Comments of India to Replies of the European Communities to question No. 55 from the Panel to both parties.

damage of the measure to the multilateral negotiating framework. In the Panel's view, tariff preferences should not be lightly assumed to be an appropriate means to achieve health objectives under Article XX(b) because any tariff preferences deviating from obligations assumed in the multilateral framework would necessarily have a direct and negative impact on the multilateral system. Even under the Enabling Clause, where tariff preferences are authorized within the multilateral framework as a deviation from Article I:1, paragraph 3(b) prohibits GSP schemes that "constitute an impediment to the reduction or elimination of tariffs … on a most-favoured-nation basis".

7.210 In light of its analysis in paragraphs 7.200-7.209, the Panel finds that the policy reflected in the Drug Arrangements is not one designed for the purpose of protecting human life or health in the European Communities and, therefore, the Drug Arrangements are not a measure for the purpose of protecting human life or health under Article XX(b) of GATT 1994. Nevertheless, the Panel considers it would be appropriate to go on to examine whether the measure is "necessary" within the meaning of Article XX(b).

(b) Necessity of the measure

7.211 The Panel recalls the Appellate Body ruling in *Korea – Various Measures on Beef* that "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'.[413] In order to determine where the Drug Arrangements are situated along this continuum between "contribution to" and "indispensable", the Panel is of the view that it should determine the extent to which the Drug Arrangements contribute to the European Communities' health objective. This requires the Panel to assess the benefits of the Drug Arrangements in achieving the objective of protecting life or health in the European Communities.

7.212 The Panel notes the Report of the Commission pursuant to Article 31 of Council Regulation No. 2820/98 of 21 December 1998 applying a multiannual scheme of generalized tariff preferences for the period 1 July 1999 to 31 December 2001. The assessment of the effects of the Drug Arrangements in this report reveals that the product coverage under the Drug Arrangements decreased by 31 per cent from 1999 through 2001. It also shows that the volume of imports from the beneficiary countries under the Drug Arrangements decreased during the same period. As the Panel understands it, this decrease in product coverage and in imports from the beneficiaries is due to the reduction to zero – or close to zero – of the MFN bound duty rates on certain products, including coffee products.[414]

7.213 The Panel considers that the above-referenced decreases in product coverage and depth of tariff cuts reflect a long-term trend of GSP benefits decreasing as Members reduce their import tariffs towards zero in the multilateral negotiations. Given this decreasing trend of GSP benefits, the contribution of the Drug Arrangements to the realization of the European Communities' claimed health objective is insecure for the future. To the Panel, it is difficult to deem such measure as "necessary" in the sense of Article XX(b). Moreover, given that the benefits under the Drug Arrangements themselves are decreasing, the Panel cannot come out to the conclusion that the "necessity" of the Drug Arrangements is closer to the pole of "indispensable" than to that of "contributing to" in achieving the objective of protecting human life or health in the European Communities.

[413] Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.
[414] Exhibit EC-24.

7.214 A further point relevant to assessing the necessity of the measure under Article XX(b) is the fact that the EC Regulation provides for no monitoring mechanism on the effectiveness of the Drug Arrangements for protecting human life or health in the European Communities. The European Communities confirms that, while it monitors the impact of the Drug Arrangements on the drug-affected beneficiary countries, it has no monitoring mechanism relating to the impact of this measure on the protection of human life or health in the European Communities. In the Panel's view, the level of necessity of a measure must be linked to its effectiveness in achieving its objectives. Given that the European Communities has not considered it necessary to monitor and assess the effectiveness of the Drug Arrangements in achieving its health objective, it is difficult to assume that the level of necessity of this measure is closer to the pole of "indispensable" than to the pole of "contributing to".

7.215 The Panel also considers that it should examine the temporary suspension mechanism in EC Regulation No. 2501/2001. The Panel notes that Article 26 of this same Regulation provides a number of bases for temporary withdrawal of preferential arrangements. The reasons for suspension include, *inter alia*, the practice of slavery or forced labour, violations of labour standards as defined in the relevant ILO Conventions, shortcomings in customs controls on export or transit of drugs, unfair trading practices and the infringement of the objectives of certain fishery conservation conventions. This signifies that the Drug Arrangements and other preferential trade arrangements can be suspended for any one of these reasons at any time, regardless of the seriousness of the drug problem in the country concerned. Given this fact, it is difficult to see how the Drug Arrangements can be seen to be a "necessary" means to achieve such an important objective as the protection of human life or health.

7.216 Assuming a beneficiary country under the Drug Arrangements was not ensuring sufficient customs controls on export of drugs, or was infringing the objectives of an international fisheries conservation convention, the European Communities could then suspend the tariff preferences under the Drug Arrangements to this country, for reasons unrelated to protecting human life or health. Given that this beneficiary would be a seriously drug-affected country, the suspension of the tariff preferences would arrest the European Communities' support to alternative development in that beneficiary and therefore also stop efforts to reduce the supply of illicit drugs into the European Communities. The whole design of the EC Regulation does not support the European Communities' contention that it is "necessary" to the protection of human life and health in the European Communities, because such design of the measure does not contribute sufficiently to the achievement of the health objective.

7.217 The European Communities confirms that while Myanmar is one of the world's leading producers of opium, it is not necessary to separately include this country under the Drug Arrangements since it is already accorded preferential tariff treatment as a least-developed country. The Panel notes that the European Communities has suspended tariff preferences for Myanmar. The Panel notes, moreover, that EC Regulation 2501/2001 provides: the "[t]emporary withdrawal of tariff preferences in respect of imports of products originating in Myanmar should remain in force".[415]

7.218 Recalling that the European Communities confirms that it is required to continue its suspension of tariff preferences for Myanmar through the expiration of the EC Regulation on 31 December 2004, the Panel notes that any of the 12 beneficiaries is also potentially subject to similar suspension under the same Regulation, regardless of the seriousness of the drug problems in that country. With one or more of the main drug-producing or trafficking countries outside the scheme, it is difficult to see how the Drug Arrangements are in fact contributing sufficiently to the reduction of drug supply into the European Communities' market to qualify as a measure necessary to achieving the European Communities' health objective.

7.219 In order to consider where the Drug Arrangements are situated along the continuum between "contributing to" and "indispensable", the Panel considers that it should also examine whether there

[415] Council Regulation (EC) No. 2501/2001, Preamble (23).

are less WTO-inconsistent or less trade-restrictive measures reasonably available to the European Communities that would achieve the same objective.[416]

7.220 The Panel notes the European Communities' arguments that it is not aware of any less trade-restrictive alternatives and that extending the preferences to all developing countries would make the Drug Arrangements much less effective. The European Communities also argues that the provision of financial assistance is not a true alternative to tariff preferences because, without market access, the alternative development would not be sustainable.[417]

7.221 The Panel also notes India's argument that financial and technical assistance, combined with initiatives consistent with WTO obligations, are reasonably available alternatives to the European Communities. In the view of the Panel, such initiatives could include, for example, GSP schemes or MFN tariff reductions that cover products of particular export interest to drug-affected countries. In fact, the preamble to the Agreement on Agriculture calls for WTO Members to provide greater market access on "[agricultural] products of particular importance to the diversification of production from the growing of illicit narcotic crops".

7.222 The Panel thus considers that at least one, less-inconsistent alternative is available to the European Communities to achieve its health objective, that of financial and technical assistance combined with multilaterally negotiated tariff reductions that provide sufficient tariff reductions on products of export interest to drug-affected countries. While the European Communities states that tariff reductions, offered more generally, would dilute the effect of the preferences to the beneficiary countries, the European Communities has not demonstrated to the satisfaction of the Panel that such alternatives are not reasonably available to it and would not achieve the equivalent effect as the Drug Arrangements. To the Panel, multilaterally negotiated tariff reductions on products for which the drug-affected countries have a real export interest would provide equivalent benefits to these countries. After all, such an approach to taking care of the interests of a certain group of countries was already sanctioned in the Agreed Conclusions for the least-developed countries.[418]

7.223 Based on the analysis in paragraphs 7.211-7.222, the Panel finds that: (i) the decrease in benefits under the Drug Arrangements does not support a finding that the measure is closer to the pole of "indispensable" than to that of "contributing to"; (ii) the temporary withdrawal mechanism, as well as its application to Myanmar, constitute an element of insecurity and do not contribute sufficiently to the achievement of the health objective; and (iii) the European Communities has not demonstrated that no less WTO-inconsistent alternative measure is reasonably available to it. Accordingly, the Panel finds that the Drug Arrangements are not "necessary to protect human … life or health", in accordance with Article XX(b) of GATT 1994.

7.224 Despite these findings, the Panel considers it would be appropriate to go on to examine whether the application of the Drug Arrangements is consistent with the chapeau of Article XX.

(c) "Chapeau"

7.225 Turning to the "chapeau" of Article XX, the Panel notes that it requires that health measures "not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail". In this respect, the Panel recalls the Appellate Body's analysis in *US – Shrimp* regarding the constitutive elements of the concept of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail":

[416] Appellate Body Report, *Korea – Various Measures on Beef*, paras. 164-166.
[417] Replies to Panel Questions to EC, No. 52
[418] Agreed Conclusions, TD/B/330, Section V, para. 2.

> "In order for a measure to be applied in a manner which would constitute 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail', three elements must exist. First, the application of the measure must result in discrimination. As we stated in *US – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI. Second, the discrimination must be *arbitrary* or *unjustifiable* in character. … Third, this discrimination must occur *between countries where the same conditions prevail*".[419]

7.226 In line with this statement by the Appellate Body, the Panel will examine the consistency of the Drug Arrangements with the chapeau.

7.227 On what constitutes discrimination under the chapeau of Article XX, the Panel further recalls the Appellate Body statement in *US – Shrimp* that "discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of a measure at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in those exporting countries".[420] Applying these standards for determining discrimination under the chapeau, the Panel notes the following.

7.228 First, the Panel notes the European Communities' argument that the assessment of the gravity of the drug issue is based on available statistics on the production and/or trafficking of drugs in each country. The Panel notes, however, from the statistics provided by the European Communities itself in support of its argument that the 12 beneficiaries are the most seriously drug-affected countries, that the seizures of opium and of heroin in Iran are substantially higher than, for example, the seizures of these drugs in Pakistan throughout the period 1994-2000.[421] Iran is not covered as a beneficiary under the Drug Arrangements. Such treatment of Iran, and possibly of other countries, in the view of the Panel, is discriminatory. Bearing in mind the well-established rule that it is for the party invoking Article XX to demonstrate the consistency of its measure with the chapeau, the Panel notes that the European Communities has not provided any justification for such discriminatory treatment *vis-à-vis* Iran. Moreover, the European Communities has not shown that such discrimination is not arbitrary and not unjustifiable as between countries where the same conditions prevail.

7.229 Second, the Panel also notes, based upon statistics provided by the European Communities, that seizures of opium in Pakistan were 14,663 kilograms in 1994, as compared to 8,867 kilograms in 2000. Seizures of heroin in Pakistan were 6,444 kilograms in 1994 and 9,492 kilograms in 2000.[422] The overall drug problem in Pakistan in 1994 and thereafter was no less serious than in 2000. The Panel considers that the conditions in terms of the seriousness of the drug problem prevailing in Pakistan in 1994 and thereafter were very similar to those prevailing in Pakistan in the year 2000. Accordingly, the Panel fails to see how the application of the same claimed objective criteria justified the exclusion of Pakistan prior to 2002 and, at the same time, its inclusion as of that year. And, given that the Panel cannot discern any change in the criteria used for the selection of beneficiaries under the Drug Arrangements since 1990, the Panel cannot conclude that the criteria applied for the inclusion of Pakistan are objective or non-discriminatory. Moreover, the European Communities has provided no evidence on the existence of any such criteria.

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[419] Appellate Body Report, *US – Shrimp*, para. 150.

[420] Appellate Body Report, *US – Shrimp*, para. 165.

[421] First written submission of the European Communities, para. 123. In this regard, the Panel recalls that, according to the European Communities, its inclusion of Pakistan in the Drug Arrangements is due to the seriousness of drug trafficking, based on statistics of drug seizures, not of drug production. First written submission of the European Communities, para. 136.

[422] Ibid.

7.230 The Panel recalls the European Communities' argument that production of opium in neighbouring Afghanistan was revived following the events of 11 September 2001 due to the collapse of the Taliban regime. According to the European Communities, the ban imposed by the Taliban on drug production in 2001 resulted in a substantial decrease in opium production in that year but, with the collapse of the Taliban, and despite a new ban imposed by the new government in January 2002, most opium poppy fields had already started to sprout and the harvest in 2002 of this crop regained the pre-2001 levels. Consequently, the European Communities argues, these changes in Afghanistan were expected to have a considerable impact on Pakistan.

7.231 Despite these arguments, the Panel notes that the situation affecting Pakistan has been serious at least since 1994, including during the period before the Taliban banned drug production in 2001. Moreover, the European Communities' argument that the reimposition of a ban by the government in January 2002 could not prevent the production of opium poppies in that year does not explain why the ban could not work in subsequent years. Yet, as the Panel understands it, Pakistan will continue to be a beneficiary through at least the end of 2004.

7.232 Given the European Communities' unconvincing explanations as to why it included Pakistan in the Drug Arrangements in 2002 and the fact that Iran was not included as a beneficiary, the Panel is unable to identify the specific criteria and the objectivity of such criteria the European Communities has applied in its selection of beneficiaries under the Drug Arrangements.

7.233 The Panel notes that the European Communities has not provided any evidence on the existence of procedures or criteria, whether published or other, relating to the periodic selection of beneficiaries under the Drug Arrangements. While the European Communities provided a description of its selection process during this litigation, stating that it is based on the "overall assessment of the gravity of the drug problem in each developing country in accordance with objective criteria"[423], and also referred to UN statistics on drug production and seizures, the Panel has no evidence before it to identify whether or not the European Communities actually conducted a selection process as described by the European Communities and whether such selection process, if it occurred, was actually based upon these UN statistics.

7.234 The Panel finds no evidence to conclude that the conditions in respect of drug problems prevailing in the 12 beneficiary countries are the same or similar, while the conditions prevailing in other drug-affected developing countries not covered by any other preferential tariff schemes are *not* the same as, or sufficiently similar to, the prevailing conditions in the 12 beneficiary countries.

7.235 Based on its analysis in paragraphs 7.225-7.234, the Panel finds that the European Communities has not demonstrated to the Panel's satisfaction that the application of the Drug Arrangements, with the exclusion of Iran and the inclusion of Pakistan, does not constitute arbitrary and unjustified discrimination between countries where the same conditions prevail. The lack of evidence to that effect makes it impossible for the Panel to assess the justifiability and non-arbitrariness of the measure. For these reasons, the European Communities has not established to the Panel's satisfaction that the application of the measure does not constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail".

### 4. Summary of findings on Article XX

7.236 For the reasons discussed in paragraphs 7.195-7.235, the Panel finds that the European Communities has not demonstrated that: (a) the Drug Arrangements are a measure designed for the purpose of protecting human life or health in the European Communities; or that (b) the Drug Arrangements are "necessary" for the protection of human life or health in the European Communities. Consequently, the Panel finds that the Drug Arrangements are not provisionally

[423] First written submission of the European Communities, para. 116.

justifiable under Article XX(b). The Panel also finds that the European Communities has not demonstrated that the Drug Arrangements are not being applied in a manner constituting arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

## VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 The Panel concludes as follows:

(a) India has the burden of demonstrating that the European Communities' Drug Arrangements are inconsistent with Article I:1 of GATT 1994;

(b) India has demonstrated that the European Communities' Drug Arrangements are inconsistent with Article I:1 of GATT 1994;

(c) the European Communities has the burden of demonstrating that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause;

(d) the European Communities has failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause;

(e) the European Communities has failed to demonstrate that the Drug Arrangements are justified under Article XX(b) of GATT 1994;

(f) under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification of benefits under that agreement. Accordingly, because the Drug Arrangements are inconsistent with Article I:1 of GATT 1994 and not justified by Article 2(a) of the Enabling Clause or Article XX(b) of GATT 1994, the European Communities has nullified or impaired benefits accruing to India under GATT 1994.

8.2 The Panel recommends that the Dispute Settlement Body request the European Communities to bring its measure into conformity with its obligations under GATT 1994.

8.3 The Panel recalls India's request to the Panel to suggest to the European Communities that it bring its measure into conformity with its obligations under GATT 1994 by obtaining a waiver. The Panel further recalls the European Communities' statement that it has requested a waiver and that this waiver request is still pending. In light of the fact that there is more than one way that the European Communities could bring its measure into conformity with its obligations under GATT 1994 and the fact that the European Communities has requested a waiver which is still pending, the Panel does not consider it appropriate to make any particular suggestions to the European Communities as to how the European Communities should bring its inconsistent measure into conformity with its obligations under GATT 1994.

8.4 As a final concluding remark, the Panel notes that, in their written submissions and in the course of the hearings, the beneficiary countries of the Drug Arrangements have repeatedly emphasized the benefits of sustainable development for these countries derived from the operation of the Drug Arrangements. The Panel sympathizes with these concerns. At the same time, the Panel recalls that its terms of reference are not to determine the benefits to these countries derived from the Drug Arrangements, but to examine India's claim and the European Communities' defence regarding Article I:1 of GATT 1994 and the Enabling Clause.

## IX. DISSENTING OPINION BY ONE MEMBER OF THE PANEL

9.1 The Enabling Clause, like the 1971 Waiver, is a carefully negotiated decision by the CONTRACTING PARTIES to permit developed countries to afford preferential tariff treatment to imports from developing countries so that the multilateral trading system can provide equivalent benefits to developing and developed countries in reality as well as textually. The legal mechanism chosen to accomplish this, first in the 1971 Waiver and subsequently in the Enabling Clause, is to restore the right to developed countries to offer more favourable tariff treatment to exports from developing countries, with the expectation that the exercise of the right would result in development and an increase in exports from developing countries, factors reflected in paragraph 3 of the Enabling Clause. The preferences authorized under the Enabling Clause are a continuation of the "positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development".[424] They complement Part IV of the GATT 1994.[425]

9.2 As explained below, the CONTRACTING PARTIES did not create a general rule-exception relationship between the Enabling Clause and Article I. In the Enabling Clause the CONTRACTING PARTIES in effect made the 1971 Waiver permanent, expanded the scope of authorized preferences to address other aspects of the "system" developed within UNCTAD and added several important factors related to development and trade liberalization. The text of the Enabling Clause, its context (including the 1971 Waiver) and preparatory work make clear that it is the applicable WTO rule regarding tariff preferences for developing countries. Consequently, it is my view that India's claim should have been brought under the Enabling Clause.

9.3 In addition, this dispute poses a dilemma regarding how the Panel should view its terms of reference, when they seem to be broader than the claim made by the complaining party. This issue will be addressed following the discussion of the Enabling Clause.

9.4 The 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries[426] (the formal title of the Enabling Clause) is a result of joint action by the CONTRACTING PARTIES during the Tokyo Round of multilateral trade negotiations. The Decision enables a Member to accord certain special and differential treatment to developing countries and authorizes limited forms of cooperation among developing countries. The Enabling Clause is a direct and immediate successor to the 1971 Waiver[427], which permitted a generalized system of tariff preferences but was about to expire. There is no available negotiating history or explanation of the Enabling Clause. However, the 1971 Waiver and its history help to understand the object and purpose of the Enabling Clause and its relationship to Article I.

9.5 In the late 1960s and 1970s developing countries argued in UNCTAD that the benefits expected to result from freer trade had not occurred and that a new approach was needed.[428] Eight years of discussions between developed and developing countries followed in UNCTAD and led to the 1971 Waiver permitting the implementation of the generalized system of preferences. The

[424] Preamble, Agreement Establishing the World Trade Organization.

[425] It is understood that the value of these tariff preferences has lessened because of tariff reductions resulting from multilateral trade negotiations and regional arrangements, in particular. Nevertheless, generalized tariff preferences remain an important type of special and differential treatment.

[426] L/4903, BISD 26S/203-205.

[427] L/3545, BISD 18S/24-26.

[428] Several representatives made statements at the GATT Council meeting such as "economically unequal countries had to be treated unequally" (Peru) and "equal rules for unequal partners did not bring about equality of trading opportunities" (Israel). C/M/69.

representative of the prospective donor countries described it as "a new experiment" and "a great step forward, a historic move".[429]

9.6 The 1971 Waiver, which is expressly cross-referenced in paragraph 2(a) and footnote 3 of the Enabling Clause, was created to permit a rebalancing, to improve trade benefits for the many developing countries that had joined the multilateral trading system during the 1960s and 1970s and to supplement Part IV of the General Agreement. The Waiver implemented a carefully negotiated "system"[430], "scheme"[431] or "arrangements"[432] that permitted a range of special and differential treatment and that was expected to allow developing countries also to reap the benefits of market access opportunities.

9.7 The uniqueness and significance of the agreed action was noted by many representatives in the GATT Council meeting that considered the developed countries' request for a waiver of their Article I obligations so that they could implement the UNCTAD generalized system of preferences. The approval of a system of trade preferences was described as "an historical event"[433], "an historic event"[434], "considerable potential which the Scheme embodied for the improvement in the conditions governing international trade of developing countries"[435], a decision of "enormous importance, not only for the future of international trade relations, but in terms of the interpretation and meaning of the General Agreement itself"[436], of "historic importance"[437], "an historic occasion in the field of international trade relations, representing at the same time an important evolutionary step in the history of GATT".[438] The representative of Greece described it as a "movement of solidarity for the benefit of world trade".[439] The representative from Uruguay noted that "it was obvious that after this waiver was voted upon, the General Agreement would be different from what it had been so far."[440] These statements reflect the change anticipated and an evolving discussion within the United Nations system about the then existing and potential trade rules and the developing countries.[441]

9.8 The developed countries were asked by UNCTAD to obtain the necessary legislative or other sanction in order to implement the generalized system of preferences.[442] In the GATT, they chose to request a waiver of their Article I obligation[443], as made possible by Article XXV:5. They applied for,

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[429] C/M/69.

[430] The Waiver is entitled "Generalized System of Preferences". The same term was used by UNCTAD. *See* Resolution 21(II), Preamble and para. 1 and Statement by the Group of 77 in Part II.B of the Charter of Algiers.

[431] Statement of the Chairman, C/M/69.

[432] OECD, Report by the Special Group on Trade with Developing Countries of the Organisation for Economic Cooperation and Development, 29 Jan. 1968. OECD also referred to "treatment".

[433] Statement of India, C/M/69.

[434] Statement of Argentina, C/M/69.

[435] Statement of Jamaica, C/M/69.

[436] Statement of Uruguay, C/M/69.

[437] Statement of Greece, C/M/69.

[438] Statement of the United Arab Republic, C/M/69.

[439] C/M/69.

[440] C/M/69.

[441] See, e.g., Article 30 of its Draft Articles on Most-Favoured-Nation Clauses, which were submitted to the United Nations General Assembly between the 1971 Waiver and the 1979 Enabling Clause by the International Law Commission: "The present articles are without prejudice to the establishment of new rules of international law in favour of developing countries."

[442] UNCTAD Trade and Development Board, Decision 75(S-IV), Generalized System of Preferences.

[443] No country has a right to MFN treatment unless a country with which it trades has undertaken an Article I obligation toward it. Given Article I, the preference-giving countries had an obligation to accord MFN treatment to all the GATT contracting parties and the other contracting parties had rights within the limits of that clause.

Only the developed or preference-giving countries had obligations that would be contravened by the offer of preferences. Under the waiver, where the "provisions of Article I shall be waived", the contracting

and were granted, a ten-year waiver from the "provisions of Article I" to implement tariff preferences as described in the terms of the Waiver.[444]

9.9 This lifting of the Article I obligation of the preference-granting countries was widely understood and intended. The Chairman of the GATT Council had introduced the matter by stating that the application was for a waiver "from the obligations under Article I of the General Agreement".[445] The spokesman for the prospective preference-granting countries asked the GATT Council to consider the proposed waiver "from the obligations under Article I of the General Agreement so as to make possible the implementation of a system of generalized preferences". He described it as a "departure from the basic most-favoured-nation principle incorporated in Article I of the General Agreement".[446]

9.10 The representative of Turkey called it a "deviation from the most-favoured-nation principle".[447] If there had been a dispute under the waiver, the complaining party would not have claimed under Article I because its rights under that provision had been relinquished, as had the contractual MFN obligation of the preference-giving country.[448]

9.11 As was true regarding the 1971 Waiver, the object and purpose of the Enabling Clause are to benefit developing countries and to promote their trade. The language of the Clause describes actions by the developed, or donor, countries that grant the preferences. It enables on a permanent basis Members to accord "differential and more favourable treatment" to developing countries without according the same treatment to other contracting parties. Four types of treatment are authorized, including preferential tariff treatment as described in the 1971 Waiver. Members maintain discretion to determine, for example, whether to offer tariff preferences, the scope of product coverage and the applicable tariff levels. All of these prerogatives had been carefully negotiated in UNCTAD and were reflected in the texts of the 1971 Waiver and the Enabling Clause.

9.12 The Enabling Clause continues the relationship between trade preferences for developing countries and Article I that was agreed in UNCTAD and in the 1971 Waiver. There is no evidence that the CONTRACTING PARTIES intended to alter this relationship in 1979. A new Decision was agreed primarily because GATT practice limited the duration of Article XXV waivers. The legal nature of the Enabling Clause and the proper reading of the word "notwithstanding" in its paragraph 1 result from this very particular history and from the link between the Enabling Clause and the 1971 Waiver.

9.13 The words "Notwithstanding the provisions of Article I of the General Agreement …" indicate the relationship between the Enabling Clause and Article I. "Notwithstanding" means nevertheless or in spite of a hindrance of some kind[449], in this case in spite of the commitments Members had made under Article I. It is a traditional legal term that, even when standing alone, has a

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parties relinquished their right to demand MFN treatment for their products when the preference giving country complied with the conditions of the waiver.

[444] Decision of 25 June 1971. The waiver had a ten year duration and was granted only "to the extent necessary" to implement the preferential tariff treatment.

[445] C/M/69, para. 1.

[446] C/M/69. The preference giving countries had adopted the notion of a "departure" from Article I in OECD, Report by the Special Group on Trade with Developing Countries, Part Two, para. 1. (1968).

[447] C/M/69. Moreover, the countries affected by this system of preferences agreed not to invoke their rights to MFN treatment.

[448] In *EC – Bananas III*, the Appellate Body considered, among many other issues, the scope of the EC's 1994 waiver from the "provisions of paragraph 1 of Article I … to the extent necessary". In analyzing the matter, the Appellate Body concluded that Article I.1 was waived so considered not Article I but whether the EC had complied with the conditions of the Lomé waiver. Paras. 164 et seq.

[449] Notwithstanding is defined as "in spite of, without regard to or prevention by". *The New Shorter Oxford English Dictionary*, 4th Edition, p. 1947.

long history. The word derives from the Latin term "non obstante", indicating that the king or ruler had granted a licence, charter or some other right despite the law, not as an exception to the law. This certainly was the relationship envisaged by the preference-giving countries, as stated in the OECD report[450] and during the meeting of the GATT Council that had considered the 1971 Waiver. Again, there is no indication that the CONTRACTING PARTIES intended to alter this relationship in 1979.

9.14 Such a reading of "notwithstanding" does not undermine the WTO goals of an improved multilateral trading system and economic development.[451] Paragraph 3 and footnote 3 of the Enabling Clause insert factors that will promote the trade of developing countries yet protect the multilateral system.

9.15 While the Appellate Body has at times followed the traditional rule-exception analysis, it has also recognized that legal relationships can differ from, and can be more complex than, the traditional general rule (e.g., Article I or III) – exception (e.g., Article XX or XXIV) relationship. *EC – Hormones*[452] and *Brazil – Aircraft* [453] are illustrative. As explained above, the relationship between the Enabling Clause and Article I is not a general rule-exception relationship. The Enabling Clause remains in the nature of a waiver from developed countries' obligations under Article I although, because the Enabling Clause is permanent, it cannot be covered by Article XXV:5. The CONTRACTING PARTIES, through their 1979 Decision, continued the then existing relationship between the Enabling Clause and Article I.

9.16 Another important consideration is that the CONTRACTING PARTIES expected and desired that the right to grant tariff preferences be exercised. That expectation continues. Although the granting of tariff preferences under the Enabling Clause is optional and a matter for each Member to decide and is not an obligation, it was understood that only simultaneous, concerted action by most developed countries would create the trade benefits intended and discussed in UNCTAD and later in the GATT.[454] The discussions in UNCTAD concluded with the expectation of simultaneous offerings of special and differential tariff treatment by developed countries, whose joint impact would be to increase significantly the trade benefits available to developing countries.[455] Consequently neither the Enabling Clause nor the 1971 Waiver were limited exceptions. Both are major changes in approach and intended to have a major change for the good in the effect of trade rules.[456]

9.17 In this sense, the Enabling Clause permits a series of individual, preferential measures each of which contributes to the goal of better market access for exports from developing countries and, consequently, increased world trade. In its anticipation of simultaneous actions the Enabling Clause is

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[450] The Report refers to the "rights granted to them by any General Agreement waiver" (para. 14) and states that the "special tariff treatment was a waiver from the basic General Agreement on Tariffs and Trade rule and therefore not an obligation" (para. 35).

[451] Paragraph 3 of the Enabling Clause is particularly significant. It requires that preferential treatment be "designed to facilitate and promote the trade of developing countries" and "respond effectively to the development, financial and trade needs of developing countries." Preferences may neither raise barriers to or create undue difficulties for the trade of other Members nor constitute an impediment to broader MFN reductions or elimination of tariffs and other trade restrictions.

[452] Appellate Body Report, *EC – Hormones*. In both *EC – Hormones* and *EC – Sardines*, the Appellate Body found no general rule-exception relationship even though the word "except" was used in both Article 3.1 of the SPS Agreement and Article 2.4 of the TBT Agreement. As stated by the Appellate Body in *EC – Hormones*, Article 3.1 "simply excludes from its scope of application the kinds of situations covered by Article 3.3 … ." Appellate Body Report, *EC – Hormones*, para. 104.

[453] Appellate Body Report, *Brazil – Aircraft*.

[454] The representative of Argentina mentioned the "basic assumption" that "all donor countries would give preferences and thus share the burden". C/M/69.

[455] This contrasts with individual actions for domestic purposes under exceptions to Article I, such as Article VI measures.

[456] This contrasts with the somewhat limited derogation at issue in *US – Wool Shirts and Blouses*.

more like the group action contemplated by Article II of GATT 1994[457] than the individual action described in many provisions of the WTO agreements. Action under the Enabling Clause benefits the trading system, in contrast to some other permitted individual actions, such as those under Article VI, Article XIX, or even Article 3.3 of the SPS Agreement.[458]

9.18 Turning to the second issue, although India has couched its claim in somewhat ambiguous and artful language, it is apparent from its submissions and from its statement at the oral hearing that it has made a claim under Article I of GATT 1994 regarding an aspect of the European Communities' tariff preferences programme for developing countries. It considers the 1979 Enabling Clause an exception to Article I and, as such, an affirmative defence. India argued in its first submission and subsequently that the Drug Arrangements are not justified under the Enabling Clause.[459] In contrast the European Communities characterizes the Enabling Clause as an autonomous right, similar to Article 3.3 of the SPS Agreement.

9.19 Given the terms of reference of this Panel, we are confronted with the dilemma of either following the mandate from the Dispute Settlement Body and thereby considering a claim that India says is not its position, or accepting the theory put forward by India in these proceedings and thereby considering the Enabling Clause as a possible defence but not a claim as envisaged by the terms of reference. If we adopt the broader reading of the terms of reference, the Panel will add a claim regarding the Enabling Clause to India's case and will consider a claim that India says it is not making. Also, in deciding the scope of the "matter", the Panel must preserve the "rights and obligations" of Members under the covered agreements[460], one of which is the Enabling Clause, and must assess the applicability of the relevant covered agreements.[461]

9.20 The Dispute Settlement Body established this Panel with the standard terms of reference: "To examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS246/4, the matter referred to the DSB by India in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[462] India had requested the DSB to establish a panel to examine whether the Drug Arrangements, any implementing rules and regulations, any amendments and their application "are consistent with Article I:1 of GATT 1994 and the requirements set out in paragraphs 2(a), 3(a) and 3(c) of the Enabling Clause."[463] While it appears that India made two claims (an Article I:1 claim and an Enabling Clause claim), India's subsequent explanation of its request is limited to the MFN claim. India calls the MFN issue its "material" claim. It asserts that the Enabling Clause is an affirmative defence – not a claim – and concludes that the European Communities has not complied with the conditions of the Enabling Clause.[464] In arguing that the Enabling Clause is an affirmative defence, India must admit that it is not a claim and that its reference to the Enabling Clause is an argument in response to the anticipated defence.

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[457] Article XXIV, considered an exception to Article I, is a more limited form of joint action, which often raises questions about the contribution of the Article XXIV arrangement to trade liberalization.

[458] The Appellate Body described Article 3.3 of the SPS Agreement as an "autonomous right" in the *EC – Hormones* dispute. In disputes involving these Articles, the Appellate Body appears to begin its analysis not with Article I or Article III but with the exception, the autonomous right or the specific agreement at issue.

[459] Cf. the distinction between a claim and an argument as explained by the Appellate Body in *EC – Sardines*, para. 280 and *EC – Hormones*, para. 156.

[460] DSU, Article 3.2.

[461] DSU, Article 11.

[462] *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/5 (6 March 2003).

[463] *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/4 (9 December 2002). Cf. India's Request for Consultations. WT/DS246/1 (12 March 2002).

[464] Both parties made arguments about the Enabling Clause.

9.21 The scope of India's claim is important because, under my analysis, India's claim should be raised under the Enabling Clause. If India's claim is limited to Article I – as India says – it has chosen the wrong theory to characterize this matter and the complaint should be dismissed. A panel may not address legal claims falling outside its terms of reference and, to protect the rights of Members whose measures are challenged, should not add claims and theories to those put forward by the complaining party.

# ANNEX A

Request for Enhanced Third-Party Rights

*Decision of the Panel*

*7 May 2003*

1. On 31 March 2003, 11 third parties in this case (Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Peru and Venezuela, hereafter referred to collectively as "the Applicants") requested that the Panel accord them enhanced third-party rights. Specifically, the Applicants request permission: to attend all the Panel meetings; to present their points of view at such meetings; to receive copies of all submissions to the Panel; to make submissions to the Panel at its second meeting; and to review the draft summary of arguments in the descriptive part of the Panel report. In support of their request, the Applicants argue that their substantial interest is of special importance in this dispute, since the measure at issue determines the conditions of access of their exports to the European market as beneficiaries of the tariff preference scheme established by the European Communities ("EC").

2. On 8 April 2003, the Panel invited the parties and the seven third parties other than the Applicants to comment, by 17 April 2003, on the Applicants' request for enhanced third-party rights. India and the EC, along with third parties Brazil, Cuba, Mauritius, Pakistan, Paraguay and the United States ("US"), each submitted comments by the 17 April deadline. No comments were received from Sri Lanka.

3. In their request, the Applicants draw a parallel between their interest in the present case and the interest of the beneficiary African, Caribbean and Pacific ("ACP") developing countries in the WTO dispute on *EC – Bananas III (WT/DS27)*. The Applicants claim that as beneficiaries of the tariff preferences under the EC's Drug Arrangements, they are very similarly situated to the ACP countries benefiting from EC preferences under the Lomé Waiver. They point out that in *EC – Bananas III*, that panel granted certain additional rights to third parties.

4. In its comments to the Panel, India first argues that it considers the interests of the Applicants and other third parties to be amply protected by the rights provided under the DSU and the Working Procedures adopted in this dispute. However, India considers that, should the Panel grant the Applicants' request, it should limit the additional rights to those provided in *EC – Bananas III* and extend them to *all developing country* third parties in this case, not only to the Applicants, but should not extend such rights to third party US because, as asserted by India, the US has not advanced sufficient justification therefor. India also cautions the Panel not to permit a blurring of the procedural rights accorded to parties with those accorded to third parties.

5. In its comments, the EC supports the granting of enhanced rights to *all the beneficiaries of the Drug Arrangements* (Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Pakistan and Peru), arguing that these countries are in a special situation analogous to that of the ACP countries in *EC – Bananas III*. While the EC does not consider that the circumstances invoked by Brazil, Paraguay and the US, if considered alone, justify the granting of additional rights to those WTO Members, the EC indicates that it would not object to the Panel granting enhanced rights also to the third parties who are not beneficiaries of the Drug Arrangements. The EC expresses no opinion in relation to third parties Cuba, Mauritius, Sri Lanka and Venezuela.

6. In its comments, Pakistan states that as a third party having both systemic and trade concerns, it "joins" the Applicants in requesting enhanced third-party rights. Third parties Brazil, Cuba, Mauritius, Paraguay and the US all indicate that while they take no position on whether or not

additional third-party rights are justified in this case, they all request that, should the Panel decide to grant enhanced rights, it should grant such rights to all third parties.

7. Having carefully considered the arguments of the parties and third parties in this case, the Panel considers as follows:

(a) There are significant similarities between this case and that of *EC – Bananas III (WT/DS27)* in terms of economic impact of the preference programmes on third-party developing countries. Both those third parties that are beneficiaries under the EC's Drug Arrangements and those that are excluded have a significant economic interest in the matter before this Panel.

(b) The outcome of this case could have a significant trade-policy impact on the US as a preference-giving country.

(c) As a matter of due process, it is appropriate to provide the same procedural rights to all third parties in this dispute.

(d) In granting any additional rights to third parties, it is important to guard against an inappropriate blurring of the distinction drawn in the DSU between parties and third parties.

8. Accordingly, the Panel ***decides*** that, beyond those rights already provided for in the DSU and in the Working Procedures adopted for this Panel, the following additional rights are granted to *all* third parties in this case:

- observe the first substantive meeting with the parties;
- receive the second submissions of the parties;
- observe the second substantive meeting with the parties;
- make a brief statement during the second substantive meeting with the parties;
- review the summary of their respective arguments in the draft descriptive part of the panel report.

9. The Panel wishes to make clear that it does not expect third parties to submit additional written material other than responses to any questions posed to them by the Panel.

Julio Lacarte-Muró
Marsha A. Echols
Akio Shimizu

# ANNEX B

## Parties


| | | Page |
|---|---|---|
| **Annex B-1** | Replies of India to Questions from the Panel after the First Panel Meeting | B-2 |
| **Annex B-2** | Replies of the European Communities to Questions from the Panel after the First Panel Meeting | B-36 |
| **Annex B-3** | Replies of the European Communities to Questions from India after the First Panel Meeting | B-68 |
| **Annex B-4** | Replies of India to Questions from the Panel after the Second Panel Meeting | B-83 |
| **Annex B-5** | Replies of the European Communities to Questions from the Panel after the Second Panel Meeting | B-111 |
| **Annex B-6** | Comments of India to the Replies of the European Communities to Question from the Panel after the Second Panel Meeting | B-141 |
| **Annex B-7** | Comments of the European Communities to the Replies of India to Questions from the Panel after the Second Panel Meeting | B-159 |

**ANNEX B-1**

Replies of India to Questions from the Panel
after the First Panel Meeting

**To both Parties**

*1. Could your delegation please indicate whether there is anything you can report in relation to the possible settlement of the matter in dispute?*

**Reply**

India has held consultations with the European Communities (the "EC") regarding the WTO-consistency of the "Special Arrangements to Combat Drug Production and Trafficking" (the "Drug Arrangements"), which form part of the EC's scheme of generalized tariff preferences for the period 1 January 2002 to 31 December 2004, on various occasions including:

(i) the meeting between Sri Murasoli Maran, India's Minister for Commerce and Industry and Mr. Pascal Lamy, Commissioner (Trade) European Commission, in the margins of the India-EU Summit held in New Delhi in November 2001,

(ii) the bilateral consultations held in Brussels on 5-6 February 2002,

(iii) the formal consultations under the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") held in Geneva on 25 March 2002,

(iv) the meeting of the India–EU Sub-Commission held on 9 April 2002,

(v) the meeting of the India–EU Joint Commission held in Brussels on 9-10 July 2002,

(vi) the India-EU Business Summit held in Copenhagen on 8-9 August 2002,

(vii) the meeting between Mr. Pascal Lamy, Commissioner (Trade) European Commission and India's Minister for Commerce and Industry in New Delhi on 13 March 2003,

(viii) the consultations on India-EU Bilateral Issues held in Brussels in January 2003,

(ix) the meeting between the India's Commerce Secretary Mr. Dipak Chatterjee and Mr. Peter Carl, DG Trade on 22nd January 2003 in Brussels,

(x) the latest attempt was made during consultations held in Brussels on 7 May 2003.

The EC did not reveal to India during any of these consultations the exact legal basis on which the EC considered the Drug Arrangements to be consistent with its obligations under the WTO Agreements. On each occasion, India indicated its willingness to enter into a mutually agreed settlement. However, the EC has consistently refused to discuss even the possibility of one. It is against this background that India reluctantly sought recourse to the dispute settlement under the DSU for redressal of its grievances.

India remains open to the settlement of the matter in the dispute based on a suitable offer by the EC.

*Legal Function*

*2. Did the negotiators of the Enabling Clause intend its legal function to be different from the 1971 Decision? Are there different legal bases for the two decisions? Please elaborate. What materials can you point to in support of this view? Please provide any such materials.*

**Reply**

Legal function of the Enabling Clause and the 1971 Decision

The best evidence of the intention of the negotiators as to the legal function of the Enabling Clause, in comparison with that of the 1971 Decision, is an analysis of the legal effects of both in relation to Article I of the GATT, to which both expressly refer.

The provisions of the Enabling Clause relevant to the "Generalized System of Preferences" ("GSP") read as follows:

> "1. Notwithstanding the provisions of Article I of the General Agreement, [Members] may accord differential and more favourable treatment to developing countries[1], without according such treatment to other [Members].
>
> 2. The provisions of paragraph 1 apply to the following:[2]
>
> *(a)* Preferential tariff treatment accorded by developed [country Members] to products originating in developing countries in accordance with the Generalized System of Preferences,[3] …
>
> _____
>
> [1] The words 'developing countries' as used in this text are to be understood to refer also to developing territories.
>
> [2] It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.
>
> [3] As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of 'generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries."

The parts of paragraphs 1 and 2(a) and footnote 3 of the Enabling Clause relevant in this dispute can be summarized as follows:

> "Members 'may', …'notwithstanding the provisions of Article I of the [GATT]', … 'accord differential and more favourable treatment to developing countries without according such treatment to other [Members]' by way of 'preferential tariff treatment accorded by developed [country Members] to products originating in developing countries in accordance with the [GSP]' … 'as described in the [1971 Decision], relating to the establishment of 'generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries' "[1]

[1] In context, the word "[*Members*]" in the phrase "notwithstanding the provisions of Article I of the [GATT], [*Members*] may …" refers to developed country Members, and the words "*other* [*Members*]" in the

Paragraph (a) of the 1971 Decision provides:

> "That without prejudice to any other Article of the General Agreement, the provisions of Article I shall be waived for a period of ten years to the extent necessary to permit developed contracting parties … to accord preferential tariff treatment to products originating in developing countries and territories with a view to extending to such countries and territories generally the preferential tariff treatment referred to in the Preamble to this Decision, without according such treatment to like products of other contracting parties."

Paragraph (a) of the 1971 Decision thus waived the provisions of Article I of the GATT "to the extent necessary to permit developed [country Members] … to accord preferential tariff treatment to products originating in developing countries [the preferential tariff treatment under the GSP referred to in the Preamble] without according such treatment to like products of other [Members]".[2]

As far as the GSP is concerned, the legal functions of the 1971 Decision and the Enabling Clause are therefore the same: both permit a developed country member to grant preferential tariff treatment to products originating in developing countries without according such treatment to like products originating in other developed country Members.

India has been unable to find any document relating to the negotiating history of the Enabling Clause that *expressly* confirms that the negotiators *intended* the Enabling Clause would to have the same legal function as the 1971 Decision as far as the GSP is concerned. In this regard however, it might be noted that paragraph (b) of the 1971 Decision provides that the GATT CONTRACTING PARTIES "keep under review the operation of this Decision and decide, before its expiry and in light of the considerations outlined in the Preamble, whether the Decision should be *renewed* and if so, what its terms should be". The Enabling Clause was adopted prior to the expiry of the ten-year period provided for under the 1971 Decision. Subsequent to the adoption of the Enabling Clause, the GATT CONTRACTING PARTIES did not take any other action relative to the 1971 Decision. It can therefore be reasonably assumed that the Enabling Clause is the *renewal* of the 1971 Decision, as contemplated in paragraph 2(b) of the latter.

Legal basis of the 1971 Decision

The 1971 Decision does not make an express reference as to its legal basis. However, paragraph (a) thereof states that "… the provisions of Article I [of the GATT] shall be *waived* …". Furthermore, the "Minutes of Meeting" of the GATT Council held on 25 May 1971[3], at which the 1971 Decision was discussed and approved for submission to the GATT CONTRACTING PARTIES, states, among others (in relation to what ultimately was adopted as the 1971 Decision):

> "At the request of a number of prospective preference-giving contracting parties, a communication containing a formal application to the CONTRACTING PARTIES for a waiver in accordance with Article XXV:5 [of the GATT] from the obligations under Article I of the [GATT] had been circulated (C/W/178)."

Document C/W/178 dated 19 May 1971 is entitled "Request for a Waiver" submitted by the Permanent Delegation of Norway, acting on behalf of several developed countries, in which they formally submit their application "for a waiver in accordance with Article XXV:5 [of the GATT]".

---

phrase "… without according such treatment to *other* [*Members*]" likewise refer to developed country Members.

[2] Similarly, in context, the words "*other* [*Members*]" in the phrase "… without according such treatment to *other* [*Members*]" likewise refer to developed country Members.

[3] C/M/69 dated 28 May 1971.

Attached to that document was a draft decision, the text of which is the same text as that of the 1971 Decision. Article XXV:5 of the GATT provides that "… CONTRACTING PARTIES may waive an obligation imposed upon a contracting party to [the] Agreement …". It is thus clear that the legal basis for the 1971 Decision is Article XXV:5 of the GATT.

Legal basis of the Enabling Clause

In the process leading to the adoption of the 1971 Decision, the Secretariat issued a note entitled "PREFERENTIAL TARIFF TREATMENT FOR DEVELOPING COUNTRIES … Technical Note by the Secretariat"[4] indicating a choice of three possible methods for the adoption of the GSP. It lays down certain principles relating to the GSP and, in respect of the methods, goes on to state:

> "These principles could be incorporated in an amendment of the provisions of the GATT …
>
> The principles could also be incorporated in a waiver under Article XXV:5 …
>
> "A third possibility … would be a declaration that, notwithstanding the provisions of Article I, the CONTRACTING PARTIES will allow new preferences of a temporary nature which accord with the general principles suggested above … [S]uch a declaration could be adopted at a session of the CONTRACTING PARTIES. It would have to be adopted without opposition. The logic of this method is that the CONTRACTING PARTIES are masters in their own house, and can agree that they will concur in temporary derogations from Article I in order to promote the objectives set out in Article XXXVI …"

The "Summary Record of Fourth Meeting" of the 25th Session of the GATT CONTRACTING PARTIES held on 28 November 1979[5], at which the Enabling Clause was adopted, states:

> "The CHAIRMAN drew attention to Annex III in document L/4884/Add.1 which contained proposals regarding the decisions to be adopted by the CONTRACTING PARTIES on the Framework texts, which were contained in document L/4885.
>
> The CONTRACTING PARTIES agreed to adopt by consensus the Decision Regarding Differential and More Favourable Treatment and Reciprocity and Fuller Participation of Developing Countries (Points 1 and 4)."

Document L/4885 dated 23 November 1979 is a Note Prepared by the Secretariat. Attached to that note is a draft entitled "POINTS 1 AND 4 … "DIFFERENTIAL AND MORE FAVOURABLE TREATMENT RECIPROCITY AND FULLER PARTICIPATION OF DEVELOPING COUNTRIES". The text of that draft is identical to that of the Enabling Clause. The draft is preceded by the following note:

> "The text below has been drawn up without prejudice to the position of any delegation with respect to its eventual legal status. Some delegations consider that such a text should appear as a new Article or set of provisions to be incorporated in the General Agreement. Other delegations consider that it should be adopted by the CONTRACTING PARTIES as a Declaration or Decision. Some consequential amendments to the text may be necessary in the light of the decision taken on this question."

[4] Spec(70)6 dated 5 February 1970.
[5] SR.35/4 dated 18 December 1979.

The sub-title of the Enabling Clause is "Decision of 28 November 1979". Among the three legal options mentioned in the Secretariat note, the CONTRACTING PARTIES thus chose the option of a "Declaration or Decision".

*3. Do you agree that in order to determine whether a particular provision lays down a positive right or an exception, it is necessary to examine its legal function in the context of the treaty as a whole? If yes, why so, and what are the implications in the present dispute? If no, why not, and what are the implications in the present dispute?*

**Reply**

"Positive right" is "a right entitling a person to have another do some act for the benefit of the person entitled".[6] "[Special] exception" is "something that is excluded from a rule's operation".[7] "[Statutory] exception" is "a provision in a statute exempting certain persons or conduct from the statute's operation."[8]

In the abstract, if the language of the particular provision is clear, it would not be necessary (in the sense of "indispensable") to examine its legal function in relation to the treaty as a whole to determine whether it is a positive right or an exception; if the language is not clear, it may then be necessary.

In this dispute, it is clear that paragraphs 1 and 2(a) of the Enabling Clause do not lay down a "positive right" for any Member as they do not create a right for the developing countries to benefit from GSP treatment. It is equally clear that 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.

In order to determine the scope of the exception established by paragraphs 1 and 2(a) of the Enabling Clause, it is necessary to examine the terms of the Enabling Clause in their context. That context includes all the other provisions of the WTO Agreement. However, the scope of an exception can not be determined without examining the rule that made the exception necessary. It is therefore essential to examine paragraphs 1 and 2(a) Enabling Clause in the context of Article I:1 of the GATT since they exempt developed countries from the operation of certain aspects of that article.

*4. With reference to paragraph 1(b)(iv) of GATT 1994, and recognizing that the Enabling Clause was adopted by the GATT Contracting Parties at the end of the Tokyo Round, is it your understanding that the Enabling Clause is/is not an "other decision of the Contracting Parties to GATT 1947"? Is it a part of GATT 1994? Please explain.*

**Reply**

India is of the view that the Enabling Clause could be considered as forming part of "other decisions of the CONTRACTING PARTIES to GATT 1947" referred to in paragraph 1(b)(iv) of the language of Annex IA of the WTO Agreement incorporating the GATT 1994 into the WTO Agreement.[9] It was adopted as a "decision" by the GATT CONTRACTING PARTIES. Therefore it is a part of the GATT 1994.

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[6] *Black's Law Dictionary*, 7th ed., B.A. Garner (ed.) (West Group, 1999), p. 1323.
[7] *Ibid*, p. 584.
[8] Ibid.
[9] The Enabling Clause is not included in the list of waivers referred to in the footnote to paragraph 1(b)(iii) of the language of Annex IA of the WTO Agreement incorporating the GATT 1994 into the WTO Agreement. Those waivers are listed in WT/L/3 dated 27 January 1995.

*5. Assuming that the Enabling Clause is not a waiver, is it an exception or an "autonomous" right? In either case, what are the differences in the legal consequences of characterizing the Enabling Clause as an exception or an autonomous right? Are there legal consequences beyond allocation of the burden of proof?*

**Reply**

India is not aware of a commonly accepted definition of "autonomous right". A "conditional right" is "a right that depends on an uncertain event; a right that may or may not exist".[10] Thus an "autonomous right" could be understood to be a right that does not depend on an uncertain event for its existence but solely on the will of the right holder. An autonomous right, like all other rights, may however be exercised only consistently with the law. In the present context, the developed countries have the right to deviate from certain aspects of Article I of the GATT *if* they decide to accord GSP preferences, but the exercise of that right is subject to disciplines.

Based on the above definition of "autonomous right", even assuming that the right to take measures under Article XX of the GATT and to form customs unions or free trade areas under Article XXIV of the GATT are autonomous rights, they are also exceptions to the basic rules of the GATT. Again, the exercise of the right is subject to applicable disciplines.

The 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 this proceeding is based on Article I:1 of the GATT and not on paragraph 1 or 2(a) of the Enabling Clause. The latter provisions are therefore not a material element of the claims that India has submitted to this Panel.

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 that the Drug Arrangements are in fact covered by that Clause, regardless of whether the Enabling Clause is an autonomous right or an exception or both.

To summarize: The Enabling Clause is, by definition, an exception to certain aspects of Article I:1 of the GATT. Even assuming that it is also an autonomous right, the issue of burden of proof does not necessarily flow from its characterization as an exception or an autonomous right. Rather, it flows from the fact that the Enabling Clause is not a material element of India's claim of violation of Article I:1 of the GATT, while it is a material element of the EC's defence.

*6. How does one identify whether a legal provision confers an "autonomous right" or provides for an "affirmative defence"?*

**Reply**

This reply is based on India's understanding of "autonomous right", as set forth in the answer to question 5 addressed by the Panel to both parties.

[10] *Black's Law Dictionary*, *supra*, footnote 6, p. 1323.

"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."[11]

As noted above, India is of the view that an "autonomous right" could also be an "affirmative defence". For example, even assuming that the right to take measures under Article XX of the GATT could be deemed as an "autonomous right", at the same time, the exercise of that right could be an "affirmative defence" in a dispute concerning other provisions of the GATT. In the same manner, even assuming that the right to form customs unions or free trade areas under Article XXIV of the GATT could be deemed an "autonomous right", in the same manner, the exercise of that right could be an "affirmative defence" in a dispute concerning other provisions of the GATT.

India believes that a case-to-case assessment is necessary in order to determine whether a particular provision is an "autonomous right", an "affirmative defence", or both.

*7. To determine the legal function of the Enabling Clause, is it useful to have reference to the exceptions clauses set out in Articles XX, XXI and XXIV of GATT 1994? Please elaborate.*

**Reply**

To determine the legal function of the Enabling Clause, it is useful to have reference to the exceptions clauses set out in Articles XX, XXI and XXIV of the GATT 1994. Even assuming that Members have the autonomous right to take measures therein authorized, those provisions are exceptions from certain obligations and may be invoked as affirmative defences in a dispute concerning other provisions of the GATT. Similarly, even assuming that the Enabling Clause could be deemed to establish an autonomous right of developed country Members to grant differential and more favourable treatment to developing countries, the Enabling Clause nevertheless is an exception to certain aspects of Article I:1 of the GATT and may be invoked as an affirmative defence in response to a claim under Article I:1.

*8. Article XX and XXI of GATT 1994 provide "nothing in this Agreement shall be construed to prevent … " and Article XXIV:3 of GATT 1994 provides "[t]he provisions of this Agreement shall not be construed to prevent …", and paragraph 1 of the Enabling Clause provides "[n]otwithstanding the provisions of Article I of the General Agreement, contracting parties may … ". Do you consider that Articles XX, XXI and XXIV of GATT 1994 provide exceptions/"affirmative defences" or not? In light of the similarity/dissimilarity of the above-cited language, do you think the Enabling Clause provides for an exception/"affirmative defence" or an "autonomous right"? Why or why not? Please elaborate.*

**Reply**

In India's view, even assuming that Articles XX, XXI and XXIV of the GATT 1994 provide autonomous rights, they are exceptions which may be used as affirmative defences. Even assuming that the Enabling Clause similarly provides an autonomous right, that right is, at the same time, an exception to certain aspects of Article I:1 of the GATT and may be invoked as an affirmative defence. (Please see answers to questions 3, 5, and 6 addressed by the Panel to both parties).

[11] *Black's Law Dictionary*, *supra*, footnote 6 p.430.

*Non-discriminatory*

*9. Assume that the Enabling Clause is a self-standing, autonomous right and that the Panel should look at the Enabling Clause itself to interpret its provisions. Could you indicate where in the Enabling Clause the Panel should find the context for the interpretation of the term "non-discriminatory" in footnote 3? Does this context provide sufficient contextual guidance for the interpretation of this term? Should the Panel also look outside the Enabling Clause for contextual guidance? If so, to which particular Agreements and provisions therein, and why these particular provisions, and not others?*

**Reply**

Within the Enabling Clause itself, the following provide context for the interpretation of the term "non-discriminatory":

- Paragraph 1 of the Enabling Clause refers to Article I of the GATT and indicates what is permitted notwithstanding that Article. Article I:1 of the GATT provides that "… any … advantage, … granted by any [Member] to any product originating in … any other country shall be accorded immediately and unconditionally to the like product originating in … the territories of other [Members]." Thus, notwithstanding the MFN rights of all Members under Article I:1 of the GATT, the Enabling Clause permits a developed country Member not to accord MFN treatment to like products originating in other developed country Members in respect of preferential tariff treatment accorded to products originating in developing country Members *in accordance with the GSP*. This is all that paragraph 1 permits. There is nothing in paragraph 1 which could be construed as a waiver by developing country Members of their MFN rights in respect of any advantage granted by any other Member to any product originating in any other country.[12]

  Stated in a different manner, it is necessary that each developed country Member be permitted not to accord MFN treatment to like products originating in other developed country Members to enable that developed country Member to accord preferential tariff treatment to products originating in developing countries in accordance with the GSP. For this purpose, it is not necessary to permit that developed country Member not to accord MFN treatment to like products originating in developing countries.

  Thus, the very first paragraph of the Enabling Clause reaffirms the MFN rights of developing country Members under Article I:1 of the GATT. In this context, "non-discriminatory" means immediate and unconditional MFN treatment between like products originating in developing countries.

  The Enabling Clause was adopted for the benefit of developing countries. Aside from the absence of clear language indicating that developing countries waived their MFN rights under Article I:1, an interpretation to the effect that paragraph 2(a) of the Enabling Clause curtails the benefits accruing to developing countries under Article I:1 runs counter to the very purpose of that paragraph, which is to create additional benefits for the developing countries in the legal framework of the GATT.

- Paragraph 2(a) refers to "preferential tariff treatment accorded … to *products* originating in developing countries …" The preferential treatment is in respect of

[12] Subject to the exception in favour of least developed countries pursuant to paragraph 2 (d) of the Enabling Clause.

tariffs, and the object of the treatment is "products". "Like products" will always be *like products* regardless of their origin. Unless the Enabling Clause expressly so provides (which it does not), there can be no valid basis for differentiation in treatment between like products for the purpose of the imposition of tariffs. In all GATT provisions and in GATT and WTO jurisprudence, the term "discriminatory" has been used to describe the denial of equal competitive opportunities to *like* products originating in different countries. "Non-discriminatory" thus refers to treatment of *like* products, and not to treatment of Members, as such.

- "Discriminatory tariff" is defined as "a tariff containing duties that are applied unequally to different countries or manufacturers."[13] A "non-discriminatory tariff" in the context of the Enabling Clause therefore is a tariff containing duties that are applied equally to different developing countries.

- 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 _____"[14]. Thus, in this instance, the phrase "the developing countries" means "all those described as developing countries". Preferential tariff treatment to 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.[15]

- The equally authentic Spanish and English texts likewise use the phrase "of *the*" in their title, 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 PARTIC PARTICIPATION PLUS COMPLETE **DES** PAYS EN VOIE DE DEVELOPPEMENT".

- If "non-discriminatory" were to have the "negative meaning" attributed to it by the EC, paragraph 2(d) would be redundant as there is a clear distinction between least developed countries and other developing countries.

Footnote 3 to paragraph 2(a) refers to the GSP as described in the 1971 Decision. Paragraph (a) of the 1971 Decision refers to "the preferential tariff treatment referred to in the "Preamble to this Decision …" The relevant provisions of the Preamble provide:

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

---

[13] *Black's Law Dictionary*, *supra*, footnote 6, p. 1468.

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

[15] 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".

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

The preferential tariff treatment referred to in paragraph (a) of the 1971 Decision and its Preamble must therefore be construed in relation to the "mutually acceptable arrangements [that] have been drawn up in the UNCTAD concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries".

The GSP had its beginnings at the First Conference of the UNCTAD in 1964, which resolved:

> "**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 to 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."[16] (emphasis added)

As early as UNCTAD I therefore, the following concepts were affirmed or endorsed:

- International trade should be conducted to mutual advantage on the basis of the MFN principle.

- As an exception to the MFN principle, new preferential concessions, both tariff and non-tariff, should be made [by developed countries] to developing countries as a whole - and such preferences should not be extended to developed countries.

- Special preferences then enjoyed by certain developing countries in certain developed countries should be regarded as transitional and subject to progressive reduction. It was thus the intention that the GSP, the benefits of which will be made available to developing countries, would replace the special preferences then enjoyed by certain developing countries in certain developed countries.

At UNCTAD II held in New Delhi in 1968, the foregoing resolution adopted in UNCTAD I was confirmed by the adoption of Resolution 21 (II) which provides, among others:

[16] Principle 8 of Recommendation A:I:1 in Final Act of the First United Nations Conference on Trade and Development (Geneva:UNCTAD, Doc E/CONF.46/141, 1964), Vol 1, at 20, cited in Lorand Bartels, "The WTO Enabling Clause and Positive Conditionality in the European Community's GSP program", *Journal of International and Economic Law*, Vol. 6, No.2 (2003), p. 507.

> "*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 …
>
> 1. *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)

To give effect to the resolution, a specialized UNCTAD Trade and Development Board was established. The "mutually acceptable arrangements" referred to in paragraph (a) in relation to the Preamble of the 1971 Decision are contained in the Agreed Conclusions of the Special Committee on Preferences adopted at the Fourth Special Session of the Trade and Development Board. The Agreed Conclusions state that "there is agreement with the objective that in principle all developing countries should participate as beneficiaries from the outset."

In the statement made by India on behalf of the Group of 77 incorporated as Annex I to the Agreed Conclusions, the Group of 77 stressed that no developing country member of the Group "should be excluded from the generalized system of preferences at the outset or during the period of the system". The Group of 77 on whose behalf the statement was made includes all the third parties in this dispute that are beneficiaries under the Drug Arrangements.

Part IV 1. of the Agreed Conclusions on "Beneficiaries" provides:

> "1. The Special Committee noted the individual submissions of the preference-giving countries on this subject and the joint position of the countries members of the Organisation for Economic Cooperation and Development as contained in paragraph 13 of the introduction to the substantive documentation containing the preliminary submissions of the developed countries (TD/B/AC.5/24), namely: 'As for beneficiaries, donor countries would in general base themselves on the principle of self-election. With regard to this principle, reference should be made to the relevant paragraphs in document TD/56 i.e., section A in Part I."

Section A, Part I of document TD/56, which lays down the position of preference-giving countries, including the then Member States of the EC, provides:

> "A. Beneficiary countries
>
> **Special tariff treatment should be given to the exports of any country, territory or area claiming developing status. This formula would get over the difficulty which would otherwise arise of reaching international agreement on objective criteria to determine relative stages of development.**" (emphasis added)

In light of the foregoing, it is therefore clear that the "generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries" referred to in the Preamble to the 1971 Decision contemplated the participation of all developing countries as beneficiaries of the GSP. Furthermore, and of particular relevance in this dispute, the GSP was intended to replace special

preferences then enjoyed by certain developing countries in certain developed countries, which were then regarded as "transitional and subject to progressive reduction".

The phrases

- "new preferential concessions, both tariff and non-tariff, should be made to developing countries **as a whole**",
- "a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences **beneficial to the developing countries** in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of **these countries**",
- "with a view to extending to such countries and territories **generally** the preferential tariff treatment referred to in the Preamble to this Decision, without according such treatment to like products of other [Members]",
- "there is agreement with the objective that in principle **all developing countries** should participate as beneficiaries from the outset", and
- "no developing country … should be excluded from the generalized system of preferences at the outset"
- "special tariff treatment should be given to the exports of any country, territory or area claiming developing status"

all indicate that, as agreed in the UNCTAD, the benefits under the GSP were intended to apply to **all** developing countries, and not just to **some** developing countries. Furthermore, in light of the resolution adopted in UNCTAD I, the GSP was intended precisely to replace "special preferences [then] enjoyed by certain developing countries in certain developed countries". The 1971 Decision refers to the GSP as adopted at the UNCTAD. The Enabling Clause defines the GSP as the GSP described in the 1971 Decision, and hence to the GSP as it was adopted at the UNCTAD.

Various subsequent UNCTAD documents confirm this agreement. Among these is the Report by the UNCTAD Secretariat on the "Review and evaluation of the generalized system of preferences" dated 9 January 1979[17]. The Report states, among others:

> "10. Conference resolution 21 (II) called for the establishment of a generalized, non-discriminatory and non-reciprocal system of preferences in favour of exports from developing countries to developed countries**. Generalized preferences imply that preferences would be granted** by all developed countries **to all developing countries** …
>
> 11. **Non-discrimination implies that the same preferences were to be granted to all developing countries**. This concept presented great difficulty from the start, since there was no agreed objective criteria for defining or classifying countries on the basis of relative stages of economic development. The principle of self-election appeared to be the only remaining possibility – i.e., preferences would be granted to any country or territory claiming developing status; however, individual preference-giving countries might decline to accord such preferences on grounds which they

[17] TD/232.

> would hold compelling[18]. An additional proviso was that such *ab initio* exclusion of a particular country would not be based on competitive considerations. As a result each preference-giving country has its own list of beneficiaries and there are thus certain differences among these lists." (emphasis and footnote added)

In the GATT itself, the Technical Note of the Secretariat[19] issued in the process of the adoption of the GSP by the GATT provides:

> "As long ago as 1963 the CONTRACTING PARTIES provided for the study of (a) 'the granting of preferences on selected products by industrialized countries to less-developed countries **as a whole**'. " (emphasis added)

Taking all of the foregoing into consideration, the following were the consequences of the adoption of the 1971 Decision:

- Each developed country Member was authorized to grant preferential tariff treatment to products originating in developing countries in accordance with the GSP without according the same treatment to like products originating in other developed country Members.

- Correspondingly, each developed country Member waived its MFN rights in respect of the preferential tariff treatment granted by other developed country Members to products originating in developing countries in accordance with the GSP.

- Each developing country Member retained its MFN rights in respect of any advantage granted by any other Member to any product originating the territory of any other country.[20]

On all matters relating to the GSP that are relevant in this dispute, the Enabling Clause did not change the 1971 Decision. On the contrary, the Enabling Clause expressly refers to the GSP "as described" in the 1971 Decision.

Thus, with the sole exceptions of (i) "special treatment of the least developed countries among the developing countries in the context of any general or specific measures in favour of developing countries" referred to in paragraph 2(d) of the Enabling Clause and (ii) the limited duration of the 1971 Decision as compared to the indefinite duration of the Enabling Clause, the GSP authorized under the Enabling Clause and the GSP authorized under the 1971 Decision are the same in all material respects.

The only other difference between the 1971 Decision and the Enabling Clause is that the latter deals with the situations referred to in paragraphs 2(b) and 2(c), which are not dealt with in the former. Paragraphs 2(b) and 2 (c) are not an issue on this dispute. Paragraph 2(d) provides further contextual guidance to paragraph 2(a).

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[18] This is not an issue in this dispute as India is a beneficiary under the general arrangements of the EC GSP scheme and is therefore not subject to an *ab initio* exclusion.

[19] See above, footnote 4.

[20] On the assumption that the *ab initio* exclusion of a particular country is authorized under the GSP, in respect of any particular GSP regime, MFN rights are retained by all developing countries which have not been excluded as beneficiaries.

*10. Does the context of the term "non-discriminatory" in footnote 3 of the Enabling Clause include Articles I:1, III:4, X, XIII, XVII and XX of GATT 1994, and Article XVII of GATS? Why or why not?*

**Reply**

India is of the view that the context of the term "non-discriminatory" in footnote 3 of the Enabling Clause includes Article I:1 only, and not Articles III.4, X, XIII, XVII and XX of the GATT 1994 and Article XVII of the GATS.

Paragraph 1 of the Enabling Clause permits developed country Members to accord differential and more favourable treatment to developing countries under any of the situations specified in paragraph 2, "notwithstanding Article I of the [GATT]". There are no references to other articles of the GATT or the GATS.

Footnote 3 is a footnote to paragraph 2(a) which refers to "preferential tariff treatment accorded by developed [country Members] to products originating in developing countries in accordance with the [GSP]". More specifically, footnote 3 is a footnote to "[GSP]", referring to it as that which is "described in [1971 Decision] … relating to the establishment of 'generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries." Preferential tariff treatment accorded by developed country Members to products originating in developing countries without according the same treatment to products originating in other Members is otherwise inconsistent with Article I:1 of the GATT, and not with any other article of the GATT or the GATS.

*11. What is your understanding of the term "generalized" in footnote 3 of the Enabling Clause? What is the difference between this term and the term "non-discriminatory", also in footnote 3?*

**Reply**

The report entitled "Review and evaluation of the generalized system of preferences" dated 9 January 1979[21] issued by the UNCTAD states:

> "10. Conference resolution 21 (II) called for the establishment of a generalized, non-discriminatory and non-reciprocal system of preferences in favour of exports from developing countries to developed countries**. Generalized preferences imply that preferences would be granted by all developed countries to all developing countries** …" (emphasis added)

The foregoing is self-explanatory. Furthermore, the term "generalized" must be construed in relation to the situation prevailing prior to the establishment of the GSP, wherein special preferences were granted by some developed countries to products originating only in *some* developing countries.

In the UNCTAD, the GSP had its beginnings at the First Conference of the UNCTAD in 1964, which resolved:

> "**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 to 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**

[21] TD/232.

> **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."[22] (emphasis supplied)

"Generalized" in relation to the GSP may be construed in several senses. As to the GSP donor countries, the intention was that all developing 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.

*Paragraph 3(c)*

*12. With reference to paragraph 3(c) of the Enabling Clause, what indicators can be used to establish objective criteria responding to development needs of developing countries? In addition to economic indicators, can other types of indicators be used? If so, why and what are they?*

**Reply**

India is of the view that if it is at all necessary to establish objective criteria, it is not for the purpose of according developed country Members granting preferential tariff treatment under the GSP to discriminate (in the "neutral sense") between like products originating in developing countries. Even the preference-giving countries recognised that "special tariff treatment should be given to the exports of *any* country, territory or area claiming developing status" because of "*the difficulty which would otherwise arise of reaching international agreement on objective criteria* to determine relative stages of development**.**"[23]

The "development, financial and trade needs" of developing countries, as referred to in paragraph 3(c) are many and are potentially infinite. All that paragraph 3(c) requires is that the differential and more favourable treatment that is permitted under the Enabling Clause must "respond positively" to those needs. In this regard, developed countries may establish their own objective criteria as to what those needs are in order to determine, for example, the product coverage, the depth of tariff cuts and similar matters. In any event, after having so determined those elements in accordance with their own "objective criteria" the ensuing preferential tariff treatment must be applied without discrimination (in the "neutral sense") to like products originating in developing countries.

*13. Please provide any relevant drafting history on the interpretation of paragraph 3(c).*

**Reply**

India has thus far been unable to obtain any document relating to the drafting history on paragraph 3(c).

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[22] Principle 8 of Recommendation A:I:1 in Final Act of the First United Nations Conference on Trade and Development (Geneva: UNCTAD, Doc E/CONF.46/141, 1964), Vol 1, at 20, cited in Lorand Bartels, "The WTO Enabling Clause and Positive Conditionality in the European Community's GSP program", *Journal of International and Economic Law*, Vol. 6, No.2 (2003), p. 507.

[23] See Report of the Special Group of the Organization for Economic Co-operation and Development (OECD) on Trade with Developing Countries, UNCTAD document TD/56, p.5 (emphasis added).

*14. If paragraph 3(c) of the Enabling Clause requires a collective response to the development needs of developing countries, both in design and modification of a GSP scheme, where within the Enabling Clause is there the possibility for a developed country to modify its scheme so as to take certain products off the preference scheme for individual beneficiary countries or, even, to take individual countries off the preference scheme?*

**Reply**

In India's view, there is nothing in the Enabling Clause that allows a developed country unilaterally to modify its scheme so as to take either certain products off the preferences scheme for an individual *beneficiary* country or individual countries off its preference schemes except with the concurrence of the developing country Member concerned, as permitted by paragraph 7 of the Enabling Clause. In any case, without prejudice to India's position, in India's view, the Panel may look to the second sentence of paragraph 7 of the Enabling Clause for guidance on this issue.

India notes that whether or not a developed country may take individual countries off its preference scheme may also arise in the context of the definition of the term "developing country". India is a developing country and a beneficiary under the general arrangements in the EC GSP regime. Therefore the Panel need not make any ruling on this issue.

As to the definition of "developing country" Part IV 1. of the Agreed Conclusions on "Beneficiaries" provides:

> "1. The Special Committee noted the individual submissions of the preference-giving countries on this subject and the joint position of the countries members of the Organisation for Economic Cooperation and Development as contained in paragraph 13 of the introduction to the substantive documentation containing the preliminary submissions of the developed countries (TD/B/AC.5/24), namely: 'As for beneficiaries, donor countries would in general base themselves on the principle of self-election. With regard to this principle, reference should be made to the relevant paragraphs in document TD/56 i.e., section A in Part I."
>
> Section A, Part I of document TD/56 provides:
>
> "A. Beneficiary countries
>
> Special tariff treatment should be given to the exports of any country, territory or area claiming developing status. This formula would get over the difficulty which would otherwise arise of reaching international agreement on objective criteria to determine relative stages of development.
>
> Individual developed countries might, however, decline to accord special tariff treatment to a particular country claiming developing status on grounds which they hold to be compelling. Such *ab initio* exclusion of a particular country would not be based on competitive considerations (which would have to be dealt with by the procedure discussed under C and G below)…
>
> C. Exceptions
>
> It is probable that developed countries will find it necessary to exclude from the outset from the benefit of the special tariff treatment a limited number of products in respect of which developing countries are already competitive…

> G. Safeguards and Adjustments
>
> Any scheme of special tariff treatment must inevitably include some safeguard or adjustment arrangements to avoid the risks of dislocation of industry and labour.
>
> Safeguards may be either related to the possibility of withdrawal or modification of special tariff treatment when imports of particular products reach certain limits (defined in advance by reference to domestic production, consumption or imports): or they can be related to determination by the developed country concerned of the causing or the threat of injury from such imports.
>
> These questions call for examination with a view to agreement among developed countries. It will be for the countries according special tariff treatment to ensure that safeguards and adjustments are applied in a manner consonant with the principle of equitable sharing of improved access and taking account of the effects of the arrangements on the exports of third countries."

It is not clear whether Part IV 1. of the Agreed Conclusions on "Beneficiaries" is treaty language or whether it is merely descriptive of the position of the preference-giving developed countries.

Assuming that Part IV.1 is treaty language, that portion of the Agreed Conclusions, in relation to TD/56, then confirms that (i) special tariff treatment should be given to **any country claiming developing status** and (ii) individual developed countries might, however, decline to accord special tariff treatment to a particular country claiming developing status on **grounds which they hold to be compelling**, provided that such *ab initio* exclusion of a particular country would not be based on competitive considerations.

However, as stated above, whether or not a developed country may take individual countries off its preference scheme altogether is not an issue in this dispute, as India is a developing country and a beneficiary under the general arrangements in the EC GSP regime.

*15. Does paragraph 3(c) of the Enabling Clause allow a preference-giving country to design different GSP schemes responding, respectively, to development needs, financial needs and trade needs of different developing countries, or would such a reading necessarily result in discrimination among developing countries?*

**Reply**

It is possible to design a different a GSP scheme to respond to the needs of different countries and nevertheless accord like products originating in all developing countries the same tariff treatment.

For example, suppose that products "A", "B" and "C" are produced predominantly or even exclusively in countries "X", "Y" and "Z", and that a preference-giving country determines that countries "X", "Y" and "Z" have specific development, financial and trade needs. Under the GSP, the preference-giving country may grant preferential tariff treatment to products "A", "B" and "C", thus effectively assisting countries "X", "Y", and "Z". But that preferential tariff treatment must likewise be accorded without discrimination to like products originating in other developing countries, thus preserving the equal competitive opportunity of those other developing countries. That those other developing countries may not be producing or exporting products "A", "B" and "C" for the moment is immaterial. The competitive opportunity accorded to all of them are the same.

*16. Does the word "and" in paragraph 3(c) mean "or"? In other words, does the word "and" mean that "development, financial and trade needs" must be considered in a comprehensive manner or may they be considered separately?*

**Reply**

The ordinary meanings of the conjunctives "and" and "or" are different. The text of paragraph 3(c) uses "and". Therefore, in India's view, those needs must be considered in a comprehensive manner.

*17. Developing countries often have different development needs. Take, for example, Indonesia, the Philippines, Morocco, Brazil and Paraguay, each having different development needs. If we agree with the argument of the Andean Community that it is possible to select some beneficiary countries according to certain criteria (paragraph 6 of the Joint Statement of the Andean Community), would it not be a logical consequence of this argument that any developed country could establish a special GSP tariff preference scheme for each individual developing country in responding to that developing country's own development needs? Is this a proper reading of paragraph 3(c) of the Enabling Clause? Why or why not? If not, where do you draw the line in term of a proper interpretation of paragraph 3(c)?*

**Reply**

India is of the view that if the argument of the Andean Community - that it is possible to select some beneficiary countries according to objective criteria- were to be validated, then the logical consequence would be that any developed country Member could establish a special GSP tariff preference scheme for each individual developing country in responding to that developing country's specific development needs. It would not be difficult to identify criteria which apply exclusively or predominantly to a group of pre-selected beneficiaries, even, as in this case, on a *post facto* basis. This is not a proper reading of paragraph 3(c).

Paragraph 3(c) does not authorize discrimination between beneficiaries. It mandates a positive response to needs. A preference-giving country may respond to the specific needs of a specific beneficiary or group of beneficiaries. But once preferential tariff treatment is granted to products originating in those beneficiaries, that treatment must be granted immediately and unconditionally to like products originating in other developing countries.

*18. Are the developed countries free to "graduate" beneficiary developing countries from a GSP scheme? If so, under which paragraph of the Enabling Clause? Please elaborate.*

**Reply**

By "graduate", India understands the question to refer to the total exclusion of beneficiary developing countries from a GSP scheme.

In responding to the Panel's question, India notes that "graduation" is not at issue in this dispute as India is a beneficiary under the EC's general arrangements in the EC GSP regime.

In India's view, there is nothing in the Enabling Clause which allows any preference-giving country to "graduate" any developing country as such. Again, the question might be related to the definition of "developing country". As earlier stated, the principle of "self-election" was earlier recognized – meaning that a "developing country" is one "claiming developing status".[24] Thus, for as long as a developing country remains a beneficiary under a GSP scheme, it cannot be "graduated"

[24] Ibid.

from that scheme. As to whether or not a preference-giving country may deny the claim of a country that it has developing status, the position of preference-giving countries is indicated in TD/56[25] which provides, in relevant part, as follows:

> "It is expected that no country will claim developing status unless there are *bona fide* grounds for it to do so; and that such claim would be relinquished if those grounds ceased to exist."

It would thus seem that developed countries sought to impose a moral obligation ("expected") on each country not to claim developing status unless there are *bona fide* grounds for it to do so; that once those grounds cease to exist, that country has the moral obligation to relinquish that status. However, in India's view, a preference-giving country does not have a legal right (as distinguished from a moral right arising from the moral obligation of a country claiming developing status) to exclude any country claiming developing status for as long as that country maintains that claim.

*19. Paragraph 3(c) of the Enabling Clause refers to "developed contracting parties" and "developing countries" in the plural form. Given the common understanding that developed countries may decide individually whether or not they wish to provide GSP, is it also possible to interpret "developing countries" under paragraph 3(c) as meaning individual developing countries?*

**Reply**

As earlier stated, in India's view, paragraph 3(c) does not authorize developed contracting parties to discriminate between like products originating in developing countries. It merely mandates that "any differential and more favourable treatment" … shall respond positively to the … needs of [the] developing countries".

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. The appropriate 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 _____"[26]. Thus, in this instance, as in the phrase "beneficial to the developing countries" in footnote 3 of the Enabling Clause, "the … needs of the developing countries" means the needs of all developing countries.

The introductory phrase of paragraph 3 of the Enabling Clause refers to "*any* differential and more favourable treatment". In the context of the GSP, such treatment is granted only by developed country Members. The obligation to respond positively to the needs of developing countries is thus imposed equally on each developed contracting party according differential and more favourable treatment.

The term "developing countries" in paragraph 3(c) appears in the phrase "development, financial and trade needs of developing countries". The phrase "development, financial and trade needs of developing countries" are qualified in paragraph 5 of the Enabling Clause as follows: "… the developed countries do not expect developing countries … to make contributions which are inconsistent with their **individual** development, financial and trade needs". (emphasis added). The word "individual" in relation to "needs" does not appear in paragraph 3(c). This permits the

[25] Ibid.

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

conclusion that, when the drafters of the Enabling Clause wanted to refer to "individual … needs" of developing countries, they did so expressly. The fact that they did not refer to "individual" needs in paragraph 3(c) is thus a clear indication that they meant to refer to the collective needs of the developing countries as a whole.

Finally, there is nothing in the Enabling Clause, including paragraph 3 (c), which might reasonably be construed that developing countries waived their MFN rights under Article I. It has always been the intention that the benefits of any GSP scheme shall be extended without discrimination to like products originating in all developing countries.

*Article XX*

*20. Please explain whether Article XX of GATT 1994 is applicable to measures under the Enabling Clause, providing reasons therefor. In the instant case, can Article XX be invoked as an exception to the Enabling Clause or only to Article I:1 of GATT 1994? Please explain.*

**Reply**

The Enabling Clause exempts certain Members adopting certain measures from certain obligations under Article I:1 of the GATT 1994. Article XX of the GATT 1994 exempts a Member adopting certain measures from all of its obligations under the GATT 1994, including Article I:1. Both the Enabling Clause and Article XX of the GATT 1994 are therefore exceptions.

In respect of both the Enabling Clause and Article XX of the GATT 1994, a claimant's cause of action is not the failure to comply with the terms and conditions for the exercise of the exception; rather, it is the defendant's failure to comply with the obligation that would otherwise apply in the absence of the exception.

In India's view, there could be no independent and self-standing claim for the violation of the Enabling Clause. No Member may compel another Member to adopt a measure under the Enabling Clause. In that sense, there are no "positive obligations" under the Enabling Clause. It merely sets out the conditions under which a Member may be exempted from certain aspects of its obligations under Article I:1 of the GATT 1994.

In the same manner, there could be no independent, self-standing claim for a violation of Article XX of the GATT 1994. No Member may compel another Member to adopt a measure under Article XX of the GATT 1994. There are thus also no "positive obligations" under Article XX of the GATT 1994.

Hierarchically, both the Enabling Clause and Article XX of the GATT 1994 are at the same level; they are exemptions from positive obligations, but they are not exemptions from each other.

In India's view therefore, Article XX of the GATT 1994 cannot be invoked as an exception to the Enabling Clause.[27]

[27] If India's recollection is correct, in the course of the meetings held with the parties and third parties on 14-16 May 2003, the EC is likewise of the view that if the Drug Arrangements are not justified under the Enabling Clause, then there would be a violation of Article I:1 of the GATT 1994; that, as a consequence, the assessment of the EC's defence under Article XX of the GATT 1994 must be in the context of its obligations under Article I:1 of the GATT.

*21. Can the Drug Arrangements be characterized as a measure to protect human health under Article XX(b) of GATT 1994 or a measure providing differential and more favourable treatment to developing countries, or both? Please elaborate.*

**Reply**

India finds it extremely difficult to see how preferential tariff treatment could reasonably be regarded as a measure "necessary to protect … human health" for purposes of Article XX(b) of the GATT 1994. The link between the measure – preferential tariff treatment – and the avowed objective – the protection of human health – is based on several assumptions, the principal assumption being that with preferential tariff treatment, drug producers would ultimately switch to the production of other products covered by the preferential tariffs, and that drug traffickers would ultimately switch to trading products covered by preferential tariffs. This assumption disregards the reality that drug production and trafficking are organized crimes, controlled by criminal syndicates motivated by profit alone, and profit beyond the reach of tax authorities.

The EC characterizes the Drug Arrangements as *both* "a measure to protect human health" and "a measure providing differential and more favourable treatment to developing countries". India believes that this simultaneous characterization of the Drug Arrangements is logically contradictory. These two goals are not identical and the measures that must be taken to achieve them are necessarily different.

The range of countries selected under the Drug Arrangements will differ depending on which of these two objectives is invoked. Consider drug trafficking through a country Z where the trafficked drugs do not flow to the EC. Even assuming that the Drug Arrangements might have a positive effect on Z's development and that developed countries can differentiate between products originating in developing countries on objective criteria, including combating drug production and trafficking, the inclusion of country Z under the Drug Arrangements will not have any impact on the health of EC citizens. In such a situation, if the objective is "providing differential and more favourable treatment to developing countries", country Z could be included. However if the objective is to protect the human health of EC citizens, there would be no basis to include country Z. The *a priori* exclusion of developed countries could be justified if the objective is to assist developing countries. However, it makes no sense when the objective is the protection of health because certain drugs are manufactured in developed countries. Furthermore, when the objective is to respond to development needs, countries with drug *problems* would need to be given preferences; when the objective is the protection of health, countries with proper drug *policies* would need to be selected.

*22. Assume for the purpose of this question that the Enabling Clause is in the nature of an exception to Article 1:1 of GATT 1994. If a measure is not consistent with the Enabling Clause, is it nevertheless legally possible to invoke another exception, e.g., Article XX of GATT 1994, to justify such measure in pursuit of a different policy objective? What are the potential systemic implications of seeking – and even cumulating – justification for a measure under multiple exceptions provisions?*

**Reply**

Theoretically, it is possible for a respondent to invoke one exception as its principal defence and a second exception as an alternative defence. However, in the present case, the EC bases its defence under one exception on the *factual* claim that the measure at issue responds to the needs of developing countries and its defence under the other exception on the *factual* claim that the same measure responds to its own health needs. For the reasons stated above, these two factual claims are contradictory.

*23. Do the criteria under Article XX of GATT 1994 change when applied to a measure under the Enabling Clause? Why or why not? Please elaborate.*

**Reply**

The criteria under Article XX of the GATT vary with the subparagraph under which justification is sought. However, the criteria in each subparagraph do not vary depending on the nature of the measure at issue.

*24. How can the Drug Arrangements meet the test of "necessary" in Article XX(b) of GATT 1994, in that they are not applied to all countries, including to developed countries?*

**Reply**

The Drug Arrangements do not include all countries with drug-problems. Myanmar and Thailand, for instance, are excluded even though they have serious drug problems. So are all developed countries and all least-developed countries, irrespective of their drug problems. The EC has failed to explain why tariff preferences for products from the twelve beneficiary countries are "necessary" within the meaning of Article XX(b) while similar preferences for products from other countries with drug-related problems were not deemed to be "necessary".

*25. Are the tariff preferences provided under the Drug Arrangements the "least trade-restrictive measure" available to achieve the EC's health policy objective? Given the variety of measures that are being applied by the many signatories to the three UN conventions against the illicit traffic in drugs, why are the Drug Arrangements the least trade-restrictive measures available?*

**Reply**

As pointed out by India in its first submission, the EC has in the past accorded financial assistance to countries with drug-related problems and could do so in future.[28] It also has concluded arrangements for administrative cooperation with countries that have drug-problems. Measures that would not restrict trade at all are thus available to the EC to pursue the policy goal that it alleges to pursue through trade preferences.

*General*

*26. Was the Enabling Clause a part of the results of the overall balance of commitments and concessions made during the Tokyo Round negotiations? If so, does this fact have any bearing on the interpretation of the Enabling Clause?*

**Reply**

India believes that whether or not the Enabling Clause is "part of the results of the overall balance of commitments and concessions made during the Tokyo Round negotiations" does not have a bearing on the interpretation of the Enabling Clause. In either case, its terms must still be interpreted in accordance with the customary rules of interpretation of public international law. However, the fact that the Enabling Clause was part of a package of concessions call for a particularly thorough analysis of the scope of the concessions that the developing countries made under it.

According to the text of the Enabling Clause, the developing countries renounced their right to MFN treatment in relation to only two benefits: according to paragraph 2(c), the benefits accorded by them to other developing countries in the framework of tariff arrangements between them and,

[28] *See also* EC, First Written Submission, paras. 11, 191.

according to paragraph 2(d) the benefits accorded to the least developed countries. The arguments of the EC imply that the developing countries made an additional concession under paragraph 2(a), namely that they renounced their right to MFN treatment in respect of benefits accorded by developed countries to other developing countries. However, this provision refers only to preferences accorded by developed to developing countries, which implies that the Members that are renouncing their MFN rights under paragraph 2(a) are exclusively the developed countries to whom the GSP benefits are denied. The EC thus claims that the developing countries made a concession during the Tokyo Round to which they never agreed.

*27. Why did the EC request a waiver for the Drug Arrangements? Why was the waiver not granted?*

**Reply**

In its request for a waiver,[29] the EC states:

> "Because the [Drug Arrangements] are only available to imports originating in those Members, a waiver from the provisions of paragraph 1 of Article I of the GATT 1994 appears necessary before they can effectively enter into force for reasons of legal certainty."

That the EC requested for a waiver in the first place indicates that, as of the promulgation of the Regulation the EC did not believe, as it *post facto* insists today, that the Drug Arrangements are justified under the Enabling Clause. The EC knew that it had to obtain a waiver before the Drug Arrangements entered into force. Otherwise, it would not have requested a waiver. Waivers are not a matter of routine at the WTO and are not merely requested for reasons of "legal certainty".

The EC's request for waiver was first discussed at the meeting of the Council for Trade in Goods held on 2 November 2001. The Minutes of that meeting contain the following response of the representative of the European Communities to a query from the delegation of Sri Lanka as to why the Drug Arrangements were not notified under the Enabling Clause:[30]

> "2.14 … On the more general issue of why the European Communities had not used the Enabling Clause, he had certain doubts as to the possibility of using it as a legal basis and this is why the European Communities had made a request for a waiver under Article I."

The foregoing clearly indicate that prior to 5 March 2002, when India requested consultations in this dispute, the EC regarded the waiver as a necessary precondition to the (legitimate) implementation of the Drug Arrangements, and that it did not regard the Enabling Clause as a justification for the Drug Arrangements.

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[29] "Request for a WTO Waiver" (G/C/W/328) dated 24 October 2001.

[30] Paragraph 4 of the Enabling Clause provides:

"Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:

*(a)* notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;

*(b)* afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties."

Waivers are granted subject to conditions and negotiations with other Members on the nature of these conditions are an intrinsic part of the negotiating process. The reason why the waiver has not been granted is that the EC has failed to negotiate conditions that address the concerns of other Members, including India.

*28. Does the term "non-reciprocal" in the 1971 Decision, referred to in footnote 1 of the 1979 Decision, mean that preferential tariff treatment should be extended by developed countries to developing countries without condition? Why or why not?*

**Reply**

India notes that it has not made any claim that the EC has violated the requirement that preferential tariff treatment under the GSP must be "non-reciprocal". Therefore, in India's view, the Panel need not address this issue to resolve the dispute.

The term "non-reciprocal" appears in the Preamble to the 1971 Decision, referring to "mutually acceptable arrangements … drawn up in the UNCTAD concerning the establishment of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries …".

It is therefore appropriate to refer to how "non-reciprocal" was understood at the UNCTAD. The report entitled "Review and evaluation of the generalized system of preferences" dated 9 January 1979[31] issued by the UNCTAD states:

> "13. The third principle of non-reciprocity is what makes GSP stand out as a land-mark in trade relations between developed and developing countries. For the first time, developed countries agreed to make special tariff concessions to developing countries without seeking reciprocity. This deviation from the MFN principle was a tacit recognition of the need to apply special and more favourable treatment to countries at lower levels of economic development. The impact of this change of attitude has been felt even outside the GSP, in particular in the Lomé Convention, which also provides for non-reciprocity.
>
> 14. It is clear, however, that under the GSP the principle of non-reciprocity has not been fully observed since, as was seen above, a number of developing countries, must meet certain conditions before they can become eligible for preferences under some schemes. The conditions set out for such eligibility amount to implicit reciprocity. In this connection it may be recalled that the Conference, in resolution 96(IV), agreed that the GSP should not be used "as an instrument of political or economic coercion or of retaliation against developing countries, including those that have adopted or may adopt, singly or jointly, policies aimed at safeguarding natural resources."
>
> The First Conference of the UNCTAD resolved:
>
> "… However, developed countries should grant concessions to all developing countries and to 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. … "

[31] TD/232.

Thus the term "non-reciprocal" was construed in UNCTAD to apply to both concessions and conditions. Accordingly, India is of the view that preferential tariff treatment under the GSP should be extended by developed countries to developing countries without condition.

**To India**

*Legal Function*

*1. In its structure and legal function, what distinguishes an exception from a positive/"autonomous" right? Please elaborate on why, in your view (India, para. 53), the Enabling Clause is in the nature of an exception from a fundamental principle of the GATT.*

**Reply**

Please see answers to questions 3,5 and 8 addressed by the Panel to both parties.

*2. Do you agree/disagree with the EC's explanation (EC, para. 49) that the term "unconditional" in the context of MFN clauses refers to a particular type of condition requiring reciprocal concessions or compensation in return for MFN treatment? Please provide a detailed response.*

**Reply**

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".[32] 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" 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."[33] (emphasis added)

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.*

Thus, the position of the EC that the requirement set out in Article I:1 that MFN treatment be "unconditional" merely establishes the obligation not to demand counter-concessions has no support in GATT and WTO jurisprudence.

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

[33]Panel Report, *Canada – Certain Measures Affecting the Automotive Industry* ("*Canada – Autos*"), WT/DS139/R, WT/DS142/R, adopted 19 June 2000, para. 10.23.

*3. Please comment on the EC's statement (EC, para. 28) that India's reading of paragraph 1 of the Enabling Clause, to the effect that it requires providing GSP to all developing countries, would render the term "non-discriminatory" in footnote 3 of the Enabling Clause redundant?*

**Reply**

The term "non-discriminatory" appears only once in the Enabling Clause, in footnote 3, which provides:

> "As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries."

Footnote 3 is a footnote to the phrase "Generalized System of Preferences" in paragraph 2(a) which, in turn, provides:

> "2. The provisions of paragraph 1 shall apply to the following:
>
> (a) Preferential tariff treatment accorded by developed [country Members] to products originating in developing countries in accordance with the Generalized System of Preferences." (footnotes omitted)

It might be noted that prior to the 1971 Decision and the Enabling Clause, the GSP was adopted at the UNCTAD. "Generalized, non-reciprocal and non-discriminatory" is the nomenclature adopted at the UNCTAD. Footnote 3 merely describes what the GSP is, with reference to the 1971 Decision which, in turn, refers to the "mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries". In this context, "non-discriminatory" is used as part of a compound phrase to *describe* what was brought over from the UNCTAD, then to the GATT, and finally to the WTO. The word "non-discriminatory" could not have been omitted from the description, as the omission would have rendered the description inaccurate. Thus, "non-discriminatory" in footnote 3 is not redundant.

*4. Could you please indicate any support from the negotiation history to confirm the argument that the Enabling Clause waived only the MFN treatment to developed countries? Please provide any such materials.*

**Reply**

As of the date of the submission of this reply, India has been unable to find any document relevant to the negotiating history of the Enabling Clause.

*Non-discriminatory*

*5. How does India respond to the EC's argument (EC, para. 195) that the Drug Arrangements have not displaced imports from other developing countries?*

**Reply**

India reiterates that the WTO legal system focuses on conditions of competition for WTO Members, not trade results. India's claim is that the Drug Arrangements are inconsistent with Article I:1 of the GATT 1994. All that India has to establish therefore are the legal and factual elements of its claim under that article. It does not need to establish adverse trade effects. As a matter of fact, since the WTO legal system assures equality of conditions of competition, a Member

does not have to wait until adverse trade effects occur before initiating a dispute on a measure that alters conditions of competition. In this regard, Article 3:8 of the DSU provides:

> "In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge."

There is no case in GATT or WTO jurisprudence in which a party whose measure has been declared to be inconsistent with a covered agreement has successfully defended itself on the basis that there are no adverse trade effects (or no nullification and impairment) as a result of the operation of the measure declared to be inconsistent.

In this regard, the EC asserts that "between 1990 and 2001, imports from India under the EC's GSP increased from €2.011 million to €5.336 million", and that "during that period, India's share of all imports under the EC's GSP increased from 9.1% to 12%."[34] Even assuming that this is correct, this assertion is irrelevant as it relates to the EC's GSP as a whole. The increase in imports under the EC GSP, whether in absolute amounts or in terms of percentage share, does not establish that there have been no adverse trade effects on India as a result of the operation of the Drug Arrangements.

Furthermore, on the assumption that the EC is correct that there have been no adverse trade effects to India (and other developing countries) as a result of the operation of the Drug Arrangements, then the EC could very well act in a WTO-consistent manner by extending the benefits under the Drug Arrangements to all developing countries. Under the EC's logic, such extension would, conversely, not have any adverse trade effects on the twelve beneficiaries under the Drug Arrangements.

In any event, the *quantification* of adverse trade effects comes, if at all, at a later stage in WTO dispute settlement proceedings – that is, when the party whose measure has been ruled contrary to its obligations does not bring its measure into conformity and the prevailing party requests for authorization to suspend concessions or other obligations. That is the appropriate time to quantify the extent of the adverse trade effects, as the level of suspension is commensurate to the level of nullification and impairment.

At the outset, it is important to understand the changes in the conditions of competition caused by the differential tariff treatment given to Pakistan on products which are eligible for GSP benefits in the EC market in order to estimate the impact of the Drug Arrangements on imports from various supplying countries. Accordingly, the table below gives the differential tariff treatment for some of the main products imported from India and Pakistan that compete in the EC market.

[34] EC, First Written Submission, para. 4.

EU TARIFF ON SELECTED PRODUCTS COVERED UNDER
CHAPTER 61 TO 63

| CN CODE | PRODUCT | MFN RATE | APPLICABLE TO INDIA AT 20% GSP CONCESSION | APPLICABLE TO PAKISTAN (AT 100% GSP CONCESSION) |
|---|---|---|---|---|
| 6109 10 00 | T-Shirts | 12 | 9.6 | 0 |
| 6203 42 | Trousers | 12.4 | 9.92 | 0 |
| 6205 20 00 | Gents Shirts | 12 | 9.6 | 0 |
| 6206 30 00 | Ladies Blouses | 12.4 | 9.92 | 0 |
| 6302 10 10 | Bed Linen | 12 | 9.6 | 0 |

*Source*: *Official Journal of the EU dated 23rd October 2001 – Commission Regulation (EC) No. 2031/2001 of 6th August 2001*

The current Drug Arrangements have been in place since 1 January 2002, thus for barely 16 months. But clear trends have already become visible demonstrating the diversion of trade away from and amongst the suppliers in the developing countries.

An analysis of the statement of EC imports in items covered by Chapters 61-63 (on a cumulative basis) shows that Pakistan has increased its imports in these items by 26.81% in quantity and 19.54% in value. Imports from India, on the other hand, declined by (-) 6.14% in quantity and marginally increased by 1.62% in value.

A comparison with the data on imports from China and Turkey during this period shows that while China increased its imports by 2.28% in quantity, in value terms it increased by 10.23%. Correspondingly, Turkey showed an increase of 11% in terms of quantity and 15% in terms of value.

While the imports from Turkey should be excluded as it already enjoys the benefits of duty free import on account of its customs union with EC, the increase in the case of China is only marginal in quantitative terms considering the fact that imports in the year 2001 over the year 2000 was 62.95%. China already has a very high level of exports accounting for almost 21.47% of the share in Extra EU Imports and is as such an isolated case.

On the other hand, a decline of (-) 24.4% in quantity of imports from extra-EC sources and corresponding increase in imports of 25.8% from Pakistan, shows that even at the time of contraction in demand, Pakistan has increased its import share substantially; even more than China and Turkey.

Other developing countries have also lost market share. However, some of them have shown a growth mainly by lowering their price realisation.

In view of the above, it is not correct on the part of EC to state that the Drug Arrangement has not resulted in displacement of trade from other developing countries.

*6. 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 such reading would effectively render paragraph 3(c) of the Enabling Clause a nullity (EC, para. 71). Please comment on this argument.*

**Reply**

The EC's argument is based on a wrong premise, namely that the term "development, financial and trade needs of [the][35] 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 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.

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.

*7. Recalling the respective arguments of the two parties on the ordinary meaning of "discrimination" (India, para. 57; EC, paras. 66-67), on what basis would India exclude from a definition of "discrimination" the notion of prejudicial or unjust distinction?*

**Reply**

India does not dispute that the term "discrimination" as used in other contexts is capable of referring to the notions of *prejudicial* or *unjust* distinction. However, in context of its use in the Enabling Clause this is clearly not the relevant meaning of "discrimination".

The meaning of the term "non-discriminatory" as used in Paragraph 2(a) of the Enabling Clause must be determined in accordance with the principles of interpretation contained in the Vienna Convention, that is in accordance with ordinary terms of the GATT 1994 in their context and in the light of its objective and purpose. On the basis of these principles the Appellate Body found:

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

[35] 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.

> to all imports of like products, except when these obligations are specifically waived or are otherwise not applicable as a result of the operation of specific provisions of the GATT 1994."[36]

The Enabling Clause is an integral part of the GATT 1994. 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 states otherwise.

The GSP covered by paragraph 2(a) of the Enabling Clause deals with preferential tariff treatment. "Discriminatory tariff" is defined as "a tariff containing duties that are applied unequally to different countries or manufacturers.". A "non-discriminatory tariff" in the context of the Enabling Clause is therefore a tariff containing duties that are applied equally to different developing countries. By definition therefore, as it applies to tariffs, unequal treatment is "discrimination".

The basic purpose of the WTO legal system is to protect conditions of competition, not trade volumes. Within that system, a tariff distinction should therefore be deemed prejudicial merely because it denies equality in competitive opportunities.

Furthermore the term "non-discriminatory" in footnote 3 refers to the 1971 Decision, which in turn makes clear that the term is derived from the mutually acceptable arrangements drawn up in the UNCTAD. There is no doubt that, in the context of the GSP agreed in the UNCTAD, "non-discriminatory" refers to non-differentiation between developing countries *per* se, not to GSP schemes which differentiate between developing countries "prejudicially" or "unjustly" in accordance with criteria unilaterally determined by the GSP donor country. (please see answer to question 9 addressed by the Panel to both parties ).

The definition of the term "non-discrimination" in the GATT 1994 consistently refers to affording equality of competitive opportunities to like products originating in different countries in respect of tariff measures. This is done by requiring that equal tariff treatment be applied to all. In the present case, the EC utilizes a definition of "non-discrimination" precisely to diminish the competitive opportunities afforded to India and other developing countries excluded from the Drug Arrangements.

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 irresolvable distributional conflicts, 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 ability of developing countries to participate in multilateral trade negotiations.

[36] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*"), WT/DS27/AB/R, adopted 25 September 1997, paras. 190-191.

*Paragraph 3(c)*

*8. What is your understanding of paragraph 3(c) of the Enabling Clause? Does it permit the design and modification of GSP in response to development needs of individual developing countries? In what way, and to what extent?*

**Reply**

Paragraph 3(c) of the Enabling Clause applies after measures consistent with paragraph 2 are taken by developed countries. As such it is a further requirement that measures permitted under the sub-clauses of paragraph 2 must meet.

The text of paragraph 3(c) refers to the "financial, trade and development needs of [the][37] developing countries", which refers to the needs of all developing countries. Where the drafters of the Enabling Clause wished to refer to the individual needs of developing countries they did so explicitly – as in paragraph 5 of the Enabling Clause which refers to " the *individual* development, financial and trade needs" of developing countries, and paragraph 6 of the Enabling Clause which refers to the "*particular* development, financial and trade needs of the least developed countries". Further, paragraph 8 of the Enabling Clause also explicitly singles out the specific needs of the category of least developing countries when it refers to their "*special* economic situation and their development, financial and trade needs".

Moreover, the consequence of accepting the EC's argument that paragraph 3(c) refers to the development needs of developing countries considered individually would be that the general arrangements under the EC GSP scheme and almost all other contemporary GSP schemes would be rendered illegal. This is because they treat all developing countries equally in terms of the tariff cuts made available despite the obvious fact that the individual development needs of developing countries differ considerably. Hence they would be inconsistent with paragraph 3(c) as interpreted by the EC.

*9. Does paragraph 3(c) of the Enabling Clause require developed countries to respond to development needs of developing countries collectively? If so, in what way can such collective response to development needs take into account the different level of development needs of different developing countries? Does it permit exclusion, i.e., "graduation", from GSP of (i) certain products imported from certain countries, or (ii) individual countries?*

**Reply**

Please see above: (i) answer to question 8 addressed by the Panel to India (ii) answer to question 14 addressed by the Panel to both parties (iii) answer to question 15 addressed by the Panel to both parties and (iv) answer to question 18 addressed by the Panel to both parties.

*General*

*10. Did India ask to be included in the EC's Drug Arrangements? If so, what materials did India provide to the EC in support of its request? Please provide all such materials to the Panel.*

**Reply**

India requests the Panel to note that there is no provision in the relevant EC regulation which allows non-beneficiary countries to apply for inclusion in the Drug Arrangements. The EC has selectively included countries under the special arrangement to combat drug trafficking, the precise

[37] Please see reply to question 9 from the Panel to both parties on the inclusion of "the" in the equally-authentic Spanish and French texts.

rationale for which is not clear. Nevertheless, India had highlighted to the EC its record in combating the drug menace and had pointed out that various international organizations had also praised India's efforts in this direction. In view of this, India believed that it was also eligible for concessions under the 'Drug Arrangements'. However, the EC had conveyed that there was no formal procedure for admitting members for concessions under the 'Drug Arrangements' and that the possibility of India being extended similar concessions appeared to be closed for the time being. The EC added that it would be possible to consider other potential beneficiaries, but only after 2004.

*11. Is there an incompatibility between India's desire to be included in the Drug Arrangements and its legal position that the Enabling Clause only allows developed countries to give GSP tariff preferences to all developing countries non-discriminatorily?*

**Reply**

There is no incompatibility. The EC requested for a waiver. In requests for waivers, it is routine and certainly not unusual that a Member which determines that its interests will be adversely affected by the implementation of the measure subject of the request (i) manifest its concern to the Member requesting for the waiver and, (ii) seek compensation that addresses its concerns. India had determined that its concerns could be addressed by its inclusion as a beneficiary under the Drug Arrangements. Other Members are free to determine what compensation to seek in exchange for their consent to a waiver. Even if India were to be included as a beneficiary under the Drug Arrangements a waiver would still be required.

*12. In India's view, are the Drug Arrangements inconsistent with the Enabling Clause regardless of the manner in which they have been applied?*

**Reply**

In India's view, the Drug Arrangements are inconsistent with the Enabling Clause regardless of the manner in which they have been applied. They could be rendered GATT-consistent only through a waiver.

*13. What adverse effects, if any, has India suffered as a result of being excluded from the Drug Arrangements? Could India provide relevant documentation and data on the extent of any such adverse effects.*

**Reply**

India reiterates that the WTO legal system focuses on conditions of competition for WTO Members, not trade results. (Please see reply to question 5 addressed by the Panel to India.)

India and Pakistan – competitive in same products

India and Pakistan have stark similarities in their product ranges, they cater to the same market segment and even have common buyers. Both countries have a strong raw material base in cottons, low conversion costs, vertical production units, comparable unit values and bilateral quotas in the same range of products. The EC even initiated trade defence measures simultaneously for both the countries for cotton bed linen falling under Chapter 63.

Indeed the EC, while justifying the cumulative assessment of the effects of dumped imports on injury suffered by the community industry at the time of imposing provisional anti-dumping duties on imports of cotton type bed linen originating in India, Pakistan and Egypt (Commission Regulation EC No. 1069/97 dated 12th June 1997), stated in para. 65 as follows :

> "In accordance with the terms of Article 3 (4) (b), the conditions of competition between imported products, and between imported products and the like Community products, were analysed. It was found that the imports compete directly with each other with the like Community product, and that in particular a number of large purchasers of bed linen buy both from the Community industry and from the countries concerned. While there are variations in the proportions by type and destination of exports from each of the countries concerned, it was found that products from each exporting country were substitutable and competed with each other with the products of Community producers on the Community market".

Competitiveness of India compared to Pakistan –effects of the Drug Arrangements

The competitiveness of the suppliers of products like clothing and made ups have been adversely affected by the tariff advantage conferred on Pakistan by the EC under the Drug Arrangements. This becomes clear from the fact that while Pakistan increased its imports for items covered by Chapter 61-63 by 19.54% in value and 26.81% in quantity in the year 2002 over the year 2001, imports from India on the other hand increased by 1.62% in terms of value but declined by (-) 6.14% in terms of quantity during the same period. This trend is not evident in textile Chapters 50-60 where both India and Pakistan have been graduated and Pakistan does not have tariff advantages under the Drug Arrangements.

A further analysis of the trade data shows that for the calendar years 1997-2000, in respect of products falling under Chapter 61, India's exports grew by 73%, while Pakistan's exports increased from Euros 228.30 million to Euros 250.55 million, i.e. only by 9.65%. There has been a this trend during the year 2002. While Pakistan's exports have increased by reversal of 14.31% during the year 2002 compared to year 2001, India's exports have increased only by 0.64%. India's percentage share has also gone down for the first time after 1997 while Pakistan's share has gone up for the first time after the year 1997, i.e. only after the duty free access provided to it under the Drug Arrangements.

As regards Chapter 62, it may be pointed out that while imports from India grew by 27.06% in terms of quantity in the year 2001 they declined in the year 2002 by (-) 0.04%. On the other hand, imports from Pakistan which increased by 13.07% in terms of quantity in the year 2001, recorded a further phenomenal increase of almost 30% in the year 2002 – an increase primarily on account of the zero duty benefit under the Drug Arrangements.

As regards chapter 63 products, India's exports were steadily rising from the year 1997 to the year 2001. For the first time they saw a drop in the year 2002 and exports were only valued at 1510.70 million during the year 2002. In the case of Pakistan, on the other hand, there has been a sharp growth during 2002. Exports have increased from Euros 499.59 million in 2001 to Euros 623.84 million in the year 2002 – a growth of around 25%. India's overall share in terms of value fell sharply from 12.41% in the year 2001 to 10.61% in year 2002, while Pakistan's share increased from 10.83% in year 2001 to 13.05% in year 2002.

Change in competition not explained by increase in quotas alone

A question is sometimes raised that Pakistan's exports to EU have increased due to increase in quota levels. There is some increase in exports due to increase in quotas but the data regarding increase in exports does not support the view that increase in exports is only due to increase in quotas. For instance, in Category 7 (Ladies Blouses) and Category 8 (Gents Shirts), quotas were never the issue. The levels are always available for use. Tariffs made the difference and Pakistan increased its exports to EU by 107% in Category 7 (by 3.2 million pieces) and by 110% in Category 8 (by 1.4 million pieces) in the year 2002 compared to the year 2001.

Effect on Unit value realization

Apart from increases in exports from Pakistan, the duty free regime under the Drug Arrangements has also affected Indian exporters in terms of product pricing. For example, the Table below gives the pricing structure for a standard quality, bleached cotton bed sheet of dimensions 20/20 60/60 "70x108" supplied to UK from India & Pakistan:

| Sr.No. | | India (£) | Pakistan (£) |
|---|---|---|---|
| 1. | CIF value/price | £ 1.62 | £1.70 |
| 2. | Duty rate | 9.6% | Nil |
| 3. | Duty charged | £0.16 | Nil |
| 4. | Total CIF + duty amount | £1.78 | £ 1.70 |

From the above, it can be observed that a producer in Pakistan is not only able to realize a better price than the corresponding Indian supplier, he is also in a position to supply the product cheaper to the customer in the European Union primarily on account of the tariff concession.

The tariff preferences available to Pakistan under the Drug Arrangements have also affected the unit value realization for comparable products being sourced from the two countries for the above-mentioned reasons. Thus for example in Cat 4 (T shirts) and Cat 5 (Pullovers) where both India and Pakistan have comparable levels of quota, the average unit price in case of India has increased from US$2.52 in 2001 to US$2.55 in 2002. In the case of Pakistan, it has increased from US$1.78 in the year 2001 to US$1.89 in the year 2002. In the case of Cat 5, while the unit value realization in the case of India has gone down from US$3.59 to US$3.54 in the case of Pakistan, it has gone up from US$3.73 to US$4.08. Pakistan is thus able to increase its unit price while at the same times it manages to sell the product at a cheaper price owing primarily to the duty advantage of approximately 9.6%.

Correspondence with importers

The change in competitive conditions is also evidenced in the messages and faxes received by Indian exporters from their importers in EC. Indian exporters have been receiving letters from their buyers regarding shifting of their sourcing from India to Pakistan in view of the duty concessions extended to the latter by EC. In this connection, some of the communications received from importers based in Denmark, Sweden, UK and Italy will be provided in India's rebuttal submission.

The feedback from Indian exporters participating in various overseas buyer-seller meets / exhibitions corroborates the large-scale shift of orders in favour of Pakistan in respect of those textile items in which India has traditionally enjoyed higher market share and growth in the past. For instances, at the HEIMTEXTIL fair held in Germany 2002, exporters from Pakistan displayed banners proclaiming the price advantage on account of duty free access for made up articles originating from Pakistan. Consequently, all the Indian participants reported low business turnout than the normal while Pakistani stalls received overwhelming response from the buyers.

**ANNEX B-2**

Replies of the European Communities to Questions from the Panel
after the First Panel Meeting

**To both parties**

Question 1

*Could your delegation please indicate whether there is anything you can report in relation to the possible settlement of the matter in dispute?*

1. The EC has made clear to India in a number of occasions that it considers that it owes no "compensation" to India for the implementation of the Drug Arrangements. The EC's GSP system is the most generous in the world. India is the second largest beneficiary of the EC's GSP. India's exports to the EC under the GSP have increased from 2 to more than 6 billion Euros since the introduction of the Drug Arrangements.

Question 2

*Did the negotiators of the Enabling Clause intend its legal function to be different from the 1971 Decision? Are there different legal bases for the two decisions? Please elaborate. What materials can you point to in support of this view? Please provide any such materials.*

2. The 1971 Decision and the Enabling Clause have both a different legal base and a different legal function within the GATT.

3. The 1971 Decision is a waiver. Although it does not mention expressly Article XXV:5 of the 1947 GATT, it was adopted on the basis of a communication from the prospective donor countries applying for a waiver in accordance with that provision.[1] Furthermore, that provision was also mentioned by the sponsors during the subsequent debate by the GATT Council.[2]

4. The 1971 Decision was temporary (10 years). Also, in accordance with the standard formula used in waivers, the 1971 Decision did not exclude completely the application of the waived provision (Article I:1 of the GATT), but only "to the extent necessary".

5. The developing countries were unsatisfied with the 1971 Decision. They considered the waiver approach unwarranted and unsuitable for the GSP because it was temporary and failed to recognise that, following the insertion of Part IV in the GATT, special and differential treatment for developing countries had become one of the basic principles of the GATT.[3] Thus, the representative of Uruguay at the GATT council meeting where the 1971 Decision was taken noted that

> The use of Article XXV of the General Agreement in the present case was very debatable. The concept in Article XXV of exceptional circumstances was absolutely different from the present situation … [T]he objectives which were taken into account in this draft decision were the objectives of the General Agreement since the entry

[1] C/W/178 cited in C/M/69, p. 1. (Exhibit CR–1).
[2] C/M/69, p.1.
[3] See the criticisms addressed by Hector Gross Espiell, Ambassador of Uruguay before the GATT, to the waiver approach in *GATT: Accommodating Generalized Preferences*, Journal of World Trade Law, Vol. 8, No. 4, 1974, p. 341. See also, Abdulqawi Yusuf, *Legal Aspects of Trade Preferences for Developing Countries*, Martinus Nijhof, 1982, p. 90.

> into force of Part IV. Reference to Part IV could not be left aside because the objectives of Part IV, according to which international trade should be an instrument of progress and development in favour of developing countries, were embodied in the draft decision. … [T]he use of a waiver was not the right approach to the situation. He would have preferred an interpretative statement based on Part IV which would have expressly indicated that nothing in the General Agreement and consequently in Article I prevented the implementation of the Generalised System of Preferences.[4]

6. When the Tokyo Round of Multilateral Trade Negotiations was launched in 1973, the Declaration of Ministers called for consideration to be given "to improvements in the international framework for the conduct of world trade".[5] Consequently, the Trade Negotiations Committee of the Tokyo Round established in November 1976 a "Framework Group" which would seek

> To negotiate improvements in the international framework for the conduct of world trade, particularly with respect to trade between developed and developing countries and differential and more favourable treatment to be adopted in such trade.[6]

7. One of the major achievements of that group was the Enabling Clause. Unlike the 1971 Decision, the Enabling Clause is not a waiver.[7] It is not based on Article XXV:2. Rather, it is a *sui generis* decision adopted by the CONTRACTING PARTIES to GATT 1947 within the framework of the Tokyo Round Multilateral Trade Negotiations, which is not based expressly on any provision of the GATT 1947. Also, unlike the 1971 Decision, the Enabling Clause is permanent.

8. Furthermore, unlike the 1971 Decision, the Enabling Clause does not say that Members may derogate from Article I:1 to "the extent necessary". Rather, it enables Members to grant differential and more favourable treatment "notwithstanding Article I:1" and, therefore, excludes completely the application of that provision.

Question 3

*Do you agree that in order to determine whether a particular provision lays down a positive right or an exception, it is necessary to examine its legal function in the context of the treaty as a whole?*

9. Yes.

*If yes, why so, and what are the implications in the present dispute?*

10. The suggested approach is in accordance with the basic rule of treaty interpretation codified in Article 31.1 of the *Vienna Convention on the Law of the Treaties* (the "Vienna Convention"), which requires to interpret the terms of a treaty "in their context" and "in the light of the object and purpose" of the treaty.

11. The Enabling Clause is one of the most important forms of "special and differential treatment" for developing countries under the WTO Agreement. In turn, "special and differential treatment" is the main instrument to achieve one of the basic objects and purposes of the WTO

[4] C/M/69, pp. 8-9.

[5] Declaration of Ministers Approved at Tokyo on 14 September 1973, GATT Doc. Min. (73) 1, at para. 9.

[6] GATT Doc. MTN/17 of 18 November 1976, para. 1.

[7] The Enabling Clause is not included in the list of waivers established by the Ministerial Conference pursuant to the footnote to Annex IA, Section on GATT 1994, sub-paragraph 1(b)(iii) of the WTO Agreement (WT/L/3).

Agreement: "to ensure that developing countries … secure a share in the growth in international trade commensurate with the needs of their economic development".[8]

12. The provisions according "special and differential treatment" are not mere deviations or derogations from the rules applicable among developed countries. Rather, they constitute a comprehensive set of alternative rules which co-exist, side-by-side and on an equal level, with such rules. For that reason, as illustrated by the ruling of the Appellate Body in *Brazil – Aircraft*[9], "special and differential treatment" cannot be characterised as a mere "affirmative defence" for the purposes of dispute settlement.[10]

Question 4

*With reference to paragraph 1(b)(iv) of GATT 1994, and recognizing that the Enabling Clause was adopted by the GATT Contracting Parties at the end of the Tokyo Round, is it your understanding that the Enabling Clause is/is not an "other decision of the Contracting Parties to GATT 1947"? Is it a part of GATT 1994? Please explain.*

13. The Enabling Clause is an "other decision of the CONTRACTING PARTIES to GATT 1947" within the meaning of subparagraph 1(b)(iv) of the GATT 1994 and, as such, is part of the GATT 1994.

14. The introductory sentence of the Enabling Clause reads as follows:

> Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES *decide* as follows:[11]

15. Therefore, it is beyond question, first, that the Enabling Clause is a "decision" and, second, that it was taken by the CONTRACTING PARTIES to GATT 1947.

16. As explained, the Enabling Decision is not one of the waiver decisions taken by the CONTRACTING PARTIES to GATT 1947 under Article XXV:5 of the GATT 1947 referred to in subparagraph 1(b)(iii) of the GATT 1994. Therefore, it falls within the residual category of "other decisions of the CONTRACTING PARTIES to GATT 1947" described in paragraph 1(b)(iv).

Question 5

*Assuming that the Enabling Clause is not a waiver, is it an exception or an "autonomous" right? In either case, what are the differences in the legal consequences of characterizing the Enabling Clause as an exception or an autonomous right? Are there legal consequences beyond allocation of the burden of proof?*

17. For the reasons explained above, the Enabling Clause is not an "affirmative defence" but rather an autonomous right. As noted in the EC's First Submission[12], the fact that the Enabling Clause is not an "affirmative defence" has two important implications for this dispute:

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[8] Cf. second recital of the Preamble to the WTO Agreement.

[9] Appellate Body report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R ("*Brazil – Aircraft*"), para. 140.

[10] EC's First Submission, paras. 17-18.

[11] Emphasis added.

[12] EC's First Submission, para. 19.

- 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
- 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).

Question 6

*How does one identify whether a legal provision confers an "autonomous right" or provides for an "affirmative defence"?*

18. In order to establish whether a provision is an "affirmative defence" it is necessary to consider not only the terms in which the "link" between that provision and other provisions of the WTO Agreement is expressed but also the content of the provision in question, as well as its "legal function" within the WTO Agreement.

19. As regards the content, the exercise of an "affirmative defence" may be subject to certain requirements in order to prevent its abuse (e.g. the requirements of the *chapeau* of Article XX). But those requirements do not seek to regulate positively the matter concerned. For example, the *chapeau* of Article XX is not an alternative to the rules on national treatment contained in Article III. In contrast, the Enabling Clause lays down a comprehensive set of rules (including both rights and obligations) which purports to regulate positively a certain matter (the granting of tariff preferences to developing countries) in place of the rules contained in Article I:1 of the GATT.

20. As regards the "legal function", "affirmative defences" typically allow Members to pursue legitimate policy objectives which, while not being among the WTO Agreement's own specific objectives, are deemed compatible with such objectives. Nevertheless, "affirmative defences" do not seek to promote actively those objectives. For example, Article XX(a) of the GATT allows Members to take measures that are necessary to protect public morals. But the protection of public morals is not one of the specific objectives of the WTO Agreement. There is nothing in the WTO Agreement which encourages Members to take any measures for that purpose.

21. In contrast, special and differential treatment provisions, including the Enabling Clause, are the main instrument to achieve one of the fundamental objectives of the WTO Agreement. The WTO Agreement does not merely tolerate the granting of trade preferences to developing countries. Rather, it encourages developed country to grant such preferences under the Enabling Clause. In view of that, the Enabling Clause, like the other provisions on special and differential treatment, cannot be considered as mere "affirmative defences".

Question 7

*To determine the legal function of the Enabling Clause, is it useful to have reference to the exceptions clauses set out in Articles XX, XXI and XXIV of GATT 1994? Please elaborate.*

22. Like any other GATT provision, those provisions may provide relevant context for the interpretation of the Enabling Clause, which is also part of the GATT.

23. As discussed below, the differences between those provisions and the Enabling Clause support the view that the Enabling Clause, unlike those provisions, is not an affirmative defence.

Question 8

*Article XX and XXI of GATT 1994 provide "nothing in this Agreement shall be construed to prevent … " and Article XXIV:3 of GATT 1994 provides "[t]he provisions of this Agreement shall not be construed to prevent …", and paragraph 1 of the Enabling Clause provides "[n]otwithstanding the provisions of Article I of the General Agreement, contracting parties may … ". Do you consider that Articles XX, XXI and XXIV of GATT 1994 provide exceptions/"affirmative defences" or not? In light of the similarity/dissimilarity of the above-cited language, do you think the Enabling Clause provides for an exception/"affirmative defence" or an "autonomous right"? Why or why not? Please elaborate.*

24. By now it is well established that Article XX of the GATT is an "affirmative defence". On the other hand, it is still an unsettled question whether Article XXIV:5 of the GATT is an "affirmative defence".[13] Article XXI of the GATT has not been considered yet by any adopted report.

25. The wording of the introductory clauses of GATT Articles XX, XXI and XXIV:5 is virtually the same and different from that of Paragraph 1 of the Enabling Clause. However, the fundamental difference is that, unlike the Enabling Clause, Articles XX, XXI and XXIV:5 do not provide "special and differential treatment" to developing countries.

Question 9

*Assume that the Enabling Clause is a self-standing, autonomous right and that the Panel should look at the Enabling Clause itself to interpret its provisions. Could you indicate where in the Enabling Clause the Panel should find the context for the interpretation of the term "non-discriminatory" in footnote 3?*

26. The most direct and relevant context for the interpretation of the term "non-discriminatory" is found in paragraphs 1, 2 and 3, which are those dealing with "differential and more favourable treatment".

27. Specifically, the EC considers that the following contextual elements are relevant for the interpretation of the term "non-discriminatory":

- Paragraph 2(a) applies within the terms of Paragraph 1, which contrary to India's claim, does not require to grant differential and more favourable treatment to *all* developing countries.[14]

- Footnote 3 requires that the preferences must be "generalised". If "non-discriminatory" meant that it was necessary to grant identical preferences to *all* developing countries, the term "generalised" would be redundant.[15]

- The objective to respond positively to "the development, trade and financial needs of developing countries" stated in Paragraph 3(c) could not be achieved if donor

[13] The Appellate Body referred to Article XXIV as a "defence" in *Turkey – Restrictions on Imports of Textile and Clothing Products* (WT/DS34/AB/R, para. 58). But the issue does not appear to have been argued by the parties either before the Appellate Body or before the Panel. (Panel report, WT/DS34/R, pars.9.57-9.59).

[14] EC's First Submission, paras. 24-31; Third Party Submission of Bolivia, Colombia, Ecuador, Perú and Venezuela, paras. 49-52; Third Party Submission of Costa Rica, paras. 15-20; Third Party Oral Statement of the United States, paras. 2-6; Third Party Oral Statement of Costa Rica, paras. 9-16.

[15] Third Party Oral Statement of the United States, para. 12.

countries were required, by virtue of the term "non-discriminatory", to grant identical preferences to all developing countries.[16]

28. Also relevant is Paragraph 7 of the Enabling Clause, which provides that developing countries "expect to participate more fully in the framework of rights and obligations under the GATT" with the "progressive development of their economies and improvement in their trade situation".[17]

29. When interpreting the term "non-discriminatory", it must be taken into account also the "object and purpose" of the Enabling Clause, which is expressed in

- the first recital of the 1971 Waiver, to which Footnote 3 of the Enabling Clause refers, and which recognises that

  A principal aim of the CONTRACTING PARTIES is promotion of the trade and export earnings of developing countries for the furtherance of their economic development.

- Article XXXVI of the GATT, including in particular its Paragraphs 2, which states that

  There is need for positive efforts designed to ensure that less developed [Members] secure a share in the growth in international trade commensurate with the needs of their economic development.[18]

- the second recital of the Preamble to the WTO Agreement, which provides that

  There is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.

30. The object and purpose of the Enabling Clause is reflected also in Paragraph 3(a), which provides that the preferences shall be "designed to facilitate and promote the trade of developing countries"; and in Paragraph 3(c), which states that the treatment provided under Paragraph 2(a) must be "designed and, if necessary, modified to respond positively to the development, financial and trade needs of developing countries".

31. The object and purpose of the Enabling Clause is of crucial importance in interpreting the term "non-discriminatory". As shown in the EC's First Submission, "non-discrimination" is not synonymous with formally equal treatment, something which India now admits. Rather, there is "discrimination" if equal situations are treated unequally (or if unequal situations are treated equally).

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[16] EC's First Submission, paras. 70-71. Third Party Submission of Bolivia, Colombia, Ecuador, Perú and Venezuela, paras. 57-59. Third Party Submission of Costa Rica, paras. 22 and 25. Third Party Oral Statement of the United States, para. 12.

[17] Third Party Submission of Costa Rica, para. 24; Third Party Oral Statement of the United States, para. 12.

[18] Paragraph 7 of the Enabling Clause recalls that the obligations assumed by developed and developing countries under the GATT (including therefore the Enabling Clause) "should promote the basic objectives of the Agreement, including those embodied in the Preamble and Article XXXVI".

In turn, Paragraph 1(e) of Article XXXVI of the GATT recognises that

International trade as a means of achieving economic and social advancement should be governed by such rules and procedures – and measures in conformity with such rules – as are consistent with the objectives set forth in this Article.

In turn, this requires to consider whether the difference in treatment pursues a legitimate objective and whether the distinction is reasonably justified in order to attain such objective.

32. Accordingly, the EC considers that, in order to establish whether the Drug Arrangements are "non-discriminatory" within the meaning of Paragraph 2(a), the Panel should address the following two issues:

- first, the Panel should establish whether the Drug Arrangements pursue an objective which is consistent with the object and purpose of the Enabling Clause, and more specifically with the objective stated in Paragraph 3(c);

- second, if so, the Panel should establish whether the Drug Preferences constitute a reasonable means to achieve that objective.

*Does this context provide sufficient contextual guidance for the interpretation of this term? Should the Panel also look outside the Enabling Clause for contextual guidance? If so, to which particular Agreements and provisions therein, and why these particular provisions, and not others?*

33. The EC is of the view that an examination of the context provided by the Enabling Clause, together with the relevant object and purpose, as expressed in the Enabling Clause itself, Part IV of the GATT and the Preamble to the WTO Agreement, may be sufficient to reach a correct interpretation of the term "non-discriminatory". Nevertheless, it may be useful to examine also, by way of context, other provisions of the WTO Agreement, and in particular of the GATT.

Question 10

*Does the context of the term "non-discriminatory" in footnote 3 of the Enabling Clause include Articles I:1, III:4, X, XIII, XVII and XX of GATT 1994, and Article XVII of GATS? Why or why not?*

34. The EC considers that Article I:1 of the GATT does not provide relevant context for the interpretation of the Enabling Clause. The Enabling Clause excludes expressly the application of the requirements of Article I:1 of the GATT ("notwithstanding Article I:1"). Accordingly, it would be entirely inappropriate to introduce those requirements into the Enabling Clause through the backdoor of a purportedly "contextual" interpretation.

35. The EC has referred to Articles III:4 and XIII of the GATT, as well as to Article XVII of the GATS, in order to illustrate the proposition that formally unequal treatment is not necessarily discriminatory. India now agrees with that proposition.[19]

36. At the same time, the EC has emphasised that there is an essential difference between the above mentioned GATT and GATS provisions and the Enabling Clause.[20] As noted by India, all those provisions "have equality of competitive opportunities as their fundamental objective".[21] The EC agrees. However, the Enabling Clause has a different "fundamental objective". The Enabling Clause is a form of "special and differential treatment" for developing countries. It is not concerned with conditions of competition, but rather with responding to the development needs of the developing countries. Having regard to that fundamental objective, formally different treatment of developing countries does not violate the "non-discrimination" requirement of footnote 3, where it is necessary to provide equal "development opportunities" to developing countries with different development needs.

[19] India's Oral Statement, para. 19.
[20] EC's First Submission, paras. 75 and 79.
[21] India's Oral Statement, para. 19.

37. India asserts the existence of a "principle of non-discrimination", which it defines as prohibiting the "denial of equal competitive opportunities to like products of different origins"[22], and which would apply uniformly throughout the WTO Agreement. That principle, however, is nowhere stated in the WTO Agreement[23] and the EC rejects its existence.

38. The term "discrimination" may have different meanings in different WTO contexts. As explained, the existence of discrimination must be examined always in light of the relevant object and purpose. A difference in treatment may be discriminatory in relation to one treaty objective, but not when considered in the light of a different objective. India's position postulates that the only objective of the WTO Agreement is the liberalisation of trade among Members in accordance with the principle of competitive advantage. That is indeed one of the main objectives of the WTO Agreement, but by no means the only one. India's position that the WTO Agreement is only about competitive opportunities is incorrect and, indeed, astonishing when expressed by a developing country such as India. It would have been mistaken under the GATT 1947. And it is manifestly untenable in the context of the WTO Agreement which, as made clear by its Preamble, recognises a plurality of objectives. Prominent among them is promoting the development of developing countries.

39. The very existence of the Enabling Clause demonstrates the non-existence of the "non discrimination principle" alleged by India. The Enabling Clause, like all the other provisions granting "special and differential treatment", does not seek to provide equal competitive opportunities for like products of different origins. To the contrary, "special and differential treatment" provisions seek to create unequal competitive opportunities in order to respond to the special needs of developing countries. In the context of the Enabling Clause, the term "non-discriminatory" must be interpreted having regard to the specific objectives of "special and differential treatment". Seen in that light, granting special preferences to some developing countries with special development needs is no more "discriminatory" than granting preferences to developing countries, but not to the developed countries.

40. Finally, India does not address Article XX of the GATT. The Appellate Body has noted that the discrimination standard in the *chapeau* of Article XX is different from that in Article III.[24] This shows, once again, that in the WTO Agreement the notion of "non-discrimination" does not have the uniform meaning alleged by India. Consider, for example, the case of a Member which applies a sanitary restriction to imports from some Members, but not to imports of like products from other Members where different sanitary conditions prevail. Such difference in treatment denies equal competitive opportunities to like products of different origins. Yet it would not be "discriminatory" for the purposes of Article XX because it is justified in the light of the specific objective of Article XX(b), which is to protect human life or health, rather than liberalising trade according to the principle of competitive advantage.[25]

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[22] Ibid.

[23] As noted by India, the Preamble to the WTO Agreement alludes to the "elimination of discriminatory treatment in international trade relations". But this does not prejudge the meaning of "discrimination". Nor does it imply that the notion of "discrimination" must be given identical meaning throughout the Agreement.

[24] Appellate Body report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 150. Appellate Body report, *United States – Standards for Reformulated Gasoline*, WT/DS2/AB/R., p. 23

[25] The same is true of Articles 2.3 and 5.5 of the *SPS Agreement*. See Appellate Body Report, *EC - Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R, para. 237, where the Appellate Body chastised the panel for importing the interpretation of discrimination made under Article III:2 of the GATT into Article 5.5 of the SPS Agreement.

Question 11

*What is your understanding of the term "generalized" in footnote 3 of the Enabling Clause? What is the difference between this term and the term "non-discriminatory", also in footnote 3?*

41. The drafting history of the Enabling Clause suggests that the term "generalised" was used in order to distinguish the system of preferences developed in UNCTAD from the existing "special" preferences granted by some developed countries to some developing countries, mainly former colonies. As originally envisaged, the UNCTAD system would have subsumed and replaced those existing "special" preferences by "generalising" them, i.e. by making them available to all, or at least most developing countries. Hence the term "generalised".[26]

42. The requirement that the preferences must be "generalized" does not imply that "all" developing countries must be given the same preferences. Rather, it means that, unlike the "special" preferences traditionally granted to certain countries or groups of countries merely for historical or geographical reasons, the preferences should be "generalised" to all the developing countries with similar development needs.

43. At the same time, and in accordance with its ordinary meaning[27], the term "generalised" appears to presuppose the existence of a given class or category of beneficiaries to which the preferences must be "generalised". Accordingly, it seems that a preference granted exclusively to one country could not be considered as "generalised" even if it could qualify as "non-discriminatory".

44. India has argued that the term "generalised" alludes to the "range of countries that would accord and receive preferences" [28], while the term "non-discriminatory" refers to the "degree of differentiation between the countries that the donor countries selected as beneficiaries".[29] But this interpretation is not supported by the text of Footnote 3. The terms "generalised" and "non-discriminatory" both qualify the term "preferences". Therefore, it is the preferences themselves, rather than the system as a whole, which must be both "generalised" and "non-discriminatory".

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[26] Thus, for example, General Principle Eight, adopted by UNCTAD at its First Conference, stated that

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.

[27] The term "generalized" is an adjective derived from the verb "generalize", which means "to make general". In turn, "general" means

Pertaining to all, or most, of the parts *of a whole*; completely or approximately universal *within implied limits.*

The New Shorter Oxford Dictionary, 1993.

Similarly, the French word "generaliser" means "étendre, appliquer a l'ensemble ou a la majorité des individus", while "general" is defined as

Qui s'applique á l'ensemble ou a la majorité des cas ou des individus *d'une classe*.

Le Petit Robert, 1999

[28] India's Question To the EC No 30.

[29] Ibid.

Question 12

*With reference to paragraph 3(c) of the Enabling Clause, what indicators can be used to establish objective criteria responding to development needs of developing countries? In addition to economic indicators, can other types of indicators be used? If so, why and what are they?*

45. There are multiple indicators of development. As illustrated by the UN definition of Least Developed Countries ("LDCs"), non-economic indicators may also be relevant. (The list of the criteria is provided as Exhibit EC - 17).

46. However, this does not mean that any difference with respect to any of those indicators is, in and of itself, relevant for the purposes of Paragraph 3(c). For example, while the literacy rate is certainly a relevant development indicator which, together with other indicators, may allow to measure the overall level of development of one country, the EC would submit that the mere fact that two countries score differently with respect to that indicator does not imply that they have different "development needs" for the purposes of Paragraph 3(c), let alone that they should be granted different trade preferences.

47. If any difference with respect to any of the many conceivable development indicators were sufficient to establish the existence of different development needs requiring different trade preferences, Paragraph 3(c) would impose an impossible task upon developed countries and become wholly unworkable.

48. Moreover, that interpretation could be a source of discrimination. As explained, in order to establish that formally unequal treatment of developing countries is "non-discriminatory" for the purposes of Footnote 3 it must be shown, first, that the difference in treatment pursues a legitimate aim having regard to the object and purpose of the Enabling Clause and, in addition, that the difference in treatment is a reasonable means to achieve that aim. Thus, for example, while a low literacy rate or a low electrification rate[30] may be relevant indicators of development, the most appropriate and immediate response to address specifically those problems would be to provide technical and financial assistance in order to build schools or power plants, rather than granting trade preferences.

49. In this regard, the EC would recall once again that the United Nations have recommended repeatedly to provide greater market access to the products from the countries affected by the drug problem.[31] Similarly, the Preamble to the *Agreement on Agriculture* records the commitment of the WTO Members to take into account the "particular needs" of the drug-affected countries in implementing their market access commitments.[32] This implies a recognition that trade measures are an appropriate response to the drug problem. In contrast, the EC is not aware that the United Nations, or any other international agency, has recommended providing greater market access as a solution to development problems such as illiteracy or lack of electrification.

Question 13

*Please provide any relevant drafting history on the interpretation of paragraph 3(c).*

50. The EC is not aware of any relevant drafting history materials.

[30] Third Party Written Submission of Paraguay, para. 15.

[31] EC's First Submission, paras. 109-111. See also the Joint Ministerial Statement recently adopted by the UN Commission on Narcotic Drugs at its Forty Sixth session, at para 21. (Exhibit EC-18).

[32] EC's First Submission, paras. 112-113.

Question 14

*If paragraph 3(c) of the Enabling Clause requires a collective response to the development needs of developing countries, both in design and modification of a GSP scheme, where within the Enabling Clause is there the possibility for a developed country to modify its scheme so as to take certain products off the preference scheme for individual beneficiary countries or, even, to take individual countries off the preference scheme?*

51. The EC does not agree with the premise that Paragraph 3(c) requires a "collective response" to the development needs of developing countries. See answer to the Panel's Question to India No. 8 below.

Question 15

*Does paragraph 3(c) of the Enabling Clause allow a preference-giving country to design different GSP schemes responding, respectively, to development needs, financial needs and trade needs of different developing countries, or would such a reading necessarily result in discrimination among developing countries?*

52. See answer to Question 16 below.

Question 16

*Does the word "and" in paragraph 3(c) mean "or"? In other words, does the word "and" mean that "development, financial and trade needs" must be considered in a comprehensive manner or may they be considered separately?*

53. The EC considers that "development, financial and trade needs" are closely interrelated and must therefore be considered in a "comprehensive manner". In fact, the trade and financial needs of developing countries may be considered to be part of their "development needs", when the latter term is used in a broad sense. Thus, the Preamble of the WTO Agreement refers exclusively to the "needs of economic development" of the developing countries[33]. The EC would submit that this language is meant to cover also the trade and financial needs of developing countries referred to in Paragraph 3(c).

54. In its First Submission the EC has sometimes used the term "development needs" as shorthand for "development, financial and trade needs" within the meaning of Article 3(c). The Drug Arrangements, nevertheless, take into account not only the development needs *stricto sensu* of the beneficiaries but also their "trade" and "financial" needs, all of which, to repeat, are closely interrelated.

55. Drug production and trafficking have a negative effect on the trade balance of the developing countries.[34] Furthermore, as explained, licit alternative economic activities are not sustainable unless the products of those activities can be exported. Thus, the countries affected by the drug problem have

[33] See also GATT Article XXXVI.3, which also alludes to "the needs of their economic development" and Article XXXVI.6, which recognises that

Because of the chronic deficiency in the export proceeds and other foreign exchange earnings of less-developed contracting parties, there are important interrelationships between trade and financial assistance to development. […]

[34] See the INCB Report (Exhibit EC-5), at paras. 36 and 37.

particular trade needs. Those needs have been recognised by the United Nations, as well as by the WTO.[35]

56. Drug production and trafficking also have negative effects on the financial system of the countries concerned.[36] Moreover, as emphasised by some of the third parties, the cost of the fight against drugs imposes a massive financial burden on the countries concerned, which prevents them from making necessary investments in development.[37]

Question 17

*Developing countries often have different development needs. Take, for example, Indonesia, the Philippines, Morocco, Brazil and Paraguay, each having different development needs. If we agree with the argument of the Andean Community that it is possible to select some beneficiary countries according to certain criteria (paragraph 6 of the Joint Statement of the Andean Community), would it not be a logical consequence of this argument that any developed country could establish a special GSP tariff preference scheme for each individual developing country in responding to that developing country's own development needs? Is this a proper reading of paragraph 3(c) of the Enabling Clause? Why or why not? If not, where do you draw the line in term of a proper interpretation of paragraph 3(c)?*

57. Paragraph 3(c) is worded in rather imprecise terms. Indeed, it might be argued that it is a purposive provision, which informs the interpretation of the other provisions of the Enabling Clause, but does not, of itself, impose any legally binding obligation.[38] As noted by the panel in *U.S - Steel Plate*, "Members cannot be expected to comply with an obligation whose parameters are entirely undefined".[39]

58. To the extent that Paragraph 3(c) imposes a legally binding obligation, it should be interpreted in a manner which makes it possible for developed countries to comply with it.

59. The question suggests that the development needs of each developing country are different from those of any other developing country. The EC would agree that the situation of each developing country is indeed unique and unlike that of any other developing country. But this does not mean that each developing country should be deemed to have different "development needs" for the purposes of Paragraph 3(c).

60. Donor countries cannot be required to identify and monitor on a permanent basis, having regard to a multiplicity of possible indicators, each and every possible difference between developing countries, and to adapt their GSPs accordingly. Any attempt to do so would necessarily fail. Furthermore, it seems that a GSP which was a mere bundle of individual ad-hoc preferences for each developing country could hardly be described as a "generalised" system.

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[35] EC's First Submission, paras. 109-115.

[36] See the UNDCP study (Exhibit EC-6), p. 10.

[37] See e.g. Oral Statement of Colombia, para. 8.

[38] The use of the term "shall" in Paragraph 3(c) would not necessarily be an obstacle to that interpretation. See Appellate Body report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (Recourse to Article 21.5 of the DSU by the United States)*, WT/DS132/AB/RW, at para. 74, where the Appellate Body concluded that the obligation imposed by Article 3.7 of the DSU was "largely self-regulating" despite the presence of the term "shall".

[39] Panel report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India* ("*US – Steel Plate*"), WT/DS206/R, at para. 7.110. The Panel held that the first sentence of Article 15 of the *Anti-Dumping Agreement* did not impose any binding obligation. That provision states that

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures …

61. India's response to this is to dispense with Paragraph 3(c). According to India, the sole purpose of Paragraph 3(c) would be to make the obvious point that trade preferences must respond to the needs ("in general") of the developing countries which receive them, rather than to the needs of the developed countries which grant them. This interpretation, however, is not supported by the text of Paragraph 3(c) (see below the EC's response to the Panel's Question to India No. 8) and would render that provision irrelevant.

62. The EC, therefore, would submit that Paragraph 3(c) must be interpreted in a manner which, while giving proper meaning to Paragraph 3(c), is both workable for the developed countries and consistent with the requirements that the preferences be "generalised" and "non-discriminatory". The fact that developed countries cannot take into account each and every difference between developing countries when designing their GSP does not mean that they should be prevented from taking into account the most important ones.

63. More specifically, the EC is of the view that developed countries should not be prevented from approaching the objective stated in Paragraph 3(c) by applying horizontal "graduation" criteria, such as those included in the EC's GSP regulation, and/or by defining subcategories of developing countries which capture the most significant differences between them on the basis of a comprehensive set of criteria.

64. The UN definition of LDCs provides a good example of this. Like Paragraph 2(a), Paragraph 2(d) is subject to Paragraph 3(c). If it is considered that providing the same preferences to all the countries falling within the UN definition of LDCs is consistent with the obligation under Paragraph 3(c) to respond positively to the individual needs of those countries, then providing special preferences to similarly defined sub-categories of other developing countries should also be consistent with that paragraph.

65. Like the UN definition of LDCs, the Drug Arrangements are not based on just one narrow criterion such as those suggested by India or Paraguay. As demonstrated in the EC's submission, the negative economic and social effects of the drug problem are multifaceted and pervasive. The selection analysis conducted by the EC authorities aims at taking into account all such effects.

66. Moreover, while the criteria suggested by India are indicators of the level of development, and as such are or could have been included in the UN definition of LDCs, the drug problem is a factor which affects developing countries with different levels of development by impairing their economies and undermining their social and political integrity to the point of preventing and even setting back their development. The particular effects of the drug problem are not captured by the criteria used in the definition of LDCs. Hence the need to create a specific category for those countries.

Question 18

*Are the developed countries free to "graduate" beneficiary developing countries from a GSP scheme? If so, under which paragraph of the Enabling Clause? Please elaborate.*

67. Donor countries may graduate developing countries, or products or sectors, in accordance with the requirements of the Enabling Clause, including those stated in footnote 3.

Question 19

*Paragraph 3(c) of the Enabling Clause refers to "developed contracting parties" and "developing countries" in the plural form. Given the common understanding that developed countries may decide individually whether or not they wish to provide GSP, is it also possible to interpret "developing countries" under paragraph 3(c) as meaning individual developing countries?*

68. Yes. As explained in the EC's response to the Panel's Question to India No. 8, the EC considers that Paragraph 3(c) refers to the needs of *individual* developing countries. This is not saying, however, that Paragraph 3(c) allows to grant preferences to just one country. In accordance with Footnote 3, the preferences must be "non-discriminatory" and "generalised".

Question 20

*Please explain whether Article XX of GATT 1994 is applicable to measures under the Enabling Clause, providing reasons therefor.*

69. The chapeau of Article XX states that "*nothing* in this Agreement shall be construed to prevent the adoption or enforcement" of the measures listed therein. Thus, Article XX provides an exception with respect to any of the obligations included in the GATT. As explained above, the Enabling Clause is part of the GATT. Therefore, Article XX applies also with respect to the Enabling Clause.

*In the instant case, can Article XX be invoked as an exception to the Enabling Clause or only to Article I:1 of GATT 1994? Please explain.*

70. The Enabling Clause and Article I:1 of the GATT are mutually exclusive. The EC has invoked Article XX of the GATT as an exception to a potential violation of either of those two provisions, depending on which of them is found to be applicable to the Drug Arrangements by the Panel.

71. It is possible, therefore, to envisage the following situations:

(1) the Panel finds that the Drug Arrangements fall within Paragraph 2(a) of the Enabling Clause and are consistent with Paragraph 3(c);

(2) the Panel finds that the Drug Arrangements fall within Paragraph 2(a) of the Enabling Clause but are inconsistent with Paragraph 3(c);

(3) the Panel finds that the Drug Arrangements fall outside the scope of Paragraph 2(a) and are consistent with Article I:1 of the GATT; and

(4) the Panel finds that the Drug Arrangements fall outside the scope of Paragraph 2(a) and are inconsistent with Article I:1 of the GATT.

72. In situations 1 and 3, there would be no violation of the GATT and, accordingly, no need to consider Article XX. In situations 2 and 4 the Panel would have to examine whether Article XX provides an exception to the violations of the Enabling Clause and Article I:1, respectively.

Question 21

*Can the Drug Arrangements be characterized as a measure to protect human health under Article XX(b) of GATT 1994 or a measure providing differential and more favourable treatment to developing countries, or both? Please elaborate.*

73. Both.

74. Contrary to India's allegations, there is no contradiction in characterizing the Drug Arrangement as being a measure to address the special development needs of the beneficiaries and, at the same time, a measure to protect the health and life of the EC population by reducing drug abuse.

75. Drug production and trafficking are a cause of underdevelopment in the beneficiary countries. At the same time, the supply of drugs from those countries poses a threat to the life and health of the EC population. The preferences provided under the Drug Arrangements address simultaneously both problems. They support the beneficiaries' efforts to replace drug production and trafficking with licit alternative economic activities, thereby contributing to the development of those countries. In turn, limiting the production and trafficking of drugs in the beneficiary countries has the effect of reducing the supply of drugs from those countries to the EC and, hence, contributes to the health policy objective of combating drug abuse within the EC.

Question 22

*Assume for the purpose of this question that the Enabling Clause is in the nature of an exception to Article 1:1 of GATT 1994. If a measure is not consistent with the Enabling Clause, is it nevertheless legally possible to invoke another exception, e.g., Article XX of GATT 1994, to justify such measure in pursuit of a different policy objective? What are the potential systemic implications of seeking – and even cumulating – justification for a measure under multiple exceptions provisions?*

76. As a preliminary remark, if the Enabling Clause were an affirmative defence it would not impose any autonomous obligation. Accordingly, a measure could not be "inconsistent" with the Enabling Clause, just like a measure cannot be said to be "inconsistent" with Article XX of the GATT, but only with Article I:1 of the GATT.

77. In any event, the EC considers that there is nothing in WTO law which prevents a defendant from asserting different defences based on different policy objectives, either in the alternative or cumulatively. Indeed, this is a frequent occurrence in practice. For example, in *US – Gasoline*, the first case under the WTO Agreement, the United States claimed that the measure in dispute was justified under paragraphs (b), (d) and (g) of Article XX.

Question 23

*Do the criteria under Article XX of GATT 1994 change when applied to a measure under the Enabling Clause? Why or why not? Please elaborate*

78. It is unclear to the EC whether the Panel envisages the situation where the Enabling Clause "applies" because the measure falls within Paragraph 2(a) but the obligation under Paragraph 3 (c) is not satisfied, or rather to the situation where the measure falls outside the scope of the Enabling Clause and is inconsistent with Article I:1 of the GATT.

79. In any event, the EC sees no basis whatsoever in Article XX for the proposition that different criteria should be applied with respect to a measure that is "applied under the Enabling Clause". Under Article XX, the same criteria apply to all measures. Moreover, the EC fails to see what could be the rationale for applying different criteria to measures "applied under the Enabling Clause".

Question 24

*How can the Drug Arrangements meet the test of "necessary" in Article XX(b) of GATT 1994, in that they are not applied to all countries, including to developed countries?*

80. In order to answer this question, it is useful to distinguish three categories of countries not covered by the Drug Arrangements:

(1) Developed countries;

(2) Developing countries which benefit from more favourable tariff treatment under other unilateral (the GSP special arrangements for LDCs) or bilateral arrangements (the Cotonou Agreement and the Free Trade Agreements concluded with certain developing countries). These countries may or may not be seriously affected by drug production or trafficking;

(3) Developing countries which do not benefit from more favourable tariff treatment under other arrangements and which are not included in the Drug Arrangements because they are not seriously affected by drug production or trafficking.

81. As regards category 1), the EC is not aware of any developed country which is as severely affected by drug production or trafficking as the beneficiaries. In any event, the developed countries have sufficient resources and do not require the EC's support in the form of trade preferences in order to fight effectively against drug production and trafficking.

82. As regards category 2), the EC would agree that some of those countries qualify as countries seriously affected by drug production or trafficking (e.g. Afghanistan or Laos). However, the inclusion of those countries in the Drug Arrangements would be redundant because in any event they benefit already from more generous tariff treatment.

83. Finally, as regards category 3), the criteria used in order to select the beneficiaries of the Drug Arrangements ensure that the excluded developing countries are not an significant source of supply of drugs to the EC and, therefore, do not pose a serious threat to the life or health of the EC population.

84. Colombia, Peru and Bolivia are the source of virtually all the cocaine consumed in the EC, while the neighbouring Andean Countries and the Central American countries are on the main route through which that narcotic reaches the EC. In turn, Pakistan is a transit country for the heroin and other opium products from Afghanistan (a least developed country), which is, by far, the main producing country and the main source of supply to the EC.

85. In contrast, neither India nor Paraguay represent a serious threat to the EC's health situation. Their production of illicit drugs is negligible. Further, neither of them is on a main transit route. The volume of seizures are negligible in the case of Paraguay, and relatively small in the case of India, as compared with the size of its population and economy. It is considered that in both countries most drug trafficking relates to internal consumption. (See below the response to Panel's Question to the EC No. 14).

86. In any event, the EC considers that the exclusion from a certain country falling within categories 2 or 3 from the Drug Arrangements is not part of the "structure and design" of the Drug Arrangements, but rather of its "application".[40] Therefore, it should be examined under the *chapeau* of Article XX and not in considering whether the Drug Arrangements are "necessary" for the purposes of paragraph (b) of that Article.

[40] EC's First Submission, paras. 197-204 and 205-208.

Question 25

*Are the tariff preferences provided under the Drug Arrangements the "least trade-restrictive measure" available to achieve the EC's health policy objective? Given the variety of measures that are being applied by the many signatories to the three UN conventions against the illicit traffic in drugs, why are the Drug Arrangements the least trade-restrictive measures available?*

87. The question suggests that countries can choose among a variety of alternative strategies to fight the drug problem and that the EC's approach is just one among many possible options. That suggestion is incorrect.

88. The three UN conventions mentioned in the question must be read together with the numerous resolutions and other texts adopted by the General Assembly of United Nations and the competent UN agencies and bodies which, over the last 30 yeas, have established a comprehensive and well-defined international strategy against the drug problem. The Drug Arrangements implement that strategy and, hence, must be deemed "necessary" for the purposes of Article XX(b) of the GATT.

89. As explained at length in the EC's First Submission[41], the United Nations have resolved in many occasions that the fight against drugs must be conducted in accordance with the principle of "shared responsibility" and requires a "comprehensive and balanced approach" which includes initiatives to reduce both illicit demand and illicit supply. Thus, Paraguay's suggestion that the EC should limit itself to control the demand is at odds with well-established international anti-drug policy.[42]

90. The United Nations also have resolved that, in order to reduce the illicit supply of drugs, the countries concerned must adopt comprehensive measures, including not only crop eradication and law enforcement, but also the development of alternative economic activities. The United Nations have further recommended that, in order to support those alternative activities, other countries should provide not only financial assistance but also greater market access. Only a few weeks ago, the ministers participating in the 46th session of the Commission on Narcotic Drugs held in Vienna renewed this recommendation:

> In accordance with the principle of shared responsibility, States are urged to provide greater access to their market for products of alternative development programmes, which are necessary for the creation of employment and the eradication of poverty.[43]

91. It would be odd, to say the least, if a WTO Panel were to rely on the fact that other countries fail to comply with their duty to implement a policy "urged" by the United Nations in order to conclude that such policy is "unnecessary" and that the EC is in breach of its WTO obligations.

92. Furthermore, the EC bears a special responsibility in implementing the UN recommendations in this field. Together with the United States, the EC is the main export market for the beneficiaries. The fact that a developing country, or a developed country with a relatively small market, does not provide preferential access to imports from, for example, Colombia is unlikely to have much impact on Colombia's fight against drug production or on that country's own fight against drug abuse. On the other hand, whether or not the EC provides market access for the products of alternative activities from Colombia is of crucial importance for the sustainability of those activities and, consequently, for the success of Colombia's fight against drugs, of the EC's own health policy, and also of the health policies of other drug consuming countries. The same is true of the United States, which also provides

[41] EC's First Submission, paras. 100-115.
[42] Paraguay's Oral Statement, para 20.
[43] E/CN.7/2003/L.23/Rev.1, p.7, para. 21. (Exhibit EC-18).

preferences with the objective of promoting alternative activities in some of the countries covered by the Drug Arrangements.

93. The UN recommendations cited by the EC make it clear that there is no alternative to providing greater access to the EC market. The only issue before the Panel is thus whether such access can be provided in a less trade restrictive manner.

94. In this regard, the EC refers the Panel to the arguments made at paragraphs 194-196 of its First Submission, which remain unanswered by India.

95. The EC is not aware of any alternatives which would be equally effective in order to provide effective market access to the products from beneficiaries. India has suggested that the EC should grant the same tariff preferences to all developing countries. However, this would be much less effective because those countries which are not handicapped by the drug problem would capture most of the additional market opportunities created by the tariff preferences.

Question 26

*Was the Enabling Clause a part of the results of the overall balance of commitments and concessions made during the Tokyo Round negotiations? If so, does this fact have any bearing on the interpretation of the Enabling Clause?*

96. Yes. As explained above, the developing countries were dissatisfied by the 1971 Decision. The Enabling Clause must be seen as a concession made by the developed countries to the developing countries in exchange for the concessions made by the developing countries elsewhere. India's position that there is no difference between the 1971 Decision and the Enabling Clause fails to recognise this.

Question 27

*Why did the EC request a waiver for the Drug Arrangements? Why was the waiver not granted?*

97. As indicated in the request for the waiver, it was made for reasons of legal certainty. The request is still under consideration.

Question 28

*Does the term "non-reciprocal" in the 1971 Decision, referred to in footnote 1 of the 1979 Decision, mean that preferential tariff treatment should be extended by developed countries to developing countries without condition? Why or why not?*

98. Footnote 3 does not prohibit all kinds of "conditions", but only the conditions of reciprocity. As explained[44], the conditions of reciprocity are a specific type of conditions involving a mutual exchange of the same or similar benefits. In the specific context of a trade agreement such as the WTO Agreement, the term "reciprocal" refers to those conditions which require the granting of equivalent trade concessions by way of compensation for the trade benefits received from another Member.

99. India does not argue that the Drug Arrangements are "non-reciprocal". Indeed, that claim would be manifestly unfounded, as it is plain that the beneficiaries are not required to provide any trade concessions to the EC. Instead, India argues that the Enabling Clause does not exempt the EC from the requirement provided for in Article I:1 of the GATT to grant the preferences

[44] EC's First Submission, paras. 33 and 55. Oral Statement of Costa Rica, para. 19.

"unconditionally".[45] Thus, implicitly, India recognises that there is a difference between the term "unconditionally" used in Article I:1 of the GATT and the term "non-reciprocal" included in Footnote 3.

100. The EC has demonstrated that the Enabling Clause excludes the application of Article I:1 of the GATT and, therefore, that Paragraph 2(a) is not subject to the "unconditionally" requirement of Article I:1.[46] The EC also has shown that, in any event, the Drug Arrangements are not "conditional" within the meaning of Article I:1 of the GATT, because they do not require any kind of compensation (whether reciprocal or of any other kind) from the beneficiaries.[47]

**To India**

Question 8

*What is your understanding of paragraph 3(c) of the Enabling Clause? Does it permit the design and modification of GSP in response to development needs of individual developing countries? In what way, and to what extent?*

101. India argues that Paragraph 3(c) does not permit to take into account the individual needs of developing countries, but only the needs of all the developing countries "in general".[48]

102. India's interpretation is not supported by the text of Paragraph 3(c). The term "developing countries" is not preceded by any qualifying term which might suggest that only the collective needs of the developing countries taken together must be taken into account.[49]

103. India's position is based on an interpretation *a contrario* of Paragraphs 5 and 6 of the Enabling Clause, which refer, respectively, to the "individual" needs of developing countries and to the "particular" needs of least developed countries.

104. *A contrario* reasoning, however, is often unreliable and should be used only with extreme caution. The Appellate Body has warned that "omissions in different contexts may have different meanings, and omission, in and of itself, is not necessarily dispositive".[50]

105. The Enabling Clause is less consistent when using the terms "individual" and "particular" than India suggests:

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[45] See e.g. India's First Submission, paras. 51 and 58.

[46] EC's First Submission, paras. 32-35. See also Oral Statement of the United States, para. 10 and Third Party Submission of the Andean Community, para. 43.

[47] EC's First Submission, paras. 36-56.

[48] Oral Statement of India, para. 12.

[49] Professor Abdulqawi Yusuf has given the following interpretation of Paragraph 3(c):

Developed countries wishing to accord preferential treatment to developing countries are required to do it in such a way as to respond positively to their development, financial and trade needs. Moreover, in view of the evolving nature of such needs, *and the different degrees of development of the beneficiaries*, preferential arrangements must be modified, if necessary, in order to meet the varying requirements of developing States. In other words, *the specific circumstances and the degree of development of each country must be taken into account in such arrangements*. [emphasis added][footnotes omitted].

Abdulqawi Yusuf, Legal Aspects of Trade Preferences for Developing States, Marinus Nijhoff, 1982, p. 91.

[50] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, para. 138. The Appellate Body concluded that Article 3.1 (b) of the *SCM Agreement* prohibits subsidies that are contingent *de facto* upon the use of domestic over imported goods, even though that provision, unlike Article 3.1(a) of the *SCM Agreement* with respect to export subsidies, does not refer expressly to de *facto* contingency.

- the second sentence of Paragraph 5, which is the operative part of that provision, does not use the term "individual" before "development, financial and trade needs";

- Paragraph 8, which states a similar obligation to that provided in Paragraph 6, does not use the term "particular" when referring to the "development, financial and trade" needs of least developed countries.

106. Unlike Paragraph 3(c), Paragraphs 5 and 6 are not concerned with "differential and more favourable treatment" but with "reciprocity". In the context of bilateral trade negotiations between developed and developing countries it makes perfect sense to specify that the relevant needs are the "individual" needs of each developing country, and only those "individual" needs. On the other hand, for the purposes of designing a GSP, it is reasonable to take into account all relevant needs, including the individual needs of each country, as well as those which are common to all or to certain sub-categories of developing countries.

107. India overlooks that Paragraph 3(c) applies also with respect to the preferences for least developed countries envisaged under Paragraph 2(d). It is obvious that those preferences must respond to the particular needs of those countries. Yet, on India's interpretation of Paragraph 3(c), the preferences for least developed countries would have to be designed also so as to respond to the development, financial and trade needs of all developing countries "in general".

108. Moreover, India's interpretation would render Paragraph 3(c) irrelevant. It is difficult to believe that Paragraph 3(c) was inserted in the Enabling Clause with the only purpose to make the obvious point that trade preferences must respond to the needs of the developing countries which receive them, rather than to the needs of the developed countries which grant them.

109. India argues that its interpretation does not make Paragraph 3(c) irrelevant, because a "scheme providing for minimal tariff reductions or excluding all sectors of export interest to the developing countries would meet the requirement of non-discrimination but not the obligation to respond positively to the needs of developing countries".[51] In other words, India is suggesting that, for example, a Member which grants no preferences with respect to agricultural products should be prevented from granting preferences with respect to industrial products. Or that a Member which grants a "small" tariff reduction (say a 3 percentage points margin) on all imports from developing countries should be forced to choose between granting a sufficiently "responsive" margin (say 10 percentage points) or nothing.

110. The EC takes issue with this interpretation of Paragraph 3(c). Developed countries are completely free to decide whether or not to apply a GSP. By the same token, they are also free to decide whether or not to grant preferences with respect to certain products, as well as to choose the depth of the tariff cuts that they wish to offer. Paragraph 3(c) cannot change this basic premise. It cannot be invoked in order to force developed countries to grant more preferences than they wish. India's "all or nothing" approach has no basis in the Enabling Clause, would greatly discourage donor countries and is clearly against the interest of the developing countries.

111. India's interpretation of Paragraph 3(c) could have yet another perverse result. As noted by the United States[52], under India's approach, any GSP would have to be administered on a "lowest common denominator basis". That is, a GSP could be applied only to the extent that it addressed needs that were identical among developing countries. This would lead to unacceptable results. For example, a developed country could be prevented from granting preferences for tropical timber because that item is not a product of interest to all developing countries "in general".

[51] Oral Statement of India, para. 13.
[52] Third Party Oral Statement of the United States, para. 13.

**To the European Communities**

Question 1

*Is it your understanding that Article I:1 of GATT 1994 is not applicable whenever the Enabling Clause is applicable? Are they completely, mutually exclusive in their application?*

112. Yes. The EC's position is that if a preference falls under one of the heads of Paragraph 2 of the Enabling Clause, then Article I:1 does not apply at all. This is reflected in the wording of Paragraph 1 of the Enabling Clause, which enables Members to provide the preferences specified in Paragraph 2 "notwithstanding Article I:1", rather than "to the extent necessary", in contrast with the 1971 Decision and other waivers.

Question 2

*To what extent, if any, is the principle of non-discrimination under Article I:1 of GATT 1994 applicable to GSP schemes under the Enabling Clause?*

113. Article I:1 of GATT does not establish "a principle of non-discrimination". Rather it lays down the obligation to accord most-favoured-nation to imports of like products originating in all Members with respect to certain matters, including tariffs.

114. The "non-discrimination" standard set out in Paragraph 2(a) is different from the MFN standard in Article I:1 of the GATT. Had the drafters of the Enabling Clause wished to transpose into Paragraph 2(a) the MFN standard of Article I:1 they would have done so expressly. Instead, they chose to lay down a different standard providing that the preferences must be "non-discriminatory". Furthermore, Paragraph 2(a) makes no reference to the notion of "like products"

115. The term "non-discriminatory" must be interpreted in accordance with its own ordinary meaning, in the specific context of the Enabling Clause and in the light of the object and purpose of the Enabling Clause, which is different from that of Article I:1 of the GATT. Article I:1 of the GATT is concerned with providing equal conditions of competition for imports of like products originating in all Members. In contrast, the Enabling Clause is concerned with promoting development. Specifically, the purpose of the Enabling Clause, which is also one of the basic objectives stated in the preamble of the WTO Agreement, is to promote the trade of all developing country Members commensurately with their respective development needs. Having regard to that objective, formally different treatment of developing countries does not violate the "non-discrimination" standard under the Enabling Clause, where it is necessary to provide equal development opportunities to developing countries with different development needs.

Question 3

*In its structure and legal function, what distinguishes an exception from a right? Please elaborate on why, in your view (EC, para. 15), the Enabling Clause is in the nature of an autonomous and permanent right. What precisely does the EC mean by an "autonomous" right? Is it part of GATT 1994? What are the implications of it being "autonomous"?*

116. The 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 developed countries pursuant to Article I:1 of the GATT. It is "permanent" because, unlike the 1971 Decision, the Enabling Clause has been agreed for an indefinite period of time.

117. As also explained, the Enabling Clause is an integral part of the GATT 1994. It is one of the main expressions of the principle of "special and differential treatment" for developing countries in the WTO Agreement. That principle, in turn, is one of the basic principles of the WTO Agreement, as well as a recognised principle of international economic law.[53]

118. As already explained, 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

- 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).

Question 4

*Do you agree with the statement, "While discrimination in favour of developing countries is allowed, there should be no discrimination between them, except for the benefit of least developed countries (LDCs)", which India excerpts from the "User's Guide to the European Union's Scheme of Generalised Tariff Preferences – February 2003" (India, para. 4; Exhibit India–1, p. 3)? Do you consider this statement to be an official position of the EC's understanding of the Enabling Clause, in that it appears on an official EC website? If so, what is the meaning of "there should be no discrimination between [developing countries]"?*

119. The "User's Guide" has the limited purpose of providing practical guidance to traders with a view to promoting the utilisation of the EC's GSP. It is not an official legal interpretation by the EC of the Enabling Clause.

120. The statement that "there should be no discrimination between [developing countries]" is a mere restatement of the requirement contained in footnote 3 of the Enabling Clause. The second part of the statement may be misleading in that it could suggest that the special preferences accorded to least developed countries are *per se* "discriminatory". That is not the EC's official position.

Question 5

*India suggests that it would have been unnecessary to include the exception in paragraph 2(d) of the Enabling Clause for special treatment to LDCs if paragraph 2(a) of the Enabling Clause already permitted selective treatment as between developing countries (India, paras. 49-50)? Do you agree with this assessment? Why or why not?*

121. As a preliminary remark, Paragraph 2 d) is not an "exception" but rather one of the four types of measures covered by Paragraph 1.[54]

122. Paragraph 2(a) does not render redundant Paragraph 2(d). In the first place, Paragraph 2(a) is concerned exclusively with tariff treatment, whereas Paragraph 2(d) covers any kind of "special treatment", including therefore non-tariff preferences. Furthermore, paragraph 2(d) applies in the

[53] See e.g. A.A. Fatouros, entry on "Developing States", in Encyclopaedia of Public International Law, Max Planck Institute, 1992, Vol. I, 1017, at 1022.

[54] EC's First Written Submission, para. 29.

context of "any general or specific measures" in favour of developing countries, whereas the preferences envisaged in Paragraph 2(a) must be part of a System of Generalised Preferences.[55]

Question 6

*Please give your views on the following questions relating to the meaning of the Enabling Clause, based upon paragraph 9 of Paraguay's Oral Statement. Is it correct to say that under the Enabling Clause developed countries are not obliged to give tariff preferences?*

123. Yes.

*Is it also correct that any preferences granted are only in respect of products of the developed country's own choice and only to developing countries of its choice?*

124. Donor countries are free to choose in respect of which products they grant preferences.

125. The beneficiaries of the preferences must be designated in accordance with the requirements of the Enabling Clause, including those stated in footnote 3.

*Are developed countries free to graduate beneficiary developing countries from their GSP schemes?*

126. Developed countries may graduate developing countries in accordance with the requirements of the Enabling Clause, including those stated in footnote 3.

Question 7

*What is your understanding of the term "non-reciprocal" in footnote 3 of the Enabling Clause? Is it permissible to establish conditions for GSP schemes under the Enabling Clause? Would not any conditions attached to GSP schemes violate the requirement of "non-reciprocal" in footnote 3?*

127. See the response to the Panel's Question to Both Parties No 28.

Question 8

*Do the beneficiary countries need to satisfy any conditions in order to benefit from the Drug Arrangements?*

128. As explained, the EC considers that the Enabling Clause excludes the application of Article I:1 of the GATT, including the "unconditionally" requirement. Instead, the Enabling Clause provides that the preferences must be "non-reciprocal". To repeat, India has not argued that the Drug Arrangements are "reciprocal". In any event, the EC has demonstrated that the Drug Arrangements are not subject to any "condition" within the meaning of Article I:1 of the GATT, i.e. to any condition requiring the beneficiaries to provide some form of compensation.[56]

[55] EC's First Written Submission, para. 30. The same point has been made by the Andean Community in its Oral Statement, paras. 7-9.

[56] Ibid.

Question 9

*Are the conditions referred to in Article 26.1(d) of the EC Council Regulation No. 2501/2001 applicable to beneficiary countries under the Drug Arrangements?*

129. Article 26.1 (d) applies with respect to all the preferences provided under the EC's GSP, including the Drug Arrangements. India has not submitted any claim with respect to Article 26.1(d) which is, therefore, outside the Panel's terms of reference.

130. Moreover, Article 26 allows but does not mandate the EC authorities to withdraw the preferences in the circumstances listed therein.[57] The EC authorities enjoy considerable discretion in order to decide whether or not to withdraw the preferences. In practice, such discretion is exercised with considerable restraint. Thus, since the possibility to withdraw trade preferences was first introduced in the GSP Regulation, the EC authorities have taken only one suspension decision, concerning the imports from Myanmar. (The decision is based on paragraph a) of Article 26.1, concerning slavery and forced labour as defined in the ILO Conventions.)

131. The EC considers that the requirements stated in Article 26.1 d) are not "conditions" within the meaning of Article I:1 of the GATT because they do not amount to a form of compensation. In any event, the EC considers that the Enabling Clause excludes the application of Article I:1 of the GATT.

*Would these conditions comply with the requirement of "non-reciprocal" in footnote 3 of the Enabling Clause?*

132. Yes. The requirements contained in Article 26.1 d) do not require to provide compensation in the form of trade concessions. In any event, Article 26.1 d) is not within the Panel's terms of reference. Furthermore, even if it were, India has not argued that the Drug Arrangements are "non-reciprocal".

*Are the attainment of the EC's health policy objectives aided by the fact that the beneficiary countries are required to meet certain conditions under Article 26.1(d)?*

133. As explained, the requirements stated in Article 26.1(d) are not "conditions". Under UN conventions to which almost all states are parties, exporting countries are required to take all the necessary measures in order to prevent the exportation of illicit drugs.[58] The enforcement of those conventions contributes *inter alia* to the EC's health policy objectives.

Question 10

*Could the EC indicate how its Drug Arrangements are made available to all developing countries? Please describe the selection process. Is this selection process made known to all potential beneficiaries? In what manner is it made known? Are there any published eligibility criteria or application procedures?*

134. The Drug Arrangements are part of the EC's GSP system and, as such, may apply potentially to any of the developing countries and territories listed under Annex I of the GSP Regulation.

[57] Cf. Articles 26.1 ("The Preferential arrangements provided for in this Regulation *may* be temporarily withdrawn …") and 31.1 ("After informing the Committee, the Commission *may* suspend the preferential treatment …")

[58] EC 's First Submission, paras. 172-175.

135. The benefits of the Drug Arrangements are granted to any developing country which is deemed to be sufficiently affected by the drug problem and which does not benefit already from more favourable tariff treatment under other GSP arrangement or under a bilateral agreement such as the Cotonou Agreement or the Free Trade Area Agreements concluded by the EC with certain developing countries (Mexico, Chile, Morocco, Algeria, Tunisia, Egypt, Lebanon, the Palestinian Authority and South Africa) .

136. Since no application is required, it is not necessary to publish the relevant eligibility criteria.

137. India seeks to demonstrate that the Drug Arrangements are "discriminatory" by contrasting the procedures for the application of the Drug Arrangements to those relating to the application of the social and environmental incentives.[59] That comparison, however, is inapposite because it fails to take into account that there are important substantive differences between those arrangements.

138. In order to benefit from the social or the environmental incentive, a developing country must apply certain internationally agreed standards.[60] Any developing country is capable of applying those standards and, therefore, of becoming a beneficiary. For that reason, it is necessary to provide in the GSP Regulation for an application procedure and to state the eligibility criteria.

139. In contrast, the Drug Arrangements are granted to the developing countries which are in a certain factual situation. There is nothing that a Member which is not seriously affected by the drug problem can do in order to become eligible for the preferences. For that reason, it is unnecessary to lay down an application procedure and to specify the eligibility criteria. In this respect, the Drug Arrangements are similar to the special arrangements for the LDCs.[61] Those arrangements do not provide an incentive to the LDCs to implement certain policies. Rather, like the Drug Arrangements, they are based on the development situation of those countries. The EC grants the special arrangements for LDCs to any country which is deemed to be an LDC. For that reason, the GSP Regulation neither sets out eligibility criteria for the LDCs nor provides for the possibility to apply for such status.

Question 11

*Is there a possibility for developing countries to apply to be covered under the Drug Arrangements?*

140. Any developing country may apply to be covered under the Drug Arrangements. But, as explained, no such application is required. The EC authorities will include any developing country which is deemed to meet the criteria, whether or not it has made an application.

141. The EC recalls that the Drug Arrangements were first introduced in 1990 for Bolivia, Colombia, Ecuador and Peru. In 1991, the preferences were extended to Costa Rica, Guatemala, Honduras, Nicaragua and El Salvador and Panama. In 1994, Venezuela was added to the list of beneficiaries. Finally, in 2001 Pakistan was included in the Drug Arrangements. This shows that the Drug Arrangements are not a "closed list" but, instead, are potentially open to all developing countries facing severe drug related development problems.

[59] Oral Statement of India, para. 25.
[60] Cf. Article 14.2 and 21.2 of the GSP Regulation.
[61] Cf. Article 9 of the GSP Regulation.

Question 12

*Does the EC carry out a world-wide survey of all countries which are involved in drug production or trafficking in order to designate beneficiaries? Please indicate all the relevant materials relied upon in carrying out any such world-wide survey. Did the EC apply a qualitative and/or quantitative threshold in designating the 12 beneficiaries under its Drug Arrangements? If so, what was it?*

142. The EC authorities monitor regularly the situation of the drug problem in all developing countries.

143. Each GSP Regulation has a limited duration (as a rule 4 years). Prior to the enactment of a new GSP Regulation, the EC authorities conduct an assessment of those countries which are susceptible to benefit from the Drug Arrangements (i.e. those which do not benefit already from more favourable tariff treatment as LDCs or under bilateral agreements) in order to decide which of them should be covered by the Drug Arrangements.

144. For that purpose, the EC authorities rely mainly on publicly available information from competent international organisations and bodies, such as the *United Nations Office for Drug Control and Crime Prevention* and the *International Narcotics Control Board.* The main publications from those entities have been cited in the EC's First Submission and can be supplied upon request. In addition, the EC authorities take into account the reports from the EC Commission delegations in the countries concerned.

145. 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.

Question 13

*Please elaborate upon the elements that constitute the "objective criteria" on which the EC bases its selection of beneficiary countries under the Drug Arrangements.*

146. The designation of beneficiary countries is made on the basis of an overall assessment of the seriousness of the drug problem in each developing country.

147. The EC authorities consider first the statistical data on the volume of drug production and seizures. The latter is considered to be the most reliable indication of the level of trafficking. This statistical analysis allows to identify those countries which are *prima facie* most affected by the drug problem.

148. Subsequently, the EC authorities refine the selection by conducting an assessment of the effects of drug problem in each country. The EC authorities take into account the entire range of effects which have been described at length in the EC's First Submission (paragraphs 86-99) and in particular the impact on the economic situation, the civil society, the political institutions, the health situation and the environment.

Question 14

*What are the differences in terms of the seriousness of drug problems in the countries cited in the "Report of the International Narcotics Control Board for 2002" (Exhibit EC-5, portion missing from document as submitted), as compared to those in the 12 beneficiary countries designated under the Drug Arrangements? Is the exclusion of other countries, cited in the report, based on objective criteria? If so, what are these criteria?*

149. The EC would first recall that the burden of proof is on India, as the complaining party, to show that the selection of beneficiary countries is discriminatory. Yet, the EC notes that thus far India has failed to submit any evidence, or indeed argument, to that effect.

150. The EC would further recall the observation of the Appellate Body in *Japan - Agricultural Products II* that

> A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the *SPS Agreement*, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party.[62]

151. Notwithstanding the above, the EC will use its best efforts in order to reply to the Panel's question. The INCB report mentions many countries (including many developed countries and developing countries which benefit from more favourable tariff treatment under other unilateral or bilateral arrangements), for very different reasons, not all of which are relevant for this dispute (e.g. traffic of psychotropics, conclusion of co-operation agreements, etc).

152. The EC, nevertheless, understands from the discussions during the first oral hearing that the Panel is interested in particular in three countries: Thailand, the Philippines and Indonesia. The EC will address the situation of each of these countries in turn here below. Nevertheless, the EC would like to stress its willingness to reply to any additional requests from the Panel concerning other countries, should the Panel consider it necessary.

153. Thailand has not been included in the Drug Arrangements considering that its opium production since 1994 has been on average only about 5 tons per year, compared to Afghanistan with an average of 2,700 tons per year. The INCB concluded:

> Thailand, with its continuing highland development programmes and sustained measures against illicit opium poppy cultivation, is no longer a major source of opium and heroin.[63]

154. Thailand's seizure figures were also relatively small with a yearly average of 1,235 kg of opium and 456 kg of heroin between 1995 and 2000 (in comparison, Pakistan's average seizure figures during the same period were 25,900 kg of opium and 6,770 kg heroin, yearly).[64]

155. As for the Philippines and Indonesia, according to UN statistics, neither of them produces opium or coca. As regards drug trafficking, the Philippines reported no opium seizures and only an annual average of 1.05 kg of heroin during the years 1995 to 2000. In turn, Indonesia, with a

[62] Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, para. 129.
[63] INCB report, para. 355.
[64] Ibid., p. 47, 83, 99.

population of 212 million people (thus making it the fourth most populous country in the world) reported between 1995 and 2000 an annual average of 540 g of opium and 14.61 kg of heroin .[65]

Table 1: Opium seizures (in kg):[66]

| | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 |
|---|---|---|---|---|---|---|
| Pakistan | 109,420 | 7,423 | 7,300 | 5,022 | 16,320 | 8,867 |
| Thailand | 927 | 381 | 1,151 | 1,631 | 422 | 1,592 |
| Philippines | No report | | | | | |
| Indonesia | 0.03 | 0.03 | No report | 0.03 | 3.097 | 0.034 |

Table 2: Heroin seizures (in kg):[67]

| | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 |
|---|---|---|---|---|---|---|
| Pakistan | 10,760 | 5,872 | 6,156 | 3,363 | 4,974 | 9,492 |
| Thailand | 518 | 598 | 323 | 508 | 405 | 386 |
| Philippines | No report | 1.5 | 3 | 1.7 | 0.022 | No report |
| Indonesia | 1.7 | 1.7 | 20.4 | 27.8 | 14 | 22.7 |

Question 15

*On what "objective criteria" did the EC exclude India and Paraguay from its list of beneficiaries under the Drug Arrangements?*

India

156. The UNDCP reports no illicit production of opium or coca in India. As to drug trafficking, India reported from 1995 to 2000 annual average seizure figures for opium of 2,306 kg and for heroin of 1,167 kg. The corresponding figures for Pakistan, a country with a much smaller population, are 27,500 kg and 6,770 kg respectively. The volume of coca seizures in India is negligible.[68]

Table 4: Heroin seizures (in kg):[69]

| | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 |
|---|---|---|---|---|---|---|
| India | 1,681 | 1,257 | 1,332 | 655 | 839 | 1,240 |
| Pakistan | 10,760 | 5,872 | 6,156 | 3,363 | 4,974 | 9,492 |

Table 5: Opium seizures (in kg):[70]

| | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 |
|---|---|---|---|---|---|---|
| India | 1,349 | 2,867 | 3,316 | 2,031 | 1,588 | 2,684 |
| Pakistan | 109,420 | 7,423 | 7,300 | 5,022 | 16,320 | 8,867 |

157. The above figures are even more negligible when considered in relation to the size of India's population and economy. Additionally, drug trafficking had no significant impact on the political

[65] Ibid., p. 83, 99.
[66] Ibid., p. 83.
[67] Ibid., p. 99.
[68] Ibid., pp. 84, 100 and 121.
[69] Ibid., p. 99, 100.
[70] Ibid., 83, 84.

stability of the country. India is considered to be the world's largest democracy, which guaranteed considerable domestic political stability.

158. For the above reasons, it is considered that India doe not have drug-related development problem comparable to those of the beneficiary countries.

Paraguay

159. UNODCCP did not report any production of coca or opium in Paraguay. Neither were there any seizures of opium or heroine.

160. Paraguay reported only small seizures of cocaine (yearly average between 1995 to 2000: 99.4 kg compared to Colombia's 83,049.7 kg). Furthermore, unlike the Central American countries, Paraguay is not on any major transit route for cocaine. In 2000 the volume of cocaine seizures was less than 25 % of El Salvador's, which reported the lowest figure in this year for all Central American countries. The *Organization of American States* in its "Statistical summary on Drugs 2001" breaks down per country the cocaine seizures for South America in 2000. Paraguay accounted for 0% of all seizures.[71]

Table 5: Cocaine seizures (kgs)[72]

| | | | | | | |
|---|---|---|---|---|---|---|
| Colombia | 59,030 | 45,779 | 42,044 | 107,480 | 63,945 | 110,428 |
| Bolivia | 8,497 | 8,305 | 13,689 | 10,102 | 7,707 | 5,559 |
| Peru | 22,661 | 19,695 | 8,796 | 9,937 | 11,307 | 11,848 |
| Venezuela | 6,650 | 5,906 | 16,741 | 8,159 | 12,149 | 14,771 |
| Ecuador | 4,284 | 9,534 | 3,697 | 3,854 | 10,162 | 3,308 |
| Paraguay | 59 | 47 | 77 | 222 | 95 | 96 |

Question 16

*How does the EC respond to India's argument (India, para. 62) that the Drug Arrangements simply cause a shift in market access opportunities from excluded countries to selected beneficiary countries? If there is such a shift in market-access opportunities, in what way is the EC responding to the development needs of developing countries, as required by paragraph 3(c) of the Enabling Clause?*

161. It is not correct that the Drug Arrangements "simply cause a shift in market access opportunities from excluded to selected beneficiary countries". The Drug Arrangements cover "sensitive products", i.e. products where the EC domestic industry is particularly vulnerable to competition from imports. By providing preferences with respect to those products, the Drug Arrangements create new market opportunities at the expense of the EC's domestic industry.

162. In any event, the argument mentioned in the question has not been raised by India in connection with Paragraph 3(c), but rather in connection with the requirement in Footnote 3 that preferences must be "beneficial to the developing countries". The EC has addressed at length this claim at paragraphs 141-152 of its First Submission.

[71] Organization of American States, Statistical Summary on Drugs 2001, p. 30.

[72] United Nations Office for Drug Control and Crime Prevention, Global Illicit Drug Trends 2002, p. 119, 120.

Question 17

*In setting out objective criteria for a GSP scheme, do you agree that, pursuant to paragraph 3(c) of the Enabling Clause, a preference-giving country must only consider the development, financial and trade needs of developing countries, but not other types of objectives? Please elaborate.*

163. Paragraph 3(c) says that preferences must be responsive to the development, financial and trade needs of developing countries, not that they must be responsive *only* to such needs. Donor countries may take into account also other considerations, as long as they do not detract from the objective set out in Paragraph 3(c).

164. Also, by responding to the needs of developing countries, the donor countries may achieve an objective which is also in the interest of the donor country or even of the international community as a whole. Thus, in the present case, by responding to the development needs of the countries affected by the drug problem, the EC achieves simultaneously the health policy objective of limiting the supply of drugs to the EC. It would be absurd to consider that a measure which is fully responsive to the development needs of developing countries is nonetheless incompatible with Paragraph 3(c) simply because it has, at the same time, also a beneficial effect for the donor country or the international community. Indeed, by that logic, all preferences would be contrary to Paragraph 3(c) because the development of the developing countries provides a benefit to all WTO members (e.g. in the form of larger markets for the exports from the developed countries).

Question 18

*To the extent that the Drug Arrangements only respond to development needs caused by drug production and trafficking, while not responding to development needs resulting from other problems, such as poverty, low per capita GNP, malnutrition, illiteracy and natural disasters, how does this EC programme satisfy the "non-discriminatory" requirement in footnote 3 of the Enabling Clause?*

165. Low per capita GNP, malnutrition and illiteracy are already taken into account in the UN definition of LDCs, which is used by the EC for the purposes of the special arrangements for LDCs provided for in its GSP. Poverty is a function of other criteria which are also included in the definition of LDCs. Thus, it would have been redundant to include these criteria also in the Drug Arrangements.

166. Natural disasters are a conjunctural factor which, at first sight, do not seem to warrant special trade preferences. Rather, the appropriate response is the provision of humanitarian aid and financial assistance.

167. In any event, the EC considers that the mere fact that the Drug Arrangement failed to take into account other possible criteria justifying the granting of special preferences would not make the Drug Arrangements "discriminatory". Paragraph 3(c) does not require that each single preference must be responsive at the same time to the individual development needs of each and every developing country. Indeed, that would be a logical impossibility. Rather, it is the system of preferences as a whole which must be responsive to the individual needs of all developing countries.

168. The objective stated in Paragraph 3(c) can be approached only by applying horizontal "graduation" criteria or by creating different arrangements which address the different development needs of different sub-categories of developing countries. If India considers that it has special development needs which are not sufficiently taken into account under any of the existing arrangements, it should have brought a claim under Paragraph 3(c) against the EC's failure to establish the necessary arrangements for addressing such needs, instead of complaining that the Drug Arrangements are discriminatory.

Question 19

*Given that the EC does not provide similar tariff preferences to all drug-affected developing countries, nor to any drug-affected developed countries, how do the Drug Arrangements comply with the requirements of the "chapeau" of Article XX of GATT 1994?*

169. The Drug Preferences seek to include all the developing countries which the EC considers to be particularly affected by drug production and trafficking, with the only exception of those which benefit already from more generous access under other unilateral or bilateral arrangements. India has provided no argument or evidence to show that India, or any other developing country, is similarly affected by drug production or trafficking and has been unjustifiably excluded from the Drug Arrangements.

170. The exclusion from the Drug Arrangements of the developing countries already covered by other tariff arrangements does not discriminate against those countries, which in fact benefit from more favourable treatment than those included in the Drug Arrangements.

171. The EC considers that the exclusion of developed countries from the Drug Arrangements is part of the "structure and design" of the Drug Arrangements, and not of their "application". Assuming that it had to be examined under the *chapeau*, the EC would submit that the "prevailing conditions" in the developed countries are different from those prevailing in the developing countries, in that the former have the necessary resources to fight against drug production and trafficking and do not need the assistance of the EC in the form of trade preferences. Moreover, the EC is not aware of any developed country which is as affected by the drug problem as the beneficiaries.

Question 20

*Despite the existence of many measures being applied to address drug abuse, as described in the relevant international conventions (e.g., Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol and UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988) and in the Report of the International Narcotics Control Board for 2002, does the EC consider that its Drug Arrangements are the least trade-restrictive measure available to meet its policy objective of protecting the health of citizens within the EC?*

172. See above the response to the Panel's Question to Both Parties No. 25. See also the EC's First Submission, at paragraphs 194-196.

Question 21

*Given that the 1971 Decision and the Enabling Clause were negotiated by developing countries through the Group of 77, could it be said that the developing countries all expected equivalent benefits from a GSP?*

173. It is unclear to the EC whether by "equivalent" the Panel means the "same" or different but of equivalent value having regard to the respective developing needs of each country. In any event, the EC considers that it would be inappropriate to attach any legal consequences to the fact that the 1971 Decision and the Enabling Clause was negotiated through the Group of 77.

Question 22

*Please explain why the EC considers (EC, para. 40) that the case of Belgian Family Allowances is not relevant for the interpretation of "unconditionality"?*

174. As noted by India[73], Article I:1 of the GATT imposes two distinct obligations: first, to grant MFN treatment to all imports of like products from all Members; and second, to do so "unconditionally". The EC's contention is that *Belgian Family Allowances* is concerned with the first of those two obligations, and not with the second.

175. For the reasons explained in the EC's First Submission[74], whether or not a country has a certain system of family allowances in place is not a "condition" within the meaning of Article I:1 of the GATT, because that requirement does not provide any compensation to the country granting MFN treatment.

176. However, this is not saying that the measures at issue in *Belgian Family Allowances* were consistent with Article I:1. Rather, the EC's position is that those measures were in violation of the first obligation imposed by Article I:1, because the fact that a country has in place a certain system of family allowances does not make the products originating in that country "unlike" the products originating in another country without the same system of family allowances.

[73] India's First Submission, para. 51.
[74] EC's First Submission, paras. 49-56.

**ANNEX B-3**

Replies of the European Communities to Questions from India
after the First Panel Meeting

Question 1

*In para. 19 of its submission, the European Communities ("EC") asserts that the Enabling Clause is an "autonomous right" and therefore, it must be established that the Drug Arrangements are outside the scope of the Enabling Clause as a precondition for pleading a violation of Article I:1 of the GATT. Is this a precondition for pleading a violation of Article I:1 of the GATT in respect of any measure? If not, please elaborate on the types of measures for which this precondition applies.*

1. Yes. In order to establish a violation of Article I:1 of the GATT the complaining party must establish that the disputed measure falls within the scope of that provision rather than within the scope of the Enabling Clause.

2. There is nothing extraordinary about this. It is always for the complaining party to show that the disputed measure falls within the scope of the provision which it invokes, rather than within the scope of another, mutually exclusive, provision. For example, the complaining party bears the burden to prove that:

- an import restriction falls within Article XI:1of the GATT, rather than within Article III:4;
- an import duty falls within Article II of the GATT, rather than within Article VI;
- a technical regulation falls within the scope of the TBT Agreement, rather than that of the SPS Agreement.

Question 2

*Does the EC dispute India's claim that that the EC violates Article I:1 of the GATT by failing to accord the advantage of tariff preferences under the Drug Arrangements to like products originating in the territories of all other Members (para. 36 of India's First Submission)?*

3. The EC's position is 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.

Question 3

*Does the EC interpret the term "unconditionally" in Article I:1 of the GATT as prohibiting only the grant of advantages contingent on a future or uncertain event (para. 45 of the EC's First Submission)?*

4. The EC's view is that, in the context of Article I:1 the term "unconditionally" alludes to those conditions which require a Member to provide some form of compensation in exchange for receiving MFN treatment from another Member. See EC's First Submission, paragraphs 49-56.

Question 4

*The EC asserts that the designation of beneficiary countries under the Drug Arrangements is made in accordance with objective criteria. Are these criteria set out in the Regulation? Are they set out in any other document that is publicly available?*

5. The criteria are not set out in the GSP Regulation. They are not contained in a public document. See the EC's reply to the Panel's Question to the EC No. 10.

Question 5

*What are the objective criteria that India would have to meet in order to be designated a beneficiary country under the Drug Arrangements?*

6. Please see the EC's response to the Panel's Question to the EC No. 13.

Question 6

*What are the procedures followed in designating a country as a beneficiary under the Drug Arrangements?*

7. Please see the EC's response to the Panel's Question to the EC No. 10.

Question 7

*Is a country required to apply for beneficiary status or is the evaluation (if any) conducted suo moto by the EC?*

8. No application is required. The EC will include in the Drug Arrangements any developing country which is found to satisfy the criteria.

Question 8

*If the evaluation (if any) is conducted suo moto by the EC, does the EC consult with the countries concerned in the course of the evaluation?*

9. The EC authorities maintain regular contacts with the authorities of all the developing countries. Within this context, the problem of drug production or trafficking is often discussed. No formal consultation is required as part of the evaluation process before a country is designated as a beneficiary of the Drug Arrangements.

Question 9

*If a beneficiary country no longer meets the criteria (if any), is there a procedure for revocation of beneficiary status? If so, please elaborate.*

10. The EC authorities monitor the situation of the drug problem in the beneficiary countries. If it were established that a beneficiary country is no longer affected by that problem, the Commission would propose an amendment to the GSP Regulation in order to exclude it from the Drug Arrangements. Unfortunately, this situation has not arisen yet since the introduction of the Drug Arrangements.

Question 10

*Have the criteria (if any) been applied to all developing countries? If so, can the EC provide the relevant internal documentation and the reasons for exclusion of all non-beneficiary developing countries?*

11. The criteria for the selection of beneficiary countries are applied to all developing countries which do not benefit from more favourable tariff treatment under other arrangements.

12. The requested internal documents are not public. If India has concerns regarding the exclusion of any specific countries from the Drug Arrangements, the EC is willing to explain the reasons which led to the exclusion of those countries.

Question 11

*Could the EC provide details of the dates at which various beneficiaries were included under the Drug Arrangements and references to the relevant legal instrument designating each country as a beneficiary?*

13. In 1990, Colombia, Peru, Ecuador and Bolivia were given special preferences by Council Regulation (EEC) No 3835/90 of 20 December 1990 (OJ L 370 of 31.12.1990, p. 126)

14. In 1991, preferences were granted to Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama by Council Regulation (EEC) No 3900/91 of 16 December 1991 (OJ L 368 of 31.12.1991, p. 11).

15. In 1994, Venezuela was added to the list of beneficiary countries by Council Regulation (EC) No 3281/94 of 19 December 1994 (OJ L 348 of 31.12.1994, p. 1).

16. In 2001, Pakistan was included in the Drug Arrangements by Council Regulation (EC) No 2501/2001 of 10 December 2001 (OJ L 346 of 31.12.2001, p. 1).

Question 12

*The EC asserts that the inclusion of new beneficiaries under the Drug Arrangements is possible (para. 212 of the EC's First Submission). However, the Draft Minutes of the 2397th Meeting of the Council held in Brussels on 10 December 2001 (15131/01- PV/CONS 79) contain the following statement by the Commission:*

> *"The Commission confirms that it does not intend to propose that the advantages of the special regime to combat drug production and trafficking be extended to countries other than those on the list of beneficiaries of that regime, which is set out in Annex I to the Regulation"*

*How can this statement be reconciled with EC's assertion that the inclusion of new beneficiaries under the Drug Arrangements is possible and will be based on the same criteria applied to the current beneficiaries? In any event, does the Regulation have to be amended to include any other Member as a beneficiary under the Drug Arrangements?*

17. The statement means that, based on its assessment of the situation at that point in time, the EC Commission did not consider it appropriate to add other countries to the list of beneficiaries. It does not preclude the possibility to include other countries if a subsequent change in the situation of those countries so required.

18. The GSP Regulation is adopted for a limited period of time (as a rule, 4 years). Accordingly, depending on the timing, the inclusion of a beneficiary in the Drug Arrangements could be effected either by amending the GSP Regulation by means of another Council regulation *ad hoc* or simply by including it in the list annexed to the next GSP Regulation.

Question 13

*The EC asserts that all the beneficiaries are included based on the application of objective criteria. However, the Draft Minutes of the 2397th Meeting of the Council held in Brussels on 10 December 2001 (15131/01- PV/CONS 79) contain the following statement by the Portuguese delegation:*

> *"this regime was established to meet specific objectives. Extending it to Pakistan would run counter to these objectives and would furthermore create a serious precedent with regard to the other GSP beneficiary countries … The countries which are currently beneficiaries of the drugs regime provided for under the GSP back this solution; they consider that Pakistan does not meet the criteria governing the application of the regime."*

*Could the EC confirm that the beneficiary countries considered that Pakistan does not meet the criteria governing the application of the regime? In light of these comments please clarify the basis for the including Pakistan as a beneficiary under the Drug Arrangements.*

19. The EC authorities neither request nor take into account the views of the existing beneficiaries in deciding whether to add other beneficiaries to the Drug Arrangements. The selection is based exclusively on the assessment of the situation in each country. Therefore, the EC cannot confirm whether other beneficiaries were opposed to the inclusion of Pakistan.

20. The EC has explained the reasons for including Pakistan in the Drug Arrangements at paragraphs 136 to 139 of its First Written Submission.

Question 14

*In this connection, could the EC please furnish India with a copy of the report by the Permanent Representatives Committee (15083/01)?*

21. The requested document is not public.

Question 15

*A note from Mr. Bernard Zepter (Deputy Secretary General of the European Commission) to Mr. Javier Solana (the Secretary-General) regarding the Amended Proposal for the present Regulation (Inter-institutional File: 2001/0131 (ACC)/ 14176/01 dated 19 November 2001) states in para. 35 that the benefits under the drug regime "… are given without any prerequisite…". Can this be reconciled with the EC's assertion that the tariff preferences under the Drug Arrangements are granted in accordance with objective criteria?*

22. The statement means that the selection of beneficiaries is made on the basis of the situation of each country concerned and that the beneficiaries are not required to undertake any specific action in order to qualify for them, such as for example enforcing certain anti-drug policies.

Question 16

*Is it correct to state that under the EC's interpretation of "non-discrimination", a developed country can accord preferential tariff treatment to a single developing country as long as this country has "according to objective criteria different development needs"?*

23. The EC's view is that differences in tariff treatment between developing countries are non-discriminatory if they pursue a legitimate objective, having regard to the object and purpose of the Enabling Clause, as specified in particular in Paragraph 3 (c); and if such difference in treatment is a reasonable means to achieve that objective. This means that differences in tariff treatment based on minor or irrelevant differences between countries or in differences which should be addressed through other means could be "discriminatory".

24. The EC considers that, in practice, it would be unlikely that the criteria used in defining a category which in practice consists of only one developing category could qualify as non-discriminatory.

Question 17

*Does the EC claim that, under the GSP, a mere difference in development needs justifies a difference in treatment? Or does the EC claim that countries with more pressing development needs should be given more favourable treatment than countries with less pressing development needs?*

25. As explained, the EC's view is that not *any* difference in development needs may justify *any* difference in tariff treatment. The difference in tariff treatment must be a reasonable response to the difference in development needs, having regard to the object and purpose of the Enabling Clause.

26. For example, assuming that the income level were an appropriate criterion to measure development needs, according better tariff treatment to a country with a relatively high income level than to another country with a relatively low level would be, in the light of the objectives pursued by the Enabling Clause, a manifestly unreasonable response to the difference in development needs between those two countries and, hence, discriminatory.

Question 18

*Is it correct to state that under the EC's interpretation of "non-discrimination", a developed country can grant preferential tariff treatment to a group of developing countries that is more favourable than that granted to the least developed countries, as long as this group, "according to objective criteria [has] different development needs"?*

27. To repeat, the difference in tariff treatment has to be reasonably justified having regard to the objectives of the Enabling Clause.

28. In principle, it would seem unjustified, and hence discriminatory, to give more favourable tariff treatment to other developing countries than to the LDCs. But this question cannot be answered in the abstract. It would be necessary to know what are the development needs of the other category of countries on which the preference purports to be based.

29. The EC recalls that, under the GSP Regulation, the LDCs receive the most favourable tariff treatment. Thus, India's question is, once again, hypothetical and not directly relevant for this dispute.

Question 19

*In para. 144 of its First Submission, the EC posits an alternative interpretation of the phrase "beneficial to the developing countries" whereby "…India would have to demonstrate that the detriment allegedly suffered by some developing countries outweighs the benefits enjoyed by the countries covered by the Drug Arrangements." Could the EC please elaborate on the methodology to be used in evaluating and comparing the "detriment" and the "benefits"?*

30. It is not for the EC to make India's case. The EC believes that it would not be an impossible task for a competent econometrician to design a methodology to estimate the trade creating and trade diverting effects of the Drug Arrangements.

Question 20

*Could the EC please clarify whether beneficiary countries are chosen according to the impact that activities within their borders have on the health of EC citizens or are chosen based on their development needs?*

31. The beneficiaries are selected on the basis of an overall assessment of the seriousness of the drug problem in each developing country. Nevertheless, the criteria used in making that assessment ensure that the selected countries are also those which pose a more serious threat to the health situation within the EC. See EC's response to Panel's Question to Both Parties No. 24.

Question 21

*Could the EC please clarify whether the beneficiary countries were chosen on the basis of their drug problems or their drug policies? Does a resolution of the drug problems or a change in drug policies lead to a withdrawal of the beneficiary status under the Drug Arrangements?*

32. The selection of the beneficiary countries is based on an overall assessment of the seriousness of the drug problem in each developing country. The drug policies implemented by them are not part of that assessment.

33. In accordance with Article 25.1 of the GSP regulation, the EC Commission must assess, among other things, the drug policies of the beneficiaries. However, Paragraph 25.3 makes it clear that the results of that assessment shall not prejudge the continuation of the Drug Arrangements.

34. As explained, if it were established that a country is no longer affected by the drug problem, it would be withdrawn from the list of beneficiaries. On the other hand, a change in a country's drug policies would not be a cause for withdrawing the preferences.

35. The EC considers that the developing countries affected by the drug problem do not require external incentives in order to comply with their obligations under the relevant U.N. Conventions, since it is in their own interest to fight against the drug problem. What those countries need is assistance, including both technical and financial assistance and trade preferences.

36. The EC, therefore, rejects the suggestion made on India's behalf to the effect that, since the drug policies of the beneficiaries are not taken into account, the Drug Arrangements provide an "incentive to perpetuate the drug problem" rather than fight against it. By the same token, the EC does not require the LDCs to implement any specific development policies. Yet, the EC assumes that even India would agree that the special arrangements for the LDCs included in the EC GSP Regulation are not an incentive for those countries to keep their children undernourished and illiterate.

Question 22

*In previous cases where developed countries wished to grant tariff preferences to some but not all developing countries, a waiver was sought. See United States Caribbean Basin Economic Recovery Act waiver adopted 15 February 1985 (L/5579, BISD 31S/20) (renewed 15 November 1995 [WT/L/104]); Canada CARIBCAN waiver adopted 26 November 1986 (L/6102, SR42/4) (renewed 14 October 1996 [WT/L/185]); United States Andean Trade Preference Act waiver adopted 19 May 1992 (L/6991) (renewed 14 October 1996 [WT/L/183 and WT/L/184]). Could the EC explain why, in its view, a waiver was required for these arrangements but not for the Drug Arrangements?*

37. The CBERA and the CARIBCAN preferences do not purport to be based on any special development needs of the beneficiary countries, as compared to those of other developing countries in different regions. Rather, the selection criterion is strictly geographical.

38. Like the Drug Arrangements, the APTA preferences are a response to the special development needs related to drug production and trafficking. However, unlike the Drug Arrangements, the scope of the APTA preferences is permanently limited to just four South American countries. The EC understands that it is not the U.S. position that those four countries are the only developing countries in the world which are seriously affected by the drug problem. Rather, the United States has made a deliberate choice to restrict its assistance to only some of the affected countries. In contrast, the Drug Arrangement purport to apply to all the developing countries which are seriously affected by the drug problem, regardless of their geographical location.

Question 23

*The EC claims that the term "unconditional" in Article I of the GATT does not imply that Members must extend the benefits of import tariff reductions irrespective of the situation or policies of the exporting country. In its view, this term merely implies that the extension of the benefit of such reductions must not be "in exchange for some form of compensation" (para. 33 of the EC's first written submission). Is this understanding of the EC's claim correct? If so, would the EC please explain how Members could effectively negotiate market access concessions in the framework of the GATT if Article I were interpreted to permit Members to vary the level of their import tariffs with the situation and policies of the exporting country?*

39. India has misunderstood the EC's position.

40. The EC's view is that the term "unconditionally" refers to the conditions which require to provide some form of compensation in exchange for receiving MFN treatment. This is not saying, however, that Article I:1 permits Members "to vary the level of their import tariffs with the situation and policies of the exporting countries".

41. India fails to distinguish between the two obligations imposed by Article I:1: to grant MFN treatment; and to do so "unconditionally". The EC's position is that it could be contrary to the first of those obligations, but not to the second, if a Member applied different import tariffs according to "the situation or policies" of the exporting country, unless such situation or policies made the products exported from a country "unlike" those from other countries. See the EC's response to the Panel's Question to the EC No. 21.

Question 24

*The function of the Enabling Clause, as made explicit in its paragraph 1, is to confer upon WTO Members the right to "accord differential and more favourable treatment to developing countries, without according such treatment to other [Members]" notwithstanding their MFN obligations under Article I of the GATT. The "other Members" to which this provision refers are the Members that are not accorded differential and more favourable treatment under the circumstances set out in paragraph 2.*

*In the case of paragraph 2 (a), these "other Members" are the developed countries to whom GSP benefits are denied.*

*In the case of paragraph 2 (c), the "other Members" are the developed and developing countries to whom the benefits of tariff arrangements among developing countries are denied.*

*In the case of paragraph 2 (d), the "other Members" are the developed and developing countries to whom the special treatment accorded to the least developed countries are denied.*

*This implies that the Members defined as "other Members" have made three "gifts" to permit the realisation of the principle of differential and more favourable treatment of developing countries: The developed countries renounced their right to MFN treatment in relation to benefits accorded to developing and the least developed countries. The developing countries renounced their right to MFN treatment in relation to two benefits: first, benefits accorded by them to other developing countries in the framework of tariff arrangements among them and, second, to the benefits accorded to the least developed countries.*

*The arguments of the EC imply that the developing countries made an additional "gift" under paragraph 2(a), namely, that they renounced their right to MFN treatment in respect benefits accorded by developed countries to other developing countries. However, this provision refers only to preferences accorded by developed to developing countries, which implies that the "other Members" that are renouncing their MFN rights under paragraph 2(a) are exclusively the developed countries to whom the GSP benefits are denied.*

*Would the EC please comment on the above observations and explain where, in the text of paragraphs 1 and 2 and in the overall construction of these provisions, it finds the basis for its claim that, under paragraph 2(a), the "other Members" renouncing their MFN rights include the developing countries?*

*The concept that the developing countries made this "gift" to each other under paragraph 2(a) is not expressed in the wording of paragraphs 1 and 2 of the Enabling Clause. The Appellate Body has stated that "the duty of the interpreter is to examine the words of the treaty to determine the intentions of the parties" and that the principles of interpretation do not "condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".*[1] *The Appellate Body further stated in one case that, to sustain an interpretation with far-reaching consequences, "specific and compelling" treaty language was required.*[2] *Would the EC please identify the specific and compelling treaty language that sustains an interpretation of paragraph 2(a) of the Enabling Claus according to which all developing country Members of the WTO have renounced all of their MFN rights in respect of benefits accorded under any GSP scheme?*

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[1] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents*"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, at 24.

[2] Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, at 198.

42. The EC and some third parties have thoroughly rebutted India's interpretation of the term "other Members". India does not address any of those arguments.

43. The EC would agree that the same words may have different meaning in the context of different treaty provisions. However, India's position that one and the same provision (Paragraph 1) may have simultaneously three different and conflicting meanings is contrary to basic principles of legal interpretation and indeed of elementary logic.

44. India's "gift theory" is entirely predicated on the unverifiable claim that developing countries would not have agreed to the result of the EC's interpretation. However, by the same token, the EC could claim that the developed countries would not have agreed to the results of India's own interpretation. More specifically, the EC could claim that the EC would not have agreed to relinquish all its MFN rights vis-à-vis all developing countries but for the expectation that countries like India (the fourth largest economy in the world, with a competitive and diversified export sector, including a significant share of high tech goods) would likewise renounce its MFN rights vis-à-vis much smaller and less fortunate developing countries, such as those ravaged by the drug problem. It is evident, however, that this kind of arguments is of little value for the interpretation of the Enabling Clause.

Question 25

*The EC and India agree that paragraph 2(a) of the Enabling Clause covers only "non-discriminatory preferences beneficial to the developing countries". Their dispute relates to the interpretation of the term "non-discriminatory". The EC and India further agree that this term has to be interpreted in its context and that the other provisions of the Enabling Clause provide contextual guidance. The EC claims that the term "non-discriminatory" cannot be interpreted to prevent responses to the specific problems of individual developing countries because this would prevent developed countries from fulfilling their obligation to respond to the development, financial and trade needs of the developing countries in accordance with paragraph 3(c) of the Enabling Clause. Paragraph 3(c) provides the contextual guidance sought by the EC only if its is interpreted to establish the obligation to respond to the individual trade, financial and trade needs of developing countries rather than their needs in general.*

*Paragraph 3(c) mentions developed and developing countries but – unlike other provisions of the Enabling Clause - not the needs of "individual" developing countries. This suggests that paragraph 3(c) contrasts the needs of the developing countries with those of the developed countries. Its rationale is to ensure that developed countries design and, if necessary modify, the product coverage and tariff cuts under their GSP schemes to satisfy the needs of developing countries rather than those of domestic industries, in other words, that GSP schemes are adopted and administered with an outward look to the Third World rather than an inward look to domestic pressure groups.*

*Against this background, India would like to ask the following questions:*

- *The terms of paragraph 3(c) do not refer to "individual" needs. Explicit references to "individual" needs are however contained in the rules on reciprocity in trade negotiations contained in paragraphs 5 and 6 of the Enabling Clause. This difference in wording implies in the view of the India that "individual" needs of each of the developing countries are to be taken into account in determining the degree of reciprocity demanded from them while the needs of the developing countries in general should be taken into account in determining the product coverage and tariff cuts under GSP schemes. Against this background, would the EC please explain the textual basis for its claim that paragraph 3(c) refers to "individual" needs?*

- *Would the EC please indicate whether there is a principle of interpretation that would permit the Panel to ignore the decision of the drafters of the Enabling Clause to qualify the terms*

*"development, financial and trade needs" with a reference to "individual" in paragraphs 5 and 6 but not in paragraph 3(c)?*

45. Please see the EC's response to the Panel's Question to India No. 8.

Question 26

*Paragraph 3(c) establishes an obligation ("shall"). If the interpretation of this provision advanced by the EC were correct, the developed countries would be under an obligation to differentiate between developing countries in accordance with their individual needs. However, in its first submission, the EC uses paragraph 3(c) as the contextual basis for its argument that it has the discretion to differentiate between developing countries with different needs. Against this background, India would like to ask the following questions:*

- *Does the EC agree that it has the obligation to differentiate between developing countries in accordance with their individual needs? If so, how can this position be reconciled with the fact that most of the tariff preferences accorded under GSP schemes (including those accorded by the EC under its general GSP arrangements for developing countries and its "Everything But Arms" arrangement for the least developed countries) do not distinguish between each of the beneficiary countries in accordance with their individual needs?*

46. Please see the response to the Panel's Question to both Parties No. 17.

47. India's description of the EC's GSP overlooks that, within each arrangement, the EC takes into account the individual needs of developing countries through the graduation mechanisms.

- *How could the obligation set out in paragraph 3(c) be observed by a WTO Member that has decided to reduce its tariffs on products from all developing countries to zero? Would the obligation of that Member to "modify if necessary" its GSP to respond to individual countries' needs constitute in these circumstances an obligation to reintroduce tariffs on products from developing countries that have lesser needs? Would the EC's interpretation of paragraph 3(c) not imply 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?*

48. As a matter of fact, the EC does take into account the need to preserve the margins of preference for LDCs and for the countries covered by the Drug Arrangements when designing its GSP. Whether or not this is legally required under Paragraph 3(c) is an interesting theoretical question which is not before the Panel.

49. It should be noted, moreover, that even if a country applied a zero duty to all developing countries it could still take into account their different development needs through graduation mechanisms for sectors and countries such as those applied by the EC.

Question 27

*Paragraph 3(c), just like paragraphs 5 and 6, uses the conjunctive "and" when referring to the development, financial and trade needs of developing countries. In the view of India, this implies an obligation to respond, both in GSP schemes and trade negotiations, to the development needs, the financial needs and the trade needs taken together. If the drafters had intended to establish an obligation to respond to specific needs of individual developing countries, they would have used the conjunctive "or". Against this background, would the EC please explain how its claim that paragraph 3(c) obliges developing countries to respond to specific drug-related needs can be reconciled with the requirement that this provision refers to development, financial and trade needs?*

50. Please see the response to the Panel's question to both parties No 12.

Question 28

*During the first meeting of the Panel, the representative of the EC stated that development, financial and trade needs were in fact the same because all these needs were economically interrelated. Would the EC please explain on the basis of which interpretative principle the Panel can assume that the references to "financial" needs and "trade" needs are redundant?*

51. Please see the response to the Panel's question to both parties No. 12.

Question 29

*India maintains that, in the legal framework of the GATT and the other WTO agreements, discrimination means denial of equal competitive opportunities to like products of different origins. India recognises that, outside of the legal framework of the WTO, other meanings have been attached to the term discrimination. Would the EC please explain whether in its view treaties other than the WTO agreements and jurisprudence and legal opinions unrelated to the world trade order can provide the Panel with contextual guidance to determine the meaning of the term "discrimination" in a legal instrument that is part of the GATT? As pointed out above, according to the Appellate Body, the duty of the interpreter is to examine the words of the treaty to determine the intention of the parties.*[3] *On the basis of which interpretative principle could the Panel conclude that the drafters of the Enabling Clause meant to use a concept of discrimination foreign to the GATT?*

52. Please see the response to the Panel's question to both parties No. 10.

Question 30

*In its first submission, the EC claims that "non-discriminatory" does not necessarily mean formally equal treatment and concludes from this that the more favourable treatment of the beneficiary countries under its Drug Arrangements is not discrimination. In view of the fact that (a) it is not in dispute that the GATT provisions implementing the principle of discrimination do not all require formally equal treatment (cf. Articles I, XIII and XVII of the GATT) and (b) there is no provision in the GATT and other WTO agreements in which the denial of an effective equality of competitive opportunities is described as non-discriminatory, India would appreciate it if the EC were to explain further the concept of discrimination that it wishes the Panel to apply.*

- *Is the EC of the opinion that, according to its concept of non-discrimination, any difference in the needs of individual developing countries justifies a more favourable tariff treatment of the countries facing those needs or would, in accordance with some generally applicable principle, the needs of the favoured developing countries have to rank higher than the needs of the countries to whom the tariff preferences are being denied?*

53. Please see the responses to India's questions Nos. 16, 17 and 18 above, and the response to the Panel's question to both parties No. 17.

- *If the latter, what principle would WTO panels have to apply when ranking the different needs of individual developing countries accorded different market access opportunities? For instance, on the basis of what principle would panels have to evaluate and compare the needs of developing countries with drug-related problems and the needs of developing countries facing starvation? Where would panels find a textual basis that could guide them on this*

[3] Appellate Body Report, *India – Patents*, *Ibid*.

*issue? If there is no such textual basis, would panels not have to resolve the intense distributional conflicts to which all trade discrimination gives rise in a complete normative void and hence turn into political bodies?*

54. The EC would agree that its interpretation of the term "non-discriminatory" is more nuanced and, as a result, more difficult to apply by Panels than India's "one-size fits all" interpretation. But the EC's is not aware of any interpretative principle whereby easy-to-apply interpretations should be preferred only for that reason. The interpretation of the notion of discrimination made by the EC is in line with the interpretation routinely applied by many other international and municipal tribunals around the world dealing with a large variety of legal issues (including trade law). The EC does not believe that WTO Panels are less qualified than those tribunals. Nor does the EC believe that those tribunals have become political bodies as a result of applying that interpretation.

55. Furthermore, WTO panel are used to apply complex, relatively indeterminate legal standards. For example, this Panel must decide whether a measure is "necessary" to protect human life. There is no further "textual legal basis" in Article XX to guide the Panel on the issue of what is "necessary". Whatever guidance is available to this Panel has been handed over by previous panel and Appellate Body decisions. And yet both India and the EC agree that panels are qualified for deciding an issue of such importance and that by doing so they are not assuming a political role, but simply carrying out the often difficult task of applying the law to the facts of each case.

56. Finally, the EC would observe that India's own interpretation of Paragraph 3(c) would require Panels to make even more difficult judgements. Indeed, on India's interpretation of that provision, a panel would have to decide issues such as whether the depth of a tariff cut is sufficiently "responsive" to the needs of developing countries. (See EC's Response to Panel's Question No. 8 to India.) There is no "textual basis" in Article 3(c) to decide those issues. Yet India seems totally unconcerned by the obvious difficulty of the task, or by the risk that in deciding by how much a developed country should cut its tariffs a Panel may be assuming a political role.

- *At the first meeting, the EC stated that the freedom of GSP donor countries to establish criteria for the grant of supplementary GSP preferences, such as those accorded under the Drug Arrangements, was curtailed by the requirement that GSP preferences be "generalised". India's understanding of the drafting history is that the term "generalised" was meant to refer to the range of countries that would accord and receive preferences but not to the degree of differentiation between the countries that the donor countries selected as beneficiaries. In view of the fact that the countries that are denied the benefits accorded under the Drug Arrangements are not excluded from the EC scheme, the question of whether the EC's GSP scheme is sufficiently "generalised" does not arise in the case before the Panel. Could the EC point to any drafting history that shows that the term "generalised" was meant to establish a standard for differentiation <u>between countries that donor countries have already selected as beneficiaries</u>?*

57. Please see the EC's response to the Panel's question to both parties No. 11.

<u>Question 31</u>

*The principal function of the GATT, as its preamble makes clear, is to provide a legal framework for the exchange of market access concessions. Article I of the GATT is the cornerstone of this framework because it ensures that two 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, put differently, except when Members have explicitly agreed otherwise. 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 always have to fear*

*that the market access commitments that they negotiate with GSP donor countries will become commercially valueless because of the subsequent more favourable treatment of other developing countries under their GSP. Against this background, India would like to ask the following questions:*

- *Suppose India wanted to negotiate with the EC a reduction of the import tariff for T-shirts from 12 % to 6 % ad valorem. What incentive would India have to exchange such a concession in the framework of the GATT if the EC were given the right to reduce the tariff charged on T-shirts originating in Pakistan to zero merely because it determines in accordance with its own criteria that the needs of Pakistan and India are different from each other and that Pakistan's needs rank higher than those of India?*

58. The EC considers that the requirements imposed by the Enabling Clause, and in particular by footnote 3, as interpreted by the EC, would provide a sufficient guarantee to India.

- *Would the EC please explain how it could effectively negotiate market access concessions with the developing countries during the Doha Round if the Panel were to endorse its interpretation of the Enabling Clause?*

59. The Drug Arrangements have been in place since 1990. They did not prevent the EC from negotiating successfully tariff concessions during the Uruguay Round.

- *Given that the EC's ability to negotiate concessions with the developing countries would be seriously impaired if its interpretation of the Enabling Clause were adopted, would the EC please explain on the basis of which considerations the EC and its Member States concluded that it would be in their interest to seek an endorsement of the Drug Arrangements under the Enabling Clause rather than to negotiate a waiver with terms and conditions acceptable to the WTO Members adversely affected by the Drug Arrangements?*

60. The EC thanks India for its concerns about the EC's interests. The internal considerations which have led the EC to take the positions expressed before the Panel are not relevant for the adjudication of the legal issues in dispute. Likewise, the internal considerations which have led India to express views that undermine the principle of special and differential treatment, contradict India's negotiating positions, endanger the viability of the most important and generous GSPs, of which India is one of the largest beneficiaries, and call into question India's standing and credibility among the developing country Members of the WTO which it aspires to lead, are also not relevant for the adjudication of the legal issues in dispute.

Question 32

*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 Round if the beneficiary countries' drug problems were to continue beyond the conclusion of that Round. Against this background, would the EC please explain:*

- *How could the EC effectively negotiate market access concessions with other Members in the framework of the GATT and, more generally, how could the GATT still serve as a legal framework for market access concessions if the Panel were to endorse the EC's interpretation of Article XX(b)?*

61. When negotiating tariff concessions the EC takes into account, among other considerations, the need to maintain appropriate margins of preference under the GSP Regulation.

62. The EC does not agree with the "logical implication" drawn by India. It is never "necessary" for a Member to breach a tariff binding because it is within its disposition to undo the binding in accordance with Article XXVIII of the GATT. In contrast, a Member has no right to a waiver, which is within the complete discretion of the Ministerial Conference.

- *Given the systemic implications that the acceptance of the EC's claims under Article XX(b) would have, what were the considerations that led the EC and its Member States to conclude that the invocation of Article XX(b) to defend the Drug Arrangements is to their advantage?*

63. See above India's response to Question 31.

- *Would the EC consider withdrawing its invocation of Article XX (b)?*

64. No.

Question 33

*The EC claims that the Enabling Clause is not an affirmative defence and that India bears the burden of establishing that the Drug Arrangements are not justified under the Enabling Clause.*

*In the course of the consultations relating to this dispute, when asked for the justification of the exclusion of all other Members from the tariff preferences granted to the twelve beneficiaries, the EC did not give any reply except to say that the dispute settlement proceedings are there precisely to settle the issue.*

*In the course of the hearings held on 14-16 May 2003, the EC claimed that at all times, it has always been the position of the EC that the Drug Arrangements are justified under the Enabling Clause.*

*In the Minutes of the Meeting of the Council for Trade in Goods held on 2 November 2001 (G/C/M/55 dated 19 November 2001), the representative of Sri Lanka "requested the EC to clarify why this arrangement was notified under Article I of the GATT", in light of the fact that "changes to GSP should be notified under the Enabling Clause" (paragraph 2.5). In his response, the representative of the EC said that on "why the European Communities had not used the Enabling Clause, he had certain doubts as to the possibility of using it as a legal basis and this is why the European Communities had made a request for a waiver under Article 1" (paragraph 2.14).*

*Could the EC clarify the apparent inconsistency between its assertion at the hearings held on 14-16 May 2003 (that it has always been of the position that the Drug Arrangements are justified under the Enabling Clause), on the one hand, and (i) its failure to assert such position in the course of the consultations and (ii) the "certain doubts as to the possibility" of using the Enabling Clause "as a legal basis" which it expressed at the meeting of the Council for Trade in Goods on 2 November 2001?*

65. India's allegations hat the EC did not invoke the Enabling Clause during the consultations are not true.

66. As shown by the minutes of the meeting drawn by the EC Commission (Exhibit EC-19), the EC representatives explained repeatedly during the consultations that the EC considered that the Drug Arrangements were covered by the Enabling Clause.

67. Specifically, in response to India's question "Are the Special arrangements for combating drug production and trafficking in the view of the EC consistent with WTO law", the unequivocal answer of the EC was:

> "Yes they are fully compatible with the enabling clause. If India believes otherwise, it can have recourse to the appropriate mechanism of the DSU."

68. India misleadingly persists on citing only the last part of the EC's response.

*Has the EC notified the Drug Arrangements pursuant to paragraph 4 of the Enabling Clause? If so, when? Which WTO document indicates that it has done so?*

69. The Drug Arrangements were introduced by Council Regulation (EC) 3835/90. That regulation was notified to the WTO under the Enabling Clause on 2 May 1991. Subsequently, the Drug Arrangements have been notified as part of the successive EC's GSP Regulations in which they were included. The EC is providing copies of the notifications as Exhibit EC – 20.

*The WTO-consistency of the Enabling Clause had earlier been raised in the WTO and in the consultations in this dispute. The EC publicly asserted the defence of justification under the Enabling Clause for the first time only in its own First Submission. In the EC's view, given the circumstances, how could India or any other complainant similarly-situated have anticipated the EC's reliance on the Enabling Clause?*

70. India could have anticipated, and indeed did anticipate, that the EC would rely on the Enabling Clause:

- the Drug Arrangements are tariff preferences granted by a developed country to developing countries and, therefore, fall *prima facie* within the scope of Paragraphs 1 and 2 (a) of the Enabling Clause;
- the Drug Arrangements have always been included in the EC's GSP Regulation;
- the Drug Arrangements have been notified under the Enabling Clause as part of the EC's GSP system;
- the EC explained during the consultations that it considered that the Drug Arrangements were covered by the Enabling Clause.

71. In any event, whether or not India could have anticipated that the EC would invoke the Enabling Clause is irrelevant. As explained in the response to Question 1, the complaining party always bears the burden to prove that the disputed measure falls within the scope of the provision which it invokes, rather than within the scope of another, mutually exclusive provision.

*This is a dispute under Article I of the GATT initiated by a developing country Member against a developed country Member involving tariff preferences which the latter grants to developing countries to the exclusion of all other Members. Is the EC of the view that, under the circumstances, a claim under Article I of the GATT could only succeed if the complainant likewise establishes that the discriminatory tariff preferences are not justified under the Enabling Clause?*

72. Yes. See the response to India's Question No 1.

**ANNEX B-4**

Replies of India to Questions from the Panel
after the Second Panel Meeting

**To both Parties**

*Legal Function*

*29. What is the difference between the Enabling Clause and the 1971 Waiver Decision? What did the Enabling Clause add to the 1971 Waiver Decision?*

**Reply**

In establishing the differences between the Enabling Clause and the 1971 Waiver Decision, it would be appropriate to start with a discussion on their *material* similarities. These are:

- Both permit developed country Members to grant preferential tariff treatment to products originating in developing countries in accordance with the Generalized System of Preferences ("GSP") without according the same treatment to products originating in other Members, notwithstanding Article I of the GATT.

- The GSP referred to in the Enabling Clause is the same GSP referred to in the 1971 Waiver Decision which, in turn, is the same GSP referred to in the mutually acceptable arrangements that had been drawn up in the UNCTAD.

  > Paragraph 2(a) of the Enabling Clause refers to "preferential tariff treatment accorded by developed [country Members] to products originating in developing countries in accordance with the Generalized System of Preferences".
  >
  > Footnote 3 to paragraph 2(a) refers to the GSP as that which is "… described in the [1971 Waiver Decision] relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries".
  >
  > Paragraph (a) of the 1971 Waiver Decision refers to "the preferential tariff treatment referred to in the Preamble to this Decision …"
  >
  > The relevant provision of the Preamble of the 1971 Waiver Decision refers to the "mutually acceptable arrangements [that] have been drawn up in the UNCTAD concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries… "

The *material* differences are as follows:

- The 1971 Waiver Decision was applicable for a limited ten-year period. The Enabling Clause has an indefinite period.

- The Enabling Clause likewise permits the acts referred to in paragraphs 2(b), 2(c), and 2(d), all of which were not covered by the 1971 Waiver Decision.

There are *other* differences, among which are the texts of paragraphs 3(c), 5, 6, 7 and 8, all of which were not contained in the 1971 Waiver Decision.

*30. Are there any options other than construing the Enabling Clause as either an autonomous right or as an exception?*

**Reply**

The facts upon which India relies in support of its claim under Article I:1 of the GATT are not in dispute. Under the Drug Arrangements, the EC grants tariff advantages to products originating in the twelve beneficiaries without according the same treatment to like products originating in all other Members. This fact is not disputed.

In its defence, the EC claims that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause because the term "non-discriminatory" permits developed country Members to differentiate between developing countries in the context of the GSP. This is a legal argument. The defence of the EC could therefore be resolved relying on the same undisputed facts upon which India relies for India's claim under Article I:1 of the GATT.

To the extent that the characterization of the Enabling Clause – whether as an autonomous right or an exception – is linked with burden of proof, the Panel therefore need not delve into the issue of characterization in order to resolve this dispute. The facts are undisputed.

In respect of the EC's legal argument, the Appellate Body has decided that the principles of *interpretation* that apply do not differ depending on the characterization of the provision at issue.[1]

Paragraph 1 and the introductory phrase of paragraph 2 of the Enabling Clause make clear that the legal function of paragraph 2(a) of the Enabling Clause is to permit preferential tariff treatment that would otherwise have been prohibited by Article I:1 of the GATT if paragraph 2(a) did not exist. The question of whether the Drug Arrangements are covered by paragraph 2(a) of the Enabling Clause consequently has to be answered by examining whether the terms of this provision, interpreted in the context in which they appear and in the light of the object and purpose of the GATT, justify the conclusion that by agreeing to paragraph 2(a), the developing countries waived their right to most-favoured-nation ("MFN") treatment under Article I:1 of the GATT. This interpretative issue does not present itself differently depending on whether paragraph 2(a) is regarded as an autonomous right or an exception.

*31. In light of the fact that the Enabling Clause was part of a treaty negotiation, did the developing countries "pay" for it?*

**Reply**

The Tokyo Round negotiations were conducted in accordance with the principle of individually graduated non-reciprocity set out in Article XXXVI:8 of the GATT and the interpretative note thereto (the same principle that is set out in paragraph 5 of the Enabling Clause). The developing countries were therefore expected to make concessions in return for market access opportunities they

[1] " … merely characterizing a treaty provision as an exception does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in light of the treaty's object and purpose or, in other words, by applying the normal rules of treaty interpretation." Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ("*EC – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 104.

obtained. However, in determining the level of these concessions, their individual development needs were taken into account.

*32. What are relevant criteria to determining whether a provision can be characterized as an affirmative defence?*

**Reply**

"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."[2] Based on this definition, the following are the relevant criteria in determining whether a provision can be characterized as an affirmative defence:

- It is an *assertion* by a defendant
- The assertion raises *new facts and arguments*.
- If those new facts or arguments are true, the *plaintiff's or prosecution's claim will be defeated*, even if all allegations in the complaint are true.

Applying the foregoing criteria to this dispute, India claims that the Drug Arrangements are inconsistent with Article I:1 of the GATT 1994 because under those arrangements, the EC grants tariff preferences to products originating in the twelve developing country beneficiaries, and the EC does not accord the same treatment immediately and unconditionally to products originating in all other Members.

The EC claims that the Drug Arrangements are justified under Paragraph 2(a) of the Enabling Clause. Paragraph 2(a) of the Enabling Clause is thus an affirmative defence:

- The defence of justification under Paragraph 2(a) of the Enabling Clause is an assertion by the EC which is material to the EC's defence, and not to India's claim.
- The EC's assertion raises new facts and arguments in relation to the facts and arguments raised by India in support of India's claim under Article I:1 of the GATT 1994). Thus, the EC asserts that the Drug Arrangements are covered by paragraph 2 (a) of the Enabling Clause and are therefore justified under the Enabling Clause.
- Should the Panel find the EC's assertion to be true, India's claim under Article I:1 of the GATT 1994 would be defeated, even if all the allegations of India in support of that claim are true.

As an affirmative defence, the Enabling Clause is similar to Articles XX and XXIV of the GATT 1994. Thus, for a example, a claim under Article I:1 or any other provision of the GATT 1994 would be defeated if the defendant were able to establish that the measure at issue is justified under Article XX; similarly, a claim under any relevant provision of the GATT 1994 would be defeated if the defendant were able to establish that the failure to adopt the measure at issue would have prevented the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or a free-trade area.

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

*Non-discriminatory*

*33. The EC has stated in response to Panel Question 12 to both Parties that, for a measure under the Enabling Clause to be "non-discriminatory", the aim must be legitimate and the means used to achieve the legitimate aim must be reasonable. In this context, how should one determine whether or not a measure to achieve a legitimate aim is reasonable, both in general and specifically with respect to the Drug Arrangements?*

**Reply**

India is not aware of any generally accepted standard or generally applicable rule that could give the Panel normative guidance on this point In the view of India, the interpretation of "non-discriminatory" advanced by the EC would effectively create a normative void and deprive panels of the opportunity to adequately review measures discriminating between developing countries.

India's interpretation of the term "non-discriminatory" would not prevent trade measures responding to special needs of particular developing countries. WTO law provides for special treatment, among others, of the least developed countries, ACP countries and countries with economies in transition, and waivers have been granted to permit preferences to countries with drug problems. Indeed, footnote 2 to the Enabling Clause itself provides that "it would remain open for [Members] to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling with the scope of [paragraph 2 of the Enabling Clause]". This footnote confirms that the issue question of whether further preferences should be permitted is a question for the Ministerial Conference and not for individual Members or Panels.[3]

The only consequence of the ruling requested by India would be that the right to determine which needs deserve special treatment would remain with the membership of the WTO, and not be conferred upon individual preference-giving donors pursuing their own interests. India therefore urges the Panel to leave the issue be resolved by the Ministerial Conference, which is the organ of the WTO competent to decide on whether trade preferences are reasonable means to achieve a legitimate goal.

*34. Is the term "non-discriminatory" in footnote 3 a provision aimed at preventing abuse of GSP? If so, in what way does this contribute to the correct interpretation of the term "non-discriminatory"?*

**Reply**

It is not clear that characterizing the term "non-discriminatory" in footnote 3 as a provision aimed at preventing abuse would alter the interpretative approach to be applied. The term still has to be interpreted in accordance with its ordinary meaning, viewed in context and in light of the treaty's object and purpose or, in other words, by applying the normal rules of treaty interpretation.

India notes that the requirement of "non-discriminatory" considerably reduces the scope for developed countries to abuse GSP schemes in order to pursue their own foreign policy goals. However, in India's view the requirement of "non-discriminatory" is something more than just preventing abuse of GSP schemes; rather, it is a fundamental requirement that defines the nature of the GSP itself and which was meant to preserve the MFN rights of developing countries and eliminate the differentiation between developing countries in the context of pre-existing special preference schemes available only to certain developing countries.

[3] For example the waiver granted for the United States – Andean Preference Act was granted pursuant to footnote 2 to the Enabling Clause, in relation to Article XXV of the GATT. See *Request for a Waiver, United States – Andean Trade Preference Act* (L/6980 dated 18 February 1982) p.1.

*35. Noting that the Enabling Clause refers to GSP in footnote 3 "[a]s 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'", does the wording of the footnote incorporate the 1971 Waiver Decision as a whole (other than the temporal limitation), including the Agreed Conclusions? If not, why not?*

**Reply**

Footnote 3 describes the GSP referred to in paragraph 2(a). Footnote 3 refers to the Generalized System of Preferences ("GSP") as that which is "… described in the [1971 Waiver Decision] relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries". The Enabling Clause therefore incorporates the *description* of the GSP as set forth in the 1971 Waiver Decision.

Paragraph (a) of the 1971 Waiver Decision, refers to "the preferential tariff treatment referred to in the Preamble to this Decision …". The relevant provision of the Preamble of the 1971 Waiver Decision refers to the "mutually acceptable arrangements [that] have been drawn up in the UNCTAD concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries… "

Thus, the 1971 Waiver Decision does not itself expressly describe the GSP. It refers to the GSP described in the mutually acceptable arrangements that had been drawn up at the UNCTAD. Those arrangements are in the Agreed Conclusions. What is therefore incorporated in the Enabling Clause is the *description* of the GSP in the Agreed Conclusions.

*36. In respect of GSP, should the context of the Agreed Conclusions be used any differently in interpreting the Enabling Clause than in interpreting the 1971 Waiver Decision? If so, why? Please elaborate.*

**Reply**

In respect of the GSP, the context of the Agreed Conclusions cannot be used differently in interpreting the Enabling Clause and the 1971 Waiver Decision, respectively. Please see India's response to Panel Question 29 to both parties.

*37. Assuming that different treatment is not necessarily discriminatory treatment and is permitted by the term "non-discriminatory" under the Enabling Clause, what then is not permitted by this term? Where do we draw the line?*

**Reply**

The text of the Enabling Clause does not provide any guidance as to what types of differentiation between developing countries are permissible, except to the extent that paragraph 2(d) permits special treatment to least developed countries. Thus, Members did not draw the line between what is permissible and what is not. The existence of such line is premised on the notion that different treatment is not necessarily discriminatory treatment. That the Members did not draw the line argues against the validity of the premise.

India also notes that *if* the EC's interpretation of "non-discrimination" were to be validated by the Panel,[4] then a legal standard must also have been established to determine when *identical*

[4] According to the EC equal treatment of unequals is also prohibited by the term "non-discriminatory". EC, *First Written Submission (*"FWS"), para. 65, 69, footnote 52.

treatment of developing countries is impermissible. On this matter, the Enabling Clause is equally silent.

The EC proposes varying formulations of the test to be applied in determining whether identical or differential treatment between developing countries is impermissible. However, all of these formulations find no basis in the text of the Enabling Clause.

For these reasons India can only confess to its inability to "draw the line" on the basis of the text of the Enabling Clause.

*38. Taking account of the contents of footnote 3, please indicate what changes – if any – the Enabling Clause made to the pre-existing GSP regime.*

**Reply**

Taking into account the contents of footnote 3, the Enabling Clause did not introduce any change to the pre-existing GSP regime. (Please see India's response to Panel Question 29 to both parties.)

*39. Did Centrally Planned Economies that were GATT contracting parties participate in the negotiations of GSP? Did the Enabling Clause affect their rights and obligations under GATT Article I:1? If so, how were they affected?*

**Reply**

Paragraphs 60-64 of Part Two of the Agreed Conclusions under the heading "Socialist Countries of Eastern Europe" indicates that interventions were made at least by (i) Bulgaria, speaking on its own behalf and on behalf of (then) Czechoslovakia, Hungary, Poland, and the (then) Union of Soviet Socialist Republics (ii) Romania, and (iii) Poland, speaking on its own behalf. The Agreed Conclusions were adopted in the course of the Second Part of the Fourth Session of the UNCTAD Special Committee on Preferences held on 21 September – 12 October 1970. As of that period, of these countries, only Czechoslovakia (original GATT Contracting Party) and Poland (as of 18 October 1967) were GATT Contracting Parties. (In addition to Czechoslovakia and Poland, (then) Yugoslavia was likewise a GATT Contracting Party (as of 25 August 1966).

To the extent that a country falling within the category of "Centrally Planned Economies" was a *beneficiary* under the GSP, the GSP under the 1971 Waiver Decision and the Enabling Clause did not affect its rights and obligations under Article I:1 of the GATT because it retained its MFN rights in full (except in respect of special preferences for the benefit of the least-developed countries under paragraph 2(d) of the Enabling Clause).

To the extent that a country falling within the category of "Centrally Planned Economies" was a *donor* under the GSP, the GSP under the 1971 Waiver Decision and the Enabling Clause affected its rights under the Article I:1 of the GATT because it effectively waived its right to MFN treatment vis-à-vis benefits accorded to other developing countries.

*40. Please indicate any preferential tariff preference granted at any time by individual GATT contracting parties or WTO Members to limited groups of developing countries which have been notified under paragraph 4(a) of the Enabling Clause and whether they were the object of the granting a waiver under GATT Article XXV.*

**Reply**

India has been unable to obtain a complete listing of preferential tariff schemes notified under the Enabling Clause. In this regard a WTO Secretariat document on GSP schemes has noted that "the difficulties in the preparation of this document from WTO source material suggests that there is a need for improvements in notifications and in statistical reporting."[5]

Nonetheless, an examination of the waiver practice indicates that there has been a consistent trend of obtaining a waiver for preferential tariff treatment accorded to a limited group of developing countries, even where the justification for the differentiation in treatment is the differing development needs of the favoured countries.

Based on information presently available to India, the following are the waivers that have been granted for preferential tariff treatment that apply to a limited group of developing countries:

1. United States Caribbean Basin Economic Recovery Act waiver adopted 15 February 1985 (L/5579, BISD 31S/20) (renewed 15 November 1995 [WT/L/104])

    - The United States waiver request specifically indicates that the Caribbean Basin Economic Recovery Act is intended to help the Caribbean countries to resolve special development problems.[6] It also states that this measure is not covered under any of the sub-paragraphs of the Enabling Clause.[7]

2. Canada CARIBCAN waiver adopted 26 November 1986 (L/6102, SR42/4) (renewed 14 October 1996 [WT/L/185])

3. United States Andean Trade Preference Act waiver adopted 19 May 1992 (L/6991) (renewed 14 October 1996 [WT/L/183 and WT/L/184])

    - The United States waiver request refers to the economic difficulties faced by the beneficiary countries on account of drug production and trafficking.[8] It

[5] Note by the Secretariat, The Generalised System of Preferences: A preliminary analysis of GSP schemes in the Quad (WT/COMTD/W/93 dated 5 October 2001) para. 90.

[6] *Caribbean Basin Economic Recovery Act, United States request for a waiver* (L/5573 dated 1 November 1983) p. 2 (" The Caribbean Basin Initiative is a development program, which seeks to use trade, tax and assistance measures to facilitate the revitalization of economies of the Caribbean Basin. The small and fragile economies of this region have been seriously affected by escalating costs of imported oil, declining prices for their major exports (sugar, coffee etc.) and a shrinking of export markets due to world-wide recession and a decline in tourism. The measures are designed to help the Caribbean nations to solve these problems by encouraging the expansion of productive capacity in response to the opening of new markets for Caribbean exports as well as to assist the service sectors of their economies, especially tourism").

[7] *Ibid*, ("The duty-free provision of the CBI do not fall specifically within any of the categories of programs authorized in sections (a) through (d) of paragraph 2 of the Framework Agreement").

[8] *United States, Andean Trade Preference Act, Request for a Waiver* (L/6980 dated 31 January 1992), p.3 ("The tariff preference in the ATPA is an essential part of the Andean Trade Initiative, which is designed to respond to the serious economic difficulties facing the Andean nations as a result of the scourge of drug production The ATPA augments the benefits provided to the region under the GSP, as well as efforts of other nations to promote trade and economic development in the region").

also states that the Andean Trade Preference Act is not covered under any of the sub-paragraphs of the Enabling Clause.[9]

4. European Communities Fourth ACP-EEC Convention of Lomé waiver adopted 9 December 1994 (L/7604) (renewed 14 October 1996 [WT/L/186 and WT/L/187])

5. European Communities – The ACP-EC Partnership Agreement waiver adopted 14 November 2001 (WT/MIN [01]/15).

*41. Under the initial application of the 1971 Waiver Decision, did any contracting party granting preferences to developing countries exclude any developing country or countries from its GSP?*

**Reply**

India has only been able to obtain details of the initial schemes applied by Canada,[10] the EC,[11] Japan[12] and the United States[13] on the basis of the notifications of these countries to the GATT.

India notes that in all these initial schemes, there was no differentiation between countries recognized to be beneficiaries on the ground that they had differing development needs.

On the distinct issue of which countries were recognized as beneficiaries, Japan and the United States had provisions permitting exclusion of certain developing countries. For instance, the United States excluded all member countries of the Organization of Petroleum Exporting Countries[14] and Japan provided for the future exclusion of all developing countries which invoked Article XXV of the GATT against Japan or which discriminated in trade or tariffs against Japan.[15] These exclusions however are based on the purported power of developed countries to exclude certain developing countries *ab initio* from beneficiary status for compelling reasons, which is not at issue in this dispute. These exclusions are not related to the issue of the purported power of developed countries to differentiate between developing countries recognized as beneficiaries on the basis of their particular development needs.

*42. What elements of Article I:1 of GATT 1994 do not apply under paragraph 2(a) GSP schemes covered by the Enabling Clause? For example, do commitments regarding charges imposed in the international transfers of payments for imports and exports, or rules and formalities in connection with importation and exportation, change in any way when trade under GSP takes place, or do they retain their validity, as set out in Article I:1?*

**Reply**

Without the Enabling Clause, Article I:1 of the GATT 1994 applies in its totality. The MFN obligation under Article I:1 of the GATT 1994 applies to:

[9] *Ibid,* p.2 ("The tariff preference provisions of the ATPA do not fall specifically within any of the categories of programs authorized in sections (a) through (d) of paragraph 2 of the Framework Agreement").

[10] Generalized System of Preferences-Notification by Canada (L/4027 dated 14 May 1974).

[11] Generalized System of Preferences-Notification by the European Communities (L/3550 dated 16 July 1971).

[12] Generalized System of Preferences-Notification by Japan (L/3559 dated 20 August, 1971).

[13] Generalized System of Preferences-Notification by the United States (L/4299 dated 13 February 1976).

[14] *Ibid,* p.3.

[15] Generalized System of Preferences-Notification by Japan (L/3559 dated 20 August, 1971) p.3.

- "customs duties or charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports",

- "the method of levying such duties and charges,

- "all rules and formalities in connection with importation or exportation", and

- "all matters referred to in paragraphs 2 and 4 of Article III …".

Paragraph 2(a) of the Enabling Clause refers solely to "preferential tariff treatment accorded by developed [country Members] to products originating in developing countries in accordance with the [GSP]". Thus the only element of Article I:1 of the GATT 1994 which does not apply, pursuant to paragraph 2(a) of the Enabling Clause, is preferential *tariff treatmen*t accorded by developed country Members to products originating in developing countries (*imports* from developing countries) in accordance with the GSP. Thus, all of the other elements of Article I:1 of the GATT 1994 which define its scope still apply. In respect of developed country Members, notwithstanding paragraph 2(a) of the Enabling Clause, the MFN obligation under Article I:1 of the GATT 1994 thus still applies with respect to:

- customs duties or charges of any kind imposed on or in connection with (i) importation *not* in accordance with the GSP, (ii) exportation, or (iii) imposed on the international transfer of payments for imports or exports,

- the method of levying such duties and charges,

- all rules and formalities in connection with importation or exportation, and

- all matters referred to in paragraphs 2 and 4 of Article III of the GATT 1994.

*43. Please give your full interpretation of the term "non-discriminatory" in footnote 3.*

**Reply**

The Preamble to the WTO Agreement provides, among others:

> "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 relations," (emphasis supplied)

The foregoing is a virtual reproduction of the relevant portion of the Preamble to the GATT. Discriminatory treatment in international relations as a means to attain the objectives of the WTO Agreement is implemented through among others, the MFN principle under Article I:1 of the GATT. "Non-discriminatory" must therefore be construed in accordance with the standard established under that article – immediate and unconditional MFN treatment of like products originating in all Members.

The Enabling Clause permits certain acts which Article I of the GATT 1994 otherwise prohibits. The interpretation of the Enabling Clause or any provision thereof cannot therefore be made in isolation from Article I of the GATT 1994.

The Drug Arrangements are inconsistent with the Enabling Clause because under those arrangements, the EC grants tariff preferences to products originating in the twelve developing country beneficiaries without according the same treatment immediately and unconditionally to products originating in other Members.

Paragraph 2(a) of the Enabling Clause permits developed country Members to grant preferential tariff treatment to products originating in developing countries without according the same treatment to products originating in all other Members in the context of the GSP. As India has pointed out, to enable developed country Members to grant preferential tariff treatment to products originating in developing countries, it is not necessary for those developed country Members to be permitted to treat like products originating in developing countries differently.[16] Thus, developing countries retain their MFN rights as between themselves.

The term "non-discriminatory" in footnote 3 does not contradict the retention of MFN rights by developing country Members. On the contrary, it reinforces that retention.

The GSP deals with preferential tariff treatment. The ordinary meaning of "discriminatory tariff" is "a tariff containing duties that are applied unequally to different countries or manufacturers."[17] The ordinary meaning of "non-discriminatory tariff" in the context of the Enabling Clause is therefore a tariff containing duties that are applied equally to different developing countries.

The EC attempts to impute a meaning to the term "non-discriminatory" which is inconsistent with the MFN rights of developing country Members. In support of its contention, the EC relies on the argument that, otherwise, the term "non-discriminatory" in footnote 3 would be redundant.

It must be recalled that the GSP was formulated at the UNCTAD, and that the 1971 Waiver Decision and the Enabling Clause were adopted at the GATT – two separate organisations. The term "non-discriminatory" was first used at the UNCTAD to describe the GSP in the mutually acceptable arrangements that were drawn up therein. That description of the GSP was incorporated into the 1971 Waiver Decision, and subsequently into the Enabling Clause. The term "non-discriminatory" in footnote 3 is therefore not redundant because it merely describes the norm applicable to the GSP as it was originally formulated. Had the term "non-discriminatory" been omitted in footnote 3, that footnote would have described the GSP inaccurately.

*Paragraph 3(c)*

*44. Is it your understanding that the Agreed Conclusions (TD/B/330) were agreed to by consensus in UNCTAD? If so, do you consider that they are part of the context of the 1971 Waiver Decision, within the meaning of Article 31.2(a) of the Vienna Convention? Are they also part of the context of the Enabling Clause, by virtue of its footnote 3? If not, are they part of the preparatory work of the 1971 Waiver Decision and of the Enabling Clause? Please elaborate.*

**Reply**

It is India's understanding that the Agreed Conclusions were agreed to by consensus in UNCTAD. As stated above, the Enabling Clause incorporates the description of the GSP in the 1971 Waiver Decision, which in turn refers to the mutually acceptable arrangements drawn up at the UNCTAD. (Please see India's response to Panel Question 29 to both parties.). That description refers to the GSP as " … non-discriminatory …". The term "non-discriminatory" and the Agreed Conclusions, incorporated in the Enabling Clause through the 1971 Waiver Decision, are therefore part of the "terms" of the Enabling Clause in the context of Article 31.1 of the Vienna Convention and

[16] India, Second Written Submission, para. 67-68.
[17] Black's Law Dictionary, supra note 2, p. 1468.

must therefore be interpreted "in good faith in accordance with [their] ordinary meaning … in their context and in the light of [the] object and purpose" of the GATT 1994.

*45. In light of Articles 31 and 32 of the Vienna Convention, are the Agreed Conclusions context, object and purpose, preparatory work or something else?*

**Reply**

Please see India's response to Panel Question 44 to both parties.

*46. Do you consider that the developing countries agreed in the Agreed Conclusions or in the 1971 Waiver Decision that GSP schemes could contain as little as a single product? If so, please provide documentary support for this contention. If not, what in the Agreed Conclusions prevent this?*

**Reply**

There is no specific provision in the Agreed Conclusions or in the 1971 Waiver Decision indicating that the developing countries agreed that GSP schemes could contain as little as a single product. Portions of the Agreed Conclusions do have a bearing on the expectations as to product coverage, including:

- The reference in paragraph 1 of Part One I to Resolution 21 (II) of the UNCTAD calling for the early establishment of GSP preferences "which would be beneficial to the developing countries";

- The reference in paragraph 2 of Part One II to the agreement that the objectives of the GSP, in relation to the developing countries, are: "(a) to increase their export earnings; (b) to promote their industrialization; and (c) to accelerate their rates of economic growth."

The foregoing indicate the expectations of the Members of the UNCTAD, including the developing countries, as to product coverage. The more products covered by the GSP the more that the GSP would be "beneficial to the developing countries" and the more that it could promote the attainment of the specified objectives.

*47. Please give your full interpretation of paragraph 3(c).*

**Reply**

Paragraph 3(c) has been invoked by the EC in support for the interpretation of the term "non-discriminatory" as permitting differentiation between developing countries. India contends that that the EC wrongly interprets paragraph 3(c) and that the paragraph 3(c), properly understood, does not support the EC's interpretation of "non-discriminatory".

Paragraph 3(c) is a requirement applied to all measures taken by developed countries to favour developing countries under the Enabling Clause. As such it applies to preferential tariff treatment, differential and more favourable treatment in the context of non-tariff barriers, differential and more favourable treatment in the context of negotiations and any further types of measures for differential and more favourable treatment that may be authorized under joint action taken under footnote 2 of the Enabling Clause.

Paragraph 3(c) requires that measures taken under the Enabling Clause respond positively to the development, financial and trade needs of developing countries.

- This requires that measures taken under the Enabling Clause respond to the needs of developing countries and not the developed countries.

- This requires that measures taken under the Enabling Clause must respond to "development, financial and trade" needs of developing countries.

- This requires that the measures respond to the development, financial and trade needs of developing countries considered as a whole and not individually or in terms of sub-groups. Where the drafters of the Enabling Clause referred to the needs of individual developing countries or sub-groups of developing countries, they did so expressly – as in paragraph 5 ("their individual development, financial and trade needs") and paragraph 6 ("their particular situation or problems").

As applied to the context of preferential tariff treatment taken under paragraph 2(a), the primary function of paragraph 3(c) is to ensure that the product range and depth of tariff cuts in GSP schemes are of a nature and magnitude that respond to the development, financial and trade needs of developing countries as a whole.

*Paragraph 2(a)*

*48. What was your position on the meaning of GSP during the negotiation in the late 1960s? Did this position change over time, through to the Enabling Clause in 1979? Please provide documentary evidence in support of your answer.*

**Reply**

In connection with the adoption of the Agreed Conclusions, India delivered a statement on behalf of the Group of 77, which states: "No developing country member of this Group should be excluded from the [GSP] at the outset or during the period of the system."[18] India held the view then that no developing country should be excluded from the GSP.

At the GATT Council meeting where the 1971 Waiver Decision was adopted, India emphasized that the arrangements drawn up in the UNCTAD must be adhered to and cannot be re-opened.[19]

At the GATT Council meeting where the exclusion of Chile from the United States GSP scheme was discussed, and India's position was expressed in the Minutes as follows:

> "The representative of India said in his delegation's view, the application of unilateral and subjective criteria for preference schemes such as GSP could only be a matter of grave concern to all contracting parties. India would follow developments in this matter with great interest."[20]

India has also consistently raised concerns about GSP schemes which violate the requirements of paragraph 2(a) in the context of trade policy reviews.[21]

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[18] UNCTAD, Annex 1 to the Report of the Trade and Development Board on its Fourth Special Session, TD/B/330, 14 October 1970, p. 8-9.

[19] Minutes of Meeting held on 25 May 1971 (C/M/69 dated 28 May 1971) pp. 14-15.

[20] Minutes of Meeting held on 2 February 1988 (C/M/217 dated 8 March 1988) p. 7.

[21] See e.g., Minutes of Trade Policy Review Body Meeting held on 14 and 17 September 2001 (WT7TPR/M/88) pp.18,35 (comments by India regarding the United States); Minutes of Trade Policy Review Meeting held on 12 and 14 July 2000 (WT/TRP/M/72/Add. 1) pp. 77-78, 88 (comments by Brazil and India

India's position has not changed and has been consistent.

*49. Do you agree that a major objective of the introduction of GSP was to replace the previously existing special preferences? If so, is it possible to set up GSP programmes addressing development problems of less than all developing countries? What is the basis for this possibility? What are the systemic consequences of such reading?*

**Reply**

India agrees that a major objective of the introduction of the GSP was to replace the previously existing special preferences.

The GSP had its beginnings at the First Conference of the UNCTAD in 1964, which resolved:

> "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 to 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**."[22] (emphasis added)

As early as UNCTAD I therefore, it was agreed that special preferences then enjoyed by certain developing countries in certain developed countries should be regarded as transitional and subject to progressive reduction. It was thus the intention that the GSP, the benefits of which will be made available to all developing countries, would replace the special preferences then enjoyed by certain developing countries in certain developed countries.

The special preferences responded to the problems of a sub-set of developing countries, and not to those of all developing countries. The instrument of such response was discriminatory preferential tariff treatment. What was objectionable under the then special preferences was that the tariff preferences granted to certain products originating in certain developing countries were not accorded to like products originating in other developing countries, thus depriving those other developing countries of equal competitive opportunities. The provision of unequal competitive opportunities to a sub-set of developing countries vis-à-vis developed countries and other developing countries was therefore a response solely to the development problems of those countries. The GSP was established both (i) to establish and preserve equality of competitive opportunities between

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regarding the EC); Minutes of Trade Policy Review Body Meeting held on 12 and 14 July 1999 (WT/TPR/M/56)p. 22 (comments by India regarding the United States); Minutes of Trade Policy Review Meeting held on 24-25 July 1995 (WT/TPR/M/3) pp. 7, 11,15, 19 (comments by ASEAN countries, Chile and India regarding the EC).

[22] Principle 8 of Recommendation A:I:1 in Final Act of the First United Nations Conference on Trade and Development (Geneva: UNCTAD, Doc E/CONF.46/141, 1964), Vol 1, at 20, cited in Lorand Bartels, "The WTO Enabling Clause and Positive Conditionality in the European Community's GSP program", *Journal of International and Economic Law*, Vol. 6, No.2 (2003), p. 507.

developing countries and (ii) to enhance the competitive opportunities of developing countries as a whole vis-à-vis developed countries.

In the context of the foregoing major objective, and in light of the term "non-discriminatory", it is therefore not possible to set up GSP programmes addressing the development problems of less than all developing countries by providing enhanced competitive opportunities to a sub-set of developing countries vis-à-vis other developing countries. Thus, no GSP scheme could be designed which differentiates in the tariff treatment of like products originating in developing countries.

The systemic consequences of allowing GSP schemes which address the development problems of less than all developing countries by altering the competitive opportunities for other developing countries would be considerable. Market access concessions granted by a developed country to a developing country would become insecure. A market access concession could easily be made ineffective by granting better competitive opportunities to a favoured group of developing countries as part of a GSP scheme. This power to alter competitive opportunities between developing countries would have considerable trade effects because the main competitors of a developing country are usually the other developing countries. Consequently, developing countries would be deprived of the fundamental safeguards they need to participate effectively in multilateral trade negotiations. Lastly, the power to vary competitive opportunities to respond to the needs of less than all developing countries can be abused by developed countries to split the negotiating leverage of developing countries as a group, or as a foreign policy tool that could undermine the policy autonomy of individual developing countries. In the absence of any normative guidance from the text of the Enabling Clause on differentiation between developing countries, the judicial organs of the WTO cannot themselves provide that normative guidance.

*50. Does "generalized" include either product coverage or country coverage or both? And does "non-discriminatory" include either of these or both?*

**Reply**

The Agreed Conclusions do not directly define the term "generalized". The report entitled "Review and evaluation of the generalized system of preferences" dated 9 January 1979[23] issued by the UNCTAD states:

> "10. Conference resolution 21 (II) called for the establishment of a generalized, non-discriminatory and non-reciprocal system of preferences in favour of exports from developing countries to developed countries**. Generalized preferences imply that preferences would be granted by all developed countries to all developing countries** …" (emphasis added)

"Generalized" in relation to the GSP can be given different meanings. As to the GSP donor countries, the intention was that all developing 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.

In India's view, based on references presently available to India, "generalized" refers to country coverage, whether as to donor countries or beneficiary countries. The term "non-discriminatory" refers to the treatment of products originating in beneficiary countries. Thus, "generalized" means that all developing countries could qualify as beneficiaries. "Non-discriminatory" means that the like products of the beneficiaries shall be treated equally.

[23] TD/232.

*51. If "generalized" does not mean to all and does not allow to one, then what does it mean? How does one determine whether a GSP scheme is "generalized" or not? Would four countries be sufficiently generalized, as was the situation in the earlier years of implementation of the Drug Arrangements? Would a scheme covering, say, 50 per cent of all developing countries be "generalized"?*

**Reply**

In India's view, "generalized" means to all, and does not allow to one. Thus, a scheme purporting to be a GSP scheme and which applies only to four countries or 50 percent of all developing countries is not "generalized". It is not even a question of degree ("*sufficiently* generalized"). It is either "generalized", or it is not. India emphasizes that this issue is distinct from the issue of whether differentiation in treatment between developing countries recognized as beneficiaries is permissible.

*52. Please give your full interpretation of paragraph 2(a). Please also give your interpretation of the term "generalized" in footnote 3.*

**Reply**

Paragraph 2(a) authorizes derogation from Article I:1 in respect of preferential tariff treatment accorded by developed country Members to developing countries which is in *accordance* with the Generalized System of Preferences. The GSP in turn is described in the Agreed Conclusions drawn up at the UNCTAD. A measure which is not "generalized" "non-discriminatory" and "non-reciprocal" is clearly not in accordance with the GSP and hence cannot fall within the protection of paragraph 2(a).

As to the interpretation of the term "generalized" please see India's response to Panel Questions 51 and 52 addressed to both parties.

*Article XX(b)*

*53. What in your view should be the test for "necessary" under Article XX(b)?*

**Reply**

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: (i) determining whether the measure at issue is designed to achieve the objectives envisaged under the subparagraph concerned; and (ii) 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.[24]

In its Second Submission (paragraphs 135-144), India has demonstrated that the Drug Arrangements "are not designed to achieve" the protection of human life or health of the EC population.

[24] 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.

In determining whether the measure at issue responds to the degree of connection or relationship – in this case, "necessary" – with the state interest or policy sought to be promoted or realized, in *Korea – Beef*, the Appellate Body described the "continuum of necessity" as follows:

> 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"**.[25] (emphasis supplied)

To what extent a measure "makes a contribution to" the protection of human life or health requires an examination of the *appropriateness and efficiency* of *the measure itself* (independent of other available measures) as a means to achieve the desired objective. There must be a direct nexus between the means and the objective. It is insufficient for the measure to be "related to" the relevant policy goal it must be "necessary" to achieve that policy goal.

To what extent a measure is "indispensable" depends on the availability of other measures to achieve the desired objective. Thus, moving towards the opposite pole of "indispensable" (as distinguished from "making a contribution to") entails not only an examination of the appropriateness and efficiency of the measure itself, but also a comparison of that measure with other available measures which could achieve the same objective. The degree of indispensability has to be determined by examining the effectiveness, cost and appropriateness of resorting to the alternative measures. For these reasons, a measure can contribute very much to the protection of life or health but nevertheless not be indispensable because an alternative measure is readily available.

*54. In light of the Appellate Body's interpretation and description of the term "necessary" as being somewhere along a continuum between "contributing to" and "indispensable", please provide your views on how and where along this continuum the Drug Arrangements qualify as "necessary" according to the interpretation enunciated by the Appellate Body.*

**Reply**

The specific measure requiring justification under Article XX(b) is the tariff discrimination between (i) the twelve beneficiaries and (ii) other WTO Members. The EC grants discriminatory preferences to the twelve beneficiaries purportedly because of the drugs-related situation in those beneficiaries which, in turn, affects the life and health of the EC population. This necessarily implies that the similar situation in other WTO Members does not affect the life and health of the EC population.

India is of the view that Article XX(b) cannot be invoked by any Member to justify burdening the trade of Members which are not the source of the problems which a measure (justification for which is sought under that provision) seeks to address. Thus, for example, Article XX(b) may be invoked by any Member to ban the importation of products from contaminated sources where those products could adversely affect the life or health of that Member's population. The trade of the contaminated source is thereby burdened. But that Member may not burden the trade of other Members.

In the present dispute, the importation into the EC of products originating in Members other than the twelve beneficiaries (including products covered by the tariff preferences under the Drug Arrangements) is not, according to the EC, the source of the problems which the EC seeks to address. Article XX cannot be interpreted to permit measures taken by a Member that has the effect of

[25] Appellate Body Report, Korea-Beef supra footnote 24, para.161.

transferring resources from a country which is not the source of a health problem to countries which are actually the source of a health problem. It would therefore *not be appropriate for the EC to burden the trade of Members other than the twelve beneficiaries.* .

As to the efficiency of the discriminatory tariff preferences to achieve the desired objective, 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 economic development of the countries concerned, in order to generate resources and capacity required for enforcing an effective system of drug control.[26]

The nexus that the EC draws between discriminatory tariff preferences and the protection of the life or health is based on several cumulative assumptions, resulting in an extended chain of causality. As India has demonstrated in its Second Submission (paragraphs 145-158), this extended chain of causality renders the link between the Drug Arrangements and the protection of human life or health of the EC population remote. Thus, the Drug Arrangements do not respond to the degree of connection or relationship – in this case, "necessary" – with the protection of the life or health of the EC population.

India notes that the EC presents no empirical evidence of the connection between the drug arrangements and the health of citizens of the EC. It relies exclusively on various texts adopted by United Nations bodies and the GATT/WTO to establish this required link. These texts cannot establish any empirical link.

In any case, these texts do not even indirectly support the contentions of the EC. Nothing in the cited texts support the proposition that market access through discriminatory GSP schemes is what is intended. These texts refer to binding multilateral trade liberalization, not discriminatory market access that can be withdrawn at any time. Contrary to the EC's contention. such non-binding market access measures cannot contribute to a "sustainable" resolution of the drug problem.[27] Further, these texts primarily refer to market access in the context of the facilitation of substitution crops in producer countries.

In India's view therefore, the Drug Arrangements are not even within the opposite poles of the continuum of necessity. At best, they "make a contribution to", the opposite of the pole of "indispensable". Therefore, it is not "substantially closer" to "indispensable", and cannot qualify as "necessary".

It this regard, it might be noted that the EC itself categorically characterizes the Drug Arrangements as precisely at the pole of "making a contribution to": Thus, according to the EC:

- "… 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";

- "… 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."[28] (emphasis supplied)

On the basis of the foregoing, the tariff discrimination between (i) the twelve beneficiaries and (ii) all other WTO Members cannot qualify as "necessary" for purposes of Article XX(b).

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[26] EC, *FWS*, para. 188.
[27] See EC, Second Written Submission, para. 74.
[28] EC, *FWS*, para. 183- 185.

Even assuming that tariff discrimination falls within the continuum of necessity, only a measure that in principle applies equally to all countries with actual or potential drug-related problems could conceivably be deemed to indispensable or "substantially closer" to indispensable. The EC cannot logically claim that it is "substantially closer" to indispensable to adopt a measure that *a priori* applies only to twelve countries in view of the fact that many more countries, actually or potentially, suffer from or are confronted with drug-related problems.

Furthermore, on the same assumption (that tariff discrimination falls within the continuum of necessity), financial and technical assistance in law enforcement and development, combined with multilateral trade negotiations in sectors of export interest of the developing countries (as foreseen in the preamble to the Agreement on Agriculture and the UN resolutions cited by the EC), would be equally – if not more – effective, WTO-consistent, and non-trade restrictive measures available to the EC.

Considering the foregoing, the Drug Arrangements are not "substantially" closer to "indispensable" in the continuum of necessity, and do not meet the requirement of necessity under Article XX(b).

*55. The EC has stated at the Second Meeting with the Parties that the existence of the Drug Arrangements tariff preference margins will not prevent it from fully contributing to the Doha tariff reduction negotiations. If the EC is ready to reduce the Drug Arrangement margins of preference, how can these preferences be considered "necessary" to protect human life and health in the EC?*

**Reply**

The EC asserts that the existence of the Drug Arrangements tariff preference margins will not prevent it from fully contributing to the Doha tariff negotiations. However, if the Panel were to validate the EC's defence under Article XX(b) of the GATT, nothing will prevent the EC from subsequently maintaining or even increasing the Drug Arrangements tariff preference margins, notwithstanding its present protestations to the contrary. The EC's present assertion that it is ready to reduce the Drug Arrangements tariff preference margins merely confirms that there are other equally, if not more, effective and less WTO-inconsistent and less trade-restrictive means to protect the health of the EC population arising from drug-related problems. Thus, in the continuum of necessity, the Drug Arrangements tariff preference margins are closer to "contributing to", rather than "substantially closer" to "indispensable" - assuming in the first place that the Drug Arrangements tariff preference margins fall within the continuum of necessity.

*56. Please briefly state the criteria under Article XX(b) of GATT 1994 for determining whether a measure is: (i) necessary; (ii) necessary to protect human life or health; (iii) necessary because there is no less trade-restrictive measure available; or (iv) there is no consistent or less inconsistent measure available.*

**Reply**

Please see India's response to Panel Questions 53, 54 and 55 to both parties.

*57. What in your view should be the test under the chapeau?*

**Reply**

Assuming that the Drug Arrangements qualify as "necessary" in the context of Article XX(b), the EC must establish that the tariff preferences under the Drug Arrangements – as the Drug Arrangements presently stand - are equally available to all countries where the same conditions

prevail, i.e., to countries which, actually or potentially, suffer from or are confronted with drug-related problems.

The Drug Arrangements are limited *a priori* to the twelve beneficiaries. There is no criteria under which any other country suffering from or confronted with the same drug-related problems, whether presently or in the future, may qualify. This being the case, the Drug Arrangements are applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

*58. In terms of the chapeau of Article XX of GATT 1994, can it be said that the same conditions prevail in all 12 beneficiaries of the Drug Arrangements, or are there differences among them? Assuming the conditions within the 12 countries differ, are the differences between the conditions in these 12 countries and in other drug-affected developing countries greater than those between the 12? Please provide justification and evidence for your response.*

**Reply**

The EC has the burden of establishing that the Drug Arrangements are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. For this purpose, it is not sufficient for the EC merely to assert that the twelve beneficiaries are confronted with drug-related problems, as this is a worldwide phenomenon. The EC must establish the *specific* conditions prevailing in the twelve beneficiaries which the Drug Arrangements seek to address, and must likewise establish that these conditions do not obtain in other countries. *Specific* conditions necessitate the establishment of equally-specific criteria. There are no such criteria under the Drug Arrangements. The EC has not provided those criteria to the Panel, notwithstanding several requests.

In the context of this dispute, an appropriate response to the Panel's question must be germane to the *specific* "conditions" which the EC seeks to address through the Drug Arrangements. India can cite readily-available statistics on various conditions prevailing in the twelve beneficiaries and other WTO Members – e.g., literacy rate, infant mortality rate, or even conditions relevant to drug-related problems. For example, the 1999 report entitled "Global Illicit Drug Trends" issued by the United Nations Office for Drug Control and Crime Prevention states that as of 1998, global illicit cultivation of opium poppy was as follows:

| Cultivation in Hectares | |
|---|---|
| **Asia** | |
| Southwest Asia | |
| Afghanistan | 63,612 |
| Pakistan | 950 |
| Sub-total | **64,562** |
| Southeast Asia | |
| Lao PDR | 26,837 |
| Myanmar | 130,300 |
| Thailand | 716 |
| Vietnam | 442 |
| Sub-total | **158,295** |
| Other Asian Countries | |
| Combined | 2,050 |
| **Total Asia** | **224,907** |
| **Latin America** | |
| Colombia | 7,466 |
| Mexico | 5,500 |
| **Total Latin America** | **12,996** |
| **Global Total** | **237,873** |

Thus, based on the foregoing, India may cite the following, *among others*:

- The area devoted to opium cultivation in Myanmar (130,000 hectares) is many times over the similar area in Colombia (7,466 hectares), and yet Myanmar is excluded from the Drug Arrangements.

- Opium is cultivated in Mexico (5,500 hectares) and other Asian countries (2,050) and there is no similar cultivation in the 10 other Latin American countries which are beneficiaries under the Drug Arrangements, and yet Mexico and other Asian countries are excluded from the Drug Arrangements.

Many other statistics related to illicit drugs are available, but unless the EC itself has specified (which it has not) the "conditions" prevailing which it seeks to address in the context of Article XX, all of those statistics would not be truly responsive to the Panel's question.

*59. Would human life and health in the EC be better protected if the Drug Arrangements were extended to all the developing countries involved with drug production and traffic which appear in the 2002 report of the International Narcotics Control Board?*

**Reply**

As stated above in India's response to Panel Questions 53 and 54 to both parties, tariff preferences are not necessary to protect human life or health. Expansion of the coverage of the Drug Arrangements to more countries does not render tariff preferences "substantially closer" to "indispensable".

**To India**

*Legal Function*

*14. Is it India's position that the Framework Negotiations in the Tokyo Round, which led to the adoption of the Enabling Clause, added nothing substantive to the Enabling Clause? Was what was obtained with the adoption of the Enabling Clause limited to putting the GSP on a permanent basis and providing special treatment for LDCs?*

**Reply**

The phrase "added nothing substantive to the Enabling Clause" can only be construed with reference to the 1971 Waiver Decision. As to what the Enabling Clause added substantively to the 1971 Waiver Decision, please see India's response to Panel Question 29 to both parties.

*15. In its title, the Enabling Clause has several parts, and India's argument is that one should separate those parts. Some parts relate to tariff preferences, another part is linked to Article XXIV and the non-reciprocity part seems linked to Article II. Is the Enabling Clause a package that cannot be broken apart? Is the whole of the Enabling Clause more than just an exception to Article I:1?*

**Reply**

India is not arguing that one should separate the various parts of the Enabling Clause It also does not believe that its interpretation of paragraph 2(a) would break apart those parts. On the contrary, its interpretation would be entirely consistent and in harmony with the other parts of the Enabling Clause. Paragraphs 1 and 2 of the Enabling Clause are by their own terms exceptions from Article I of the GATT. Other elements of the Enabling Clause, in particular paragraphs 5 and 6, are unrelated to Article I of the GATT. The existence of these other elements cannot guide the interpretation of the term "non-discriminatory" because they are not related to the issue of discrimination.

*Non-discriminatory*

*16. What specifically do the Agreed Conclusions tell us about the term "non-discriminatory"?*

**Reply**

The meaning of the term "non-discriminatory" can be discerned from the following, all contained in the Agreed Conclusions:

- The reference in paragraph 1 of Part One I to Resolution 21 (II) of the UNCTAD calling for the early establishment of GSP preferences "which would be beneficial to the developing countries";

- The reference in paragraph 2 of Part One II to the agreement that the objectives of the GSP, in relation to the developing countries, are: "(a) to increase their export earnings; (b) to promote their industrialization; and (c) to accelerate their rates of economic growth";

- The provision of paragraph 1 of Part One II that, " … consistent with Conference resolution 21 (II), there is agreement with the objective that in principle all developing countries should participate as beneficiaries …";

- The provision of paragraph 1 of Part One IV noting the following position of the preference-giving countries:

  "… As for beneficiaries, donor countries would in general base themselves on the principle of self-election. With regard to this principle, reference should be made to the relevant paragraphs in document TD/56 i.e., section A in Part I."

  The provision of Section A, Part I of document TD/56 elaborating on the position of preference-giving countries states:

  "Special tariff treatment should be given to the exports of any country, territory or area claiming developing status. This formula would get over the difficulty which would otherwise arise of reaching international agreement on objective criteria to determine relative stages of development."

- The statement on behalf of the Group of 77 contained in Annex I:

  "… no developing country member of this Group should be excluded from the generalized system of preferences at the outset or during the period of the system".

The foregoing indicate that, as agreed in the UNCTAD, the benefits under the GSP were intended to apply to *all d*eveloping countries – at least to all claiming developing country status - and not just to *some* developing countries.

Further, Paragraph 2 of Part One V of the Agreed Conclusions provides:

"The preference-giving countries will consider, as far as possible, on a case-by-case basis, 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".

Thus, the means to address the different development needs of the least-developed among the developing countries was not discriminatory tariff treatment between developing countries; rather, it was the inclusion in the GSP of products of export interest mainly to them and greater tariff reductions on such products.

As to the treatment of developing country beneficiaries as between themselves, paragraph 1 of Part One IX provides:

"The Special Committee recognizes that no country intends to invoke its rights to most-favoured-nation treatment with a view to obtaining, in whole or in part, the preferential tariff treatment granted to developing countries …"

Thus, since all developing countries – or those countries claiming developing country status – were intended to be the beneficiaries under the GSP, the other countries which are not beneficiaries assumed the obligation not to invoke their MFN rights (or to waive their MFN rights). The beneficiaries therefore did not assume the obligation to waive their MFN rights. Thus, "non-discriminatory" as between developing countries means exactly the MFN rights of developing country Members under Article I:1 of the GATT.

Various subsequent UNCTAD documents confirm this interpretation. Among these is the Report by the UNCTAD Secretariat on the "Review and evaluation of the generalized system of preferences" dated 9 January 1979[29]. The Report states, among others:

> "11. Non-discrimination implies that **the same preferences** were to be granted to all developing countries … " (emphasis supplied).

*17. Where, in the Agreed Conclusions, was special treatment to least-developed countries expressly prohibited?*

**Reply**

The terminology used in the GSP to refer to "least-developed countries" was "least developed among the developing countries". In terms of preferential tariff treatment under the GSP, least-developed countries were not singled out as such in the sense that no discriminatory tariff treatment for their benefit (to the exclusion of other developing countries) was authorized. Since they were included in the category of "developing countries", and the tariff preferences under the GSP were intended to be "non-discriminatory" between developing countries, there was no need for an express prohibition against discriminatory tariff treatment for the benefit of the least-developed countries (to the exclusion of other developing countries).

However, "special measures" for the benefit of the least-developed countries were contemplated under the Agreed Conclusions. Paragraph 2 of Part One V of the Agreed Conclusions provides:

> "The preference-giving countries will consider, as far as possible, on a case-by-case basis, 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".

Thus, the means to address the specific situation of the least-developed countries was not discriminatory tariff treatment between developing countries; rather, it was the inclusion in the GSP of products of export interest mainly to them and greater tariff reductions on such products (which had to be applied on an MFN basis between developing countries, including the least-developed countries).

It was not until the adoption of the Enabling Clause that developed countries were authorized to grant discriminatory preferential tariff treatment to the least-developed countries, to the exclusion of other developing countries.

*Paragraph 3(c)*

*18. What are India's views on the specific obligations in the Enabling Clause in terms of product coverage and depth of tariff cuts?*

Paragraph 3(c) provides that any special and differential treatment provided under the Enabling Clause "shall in the case of such treatment by developed [country Members] be designed and, if necessary, modified, to respond positively to the development, financial, and trade needs of developing countries". In the context of GSP schemes, this obligation is intended to ensure that the product coverage and depth of tariff cuts are responsive to the needs of developing countries as a whole. Paragraph 3(c) is the only provision within the Enabling Clause that regulates these aspects of GSP schemes.

[29] TD/232.

*Article XX*

*19. If the Drug Arrangements contribute to the protection of public health in the EC, is it then "necessary"? Or is it India's position that "necessary" means "indispensable"?*

**Reply**

Please see India's response to Panel Questions 53 and 54 to both parties.

*20. What is India's estimate of quantity of illicit drugs being exported from India to the EC?*

**Reply**

It is very difficult to estimate illicit trade due to the very nature of operations involved in such trade. However, an idea of the existence of such trade and its seriousness can be had from the results of enforcement measures against such trade.

There is significant wild growth of cannabis plant, from which hashish is obtained in India. Indian law enforcement agencies seize significant quantities of Cannabis and hashish each year. The seizures of the last four years are given below:

(all figures in kgs.)

| Name of the drug | 1999 | 2000 | 2001 | 2002 |
|---|---|---|---|---|
| Ganja | 40113 | 100056 | 86929 | 88137 |
| Hashish | 3391 | 5041 | 5664 | 3300 |

Europeans nationals were arrested while taking drugs to European destinations in the year 2002. In addition, several West African traffickers, who are known to be engaged in trafficking of methaqualone/mandrax, have also been arrested. Indian law enforcement agencies seized 111130 kgs of mandrax and broken apart several illicit manufacturing facilities.

Heroin and morphine hauls mainly find there way out of Afghanistan through Iran as well as Pakistan for onward transportation to Europe. Drugs transported into Pakistan transit India on their way to Europe. Historically, almost 35% of seizures of heroin in India were of heroin trafficked through Indo-Pak border. Significant quantities of this would have ultimately reached consumption centres in Europe.

There has been a continuous decline in the share of Afghan heroin in the total seizures of heroin in India over 2001 and 2002. This trend appears to be attributable to the events of September 11, 2001 and the consequent onslaught against the Taliban, as well as due to the military build up on both sides of the Indo-Pak border. Towards the end of the year, however, there were indications of resurgence in trafficking.

India is a significant manufacturer of precursor chemicals (like Ephedrine, pseudo-ephedrine, Acetic anhydride etc.), that are used for the manufacture of drugs. It is generally believed that the Indian precursor chemical industry is even more regulated than its counterpart in Europe.

*21. What specific, less-inconsistent, alternative measures are reasonably available to the EC and which would be equally effective in achieving the EC's health objectives?*

**Reply**

In India's view, financial and technical assistance in law enforcement and development, combined with multilateral trade negotiations in sectors of export interest of the developing countries (as foreseen in the preamble to the Agreement on Agriculture and the UN resolutions cited by the EC), would be equally – if not more – effective, WTO-consistent, and non-trade restrictive measures available to the EC.

*22. Does India think that technical and financial assistance to the drug beneficiaries would have a significant effect for taking people off the production of drugs and getting them to produce other, licit crops?*

**Reply**

Yes. Ultimately, tariff preferences are a form of financial assistance affecting conditions of competition as they enable beneficiaries to compete with the advantage of preference margins. Thus, direct financial assistance and preference margins virtually could have the same effect. The only difference is that direct financial assistance would have to be at the EC's expense, which is only fair, because it is the EC's problems which are being addressed. On the other hand, preference margins are borne by other developing countries which have development needs of their own, many of which have their own drug problems. Preference margins in the context of the Drug Arrangements is thus foreign aid in the reverse – from developing to developed countries.

Thus, in India's view, financial assistance, albeit in different form, along with technical assistance in the law enforcement and development, would have a significant effect for taking people off the production of drugs and getting them to produce other, licit crops, or at the very least, have the same effect as technical assistance plus financial assistance through preference margins. India also notes that such assistance combined with *binding* multilateral trade liberalization would also be equally effective.

*23. In paragraph 58 of the EC's second submission, the EC cites the U.N. General Assembly: "… within the context of shared responsibility, appropriate measures, including strengthened international cooperation in support of alternative and sustainable development activities, in the affected areas of those countries, that have as their objectives the reduction and elimination of illicit production." On the next page, the EC states that the U.N. further recommended that, "… in order to support those alternative activities, other countries should provide not only financial assistance but also greater market access", and that only a few weeks ago, the Commission on Narcotic Drugs renewed this recommendation. Could India please comment on what implications these activities of international agencies have for the EC's Article XX(b) defence?*

**Reply**

"Strengthened international cooperation" means the consent of those who cooperate. It is not forbearance of measures unilaterally determined by a single country or a group of countries. It is in this context that the call for "greater market access" must be construed. In the context of the WTO, the results of market access negotiations are always applied on an MFN basis. Where there are exceptions, as in the case of the GSP, the Members themselves specify the conditions under which the exceptions apply. Again, this cannot be unilaterally determined by a single Member or a group of Members.

In India's view therefore, the activities of other international agencies have no implications for the EC's Article XX(b) defence. The call for "greater market access" is a non-binding recommendation. From the strictly legal viewpoint, the decisions or recommendations of international agencies are not, as such, part of the "covered agreements" under the WTO. Furthermore, a call for "greater market access" by another international agency cannot be construed as a call for *discriminatory* market access. It would be unrealistic to presume that such a recommendation would be made without detailed discussion as to be nature of the discriminatory treatment and the criteria to be applied. It cannot be presumed that an international agency would wittingly and deliberately recommend that any country commit acts in violation of its obligations under a treaty, even if those treaties are administered by other international organizations or agencies.

*24. Is it India's view that any tariff preference programme which has a limited time horizon is not beneficial or is just minimally beneficial?*

**Reply**

Tariff preference programmes under the GSP are intended to provide enhanced opportunities to developing countries to compete in developed country markets vis-à-vis developed countries, at the same time preserving equal competitive opportunities as between developing countries. Tariff preferences are a significant factor in establishing conditions of competition, conditions of competition influence investment flows, the establishment or maintenance of export industries require investments, and investors need security and predictability as to conditions of competition. Thus, the longer the duration of the tariff preference programme, the more secure and predictable the conditions of competition. Accordingly, a tariff preference programme equally applicable to all developing countries (as contemplated in the GSP) which is of longer or indefinite duration is more beneficial to developing countries than one which is of limited duration.

Since tariff preference programmes under the GSP are applied by developed country Members on a voluntary basis, they may be withdrawn or reduced in scope at any time. Thus, implicit in tariff preference programmes under the GSP is that at any time, the enhanced competitive opportunities of developing countries vis-à-vis developed countries may be eroded or even eliminated at any time. The worst case scenario therefore for developing countries in a situation where tariff preferences are applied equally to all developing countries as contemplated under the GSP is that they will have equal competitive opportunities vis-à-vis developed countries and other developing countries in developed country markets. Thus, conditions of competition would still be relatively secure and predictable, at least as between developing countries.

On the other hand, discriminatory tariff preferences, like those in the Drug Arrangements, have a different effect on the security and predictability of conditions of competition. Investors would be less likely to invest in developing countries excluded from the tariff preferences because of the competitive advantage enjoyed by those which are included. But this does not mean that those investors will necessarily invest in developing countries which benefit from the discriminatory tariff arrangements. Tariff preferences are a factor in establishing conditions of competition, but they are not the only factors. As earlier stated, tariff preferences may be withdrawn at any time. Thus, an investor will not necessarily invest in a developing country benefiting from discriminatory tariff preferences – particularly long-term investments - because those preferences could be withdrawn at any time. When those preferences are withdrawn, the developing country benefiting from a discriminatory tariff preferences will find itself in the same position as other developing countries.

Preferential tariff treatment which discriminates between developing countries therefore does not contribute to the security and predictability of conditions of competition, and therefore to the security and predictability of the multilateral trading system. Hence, in this context, it is not beneficial at all.

*25. Does the initial measure imposed by the EC have to take into account the potential drug production and trafficking in other developing countries in applying the initial measure?*

**Reply**

The question is premised on the EC's contention that tariff preferences, as such, or discriminatory tariff preferences, as such, could be legitimately resorted to and could qualify as "necessary to protect … human … life or health" in the context of Article XX(b) of the GATT. India does not agree with the EC's premise.

Nevertheless, in response to the Panel's question, even assuming that tariff preferences could be legitimately resorted to and could so qualify, the initial measure imposed by the EC must take into account the potential drug production and trafficking in other countries, including the developing countries, in *applying* the initial measure. The measure as it is (as distinguished from any *future* measure that the EC may promulgate) must thus be capable of being applied without discrimination between countries where the same conditions prevail. As it presently stands, the tariff preferences under the Drug Arrangements cannot be applied to any other country where the same conditions prevail. This therefore constitutes arbitrary and unjustifiable discrimination. The possibility of amending a measure can never be invoked as a defence against the present WTO-inconsistency of such a measure.

*26. In light of U.N. recommendations that, within this overall campaign against drug production and trafficking, giving market access is a component of the overall strategy, is it India's contention that giving market access to affected countries within this overall strategy is not such to render it "necessary" within the meaning of Article XX (b)?*

**Reply**

In the first place, whether a measure is "necessary" in the context of Article XX(b) entails an empirical analysis. The determination of necessity cannot be based on pronouncements, regardless of source. These pronouncements do not establish an empirical connection between the Drug Arrangements and the health of EC citizens; they are political statements of desirable goals.

In the context of the present dispute, "giving market access" is pursued through discriminatory tariff preferences. Thus, the issue is the same, albeit stated in a different form: Are tariff preferences necessary to promote the life or health of the EC population? In this regard, please see India's response to Panel Questions 53 and 54 to both parties.

*27. Is it India's view that the Drug Arrangements are not "necessary" under Article XX(b) because they are tariff preferences or also because they do not apply to all WTO Members, or to all countries or to all developing countries, or to all drug-producing developing countries?*

**Reply**

As earlier explained (please see India's response to Panel Questions 53 and 54 to both parties), tariff preferences, as such, cannot qualify as "necessary" in the context of Article XX(b). Thus, the expansion of the coverage of the Drug Arrangements to all drug-producing developing countries would not likewise render tariff preferences similarly "necessary". The expansion of the coverage of the Drug Arrangements to all WTO Members or to all countries would render the issue of justification under Article XX(b) moot, as there would be no violation of Article I:1 of the GATT. The expansion of the coverage of the Drug Arrangements to all developing countries would render the issue of justification under Article XX(b) moot, as they would then be justified under paragraph 2(a) of the Enabling Clause.

*28. In light of the Appellate Body's pronouncements on the term "necessary" in Korea – Beef and other relevant jurisprudence, where on the continuum between "contributing to" and "indispensable" does one place "necessary" in relation to the Drug Arrangements?*

**Reply**

Please see India's response to Panel Question 54 to both parties. India reiterates that it considers that the EC has failed to demonstrate that its measure is "substantially closer" to the pole of "indispensable" within the meaning of the Appellate Body ruling. The EC has failed to demonstrate that tariff discrimination between the twelve beneficiaries and other countries that actually or potentially suffer from drug-related problems is necessary to protect life and health in the EC. The EC has also failed to demonstrate that financial and technical assistance, combined with multilateral trade negotiations in sectors of export interest of the developing countries, would not be an alternative, WTO-consistent and less trade-restrictive measure available to it.

*29. Could India confirm that, as regards the chapeau of Article XX, India is not raising any issue concerning a "disguised restriction on trade"?*

**Reply**

As the party invoking Article XX(b) as a defence, it is incumbent on the EC to establish all of the elements under that article, including the chapeau, which specifically provides that the measure (justification for which is sought) is "not applied in a manner which constitutes … a disguised restriction on international trade …". The EC has thus far failed to establish that the Drug Arrangements are "necessary" in the context of Article XX(b). Thus, it is not necessary for the Panel to examine the application of Drug Arrangements in the context of the chapeau. Should the Panel proceed to examine the Drug Arrangements in relation to the chapeau, India is of the view that the EC has likewise failed to establish that the measure meets all of the elements in the chapeau, including the above-quoted portion. In its Second Submission (paragraphs 159-162), India has established that 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 between countries where the same conditions prevail" within the meaning of the chapeau of Article XX.

**ANNEX B-5**

Replies of the European Communities to Questions from the Panel
after the Second Panel Meeting

**To both parties**

Question 29

*What is the difference between the Enabling Clause and the 1971 Waiver Decision? What did the Enabling Clause add to the 1971 Waiver Decision?*

1. The EC has referred to the differences between the legal base, the wording and the functions of the 1971 Decision and the Enabling Clause in its reply to the Panel's Question to both Parties No. 2.[1] Other significant differences include the following:

– under the Enabling Clause, donors are subject to the obligations imposed by Paragraph 3, including in particular Paragraph 3(c). The relevance of this provision for the interpretation of the term "non-discriminatory" has been discussed at length elsewhere. (See below the reply to the Panel's Question to both Parties No. 47).

– in the Enabling Clause, GSP preferences are part of a comprehensive package, which includes *inter alia* the authorization of other forms of differential and more favourable treatment involving differentiation between developing countries (Paragraphs 2(c) and 2(d)), as well as the formal recognition of the principle of "graduation" (Paragraph 7). This supports the EC's position that interpreting the term "non-discriminatory" in footnote 3 as allowing differentiation between developing countries with different development needs is fully consistent with the objectives of the Enabling Clause.

[1] Further confirmation of the EC's account of the drafting history of the Enabling Clause is provided by the Report of the Director General of GATT on the Tokyo Round of Multilateral Trade Negotiations, which recalls that:

Over a long period of time, developing countries had pressed for inclusion in the GATT of legal recognition of preferences as a means of promoting their export trade and economic development. In their view such recognition would reflect a more equitable trading relationship between developed and developing countries and remove the anomalous application of "equal rights and obligations among unequals".

The possible inclusion of a provision in the GATT to authorise the grant of preferences was the subject of some consideration when the new Part IV of the GATT on Trade and Development was under negotiation in 1964. Nothing concrete resulted from this consideration however. Later, when the Generalized System of Preferences and the preferences resulting from negotiations among developing countries were brought to the GATT, the necessary authorization took the form of waivers dated 25 June 1971 and 21 November 1971 respectively. Developing countries always took the view that this waiver approach was unwarranted and outmoded.

[…]

The Enabling Clause meets the fundamental concern of developing countries by introducing differential and more favourable treatment as an integral part of the GATT system, no longer requiring waivers from the GATT. It also provides the perspective against which the participation of developing countries in the trading system may be seen.

*The Tokyo Round of Multilateral Trade Negotiations*, report by the Director General GATT, Geneva, April 1979, pp. 98-99.

Question 30

*Are there any options other than construing the Enabling Clause as either an autonomous right or as an exception?*

2. The case law of the Appellate Body suggests that the mere fact that a provision can be characterised as an "exception" does not preclude it from being an "autonomous right" and that the relevant distinction is not between "exceptions" and "autonomous rights", but rather between "autonomous rights" and "affirmative defences" (See e.g. Appellate Body report, *EC – Hormones*, para. 104).

Question 31

*In light of the fact that the Enabling Clause was part of a treaty negotiation, did the developing countries "pay" for it?*

3. Yes. As explained, Paragraph 2(a) of the Enabling Clause is part of a new balance of rights and obligations agreed at the Tokyo Round, including those under the other provisions of the Enabling Clause.

Question 32

*What are relevant criteria to determining whether a provision can be characterized as an affirmative defence?*

4. Please see the EC's reply to the Panel's Question to both Parties No. 6. See also EC's Second Submission, paras. 10-12 and the EC's Second Oral Statement, paras. 2-25.

Question 33

*The EC has stated in response to Panel Question 12 to both Parties that, for a measure under the Enabling Clause to be "non-discriminatory", the aim must be legitimate and the means used to achieve the legitimate aim must be reasonable. In this context, how should one determine whether or not a measure to achieve a legitimate aim is reasonable, both in general and specifically with respect to the Drug Arrangements?*

5. In order to establish whether a measure is a "reasonable" means to achieve a legitimate objective, it is necessary to consider, first, whether the measure is objectively apt to achieve that objective and, second, whether it is proportionate.

6. The EC has shown that the countries affected by the drug problem have special development needs (EC's First Submission, paras. 86-99) and that tariff preferences are an appropriate response to such needs. (See EC's First Submission, paras. 100-115).

Question 34

*Is the term "non-discriminatory" in footnote 3 a provision aimed at preventing abuse of GSP? If so, in what way does this contribute to the correct interpretation of the term "non-discriminatory"?*

7. The term "non-discriminatory" is not an "anti-abuse" provision in the same sense as, for example, the chapeau of Article XX of the GATT.[2] Rather, it is one of the defining characteristics of the measures covered by Paragraph 2(a).

Question 35

*Noting that the Enabling Clause refers to GSP in footnote 3 "[a]s 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'", does the wording of the footnote incorporate the 1971 Waiver Decision as a whole (other than the temporal limitation), including the Agreed Conclusions? If not, why not?*

8. Footnote 3 does not incorporate by reference the whole of the 1971 Decision. It does not say, for example, "in accordance with" the 1971 Decision, or "subject to the provisions of" the 1971 Decision. Instead, footnote 3 refers to the "preferential tariff treatment" which is "described" in the 1971 Decision.[3] Accordingly, it is only such "description" of the GSP which is relevant, rather than the 1971 Decision as a whole. The footnote itself, by quoting the phrase "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries", indicates what are the essential elements of that description.

9. A fortiori, footnote 3 does not incorporate into the Enabling Clause the Agreed Conclusions. Footnote 3 does not say "as described in the Agreed Conclusions", but rather "as described in [the 1971 Decision]". Accordingly, to repeat, it is only the description of the GSP which is found in the 1971 Decision itself that is relevant.

10. Contrary to what is suggested by India, the Agreed Conclusions are not part of the 1971 Decision. Letter (a) of the 1971 Decision provides that

> … without prejudice to any other Article of the General Agreement, the provisions of Article I shall be waived for a period of ten years to the extent necessary to permit developed contracting parties, subject to the procedures set out hereunder, to accord *preferential tariff treatment* to products originating in developing countries and territories *with a view to extending to such countries and territories generally the preferential tariff treatment referred to in the Preamble to this Decision*, without according such treatment to like products of other contracting parties … [emphasis added]

11. Thus, Letter (a) alludes exclusively to the "preferential treatment referred to in the Preamble", and not to the Agreed Conclusions. That "preferential treatment" is described in the Preamble with the terms "generalized", "non-reciprocal", "non discriminatory" and "beneficial to the developing countries".

12. Furthermore, the subject of the waiver granted by the 1971 Decision was not the "preferential treatment referred to in the Preamble" as such. Rather, the 1971 Decision permitted developed countries to accord "preferential tariff treatment" "**with a view to**" extending generally to developing countries the "preferential treatment referred to in the Preamble".[4] Thus, in the context of the 1971

[2] See e.g. Appellate Body report, US – *Gasoline*, p. 22, and Appellate Body report, US – *Shrimps*, para. 151.

[3] It may be open to debate whether footnote 3 refers to the "preferential tariff treatment" or to "the Generalised System of Preferences". The question, nevertheless, is inconsequential, because the 1971 Decision describes the Generalised System of Preferences by enumerating the characteristics of the preferential tariff treatment to be provided thereunder.

[4] See Lorand Bartels, *The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program*, Journal of International Economic Law 6 (2003), 507-532, at p. 520.

Decision, the "preferential treatment referred to in the Preamble" is an objective at which donors should aim, rather than a binding requirement. Therefore, even if the Agreed Conclusions were deemed to be covered by the reference in Letter (a), they would impose no binding obligations.[5] While the EC has chosen not to dispute the binding nature of the "description" of the GSP contained in the Preamble to the 1971 Decision, this position does not extend to the Agreed Conclusions.

13. Moreover, as explained in the EC's Second Submission (paras. 33-37), the Agreed Conclusions are drafted in hortatory language, do not purport to be binding and indeed would be extremely difficult to enforce due to their lack of precision. It would be an illogical and unacceptable result if the reference in footnote 3 to the 1971 Decision were interpreted so as to confer upon the Agreed Conclusions legal effects which they were never meant to have either within UNCTAD or under the 1971 Decision.

Question 36

*In respect of GSP, should the context of the Agreed Conclusions be used any differently in interpreting the Enabling Clause than in interpreting the 1971 Waiver Decision? If so, why? Please elaborate.*

14. The Agreed Conclusion are not "context" for the interpretation of the 1971 Decision (See the replies to the Panel's Questions to both Parties Nos.35 and 44.) Even if they were, Paragraph 2(a) must be read in its own context, which includes in particular the other provisions of the Enabling Clause. As explained, the legal base, the wording and the legal function of the Enabling Clause are different from those of the 1971 Decision.

Question 37

*Assuming that different treatment is not necessarily discriminatory treatment and is permitted by the term "non-discriminatory" under the Enabling Clause, what then is not permitted by this term? Where do we draw the line?*

15. The term "non-discriminatory", as interpreted by the EC, does not allow all kinds of distinctions between developing countries, but only those which

(1) pursue an objective which is legitimate in the light of the objectives of the Enabling Clause and, more generally, of Special and Differential Treatment; and

(2) which are a reasonable means in order to achieve that objective, i.e. which are both objectively apt to achieve the objective and proportionate.

16. For example, if a developed country differentiated between developing countries according to whether they are located in a certain geographical region, or have English as their official language, or belong to a certain political or military grouping, or qualified for the final round of the last World Football Cup, such differentiation would be discriminatory because it does not pursue an objective which advances the objectives of the Enabling Clause.

17. Even where differentiation between developing countries pursues a legitimate objective, it may still be discriminatory if it is not a "reasonable" (i.e. adequate and proportionate) measure to achieve that objective. For example, as discussed below, it seems that tariff preferences would not be an appropriate response to address problems such as famine or AIDS.

18. The EC has shown that the Drug Arrangements are "non-discriminatory" because

[5] See US First Oral Statement, para. 8.

- first, they pursue an objective which is legitimate having regard to the objectives of the Enabling Clause: responding to the special development needs of the countries affected by drug production and trafficking; and

- second, tariff preferences are an appropriate response to the drug problem because they are necessary to support sustainable alternative licit activities which replace drug production or trafficking.

Question 38

*Taking account of the contents of footnote 3, please indicate what changes – if any – the Enabling Clause made to the pre-existing GSP regime*

19. See the EC's replies to the Panel's Questions to both Parties Nos. 2 and 35.

Question 39

*Did Centrally Planned Economies that were GATT contracting parties participate in the negotiations of GSP? Did the Enabling Clause affect their rights and obligations under GATT Article I:1? If so, how were they affected?*

20. A number of socialist countries attended the meetings of the UNCTAD Special Committee on Preferences. Some of the them (Czechoslovakia and Poland) were GATT Members at the time.

21. In response to persistent requests by the developing countries, Bulgaria, Czechoslovakia, Hungary, Poland and the Soviet Union made a Joint Declaration in the Special Committee on the measures those countries intended to take to contribute to the attainment of the objectives of Resolution 21(II).

22. The Enabling Clause does not distinguish between Centrally Planned Economies and other Contracting Parties. Accordingly, their rights and obligations were affected in the same manner as those of other contracting parties.

Question 40

*Please indicate any preferential tariff preference granted at any time by individual GATT contracting parties or WTO Members to limited groups of developing countries which have been notified under paragraph 4(a) of the Enabling Clause and whether they were the object of the granting a waiver under GATT Article XXV.*

23. At the outset, the EC would recall that the EC authorities will include in the Drug Arrangements any beneficiary of its GSP scheme which is found to be severely affected by drug production or trafficking. Thus, potentially, all developing countries are beneficiaries of the Drug Arrangements.

24. Therefore, the issue before the Panel is not whether the Enabling Clause allows to exclude *a priori* and permanently certain countries from a GSP scheme, but rather whether it is possible to apply differentiation criteria among the GSP beneficiaries which have the consequence that, at any given point in time, not all the GSP beneficiaries receive identical preferences.

25. Like the EC's GSP, the GSP schemes of other donor countries, such as the United States and Japan, also differentiate between developing countries. For example, both the United States and Japan

"graduate" countries with respect to products or sectors where they have become competitive. [6] This form of differentiation, like the Drug Arrangements, reflects the assumption that the term "non-discriminatory" does not require to grant identical preferences to all developing countries.

Question 41

*Under the initial application of the 1971 Waiver Decision, did any contracting party granting preferences to developing countries exclude any developing country or countries from its GSP?*

26. The GSP scheme introduced by the EC following the adoption of the 1971 Waiver did not exclude a priori any developing country. The EC understands that, in contrast, other donors (in particular the United States) did exclude from the outset certain developing countries.

27. It is recalled, nevertheless, that the issue in dispute is not the possibility to exclude *a priori* and permanently certain developing countries from a GSP scheme, but rather whether the term "non-discriminatory" means that all the developing countries previously designated as beneficiaries of a GSP scheme must be granted identical preferences.[7]

Question 42

*What elements of Article I:1 of GATT 1994 do not apply under paragraph 2(a) GSP schemes covered by the Enabling Clause? For example, do commitments regarding charges imposed in the international transfers of payments for imports and exports, or rules and formalities in connection with importation and exportation, change in any way when trade under GSP takes place, or do they retain their validity, as set out in Article I:1?*

28. The Enabling Clause excludes completely the application of Article I:1 of the GATT with respect to measures that fall within Paragraph 2(a).

[6] See the description of the GSP schemes applied by the United States and Japan made in the Note by the WTO Secretariat entitled "The Generalised System of Preferences: A preliminary analysis of the GSP schemes of the Quad", WT/COMTD/W/93, of 5 October 2001, paras. 46 and 57-61.

[7] The WTO Secretariat has observed that in the discussions within UNCTAD

some flexibilities were discussed and these have become *de facto* part of operational schemes. For example, it was noted that "…the industrial countries could establish a quota for admitting manufactured goods from developing countries *free of duty*, but they could *exclude from these preferences* a schedule of items constituting a reasonable percentage of the total goods they import."7 And "*all the developing countries*, irrespective of their level of development, would be eligible to avail themselves of the *preferential system* up to the amount of the relevant quota. But there would have to be a periodic review of the flow of exports; and if the exports from one or more countries increased so much that they did not leave sufficient room for those from others, equitable solutions should be sought." "Special preferences should be granted to the less advanced developing countries." It was also accepted that, after preferences had helped the developing countries "to prevent or rectify the structural imbalance in their trade", they "will gradually have to disappear". That was the concept of "graduation": that developing countries becoming advanced would not longer benefit from the GSP. Finally, it was recognised that, while developing countries would not offer "conventional reciprocity", as a result of preferences they would be able to import more than if the preferences had not been granted. Thus, irrespective of the subsequent legal texts, the early discussion already envisaged quota limits, graduation, special preferences for LDCs and the eventual phasing out of preferences.

Note by the WTO Secretariat entitled "The Generalised System of Preferences: A preliminary analysis of the GSP schemes of the Quad", WT/COMTD/W/93, of 5 October 2001, para. 12. [footnotes omitted].

29. Paragraph 2(a) covers only "preferential tariff treatment". Accordingly, it does not cover the granting of preferences with respect to other measures such as "rules or formalities"[8] or with respect to "charges on international transfers of payments".

30. The preferences provided under the Drug Arrangements consist exclusively of tariff preferences. India does not contest that they constitute "preferential tariff treatment" within the meaning of Paragraph 2(a).

Question 43

*Please give your full interpretation of the term "non-discriminatory" in footnote 3.*

31. The Panel is referred to:

- the EC's First Submission, paras. 64-85;
- the EC's reply to the Panel's Question to both parties Nos. 9, 10, 12 and 37;
- the EC's reply to the Panel's Question to the EC Nos. 2 and 18;
- the EC's Second Submission, paras. 19-44; and
- the EC's Second Oral Statement, paras. 36-63.

Question 44

*Is it your understanding that the Agreed Conclusions (TD/B/330) were agreed to by consensus in UNCTAD?*

32. No. The Agreed Conclusions embody the results of the consultations undertaken by certain countries within the Special Committee on Preferences. The UNCTAD Trade and Development Board limited itself to "take note" of those results. (see EC's Second Submission, para. 36.)

*If so, do you consider that they are part of the context of the 1971 Waiver Decision, within the meaning of Article 31.2(a) of the Vienna Convention?*

33. No. First, the Agreed Conclusions do not purport to be a binding "agreement" (see EC's Second Submission, para. 36). Second, India has not established that the Agreed Conclusions were made by all the countries that were Contracting Parties to the GATT 1947.[9] Third, the Agreed Conclusions were not made "in connection with the conclusion of" the 1971 Decision, let alone "in connection with the conclusion of" the Enabling Clause. They were drawn up before the 1971 Decision was adopted, or even drafted, and, therefore, they cannot be an interpretation of its terms.[10]

*Are they also part of the context of the Enabling Clause, by virtue of its footnote 3?*

34. No. See the EC's Second Submission, paras. 33-37 and the EC's reply to the Panel's Question to both Parties No. 35.

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[8] See Panel report, United States – Denial of Most-Favoured-Nation Treatment as to Non-rubber Footwear from Brazil, adopted on 19 June 1998, 39S/128, paras. 6.14-6.17.

[9] It appears that some countries that were Contracting Parties to the GATT 1947 were neither present nor represented in the Special Committee on Preferences. For example, South Africa and Zimbabwe.

[10] According to Sir Ian Sinclair,

It is of course essential that the agreement … should be related to the treaty. It must be concerned with the substance of the treaty and clarify certain concepts in the treaty or limit its field of application. It must equally be drawn up on the occasion of the conclusion of the Treaty.

Sir Ian Sinclair, *The Vienna Convention on the Law of the Treaties*, 2nd Edition, Manchester University Press, p. 129.

*If not, are they part of the preparatory work of the 1971 Waiver Decision and of the Enabling Clause? Please elaborate.*

35. The EC would agree that the Agreed Conclusions may be considered as "preparatory work" of the 1971 Decision.

Question 45

*In light of Articles 31 and 32 of the Vienna Convention, are the Agreed Conclusions context, object and purpose, preparatory work or something else?*

36. See the reply to the Panel's Question to both Parties No 44.

Question 46

*Do you consider that the developing countries agreed in the Agreed Conclusions or in the 1971 Waiver Decision that GSP schemes could contain as little as a single product? If so, please provide documentary support for this contention. If not, what in the Agreed Conclusions prevent this?*

37. Neither the Agreed Conclusions nor the Enabling Clause contain any express requirement concerning the product coverage of the GSP schemes.

38. In their "offers" to the Special Committee on Preferences, the prospective donor countries specified the products in respect of which they intended to grant preferences. Those "offers" are not binding and the donor countries remain free to withdraw preferential treatment with respect to all or part of those products, in accordance with the strictly voluntary nature of the GSP preferences (cf. Section IX.2(ii)(a) of the Agreed Conclusions).

39. As suggested by some of the Panel's questions, it might be arguable that the term "generalised" refers to the product scope of the preferences. [11] But this interpretation does not appear to be supported by the drafting history.

Question 47

*Please give your full interpretation of paragraph 3(c).*

40. Please see:

- the EC's First Submission, paras. 70-71;
- the EC's replies to the Panel's Questions to both Parties Nos. 12, 13, 14, 15, 16, 17 and 19;
- the EC's reply to the Panel's Question to India No. 8;
- the EC's replies to the Panel's Questions to the EC Nos. 16, 17 and 18; and
- the EC's Second Submission, paras. 48-52.

Question 48

*What was your position on the meaning of GSP during the negotiation in the late 1960s? Did this position change over time, through to the Enabling Clause in 1979? Please provide documentary evidence in support of your answer.*

[11] This interpretation is advanced also in the Note by the WTO Secretariat entitled "The Generalised System of Preferences: A preliminary analysis of the GSP schemes of the Quad", WT/COMTD/W/93, of 5 October 2001, para. 89.

41. The EC's position on the meaning of the term "non-discriminatory" has always been that this term does not prevent differentiation between developing countries according to their development needs. Thus, for example, as noted below, the EC introduced special tariff preferences for LDCs as early as 1976. Also, graduation mechanisms have been a feature of the EC's GSP scheme since its inception.

Question 49

*Do you agree that a major objective of the introduction of GSP was to replace the previously existing special preferences?*

42. Yes. As explained, the drafting history of the Enabling Clause suggests that the term "generalised" was used in order to distinguish the system of preferences developed in UNCTAD from the existing "special" preferences granted by some developed countries to some developing countries, mainly former colonies, on purely historical or geographical grounds. As originally envisaged, the UNCTAD system would have subsumed and replaced those existing "special" preferences for certain developing countries by "generalising" them, i.e. by making them available to all, or at least most developing countries. Hence the term "generalised".

43. As noted by one commentator, the Enabling Clause reflects the principle that

> The preferences for development are to be accorded, not because of political, cultural or even geographical ties, but because of the difference that exists in the levels of economic development.[12]

*If so, is it possible to set up GSP programmes addressing development problems of less than all developing countries? What is the basis for this possibility? What are the systemic consequences of such reading?*

44. One thing is to give "special" preferences only to certain designated developing countries for historical or geographical reasons. Another is to include all developing countries in a GSP scheme and then differentiate among them according to criteria related to their development needs. Such differentiation among the beneficiaries of a GSP scheme is compatible with the requirement that the preferences must be "non-discriminatory" and indeed necessary in order to attain the objective stated in Paragraph 3(c).

Question 50

*Does "generalized" include either product coverage or country coverage or both?*

45. As mentioned, the drafting history of the Enabling Clause suggests that the term "generalised" was used to define the country scope of the preferences, rather than their product scope. (see above the EC's reply to the Panel's question to both Parties No. 46).

[12] Abdulqawi A. Yusuf, *Differential and More Favourable Treatment: The GATT Enabling Clause*, Journal of World Trade Law, Vol. 14, 1980, p.488-507, at p. 492.

*And does "non-discriminatory" include either of these or both?*

46. The term "non-discriminatory" is concerned exclusively with the country coverage. The fact of granting preferences with respect to certain products, rather than with respect to other products can never be considered as "discriminatory".

Question 51

*If "generalized" does not mean to all and does not allow to one, then what does it mean? How does one determine whether a GSP scheme is "generalized" or not? Would four countries be sufficiently generalized, as was the situation in the earlier years of implementation of the Drug Arrangements? Would a scheme covering, say, 50 per cent of all developing countries be "generalized"?*

47. See below the reply to the Panel's question to both Parties No. 52.

Question 52

*Please give your full interpretation of paragraph 2(a).*

48. Paragraph 2(a) is one of the forms of "differential and more favourable treatment to developing countries" to which Paragraph 1 "applies". Accordingly Paragraph 2(a) must be interpreted within the framework of Paragraph 1. As explained, Paragraph 1 does not require to grant the same preferences to all developing countries. Accordingly, there is no reason to read that requirement into Paragraph 2(a), unless Paragraph 2(a) so provides.

49. The interpretation of the term "preferential tariff treatment" does not seem to be disputed between the parties. Rather, it is the characteristics of such treatment which are at issue.

50. The term "tariff" makes clear that Paragraph 2(a) covers only tariff preferences, unlike Paragraph 2(d), which covers any kind of "special treatment". This is one of the reasons why the EC's interpretation of Paragraph 2(a) does not render redundant Paragraph 2(d), contrary to India's assertion.

51. In turn, the terms "accorded by developed countries" make clear that Paragraph 2(a) does not apply to preferential treatment granted by developing countries to other developing countries. As pointed out by the EC, this is another of the differences between Paragraphs 2(a) and 2(d)

52. The preferences must apply to "products originating in developing countries". By India's own logic, the absence of the term "the" before "developing countries" supports the EC's interpretation that developed countries are not required to grant the same preferences to each and every developing country.

53. Finally, "preferential tariff treatment" must be granted "in accordance with the Generalised System of Preferences". This means that the preferences must be granted as part of, and consistently with "the Generalised System of Preferences".

54. It is unclear whether Footnote 3 refers to the description of the "preferential tariff treatment" or of the "Generalised System of Preferences". The issue, nevertheless, seems inconsequential, since the 1971 Decision describes the General System of Preferences by describing the characteristics of the preferential treatment provided thereunder.

55. The scope of the cross-reference made in Footnote 3, as well as the meaning of the terms "generalised", "non-discriminatory", "non-reciprocal" and "beneficial to the developing countries" have been addressed elsewhere by the EC.

*Please also give your interpretation of the term "generalized" in footnote 3.*

56. The term "generalised" must be given a meaning that, while being compatible with the other requirements included in footnote 3, does not reduce those requirements to inutility.

57. The EC considers that the issue of whether developed countries are permitted to differentiate between developing countries is addressed specifically by the term "non-discriminatory". The presence of this term in footnote 3 presupposes that the term "generalised" does not exclude *a priori* any conceivable form of differentiation between developing countries. If "generalised" meant that the same preferences must be granted to all developing countries, the term "non-discriminatory" would become meaningless and redundant, because any "discriminatory" preferences would be, by definition, "non-generalised", regardless of whether the EC's or India's interpretation of "non-discriminatory" is adopted.

58. It is possible to conceive a number of different ways in which the term "generalised" could be interpreted so as to give it a meaning which is different but nevertheless compatible with that of "non-discriminatory".

59. First, the term "generalised" could be interpreted as referring to the question of whether developed countries may exclude *a priori* certain developing countries from a GSP scheme (e.g., because they provide "reverse preferences"), while the term "non-discriminatory" would address the different and subsequent question of whether each and every developing country previously recognised as a beneficiary of a GSP scheme must be given the same preferences. This appears to be India's interpretation:

> India's understanding of the drafting history is that the term "generalised" was meant to refer to the range of countries that would accord and receive preferences but not to the degree of differentiation between the countries that the donor countries select as beneficiaries. In view of the fact that the countries that are denied the benefits accorded under the Drug Arrangements are not excluded from the EC's GSP scheme, the question of whether the EC's GSP scheme is sufficiently "generalised" does not arise in the case before the Panel.[13]

60. Another possible interpretation of the term "generalised", based on its ordinary meaning rather than on the drafting history, would be that, while not prohibiting all forms of differentiation between developing countries, an issue which is addressed by the term "non-discriminatory", the term "generalised" nonetheless requires that preferences be granted to a subcategory of developing countries and thus prohibit individual preferences. The obvious difficulty with this interpretation, as suggested by some of the Panel's questions, is where to draw the line.

61. Finally, the term "generalised" could also be interpreted as meaning that preferences must be granted with respect to all or at a least a sufficiently wide range of products. However, as discussed above, the drafting history does not appear to support this interpretation.

62. The above three interpretations are not necessarily mutually exclusive.

63. It should be noted that none of the above interpretations requires to interpret the term "non-discriminatory" as prohibiting differentiation between developing countries.

64. It should also be noted that the Drug Arrangements are consistent with all the above interpretations. Indeed, India has not claimed in this dispute that the Drug Arrangements are not "generalised".

[13] India's Question to the EC No. 30

Question 53

*What in your view should be the test for "necessary" under Article XX(b)?*

65. Please see the EC's First Submission, paras. 176-182. See also the EC's reply to the Panel's Question to both Parties No. 54.

Question 54

*In light of the Appellate Body's interpretation and description of the term "necessary" as being somewhere along a continuum between "contributing to" and "indispensable", please provide your views on how and where along this continuum the Drug Arrangements qualify as "necessary" according to the interpretation enunciated by the Appellate Body.*

66. From the analysis made by the Appellate Body in *Korea – Beef* it is possible to draw the following guidance:

- first, a measure does not have to be "indispensable", i.e. a measure may be deemed "necessary" even if it is possible to achieve the same objective by other means;[14]

- second, the measure must be "closer to the pole of indispensable than to the opposite pole of simply 'making a contribution to'".[15] However, contrary to what is stated sometimes by India, this is not the same as saying that the measure must be "close" to the "pole of indispensable";

- third, the Appellate Body has noted that the more vital or important the value, the easier it would be to accept as "necessary" a measure.[16] Accordingly, measures to protect human life or health need to be "less closer" to the "pole of indispensable" than other types of measures in order to be considered "necessary".

67. The EC considers that the Drug Arrangements are "necessary" to protect human life and health for the following reasons:

- First, the United Nations has recognised that, in order to fight effectively against drug abuse, it is necessary to reduce both illicit demand and illicit supply. For example, the 1988 Action Plan states that:

  > … in order to achieve a maximum effectiveness in the fight against drug abuse it is necessary to maintain a balanced approach by allocating appropriate resources to initiatives that include the reduction of both illicit demand and illicit supply.[17]

- Second, the United Nations has recognised that, in order to reduce illicit supply, it is necessary to adopt a balanced approach which combines law enforcement and initiatives to promote alternative economic activities. For example, the 1988 Action Plan states that:

[14] Appellate Body report, *Korea – Beef*, para. 161.
[15] Ibid.
[16] Ibid., para. 162.
[17] 1998 Action Plan, preamble, para. 5 (Exhibit EC – 9). See also the Declaration on the Guiding principles of Drug Demand Reduction, included in the same resolution, which provides (at II.8 a)) that "there shall be a balanced approach between demand reduction and supply reduction, each reinforcing the other, in an integrated approach to solving the drug problem". (Exhibit EC -10).

> History has shown that there is no single response to reducing and eliminating the cultivation and production of illicit drugs. Balanced approaches are likely to result in more efficient strategies and successful outcomes.[18]
>
> National drug crop reduction and elimination strategies should include comprehensive measures such as programmes in alternative development, law enforcement and eradication.[19]
>
> Alternative development … is one of the key components of the policy and programmes for reducing illicit drug production that have been adopted within the comprehensive framework of the global strategy of the United Nations.[20] [21]

- Third, the United Nations has recommended that, in order to support sustainable alternative activities, other countries should provide greater market access. For example, only a few weeks ago the UN Commission on Narcotic Drugs resolved that

> In accordance with the principle of shared responsibility, States are urged to provide greater access to their market for products of alternative development programmes, which are necessary for the creation of employment and the eradication of poverty.[22]

- Finally, the EC considers that, in order to provide "greater market access" to the products of the beneficiaries it is necessary to provide tariff preferences to those countries. Extending the same preferences to all developing countries, as suggested by India, would fail to provide effective "greater market access" to the countries affected by the drug problem, because other developing countries which are not handicapped by the drug problem would capture the new market opportunities created by the Drug Arrangements, as it is already the case under the GSP General Arrangements.

Question 55

*The EC has stated at the Second Meeting with the Parties that the existence of the Drug Arrangements tariff preference margins will not prevent it from fully contributing to the Doha tariff reduction negotiations. If the EC is ready to reduce the Drug Arrangement margins of preference, how can these preferences be considered "necessary" to protect human life and health in the EC?*

68. To be precise, the EC noted that, when negotiating tariff reductions, the EC takes into account *inter alia* of the need to preserve the margins of preference under the Drug Arrangements. Whether or not the Doha negotiations will lead to a reduction of the margins of preference for the products

[18] 1988 Action Plan, para. 1.
[19] Ibid., para. 4.
[20] Ibid., para. 8.
[21] See also the Joint Ministerial Statement adopted at the 46th Session of the Commission on Narcotic Drugs, E/CN.7/2003/L.23/Rev.1, p.7, para. 8. (Exhibit EC - 18):

> [Action to counter the drug problem] requires a comprehensive strategy that combines alternative development, including, as appropriate, preventive alternative development, eradication, interdiction, law enforcement, prevention, treatment and rehabilitation as well as education.

[22] Ibid., para. 21. (Exhibit EC - 18).

covered by the Drug Arrangements which would render ineffective the Drug Arrangements is at this point in time mere speculation.

Question 56

*Please briefly state the criteria under Article XX(b) of GATT 1994 for determining whether a measure is: (i) necessary; (ii) necessary to protect human life or health; (iii) necessary because there is no less trade-restrictive measure available; or (iv) there is no consistent or less inconsistent measure available.*

69. As regards the meaning of "necessary" and "necessary to protect human life or health", the Panel is referred to the EC's First Submission, paras. 176-182 and the reply to the Panel's Question to both Parties No. 54.

70. On the issue of whether the measure should be the "least trade restrictive" or the "least inconsistent", the EC would like to make two observations.

71. First, in *Korea – Beef*, the Appellate Body held that one of the factors to be weighed in establishing whether a measure was necessary, is "the extent to which the compliance measures produces restrictive effects on international commerce"[23] or, according to another formulation, "the accompanying impact of the law or regulation on imports or exports".[24]

72. At the same time, nevertheless, the Appellate Body endorsed the standard established by the Panel in *US – Section 337*, according to which it must be determined whether a WTO-consistent measure, or a less-inconsistent WTO measure is reasonably available.[25]

73. Contrary to what has been suggested by the United States, the two approaches are not incompatible, but rather complementary. Thus, in *Korea – Beef*, the Appellate Body upheld the panel's findings by noting that there existed alternative measures that were "consistent with the WTO Agreement, and thus less trade restrictive and less market intrusive".[26] On the other hand, where two measures are equally WTO-inconsistent, it may be necessary to consider their respective trade restrictive effects.

74. Second, a measure cannot be considered as a true "alternative" to the measure for which justification is being sought unless it is equally effective in achieving the objective of life and health protection pursued by the Member concerned.[27]

75. The EC's position in this dispute is that there is no true "alternative" WTO-consistent measure, or less WTO-inconsistent measure, because there is no measure that would be as effective as the Drug Arrangements in providing greater market access for the products of the beneficiaries.

76. In particular, extending the Drug Arrangements to other developing countries which are not handicapped by the drug problem would have the consequence that those countries would capture most of the additional market opportunities created by the Drug Arrangements, just like under the GSP general arrangements. As a result, the Drug Arrangements would be much less effective in reducing the drug supply from the beneficiaries.

[23] Appellate Body report, *Korea – Beef*, para. 163
[24] Ibid., para. 164.
[25] Ibid., paras. 165-166.
[26] Ibid., para. 172.
[27] Appellate Body report, *EC – Asbestos*, para. 174.

Question 57

*What in your view should be the test under the chapeau?*

77. Please see the EC's First Submission, paras. 197- 216 and the EC's Second Oral Statement, paras. 79-80.

Question 58

*In terms of the chapeau of Article XX of GATT 1994, can it be said that the same conditions prevail in all 12 beneficiaries of the Drug Arrangements, or are there differences among them?.*

78. Obviously the situation of the 12 beneficiaries is not identical. However, the prevailing conditions are sufficiently similar to consider that, for the purposes of the chapeau, the same conditions prevail in all of them.

*Assuming the conditions within the 12 countries differ, are the differences between the conditions in these 12 countries and in other drug-affected developing countries greater than those between the 12? Please provide justification and evidence for your response.*

79. Yes. The Panel is referred to the argument and evidence provided in:

- the EC's First Submission, paras. 116-140; and
- the EC's replies to the Panel's Questions to the EC Nos. 14, 15, 57 and 62.

Question 59

*Would human life and health in the EC be better protected if the Drug Arrangements were extended to all the developing countries involved with drug production and traffic which appear in the 2002 report of the International Narcotics Control Board?*

80. The EC considers that the Drug Arrangements include all the developing countries which are seriously affected by drug production or trafficking (with the exception of those that benefit already from more favourable tariff arrangements) and which, therefore, prose a threat to the human life and health in the EC.

81. The mere fact that a developing country is mentioned in the 2002 INCB Report does not mean that it is as seriously affected by drug production or trafficking as the beneficiaries. The EC has already explained why the developing countries mentioned by India and by the Panel (India, Paraguay, Indonesia, Thailand, the Philippines, South Africa) are not included in the Drug Arrangements. The EC stands ready to explain why any other countries specifically identified by the Panel have not been included either.

82. As explained above, extending the Drug Arrangements to other developing countries which are not as severely affected by drug production or trafficking as the beneficiaries would render the Drug Arrangements much less effective in reducing the supply of drugs from the beneficiaries.

**To the European Communities**

Question 23

*Are developed countries free to decide upon the development needs of developing countries in setting up a GSP scheme?*

83. See below the answer to the Panel's Question to the EC No. 33.

*Are they also free to choose the countries and the products covered by the GSP scheme? If yes, where is the textual basis for such authorization? If not, what is the legal basis limiting or qualifying such measures.*

84. As regards products, see above the reply to the Panel's question to both Parties No. 46.

Question 24

*If different treatment is allowed under the concept of "non-discriminatory", then what is not allowed?*

85. As explained, the term "non-discriminatory" does not allow to make all kinds of distinctions between developing countries. See the responses to the Panel's Questions to both Parties Nos. 32 and 37.

Question 25

*Originally the Drug Arrangements covered four countries. There certainly was a drug problem in other countries at that time, including in Pakistan. Under what criteria at that time did the EC incorporate those four South American countries and not Pakistan?*

86. The EC applied the same criteria as in the current GSP Regulation. Obviously, the EC does not agree with the suggestion that, at the time were the Drug Arrangements were introduced, there were "certainly" other countries as affected by the drug problem as the beneficiaries. No evidence to that effect has been provided by India. In any event, the issue before the Panel is whether the *current* GSP Regulation is discriminatory.

87. The reasons for including Pakistan in the Drug Arrangements in the current GSP Regulation are explained in the reply to the Panel's Question to the EC No. 62.

Question 26

*Please provide the list of those developing countries which are referred to in the Board's 2002 report and which are not included in the Drug Arrangements and are however the beneficiaries of similar preferential treatment by the EC under other schemes.*

88. The EC assumes that the Panel refers to Part III of the INCB report, which provides a general overview of the drug situation in the different world regions.

89. The following developing countries mentioned in the INCB Report are covered by other preferential arrangements:

- **GSP Special Arrangements for Least Developed Countries:** Cap Verde, Senegal, Mozambique, Tanzania, Haiti, Laos, Myanmar, Afghanistan, Cambodia, Bhutan, Nepal, Bangladesh and the Maldives.

- **ACP-EC Partnership Agreement:** Cape Verde, Senegal, Nigeria, Kenya, Mozambique, Tanzania, Namibia, Zimbabwe, Belize, Saint Vincent and the Grenadines, Haiti, St. Lucia, Saint Kitts and Nevis, Grenada, the Bahamas, Jamaica, Trinidad and Tobago and the Dominican Republic.

- **Bilateral Free Trade Agreements:** Morocco, Tunisia, Egypt, Algeria, South Africa and Chile

Question 27

*Has it not been the practice to either grant GSP to all developing countries or to obtain a waiver for the purpose of differentiation?*

90. See the replies to the Panel's questions to both Parties Nos. 40 and 41.

Question 28

*Under the Agreed Conclusions, would it have been possible to give special preferential treatment to the LDCs prior to the Enabling Clause?*

91. The Agreed Conclusions do not prevent developed countries from granting special tariff treatment to the LDCs. See the EC's Second Oral Statement at para. 58.

92. The EC considers that the 1971 Decision allowed developed countries to give special tariff preferences to the LDCs as part of a GSP scheme. Indeed, the EC has granted special tariff preferences to the LDCs since 1976.

*And prior to the 1971 Waiver?*

93. No.

Question 29

*Is there any requirement that product coverage must be broad enough, according to the 1971 Waiver? Or is a GSP scheme that only contains one product legally permitted under the 1971 Waiver? Why or why not?*

94. See the reply to the Panel's Question to both Parties No. 46.

Question 30

*Can the EC conceive of unique needs justifying special preferences other than drug-caused needs or the needs of least-developed countries? Leaving aside least-developed countries, what about AIDS-related needs or famine?*

95. The EC considers that the special arrangements for LDCs and countries affected by drug production and trafficking, together with the graduation mechanisms provided in the EC's GSP Regulation, capture the most significant differences between the needs of developing countries. The EC does not wish to rule out, however, that in the future it may become necessary to modify or complement those arrangements in the light of the evolving needs of development countries.

96. The EC recalls that the UN definition of LDCs already take into account *inter alia* he levels of nutrition and health, as well as the instability of agricultural production which is often the cause of

famines.[28] In contrast, the UN definition of LDCs does not address the drug problem, which may affect developing countries with different levels of development. Hence the need to provide special preferences for the countries affected by that problem.

97. Moreover, as explained above, in order to be "non-discriminatory", the differences in treatment must be objectively apt and proportionate to achieve the objective of responding to the needs of the developing countries.

98. The Drug Arrangements are an appropriate response to the drug problem because in order to reduce drug production and trafficking it is necessary to replace them with licit alternative economic activities and, in turn, this requires to provide greater market access for the products of such activities.

99. On the other hand, tariff preferences would be an inappropriate response to famines. The most direct and effective response to a famine is emergency food aid. Similarly, the most direct and effective response to the AIDS problem is providing financial and technical assistance, in the form of medicines, doctors, funds to build hospitals, etc.

100. Both the UN and the WTO have recognised that providing greater market access for the products of countries affected by the drug problem is an appropriate response to the that problem. No similar international recognition exists with respect to famines or AIDS.

Question 31

*When was the last time the EC conducted a review of all countries to determine which countries are the principle drug producers or drug traffickers?*

101. The EC authorities monitor regularly the situation of the drug problem in all developing countries.

102. Each GSP Regulation has a limited duration (as a rule 4 years). Prior to the enactment of a new GSP Regulation, the EC Commission conducts an assessment of those countries which are susceptible to benefit from the Drug Arrangements (i.e. those which do not benefit already from more favourable tariff treatment as LDCs or under bilateral agreements) in order to decide which of them should be covered by the Drug Arrangements.

103. The current GSP Regulation was adopted in December 2001 on the basis of a proposal submitted by the EC Commission in September of the same year. The latest assessment of the drug situation in those countries which could potentially qualify for the Drug Arrangements was conducted by the EC Commission as part of the preparation of that proposal. The next GSP Regulation will apply from 1 January 2005. The EC Commission will submit a proposal for that regulation during 2004.

Question 32

*The EC states, in response to Panel Question 11 to Both Parties, that "generalized" in footnote 3 means that GSP is to be provided to all developing countries with similar development needs. Based on this analysis, how does one determine whether these needs are in fact "similar"?*

104. See the EC's replies to the Panel's Questions to Both Parties Nos. 12 and 17.

105. The EC has explained why the countries affected by drug production and trafficking have special development needs in its First Submission, paras. 87-99. India has nowhere addressed the EC's

[28] Exhibit EC–18.

arguments and evidence. Both the UN and the WTO have recognised that the countries affected by the drug problem have special development needs.

Question 33

*Is it EC's position that the determination of legitimate objectives and special needs is something to be determined by the country granting those preferences?*

106. No.

107. Developed countries have some discretion in designing their GSP schemes. Otherwise, the provision contained in Paragraph 3(c) to the effect that preferences shall be designed, and if necessary, modified to respond to the needs of developing countries would be superfluous

108. However, this discretion must be exercised within the limits of the requirements imposed by the Enabling Clause, including in particular the requirement that preferences must be "non-discriminatory".

109. Under the EC's interpretation of the term "non-discriminatory", WTO panels can review whether (1) tariff differentiation between developing countries pursues an objective which is legitimate in light of the object and purpose of the Enabling Clause; and (2) whether tariff differentiation is an adequate and proportionate means to achieve that objective.

110. Thus, India's allegations that, under the EC's interpretation, the needs of developing countries would be determined "solely"[29] by the developed countries are thoroughly misguided.

Question 34

*Can you point to any of the initial "primitive" schemes in which there is a differentiation among developing countries?*

111. As mentioned, the EC's GSP scheme has differentiated between LDCs and other developing countries since 1976. Also, the EC's GSP scheme has included from its inception mechanisms to limit imports from the most competitive developing countries.[30]

Question 35

*One would suppose that when the developed countries introduced their GSP schemes and did so uniformly, there must have been some common understanding that all developing countries would be included. Has there been any GSP scheme to selected developing countries which was not covered by a GATT/WTO waiver? If so, please point to any such schemes.*

112. See the EC's replies to the Panel's questions to both Parties Nos. 40 and 41.

Question 36

*India states in response to Panel Question 11 to Both Parties that "generalized" in footnote 3 means that GSP is to be provided to all developing countries. Could the EC please give a detailed explanation as to why it disagree with India's interpretation of this term?*

[29] India's Second Submission, para. 4.

[30] This possibility was mentioned expressly in the "offer" submitted by the EC to UNCTAD. (TD.B/AC.5/34/Add.1). Similar mechanisms are mentioned in Austria's submission. (TD/B/AC.5/34/Add.3).

113. The EC understands that India's position is that that the term "generalised" means that, in principle, no developing country should be excluded *a priori* from a GSP scheme, but does not address the different issue of whether the same preferences must be granted to each and every recognised GSP beneficiary. According to India, that issue is addressed by the term "non-discriminatory". Thus, India has explained that

> India's understanding of the drafting history is that the term "generalised" was meant to refer to the range of countries that would accord and receive preferences but not to the degree of differentiation between the countries that the donor countries select as beneficiaries. In view of the fact that the countries that are denied the benefits accorded under the Drug Arrangements are not excluded from the EC's GSP scheme, the question of whether the EC's GSP scheme is sufficiently "generalised" does not arise in the case before the Panel.[31]

114. The above is consistent with the EC's own understanding of the drafting history of the term "generalised".[32] The EC, nevertheless, has pointed out that, in addition, the ordinary meaning of "generalised" could support another interpretation:

> At the same time, and in accordance with its ordinary meaning, the term "generalised" appears to presuppose the existence of a given class or category of beneficiaries to which the preferences must be "generalised". Accordingly, it seems that a preference granted exclusively to one country could not be considered as "generalised" even if it could qualify as "non-discriminatory".[33]

115. The two interpretations are not necessarily mutually exclusive. In any event, neither of them has the implication that the term "non-discriminatory" requires to provide the same preferences to *all* the developing countries included in a GSP scheme.

Question 37

*If "generalized" means all and "non-discrimination" allows differentiation as to different needs, how do you reconcile the contradiction in these two terms?*

116. As explained, it is neither the EC's nor India's position that the term "generalized" prohibits differentiation between the developing countries included in a GSP scheme. If "generalized" meant that identical preferences must be provided to all the beneficiaries of GSP scheme, the term "non-discriminatory" would become redundant and meaningless. The EC submits that, if only for that reason, that interpretation of "generalized" cannot be correct.

117. As explained above in the EC's reply to Panel's Question to both Parties No. 52, there are number of different ways in which the term "generalised" could be interpreted as having a meaning which is different, yet compatible, with that of "non- discriminatory". None of those interpretations of "generalised" requires to interpret "non-discriminatory" as prohibiting all kinds of differentiation between developing countries.

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[31] India's Question to the EC No. 30. By using the terms "sufficiently generalised" India appears to admit that donors are not required to include all developing countries in their GSP schemes. This would be consistent with the Agreed Conclusions, which stated the objective that "*in principle* all developing countries should participate as beneficiaries from the outset", but left open the issue of the countries granting "reverse preferences" (Section II.1) and noted the statement by the donors that "in general" they would base themselves in the principle of self-election (Section IV.1).

[32] EC's Reply to the Panel's Question to both Parties No. 11, at para. 41.

[33] Ibid., at para. 46. [Footnotes omitted].

Question 38

*Under the Enabling Clause the EC originally selected four countries under this Drug Arrangements. Therefore, is it the EC's view that if similar development needs only cover four countries, then it is legally adequate and proper to apply such a system to just those four countries?*

118. The EC considers that the mere fact that, at a certain point in time, certain preferences apply to four of the beneficiaries of a GSP scheme is not a sufficient reason to consider that such preferences are inconsistent with the requirements of footnote 3. More specifically, it would not be a sufficient reason to consider that the preferences are "discriminatory", which is the only issue before this Panel.

Question 39

*In Korea – Beef, the Appellate Body stated that: "For a measure … to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be designed to secure compliance" with laws and regulations that are not themselves inconsistent with some provisions of the GATT 1994. Second, the measure must be necessary to secure such compliance". In Japan – Alcoholic Beverages, the Appellate Body said that "the aim of a measure may not be easily ascertained, nevertheless, its protective application can most often be discerned from the design, the architecture and the revealing structure of a measure". Similarly, the first step in this case is for the EC to demonstrate that the measure is designed to achieve/for the purpose of achieving a legitimate objective. The EC must then demonstrate that the measure is "necessary" to achieve that legitimate objective. With this in mind, what specific evidence can the EC provide in support of its claim that its preferential tariff measure is for the purpose of the protection of human life or health in the EC, while we note the Drug Arrangements are aimed at promoting sustainable development in 12 developing countries? Please provide your analysis as to the design, architecture and structure of the Drug Arrangements.*

119. The Appellate Body has warned repeatedly against applying "tests", rather than the actual wording of the WTO Agreement.[34] The only requirement stated in Article XX(b) of the GATT is that the measure must be "necessary" for the protection of human life or health. The EC sees no basis whatsoever in the text of Article XX(b) for the proposition that, in addition to showing that a measure is "necessary" for the protection of human life and health, it must be shown that it has been specifically "designed" for that purpose.

120. The EC considers that the examination of the "design, architecture and structure" of a measure may be pertinent as part of the examination of whether a measure is "necessary", but not as a separate requirement. The EC believes that the passage of the Appellate Body report in *Korea – Beef* quoted in the question should be understood in this way. (Moreover, the EC would note that there are important differences between the structure of Article XX(b) and that of Article XX(d), which could explain the two-step approach applied by the Panel, and endorsed by the Appellate Body in *Korea – Beef*.)

121. At any rate, the EC rejects the suggestion that a measure cannot be justified under Article XX(b) unless it can be shown that it has as its sole and exclusive purpose the protection of human life and health. To repeat, the only requirement provided in Article XX(b) is that the measure must be "necessary" to protect human life or health. Yet, it is evident that a measure may be "necessary" to protect human life or health and, at the same time, achieve another, compatible objective.

[34] See e.g. Appellate Body Report, US – *FSC*, para. 91.

122. The immediate objective of the Drug Arrangements is to promote exports from the countries affected by the drug problem with a view to support licit alternative activities that replace drug production and trafficking. Reducing drug production and trafficking in the beneficiary countries promotes the economic development of those countries, which is impaired by those activities. At the same time, reducing drug production and trafficking in those countries has the necessary effect of reducing the supply of drugs to the EC, which in turn has the necessary effect of reducing drug consumption within the EC.

123. In sum, the development problems of the beneficiaries and the problem of drug abuse within the EC have a common cause: the extent of drug production and trafficking in the beneficiary countries. Reducing drug production and trafficking in those countries addresses simultaneously both problems.

Question 40

*What evidence can the EC provide as to the effect of the Drug Arrangements on the protection of the health of EC citizens?*

124. The EC monitors the levels of production and trafficking in the beneficiary countries. The EC also monitors the effects of the Drug Arrangements in promoting exports from the beneficiaries and, therefore, in supporting alternative activities to drug production and trafficking (See below, the reply to the Panel's Question to the EC No. 49).

125. The EC considers that it is a self-evident proposition that reducing the supply of drugs from the beneficiaries to the EC reduces the consumption of drugs in the EC and, therefore, protects the health and life of the EC citizens.

126. However, it would be an impossible task to separate and quantify the effects on drug consumption within the EC which are attributable to the Drug Arrangements from those which are attributable to other actions undertaken by the beneficiaries in order to reduce production and trafficking of drugs or to others actions that are part of the EC's comprehensive strategy against drug abuse, including in particular those aimed at reducing the demand for drugs.

127. The UN recommendations relied upon by the EC in this dispute reflect the basic assumption that promoting alternative licit activities will reduce (or at least prevent the increase of) the production and trafficking of drugs and, hence, their supply to, and their consumption in other countries. India has provided no evidence that calls into question this premise, which underlies well-established international anti-drug policies to which all WTO Members, including India, have agreed within the United Nations.

Question 41

*Does the EC have any mechanism that in one way or other monitors the effect of the DA on the health of the EC's citizens?*

128. See above the EC's reply to the Panel's Question to the EC No. 40.

Question 42

*Was there any report prepared by the EC before the Drug Arrangements were enacted that described the link between production in the drug-producing and trafficking countries and consumption by the EC's citizens?*

129. As mentioned above, the EC considers that there is a self-evident link between the production and trafficking of drugs in other countries and their consumption in the EC. There is no production of coca or opium products in the EC. If those drugs were not produced and trafficked in other countries, they would not be consumed in the EC.

Question 43

*Is there any documentary material that the EC can point to from any of its member states, in terms of referring to the health benefits ascertained from the Drug Arrangements, rather than in terms of quantification?*

130. See above the EC's reply to the Panel's Question to the EC No. 40.

Question 44

*The EC mentions a comprehensive strategy for combating drug problems, including improved market access for developing countries, called for by various UN conventions, resolutions and other reports. Is this comprehensive strategy aimed at supporting sustainable development of drug-affected developing countries or at protecting human health in the importing country, or both?*

131. Both. The UN strategy is aimed to counter the "world drug problem", which the United Nations has described as

> a challenge of a global dimension which constitutes a *serious threat to the health*, safety and well being of all mankind, in particular young people, in all countries, *undermines development, including efforts to reduce poverty, socio-economic and political stability and democratic institutions*, entails an increasing economic cost for Government, also threatens the national security and sovereignty of States, as well as the dignity and hope of millions of people and their families, and causes irreparable loss of human lives.[35]

*Please identify the specific wording of the strategy in any UN conventions, resolutions or related reports which links improved market access to the protection of human health in the importing country.*

132. Please see above the EC's Reply to the Panel's Question to both Parties No. 54. See also EC's First Submission, paras. 100-115, EC's Second Submission, paras. 57-61, and the reply to the Panel's Question to both Parties No. 25.

Question 45

*Is improved market access suggested as one alternative component or as a necessary component of this strategy?*

133. It is a necessary component of the UN strategy. The texts cited by the EC contain no suggestion to the effect that providing greater market access is merely one among various options. As explained, alternative activities would not be sustainable in the absence of markets for the products of such activities.

[35] U.N General Assembly Resolution 56/124 of 19 December 2001 (International Cooperation against the World Drug Problem), Fourth recital (Emphasis added) (Exhibit EC–4).

Question 46

*The EC argues that the objective criteria for designating beneficiaries under the Drug Arrangements are based solely on the seriousness of the drug production and trafficking problems in each of the developing countries. It seems that there is nothing in the criteria focusing on whether or not the drugs are supplied into the EC market. How does providing tariff preferences to non-suppliers serve to protect the health of EC citizens?*

134. The EC is, by far, the largest market for narcotic drugs, together with the United States. All the countries included in the Drug Arrangements are, as a matter of fact, "suppliers" to the EC.

135. See also the EC's reply to the Panel's Question to both Parties No. 24.

Question 47

*In light of the pronouncements of relevant UN and other international bodies regarding the fight against drugs, contained in UN documentation mentioning promotion of market access for drug-producing and trafficking countries, there is no reference to the consequences for protecting life and health in importing countries. Could the EC comment on this fact.*

136. The EC does not agree with the statement made in the question. The relevant UN recommendations make clear that providing greater market access is necessary in order to support alternative development, which in turn is one of the necessary components of the strategy to reduce illicit production and trafficking, which in turn is one of the actions, together with the reduction of demand, required to counter the "drug problem". One of the main aspects of the "drug problem" which the UN strategy aims to resolve are the negative health consequences of drug abuse, including in the importing countries.

137. Please see

- the EC's First Submission, paras. 100-115;
- the EC's Second Submission, paras. 57-61;
- the EC's Reply to the Panel's Question to both Parties Nos. 25 and 54; and
- the EC's reply to the Panel's Question to the EC No. 44.

Question 48

*Is the EC saying that the tariff preferences under the Drug Arrangements are reducing the drug supply into the EC and can you supply evidence of this? Or are you saying that the effects of the Drug Arrangements cannot be known?*

138. See above the EC's reply to the Panel's Question to the EC No. 40.

Question 49

*In light of the preamble of the EC's Regulation enacting the Drug Arrangements, which states "that special arrangements must be closely monitored under the Drug Arrangements", how does the EC monitor the Drug Arrangements in the 12 beneficiaries? Please provide the most recent report on the monitoring of the Drug Arrangements.*

139. The most recent report on the effects of the Drug Arrangements was drawn up under Regulation (EC) No 2820/98 for the period 1 July 1999 to 31 December 2001. This report analyses the effects of the Drug Arrangements on the trade from the beneficiaries.[36]

140. In addition, the EC would like to draw the Panel's attention to an evaluation of the impact of the Drug Arrangements conducted by the General Secretariat of the Andean Community.[37]

Question 50

*Does the EC monitor the effects of the Drug Arrangements on the protection of human life and health in the EC? If yes, please describe this monitoring mechanism and provide relevant evidence thereof. If no, how can the EC determine whether the Drug Arrangements continue to be "necessary" to protect human life and health in the EC?*

141. See above the reply to the Panel's Question to the EC No. 40.

Question 51

*Do the UN reports suggest alternative measures to reduce production in drug-producing developing countries?*

142. No. Rather, the UN texts recommend a series of complementary measures, all of which are necessary in order to fight against the drug problem.

143. See also the reply to the Panel's Questions to the EC No. 56.

Question 52

*Prior to adopting the most recent version of the EC's Drug Arrangements, did the EC consider other possible, less trade-restrictive alternatives? If so, please indicate what these were and provide documentary support for your answer. If not, why not?*

144. The EC is not aware of the existence of other less-trade restrictive alternatives.

145. As explained, giving the same preferences to all developing countries is not a true alternative, because it would be much less effective, as other developing countries which are not affected by the drug problem would capture most of the additional market opportunities created by the Drug Arrangements.

146. The provision of financial assistance is also not a true alternative. The relevant UN recommendations make clear that it is necessary to provide both financial assistance and greater market access. Without the latter, alternative development would not be sustainable. Suggesting, as India did during the second hearing, that financial assistance is a sufficient, and indeed more effective way than trade preferences to promote sustainable development calls into question the justification for any GSP preferences, and not just for the Drug Arrangements.

[36] Exhibit EC–22.
[37] Exhibit EC–23.

Question 53

*Does the EC consider that improved market access under the Drug Arrangements is more necessary to promote sustainable development or more necessary to protect human health in the EC?*

147. The question draws a false alternative. The Drug Arrangements are equally necessary to achieve both objectives. They are designed to reduce drug production and trafficking in the beneficiary countries. By doing so, they achieve simultaneously the objectives of promoting the development of those countries and the objective of protecting the health and life of the EC population.

148. See also the EC's reply to the Panel's Question to both Parties No. 21.

Question 54

*Does the EC consider that it has met its burden of demonstrating to the Panel that its tariff preference measure is "necessary" under Article XX(b)? Why does the EC consider that it has met this burden?*

149. Yes.

150. Please see the following sections of the EC's submissions, as well as the evidence cited therein:

- the EC's First Submission, paras. 185-193 and 100-115;
- the EC's replies to the Panel's questions to both Parties Nos. 24 and 25; and
- the EC's Second Submission, paras. 54-76.

Question 55

*The 2002 Annual Report on the state of the drugs problem in the European Union and Norway does not appear to refer at all to the Drug Arrangements. Given this circumstance, can the Drug Arrangements be considered as a measure under Article XX(b) and, moreover, can it be deemed as "necessary" to protect human life and health in the EC?*

151. The 2002 EMCDDA report focuses on the drug situation in the European Union and does not provide an exhaustive overview of all the EU policies. In particular, the section concerning the reduction of drug supply refers only to the actions taken in order to reduce drug production and trafficking *within* the European Union, and does not address the action taken to reduce drug production and trafficking in other countries with a view to limit the supply of drugs to the EC. Thus, for example, the report does not mention either the financial assistance for alternative development provided by the EC and its Member States.

152. A more comprehensive description of the EU anti-drug strategy is found in documents such as the EC Commission's "European Union Action Plan to Combat Drugs 2000 - 2004"[38]. The Plan covers three main areas: "action on demand reduction"; "action on reduction of illicit trafficking"; and "action at international level", which refers specifically to the GSP Regulation as one of the instruments of the EC's anti-drug policy.

[38] COM(1999) 239 final of 26 May 1999.

Question 56

*How does giving special preferences to 12 beneficiaries have the desired effect if the same, equivalent or better preferences are given to many other developing countries under other programmes, for example, "Everything but Arms", LDC schemes, the Cotonou Agreement, regional free trade agreements?*

153. Obviously, the Drug Arrangements would provide even greater market access to the beneficiary countries, if they were the only tariff preference accorded by the EC. Nonetheless, there is clear evidence that the Drug Arrangements are effective in promoting the exports from the countries concerned and, therefore, in promoting alternative activities. (See the reports mentioned in the reply to the Panel's Question to the EC No. 49).

*Are you giving the equivalent preferential treatment to such other countries under other programmes?*

154. The developing countries seriously affected by drug production or trafficking that are covered by the arrangements mentioned in the question, and which for that reason have not been included in the Drug Arrangement, enjoy equivalent or greater market access under those arrangements than if they were included in the Drug Arrangements. Accordingly, it is not necessary (or indeed possible) to provide them with additional trade preferences in order to support their fight against the drug problem.

Question 57

*The EC has a free-trade agreement with South Africa. A recent report of the Narcotics Board mentions the problem of drug production and trafficking in South Africa. Would you say that the problem in South Africa is comparable to that in the 12 beneficiary countries? Is there any distinction between the preferences given to South Africa under that agreement and the 12 beneficiaries? If so, can you say that those differences are not discriminatory?*

155. The EC assumes that the Panel refers to the INCB report of 2002 and in particular para. 222, which states that "over 20 per cent of all cocaine seizures in Africa took place in South Africa (…)".

156. This statement must be read in light of the fact that Africa's overall production and trafficking is very low. The EC would invite the Panel to consult the latest report of the United Nations Office on Drugs and Crime (UNODC) on "Global Illicit Drug Trends 2003". According to the most recent statistics there is no significant opium or coca production in South Africa. Indeed, South Africa is not even mentioned as a producing country.[39] With regard to trafficking, UNODC does not report any seizures of opiates in Southern Africa (including South Africa) for the years 2000 and 2001.

157. As to seizures of heroin, the figures for South Africa compared to Pakistan are minimal (in kg)[40]:

| | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 |
|---|---|---|---|---|---|---|---|
| Pakistan | 10760.1 | 5872.1 | 6156 | 3363.7 | 4973.7 | 9492 | 6931.5 |
| South Africa | 5.9 | 0.8 | 1.5 | 5.4 | 7.4 | 15.4 | 8.5 |

[39] Global Illicit Drug Trends 2003, p. 165, 190.
[40] Ibid., p. 226.

158. Regarding seizures of cocaine, South Africa only plays a minor role compared to South America, and in particular Colombia. The figures in kg are as follows:

| | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 |
|---|---|---|---|---|---|---|---|
| Colombia | 59 030 | 45 779 | 42 044 | 107 480 | 63 945 | 110 428 | 73 863.5 |
| South Africa | 187.8 | 106.6 | 151.5 | 635.9 | 345.5 | 91.2 | 155.3 |

159. The EC therefore considers that on the basis of these figures the situation of the drug problem in South Africa is indeed very different from that in the beneficiary countries.

*Does the EC consider that in extending the Drug Arrangements to the 12 designated beneficiaries, it is extending these preferences to all developing countries where the same conditions prevail?*

160. Yes, except that some countries that are seriously affected by drug production and trafficking are not included in the Drug Arrangement because they benefit already from equivalent or more favourable treatment under other trade arrangements. As shown above, South Africa is not one of such countries. It would not have qualified for inclusion in the Drug Arrangements, even if it were not a party to a Free Trade Agreement with the EC.

Question 58

*The 2002 INCB Report provides information on drug problems in various developing countries where, apparently, largely the same or equivalent conditions prevail as in the 12 beneficiary countries under the Drug Arrangements. Can the EC demonstrate to the Panel that, in fact, the same or equivalent conditions do not prevail as between the two sets of countries? Please provide any such evidence.*

161. The EC does not agree with the statement that, according to the INCB Report, the drug problems in other developing countries not included in the Drug Arrangements are "largely the same".

162. The mere fact that a country is mentioned in the INCB report, regardless of what it is said about that country, is clearly not evidence that such country is as affected by drug problem as those included in the Drug Arrangements.

163. The designation of beneficiaries is a complex process involving the examination of all relevant statistical data on drug production and trafficking, as well as a comprehensive analysis of the effects of the drug problem in each country. For that purpose, the EC uses a variety of sources, including not only the ICBN reports, but also other UN publications such as for instance the "World Drug Report" or the annual "Global Illicit Drug Trends", as well as the reports from its delegations in the countries concerned.

164. The EC recalls that it has already explained why India, Paraguay, Thailand, Indonesia, the Philippines and South Africa (all the countries identified by the Panel and India) have not been included in the Drug Arrangements. The EC would like to put on record, once again, its willingness to explain the reasons why any other developing countries have been excluded, provided that those countries are sufficiently identified by the Panel.

Question 59

*In your view, how should the Panel proceed to assess whether the application of the EC's measure is not "arbitrary or unjustifiable discrimination", given the fact there are no explicit criteria for the application of the Drug Arrangements? How does the EC ensure the non-arbitrariness of the application of its Drug Arrangements?*

165. From the fact that the criteria for the selection of the beneficiaries are not stated in the GSP Regulation it does not follow that such criteria lead to "arbitrary or unjustifiable discrimination". The EC has explained why the publication of the selection criteria is not necessary. (See EC's reply to the Panel's Question to the EC No. 10).

166. The EC has explained what are the criteria used in the designation of the beneficiaries (EC's First Submission, paras. 116-118 and 86-99, EC's Reply to the Panel's Question to the EC No.13) and has shown, first, that all the countries included in the Drug Arrangements meet those criteria (EC's First Submission, paras. 119-139) and, second, that all the non-included countries identified by the Panel and by India do not meet those criteria (EC's replies to the Panel's Questions to the EC Nos. 14, 15 and 57). The EC has offered to do the same with respect to any other developing country specifically identified by the Panel. All this confirms that the EC is not applying the selection criteria in a discriminatory manner.

Question 60

*What are the objective criteria applicable to determining whether or not the Drug Arrangements are in compliance with the chapeau of Article XX? Does the EC consider that it has met its burden of demonstrating to the Panel that its tariff preference measure meet the requirements of the chapeau? Why does the EC consider that it has met this burden?*

167. Please see:

- The EC's First Submission, paras. 197-216;
- The EC's reply to the Panel's Questions to both Parties No. 24;
- The EC's reply to the Panel's Question to the EC No. 19;
- The EC's Second Oral Statement, paras. 79-80.

Question 61

*Assuming that the Drug Arrangements are not consistent with the Enabling Clause, would not making sufficient effort to obtain a waiver on terms and conditions acceptable to WTO Members be a less inconsistent, reasonably available alternative to achieve the EC's health objectives?*

168. A waiver is required only to the extent that a measure is inconsistent with a Member's WTO obligations. A measure justified under Article XX(b) is not inconsistent with a Member's WTO obligations and does not require a waiver.

169. Since a measure which is justified under Article XX(b) does not require a waiver, whether or not a Member has made sufficient efforts in order to obtain a waiver cannot be a relevant consideration in establishing whether a measure is "necessary" for the purposes of Article XX(b).

170. The EC would recall that in *EC – Asbestos*, the only dispute so far where a measure has been found to be justified under Article XX(b), there was no suggestion that the EC should have asked for a waiver. Yet, that possibility existed also in that case. Indeed, by the logic of the Panel's question, no measure could ever be justified under Article XX, as it may always be possible for a Member to request a waiver rather than invoking Article XX(b).

Question 62

*What documentary evidence can the EC provide to the Panel in support of its argument that the seriousness of the drug problem in Pakistan changed dramatically along with the "regime change" in Afghanistan?*

171. The situation in Pakistan is closely related to the events in Afghanistan, the most important opium producer in the world. In its report "Global Illicit Drug Trends 2003" UNODC has noted:[41]

> An abrupt decline of illicit opium poppy cultivation was recorded in Afghanistan in 2001, following the ban imposed by the Taliban regime in its last year of power. Despite the existence of significant stocks of opiates accumulated during previous years of bumper harvests, the beginning of a heroine shortage became apparent on some European markets by the end of 2001. Furthermore, the absence of the usual harvest in Afghanistan in spring 2001 and the subsequent depletion of stocks pushed opium prices upwards to unprecedented levels in the country (prices increased by a factor of 10), creating a powerful incentive for farmers to plant the 2002 crop. The power vacuum in Kabul caused by the aftermath of 11 September 2001 enabled farmers to replant opium poppy (starting in October/November 2001). By the time the Afghan Interim Administration was established and issued a strong ban on opium poppy cultivation, processing, trafficking and consumption (17 January 2002), most opium poppy fields had already started to sprout.

172. Thus, before the events of 11 September 2001, the expectation prevailed that, due to the ban on opium poppy cultivation imposed by the Taliban, the supply of drugs from Afghanistan would eventually run out. Indeed, the production figures of 2001 clearly demonstrate that the ban was very successful, reducing opium production in 2001 to a mere 185 tons compared to an average of 2657 tons in the years 1994 to 2000. This represents a decrease of 94% in 2001 when directly compared with the figures of 2000.[42]

173. In the context of the imminent invasion of Afghanistan, it was considered that there was a great risk that, following the fall of the Taliban, opium production Afghanistan would resume once again, as the new authorities would be initially very weak. This is exactly what happened in 2002, despite the newly imposed ban on opium cultivation, trafficking and consumption by the new government.[43]

174. Against this background, the EC considered that the events in Afghanistan would have a considerable negative impact on Pakistan. Indeed, the facts show that this risk eventually materialised and that the inclusion of Pakistan in the Drug Arrangements was fully justified.

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[41] Ibid., p. 166.

[42] United Nations Office on Drugs and Crime, The Opium Economy in Afghanistan, 2003, p. 31 *et seq.*

[43] The central government' powers are geographically very limited and do not extend to the main opium producing areas in the south of Afghanistan around Kandahar, the former stronghold of the Taliban.

**ANNEX B-6**

Comments of India to the Replies of the European Communities
to Questions from the Panel after the Second Panel Meeting

**To both Parties**

Question 29

1. India reiterates that paragraph 3(c) of the Enabling Clause does not support the EC's interpretation of the term "non-discriminatory". The inclusion of paragraph 3(c) cannot have the consequences that the EC seeks to attach to it. There is no basis to conclude that the drafters of the Enabling Clause altered the meaning of the term "non-discriminatory" by introducing paragraph 3(c). Had they intended to do so, they could have done so more directly in paragraph 2(a) or in wording specifically directed at preferential tariff treatment. as opposed to all measures taken under the Enabling Clause. The inclusion of paragraph 3(c) in the Enabling Clause does not therefore alter the meaning of the term "non-discriminatory", as the term was used in the 1971 Waiver Decision.

2. Contrary to the EC's assertion, paragraph 7 of the Enabling Clause does not formally recognize the principle of "graduation" *in the context of preferential tariff treatment* under paragraph 2(a) of the Enabling Clause. Indeed, the term "graduation" does not appear in paragraph 7. Paragraph 7 refers to an improvement of the capacity of less developed contracting parties to "make contributions or negotiated concessions or take *other* mutually agreed action under the provisions and procedures of the General Agreement" (emphasis added). Paragraph 7 is concerned with mutually agreed action taken under the provisions and procedures of the GATT. It applies to the process of negotiations and obligations assumed by developing countries as a consequence of negotiations. The use of the term "other" prior to the phrase "mutually agreed action" means that contributions or (negotiated) concessions of the less developed contracting parties must be "mutually agreed"; meaning with the consent of contracting parties, including the less developed contracting party making the contribution or concession. In this context, paragraph 7 has no bearing on the GSP.

Question 30

3. Contrary to what the EC asserts, the Appellate Body has clearly stated, with regard to GATT "exceptions", such as those found under Article XX or XI:(2)(c)(i), that "[t]hey are in the nature of affirmative defences".[1] The EC's reply to this question shows the difficulties that the EC itself finds

[1] In 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, p. 15, the Appellate Body stated:

"We acknowledge that several GATT 1947 and WTO panels have required such proof [that the party invoking a provision which is identified as an exception must offer proof that the conditions set out in that provision are met] of a party invoking a defence, such as those found in Article XX or Article XI:2(c)(i), to a claim of violation of a GATT obligation, such as those found in Articles I:1, II:1, III or XI:1. 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. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it.[23]

[23]Furthermore, there are a few cases that are similar in that the defending party invoked, as a defence, certain provisions and the panel explicitly required the defending party to demonstrate the applicability of the provision it was asserting. See, for example, *United States - Customs User Fee*, adopted 2 February 1988, BISD 35S/245, para. 98, concerning Article II:2 of the GATT 1947; *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, adopted 22 March 1988, BISD 35S/37, para 4.34, concerning Article XXIV:12 of the GATT 1947; and *United States - Measures Affecting Alcoholic and Malt*

in trying to make sense of the distinctions between "autonomous right", "exception" and "affirmative defence" with a view to demonstrating that it does not bear the burden of proof. As stated in India's reply to the same question from the Panel, the defence of the EC could be resolved by relying on the same undisputed facts upon which India relies for India's claim under Article I:1 of the GATT without the need of characterizing paragraph 2(a) of the Enabling Clause as an "exception", an "autonomous right", or an "affirmative defence" for purposes of the allocation of burden of proof.

Question 31

4. India does not disagree with the EC. As a matter of fact, that the developing countries "paid" for the Enabling Clause confirms that, in agreeing to the Enabling Clause, the developing countries did not waive their MFN rights as between themselves and that the term "non-discriminatory" is to be construed to mean that developed countries cannot differentiate between developing countries in the context of the GSP. Otherwise, if the EC's interpretation of the term "non-discriminatory" were to be upheld, the conclusion would be that the developing countries "paid" to relinquish their unqualified MFN rights under Article I:1 and to be discriminated against in exchange for tariff preferences, which developed countries are not obliged to grant in the first place, and which, if granted, are granted only in respect of products chosen by developed countries, are granted only to products originating in developing countries chosen by developed countries and when granted, could be removed when developed countries choose to do so.

Question 33

5. The EC's elaboration on its "reasonableness" requirement is devoid of content. The Panel is left without any further criteria to determine whether a measure is "apt" or "proportionate". India also notes that there are implied variations in the EC's formulation of it's test of "non-discriminatory". In its First Submission, it contended that tariff preferences are an appropriate response to the development needs of countries affected by drug production or trafficking. There was no explicit analysis whether the tariff preferences under the Drug Arrangements are "apt" or "proportionate". Neither was there any analysis of the "legitimacy" of the objective pursued by the Drug Arrangements.

Question 35

6. The EC's argument seeks to distinguish between the binding nature of the "description of the GSP contained in the preamble to the 1971 Decision" and the "Agreed Conclusions". No such distinction can be made; the Agreed Conclusions describe the GSP. Without reference to the Agreed Conclusions, there can be no understanding of the GSP; this is evident from the preamble of the 1971 Waiver Decision.

7. The phrase "with a view to" cannot support the distinction which the EC makes between the "Agreed Conclusions" and the "description of the GSP". Either the description of the GSP is binding, or it is not. The EC has conceded that it is binding. Thus, if the Agreed Conclusions are the description of the GSP then the Agreed Conclusions are likewise binding. The EC may argue that the Agreed Conclusions are *not* the description of the GSP in the 1971 Waiver but the use of the term "with a view to" is irrelevant to this argument.

8. In any case, the phrase "with a view to" does not mean that preferential tariff treatment of any kind was sanctioned by the 1971 Decision. On the contrary, it indicates that the purpose of the preferential tariff treatment under the 1971 Waiver Decision must be to implement the GSP. Further,

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*Beverages*, adopted 19 June 1992, BISD 39S/206, para. 5.44, concerning the Protocol of Provisional Application."

even if such an interpretation *may be possible* under the 1971 Waiver, the Enabling Clause removes all doubt. Under the Enabling Clause, the "description of the GSP" is clearly a binding condition.[2]

Question 36

9. The EC does not give any plausible reason as to why the Agreed Conclusions are not context of the 1971 Waiver Decision. Without providing any reason, the EC contends that even if the Agreed Conclusions are context of the 1971 Waiver Decision, "paragraph 2(a) must be read in its own context". This is clearly wrong. There is a specific reference in the Enabling Clause to "non-discriminatory" GSP schemes as described in the 1971 Waiver Decision, which, in turn, refers to the mutually acceptable arrangements drawn up at the UNCTAD.

Question 37

10. India notes that the EC's test of "non-discriminatory" is limited to the issue of what types of differentiation between developing countries are permitted. However, the EC must also explain the test to be applied in determining when identical treatment of developing countries is not permitted. Under it's own interpretation this is also "prohibited" by the term "non-discriminatory".

11. India also notes that terms "legitimate" and "reasonable" do not appear in the Enabling Clause; neither do those terms provide adequate guidance as to where to draw the line in order to establish that different treatment of developing countries is permissible.

Question 40

12. The EC has not addressed the Panel's question squarely.

13. India notes that the issue of "sector graduation" is not before the Panel. "Sector graduation" raises distinct issues, such as the appropriate scope and effect of the safeguard provisions under the Agreed Conclusions, all of which are not at issue in this dispute.

Question 42

14. The EC merely confirms that the application of Article I:1 of the GATT is not totally excluded by the Enabling Clause. Therefore, the EC has now qualified its blanket assertion in paragraph 22 of its First Written Submission that the phrase "notwithstanding the provisions of Article I of the General Agreement" excludes the application of Article I:1 of the GATT. This is precisely the position that India has taken in this dispute – that paragraph 2(a) of the Enabling Clause only permits developed country Members to grant preferential tariff treatment to products originating in developing countries but does not permit them to disregard other aspects of Article I:1, including the MFN rights of developing countries as between themselves.

Question 44

15. The EC attempts to downplay the value of the Agreed Conclusions. The EC denies the obvious:

(i) that the Agreed Conclusions are called "agreed" precisely because of its consensual nature,

[2] See Lorand Bartels, "The WTO Enabling Clause and Positive Conditionality in the European Community's GSP program", *Journal of International and Economic Law*, Vol. 6, No.2 (2003), p. 520.

(ii) that Paragraph 2(a) of the Enabling Clause refers to "preferential tariff treatment accorded by developed [country Members] to products originating in developing countries in accordance with the Generalized System of Preferences"; footnote 3 to paragraph 2(a) refers to the GSP as that which is "… described in the [1971 Waiver Decision] relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries"; paragraph (a) of the 1971 Waiver Decision refers to "the preferential tariff treatment referred to in the Preamble to this Decision …" and; the relevant provision of the Preamble of the 1971 Waiver Decision refers to the "mutually acceptable arrangements [that] have been drawn up in the UNCTAD concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries… "

(iii) regardless of the formal status of those mutually acceptable arrangements under the law of the UN, it is sufficient to note that the Enabling Clause refers to the GSP referred to in the 1971 Waiver and that the 1971 Waiver in turn refers to the "mutually acceptable arrangements" that "have been drawn up in the UNCTAD". Those arrangements define the legal scope of the Enabling Clause;

(iv) whether the Agreed Conclusions were accepted by all Contracting Parties to the GATT 1947 at the time (unanimity as opposed to consensus of Contracting Parties) is completely irrelevant for ascertaining the legal value of this document. That it was incorporated into the 1971 Waiver Decision and the 1979 Enabling Clause, both legally binding instruments, is sufficient.

The EC concedes that Agreed Conclusions may be considered at the very least, as "preparatory work" of the 1971 Decision. India notes that even as "preparatory work", the Agreed Conclusions support India's interpretation of the term "non-discriminatory".

Question 48

16. To establish that it had always been of the position that the term "non-discriminatory" does not prevent differentiation between developing countries according to their development needs, the sole evidence of the EC is that as early as 1976, it had granted special tariff preferences to least-developed countries. The grant of such special tariff preferences prior to the Enabling Clause, wherein special preferences in favour of least developed countries was authorized for the first time, was thus in violation of the terms of the 1971 Waiver Decision. What is more credible evidence in respect of the EC's position is that it requested a waiver of the provisions of Article I of the GATT in order that it may implement the Drug Arrangements. This is conclusively indicative of its position *then* that differentiation between developing countries according to their development needs is not permitted by the Enabling Clause, contrary to the position which it takes today.

17. Incidentally, apart from the EC and Norway, all other major GSP donors only differentiated in favour of LDCs after the adoption of paragraph 2(d) of the Enabling Clause. As of 1982, in addition to the EC and Norway, only Austria (1982), Canada (1982) Finland (1980) and Switzerland (1982) had granted special preferences to least developed countries.

18. India also notes that a present Member State of the EC had taken a different position on the meaning of the GSP in the 1960s. The so-called "Brasseur Plan" was presented to the GATT, to the OECD Council, and to the First UNCTAD. The Brasseur plan proposed a selective preferential system (in contrast to the developing countries' demand for the introduction of a generalized uniform system of preferences to apply to all imports of manufactures and semi-manufactures from developing to developed countries). In rejecting the Brasseur plan, the delegation of the United Kingdom said:

> It seems reasonably plain that all developing countries need to export more and to earn more foreign exchange and that any reduction in tariff barriers, whether preferential or not, will help them do it … We believe, therefore, that any principle of selection of countries on the basis of need for preferences should be rejected. We think it would be invidious to put developing countries in the position of applicants, as it were, for piecemeal preferential tariff concessions.[3]

Question 49

19. As India had earlier cited, the GSP had its beginnings at the First Conference of the UNCTAD in 1964, which resolved:

> … 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."[4]

20. According to the EC, the special preferences were granted then for "historical or geographical reasons", and that what the GSP was intended to accomplish was to eliminate special preferences for these reasons. Regardless of the reasons – whether historical, geographical or any other reason – the relevant fact is that the distinctions between developing countries under the special preferences were unilaterally determined by the developed countries granting those preferences. This is precisely the aspect which the GSP was supposed to eliminate – the unilateral determination by developing countries, regardless of the reason invoked, including differentiation between developing countries on the basis of needs *unilaterally* determined by developed countries. Thus, the UNCTAD resolution did not delve into the *reasons* for the special preferences then existing. On the contrary, it referred to all special preferences, regardless of the reasons for their grant. Hence, as distinguished from "special" (applicable only to *some* and not to all developing countries) "generalized" should be interpreted as having a special meaning – that tariff preferences under the GSP shall be made available to all developing countries.

21. This interpretation is confirmed by the report entitled "Review and evaluation of the generalized system of preferences" dated 9 January 1979[5] issued by the UNCTAD, which states:

> "10. Conference resolution 21 (II) called for the establishment of a generalized, non-discriminatory and non-reciprocal system of preferences in favour of exports from developing countries to developed countries**. Generalized preferences imply that preferences would be granted by all developed countries to all developing countries** …" (emphasis added)

22. Even the EC concedes this, albeit in a slightly qualified way, when it states in its reply:

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[3] TD/B/C.2/1. Add. 1. Annex B, p.26 quoted from Peter Tulloch, *The Politics of Preferences: EEC policy making and the generalised system of preferences* (Croom Helm, London, 1975) p. 44. *See also* R. Krishnamruthi "Tariff Preferences in favour of the developing countries" *Journal of World Trade Law*, Vol. 1, No. 6 (1967) 643, p.648-50.

[4] Principle 8 of Recommendation A:I:1 in Final Act of the First United Nations Conference on Trade and Development (Geneva: UNCTAD, Doc E/CONF.46/141, 1964), Vol 1, at 20, cited in Lorand Bartels, "The WTO Enabling Clause and Positive Conditionality in the European Community's GSP program", *Journal of International and Economic Law*, Vol. 6, No.2 (2003), p. 507.

[5] TD/232.

> As originally envisaged, the UNCTAD system would have subsumed and replaced those existing "special" preferences for certain developing countries by "generalising" them, i.e. by making them available to all, or at least most developing countries.

Question 50

23. Please India's comments on the EC's reply to Question 52 to both parties.

Question 51

24. Please see India's comments to Question 52 to both parties.

Question 52

25. According to the EC, paragraph 2(a) of the Enabling Clause must be interpreted within the framework of paragraph 1, paragraph 1 does not require to grant the same preferences to all developing countries. As India has stated before to grant "preferential tariff treatment … to products originating in developing countries in accordance with the [GSP]" in the context of "differential and more favourable treatment to developing countries", it is not necessary for developed countries to derogate from their MFN obligations under Article I:1 of the GATT.[6]

26. In its reply to Question 50 to both parties, the EC states that the drafting history of the Enabling Clause suggests that the term "generalised" was used to define the *country scope* of the preferences. In its reply to Question 49, the EC states, "as originally envisaged, the UNCTAD system [referring to the GSP] would have subsumed and replaced [the] existing 'special' preferences for certain developing countries by 'generalising' them, i.e. by making them available to all, or at least most developing countries . Hence the term 'generalised'."

27. In paragraph 42 of its reply to Panel Question 11 to both parties, the EC confirms the foregoing, by saying that "unlike the 'special' preferences traditionally granted to certain countries or groups of countries merely for historical or geographical reasons, the preferences should be 'generalised' to all the developing countries ….", and then adds "with similar development needs". The addition of the phrase "with similar development needs" merely re-establishes what the GSP sought to eliminate by making preferences available to all developing countries ("generalised") – the differentiation between developing countries on a basis unilaterally determined by developed countries under the "special preferences".

28. In this dispute, the EC has always contended that the term "non-discriminatory" permits developed countries to differentiate between developing countries on the basis of development needs. Now, the EC states that "generalised" means that benefits under the GSP shall be made available to all developing countries "with the same development needs". Thus, the EC invokes "development needs" to justify differentiation in treatment between developing countries under both "non-discriminatory" and "generalised". This renders one of those terms redundant. Thus, back to the era of "special preferences".

29. The EC's position is that the term "non-discriminatory" permits the classification of, and differentiation among, developing country Members based on development needs chosen by a developed country Member, such as the EC. The EC then argues that the term "generalized" does not require a GSP programme to extend to all developing country Members but rather may be restricted to all developing country Members that fall within a sub-set of developing country Members selected by the EC based on its choice of development criteria.

[6] See eg, India, *Second Written Submission*, para. 68.

30. The EC's interpretation contemplates the possibility of GSP programmes that, in their entirety, do not extend to all developing country Members. Moreover, it also contemplates the possibility of multiple GSP programmes that are available in each case to some but not all developing country Members with overlapping product coverage and different tariff levels depending on the choice of the developed country donor.

31. The possibility of such multiple GSP programmes was never expressly envisaged in the Agreed Conclusions, in the 1971 Waiver, in the "Review and evaluation of the Generalized System of Preferences" dated 9 January 1979 by UNCTAD or in the Enabling Clause. Moreover, the EC's interpretation clearly departs from the meaning of the term "generalized" as contemplated in Footnote 3 of the Enabling Clause, the 1971 Waiver and the Agreed Conclusions. Footnote 3 makes it clear that the preferential treatment contemplated by paragraph 2(a) of the Enabling Clause in accordance with the Generalized System of Preferences must be as described in the 1971 Waiver relating to the establishment of "generalized, non reciprocal and non discriminatory preferences beneficial to the developing countries".

32. The reference in Paragraph (a) of the 1971 Waiver Decision to "the preferential treatment referred to in the Preamble to this Decision" is clearly intended to take in the Agreed Conclusions. The fourth paragraph of the Preamble to the 1971 Waiver specifically refers to "mutually acceptable arrangements [that] have been drawn up in the UNCTAD …" The preambular portion of the Agreed Conclusions also "recognizes that these preferential arrangements are mutually acceptable …".[7] The scope of developing country coverage of a GSP programme envisaged by the term "generalized" in turn is clear from the Agreed Conclusions. The Special Committee noted that:

> [C]onsistent with the Conference Resolution 21(II), there is agreement with the objective that in principle all developing countries should participate as beneficiaries from the outset ….[8]

The Special Committee also noted that the developed countries agreed that GSP programmes must extend to all developing countries based on the principle of self-election.[9] The next paragraph records the statement of the spokesman of the Group of 77 on the question of beneficiaries and makes a reference to Annex I. Further, the note at the end of Annex I entitled "Statement on behalf of the Group of 77" states that the Group of 77 "hold[s] the view that no developing country member of this Group should be excluded from the generalized system of preferences at the outset or during the period of the system"

33. There is little doubt, therefore, that it was agreed among all participating countries that GSP programmes must extend to all developing countries. Therefore, the requirement that a GSP programme be "generalized" clearly prohibits a GSP donor from carving out from its GSP programme special sub-programmes for sub-sets of developing countries. Accordingly, in India's view, the Drug Arrangements are not "generalized" because the benefits thereunder are not made available to all developing countries.

Question 54

34. In paragraphs 146-148 of its Second Submission, India pointed out that (i) the EC had manifested that the Drug Arrangements "contribute to" the objective of preserving the life and health of the EC population and that "the reach of the word 'necessary' is not limited to that which is

[7] Agreed Conclusions, Part One, Section I , paragraph 9.
[8] Agreed Conclusions, Part One, Section II, paragraph 1.
[9] Agreed Conclusions, Part One, Section IV, paragraph 1.

'indispensable' or of 'absolute necessity' or 'inevitable'" (ii) in support of the latter proposition, the EC had cited paragraph 161 of the Appellate Body Report in *Korea - Beef* in the following manner:

> "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 compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception."[10]

35. As India had pointed out, in citing paragraph 161 of the Appellate Body report in *Korea – Beef,* the EC made a material omission, as the full quote 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**)**

36. In its reply, the EC again cites paragraph 161 of the Appellate Body report in *Korea – Beef,* in the following manner:

> second, the measure must be "closer to the pole of indispensable than to the opposite pole of simply 'making a contribution to'". However, contrary to what is stated sometimes by India, this is not the same as saying that the measure must be "close" to the "pole of indispensable";

37. Having manifested in categorical terms that the Drug Arrangements "contribute to", the EC again makes a material omission in citing paragraph 161 of the Appellate Body report in *Korea – Beef.* It omits the word "significantly" prior to the phrase "closer to the pole of 'indispensable'" and, in so omitting, concludes that that in order to qualify as "necessary" under Article XX(b), the Drug Arrangements need not be "'close' to the 'pole of indispensable'". This is contrary to the test applied by the Appellate Body. Not only must the Drug Arrangements be close to "indispensable"; rather, they must be "significantly" closer. Thus, by the EC's own admission that the Drug Arrangements merely "contribute to", the Drug Arrangements are in the opposite pole of "making a contribution to" and cannot be deemed to be "significantly closer" to the pole of "indispensable". Hence, the Drug Arrangements do not qualify as "necessary".

Question 55

38. Even if the Doha tariff reduction negotiations were to result in bound tariffs at nominal or even zero levels for all products for all Members, if the EC's defence on Article XX(b) were to be upheld, by the EC's theory, it would be exempt from the provisions of both Articles I and II of the GATT. Thus, under the EC's defence, in such event, it could maintain discriminatory tariff

[10] EC, First Submission, para. 176, citing Appellate Body Report, *Korea – Beef,* para. 161.

preferences (even by imposing *discriminatory* tariffs beyond the nominal or zero bound levels). In this context, while the EC may agree to tariff reductions, the EC's agreement would not be meaningful, as other Members would not have the assurance that the EC will apply tariffs on an MFN basis or, in the context of the Enabling Clause, as developing countries would not have the assurance that tariffs shall be applied on an MFN basis as between them. Therein lies the moral danger of presently legitimizing resort to discriminatory tariff preferences as a measure permissible under Article XX(b). This would render the WTO inutile as a forum for the mutual reduction of tariffs (implicit in which is the application of tariffs on an MFN basis).

Question 56

39. Please see India's comments on the EC's replies to Question 54 to both parties. The EC further argues that "there is no true 'alternative' WTO-consistent measure, or less WTO-inconsistent measure, because there is no measure that would be as effective as the Drug Arrangements in providing greater market access for the products of the beneficiaries". In order to assess the effectiveness of the alternative measures, the EC switches the goal pursued from "reducing the drug supply from the beneficiaries" to "greater market access for the products of the beneficiaries". However, in terms of "reducing the drug supply from the beneficiaries", the EC has failed to establish that other alternative, WTO-consistent, non-trade restrictive measures, such as (i) improved enforcement both in the beneficiary countries and in the EC's borders, and (ii) financial assistance to substitute licit crops for illicit crops in the beneficiaries, which are measures equally available, are less effective in reducing drug supply from the beneficiaries..

Question 57

40. Please see India's comments on the EC's reply to Panel Question 59 to the EC.

Question 58

41. Please see India's comments on the EC's reply to Panel Question 59 to the EC.

**To the European Communities**

Question 25

42. The EC refers to "the same criteria as in the current GSP Regulation". There are no criteria under the Drug Arrangements. The EC likewise refers to certain criteria which it has "explained" to the Panel. Thus, far, the Panel has not been satisfied that those criteria indeed do exist. (Please see India's comments on the EC's reply to Panel Question 59 to the EC). In the absence of criteria, the question cannot be properly responded to.

Question 28

43. The terminology used in UNCTAD in the course of adopting the GSP to refer to "least-developed countries" was "least developed among the developing countries". In terms of preferential tariff treatment under the GSP, least-developed countries were not singled out as such in the sense that no discriminatory tariff treatment for their benefit (to the exclusion of other developing countries) was authorized. Since they were included in the category of "developing countries", and the tariff preferences under the GSP were intended to be "non-discriminatory" between developing countries, there was no need for an express prohibition against discriminatory tariff treatment for the benefit of the least-developed countries (to the exclusion of other developing countries).

44. However, "special measures" for the benefit of the least-developed countries were contemplated under the Agreed Conclusions. Paragraph 2 of Part One V of the Agreed Conclusions provides:

> "The preference-giving countries will consider, as far as possible, on a case-by-case basis, 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".

45. Thus, the means to address the specific situation of the least-developed countries was not discriminatory tariff treatment between developing countries; rather, it was the inclusion in the GSP of products of export interest mainly to them and greater tariff reductions on such products (which had to be applied on an MFN basis between developing countries, including the least-developed countries).

46. It was not until the adoption of the Enabling Clause that developed countries were authorized to grant discriminatory preferential tariff treatment to the least-developed countries, to the exclusion of other developing countries.

Question 30

47. Enhanced market access for developing countries addresses the development needs of developing countries in general. In this light, the distinction the EC maintains between developing countries which require market access for their development and developing countries that do not require such market access simply cannot be sustained. Market access helps all developing countries. Indeed this is a fundamental premise underlying the GSP. The EC provides no further explanation of why preferential tariff treatment is not a "direct" or "effective" enough response to underdevelopment in general. The EC's test of non-discrimination thus allows it not only to determine the development needs of developing countries (without considering income etc) but also allows it to determine when market access is an "appropriate response" to the problems of developing countries. That the EC can assert that a low-income country suffering from famine could be provided lesser preferences than a higher income country through which drugs are trafficked (in effect making the low-income country suffering from famine paying for efforts to combat drug production and trafficking) is yet another illustration of the dangers involved in accepting the EC's interpretation of "non-discriminatory".

48. India notes that it could just as easily be stated that the "most direct and effective response" to drug problems are financial assistance to affected countries in order to enforce anti-drug policies.

Question 32

49. In its replies to questions 12 and 17 from the Panel, the EC sets out no test for determining whether development needs are similar. The EC states that it cannot be prevented from considering the most "important" or "significant" differences between developing countries without providing any criteria to determine what makes a difference "significant" or "important".

Question 33

50. In practical terms, the open-endedness of the test of "non-discriminatory" posited by the EC will have the effect of allowing developed countries to unilaterally determine legitimate objectives and special needs.

Question 36

51. India reiterates that the term "generalized" means that preferences should be given to all developing countries. The EC's understanding of the term "generalized" is *not* that preferences must be given to *all* developing countries. It is that preferences must be given to *subsets* of developing countries with similar development needs. The EC presents no basis for this limitation on the scope of the term "generalized". India has set out in detail how the term "generalized", properly understood, supports the neutral meaning of the term "non-discriminatory".

52. The EC also states that India's understanding of the application of the term "generalized" is consistent with it's own understanding. However in response to the question from India that it quotes, the EC had previously stated:

> India has argued that the term "generalised" alludes to the "range of countries that would accord and receive preferences", while the term "non-discriminatory" refers to the "degree of differentiation between the countries that the donor countries selected as beneficiaries". **But this interpretation is not supported by the text of Footnote 3**. The terms "generalised" and "non-discriminatory" both qualify the term "preferences". Therefore, it is the preferences themselves, rather than the system as a whole, which must be both "generalised" and "non-discriminatory". (emphasis added) (see para. 44 of the EC's reply to question 11 from the Panel to both Parties read with para. 57 of the EC's reply to question 30 from India)

53. It must be emphasized that EC's original interpretation of the term "generalized" is distinct and in contradiction to the interpretation it now endorses.

Question 37

54. India's position is that the term "generalized" supports the neutral meaning of "non-discriminatory". As the EC has explained:

> The drafting history of the Enabling Clause suggests that the term "generalised" was used in order to distinguish the system of preferences developed in UNCTAD from the existing "special" preferences granted by some developed countries to some developing countries, mainly former colonies. As originally envisaged, the UNCTAD system would have subsumed and replaced those existing "special" preferences by "generalising" them, i.e. by making them available to all, or at least most developing countries. Hence the term "generalised". (EC response to Question 11 from the Panel to both parties, para. 41)

55. Thus the objective of the GSP was not only to ensure preferential access to developed country markets; it was also to ensure that such preferential access was granted equally to all developing countries. This is achieved by ensuring that all developing countries participate in GSP schemes (by disciplining the use of "compelling reasons" to exclude developing countries from beneficiary status altogether) and by ensuring there is no differentiation between beneficiary countries in terms of the tariffs applied on like products (the neutral meaning of non-discriminatory). The EC's response does not explain away the tension between the goal of ensuring equal preferential access for developing countries and an interpretation of "non-discriminatory" which permits differentiation between developing countries.

Question 39

56. The EC presents inconsistent views with respect of the value of the Appellate Body Report in *Korea – Beef* to support its defence under Article XX(b). It relies on *Korea- Beef*, drawing an

analogy between the meaning of "necessary" under Article XX(d) and Article XX(b) in order to assert that a measure to be provisionally justified under Article XX(b) must not necessarily be "indispensable" to be deemed as "necessary". However, it fails to accord the same treatment to the methodology used by the Appellate Body to determine the provisional justification under Article XX(d) , without any logical reason; namely first, to analyse whether the measure is designed to secure compliance with laws and regulations that are not themselves inconsistent with some provisions of the GATT 1994, and second, whether the measure must be necessary to secure such compliance. Indeed, the EC overlooks that in order to assess the "necessity" of a measure along the continuum between "indispensable" and "making a contribution", it is necessary to determine whether the measure has been indeed designed to achieve the objective proposed. Otherwise, there is no point to determine the "necessity" of a measure for which the policy goal intended is totally different from the goals that could be pursued under the subparagraphs of Article XX.

57. Even if a measure under Article XX(b) could pursue not only a "sole and exclusive purpose", this is clearly not the case of the Drug Arrangements. The EC has not provided evidence to rebut what the design, structure and architecture of the Drug Arrangements shows: that the Drug Arrangements are a mere preferential tariff arrangement designed to further market access of certain developing countries. The stated objectives of the legislation do not support the health objectives alleged by the EC either.

Question 40

58. The EC relies on mere assertions that do not amount to proof. The EC states that "it would be an impossible task to separate and quantify the effects on drug consumption within the EC which are attributable to the Drug Arrangements from those which are attributable to other actions undertaken by the beneficiaries in order to reduce production and trafficking of drugs or to others actions that are part of the EC's comprehensive strategy against drug abuse, including in particular those aimed at reducing the demand for drugs." However, if it is *impossible* to determine the real effects of the Drug Arrangements on drug consumption within the EC, that means that these effects could possibly range from 0% to 100%. Under this complete uncertainty as to whether or not the Drug Arrangements have effects on the EC's domestic drug consumption and the magnitude of those effects, the Panel would have to find that the EC has not established that the Drug Arrangements have effects on drug consumption within the EC.

59. Even the so-called "self-evident proposition" is only an assertion that would require evidence to be corroborated. In effect, the EC states that reducing the supply of drugs from the beneficiaries to the EC (e.g. cocaine-based drugs from Latin-American and heroine from Pakistan) reduces the consumption of drugs in the EC, and therefore, protects the health and life of the EC citizens. In other words, according to the EC, if those drugs were not produced and trafficked in other countries, they would not be consumed in the EC. However, this proposition is not necessarily true in all circumstances. To be true and self-evident the EC would have to have shown that the supply of drugs from the beneficiaries cannot be substituted for by the supply of drugs from countries other than the beneficiaries. However, the EC has failed to provide evidence that

- countries other than the beneficiaries but equally or more affected by drug trafficking and production, such as Myanmar, Mexico, Thailand, the Philippines cannot replace the supply of drugs to the EC that comes from the beneficiary countries, and

- there is no substitutability between cocaine-based, opium-based and synthetic drugs, and therefore, that the eradication of the supply of one of them would not entail substitution by any other. As a matter of fact, the Global Illicit Drug Trends 2003 (http://www.unodc.org/pdf/report_2003-06-26_1.pdf) shows, among others, that:

> "[c]landestine manufacture of amphetamine is mainly concentrated in Europe. The region accounts for close to 60% of all amphetamine laboratories seized over the 1991-2001 period." (p. 41)
>
> "[p]recursor seizures suggest that ecstasy (MDMA) production is still largely concentrated in Europe, even though it has spread to other regions in recent years. Overall, 87% of all ecstasy precursors – sufficient for the production of 4.7 tons p.a. of MDMA – were seized in Europe over the 1991-2001 period."
>
> However, the EC has failed to show that supply of its domestic production would not substitute drugs coming from the beneficiaries.

Question 42

60. India considers that it could be inferred from the answer given by the EC that there were no reports prepared by the EC before the Drug Arrangements were enacted that described the link between production in the drug-producing and trafficking countries and consumption by the EC's population. The enactment of the Drug Arrangements was therefore based on a so-called "self-evident" proposition, which, as shown in India's comments to Question 40 to the EC, is not "self-evident".

Question 43

61. It can be inferred from the EC's reply that there is no such documentary material.

Question 44

62. India re-iterates that UN pronouncements or recommendations are wholly irrelevant to the empirical question of whether there is an appropriate relationship between the Drug Arrangements and the protection of the life or health of the EC population or the special development needs of certain developing countries. If the UN were to revoke all these resolutions, surely the EC would not concede that action *ipso facto* makes the Drug Arrangements "unnecessary" for purposes of Article XX(b) or "discriminatory" for the purposes of the EC's interpretation of paragraph 2(a) of the Enabling Clause. As regards the relevant empirical issue, the EC has not presented any pertinent evidence to the Panel. Indeed, it has expressed its inability to discharge its burden of proof:

> However, it would be an impossible task to separate and quantify the effects on drug consumption within the EC which are attributable to the Drug Arrangements from those which are attributable to other actions undertaken by the beneficiaries in order to reduce production and trafficking of drugs or to others actions that are part of the EC's comprehensive strategy against drug abuse, including in particular those aimed at reducing the demand for drugs.[11]

63. Even the UN pronouncements cited by the EC do not support its claims:

i. Article 14.3(a) of the *1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* is unsupportive.[12] It is not a mandatory provision (in contrast to sub-clauses (b) and (c) of Article 14.3) hence cannot support any inference that the provision of market access is a "necessary component of any UN strategy". In any case, this provision refers to market access as one of the factors that must be considered before rural development

[11] Answer to Question 40 form the Panel to the EC, para. 126.
[12] Cited in EC, *FWS*, para 101.

programmes are implemented. This does not support the claim that discriminatory preferential tariff treatment for a wide range of products (including products having no connection with crop substitution programmes) is *required* in order to combat drug production and trafficking.

ii. The guidelines adopted by the *International Conference on Drug Abuse and Illicit Trafficking* held in Vienna in 1987[13] state that "Governments… might consider favourably" the grant of preferential tariff treatment. This does not support the inference that discriminatory preferential tariff treatment is a necessary measure to safeguard the health of EC citizens. In any case this exhortation is limited to substitute crops; the Drug Arrangements have much wider product coverage. The EC has not led any evidence that all (or any) substitute crops are covered under the Drug Arrangements.

iii. The EC cites a political declaration adopted by the UN General Assembly on 23 February 1990.[14] However, there is no indication that the General Assembly stated that preferential tariff treatment was necessary; it merely "urges" measures that would facilitate trade flows. This should be presumed to refer to binding multilateral trade liberalization in contrast to discriminatory preferential tariff treatment.

iv. The EC cites as particularly important the *Action Plan on International Co-operation on the Eradication of Illicit Drug Crops and on Alternative Development* adopted by the UN General Assembly in 1998 (the "1998 Action Plan")[15]. Paragraph 15 of the 1998 Action Plan cited by the EC merely states that the international community "should attempt" to provide greater market access this does not indicate that market access is a "necessary complement". Further this market access is for "alternative development products". Alternative development is defined in the 1998 Action Plan as " a process to prevent and eliminate the illicit cultivation of plants containing narcotic drugs and psychotropic substances through *specifically designed rural development* measures….". There is no limitation within in the Drug Arrangements to such products. Indeed the EC has not presented any evidence that substitute agricultural crops are covered under the Drug Arrangements. Further market access should be presumed to refer to multilateral secure trade liberalization and not to discriminatory preferential tariff treatment. It should also be noted that paragraph 15 appears in the context of actions to be taken to redress difficulties resulting from insufficient funding for alternative development programmes.

v. The EC cites a UN General Assembly resolution of 19 December 2001.[16] This resolution merely "encourages" markets access. There is no reference to discriminatory preferential tariff treatment and it is limited to products of alternative development activities.

vi. The resolution of the UN Commission on Narcotic Drugs of 15 March 2002[17] likewise merely "encourages" access to international markets. This is limited

[13] Cited in EC, *FWS*, para. 103.
[14] Cited in EC, *FWS*, para. 104.
[15] Cited in EC, *FWS*, para. 105-110. See in particular para. 109.
[16] Cited in EC, *FWS*, para. 110.
[17] Cited in EC, *FWS*, para. 111.

to products of alternative development activities and cannot be construed to encourage discriminatory preferential tariff treatment.

vii. The statement from the 46th session of the Commission on Narcotic Drugs held in Vienna[18] uses language identical to UN General Assembly resolution of 19 December 2001 discussed in (5) above.

64. In summary, the texts cited by the EC (i) refer to market access (meaning multilateral binding liberalization) as opposed to discriminatory preferential tariff treatment, (ii) are expressed in non-obligatory language and contain no suggestion that market access is a necessary component of the UN strategy or (iii) are limited in scope to market access for agricultural crops which substitute for narcotics cultivation as opposed to market access for employment generation in general.[19]

Question 45

65. The texts cited by the EC do not contain any suggestion that improved market access is a "necessary component" of the UN strategy. The call for market access in the texts cited by the EC is invariably expressed in a non-obligatory and discretionary manner (see India's comments on the EC's reply to question 44 from the Panel to the EC). Further, the texts cited by the EC can only yield a partial and selective understanding of the UN strategy for combating drug problems. It is just as likely that there are a plethora of *UN* conventions, resolutions and other reports which simply do not mention market access (much less discriminatory preferential tariff treatment) as part of the UN strategy.

Question 46

66. Again, in the first place, the EC has not presented any objective criteria. In any event, the EC has not presented any evidence to substantiate its assertion that "[a]ll the countries included in the Drug Arrangements are, *as a matter of fact*, "suppliers" to the EC."

Question 48

67. The EC's replies to the Panel Question 40 to the EC relate to the effects of the reduction of supply on the consumption of drugs within the EC (para. 125) or to the effects of the Drug Arrangements on the consumption of drugs within the EC (para. 126). None of those replies are related to the Drug Arrangements and the reduction of supply to the EC as a consequence of the Drug Arrangements. The EC has therefore failed to respond to the Panel's question. The EC has likewise failed to provide any evidence to show the link between the Drug Arrangements and the reduction of supply in the EC.

Question 50

68. Again, the EC does not respond to the question of the Panel. It only provides assertions and a "self-evident" proposition which have been discussed by India in prior comments.

Question 51

69. Please see India's comments on the replies to Panel Questions 44 and 45 to the EC.

[18] Cited in EC, Second Written Submission, para. 59.
[19] See Oral Statement of the European Communities at the Second Meeting with the Panel, para. 76.

Question 52

70. India notes that the EC has not provided the Panel with clear indication as to whether it considered other possible, less trade-restrictive alternatives. Whether or not there are other less trade restrictive alternatives is an issue of fact. That there are other alternatives is not in dispute, as there have been substantial efforts under the auspices of domestic authorities, U.N: agencies, and other organizations to combat drug production and trafficking prior to the Drug Arrangements. Thus, the EC cannot be unaware of the existence of other less trade-restrictive alternatives.

Question 56

71. By its response, the EC concedes that the Drug Arrangements engender less of the "desired effect" because equivalent preferences are granted to many other developing countries under other programmes, for example, "Everything but Arms", LDC schemes, the Cotonou Agreement and regional free trade agreements. Even assuming that tariff preferences fall within the continuum of necessity, that equivalent preferences are granted to other developing countries where the same conditions do not prevail (assuming the existence of criteria as to what those conditions are) as those prevailing in the twelve beneficiary countries renders the Drug Arrangements not "significantly closer" to the pole of "indispensable", but rather significantly farther from that pole.

Question 57

72. The EC has not replied to the Panel's question regarding the distinction between preferences granted to South Africa and all the 12 beneficiaries. The conclusions that can be drawn from the comparative statistics cited by the EC as to heroin or cocaine seizures can only be rendered relevant if there were explicit criteria as to the specific conditions that the Drug Arrangements seek to address. There are no such criteria.

Question 58

73. The absence of explicit criteria for the inclusion of countries as beneficiaries under the Drug Arrangements and the arbitrariness of the Drug Arrangements are highlighted by the EC's reply that it is willing "to explain the reasons why any other developing countries have been excluded, provided that those countries are sufficiently identified by the Panel". If indeed there were explicit criteria and those explicit criteria were applied in a non-arbitrary manner, it would not have been difficult for the EC to respond to the Panel's question. Instead, the EC expects the Panel to identify which countries are not included in accordance with criteria not disclosed to the Panel.

Question 59

74. The factual premise of the Panel's question is that the EC has not established the existence of explicit criteria In response to the Panel's question, the EC merely cites paragraphs 116-118 of its First Submission and paragraphs 86-99 of its reply to Question 10 of the Panel to the EC and reiterates that those paragraphs explain what those criteria are. But the factual premise of the Panel's question – that there are no explicit criteria - was arrived at by the Panel after it had (i) read all of the submissions of the EC and the replies of the EC to the questions of the Panel and those of India and (ii) heard all of the oral arguments of the EC. India agrees with the Panel's factual premise because there are no explicit criteria under Regulations establishing the Drug Arrangements, the paragraphs cited by the EC in its First Submission and responses to the Panel's question do not qualify as explicit criteria, and the EC has thus far failed to provide the Panel with those criteria, notwithstanding several requests by the Panel and by India. In the absence of those criteria, the EC is therefore not in a position to establish that the Drug Arrangements are not applied in an arbitrary manner.

Question 60

75. Please see India's comments on the EC's reply to Panel Question 59 to the EC.

Question 61

76. The fact is that the EC did seek a waiver but had failed to obtain a waiver. This tends to establish that the defence of justification under Article XX(b) of the GATT was conceived only after the initiation of this dispute, and at the time when the Drug Arrangements were formulated, the EC did not even take Article XX(b) into consideration.

Question 62

77. The EC explains that the inclusion of Pakistan in the Drug Arrangements was based on the anticipation of the great risk that, following the fall of the Taliban regime, opium production in Afghanistan would resume once again, and that this would have a considerable impact on Pakistan. This is an explanation made today, in the context of this dispute. However, EC pronouncements at or about the time the inclusion of Pakistan in the Drug Arrangements was being contemplated points to certain reasons other than the possible effects of the fall of the Taliban regime on Pakistan and the consequent effects thereof on the life or health of the EC population. As the EC explained *then,:*

i. The circumstances of the inclusion of Pakistan in the Drug Arrangements make it particularly clear that the arrangements are designed to respond to policy objectives of the EC rather than the needs of developing countries. These circumstances have been described by the EC as follows:

> *In recognition of Pakistan's changed position on the Taliban regim*e … the Commission has stepped up the EU's assistance to Pakistan … A new Cooperation Agreement was signed at the occasion of the visit of President Prodi and PM Verhofstadt to Pakistan on the 24 November 2001, where they also met with President Musharraf. On 16 October, the Commission presented a package of trade measures designed to significantly improve access for Pakistani exports to the EU… *The proposed package has been specifically tailored to target clothing and textiles accounting for three-quarters of Pakistan's exports to the EU.* It removes all tariffs on clothing and increases quotas for Pakistan textiles and clothing by 15%. *In return, Pakistan will improve access to its market for EU clothing and textile exporters*. The package gives Pakistan the best possible access to the EU short of a Free Trade Agreement by making it eligible for the new Special Generalised System of Preferences Scheme for countries combating drugs. This package was approved by the General Affairs Council on 10 December 2001.[20] (emphasis added)

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

78. Thus, the reasons given then were the following:

- "Pakistan's changed position on the Taliban regime", and
- The reciprocal commitment by Pakistan to "improve access to its market for EU clothing and textile imports".

**ANNEX B-7**

Comments of the European Communities to Replies of India
to Questions from the Panel after the Second Panel Meeting

**Questions to both Parties**

Question 30

1. Contrary to India's assertion, the EC does not argue "that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause". The term "justified" implies that the Drug Arrangements are inconsistent with Article I:1 of the GATT. Yet, the EC's position is that Article I:1 of the GATT does not apply at all to measures falling within the scope of the Enabling Clause. It is part of India's claim that Article I:1 of the GATT, rather than the Enabling Clause, apply to the Drug Arrangements and, accordingly, it is for India to prove that part of its claim.

2. It is not correct to say that that the facts upon which India relies in support of its claim under Article I:1 of the GATT are not in dispute. India claims in the alternative that, even under the EC's interpretation of "non-discriminatory", the Drug Arrangements would be discriminatory and inconsistent with the Enabling Clause. This claim involves factual allegations which are disputed by the EC. India bears of proving those factual allegations.

3. Finally, the EC notes that India now concedes that Paragraph 2(a) should not be interpreted differently simply because, according to India, it is an "exception" to Article I:1 of the GATT.

Question 31

4. India concedes that the developing countries had to make concessions in return for the Enabling Clause and that, in determining the level of these concessions, their individual development needs were taken into account, in accordance with "the principle of individually graduated non-reciprocity" set out in Article XXXVI:8 of the GATT (the same principle that is restated in paragraph 5 of the Enabling Clause).

5. This amounts to an admission by India that each developing country paid a different "price" for the Enabling Clause, according to its individual development needs. This supports the EC's interpretation of "non-discriminatory" in footnote 3, which implies that some developing countries paid a "higher price" for the Enabling Clause by "renouncing" their MFN rights vis-à-vis other developing countries with special development needs.

Question 32

6. India puts forward yet another interpretation of the notion of "affirmative defence" based on a definition found in the Black's Law Dictionary. Like India's previous interpretations of this term, this new interpretation is at odds with the guidance provided by the Appellate Body and well established practice. Indeed, according to the criteria outlined by India, Article 27.4 of the SCM Agreement would also be an "affirmative defence" if invoked by the defending party, just like Article 3.3 of the SPS Agreement, Article 6 of the ATC, or even Articles VI or XIX of the GATT.

7. For example, assume that India claimed that an import duty applied by another Member violates Article I:1 of the GATT and that, in response, the defending party argued that the duty is an anti-dumping measure imposed consistently with Article VI of the GATT. According to India, this would amount to an "affirmative defence" because

– it is an "assertion by the defendant";

– it raises "new facts and arguments"; and

– should the Panel find the defendant's assertion to be true, India's claim based on Article I:1 of the GATT would fail.

Question 33

8. India's contention that the EC's interpretation of "non-discriminatory" should be rejected because it would lead to a "normative void" is groundless. As shown by the EC, its interpretation of "non-discriminatory" is in line with the interpretation of that term made by numerous municipal and international tribunals in a variety of different legal areas. The EC's interpretation is also in line with the interpretation made by the panel in Canada – Pharmaceutical Patents[1].

9. Clearly, the mere possibility of requesting a waiver does not justify an otherwise unwarranted interpretation of Paragraph 2(a).

Question 35

10. It is incorrect to say that "the 1971 Decision does not itself describe the GSP". The 1971 Decision describes the GSP as providing preferential tariff treatment which is "generalised", "non-discriminatory" "non-reciprocal" and "beneficial to the developing countries".

Question 37

11. The mere fact that an interpretation is easier to apply is not a sufficient reason to conclude that it is the correct interpretation. From the fact that the Enabling Clause does not establish precise criteria for the application of the term "non-discriminatory" it does not follow that the Panel should ignore this standard and apply instead the MFN standard of Article I:1 of the GATT, which the drafters of the Enabling Clause clearly intended to exclude. Rather, the absence of precise criteria suggests that the drafters considered that whether or not differentiation between developing countries is "discriminatory" is something to be ascertained by panels on a case-by-case basis.

12. In order to resolve this dispute, it is not necessary to draw a bright line between all conceivable instances of differentiation between developing countries. Rather, the Panel should follow the same approach as the panel in Canada – Pharmaceutical Patents when applying the term "discrimination" in the context of Article 27 of the TRIPS Agreement:

> In considering how to address these conflicting claims of discrimination, the Panel recalled that various claims of discrimination, de jure and de facto, have been the subject of legal rulings under GATT or the WTO. These rulings have addressed the question whether measures were in conflict with various GATT or WTO provisions prohibiting variously defined forms of discrimination. As the Appellate Body has repeatedly made clear, each of these rulings has necessarily been based on the precise legal text in issue, so that it is not possible to treat them as applications of a general concept of discrimination. Given the very broad range of issues that might be involved in defining the word "discrimination" in Article 27.1 of the TRIPS Agreement, the Panel decided that it would be better to defer attempting to define that term at the outset, but instead to determine which issues were raised by the record

[1] Panel report, *Canada – Pharmaceutical Patents*, para. 7.94.

before the Panel, and to define the concept of discrimination to the extent necessary to resolve those issues.[2]

Question 40

13. There is a fundamental difference between the preferential schemes cited by India and the Drug Arrangements. The five waivers mentioned by India cover preferences that were confined ab initio and permanently to a limited number of developing countries located in a certain geographical region. While some of the waivers refer to the development needs of the beneficiary countries, the donor countries did not claim that no other developing country in the world had similar development needs. For example, with regard to the APTA, the United States has never claimed that Ecuador, Colombia, Peru and Bolivia are the only countries in the world affected by the drug problem.

14. In contrast, the Drug Arrangements are "non-discriminatory" because the designation of the beneficiary countries is based only and exclusively on their development needs. All the developing countries that are similarly affected by the drug problem have been included in the Drug Arrangements, regardless of their geographical location.

Question 43

15. India notes that the "elimination of discriminatory treatment in international trade relations" is one of the objectives stated in the Preamble of the WTO Agreement and that this objective "is implemented through, among others, the MFN principle under Article I:1 of the GATT". From this India concludes that the term "non-discriminatory" in footnote 3 "must therefore be construed in accordance with the standard established under [Article I:1]". This reasoning involves a number of manifest non-sequiturs.

16. First, the elimination of discrimination in international trade relations is certainly one of the objectives of the WTO Agreement. But it is not the only one. Another objective stated in the Preamble to the WTO Agreement is to ensure that developing countries "secure a share in the growth in international trade commensurate with the needs of their economic development". The Enabling Clause, like the other provisions on Special and Differential Treatment, is an instrument to achieve this objective. India, however, continues to gloss over the fact that the Enabling Clause is the main form of Special and Differential Treatment and about its specific objectives.

17. Second, while the Preamble of the WTO Agreement alludes to the elimination of "discrimination" it does not define that term. There is no reason to assume that the term "discrimination" must be given identical meaning throughout the WTO Agreement, let alone the meaning asserted by India in this dispute.[3] As noted by India, the objective to eliminate discrimination "is implemented through, among others, the MFN principle under Article I:1 of the GATT". As conceded by India, Article I:1 of the GATT is not the only provision which pursues that objective. Hence, there is no basis for India's assertion that "non-discriminatory must, therefore, be construed in accordance with the standard established under Article I:1". The Enabling Clause excludes expressly the application of Article I:1 of the GATT. Had the drafters of the Enabling Clause intended to maintain the MFN standard as between developing countries, they would have referred expressed to such standard, instead of using the term "non-discriminatory". Contrary to India's contention, the fact that the Enabling Clause reproduces language from the UNCTAD texts cannot explain the use of the term "non-discriminatory". As evidenced by the discussions within UNCTAD, its members were well aware of the specific meaning of the MFN standard in Article I:1of the GATT.

[2] Panel report, *Canada – Pharmaceutical Patents*, para. 7.98.
[3] See Panel report, *Canada – Pharmaceutical Patents*, para. 7.98.

18. Third, the different objectives stated in the Preamble to the WTO Agreement must be presumed to be compatible with each other and should, therefore, be interpreted harmoniously. Yet, India's interpretation of "non-discriminatory" presupposes that the objective to eliminate discrimination would be in direct conflict with, and prevail over the objective to ensure that developing countries must secure a share of international trade commensurate with their development needs. On India's interpretation, not only the Drug Arrangements, but any preferences provided under the Enabling Clause, and indeed any provisions granting Special and Differential Treatment to developing countries, would have to be considered as "discriminatory". It is more reasonable to consider that the drafters of the WTO Agreement regarded the different objectives stated in the Preamble as compatible and, therefore, that, as used in the Preamble, the term "discrimination" does not encompass the different treatment of countries with different development needs.

Question 46

19. The phrase "beneficial to the developing countries" is found also in footnote 3. Yet, India has at no point argued that, in the context of footnote 3, this phrase alludes to the product coverage of the GSP schemes. In any event, it is evident that a GSP scheme limited to a few products could still be "beneficial", rather than "detrimental" to the developing countries.

20. Obviously, a GSP scheme with a wide product coverage would promote the attainment of the objectives cited by India. But from this it does not follow that the Enabling Clause imposes any binding requirements with respect to the product coverage.

Question 47

21. India continues to argue that preferences must respond to the developing countries "as a whole and not individually or in terms of subgroups".

22. Yet, India still has to explain whether this means that, for example, granting preferences with respect to textile products is not compatible with Paragraph 3(c) because not all developing countries have a textiles industry. (During the second meeting with the Panel, India's representative declined to answer this question on the grounds that it was irrelevant). India's position appears to be that all developing countries may have a potential interest in exporting textiles. But, by the same token, it could be argued that all developing countries have a potential interest in the Drug Arrangements because all of them may be potentially affected by the drug problem.

23. Furthermore, India's interpretation leads to a manifestly absurd result in conjunction with subparagraph 2(d), as it would imply that, in designing special treatment for LDCs, donor countries should respond to the interests of developing countries "as a whole", rather than to the interests of the LDCs as a "subgroup". India has nowhere addressed this argument.

24. India also argues that "the primary function of Paragraph 3(c) is to ensure that the product range and depth of tariff cuts schemes are of a nature and magnitude that respond to the development, financial and trade needs of developing countries as a whole."

25. This interpretation has no support in the text of Paragraph 3(c) or anywhere else in the Enabling Clause. Surely, if the drafters of the Enabling Clause had aimed at imposing upon the donor countries the kind of obligations suggested by India with respect to the depth of the tariff cuts or the product coverage they would have used more specific language to that effect.

26. Furthermore, India has not explained yet on the basis of which criteria panels should decide whether a tariff cut is sufficiently deep to be "responsive" or whether a given product should be included in a GSP scheme. (Again, during the second meeting with the Panel, India's representative

argued that this issue was irrelevant for this dispute). This contrasts with India's concern about the uncertainty that would supposedly arise from the EC's interpretation of "non-discriminatory".

Question 48

27. Elsewhere, India has emphasised that the issue of whether developing countries may be excluded ab initio from a GSP scheme is distinct from the issue of whether differentiation in treatment between developing countries recognised as beneficiaries of a GSP scheme is permissible. (See below the comments to India's reply to the Panel's question to India No. 16) The statement by the Group of 77 quoted by India is concerned with the first of these issues and, therefore, does not support India's interpretation of the term "non-discriminatory", which addresses the second issue.

Question 49

28. Principle 8 does not support India's interpretation of "non-discriminatory".

29. The "special" preferences mentioned in Principle 8 were objectionable because they were based on the historical or geographical ties between the beneficiaries and the donors, rather than on any special development needs of the beneficiaries. Principle 8 envisaged that those preferences should be made equally available to all developing countries, regardless of geographical or historical considerations. But this is not the same as saying that identical preferences should be granted to all developing countries and that no differentiation was to be permitted between developing countries in order to take account of differences between their development needs.

30. India's reply contradicts its own interpretation of "generalised" under other replies. (See EC comments to India's reply to the Panel's Question to India No. 16.)

Question 54

31. There is simply no basis in the text of Article XX for the proposition that tariff preferences can never be justified under Article XX(b). Article XX provides an exception from all the obligations contained in the GATT, including those relating to tariffs ("Nothing in this agreement…).

32. Likewise, India's contention that Article XX(b) only permits to "burden" the trade from the country that is the source of the risk to human health or life has no basis in the text of that provision or elsewhere in the GATT. The measures adopted under Article XX(b) are not penalties. They are not applied in order to sanction the conduct of other countries. The focus of Article XX(b) is on the needs of the country applying the measure. What matters is exclusively whether a measure is "necessary" to protect human health or life.

33. In most cases, restricting the importation and/or sale of substances that pose a threat to human life or health will be sufficient to protect adequately human life and health. Clearly, however, this is not so in the case of narcotic drugs. The EC already bans the importation and sale of drugs from all sources. This measure, nevertheless, is manifestly insufficient to protect adequately the life and health of the EC citizens, because drugs continue to be imported illicitly in large volumes. There is agreement among the international community, as reflected in the relevant UN resolutions cited by the EC, that trade restrictions are not enough to fight effectively against drug abuse. More specifically, there is agreement that, in order to counter the drug problem, it is necessary to reduce the production of drugs in the supplying countries. Not even India appears to dispute this at this stage of the proceedings. The only issue before the Panel, therefore, is what measures are "necessary" in order to achieve this objective.

34. India argues that the UN texts relied by the EC "cannot establish any empirical link". This amounts to saying that the UN recommendations themselves have no "empirical basis" or, in other

words, that they are groundless. The EC wonders why, if so, all WTO Members, including India, have agreed to those recommendations. At the very least, the UN resolutions cited by the EC constitute prima facie evidence that the Drug Arrangements are "necessary" to reduce the supply of drugs to the EC. India has provided no evidence to rebut that evidence.

35. The EC would caution against second-guessing the UN resolutions and, more generally, the well established international anti-drug policies which have been codified in those resolutions. In particular, since India has provided no "empirical basis" whatsoever for its own assertions, which in fact do not even reflect India's positions in the competent international fora.

36. There is no basis for India's assertion that the UN recommendations "refer" to "multilateral" trade liberalisation, let alone to "binding" liberalisation. India's contention that "non-binding" market access measures cannot contribute to sustainable alternative activities would deprive of their justification any GSP preferences, since they are also "non-binding". The EC doubts that this type of arguments is in the interest of India, as one of the main beneficiaries of the GSP schemes.

Question 55

37. The EC has already explained why the violation of a negotiated tariff binding can never be "necessary" for the purposes of Article XX(b). (See EC's reply to the India's Question to the EC No. 32, at para. 62). Characteristically, India ignores the EC's response.

Question 57

38. The conditions prevailing in a country which is "actually" affected by the drug problem are not the same as those prevailing in a country which is only "potentially" affected by such problem.

39. By India's logic, a Member could not take any action against the imports from a country which is "actually" affected by a disease or pest unless it imposed the same measures against the imports from any other country which may be "potentially" affected by the same risk. While, depending on the circumstances, it may be justified to take precautionary action against a "potential" risk to human health or life, it seems obvious that an "actual" risk is not the same as a "potential" risk and that differentiating between countries on that basis is not necessarily discriminatory.

Question 58

40. It is simply not true that the EC has not explained the criteria used to identify the beneficiaries of the Drug Arrangements. Rather, India has deliberately chosen to ignore the EC's repeated explanations, as well as the supporting evidence provided by the EC.

41. For some unexplained reason, the figures now adduced by India have been drawn from the Global Illicit Drug Report for 1998, although in the meantime UNODC has published four reports. This has some implications. For instance, the cultivation area has decreased drastically in Mexico. Also, the figures for Vietnam have not been listed separately since 2000, because, as explained in a footnote, "due to small production, Vietnam cultivation and production were included in the category 'Other Asian countries' ..."[4].

42. Again, for some unexplained reason, India provides figures on the "cultivation area", whereas the data provided by the EC relate to "production". The difference may become important because of the climate conditions for the growth of poppy in each year.

[4] United Nations Office on Drugs and Crime, "Global Illicit Drug Trends 2003", p. 165.

43. Also for unexplained reasons, India does not refer to coca products, which are the most relevant in Latin America.

44. In any event, the figures now provided by India do not contradict the EC's explanations and, therefore, it is difficult to understand what point, if any, India is trying to make:

- as explained repeatedly, Myanmar is not included in the Drug Arrangements because it is included in the Special Arrangements for LDCs, which provide greater benefits.[5] The comparison with Colombia is inapposite, because the main reason to include Colombia in the Drug Arrangements is that it is the world largest producer of coca products, not of opiates[6];

- Laos is also a LDC;[7]

- the EC has already explained in detail why Thailand has not been included in the Drug Arrangements;[8]

- Mexico is a party to a FTA with the EC. Again, the comparison with Colombia is flawed for the above mentioned reason;

- Vietnam's production of opium is negligible and, as just explained, is no longer reported separately by UNODC. In any event, the comparison with Pakistan is irrelevant. Pakistan has been included in the Drug Arrangements as a transit country and not because it is a production country.[9] The following tables compare the seizure volumes for opium and heroine in Vietnam and Pakistan[10]:

Opium seizures (kgs)

| | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 |
|---|---|---|---|---|---|---|
| Vietnam | 839.9 | No report | No report | 495.4 | 460 | 583 |
| Pakistan | 7422.8 | 7300 | 5021.7 | 16319.9 | 8867.4 | 5175 |

Heroin seizures (kgs)

| | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 |
|---|---|---|---|---|---|---|
| Vietnam | 54.8 | 24.3 | 60 | 66.6 | 49.3 | 40.3 |
| Pakistan | 5872.1 | 6156 | 3363.7 | 4973.7 | 9492 | 6931.5 |

**Questions to India**

Question 16

45. At several points in its replies to the Panel's questions India has emphasised that the issue of whether all developing countries should be recognised as beneficiaries of a GSP scheme is "distinct" from "the issue of whether differentiation in treatment between developing countries recognised as

[5] EC's First Submission, para. 140.
[6] Ibid., paras. 126-127.
[7] Ibid., para. 140.
[8] EC's reply to the Panel's question to the EC No. 14.
[9] EC's First Submission, paras. 136-139.
[10] UNODC, Global Illicit Drug Trends 2003, p. 214, 229 *et seq*.

beneficiaries is permissible".[11] The first issue is addressed by the term "generalised". The second by the term "non-discriminatory".

46. Yet, in its reply to this question, India conveniently forgets this distinction and cites passages from the Agreed Conclusions which relate to the first of the above two issues in support of its interpretation of the term "non-discriminatory":

- the provision of Section II(1) of the Agreed Conclusions that, "… there is agreement with the objective in principle that all developing countries should participate as beneficiaries" is clearly concerned with the issue of whether donor countries should be allowed to exclude ab initio developing countries from their GSP schemes, and not with the issue of whether differentiation is permitted among the recognised beneficiaries of a GSP scheme;[12]

- likewise, the provision of Section IV:12 noting the position of the donor countries that "as for beneficiaries, donor countries would in general base themselves on the principle of self-election" is, by its own terms, concerned with the issue of what countries should be recognised as beneficiaries of a GSP scheme, and not with the "distinct" issue of whether identical preferences should be granted to all the recognised beneficiaries.

47. The indisputable fact is that there is no provision in the Agreed Conclusions which addresses the meaning of the term "non-discriminatory".

48. In reply to this question, India also cites section IX(1) of the Agreed Conclusions, which provides that

> The Special Committee recognizes that no country intends to invoke its rights to most-favoured-nation treatment with a view to obtaining in whole or in part the preferential treatment granted to developing countries.

49. However, the above passage undermines, rather than supports India's position:

- first, it says that "no country" intends to invoke its MFN rights, rather than "no developed country". The term "no country" includes also "no developing country". If only developed countries had renounced to their MFN rights under the Agreed Conclusions, it would have been unnecessary to refer to "no country", rather than "no developed country";

- second, it alludes to "the preferential treatment granted to developing countries", without the definite article the before "developing countries". This, by India's well-known own interpretation, would confirm that the "preferential treatment" envisaged by the Agreed Conclusion does not have to be granted to all developing countries.

Question 17

50. The EC notes that India concedes that the Agreed Conclusions do not prohibit expressly to grant special preferences to the LDCs. According to India, no such express prohibition was necessary because "the preferences under the GSP were intended to be non-discriminatory".

[11] India's reply to the Panel's Question to both Parties No. 51. See also India's replies to the Panel's Questions to both Parties Nos. 41 and 50.

[12] EC's Second Oral Statement, para. 59.

51. It seems hardly necessary to point out that this amounts to purely circular reasoning. India has invoked the Agreed Conclusions as contextual support for its interpretation of "non-discriminatory". But then it is forced to rely on its own interpretation of "non-discriminatory" in order to read the Agreed Conclusions in a manner which suits that interpretation.

Question 20

52. The EC notes that India does not contest the figures concerning the seizures of coca and opium products in India provided by the EC. (See EC's reply to the Panel's Question to the EC No. 15). Those data show that the trafficking of coca products in India is negligible, while the trafficking of opium products is relatively small, as compared to Pakistan, in particular when considered in the light of the size of their respective population and economy.

Question 21

53. The UN texts cited by the EC do not foresee "multilateral trade negotiations in sectors of export interest of the developing countries". Rather, they urge to provide "greater market access" specifically for the products of the countries affected by the drug problem. There is no suggestion in the UN texts that this should be done pursuant to "multilateral trade negotiations" or with respect to products of export interest to all developing countries in general.

54. As explained, providing the same access to all developing countries would not be effective in achieving the objective of providing "greater market access" for the developing countries affected by the drug problem. India has nowhere addressed this argument. In fact, India's claims of trade diversion amount to a recognition that providing the same preferences to all developing countries would be less effective in supporting alternative activities in the beneficiary countries.

55. It is also incorrect to say that the Preamble of the Agreement on Agriculture "foresees" "multilateral trade negotiations in sectors of export interests of the developing countries". Rather, the Agreement on Agriculture provides that "in implementing their commitment on market access" developed country Members will provide "greater improvements and terms of access… for products of particular importance to the diversification of production from the growing of illicit narcotic crops". This involves an express recognition by the WTO that the countries affected by the drug problem have particular needs, different from those of other developing countries.

Question 22

56. India cites no evidence ("empirical basis") or authority in support of its proposition that financial assistance alone would be sufficient to support sustainable alternative economic activities in the drug affected countries.

57. India's position that financial assistance is a "sufficient" response to the drug problem is at odds with well established international anti-drug policies, as reflected in the UN resolutions cited by the EC, which urge to provide greater market access to the products of the countries affected by the drug problem. Those resolutions refer to financial assistance and greater market access as complementary, rather than alternative measures to counter the drug problem.

58. Moreover, India's position that financial assistance is as effective as trade preferences is also at odds with the traditional views of developing countries, which since the 1960s have consistently demanded "trade not aid". If accepted, it would deprive of its justification the Enabling Clause and, more generally, all Special and Differential Treatment provisions in the WTO Agreement. If India were correct, there would be no reason why developed countries should go on providing tariff preferences to developing countries. They could scrap their GSP schemes altogether and replace them with targeted financial assistance. This would have the additional advantage of allowing the

developed countries to respond more specifically to the needs of each developing country and to avoid the problems which result from the monopolisation of trade preferences by a few competitive developing countries. The EC doubts very much that the position expressed in this dispute reflects the considered views of India, which is both one of the main beneficiaries of all GSP schemes and the chief proponent of strengthening Special and Differential Treatment.

59. Moreover, if financial assistance were as effective in promoting exports as trade preferences (which India describes as "indirect financial assistance") it would follow that it would be also as trade restrictive. As such, it could be inconsistent with the provisions of Part IV of the SCM Agreement. Also, it seems that, in order to be as effective as trade preferences in promoting exports, financial assistance would need to be, de iure or de facto, export contingent, which would be prohibited in principle by Article 3 of the SCM Agreement. [13] Thus, it is far from clear whether India's suggestion that the EC should provide financial assistance, rather than trade preferences, would ultimately be less trade restrictive and less WTO consistent than the Drug Arrangements.

60. Finally, it is simply not true that the Drug Arrangements are "at no expense" to the EC. See the EC's reply to the Panel's Question No. 16 to the EC.

Question 23

61. The obvious fact that the UN recommendations cited by the EC are not "legally binding" or that they are not part of the "covered agreements" is irrelevant. The EC does not contend that, as a matter of law, the UN recommendations derogate from, or take precedence over its WTO obligations.

62. Rather, the EC's position is that the fact that the United Nations has "urged" its members to provide greater market access in order to respond to the drug problem is evidence that, as a matter of fact, such action is "necessary" for the purposes of Article XX(b).

63. WTO Panels cannot assume lightly that the UN resolutions, and in particular the resolutions of the UN General Assembly, are, to use India's words, devoid of "empirical basis". India has provided no evidence of its own in order to substantiate its assertion that the UN resolutions are "empirically" groundless. The Panel, therefore, should accept the unquestionably well informed views of the United Nations that providing greater market access is indeed a necessary response to the drug problem.

64. India further contends that the United Nations could not have recommended a measure that it prohibited by the WTO Agreement. However, once again, this is purely circular reasoning. India's contention anticipates the conclusion to be reached by the Panel in this dispute. The issue before the Panel is precisely whether the action recommended by the United Nation is "prohibited" by the WTO Agreement at all.

Question 24

65. India makes the astonishing assertion that preferential treatment which is discriminatory between developing countries "is not beneficial at all". The EC wonders how this can be reconciled with India's claim that

[13] Clearly, it would unfeasible for the EC authorities to administer by themselves a programme that provided subsidies to any individuals in the drug affected countries wishing to engage in export activities to the EC. Rather, the EC would have to make the funds available to the authorities of the drug affected country, which would then provide the subsidies. Thus, the controversial question of whether the *SCM Agreement* may apply to foreign subsidies would not arise in practice.

> The tariff preferences under the Drug Arrangements are beneficial to some developing countries and detrimental to others and consequently do not comply with paragraph 2(a) of the Enabling Clause.[14]

66. More fundamentally, why should the WTO Agreement be concerned about differentiation between developing countries which does not provide any benefit? Even if such differentiation were prohibited, it would have to be concluded that it causes no nullification or impairment.

67. The EC also notes the manifest contradiction between India's assertions that

> An investor will not necessarily invest in a developing country benefiting from discriminatory tariff preferences … because those preferences could be withdrawn at any time.

and Paraguay's repeated (but unsupported) claims to the effect that

> As a result of the discriminatory tariff preferences under the Drug Arrangements, there has also been an "investment diversion". The proximity between Paraguay and some of the beneficiary countries creates the incentive to shift investments away from Paraguay and those countries. Moreover, international investment flows in sectors benefiting from the Drug Arrangements are diverted away from Paraguay.[15]

68. Once again, the EC wonders whether the interests of Paraguay and India are in fact the same in this dispute.

[14] India's First Submission, para. 62.
[15] Paraguay's Third Party Submission, para. 25.

# ANNEX C

## Third Parties


| Comments | | Page |
|---|---|---|
| **Annex C-1** | Replies of the Andean Community Collectively to Questions from the Panel and from India after the First Panel Meeting | C-2 |
| **Annex C-2** | Replies of Members of the Andean Community Separately to Questions from the Panel and from India after the First Panel Meeting | C-9 |
| **Annex C-3** | Reply of Brazil to the Question from India after the First Panel Meeting | C-14 |
| **Annex C-4** | Replies of Costa Rica to Questions from the Panel and from India after the First Panel Meeting | C-15 |
| **Annex C-5** | Replies of El Salvador, Guatemala, Honduras and Nicaragua to Questions from the Panel after the First Panel Meeting | C-20 |
| **Annex C-6** | Replies of Panama to Questions from the Panel and from India after the First Panel Meeting | C-21 |
| **Annex C-7** | Replies of Paraguay to Questions from the Panel and from India after the First Panel Meeting | C-27 |
| **Annex C-8** | Replies of the United States to Questions from the Panel and from India after the First Panel Meeting | C-40 |

## ANNEX C-1

Replies of the Andean Community Collectively to Questions from the Panel and from India after the First Panel Meeting

## PANEL'S QUESTIONS TO THE THIRD PARTIES

**To All Third Parties**

***Legal Function***

**1. Assuming that the Enabling Clause is not a waiver, is it an exception or an 'autonomous' right? In either case, what are the differences in legal consequences of characterizing the Enabling Clause as an exception or an autonomous right? Are there legal consequences beyond allocation of the burden of proof?**

We view the Enabling Clause as an autonomous right. As we have said in our submissions, the Enabling Clause establishes a 'self-standing' regime.[1] The Enabling Clause affirmatively establishes how developed countries are to assist developing countries, rather than simply providing for a limited exception to Article I:1 GATT.

There are legal consequences to characterizing the Enabling Clause as an exception or an autonomous right. Obviously, an immediate and important consequence in this dispute settlement context has to do with the burden of proof. Since the Enabling Clause is an autonomous right of the EC, it is India who bears the burden of proving that the Drug Arrangements constitute a violation of it. India has to clear this hurdle before the EC bears any burden of justifying the exercise of its right. India has not met its burden. And if at the end of the day the Panel is not convinced, doubt goes to the benefit of the EC, rather than India. On that basis alone, the EC should prevail.

Burden of proof is not the only consequence of characterizing the Enabling Clause as an exception or as an autonomous right. Exceptions are normally subject to a strict or narrow interpretation, as they are a derogation from an obligation. The Enabling Clause is not an exception, and therefore, like the Appellate Body said in the *Hormones* case[2], it would be inappropriate to apply to the interpretation of the Enabling Clause a reading more narrow or strict than would be warranted by examination of the ordinary meaning of its terms, viewed in the context and in the light of their object and purpose.

The terms of the Enabling Clause, viewed in their context and in light of their object and purpose, do not merit a restrictive interpretation. The Enabling Clause has a fundamentally different purpose than that of an exception like Article XX GATT. There, the EC would be derogating from the GATT in its own interest. With the Enabling Clause, the interest is altruistic – the Enabling Clause enables developed countries to help other countries. When a country acts thus, as the EC has done with the Drug Arrangements, there is no need to look at the measures with special scrutiny.

**2. How does one identify whether a legal provision confers an 'autonomous right' or provides for an 'affirmative defence'?**

First and foremost, one should look at the text of the provision in question to determine whether it confers an 'autonomous right' or provides for an 'affirmative defence'. As we have

[1] See paras. 33-45 of the Third Party Submissions of the Andean Community of 30 April 2003.
[2] WT/DS26/AB/R, WT/DS48/AB/R para. 104.

explained in our submissions, the text of the Enabling Clause supports the conclusion that it creates an 'autonomous right'.[3]

Furthermore, as we said in our submissions, the pivotal role of the Enabling Clause as part of the broader and evolving GATT/WTO regime for the benefit of developing countries also supports the conclusion that it confers an 'autonomous right'.[4]

***Non-discriminatory***

**3. Assume that the Enabling Clause is a self-standing, autonomous right and that the Panel should look at the Enabling Clause itself to interpret its provisions. Could you indicate where in the Enabling Clause the Panel should find the context for the interpretation of the term 'non-discriminatory'? Does this context provide sufficient contextual guidance for the interpretation of this term? Should the Panel also look outside the Enabling Clause for contextual guidance? If so, to which particular Agreements and provisions therein, and why these particular provisions, and not others?**

Since the 'Enabling Clause' is a self standing regime, the Panel should indeed look to it first and foremost, viewed in its context and in light of its object and purpose, in order to interpret its terms. Part of the Enabling Clause's context, object and purpose is its pivotal role of as part of the broader and evolving GATT/WTO regime for the benefit of developing countries. In interpreting the term 'non-discriminatory', the Panel must ensure that its interpretation allows the Enabling Clause to 'enable' what it is meant to 'enable'.

For that, the Panel must consider the Enabling Clause as a whole, with due regard for its pivotal role as part of the broader and evolving GATT/WTO regime for developing countries. Within the Enabling Clause, we would point to its paragraphs 1, 2(a), 3(a) and (c) and 5 as particularly relevant.

We think that the Panel, knowing the pivotal role that the Enabling Clause is meant to play, has sufficient context to interpret the term 'non-discriminatory'. We therefore do not think it necessary for the Panel to look outside the Enabling Clause for guidance.

Further, we are sceptical about the appropriateness of doing so. The term 'non-discrimination' appears elsewhere in the WTO, but in provisions that have different contexts and objects and purposes – and therefore where 'non-discrimination' has a different interpretation. In particular, it would not be appropriate for the Panel to be guided by the interpretation of Article I, since non-discrimination is not the same concept as Most Favored Nation treatment.[5] Likewise, it would not be appropriate for the Panel to use the interpretation in an exception like Article XX.

**4. Does the context of the term 'non-discriminatory' in footnote 3 of the Enabling Clause include Articles I:1, III:4, X, XIII, XVII and XX of GATT 1994, and Article XVII of GATS? Why or why not?**

As explained above, we do not think so. The context of the term 'non-discriminatory' in footnote 3 of the Enabling Clause is the Enabling Clause.

The context of Articles I:1, III:4, X, XIII, XVII and XX of GATT 1994, and Article XVII of GATS is different. The object and purpose of those provisions is also different.

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[3] See paras. 33-45 of the Third Party Submissions of the Andean Community of 30 April 2003.

[4] See paras. 20-32 of the Third Party Submissions of the Andean Community of 30 April 2003.

[5] See para. 40 of the Third Party Submissions of the Andean Community of 30 April 2003, Oral Statement of 15 May 2003 at para. 3.

***Paragraph 3(c)***

**5. Please give your views on the following questions relating to the meaning of the Enabling Clause, based upon paragraph 9 of Paraguay's Oral Statement. Is it correct to say that under the Enabling Clause developed countries are not obliged to give tariff preferences? Is it also correct that any preferences granted are only in respect of products of the developed country's own choice and only to developing countries of its choice? Are developed countries free to graduate beneficiary developing countries from their GSP schemes?**

It is correct to say that under the Enabling Clause developed countries are not obliged to give tariff preferences. They also may decide unilaterally which products and countries are covered by the same.

If they give preferences, they must respect the provisions of the Enabling Clause;, the preferences must be 'generalized' and 'non-discriminatory'. As we have explained in our submissions, the Drug Arrangements respect the requirements of the Enabling Clause.

**6. Developing countries often have different development needs. Take, for example, Indonesia, the Philippines, Morocco, Brazil and Paraguay, each having different development needs. If we agree with the argument of the Andean Community that it is possible to select some beneficiary countries according to certain criteria (paragraph 6 of the Joint Statement of the Andean Community), would it not be a logical consequence of this argument that any developed country could establish a special GSP tariff preference scheme for each individual developing country in responding to that developing country's own development needs? Is this a proper reading of paragraph 3(c) of the Enabling Clause? Why or why not? If not, where do you draw the line in term of a proper interpretation of paragraph 3(c)?**

As we have said above, while developed countries can decide unilaterally which products and countries are covered by the their GSP schemes, when doing so they must respect the provisions of the Enabling Clause; they must be 'generalized' and 'non-discriminatory'. [note, you have to put a semi-colon here instead of a comma] A regime designed for one particular country might very well fall foul of provisions of the Enabling Clause, viewed in the context of its object and purpose.

In the Enabling Clause the term "non – discriminatory" must be interpreted having regard to the objective of "special and differential treatment". The requirement that preferences must be "generalized" means that, unlike the "special" preferences traditionally granted to certain countries or groups of countries merely for historical or geographical reasons, the preferences should be "generalized" to all developing countries with similar development needs.

However, it is not feasible, necessary or indeed appropriate for this Panel to consider every possible 'hypothetical' in coming to its decision. Rather, this Panel is called upon to determine whether the Drug Arrangements violate the Enabling Clause.

This concrete application of the Enabling Clause is not a violation of it. As we have explained in our submissions, the Drug Arrangements respect the Enabling Clause as a whole, and in particular its para. 3, because they properly acknowledge a development problem – drugs – that is internationally recognized[6], and the kind of increased market access that they provide is an effective tool to alleviate the special development needs of countries affected by drug production and trafficking.[7] Furthermore, the countries that benefit from the Drug Arrangements were properly selected. This is not challenged by India, nor does it argue that it has similar drug problems such that it was discriminatorily excluded.

[6] See paras. 62 and 63 of the Third Party Submissions of the Andean Community of 30 April 2003.
[7] See paras. 64 through 66 of the Third Party Submissions of the Andean Community of 30 April 2003.

**7. Are the developed countries free to 'graduate' beneficiary developing countries from a GSP scheme? If so, under which paragraph of the Enabling Clause? Please elaborate.**

We understand that the issue of graduation is not before the Panel.

**8. Does the word 'and' in paragraph 3(c) of the Enabling Clause mean 'or'? In other words, does the word 'and' mean that 'development, financial and trade needs' must be considered in a comprehensive manner or may they be considered separately?**

We would not advocate reading the word 'or' for 'and' in para. 3(c) of the Enabling Clause. Development, financial and trade needs should be considered together, but due to the context and objective of the Enabling Clause, which is specifically meant to aid in development, that word has a special emphasis.

**9. Paragraph 3(c) of the Enabling Clause refers to 'developed contracting parties' and 'developing countries' in the plural form. Given the common understanding that developed countries may decide individually whether or not they wish to provide GSP, is it also possible to interpret 'developing countries' under paragraph 3(c) as meaning *individual* developing countries?**

As we have said above, developed countries can decide unilaterally which products and countries are covered by the their GSP schemes, but when they do so they must respect the provisions of the Enabling Clause; they must be generalized and non-discriminatory. Textually this is an interesting parallel. If you can read one as singular, perhaps you can also read the other that way. However, a regime designed for one individual developing country might very well fall foul of provisions of the Enabling Clause, viewed in the context of its object and purpose. However, it would have to be examined concretely rather than in the hypothetical

**10. To the extent that the Drug Arrangements only respond to development needs caused by drug production and trafficking, while not responding to development needs resulting from other problems, such as poverty, low *per capita* GNP, malnutrition, illiteracy and natural disasters, how does this EC programme satisfy the 'non-discriminatory' requirement in footnote 3 of the Enabling Clause? Please elaborate.**

Nothing in the Enabling Clause requires developed countries to respond to all or any particular development needs in establishing their GSP programs.

Indeed, somebody could argue that identifying and responding to a concrete need is 'better' for development than to trying to tackle the whole range of development issues.

Paragraph 3c does not require that each single preference be responsive at the same time to the individual needs of each and every developing country.

***General***

**11. Please indicate whether or not you consider that the Drug Arrangements need to be covered by a waiver. Please elaborate.**

No. Please see our answer to question 9 below.

**To the Andean Community**

**1. In paragraph 2 of the Andean Community's Oral Statement, it is stated:**

> **'My starting-point, and you have read and heard this before, is that the Enabling Clause represents a self-standing regime. It is not merely an exception to the GATT's MFN principle'.**

**Please give your reasoning as to why the Enabling Clause is not an exception, but a self-standing regime. What are the implications of this provision being an exception or a self-standing regime?**

Please see our responses to questions 1 and 2 above.

**2. Assuming that the Enabling Clause is not a waiver, is it an exception or an 'autonomous' right? In either case, what are the differences in legal consequences of characterizing the Enabling Clause as an exception or an autonomous right? Are there legal consequences beyond allocation of the burden of proof?**

Please see our responses to questions 1 and 2 above.

**3. How does one identify whether a legal provision confers an 'autonomous right' or provides for an 'affirmative defence'?**

Please see our response to question 2 above.

**4. To determine the legal function of the Enabling Clause, is it useful to have reference to the exceptions clauses set out in Articles XX, XXI and XXIV of GATT 1994? Please elaborate.**

As explained above, the Enabling Clause is neither an exception nor a waiver, but an autonomous right. Therefore, we are sceptical about the relevance and appropriateness of references to Articles XX, XXI and XXIV of GATT 1994, which are exceptions. Their terms must be interpreted in the light of their particular context, object and purpose, which is fundamentally different from that of the Enabling Clause.

**5. Article XX and XXI of GATT 1994 provide 'nothing in this Agreement shall be construed to prevent … ' and Article XXIV:3 of GATT 1994 provides '[t]he provisions of this Agreement shall not be construed to prevent … ', and paragraph 1 of the Enabling Clause provides '[n]otwithstanding the provisions of Article I of the General Agreement, contracting parties may … '. Do you consider that Articles XX, XXI and XXIV of GATT 1994 provide exceptions/'affirmative defences' or not? In light of the similarity/dissimilarity of the above-cited language, do you think the Enabling Clause provides for an exception/'affirmative defence' or an 'autonomous right'? Why or why not? Please elaborate.**

Please see our responses to questions 1 and 2 above as to why we consider that the Enabling Clause confers an autonomous right.

Articles XX, XXI and XXIV:3 of GATT are affirmative defenses. As we have noted, we are sceptical about the relevance of other provisions because they each have different wording, different contexts, different objects and purposes. That is even more so with regard to provisions like these, which are justifications for departing from general WTO rules for the country's <u>own</u> benefit, versus the Enabling Clause, whose goal is to enable states to take measures for the benefit of <u>other</u>, developing states.

**6. Assume that the Enabling Clause is a self-standing, autonomous right and that the Panel should look at the Enabling Clause itself to interpret its provisions. Could you indicate where in the Enabling Clause the Panel should find the context for the interpretation of the term 'non-discriminatory' in footnote 3? Does this context provide sufficient contextual guidance for the interpretation of this term? Should the Panel also look outside the Enabling Clause for contextual guidance? If so, to which particular Agreements and provisions therein, and why these particular provisions, and not others?**

Please see our response to questions 3 and 4 above.

**7. With reference to the Preamble to the Agreement on Agriculture, which mentions that developed country Members agreed to take fully into account the particular needs and conditions of developing country Members, including through 'the diversification of production from the growing of illicit narcotic crops', does the Andean Community believe that this commitment on market access is applicable only to the Agreement on Agriculture or also to the Enabling Clause?**

We think that the Enabling Clause is a self-standing regime that must be considered on its own merits. We would also like to point out that the "diversification of production from the growing of illicit narcotic crops" has been specifically linked to the special and differential treatment provisions in the Agreement on Agriculture. At the same time the fact that the problem of the growing of illicit narcotic crops has been mentioned in other places in the WTO underscores the importance of the problem and the legitimacy of the EC efforts to address it.

**8. Was the Enabling Clause a part of the results of the overall balance of commitments and concessions made during the Tokyo Round negotiations? If so, does this fact have any bearing on the interpretation of the Enabling Clause?**

The Enabling Clause was certainly part of the balance of **commitments and** concessions made by the developing countries during the Tokyo Round, and more significantly it was part of the Uruguay Round WTO package, as it remains integral in the Doha Development Round.[8]

**9. The 'Aide-mémoire of the Joint Andean Community – European Commission Technical Evaluation Meeting on the Profitable Use of the Andean GSP' mentions that 'the CAN pointed out the need for the EC to obtain a waiver in order to continue granting preferences to the drug-related régime in the face of pressure brought to bear by other countries that consider themselves affected by that régime' (Exhibit India-3). Is this the official position of the Andean Community? If so, why is it necessary for the EC to obtain a waiver for its Drug Arrangements?**

The 'Aide-mémoire of the Joint Andean Community – European Commission Technical Evaluation Meeting on the Profitable Use of the Andean GSP' is not an official document – it is merely a summary from the technical group of experts in the context of the political dialogue of possible future frameworks for the Andean Community – EC relations. Hence due to its nature is has no legally binding effect, nor can it be considered as an statement of the position of the Andean countries.

[8] See the re-affirmation of the Enabling Clause in the Doha Implementation decision, § 12.2.

## INDIA'S QUESTIONS TO THE THIRD PARTIES

**To all third parties**

**1. Do the third parties support the EC's contention that the Drug Arrangements are justified under Article XX(b) of the GATT?**

***(This question is addressed to Bolivia, Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mauritius, Nicaragua, Pakistan, Panama, Paraguay, Peru, Sri Lanka, the United States and Venezuela)***

As Third Parties the Andean countries consider that we need not elaborate on an EC argument which has not been part of our written submission or oral statement.

**ANNEX C-2**

Replies of Members of the Andean Community Separately
to Questions from the Panel and from India after the First Panel Meeting

## PANEL'S QUESTIONS TO ECUADOR

**1. In what form and to what extent do the "binding political and moral commitments that arise out of international co-responsibility that is incumbent upon all states", as referred to in paragraph 12 of Ecuador's Oral Statement, have a bearing on the legal regime in the WTO?**

Article 3.2 of the WTO Dispute Settlement Understanding states that "[t]he Members recognize that [the dispute settlement system of the WTO] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law".

Article 31 (general rule of interpretation), paragraph 3, of the Vienna Convention on the Law of Treaties of 1969 thus stipulates that "[t]here shall be taken into account, together with the context … (c) any relevant rules of international law applicable in the relations between the parties".

The decisions and resolutions of the General Assembly of the United Nations, as part of international law, contain real obligations that are incumbent on States and other subjects of international law and make it easier to determine matters of substance, i.e. what the subjects of international law may or may not do in the sphere of international relations. Moreover, these decisions and resolutions serve as a basis for the framing and development of public international law.

Since narcotics production and trafficking is a worldwide problem, the United Nations has reaffirmed the need to promote international cooperation in fighting this global scourge. The principle of co-responsibility addressed in the United Nations resolutions and international conventions on the subject merely underscore the fact that the States are committed to working together to combat this situation. These UN resolutions were later embodied in the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, to which Ecuador, India and the European Union Member States are party, thereby undertaking a **legal obligation** in this respect. The principle of international cooperation in this area is hence clearly enshrined in an internationally recognized convention and in UN resolutions and is confirmed by State practice consistent with the relevant legislation.

The GPS-Drug Arrangements thus constitute international cooperation in this sense through the mechanisms they provide. Under the WTO legal regime, it is the Enabling Clause that provides the framework for such international cooperation, which in this connection is also the expression of special and differential treatment.

It can therefore be concluded that we have binding rules in this area. It would be wrong, moreover, to consider that the World Trade Organization can remain uninvolved in regard to the numerous standards laid down by the international community in this sphere.

Ecuador believes that the fulfilment of trade obligations cannot in any circumstances detract from the political or other obligations freely undertaken by the States.

## QUESTIONS POSED BY INDIA TO THE THIRD PARTIES

**Colombia**

**2. On 28 December 1987, the United States formally notified Chile of its removal from the United States GSP scheme for not taking measures to grant its workers internationally-recognized rights. Chile raised the issue in the GATT Council and argued that this action violated the 1971 Waiver and the Enabling Clause because it was contrary to the requirement of "non-discrimination" because "… once a developed contracting party had unilaterally chosen to establish a GSP scheme, it could not apply it to some developing countries and not to others". In response, the United States argued that its action was non-discriminatory because the "same criterion applied to all countries and was implemented on a non-discriminatory basis".**

> **The Minutes of the meeting of the GATT Council held on 2 February 1988 state:**
>
> **"The representative of Colombia said that his delegation was deeply concerned by the US action and in particular by the reasons invoked by the United States."**

**This implies an agreement with Chile's understanding of "non-discrimination". Is this still the considered view of Colombia?**

It is important to specify that the statement by the representative of Colombia does not once refer to Chile's interpretation of the scope of non-discrimination. The statement refers exclusively to the US action.

Furthermore, we understand that the consistency with the multilateral commitments of the linkage to compliance with environmental and labour standards, as a legal argument in this dispute, has been abandoned by India, according to paragraph 21 of its written submission.

Therefore, and given that Colombia's statement was delivered in connection with a withdrawal of preferences for reasons relating to labour standards, we do not consider it appropriate to state our views in this regard.

In any event, we note that according to Mr. Frieder Roessler, writing in 1996 about the situation between the United States and Chile in "Diverging Domestic Policies and Multilateral Trade Integration", a chapter of the book FAIR TRADE AND HARMONIZATION, PREREQUISITES FOR FREE TRADE?:[1]

> *WTO Members have the right to give tariff preferences to the developing countries in accordance with the Generalized System of Preferences (GSP). The GSP preferences are accorded on an autonomous basis and* ***may therefore be withdrawn in whole or in part at any time.*** *This has led some contracting parties to grant preferences conditional upon the pursuit of policies by the exporting country unrelated to trade….*
>
> *Chile, having been denied GSP benefits by the United States because of its labor policies, requested consultations under the GATT with the United States on that denial, claiming that the US action was inconsistent with the principle that GSP benefits must be accorded to all developing countries on a nondiscriminatory basis. Chile did not pursue the matter under the GATT dispute settlement procedures and there is therefore no GATT panel ruling on Chile's claim. While it is debatable whether GSP benefits may be granted on domestic policy*

[1] Chapter of the book FAIR TRADE AND HARMONIZATION, PREREQUISITES FOR FREE TRADE?, Vol. 2, Legal Analysis, edited by Jagdish N. Bhagwati and Robert E. Hudec, MIT Press (1996), Cambridge, Massachusetts, at pp. 39-40.

*conditions,* ***it is undeniable that there is no obligation to grant GSP benefits at all. Any inconsistency resulting from the conditional denial of GSP benefits can therefore always be corrected by denying GSP benefits altogether. As a practical matter, there is therefore little a GSP recipient can do to prevent a donor country from linking the grant of GSP benefits to the pursuit of specified domestic policies.*** [emphasis added]

(at pp. 39-40)

Colombia would be unable to endorse all of Mr. Roessler's assertions because, unlike his interpretation, our understanding is that the Enabling Clause establishes some restrictions on the developed countries in defining their preferential schemes.

**Peru**

**1. On 28 December 1987, the United States formally notified Chile of its removal from the United States GSP scheme for not taking measures to grant its workers internationally-recognized rights. Chile raised the issue in the GATT Council and argued that this action violated the 1971 Waiver and the Enabling Clause because it was contrary to the requirement of "non-discrimination" because "… once a developed contracting party had unilaterally chosen to establish a GSP scheme, it could not apply it to some developing countries and not to others". In response, the United States argued that its action was non-discriminatory because the "same criterion applied to all countries and was implemented on a non-discriminatory basis".**

**The Minutes of the meeting of the GATT Council held on 2 February 1988 state:**

**The representative of Peru said that his delegation was likewise deeply concerned. The GSP could not be used for political reasons, but should be based on GATT Decisions and should be non-discriminatory. His delegation noted with satisfaction that consultations would be held by the interested parties."**

**This implies an agreement with Chile's understanding of "non-discrimination". Is this still the considered view of Peru?**

The case at issue concerns a scheme especially designed to address the needs of developing countries facing serious problems in terms of narcotics production and trafficking. The problem at hand relates to a particular situation which, because of its effects and characteristics, cannot be compared to other situations and/or circumstances in which tariff preferences may be granted or denied.

As regards the principle of non-discrimination, Peru reaffirms its statements at paragraphs 36, 42 and 44 of the joint submission made on behalf of the Andean countries.

**Venezuela**

1. Paragraph 40 of the Minutes of the Trade Policy Review Body Meeting held on 25-26 November 1997 (WT/TPR/M/30) states:

**The representative of Venezuela questioned the linkage of EU's GSP Scheme to the fight against drugs and other environmental or labour standards-related criteria.**

**Could Venezuela please elaborate on its concerns in this regard?**

Venezuela's response to India's question regarding the statement by the representative of Venezuela cited in paragraph 40 of the Minutes of the 1997 Trade Policy Review of the European Union (WT/TPR/M/30) is as follows:

It is important, in our view, to recall that according to the first paragraph of Annex 3 to the Marrakesh Agreement Establishing the World Trade Organization the Trade Policy Review Mechanism "is not … intended to serve as a basis … for dispute settlement procedures". Nevertheless, Venezuela considers it relevant to explain that the political context of the statement made in 1997 was an assessment of the GSP with a view to considering a prospective application the labour and environmental incentives to the GSP-Drugs. It was therefore a context of transition in regard to those incentives. We should also specify that, according to the European Union, the special environmental and labour arrangements were entirely voluntary and therefore not of a punitive nature.

Venezuela is also surprised that India should ask this question, because in stating in its first submission to the Panel that it had "informed the EC and the Director-General that it had decided to limit the present complaint to the tariff concessions applied by the EC under the Drug Arrangements", India excluded from the Panel's terms of reference all legal arguments relating to the environmental and labour arrangements.

**Ecuador**

**1. The summary of discussions of the High Level meeting between the European Union and the Andean Community on Drugs (held in Brussels on 11 June 2002) contains the following statement of the representative from Ecuador:**

**[I]ncluir en este régimen [regimen especial "droga"] a países de fuera de la región, aleja a la UE del marco conceptual dentro del cual estas preferencias fueron concebidas.** ***(Adding to this arrangement [drug arrangement] countries out of the region, takes the EU away from the conceptual framework in which these preferences were conceived).***

**This statement seems to suggest that according to Ecuador, the Drug Arrangements are to be confined exclusively to the Latin American region. Could Ecuador please explain whether this can be reconciled with the assertion that the Drug Arrangements apply to *all* developing countries particularly affected by the drug problem?**

In reply to this question, Ecuador wishes to explain that the above statement should be understood in the context of a political and trade meeting and hence in no way prejudges the legal basis of the system or the possibility for the EU to include, on the basis of objective criteria, further beneficiary countries facing the problem of drug production and trafficking.

**Bolivia, Colombia, Ecuador, Peru and Venezuela**

**6. The Aide-Memoire of the Joint Andean Community-European Commission Technical Evaluation Meeting on the Profitable Use of the Andean GSP states:**

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

**Could Bolivia, Colombia, Ecuador, Peru and Venezuela please explain why a waiver from the EC's WTO obligations was required?**

The response to this question was given in the reply to question 9 of the Panel to the Andean countries.

**ANNEX C-3**

Reply of Brazil to the Question from India
after the First Panel Meeting

**Brazil**

**1. At the Sixty-third Session of the Committee on Trade and Development, 19 April 1988 the Representative of Brazil stated:**

> **"… although preferential tariff concessions constituted a unilateral act of the donor country the exclusion of countries from GSP was per se a discrimination which was not based on the agreed principles … developed contracting parties acting individually had been authorized to grant such preferential treatment provided that the corresponding schemes were of a generalized, non-discriminatory and non-reciprocal nature. The fact that such schemes were of a voluntary character and did not constitute a binding obligation for the preference giving countries did not in his view give them the right to ignore the legal framework under which they had been authorized to implement such schemes"(COM.TD/127, p.5).**

**Does this remain the considered view of Brazil?**

Answer:

Yes, the statement made by Brazil at the Committee on Trade and Development on 19 April 1988 continues to be the view of Brazil on the issue. Brazil, in that statement, focused on the essential principles governing the granting of preferential treatment under the Enabling Clause, i.e., that any preference granted must be of a generalized, non-discriminatory and non-reciprocal nature.

**ANNEX C-4**

Replies of Costa Rica to Questions from the Panel and from India
after the First Panel Meeting

***Legal Function***

***1. Assuming that the Enabling Clause is not a waiver, is it an exception or an "autonomous" right? In either case, what are the differences in legal consequences of characterizing the Enabling Clause as an exception or an autonomous right? Are there legal consequences beyond allocation of the burden of proof?***

The Enabling Clause is an autonomous right. The legal consequence of such characterization is that India, the party making the assertion of illegality, bears the burden of proving that GSP drug program is not consistent with the Enabling Clause and a violation of Article I. If it were an exception, which it is not, then the EC would bear the burden of proving that the drug program is consistent with the Enabling Clause and thus falls within the exception that excuses the violation of Article I of GATT. Also, as an exception, it would have to be interpreted narrowly

***2. How does one identify whether a legal provision confers an "autonomous right" or provides for an "affirmative defence"?***

By looking at its ordinary meaning in its context, and in light of the object and purpose of the treaty, and by determining the legal function of the provision at issue (in this case, paragraph 1 and 2(a) of the Enabling Clause). The context includes, for that purpose, the treaty as a whole. The provisions of the WTO Agreements and the GATT decisions cannot be interpreted in clinical isolation. As the AB noted in Brazil-Desiccated Coconut, the WTO Agreement is a single treaty instrument which was accepted by the WTO Members as a "single undertaking". It is an integrated system and in that sense "fundamentally different from the GATT system which preceded it." (p. 13, AB report) Therefore, the legal function of a provision, in this case paragraph 1 and 2(a) of the Enabling Clause, must be considered in the context of the treaty *as a whole*. The legal function in such broad context is relevant for the interpretation of the provisions, including whether it is an exception or a affirmative defence.

The Enabling Clause is an autonomous right. The provisions of Article XX, XXI, and XXIV, all recognized exceptions to GATT rules and authorize certain conduct by establishing the boundaries of all other provisions of the GATT. The limitation that these exceptions impose on all other provisions of the GATT is evidenced by their specific wording, i.e., "nothing in this Agreement shall be construed to prevent" or "the provisions of this Agreement shall not be construed to prevent." They establish a limitation on what all other provisions can do or preclude. By contrast, the Enabling Clause does not seek to detract in any way from Article I. In fact, it reinforces Article I. The phrase "notwithstanding the provisions of Article I" clarifies that the Enabling Clause and Article I co-exist harmoniously, and that one will not detract from the other.

It is also noteworthy that, contrary to the preceding Decision of 1971, the negotiators did not intend the Enabling Clause to be a waiver, thus demonstrating that the contracting parties did not deem such instrument as an exception or affirmative defence, but rather as an autonomous right.

***Non-discriminatory***

***3. Assume that the Enabling Clause is a self-standing, autonomous right and that the Panel should look at the Enabling Clause itself to interpret its provisions. Could you indicate where in the Enabling Clause the Panel should find the context for the interpretation of the term "non-discriminatory"?***

The *immediate* context for the interpretation of the term "non-discriminatory" is, by direct reference of footnote 3 of the Enabling Clause, the Decision of 1971 that authorized the GSP system. The object and purpose of the Decision of 1971 is therefore relevant as well for purposes of interpreting the term non-discriminatory.

***Does this context provide sufficient contextual guidance for the interpretation of this term? Should the Panel also look outside the Enabling Clause for contextual guidance?***

In this case, the immediate context of the ordinary meaning of the term "non-discriminatory", i.e., the Decision of 1971, provides sufficient contextual guidance for the interpretation of that term. The Panel should look beyond the Decision of 1971 only if that immediate context does not enable it to adopt an interpretation that gives full meaning to the terms of the Enabling Clause and the other relevant provisions of the WTO Agreement, in accordance with the object and purpose of the treaty. In this case, however, the complainants' interpretation of the term "non-discriminatory," in the context of the Enabling Clause and the Decision of 1971, gives full meaning to that term and furthers the object and purpose of the Enabling Clause and the GATT.

***If so, to which particular Agreements and provisions therein, and why these particular provisions, and not others?***

NA

***4. Does the context of the term "non-discriminatory" in footnote 3 of the Enabling Clause include Articles I:1, III:4, X, XIII, XVII and XX of GATT 1994, and Article XVII of GATS? Why or why not?***

It would, but only in limited circumstances which are not present in this case. Costa Rica insists that the Panel should rely on the broader context in which the term "non-discriminatory" must be interpreted *only* if it finds that the *ordinary meaning* of the term, considered in its immediate context and in light of the Enabling Clause's object and purpose, is equivocal or vague. As indicated above, the immediate context is the Decision of 1971. The provisions mentioned in the question are indeed context because they are part of GATT; the Decision of 1971 in turn is part of GATT by virtue of Art. 1(b)(iv) of GATT 1994. However, the legal function of the Enabling Clause is very different from the legal function of Articles I:1, III:4, X, XIII, XVII and XX of GATT 1994, and Article XVII of GATS. Unlike these provisions, the Enabling Clause is not concerned, first and foremost, with ensuring the equality of competitive conditions between like products. The purpose and fundamental objective of the Enabling Clause is to authorize developed countries to grant differential and more favourable treatment to developing countries, notwithstanding the Most-Favoured-Nation principle of Article I of the General Agreement. Therefore, even if paragraph 2(a) and footnote 3 of the Enabling Clause and Article I:1 of GATT, are part of the same context, broadly speaking, it is incorrect to extrapolate the non-discrimination notion found in Article I to the Enabling Clause and the Decision of 1971.

***Paragraph 3(c)***

***5. Please give your views on the following questions relating to the meaning of the Enabling Clause, based upon paragraph 9 of Paraguay's Oral Statement. Is it correct to say that under the Enabling Clause developed countries are not obliged to give tariff preferences?***

Yes, it is correct. The GSP is an autonomous system. As evidenced by the "Agreed Conclusions" of the Special Committee on Preferences of UNCTAD's Trade Development Board, the grant of the tariff preferences does not constitute a "binding commitment" and it does not in any way prevent their subsequent withdrawal in whole or in part, or the subsequent reduction of tariffs on a MFN basis. Likewise, per the terms of the Decision of 1971, the grant of tariff preferences does not constitute a binding commitment and is only temporary in nature.

***Is it also correct that any preferences granted are only in respect of products of the developed country's own choice and only to developing countries of its choice?***

It is correct that the preferences granted are only in respect of the products of the developed country's own designation. However, the choice of developing countries beneficiaries cannot be arbitrary nor is it entirely discretionary. The choice of beneficiaries has to be based on objective, non-discriminatory, criteria.

***Are developed countries free to graduate beneficiary developing countries from their GSP schemes?***

The obligation to take into account the specific level of economic and trade development, for the purpose of determining which developing countries meet the objective criteria that make them eligible to receive preferences, exists also for the purpose of determining which countries no longer meet such conditions. The arbitrary removal of tariff preferences accorded to a beneficiary country that continues to meet the conditions would be just as discriminatory and inconsistent with the Decision of 1971 as according tariff preferences to a country that does not meet such conditions. Therefore, the non-discrimination requirement of the Generalized System of Preferences requires that the withdrawal of preferences by the donor country be based on objective, non-discriminatory criteria.

***Developing countries often have different development needs. Take, for example, Indonesia, the Philippines, Morocco, Brazil and Paraguay, each having different development needs. If we agree with the argument of the Andean Community that it is possible to select some beneficiary countries according to certain criteria (paragraph 6 of the Joint Statement of the Andean Community), would it not be a logical consequence of this argument that any developed country could establish a special GSP tariff preference scheme for each individual developing country in responding to that developing country's own development needs? Is this a proper reading of paragraph 3(c) of the Enabling Clause? Why or why not? If not, where do you draw the line in term of a proper interpretation of paragraph 3(c)?***

No. The Enabling Clause does not require, or even authorize, developed countries to grant specific tariff preferences to developing countries on an individual basis. The requirement that the GSP tariff preference scheme be *generalized* would preclude donor countries from establishing an atomized GSP scheme made up of a multitude of individual tariff preferences. Nevertheless, the term "generalized" cannot be interpreted as rigidly *requiring* donor countries to grant the same preferences to *all* developing countries without consideration to their specific development, financial, and trade needs. Paragraph 5 is the only provision of the Enabling Clause that makes reference to the *individual* development, financial and trade needs of developing countries.

***6. Are the developed countries free to "graduate" beneficiary developing countries from a GSP scheme? If so, under which paragraph of the Enabling Clause? Please elaborate.***

Concerning the first question see answer to question No. 5. There is no specific provision in the Enabling Clause that addresses the removal of preferences. However, such authority is implicit in (i) paragraph 3(c) of the Enabling Clause, (ii) in the autonomous, non-binding nature of the tariff preferences granted by donor countries to developing countries, and (iii) the right to grant preferences to some but not all developing countries, provided that such differential and more favourable treatment is non-discriminatory.

***7. Does the word "and" in paragraph 3(c) of the Enabling Clause mean "or"? In other words, does the word "and" mean that "development, financial and trade needs" must be considered in a comprehensive manner or may they be considered separately?***

The "development, financial and trade needs" can be considered separately under paragraph 3(c). In any event, drug production and trafficking affects the development, financial *and* trade needs of the developing countries that face that problem. Therefore, the EC's special arrangement to combat drug production and trafficking, positively responds to the development, financial *and* trade needs of the beneficiary developing countries.

***8. Paragraph 3(c) of the Enabling Clause refers to "developed contracting parties" and "developing countries" in the plural form. Given the common understanding that developed countries may decide individually whether or not they wish to provide GSP, is it also possible to interpret "developing countries" under paragraph 3(c) as meaning individual developing countries?***

Yes, paragraph 3(c) can be interpreted as requiring a donor country to consider the individual development, financial and trade needs of developing countries when designing or modifying its differential and more favourable treatment. However, as stated above, that does not mean that developed countries are required or even authorized to grant specific tariff preferences to developing countries on an *individual* basis. It is one thing to design a *generalized* system that responds to the individual development, financial and trade needs of developing countries, pursuant to the Decision of 1971 and the Enabling Clause, and it is quite a different thing to have a specific system for each individual developing country. The latter is not a direct or necessary consequence of the former.

Developing countries cannot be grouped into one single unified, undifferentiated category. Although similar in various ways, developing countries have widely different development, financial and trade needs. Nevertheless, there are common problems or challenges that are shared by either a wide or narrow group of developing countries. Paragraph 3(c) requires donor countries to respond positively to the differing levels of development through programs that can be more efficiently applied to a category of developing countries that share, overall, the same development, financial and trade needs. It simply would not be efficient or even practicable to design individual preferential systems for each developing country. It is far more feasible and efficient to respond to the common development, financial and trade needs shared by some but not necessarily all developing countries through special preferential schemes that considers and responds to those shared needs. In fact, it is absurd, given the wide disparity between developing countries, to suggest that a donor country can respond to the needs of developing countries through one single GSP scheme, and still give full meaning to the requirement in paragraph 3(c). The donor country must consider the individual needs of the developing countries when determining which countries share the same developmental problems or obstacles, in order to apply a generalized, but not single, GSP system that adequately responds to those needs. That is the meaning of paragraph 3(c) of the Enabling Clause and that is exactly what the EC GSP drug program does. It responds to the development, financial and trade needs of a group of developing countries that share a common problem, viz., drug production or trafficking.

***9. To the extent that the Drug Arrangements only respond to development needs caused by drug production and trafficking, while not responding to development needs resulting from other problems, such as poverty, low per capita GNP, malnutrition, illiteracy and natural disasters, how does this EC programme satisfy the "non-discriminatory" requirement in footnote 3 of the Enabling Clause? Please elaborate.***

The non-discriminatory requirement of the Decision of 1971 does not prevent or preclude donor countries from responding *both* to development needs caused by drug production and trafficking, *and* to development needs resulting from other problems, such as poverty, low per capita GNP, malnutrition, illiteracy and natural disasters. Therefore, it is a mistake to force donor countries to choose between which specific developmental or trade problems to address, to the exclusion of all other problems. Yet, India appears to be suggesting that the EC needs to choose between addressing either drug production and trafficking *or* child malnutrition. India's suggested response is to either treat all problems and challenges faced by developing countries through one single, rigid GSP system, as if all problems were the same, or to not address the specific problems at all. This approach ignores the possibility that, pursuant to the Enabling Clause, a donor country can establish a GSP scheme that would provide additional preferences to developing countries that, according to objective criteria, faced, for instance, a grave child malnutrition problem.

The EC responds to the non-discriminatory requirement referred to in footnote 3 by according differential and more favourable treatment to developing countries that, objectively, face a specific development, financial and trade problem.

***General***

***10. Please indicate whether or not you consider that the Drug Arrangements need to be covered by a waiver. Please elaborate.***

A waiver would add legal certainty to the multilateral trading system by strengthening the legal basis of what all recognize as a vital trade program that is essential to the development of developing countries.

## QUESTIONS POSED BY INDIA TO THE THIRD PARTIES

***1. Do the third parties support the EC's contention that the Drug Arrangements are justified under Article XX(b) of the GATT?[1]***

Costa Rica is of the opinion that, given that Article XX(b) of GATT constitutes a general exception and is in the nature of an affirmative defense, it is appropriate only for the EC to assert it and to provide the reasons that, in its view, justify its invocation.

[1] This question was addressed by India to Bolivia, Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mauritius, Nicaragua, Pakistan, Panama, Paraguay, Peru, Sri Lanka, the United States and Venezuela.

**ANNEX C-5**

Replies of El Salvador, Guatemala, Honduras and Nicaragua
to Questions from the Panel after the First Panel Meeting

## PANEL'S QUESTIONS TO THE THIRD PARTIES

**To Guatemala, El Salvador, Honduras and Nicaragua**

***1.1 What, in your view, is the principle of shared responsibility, and what is the relevance of this principle in this case?***

**Definition of the principle of shared responsibility**[1]

Action against the world drug problem is a common and shared responsibility requiring an integrated and balanced approach in full conformity with the purposes and principles of the Charter of the United Nations and international law.

**Relevance of the principle of shared responsibility in this case**

The multinational dimension of drug trafficking is such that it does not lie within the power of any of the world's countries single-handedly to eliminate this threat.[2] In the fight against drugs, every State should have a task to accomplish that is commensurate with its own circumstances and capacities.

The special arrangements to combat drug production and trafficking (Drug Arrangements) are one of the means used by the EC to address this global task of fighting drug production and trafficking, by providing beneficiary countries *inter alia* with opportunities to conduct lawful activities to replace those related to the narcotics trade.

[1] Political Declaration, Special Session of the General Assembly of the United Nations, 1998.

[2] Paragraph 1 of the first written submission by El Salvador, Guatemala, Honduras and Nicaragua: "The drug problem is a multilateral issue that calls for constructive solutions on the part of countries affected by drug production and trafficking, as well as destination countries. Ultimately, the effort must be made by both developed and developing countries."

**ANNEX C-6**

Replies of Panama to Questions from the Panel and from India
after the First Panel Meeting

**PANEL'S QUESTIONS TO ALL THIRD PARTIES**

**To All Third Parties**

***Legal Function***

**1. Assuming that the Enabling Clause is not a waiver, is it an exception or an "autonomous" right? In either case, what are the differences in legal consequences of characterizing the Enabling Clause as an exception or an autonomous right? Are there legal consequences beyond allocation of the burden of proof?**

The Enabling Clause is an autonomous right and not an exception or a waiver. It is a Decision taken by Members on 28 November 1979 under the title "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries". Its title so specifies, and as a Decision taken by the GATT CONTRACTING PARTIES in 1994, it is included in paragraph 1(b)(iv) of the GATT 1994. If it were a waiver, it would be included under paragraph 1(b)(iii) of the GATT 1994, or it would appear on its own, like, for example, the exemption granted under paragraph 3 of the GATT 1994.

The fact that the Enabling Clause was created by a Decision as a separate and distinct statute for the purpose of providing "special and more favourable treatment" distinguishes it from the exception regimes which are conceived as derogations from the General Agreement itself that are permitted for other purposes than granting "special and more favourable treatment" to developing countries. It is this development dimension that gives the Enabling Clause its distinct and autonomous status. Exceptions can be invoked by any Member State regardless of its level of development, and they are normally used to protect or promote specific interests of the Member State invoking them. The Enabling Clause, on the other hand, establishes a separate and distinct statute whose purpose is to enable benefits to be granted to third parties, and those benefits can only be accorded to developing or least-developed countries. It is different from an exception in that it precludes the rights and obligations contained in the Agreement only when preferential treatment is given to third parties, taking account of the development dimension.

**2. How does one identify whether a legal provision confers an "autonomous right" or provides for an "affirmative defence"?**

The context of the question leads us to consider the question of why the Enabling Clause is an autonomous right. In response to that question, we conclude that the following conditions indicate that it is:

(a) It is and has been (since 1979) a right recognized by the CONTRACTING PARTIES (Tokyo Round involved in multilateral trade negotiations;

(b) it is recognized in paragraph 1 thereof that notwithstanding Article I of the GATT, favourable treatment may be accorded to third parties with a particular development status;

(c) among its basic provisions is the requirement that such treatment should be provided for particular purposes (paragraph 3).

A legal provision is identified as an autonomous right when it confers a permanent right on one or several parties without any mention of contingency on other provisions. Thus, the autonomy of a right exists where the exercise of a right deriving from a provision is regulated by the same provision. In the case of the Enabling Clause, the reason for its autonomy is to provide for "special and more favourable treatment" in response to a development dimension. If it were an "affirmative defence", it would be based on a whole set of rights and obligations which would be equal for all and would not be associated with any specific purposes or level of development.

**3. Assume that the Enabling Clause is a self-standing, autonomous right and that the Panel should look at the Enabling Clause itself to interpret its provisions. Could you indicate where in the Enabling Clause the Panel should find the context for the interpretation of the term "non-discriminatory"? Does this context provide sufficient contextual guidance for the interpretation of this term? Should the Panel also look outside the Enabling Clause for contextual guidance? If so, to which particular Agreements and provisions therein, and why these particular provisions, and not others?**

The meaning of "non discriminatory" can be found throughout the text of the Clause, but above all in paragraphs 1, 2 and 3. The context of "non-discrimination" should be found in the very reason for the Enabling Clause's existence. As a cooperation and development mechanism, it unquestionably constitutes a means of stimulating growth in the beneficiary countries by promoting their trade. This promotion does not need to take account of the provisions of Article I.1 of the GATT; in other words we are able, in our view, to exercise a right (the granting of certain benefits), with elements of discretionality that are distinct from those contained in Article I.1 of the GATT (MFN). The exercise of this discretion can only be judged on the basis of the object and raison d'être of the Clause itself. And indeed, this discretionality is confirmed by the final part of paragraph 1 with the words "without according such treatment to other contracting parties".

The use and meaning of the terms as they appear in the Enabling Clause must also be taken into account in determining the limits imposed by the Clause itself. The wording of the Enabling Clause does not reflect any doubt in establishing the appropriate distinctions and clarifications when it wishes to distinguish between the developed and developing parties and countries. The Enabling Clause uses the term "CONTRACTING PARTIES"[1] on several occasions to mean both the developed members and the developing members. The authors did not see any need to make the distinctions and clarifications in this case that it had made in other cases [2], so that what was meant was all members without distinction as to their level of development. It is possible, therefore, not to grant schemes accorded under the Clause to other contracting parties (not to all) whatever of their level of development.

The Panel must look for any meaning within the Clause itself – it is there that the meaning of "non-discriminatory" can be found. The meaning of "non-discriminatory" in respect of a scheme accorded under Article 2(a) of the Enabling Clause must be established by answering the following questions:

(d) Is the preference scheme granted under paragraph 2(a) of the Enabling Clause in fact consistent with the objectives and purposes of the Clause?

[1] Paragraphs 1, 2(c) , 4(a), 4(b) and 9 of the Enabling Clause

[2] "Developed contracting party or developed party": Paragraphs 2(a), 3(c), 5 and 7 of the Enabling Clause. On all of these occasions, the term is contrasted with terms such as "developing countries" (paragraphs 2(a) and 3(c) or "developing contracting parties" (paragraphs 5 and 7).

(e) Is the preference scheme granted under paragraph 2(a) of the Clause in fact consistent with the guidelines on differential and more favourable treatment in paragraph 3(c) of the Clause?

(f) Does the preference scheme in fact constitute a means granted for the purposes it is supposed to achieve?

The Enabling Clause in itself provides sufficient guidance as to how the term should be interpreted. With respect to the question as to whether the Panel should look outside the Enabling Clause for other guidance, we believe that Members may use all of the resources available to them as they deem necessary in the light of their experience and expertise. We think that the meaning can be found in the Clause itself to the extent that it introduces a concept that is separate and distinct from the General Agreement, as is the Most Favoured Nation Principle, and any help that could be derived from the different Agreements (including the GATT) would be limited and illustrative, since they are governed by Article 1 of the GATT and do not invalidate it as does the Enabling Clause. If we were to proceed otherwise, we would be undermining the autonomy of a right that could literally be jeopardized if we tried to relate it directly to the general context of the GATT provisions.

**4. Does the context of the term "non-discriminatory" in footnote 3 of the Enabling Clause include Articles I:1, III:4, X, XIII, XVII and XX of GATT 1994, and Article XVII of GATS? Why or why not?**

The context of the term "non discriminatory" in footnote 3 of the Enabling Clause does not include Article I of the GATT. Its status as a separate and distinct statute with a specific purpose precludes the use of the principles of Article I to interpret the way in which "special and differential treatment" must be granted. The Enabling Clause would lack coherence if it were subsumed, through interpretative context, under the same provision from which it is expressly excluded.

Footnote 3 makes it clear that differentiated and more favourable treatment schemes under paragraph 2 (a) of the Clause must be generalized (to several), but does not imply that it must be universalized to all). If footnote 3 implied universality of the benefits granted by the inclusion in its interpretative context of the concepts set forth in Article III.4, X, XIII, XVII and XX of the GATT 1994, we would be depriving the Clause of its "legal autonomy" and in fact applying it as if it were an exception to the General Agreement. Reference to the different meanings of the term "non-discrimination" may be a good illustrative exercise, but cannot and should not turn into an interpretation which results in depriving it of its status as a statute which is separate and distinct from the Clause. To the extent that we apply the general principles of the GATT within the non-discrimination obligation (beyond simply trying to understand the differences with the Enabling Clause), we will be losing the autonomous right that was there from the start.

Our delegation has given much attention to Article XVII of the GATS. We do not consider that provisions of the Services agreement such as Article XVII which concern conditions of competitions between services suppliers should be transposed or used to judge incentive schemes on the basis of special and more favourable treatment for the developing countries. The equality of opportunities to compete is an element alien to the motivation behind the granting of incentive schemes on the basis of special and more favourable treatment. Our understanding is that the Communities mentioned this Article in order to "illustrate" the point that formerly different treatment is not necessarily discriminatory[3] India seems to concur in this respect.[4]. Their dispute currently before the panel does not involve the supply of services so that in our view, any interpretation of Article XVII of the GATS should be confined to the illustrative purposes for which the parties used

[3] … written submission of the European Communities, paragraph 74 and 75.
[4] Statement of India before the panel of 14 May 2003, paragraph 19.

and accepted them, and not to create precedence for future interpretations of Article XVII of the GATS.

**5. Please give your views on the following questions relating to the meaning of the Enabling Clause, based upon paragraph 9 of Paraguay's Oral Statement. Is it correct to say that under the Enabling Clause developed countries are not obliged to give tariff preferences? Is it also correct that any preferences granted are only in respect of products of the developed country's own choice and only to developing countries of its choice? Are developed countries free to graduate beneficiary developing countries from their GSP schemes?**

The purpose of the Enabling Clause is to encourage the granting of preferences under a system of differential and more favourable treatment for the developing countries. The text of the Enabling Clause reflects the unilateral and non-mandatory nature of the "differential and more favourable treatment" by using the clear terms "*may accord*". These concessions are clearly made outside (through a separate and distinct statute) the obligations contained in the General Agreement, where the concessions were granted under a different system necessarily involving negotiation, in which reciprocal concessions and case by case examination would play a relevant role. This interpretation is reaffirmed by footnote 2 of the Clause which states that any measures involving differential and more favourable treatment other than those stipulated in the Enabling Clause should be considered on a different basis from those covered by the Clause.

It is correct that a country that unilaterally grants certain preferences in exercise of its discretionary rights under the Enabling Clause chooses the products for which they are granted. Who, otherwise, would have the discretion to take the final decision on what product should be included or excluded from a particular scheme? The modification of tariffs continued to be the sovereign right of Members, so that only the Member granting the tariff benefit can decide whether or not to include in its legislation and give it a force of law. The exercise of this sovereign authority can be the subject of consultation as to the consistency of the measures taken with that Member's international obligations. Since the said member can be held responsible for its actions as demonstrated by the appearance of the European Communities before this panel, there is no doubt in our minds that it is the granting Member that must make that choice.

Paragraph 3(c) imposes on developed countries the obligation to ensure that any differential and more favourable treatment granted under the Clause is "designed and, if necessary, modified, to respond positively to the development, financial and trade needs of the developing countries." This obligation cannot be properly fulfilled if the country granting the benefits is not given a certain amount of flexibility to draw up preference schemes that respond effectively to the "generalized" needs (of some) instead of the universal needs (of all). The generalized (to some) nature provided for in paragraph 2(a) requires that the countries granting such benefits should create a reference framework or process on the basis of which the benefits will be accorded.

Graduation is not an issue that Panama has argued during these proceedings and it does not fall within the terms of reference of the panel for this dispute. Consequently, we do not wish to discuss this particular issue.

**6. Developing countries often have different development needs. Take, for example, Indonesia, the Philippines, Morocco, Brazil and Paraguay, each having different development needs. If we agree with the argument of the Andean Community that it is possible to select some beneficiary countries according to certain criteria (paragraph 6 of the Joint Statement of the Andean Community), would it not be a logical consequence of this argument that any developed country could establish a special GSP tariff preference scheme for each individual developing country in responding to that developing country's own development needs? Is this a proper reading of paragraph 3(c) of the Enabling Clause? Why or why not? If not, where do you draw the line in term of a proper interpretation of paragraph 3(c)?**

Paragraph 3 (c) does not speak of granting a preference system to one developing country only; the complete text of the Clause speaks of a group of developing countries – it does not say all, nor does it suggest only one. Development needs can unquestionably be different among the developing countries as the question states. Clearly, the system of preferences (drugs) in question responds to the development needs of developing countries suffering from the adverse influence of a common phenomenon, which is the vast production and/or trafficking of drugs, and/or money laundering.

**7. Are the developed countries free to "graduate" beneficiary developing countries from a GSP scheme? If so, under which paragraph of the Enabling Clause? Please elaborate.**

Graduation is not an issue that has been argued by Panama during these proceedings, and it does not fall within the panel's terms of reference with respect to this dispute. Consequently, we do not wish to discuss this particular issue.

**8. Does the word "and" in paragraph 3(c) of the Enabling Clause mean "or"? In other words, does the word "and" mean that "development, financial and trade needs" must be considered in a comprehensive manner or may they be considered separately?**

Drugs represent a phenomenon which negatively affects development potential in its totality. It causes economic distortion that has nothing to do with market dynamics. It generates additional public health needs, crime and the disintegration of families. The economic power generated by drugs can go as far as infiltrating, corrupting and rendering useless our institutions and the political system. The combat against this phenomenon calls for resources which could otherwise be used for development. It seems to … the phrase "development, financial and trade needs." should be viewed comprehensively, since any effort to improve one of these elements would, one way or another, help the others.

**9. Paragraph 3(c) of the Enabling Clause refers to "developed contracting parties" and "developing countries" in the plural form. Given the common understanding that developed countries may decide individually whether or not they wish to provide GSP, is it also possible to interpret "developing countries" under paragraph 3(c) as meaning *individual* developing countries?**

At no time has this delegation considered that one single developing country could benefit from the treatment; rather, the treatment would be granted to a group of developing countries which, in turn, does not mean that it is granted to all developing countries.

**10. To the extent that the Drug Arrangements only respond to development needs caused by drug production and trafficking, while not responding to development needs resulting from other problems, such as poverty, low *per capita* GNP, malnutrition, illiteracy and natural disasters, how does this EC programme satisfy the "non-discriminatory" requirement in footnote 3 of the Enabling Clause? Please elaborate.**

The GSP-drugs scheme was introduce in response to a phenomenon which has repercussions on all aspects of development needs of the countries affected. We consider that the ultimate aim of this scheme is to achieve a certain level of development, alleviate poverty and increase per capita income. As we mentioned in our statement of 15 May to the panel, we think that the GSP drugs scheme offers the economies and societies that are truly affected by the impact of drugs benefits that enable them to a certain extent to alleviate the dire situation in which they find themselves and, by offering them the possibility of expanding their exports, provides them with a means of improving their production capacity and achieving their development objectives. Although the needs of the developing countries are similar, the causes for these needs are different and can require different

approaches (without singling out any country). The GSP drugs scheme addresses the needs of countries that are severely affected by the phenomenon. As with the scheme for the least developed countries, beneficiaries must be elected on the basis of certain criteria or parameters. This does not mean that the development needs of the other developing countries do not exist, but that the approach and the beneficiaries may be different. The GSP drugs scheme of European Communities has enabled new countries to join as beneficiaries at various different stages. This clearly means that the scheme is not singular or closed. Thus, there is one contradiction with the term "non-discrimination" in footnote 3 of the Clause.

**11. Please indicate whether or not you consider that the Drug Arrangements need to be covered by a waiver. Please elaborate.**

We do not think that the GSP drugs scheme should be covered by a "waiver". Firstly, we repeat what we said in the first paragraph of our answer to question 1 above. Moreover, the difference with a "waiver" is clearly stated in footnote 2 of the Clause where it refers to "differential and more favourable treatment" schemes different from those covered by the Clause. The schemes that are different from those covered by the Clause may be considered consistent with the provisions of the General Agreement on collective action. Since the GSP drug scheme is based on the exercise of an autonomous right, its implementation and interpretation must come within the framework of the Enabling Clause, and hence not Article XXV (5) of the GATT.

## QUESTIONS POSED BY INDIA TO THIRD PARTIES

**To all third parties**

**1. Do the third parties support the EC's contention that the Drug Arrangements are justified under Article XX(b) of the GATT?**

*(This question is addressed to Bolivia, Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mauritius, Nicaragua, Pakistan, Panama, Paraguay, Peru, Sri Lanka, the United States and Venezuela)*

Without wishing to take position on whether the GSP drugs arrangements are justified under Article XX(b) of the GATT, Panama would like to note that for the moment it has not challenged the invocation of that article by the European Communities in this specific case. Moreover, the invocation of Article XX (b) of the GATT is a right of all Members which, in our view, should be considered case by case as an affirmative defence and not as an autonomous right under the Enabling Clause. Nothing precludes a scheme from being a measure designed to address the development needs of certain countries severely affected by the drugs problem on the one hand, while at the same time being a measure intended to safeguard public health. As we stated earlier, each case should be judged on its merits and on the basis of its legal status. Nor is there anything to prevent different lines of a defence being followed in the same case concerning policies with different objectives.

**ANNEX C-7**

Replies of Paraguay to Questions from the Panel and from India
after the First Panel Meeting

**To All Third Parties**

*Legal Function*

*1. Assuming that the Enabling Clause is not a waiver, is it an exception or an "autonomous" right? In either case, what are the differences in legal consequences of characterizing the Enabling Clause as an exception or an autonomous right? Are there legal consequences beyond allocation of the burden of proof?*

Reply

Paraguay is not aware of a commonly accepted definition of "autonomous right". A "conditional right" is "a right that depends on an uncertain event; a right that may or may not exist".[1] Thus an "autonomous right" could be understood to be a right that does not depend on an uncertain event for its existence but solely on the will of the right holder. An autonomous right, like all other rights, may however be exercised only consistently with the law. In the present context, the developed countries have the right to deviate from certain aspects of Article I of the GATT *if* they decide to accord GSP preferences, but the exercise of that right is subject to disciplines.

The question seems to imply that "autonomous right" and "exception" are necessarily mutually exclusive. Paraguay is of the view that they are not necessarily mutually exclusive, and situations must be analyzed on a case-to-case basis. For example, based on the above definition of "autonomous right", even assuming that the right to take measures under Article XX of the GATT, and to form customs unions or free trade areas under Article XXIV of the GATT are autonomous rights, they are also exceptions to the basic rules of the GATT. Again, the exercise of the right is subject to applicable disciplines.

The 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:1of the GATT. India's claim in this proceeding is based on Article I:1 of the GATT and not on paragraph 1 or 2(a) of the Enabling Clause. The latter provisions are therefore not a material element of the claims that India has submitted to this Panel.

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 that the Drug Arrangements are in fact covered by that Clause regardless of whether the Enabling Clause is an autonomous right or an exception or both.

To summarize: The Enabling Clause is, by definition, an exception to certain aspects of Article I:1 of the GATT. Even assuming that it is also an autonomous right, the issue of burden of proof does not necessarily flow from its characterization as an exception or an autonomous right.

[1] *Black's Law Dictionary*, 7th ed., B.A. Garner (ed.) (West Group, 1999), p. 1323.

Rather, it flows from the fact that the Enabling Clause is not a material element of India's claim of violation of Article I:1 of the GATT, while it is a material element of the EC's defence.

*2. How does one identify whether a legal provision confers an "autonomous right" or provides for an "affirmative defence"?*

Reply

This reply is based on Paraguay's understanding of "autonomous right", as set forth in the answers to question 1 addressed by the Panel to the third parties.

"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."[2]

As noted above, Paraguay is of the view that an "autonomous right" could also be an "affirmative defence". For example, even assuming that the right to take measures under Article XX of the GATT could be deemed as an "autonomous right", at the same time, the exercise of that right could be an "affirmative defence" in a dispute concerning other provisions of the GATT. In the same manner, even assuming that the right to form customs unions or free trade areas under Article XXIV of the GATT could be deemed an "autonomous right", in the same manner, the exercise of that right could be an "affirmative defence" in a dispute concerning other provisions of the GATT.

Paraguay believes that a case-to-case assessment is necessary in order to determine whether a particular provision is an "autonomous right", an "affirmative defence", or both.

*Non-discriminatory*

*3. Assume that the Enabling Clause is a self-standing, autonomous right and that the Panel should look at the Enabling Clause itself to interpret its provisions. Could you indicate where in the Enabling Clause the Panel should find the context for the interpretation of the term "non-discriminatory"? Does this context provide sufficient contextual guidance for the interpretation of this term? Should the Panel also look outside the Enabling Clause for contextual guidance? If so, to which particular Agreements and provisions therein, and why these particular provisions, and not others?*

Reply

Within the Enabling Clause itself, the following provide context to the term "non-discriminatory":

- Paragraph 1 of the Enabling Clause refers to Article I of the GATT and indicates what is permitted notwithstanding that article. Article I:1 of the GATT provides that "… any … advantage, … granted by any [Member] to any product originating in … any other country shall be accorded immediately and unconditionally to the like product originating in … the territories of other [Members]". Thus, notwithstanding the MFN rights of all Members under Article I:1 of the GATT, the Enabling Clause permits a developed country Member not to accord MFN treatment to like products originating in other developed country Members in respect of preferential tariff treatment accorded to products originating in developing country Members *in accordance with the GSP*. This is all that paragraph 1 permits. There is nothing in paragraph 1 which could be construed as a waiver by developing country Members of

[2] *Ibid*, p. 584.

their MFN rights in respect of any advantage granted by any other Member to any product originating in any other country.[3]

Stated in a different manner, it is necessary that each developed country Member be permitted not to accord MFN treatment to like products originating in other developed country Members to enable that developed country Member to accord preferential tariff treatment to products originating in developing countries in accordance with the GSP. For this purpose, it is not necessary to permit that developed country Member not to accord MFN treatment to like products originating in developing countries.

Thus, the very first paragraph of the Enabling Clause reaffirms the MFN rights of developing country Members under Article I:1 of the GATT. In this context, "non-discriminatory" means immediate and unconditional MFN treatment between like products of developing countries.

The Enabling Clause was adopted for the benefit of developing countries. Aside from the absence of clear language indicating that developing countries waived their MFN rights under Article I:1, an interpretation to the effect that paragraph 2(a) of the Enabling Clause curtails the benefits accruing to developing countries Article I:1 runs counter to the very purpose of that paragraph, which is to create additional benefits for the developing countries in the legal framework of the GATT.

- Paragraph 2(a) refers to "preferential tariff treatment accorded … to *products* originating in developing countries …" The preferential treatment is in respect of tariffs, and the object of the treatment is "products". "Like products" will always be *like products* regardless of their origin. Unless the Enabling Clause expressly so provides (which it does not) there can be no valid basis for differentiation in treatment between like products for the purpose of the imposition of tariffs. In all GATT provisions and in GATT and WTO jurisprudence the term "discriminatory" has been used to describe the denial of equal competitive opportunities to *like* products originating in different countries. "Non-discriminatory" thus refers to treatment of *like* products, and not to treatment of Members, as such.

- "Discriminatory tariff" is defined as "a tariff containing duties that are applied unequally to different countries or manufacturers."[4] A "non-discriminatory tariff" in the context of the Enabling Clause therefore is a tariff containing duties that are applied equally to different developing countries.

- 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 _____"[5]. Thus, in this instance, the phrase "the developing countries" means "all those described as developing countries". Preferential tariff treatment to products originating in some developing

[3] Subject to the exception in favour of least developed countries pursuant to paragraph 2 (d) of the Enabling Clause.

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

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

country beneficiaries to the exclusion of like products originating in other developing country beneficiaries is not beneficial to all developing countries.[6]

- The equally authentic Spanish and English texts likewise use the phrase "of *the*" in their title, 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".

- If "non-discriminatory" were to have the "negative meaning" attributed to it by the EC, paragraph 2(d) would be redundant as there is a clear distinction between least developed countries and other developing countries.

Footnote 3 to paragraph 2(a) refers to the GSP as described in the 1971 Decision. Paragraph (a) of the 1971 Decision refers to "the preferential tariff treatment referred to in the "Preamble to this Decision …" The relevant provisions of the Preamble provide:

> *"Recalling* that at the Second UNCTAD, unanimous agreement was reached in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries;
>
> *Considering* that mutually acceptable arrangements have been drawn up in the UNCTAD concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries…"

The preferential tariff treatment referred to in paragraph (a) of the 1971 Decision and its Preamble must therefore be construed in relation to the "mutually acceptable arrangements [that] have been drawn up in the UNCTAD concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries".

The GSP had its beginnings at the First Conference of the UNCTAD in 1964, which resolved:

> "**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 to 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 <u>developing countries as a whole</u> 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

[6] 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".

equivalent advantages to the countries concerned come into operation."[7] (emphasis added)

As early as UNCTAD I therefore, the following concepts were affirmed or endorsed:

- International trade should be conducted to mutual advantage on the basis of the MFN principle.

- As an exception to the MFN principle, new preferential concessions, both tariff and non-tariff, should be made [by developed countries] to developing countries as a whole - and such preferences should not be extended to developed countries.

- Special preferences then enjoyed by certain developing countries in certain developed countries should be regarded as transitional and subject to progressive reduction. It was thus the intention that the GSP, the benefits of which will be made available to developing countries, would replace the special preferences then enjoyed by certain developing countries in certain developed countries.

At UNCTAD II held in New Delhi in 1968, the foregoing resolution adopted in UNCTAD I was confirmed by the adoption of Resolution 21 (II) which 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 …

1. *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)

To give effect to the resolution, a specialized UNCTAD Trade and Development Board was established. The "mutually acceptable arrangements" referred to in paragraph (a) in relation to the Preamble of the 1971 Decision are contained in the Agreed Conclusions of the Special Committee on Preferences adopted at the Fourth Special Session of the Trade and Development Board. The Agreed Conclusions state that "there is agreement with the objective that in principle all developing countries should participate as beneficiaries from the outset."

In the statement made by India on behalf of the Group of 77 incorporated as Annex I to the Agreed Conclusions, the Group of 77 stressed that no developing country member of the Group "should be excluded from the generalized system of preferences at the outset or during the period of the system". The Group of 77 on whose behalf the statement was made includes all the third parties in this dispute that are beneficiaries under the Drug Arrangements.

[7] Principle 8 of Recommendation A:I:1 in Final Act of the First United Nations Conference on Trade and Development (Geneva:UNCTAD, Doc E/CONF.46/141, 1964), Vol 1, at 20, cited in Lorand Bartels, "The WTO Enabling Clause and Positive Conditionality in the European Community's GSP program", *Journal of International and Economic Law*, Vol. 6, No.2 (2003), p. 507.

Part IV 1. of the Agreed Conclusions on "Beneficiaries" provides:

> "1. The Special Committee noted the individual submissions of the preference-giving countries on this subject and the joint position of the countries members of the Organisation for Economic Cooperation and Development as contained in paragraph 13 of the introduction to the substantive documentation containing the preliminary submissions of the developed countries (TD/B/AC.5/24), namely: 'As for beneficiaries, donor countries would in general base themselves on the principle of self-election. With regard to this principle, reference should be made to the relevant paragraphs in document TD/56 i.e., section A in Part I."

Section A, Part I of document TD/56, which lays down the position of preference-giving countries, including the then Member States of the EC, provides:

> "A. Beneficiary countries
>
> **Special tariff treatment should be given to the exports of any country, territory or area claiming developing status. This formula would get over the difficulty which would otherwise arise of reaching international agreement on objective criteria to determine relative stages of development.**" (emphasis added)

In light of the foregoing, it is therefore clear that the "generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries" referred to in the Preamble to the 1971 Decision contemplated the participation of all developing countries as beneficiaries of the GSP. Furthermore, and of particular relevance in this dispute, the GSP was intended to replace special preferences then enjoyed by certain developing countries in certain developed countries, which were then regarded as "transitional and subject to progressive reduction".

The phrases

- "new preferential concessions, both tariff and non-tariff, should be made to developing countries **as a whole**",
- "a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences **beneficial to the developing countries** in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of **these countries**",
- "with a view to extending to such countries and territories **generally** the preferential tariff treatment referred to in the Preamble to this Decision, without according such treatment to like products of other [Members]",
- "there is agreement with the objective that in principle **all developing countries** should participate as beneficiaries from the outset",
- "no developing country … should be excluded from the generalized system of preferences at the outset", and
- "special tariff treatment should be given to the exports of any country, territory or area claiming developing status"

all indicate that, as agreed in the UNCTAD, the benefits under the GSP were intended to apply to **all** developing countries, and not just to **some** developing countries. Furthermore, in light of the resolution adopted in UNCTAD I, the GSP was intended precisely to replace "special preferences [then] enjoyed by certain developing countries in certain developed countries". The 1971 Decision refers to the GSP as adopted at the UNCTAD. The Enabling Clause defines the GSP as the GSP described in the 1971 Decision, and hence to the GSP as it was adopted at the UNCTAD.

Various subsequent UNCTAD documents confirm this agreement. Among these is the Report by the UNCTAD Secretariat on the "Review and evaluation of the generalized system of preferences" dated 9 January 1979[8]. The Report states, among others:

> "10. Conference resolution 21 (II) called for the establishment of a generalized, non-discriminatory and non-reciprocal system of preferences in favour of exports from developing countries to developed countries**. Generalized preferences imply that preferences would be granted** by all developed countries **to all developing countries** …
>
> 11. **Non-discrimination implies that the same preferences were to be granted to all developing countries**. This concept presented great difficulty from the start, since there was no agreed objective criteria for defining or classifying countries on the basis of relative stages of economic development. The principle of self-election appeared to be the only remaining possibility – i.e., preferences would be granted to any country or territory claiming developing status; however, individual preference-giving countries might decline to accord such preferences on grounds which they would hold compelling.[9] An additional proviso was that such *ab initio* exclusion of a particular country would not be based on competitive considerations. As a result each preference-giving country has its own list of beneficiaries and there are thus certain differences among these lists." (emphasis and footnote added)

In the GATT itself, the Technical Note of the Secretariat[10] issued in the process of the adoption of the GSP by the GATT provides:

> "As long ago as 1963 the CONTRACTING PARTIES provided for the study of (a) 'the granting of preferences on selected products by industrialized countries to less-developed countries **as a whole**'". (emphasis added)

Taking all of the foregoing into consideration, the following were the consequences of the adoption of the 1971 Decision:

- Each developed country Member was authorized to grant preferential tariff treatment to products originating in developing countries in accordance with the GSP without according the same treatment to like products originating in other developed country Members.

- Correspondingly, each developed country Member waived its MFN rights in respect of the preferential tariff treatment granted by other developed country Members to products originating in developing countries in accordance with the GSP.

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[8] TD/232.

[9] This is not an issue in this dispute as India is a beneficiary under the general arrangements of the EC GSP scheme and is therefore not subject to an *ab initio* exclusion.

[10] Preferential Tariff treatment for Developing Countries- Technical Note by the Secretariat, Spec (70) 6 dated 5 February 1970.

- Each developing country Member retained its MFN rights in respect of any advantage granted by any other Member to any product originating the territory of any other country.[11]

On all matters relating to the GSP that are relevant in this dispute, the Enabling Clause did not change the 1971 Decision. On the contrary, the Enabling Clause expressly refers to the GSP "as described" in the 1971 Decision.

Thus, with the sole exceptions of (i) "special treatment of the least developed countries among the developing countries in the context of any general or specific measures in favour of developing countries" referred to in paragraph 2(d) of the Enabling Clause and (ii) the limited duration of the 1971 Decision as compared to the indefinite duration of the Enabling Clause, the GSP authorized under the Enabling Clause and the GSP authorized under the 1971 Decision are the same in all material respects.

The only other difference between the 1971 Decision and the Enabling Clause is that the latter deals with the situations referred to in paragraphs 2(b) and 2(c), which are not dealt with in the former. Paragraphs 2(b) and 2 (c) are not an issue on this dispute. Paragraph 2(d) provides further contextual guidance to paragraph 2(a).

*4. Does the context of the term "non-discriminatory" in footnote 3 of the Enabling Clause include Articles I:1, III:4, X, XIII, XVII and XX of GATT 1994, and Article XVII of GATS? Why or why not?*

Reply

Paraguay is of the view that the context of the term "non-discriminatory" in footnote 3 of the Enabling Clause includes Article I:1 only, and not Articles III:4, X, XIII, XVII and XX of the GATT 1994 and Article XVII of the GATS.

Paragraph 1 of the Enabling Clause permits developed country Members to accord differential and more favourable treatment to developing countries under any of the situations specified in paragraph 2, "notwithstanding Article I of the [GATT]". There are no references to other articles of the GATT or the GATS.

Footnote 3 is a footnote to paragraph 2(a) which refers to "preferential tariff treatment accorded by developed [country Members] to products originating in developing countries in accordance with the [GSP]". More specifically, footnote 3 is a footnote to "[GSP]", referring to it as that which is "described in [1971 Decision] … relating to the establishment of 'generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries." Preferential tariff treatment accorded by developed country Members to products originating in developing countries without according the same treatment to products originating in other Members is otherwise inconsistent with Article I:1 of the GATT, and not with any other article of the GATT or the GATS.

[11] On the assumption that the *ab initio* exclusion of a particular country is authorized under the GSP, in respect of any particular GSP regime, MFN rights are retained by all developing countries which have not been excluded as beneficiaries.

*Paragraph 3(c)*

*5. Please give your views on the following questions relating to the meaning of the Enabling Clause, based upon paragraph 9 of Paraguay's Oral Statement. Is it correct to say that under the Enabling Clause developed countries are not obliged to give tariff preferences? Is it also correct that any preferences granted are only in respect of products of the developed country's own choice and only to developing countries of its choice? Are developed countries free to graduate beneficiary developing countries from their GSP schemes?*

Reply

Paraguay reasserts what was stated in its Oral Statement, including paragraph 9 thereof.

By "graduate", Paraguay understands the question to refer to the total exclusion of beneficiary developing countries from a GSP scheme.

In responding to the Panel's question, Paraguay notes that "graduation" is not at issue in this dispute as India is a beneficiary under the EC's general arrangements in the EC GSP regime.

In Paraguay's view, there is nothing in the Enabling Clause which allows any preference-giving country to "graduate" any developing country as such. Again, the question might be related to the definition of "developing country". As earlier stated, the principle of "self-election" was earlier recognized – meaning that a "developing country" is one "claiming developing status".[12] Thus, for as long as a developing country remains a beneficiary under a GSP scheme, it cannot be "graduated" from that scheme. As to whether or not a preference-giving country may deny the claim of a country that it has developing status, the position of preference countries is indicated in TD/56[13] which provides, in relevant part, as follows:

> "It is expected that no country will claim developing status unless there are *bona fide* grounds for it to do so; and that such claim would be relinquished if those grounds ceased to exist".

It would thus seem that developed countries sought to impose a moral obligation ("expected") on each country not to claim developing status unless there are bona fide grounds for it to do so; that once those grounds cease to exist, that country has the moral obligation to relinquish that status. However, in Paraguay's view, a preference-giving country does not have a legal right (as distinguished from a moral right arising from the moral obligation of a country claiming developing status) to exclude any country claiming developing status for as long as that country maintains that claim.

*6. Developing countries often have different development needs. Take, for example, Indonesia, the Philippines, Morocco, Brazil and Paraguay, each having different development needs. If we agree with the argument of the Andean Community that it is possible to select some beneficiary countries according to certain criteria (paragraph 6 of the Joint Statement of the Andean Community), would it not be a logical consequence of this argument that any developed country could establish a special GSP tariff preference scheme for each individual developing country in responding to that developing country's own development needs? Is this a proper reading of paragraph 3(c) of the Enabling Clause? Why or why not? If not, where do you draw the line in term of a proper interpretation of paragraph 3(c)?*

[12] See Report of the Special Group of the Organization for Economic Co-operation and Development (OECD) on Trade with Developing Countries, UNCTAD document TD/56, p.5 (emphasis supplied).

[13] Ibid.

Reply

Paraguay is of the view that if the argument of the Andean Community - that it is possible to select some beneficiary countries according to objective criteria - were to be validated, then the logical consequence would be that any developed country could establish a special GSP tariff preference scheme for each individual developing country in responding to that developing country's specific development needs. It would not be difficult to identify criteria which apply exclusively or predominantly to a group of pre-selected beneficiaries, even, as in this case, on a *post facto* basis. This is not a proper reading of paragraph 3(c).

Paragraph 3(c) does not authorize discrimination between beneficiaries. It mandates a positive response to needs. A preference-giving country may respond to the specific needs of a specific beneficiary or group of beneficiaries. But once preferential tariff treatment is granted to products originating in those beneficiaries, that treatment must be granted immediately and unconditionally to like products originating in other developing countries.

*7. Are the developed countries free to "graduate" beneficiary developing countries from a GSP scheme? If so, under which paragraph of the Enabling Clause? Please elaborate.*

Reply

By "graduate", Paraguay understands the question to refer to the total exclusion of beneficiary developing countries from a GSP scheme.

In responding to the Panel's question, Paraguay notes that "graduation" is not at issue in this dispute as India is a beneficiary under the EC's general arrangements in the EC GSP regime.

In Paraguay's view, there is nothing in the Enabling Clause which allows any preference-giving country to "graduate" any developing country as such. Again, the question might be related to the definition of "developing country". As earlier stated, the principle of "self-election" was earlier recognized – meaning that a "developing country" is one "claiming developing status".[14] Thus, for as long as a developing country remains a beneficiary under a GSP scheme, it cannot be "graduated" from that scheme. As to whether or not a preference-giving country may deny the claim of a country that it has developing status, the position of preference-giving countries is indicated in TD/56[15] which provides, in relevant part, as follows:

> "It is expected that no country will claim developing status unless there are *bona fide* grounds for it to do so; and that such claim would be relinquished if those grounds ceased to exist".

It would thus seem that developed countries sought to impose a moral obligation ("expected") on each country not to claim developing status unless there are *bona fide* grounds for it to do so; that once those grounds cease to exist, that country has the moral obligation to relinquish that status. However, in Paraguay's view, a preference-giving country does not have a legal right (as distinguished from a moral right arising from the moral obligation of a country claiming developing status) to exclude any country claiming developing status for as long as that country maintains that claim.

[14] See Report of the Special Group of the Organization for Economic Co-operation and Development (OECD) on Trade with Developing Countries, UNCTAD document TD/56, p.5 (emphasis supplied)

[15] Ibid.

*8. Does the word "and" in paragraph 3(c) of the Enabling Clause mean "or"? In other words, does the word "and" mean that "development, financial and trade needs" must be considered in a comprehensive manner or may they be considered separately?*

Reply

The ordinary meanings of the conjunctives "and" and "or" are different. The text of paragraph 3(c) uses "and". Therefore, in Paraguay's view, those needs must be considered in a comprehensive manner.

*9. Paragraph 3(c) of the Enabling Clause refers to "developed contracting parties" and "developing countries" in the plural form. Given the common understanding that developed countries may decide individually whether or not they wish to provide GSP, is it also possible to interpret "developing countries" under paragraph 3(c) as meaning individual developing countries?*

Reply

Paraguay is of the view that paragraph 3(c) does not authorize developed contracting parties to discriminate between like products originating in developing countries. It merely mandates that "any differential and more favourable treatment" … shall respond positively to the … needs of [the] developing countries".

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 d**eveloping countries therefore refers to the needs of **all** developing countries. The appropriate 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 _____"[16]. Thus, in this instance, as in the phrase "beneficial to the developing countries" in footnote 3 of the Enabling Clause, "the … needs of the developing countries" means the needs of all developing countries.

The introductory phrase of paragraph 3 of the Enabling Clause refers to "*any* differential and more favourable treatment". In the context of the GSP, such treatment is granted only by developed country Members. The obligation to respond positively to the needs of developing countries is thus imposed equally on each developed contracting party according differential and more favourable treatment.

The terms "developing countries" in paragraph 3(c) appear in the phrase "development, financial and trade needs of developing countries". The phrase "development, financial and trade needs of developing countries" are qualified in paragraph 5 of the Enabling Clause as follows: "… the developed countries do not expect developing countries … to make contributions which are inconsistent with their **individual** development, financial and trade needs". (emphasis added). The word "individual" in relation to "needs" does not appear in paragraph 3(c). This permits the conclusion that, when the drafters of the Enabling Clause wanted to refer to "individual … needs" of developing countries, they did so expressly. The fact that they did not refer to "individual" needs in paragraph 3(c) is thus a clear indication that they meant to refer to the collective needs of the developing countries as a whole.

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

Finally, there is nothing in the Enabling Clause, including paragraph 3 (c), which might reasonably be construed that developing countries waived their MFN rights under Article I. It has always been the intention that the benefits of any GSP scheme shall be extended without discrimination to like products originating in all developing countries.

*10. To the extent that the Drug Arrangements only respond to development needs caused by drug production and trafficking, while not responding to development needs resulting from other problems, such as poverty, low per capita GNP, malnutrition, illiteracy and natural disasters, how does this EC programme satisfy the "non-discriminatory" requirement in footnote 3 of the Enabling Clause? Please elaborate.*

Reply

Even assuming that the Drug Arrangements respond to development needs caused by drug production and trafficking, the Drug Arrangements do not satisfy the "non-discriminatory" requirement in footnote 3 of the Enabling Clause because the preferential tariffs granted therein are not accorded to all developing countries. The failure to satisfy the "non-discriminatory" requirement does not arise from its failure to respond to other development needs, including low per capita GNP, malnutrition, illiteracy and natural disasters. Paragraph 3(c) does not authorize developed country Members implementing GSP schemes to discriminate between like products originating in developing countries.

*General*

*11. Please indicate whether or not you consider that the Drug Arrangements need to be covered by a waiver. Please elaborate.*

Reply

The Drug Arrangements need to be covered by a waiver. The Drug Arrangements are inconsistent with Article I:1 of the GATT 1994 because the preferential tariffs granted therein are not granted immediately and unconditionally to like products originating in all other Members. The Drug Arrangements are likewise not justified under the Enabling Clause because the preferential tariffs granted to the twelve beneficiaries are not granted immediately and unconditionally to all other developing country Members.

**To Paraguay**

*1. Is it your understanding that the term "non-discriminatory" in footnote 3 of the Enabling Clause has the same meaning as the non-discrimination principle under Article I:1 of GATT 1994? Please justify your position.*

Reply

It is Paraguay's understanding that the term "non-discriminatory" in footnote 3 of the Enabling Clause has the same meaning as the non-discrimination principle under Article I:1 of the GATT 1994.[17] The GSP was never intended to grant developed countries the authority to treat like

[17] Subject to the qualification that "non-discriminatory" under footnote 3 of the Enabling Clause applies to like products originating in developing countries, and the non-discrimination principle under Article I:1 of the GATT 1994 applies to like products originating in all (other ) Members; and the further qualification that pursuant to paragraph 2 (d) developed country Members may provide special treatment to products originating in least-developed countries, but as between like products originating in least-developed countries, there could likewise be no discrimination.

products originating in developing countries differently in the context of the GSP. (Please see reply to question 3 addressed by the Panel to all third parties for the meaning of the term "non-discriminatory").

Under the 1971 Decision, only developed country Members effectively waived their MFN rights under Article I:1 of the GATT. Developing countries did not waive their MFN rights as between themselves. Such a waiver was not necessary in order to allow developed country Members to accord differential and more favourable treatment to products originating in developing countries. The GSP was established for the benefit of **the**, and therefore **all**, developing countries. In all respects material in this dispute, the Enabling Clause did not change the 1971 Decision as far as the GSP is concerned.

Thus, developing countries, as between themselves and in relation to developed country Members have never waived, and still maintain, their immediate and unconditional right to MFN treatment under Article I:1 of the GATT 1994.

**Question addressed by India**

*1. Do the third parties support the EC's contention that the Drug Arrangements are justified under Article XX(b) of the GATT?*

No, Paraguay does not support the EC's contention that the Drug Arrangements are justified under Article XX(b) of the GATT.

## ANNEX C-8

Replies of the United States to Questions from the Panel
and from India after the First Panel Meeting

## PANEL'S QUESTIONS TO THE THIRD PARTIES

***Legal Function***

**Q1. Assuming that the Enabling Clause is not a waiver, is it an exception or an "autonomous" right? In either case, what are the differences in legal consequences of characterizing the Enabling Clause as an exception or an autonomous right? Are there legal consequences beyond allocation of the burden of proof?**

2. The phrasing used in this question ("exception or an 'autonomous' right") and the next one ("'autonomous right' or ... 'affirmative defence'") could be read to suggest a dichotomy between "autonomous rights" on the one hand and affirmative defenses/exceptions on the other hand. As an initial matter, this dichotomy would appear to be too limited. The choice is not simply between whether the Enabling Clause is an "exception"/"affirmative defense" or an "autonomous right." Rather, as the United States noted in its written submission, the Enabling Clause is part of the overall balance of rights and obligations agreed to in the GATT 1994 and the WTO Agreement. For example, Members agreed to provide the treatment called for under Article I of the GATT 1994 at the same time that they agreed to permit the treatment provided under the Enabling Clause as part of the GATT 1994, notwithstanding Article I. Together these provisions are part of the overall balance of concessions under the WTO Agreement.

3. Furthermore, it is useful to distinguish between an "affirmative defense" and an "exception". As the Appellate Body explained in the *EC Hormones* case, simply describing a provision as an "exception" does not shift the burden of proof to the defending party;[1] a party to a dispute does not have the burden of proof unless it asserts the affirmative of the claim or defense.[2] The Enabling Clause is not merely an "affirmative defense" to the provisions of Article I:1 of the GATT 1947.[3] Rather, the Enabling Clause is a positive rule providing authorization to extend trade preferences to developing country Members under certain circumstances. Consequently, the analysis should be directed at the question of whether India has established that the measure in question does not meet the requirements of the Enabling Clause. If India fails to do so, its claims should be rejected.

**Q2. How does one identify whether a legal provision confers an "autonomous right" or provides for an "affirmative defence"?**

4. As noted in the US written submission, paragraph 1 of the GATT 1994 provides that the GATT 1994 shall consist not only of the provisions of the GATT 1947 (Paragraph 1(a)), but also the provisions of "other decisions of the CONTRACTING PARTIES to GATT 1947" (Paragraph 1(b)(iv)), of which the Enabling Clause is one.[4] The Enabling Clause thus is as much a part of the GATT 1994 as is the text of the GATT 1947. As stated above, the Enabling Clause is part of the overall balance of rights and obligations agreed to in the GATT 1994 and the WTO Agreement, and is not an "affirmative defense" to the provisions of Article I:1 of the GATT 1947. The Enabling Clause applies *"[n]othwithstanding* the provisions of Article I of the General Agreement."

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[1] Appellate Body Report, *EC Measures Concerning Meat and Meat Products* ("*EC Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 105.

[2] See Appellate Body Report, United States - Measures Affecting Imports of Woven Shirts and Blouses from India ("US Wool Shirts"), WT/DS33/AB/R, adopted 23 May 1997, p. 14.

[3] US Third Party Submission at paras. 4-9.

[4] US Third Party Submission at para. 5-7.

"Notwithstanding," by its ordinary dictionary definition, means "in spite of."[5] Thus, pursuant to the Enabling Clause, Members may "accord differential and more favorable treatment to developing countries, without according such treatment to other contracting parties," in spite of the obligation contained in Article I to extend MFN treatment unconditionally. This means, for example, that there is no need to determine if the measure in question is inconsistent with the general obligation contained in Article I:1 before applying the Enabling Clause.

***Non-discriminatory***

**Q3. Assume that the Enabling Clause is a self-standing, autonomous right and that the Panel should look at the Enabling Clause itself to interpret its provisions. Could you indicate where in the Enabling Clause the Panel should find the context for the interpretation of the term "non-discriminatory"? Does this context provide sufficient contextual guidance for the interpretation of this term? Should the Panel also look outside the Enabling Clause for contextual guidance? If so, to which particular Agreements and provisions therein, and why these particular provisions, and not others?**

5. The Panel should interpret the term "non-discriminatory" according to its ordinary meaning in its context, and in light of the object and purpose of the 1971 Decision as referred to in the Enabling Clause. With respect to the term's ordinary meaning, we note first the EC's demonstration, through references to various dictionary definitions, that the ordinary meaning of "non-discriminatory," especially when used in a legal context, allows differentiation among unequal situations.[6] To put that ordinary meaning in its proper context, the United States notes that the Enabling Clause does not use the term "non-discriminatory" itself; rather, it merely quotes (in footnote 3) the preamble of the 1971 Decision, which uses the term "non-discriminatory." Thus, the 1971 Decision provides the immediate context for interpretation of the term "non-discriminatory" in the Enabling Clause. The Enabling Clause does not provide any new requirement for "non-discriminatory" treatment. Rather, it permits treatment "described in" the 1971 Decision. In other words, the 1971 Decision provides a description of the type of treatment permitted under paragraph 2(a) of the Enabling Clause, and that description includes the concept that the treatment is to be provided "with a view to" extending "mutually acceptable" "generalized" "non-reciprocal" and "non-discriminatory" preferences.

6. Interpreting the term "non-discriminatory" so as to maintain the flexibility of donor countries to adapt GSP programs to differentiate among unequal situations is consistent with the object and purpose expressed in the 1971 Decision that GSP programs are "to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth" of developing countries. As explained in the US oral statement,[7] if differentiation among unequal situations were not allowed, any GSP program would have to be administered on a "lowest common denominator" basis. That is, a GSP program could be applied only to the extent it addressed needs that were identical among developing countries, and it could not be adapted with respect to particular needs of sub-sets of developing countries. Further, the 1971 Decision calls for a "mutually acceptable system" of preferences, and a Member has the right, *not* the obligation, to extend preferences. While a "one size fits all" obligation to grant any preference to all developing countries may be acceptable to India for purposes of this dispute, it is doubtful that it would be acceptable to other beneficiary countries or to GSP donor countries, or even to India in a different dispute.

7. The 1971 Decision provides another source of context as well. As the United States has already explained, use of the term "generalized" in the preamble of the 1971 Decision also supports an

[5] Webster's New World Dictionary 513 (2nd Concise ed. 1982).
[6] *See* EC First Submission at paras. 66-67.
[7] US Oral Statement at para. 13.

interpretation of "non-discriminatory" that allows differentiation among unequal situations; "generalized" must mean something different than "non-discriminatory."[8]

8. For these reasons, an interpretation of "non-discriminatory" that allows differentiation among unequal situations comports with the term's ordinary meaning in the context of the 1971 Decision and in light of the Decision's object and purpose.

9. Should the Panel find it necessary to go beyond the context of the 1971 Decision, the next source of context is the Enabling Clause itself. As the United States described in its oral statement, paragraphs 3(c) and 7 of the Enabling Clause also support an interpretation of "non-discriminatory" that allows differentiation among unequal situations.[9]

10. The United States notes that the 1971 Decision expired before the WTO Agreement was negotiated, and thus is not itself part of the GATT 1994. Consequently, other provisions of the WTO Agreement may provide, at best, limited context for interpreting the term "non-discriminatory" in the 1971 Decision. The drafters of the 1971 Decision and, subsequently, the Enabling Clause, chose not to define the term "non-discriminatory." Therefore, if the Panel does consider these other provisions, it should do so with caution, so as not to read into the Enabling Clause legal obligations not found there.[10] For further discussion of particular provisions, please see the US answer to Question 4 below.

**Q4. Does the context of the term "non-discriminatory" in footnote 3 of the Enabling Clause include Articles I:1, III:4, X, XIII, XVII and XX of GATT 1994, and Article XVII of GATS? Why or why not?**

11. The language of Articles I:1 and III:4 of the GATT 1994 differs from that in the Enabling Clause, most fundamentally in the absence in either Article I:1 or Article III:4 of the term "discrimination," and the absence in the Enabling Clause of the specific and detailed language in these articles which gave rise to the "conditions of competition" and "like product" analyses applied in the past by GATT and WTO panels. There is no basis to read the term "discrimination" into these provisions, and consequently no basis to use these provisions as context for understanding the term "non-discriminatory" in the 1971 Decision. For the same reason, as explained in the US oral statement, it would be incorrect to interpret "non-discriminatory" to mean "unconditionally," as that term is used in Article I:1 of GATT 1994.[11] The word "unconditionally" is not found in the text of the 1971 Decision or the Enabling Clause. Moreover, as described in the US answer to Question 1, the Enabling Clause excludes the application of Article I:1 altogether, including Article I:1's "unconditionally" requirement.

12. Likewise, it would be incorrect to treat the term "non-discriminatory" as involving a "like product" or "like services and service suppliers" analysis similar to that under GATT Articles I or III, or GATS Article XVII, since these provisions explicitly call for a comparison of treatment of "like" products or services and service suppliers, while the Enabling Clause does not.[12] Unlike these articles, the 1971 Decision simply uses the term "non-discriminatory," without linking that term to the treatment of products as such. Indeed, the Appellate Body has recognized that "discrimination" is not the same as Article III's "national treatment" test.[13] Whatever context these articles provide thus reinforces the point that the application of the "non-discriminatory" requirement is not the same as that under provisions which specifically direct an analysis based on comparisons of treatment of imported and "like" products or services and service suppliers.

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[8] US Oral Statement at para. 12 (footnote omitted).
[9] US Oral Statement at para. 12 (footnote omitted).
[10] *See* US Oral Statement at para. 14.
[11] US Oral Statement at para. 10.
[12] *See* US Oral Statement at para. 11.
[13] See Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*US – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, p. 23.

13. Similarly, Article X:3(a) of GATT 1994 does not use the term "discrimination," and by its terms directs a very specific analysis of whether laws, regulations, decisions and rulings have been administered in a uniform, impartial and reasonable manner. It thus provides little, if any, useful context for interpreting "non-discriminatory" as used in the 1971 Decision.

14. Article XIII of GATT 1994 refers to "non-discriminatory administration" in its title, and thus, to the extent the GATT 1994 provides context to the 1971 Decision, Article XIII would appear more relevant to an understanding of "non-discriminatory." The United States observes that Article XIII permits differentiation among countries in terms of the shares allocated to various countries and even in terms of who may receive an allocation. Article XIII also allows use of "special factors affecting trade" in making an allocation, so Article XIII clearly contemplates taking into account the individual situations of countries and differentiating on the basis of any "special factors." This is thus clearly not a "one size fits all" approach to "non-discriminatory," and serves to confirm that the meaning of "non-discriminatory" allows differentiation among unequal situations.[14]

15. Similarly, while the chapeau of Article XX of GATT 1994 does use the term "discrimination," it provides, at best, attenuated context for the term "non-discriminatory" as used in the 1971 Decision, for the reason explained in the US answer to Question 3. Further, the term "discrimination" is preceded by the qualifying terms "arbitrary and unjustifiable," whereas the 1971 Decision simply uses the term "non-discriminatory." Consequently, the chapeau of Article XX would at best provide limited context. And in that limited context, the reference to "arbitrary and unjustifiable discrimination *between countries where the same conditions prevail*" reinforces the notion that the ordinary meaning of "discrimination" allows differentiation among unequal situations.[15]

16. GATT 1994 Articles XVII and XX(i) both define "discrimination" in terms of other GATT provisions without specifying exactly what those provisions are ("the general principles of non-discriminatory treatment prescribed in this Agreement" and "the provisions of this Agreement relating to non-discrimination," respectively). By contrast, the 1971 Decision, and the quote from it included in footnote 3 of the Enabling Clause, simply use the term "non-discriminatory," and do not rely on other WTO provisions to define "non-discriminatory" for purposes of GSP programs.

***Paragraph 3(c)***

**Q5. Please give your views on the following questions relating to the meaning of the Enabling Clause, based upon paragraph 9 of Paraguay's Oral Statement. Is it correct to say that under the Enabling Clause developed countries are not obliged to give tariff preferences? Is it also correct that any preferences granted are only in respect of products of the developed country's own choice and only to developing countries of its choice? Are developed countries free to graduate beneficiary developing countries from their GSP schemes?**

17. Under paragraph 1 of the Enabling Clause, Members "*may* accord differential and more favorable treatment to developing countries" in the ways described in paragraph 2. Thus, developed countries are not obligated by the terms of the Enabling Clause to extend tariff preferences pursuant to a GSP scheme. The United States does not agree, however, that this means that a donor country has complete discretion in granting such preferences to products and developing countries. Rather, the Enabling Clause, through its reference to the 1971 Waiver, sets out certain parameters for any GSP scheme; namely, that GSP schemes must at least be provided with a view to being mutually acceptable, generalized, non-reciprocal, and non-discriminatory.[16]

[14] *See also* EC First Submission at paras. 78-79.
[15] *See also* EC First Submission at para. 77.
[16] *See* US Oral Statement at para. 9.

18. With respect to graduation, the United States notes that this is not an issue presented in this dispute; under the terms of reference for this dispute, there is therefore no reason for the Panel to reach this issue. However, there is nothing to indicate that a GSP scheme applied with a view to being "mutually acceptable," "generalized" and "non-discriminatory" would prevent "graduating" some developing countries as their situation changes. In fact, the Enabling Clause contemplates that a developed country may graduate beneficiary developing countries from its GSP scheme since, under paragraph 7, it is explicitly stated that developing countries "expect to participate more fully in the framework of rights and obligations under the General Agreement" as they develop. If graduation were not allowed, it would reflect a presumption that "developing" countries could never become "developed" countries, that their needs could never change, and that a developing country could never become competitive with respect to certain products. Such a presumption would run directly counter to the underlying principles of the Enabling Clause.

**Q6. Developing countries often have different development needs. Take, for example, Indonesia, the Philippines, Morocco, Brazil and Paraguay, each having different development needs. If we agree with the argument of the Andean Community that it is possible to select some beneficiary countries according to certain criteria (paragraph 6 of the Joint Statement of the Andean Community), would it not be a logical consequence of this argument that any developed country could establish a special GSP tariff preference scheme for each individual developing country in responding to that developing country's own development needs? Is this a proper reading of paragraph 3(c) of the Enabling Clause? Why or why not? If not, where do you draw the line in term of a proper interpretation of paragraph 3(c)?**

19. As mentioned in the US oral statement, paragraph 3(c) (as well as paragraph 7) of the Enabling Clause appears to contemplate explicitly that preferences extended pursuant to the Enabling Clause, including GSP schemes, need not be extended on a "one size fits all" basis, and that distinctions among developing countries based on their different development needs are specifically contemplated.[17] At the same time, GSP schemes must be "generalized." Thus, paragraph 3(c), read in the context of other provisions of the Enabling Clause, would not seem to either require or permit donor countries to design a tariff preference program for each individual country, but would allow "generalized" GSP schemes to contain features that are designed to respond positively to the different needs of different developing countries.

**Q7. Are the developed countries free to "graduate" beneficiary developing countries from a GSP scheme? If so, under which paragraph of the Enabling Clause? Please elaborate.**

20. Please see the second part of the US answer to Question 5.

**Q8. Does the word "and" in paragraph 3(c) of the Enabling Clause mean "or"? In other words, does the word "and" mean that "development, financial and trade needs" must be considered in a comprehensive manner or may they be considered separately?**

21. Paragraph 3(c) identifies categories of needs to which developed countries must "respond positively" through their GSP programs, but does not, contrary to India's suggestion, prevent developed countries from responding to a particular need simply because of the use of the term "and."[18] Indeed, such a requirement would seem inconsistent with the obligation developed countries have under paragraph 3(c) to "modify" their GSP programs to respond positively to the changing needs of developing countries, since a developing country's needs may change in one but not all three categories of need. It is not necessary to interpret "and" to mean "or" to arrive at this conclusion. While all factors must be considered, not all factors need to be dispositive of treatment in a specific case.

[17] US Oral Statement at para. 12.
[18] India Oral Statement at para. 14.

**Q9. Paragraph 3(c) of the Enabling Clause refers to "developed contracting parties" and "developing countries" in the plural form. Given the common understanding that developed countries may decide individually whether or not they wish to provide GSP, is it also possible to interpret "developing countries" under paragraph 3(c) as meaning *individual* developing countries?**

22. Yes. Certainly a developed country Member could, for example, modify its GSP scheme to respond to the changing needs of an individual developing country. The text of paragraph 3(c) is flexible enough that "developing countries" may be interpreted to refer to one or more developing countries, and thus allow developed countries to respond to the development needs of one or more developing countries without requiring all developing countries to have the exact same needs before the developed country could modify its GSP scheme.[19] Please see also the US answer to Question 6.

**Q10. To the extent that the Drug Arrangements only respond to development needs caused by drug production and trafficking, while not responding to development needs resulting from other problems, such as poverty, low *per capita* GNP, malnutrition, illiteracy and natural disasters, how does this EC programme satisfy the "non-discriminatory" requirement in footnote 3 of the Enabling Clause? Please elaborate.**

23. The United States is not taking a position on the EC program. However, the United States does not read the objective that preferences be "non-discriminatory" to refer to discrimination between "needs" but rather to refer to discrimination between Members. "Non-discriminatory" does not mean that it is "discriminatory" to respond to certain needs and not others. As explained in the US answer to Question 8, paragraph 3(c) does not prevent developed countries from responding to a particular need, even while recognizing that developing countries have many needs. Consequently, it cannot be "discriminatory" to respond to a particular need, otherwise paragraph 3(c) and the "non-discriminatory" concept in footnote 3 of the Enabling Clause would be at odds. Rather, the question appears to go to the scope of the obligation in paragraph 3(c) rather than to the scope of "non-discriminatory." And paragraph 3(c) cannot be read so rigidly as to require that a program be at once both "generalized" and tailored to every single difference in every need in every individual country.

***General***

**Q11. Please indicate whether or not you consider that the Drug Arrangements need to be covered by a waiver. Please elaborate.**

24. As indicated in its written submission, the United States takes no position on whether the Drug Arrangements are consistent with the EC's WTO obligations.[20] As such, the United States takes no position on whether the Drug Arrangements need to be covered by a waiver.

[19] *See* US Oral Statement at para. 2-6.
[20] US Third Party Submission at para. 2.

## QUESTIONS FROM THE PANEL TO THE UNITED STATES

**Q12. Under its current GSP scheme, does the United States include all developing countries who have designated themselves as such or does the United States use their own list of developing countries? Does the United States provide identical treatment under its GSP scheme to all developing countries on its list?**

25. The President of the United States designates countries as beneficiary developing countries under its GSP program after considering statutory eligibility criteria related to economic development and competitiveness.[21] The United States publishes an updated list of beneficiary developing countries each year in General Note 4 to the Harmonized Tariff Schedule of the United States.

26. Upon designation, a beneficiary developing country is automatically eligible to receive duty-free treatment for all GSP-eligible products. Countries that the President designates as least-developed beneficiary developing countries under the US GSP program are eligible to receive duty-free treatment for additional products that are GSP-eligible only when imported from such countries. A beneficiary developing country may become ineligible to receive duty-free treatment for a GSP-eligible product if the value of imports of the product exceeds statutory limits called competitive need limits, or if the President determines to withdraw, suspend, or limit the application of duty-free treatment after considering the statutory eligibility criteria.

**Q13. Is it your understanding that paragraph 2(a) of the Enabling Clause requires identical treatment to *all* developing countries in any GSP scheme? If so, why? If not, why not and how narrowly can a GSP scheme be drawn? Please elaborate.**

27. The United States, for the reasons explained in its oral statement and its response to Question 6, does not consider that the Enabling Clause may be read to require identical treatment of all developing countries in an GSP scheme.[22] GSP schemes should be designed in line with the provisions of the Enabling Clause, which serves as a guide for countries wishing to extend GSP preferences.

**Q14. If paragraph 2(a) of the Enabling Clause does not require a preference-giving country to provide GSP to *all* developing countries, what does the term "generalized" in footnote 3 mean?**

28. As the United States explained in its oral statement,[23] "generalized" does not mean "all." "Generalized" permits "less than all."[24] If negotiators had meant to say "all," they could just have said "uniform" or "preferences to all developing countries." The United States notes, with respect to the question of what number "less than all" may still be considered "generalized," that the parties to this dispute have not raised the issue of whether the EC's Drug Arrangements are "generalized," so there is no need for the Panel to address it.

**Q15. Why do you consider a waiver is needed to provide a GSP scheme to certain drug-affected countries (e.g., APTA), in light of the requirements of the Enabling Clause?**

29. The United States requested a waiver for its ATPA program because it was not certain that the program provides the "generalized" coverage specified in the Enabling Clause. The ATPA program is limited by law to four countries (*i.e.,* Bolivia, Colombia, Ecuador, and Peru).

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[21] *See* 19 U.S.C. 2461 et seq.

[22] US Oral Statement at para. 2-6.

[23] US Oral Statement at para. 12.

[24] *See* THE NEW SHORTER OXFORD DICTIONARY 1074 (defining "generalize" as "Bring into general use; make common, familiar, or generally known; spread or extend; apply more generally; become extended in application.").

## QUESTION FROM INDIA TO ALL THIRD PARTIES

**Q16. Do the third parties support the EC's contention that the Drug Arrangements are justified under Article XX(b) of the GATT?**

30. As explained in our written submission, the United States does not consider it necessary for the Panel to reach the arguments of the EC justifying the Drug Arrangements under Article XX(b) of the GATT 1994.[25] Given India's burden of proof in this proceeding, and the arguments it has presented, India has not thus far demonstrated that the Drug Arrangements are not in accordance with the Enabling Clause; as such, there is no need for the Panel to reach the EC's argument in the alternative that the Drug Arrangement falls under an "exception" to the obligations of the covered agreements pursuant to Article XX(b).

[25] US Third Party Submission at para. 10 (footnote omitted).

**ANNEX D**


| | | Page |
|---|---|---|
| **Annex D-1** | Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the "Enabling Clause") | D-2 |
| **Annex D-2** | Decision on Generalized System of Preferences (the "1971 Waiver Decision") | D-4 |
| **Annex D-3** | Resolution of the Second Session of UNCTAD on the Expansion and Diversification of Exports of Manufactures and Semi-Manufactures of developing countries ("Resolution 21 (II)") | D-6 |
| **Annex D-4** | Agreed Conclusions of the Special Committee on Preferences ("Agreed Conclusions") | D-8 |

**ANNEX D-1**

DIFFERENTIAL AND MORE FAVOURABLE TREATMENT
RECIPROCITY AND FULLER PARTICIPATION
OF DEVELOPING COUNTRIES

*Decision of 28 November 1979*
*(L/4903)*

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

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries[1], without according such treatment to other contracting parties.

2. The provisions of paragraph 1 apply to the following:[2]

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

(*b*) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;

(*c*) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another

(*d*) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

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

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

(*b*) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;

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

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

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

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

4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:[4]

(*a*) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;

(*b*) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.

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

6. Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

7. The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

8. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.

9. The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to meet the development needs of developing countries and the objectives of the General Agreement.

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

## ANNEX D-2

## WAIVERS

GENERALIZED SYSTEM OF PREFERENCES

*Decision of 25 June 1971*
*(L/3545)*

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

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

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

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

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

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

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

*Decide:*

(*a*) That without prejudice to any other Article of the General Agreement, the provisions of Article I shall be waived for a period of ten years to the extent necessary to permit developed contracting parties, subject to the procedures set out hereunder, to accord preferential tariff treatment to products originating in developing countries and territories with a view to extending to such countries and territories generally the preferential tariff treatment referred to in the Preamble to this Decision, without according such treatment to like products of other contracting parties

*Provided that* any such preferential tariff arrangements shall be designed to facilitate trade from developing countries and territories and not to raise barriers to the trade of other contracting parties;

(*b*) That they will, without duplicating the work of other international organizations, keep under review the operation of this Decision and decide, before its expiry and in the light of the considerations outlined in the Preamble, whether the Decision should be renewed and if so, what its terms should be;

(*c*) That any contracting party which introduces a preferential tariff arrangement under the terms of the present Decision or later modifies such arrangement, shall notify the CONTRACTING PARTIES

and furnish them with all useful information relating to the actions taken pursuant to the present Decision;

(*d*) That such contracting party shall afford adequate opportunity for consultations at the request of any other contracting party which considers that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the preferential arrangement;

(*e*) That any contracting party which considers that the arrangement or its later extension is not consistent with the present Decision or that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the arrangement or its subsequent extension and that consultations have proved unsatisfactory, may bring the matter before the CONTRACTING PARTIES which will examine it promptly and will formulate any recommendations that they judge appropriate.

**ANNEX D-3**

EXPANSION AND DIVERSIFICATION OF EXPORTS OF MANUFACTURES AND SEMI-MANUFACTURES OF DEVELOPING COUNTRIES

Resolution 21 (II)

*Preferential or free entry of exports of manufactures and semi-manufactures of developing countries to the developed countries*[1]

*The United Nations Conference on Trade and Development,*

*Having examined* the problems relating to the application of a generalized non-reciprocal, non-discriminatory system of preferences in favour of the developing countries,

*Having taken cognizance* of the Charter of Algiers,[2] the report of the Special Group on Trade with Developing Countries submitted by the Organisation for Economic Co-operation and Development (OECD),[3] and document TD/H/C.2/L.5, submitted by the Group of 77,

*Recognizing* the progress achieved since the first session of the Conference as reflected in the OECD report which involves a major change in commercial policies as between developed market-economy countries and the developing countries,

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

*Considering* that it was not possible to achieve sufficient progress in respect to some key questions related to this problem,

*Convinced* of the need for further intensive work so as to elaborate such a system,

*1. 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;

2. *Establishes,* to this end, a Special Committee on Preferences, as a subsidiary organ of the Trade and Development Board, to enable all the countries concerned to participate in the necessary consultations. Any member State which is unable to participate in the Special Committee may make its views known to the Secretary-General of UNCTAD who will bring them to the attention of the Special Committee;

[1] The Conference adopted this resolution unanimously.
[2] TD/38.
[3] TD/56.

3. *Decides* that, for the purpose of the action to be taken in accordance with paragraph 2 above, due account should be taken of the agreements and comments contained in the report of the Second Committee,[4]

4. *Requests* that the first meeting of the Special Committee be held in November 1968 to consider the progress made by that time, and further requests that a second meeting be held in the first half of 1969 so that the Committee can draw up its final report to the Trade and Development Board; the aim should be to settle the details of the arrangements in the course of 1969 with a view to seeking legislative authority and the required waiver in the General Agreement on Tariffs and Trade as soon as possible thereafter;

5. *Notes* the hope expressed by many countries that the arrangements should enter into effect in early 1970.

[4] The report of the Second Committee appears in annex VII.

**ANNEX D-4**

AGREED CONCLUSIONS
OF THE SPECIAL COMMITTEE ON PREFERENCES

**I.**

*The Special Committee on Preferences*:

1. Recalls that in its resolution 21 (ii), the United Nations Conference on Trade and Development at its second session recognized the unanimous agreement in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal, non-discriminatory preferences which would be beneficial to the developing countries.

2. Further recalls the agreement 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 developed among the developing countries, should be: *(a)* to increase their export earnings; *(b)* to promote their industrialization; and *(c)* to accelerate their rates of economic growth.

3. Welcome with appreciation the revised submissions by the developed market-economy countries (TD/B/AC.5/34 and Add.l-3, Add.4 and 4(A), Add.5 and Rev.1 and Rev.1 Corr.1, Add.6, Add.7 and Corr.2-3 and Add.8, Add.9 and Rev.1 and Add.10) which should be read in conjunction with the preliminary submissions of November 1969 (TD/B/AC.5/24 and Add.1-3, Add.4 and Corr.1, Add.5 and Corr.1, Add.5(A), Add.6, Add.7 and Corr.1 and Add.8-11). These submissions represent an important success in the efforts and endeavours in UNCTAD in order to put a generalized system of preferences into operation and an important element in the fulfilment of the aims and objectives of Conference resolution 21 (II) mentioned above and in the international strategy for development in the 1970s.

4. Welcomes with appreciation the joint declaration of several socialist countries of Eastern Europe, as supplemented and clarified in their individual statements, which constitute a useful and positive contribution in the light of the objectives of Conference resolution 21 (II). (See below part two, chapter I, section C.)

5. Notes the expectations of developing countries regarding the generalized system of preferences as expressed in the relevant parts of the Charter of Algiers.[1]

6. Notes the observations, suggestions, and requests made by the developing countries on the submissions of the developed market-economy countries during the consultations which have taken place in the Special Committee, and in particular those contained in the report on its fourth session; and notes also that some of the suggestions and requests have been taken into account in the revised submissions.

7. Notes also the explanations given by the prospective preference-giving countries on their submissions and their statements that they will, as far as possible, take into account the observations, suggestions and requests of the developing countries, including those of the least developed among them.

8. Considers that efforts for further improvements should be pursued in a dynamic context in the light of the objectives of Conference resolution 21 (II).

[1] See *Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. I, *Report and Annexes* (United Nations publication, Sales No. : E.68.II.D.14), p. 431-441.

9. Recognizes that these preferential arrangements are mutually acceptable and represent a co-operative effort which has resulted from the detailed and intensive consultations between the developed and developing countries which have taken place in UNCTAD. This co-operation will continue to be reflected in the consultations which will take place in the future in connexion with the periodic reviews of the system and its operation.

10. Notes the determination of the prospective preference-giving countries to seek as rapidly as possible the necessary legislative or other sanction with the aim of implementing the preferential arrangements as early as possible in 1971.

11. Recommends that the Trade and Development Board at its fourth special session adopt the report of the Special Committee on its fourth session, take note of these Conclusions, approve the institutional arrangements proposed in section VIII and take a decision on the appropriate UNCTAD body referred to in that section.

## II. Reverse preferences and special preferences

1. The Special Committee notes that, consistent with Conference resolution 21 (II), there is agreement with the objective that in principle all developing countries should participate as beneficiaries from the outset and that the attainment of this objective, in relation to the question of reverse preferences, which remains to be resolved, will require further consultations between the parties directly concerned. These consultations should be pursued as a matter of urgency with a view to finding solutions before the implementation of the schemes. The Secretary-General of UNCTAD will assist in these consultations with the agreement of the Governments concerned.

2. Developing countries which will be sharing their existing tariff advantages in some developed countries as the result of the introduction of the generalized system of preferences will expect the new access in other developed countries to provide export opportunities at least to compensate them.

3. As a result of the periodic reviews in UNCTAD and of bilateral or multilateral consultations between the countries concerned, those countries granting tariff advantages will, when reviewing the operation of the generalized system of preferences, give careful consideration to the extent to which the developing countries enjoying tariff advantages have benefited over-all from the system.

## III. Safeguard mechanisms

1. All proposed individual schemes of preferences provide for certain safeguard mechanisms (for example, *a priori* limitation or escape-clause type measures) so as to retain some degree of control by preference-giving countries over the trade which might be generated by the new tariff advantages. The preference-giving countries reserve the right to make changes in the detailed application as in the scope of their measures, and in particular, if deemed necessary, to limit or withdraw entirely or partly some of the tariff advantages granted. The preference-giving countries, however, declare that such measures would remain exceptional and would be decided on only after taking due account in so far as their legal provisions permit of the aims of the generalized system of preferences and the general interests of the developing countries, and in particular the interests of the least developed among the developing countries.

2. Preference-giving countries will offer opportunities for appropriate consultations to beneficiary countries, in particular to those having a substantial trade interest in the product concerned, in connexion with the use of safeguard measures; where prior consultations are not possible, preference-giving countries will undertake for the purpose above to inform all beneficiary

countries, through the Secretary-General of UNCTAD, with a minimum of delay, of the action taken. Safeguard measures taken should be reviewed from time to time by the preference-giving country concerned with the aim of relaxing or eliminating them as quickly as possible.

3. Certain preference-giving countries provide for a mechanism including an *a priori* limitation formula under which quantitative ceilings will be placed on preferential imports. Some of these countries might, nevertheless, have recourse also to escape type measures, for those products which are not covered by *a priori* limitation formulae.

4. For those countries which do not envisage *a priori* limitations, escape-type measures are the main safeguards at their disposal.

## IV. Beneficiaries

1. The Special Committee noted the individual submissions of the preference-giving countries on this subject and the joint position of the countries members of the Organisation for Economic Co-operation and Development as contained in paragraph 13 of the introduction to the substantive documentation containing the preliminary submissions of the developed countries (TD/B/AC.5/24), namely: "As for beneficiaries, donor countries would in general base themselves on the principle of self-election. With regard to this principle, reference should be made to the relevant paragraphs in document TD/56[e] i.e. section A in Part I.

2. The spokesman on behalf of the developing countries members of the Group of 77 made a statement on the question of beneficiaries (see annex I to these agreed conclusions).

3. Other statements were also made on this subject by the representatives of Romania, China, Bulgaria, Cuba, Turkey, Israel, Greece, Bulgaria on behalf of the socialist countries of Eastern Europe, United Kingdom, Australia, Netherlands, New Zealand, Spain, Malta and Mongolia. (See below part two, chapter I, section D.)

4. The spokesman on behalf of the countries members of Group B made a statement on this subject also (see annex II to these agreed conclusions).

5. The Special Committee took note of these statements.

## V. Special measures in favour of the least developed among the developing countries

1. In implementing Conference resolution 21 (II), and as provided therein, the special need for improving the economic situation of the least developed among the developing countries is recognized. It is important that these countries should benefit to the fullest extent possible from the generalized system of preferences. In this context, the provisions of Conference resolution 24 (II) should be borne in mind.

2. The preference-giving countries will consider, as far as possible, on a case-by-case basis, 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.

3. The preference-giving countries declare that escape clause measures would remain exceptional and would be decided on only after due account has been taken, in so far as their legal provisions permit, of the interests of the least developed among the developing countries.

4. During the annual review of the operation of the generalized system of preferences, special attention should be given by the institutional machinery to the effects of the system on the volume of exports and export earnings of the least developed countries and in regard to other objectives of Conference resolution 21 (II). This machinery should further investigate and consult on the special measures in favour of those countries within the generalized system as provided in Conference resolution 21 (II).

5. The Special Committee recommends to the Trade and Development Board that it suggest to each of its main committees that, taking into account the imminent implementation of a generalized system of preferences, priority attention should be given to measures in the field of competence of these committees that would be related or complementary to the generalized system of preferences, especially measures which would enable the least developed among the developing countries to participate fully in that system.

6. Besides those mentioned above, other additional measures have been suggested with a view to enabling developing countries and specially the least developed among them to derive additional benefits from the generalized system of preferences. The international efforts in this field should give priority to:

*(a)* The identification of products for which the generalized system of preferences opens up new or improved export possibilities for the least developed countries;

*(b)* Market studies for such products;

*(c)* Assistance to the improvement of export and export-promotion services or the establishment of such new services where appropriate.

7. The Special Committee invites the Trade and Development Board to call the attention of other appropriate international organizations to the importance of taking measures related to the generalized system of preferences. Such measures might include, as appropriate, financial and technical assistance for the establishment and development of industries likely to further the exports of products included in the generalized system of preferences, as well as financial assistance for pre-investment studies for such industries.

## VI. Duration

The initial duration of the generalized system of preferences will be ten years. A comprehensive review will be held some time before the end of the ten-year period to determine, in the light of the objectives of Conference resolution 21 (II), whether the preferential system should be continued beyond that period.

## VII. Rules of origin

1. It is agreed that the rules of origin should facilitate the achievement of the objectives of Conference resolution 21 (II) on the generalized system of preferences, in this connexion, to ensure effectively for the beneficiary countries the advantages of preferential treatment for those exports which will qualify therefor; to help to ensure equivalence in conditions of access to the markets of the preference-giving countries, and to avoid distortion of trade.

2. Satisfactory functioning of the rules of origin will be greatly helped if it is possible to establish close and confident collaboration between the competent authorities of the donor and beneficiary countries, particularly concerning documentation and control. It is agreed that such co-

operation should be assured bilaterally and as appropriate through the institutional arrangements as provided for in the relevant part of these conclusions.

3. It is recognized that it is desirable to have rules of origin as uniform as possible and as simple to administer as practicable. The Working Group on Rules of Origin had, at a technical level, formulated preliminary texts on a number of important aspects of the rules of origin. However, in regard to the basic element, for any rules of origin, namely the criterion for substantial transformation, the Group did not at this stage arrive at common views.

4. In view of the importance which the Special Committee attaches to putting into effect the generalized system of preferences as rapidly as possible, it might be necessary to apply, at the outset, origin rules which are different in certain aspects. This would not preclude further efforts to achieve, as far as possible, more harmonization at a later stage.

5. In view of the substantial progress made in drawing up common solutions on matters such as a standard form of origin certificate and agreed rules and undertakings as to verifications, sanctions, and mutual co-operation, the administrative difficulties from the use of different systems of origin at the initial stage will be minimized.

6. The Group should conclude as soon as possible its examination of all technical aspects of the rules of origin for the generalized system of preferences, with a view to agreeing on as many common elements in the rules of origin as possible at this stage. Such technical aspects include harmonization of the different elements used in the determination of substantial transformation among preference-giving countries applying the same criteria in this respect and the questions of cumulative treatment of beneficiary countries and treatment of developed country content. In this connexion the Working Group should also examine possible solutions to specific problems of the least developed among the developing countries. To avoid any delays and to facilitate the implementation of the generalized system of preferences, the Group's conclusions including agreed texts on rules of origin should be remitted directly both to the prospective preference-giving countries and prospective beneficiaries to facilitate appropriate domestic action. The secretariat of UNCTAD should be invited to compile and distribute to Governments of member States an integrated text on rules of origin that will be applied by the preference-giving countries for the purpose of the generalized system of preferences.

## VIII. Institutional arrangements

1. The Special Committee on Preferences agrees that there should be appropriate machinery within UNCTAD to deal with the questions relating to the implementation of Conference resolution 21 (II) and bearing in mind Conference resolution 24 (II). The [appropriate UNCTAD body] should have the following terms of reference:

*(a)* It will review:

(i) The effects of the generalized system of preferences on exports and export earnings, industrialization and the rates of economic growth of the beneficiary countries including the least developed among the developing countries and in so doing will consider inter alia questions related to product coverage, exception lists, depths of cut, working of safeguard mechanisms (including ceilings and escape clauses) and rules of origin;

(ii) The effects of the generalized system of preferences on the process of industrialization as well as on the volume of exports and export earnings of the least developed among the developing countries, and review and study the special

measures in favour of those countries within the generalized system as provided for in Conference resolution 21 (II);

(iii) Especially the effects on the export earnings of developing countries from the sharing of their existing tariff advantages with the rest of the developing countries as a result of the generalized system of preferences, in particular in order to avoid that these countries might be adversely affected;

(iv) Complementary efforts made by developing countries to utilize as fully as possible the benefits from the potential trade advantages created by the grant of special tariff treatment;

(v) Other problems related to the operation of the system;

*(b)* It will review questions related to measures taken by the socialist countries of Eastern Europe with a view to contributing to the attainment of the objectives of Conference resolution 21 (II);

*(c)* The above-mentioned functions would appropriately be carried out by means of:

(i) An annual review and analysis of the functioning of the system;

(ii) A triennial review to assess the benefits of the system for the beneficiary countries and the possibilities of improvement of the system and of its operation;

(iii) A comprehensive review towards the end of the initial period of the system, to determine, in the light of the objectives of Conference resolution 21 (II), whether the preferential system should be continued beyond that period.

2. All these periodic reviews would also provide opportunity for multilateral or bilateral consultations between preference-giving countries and beneficiary countries on the system as initially applied, on the modalities of its application and on subsequent changes. These reviews will provide opportunity for consultations between developed market-economy countries and developing countries with respect to possible improvements in the system and between the socialist countries of Eastern Europe and the developing countries with a view to the early and effective implementation of measures by the former, as set forth in their joint declaration, designed to contribute to the attainment of the objectives of Conference resolution 21 (II).

3. The Special Committee on Preferences considers that there may also be a need for consultations of an *ad hoc* character on specific aspects of the system that require urgent consideration. Such consultations could be arranged in agreement with interested Governments of member States and with the assistance when desired of the Secretary-General of UNCTAD.

## IX. Legal status

1. The Special Committee recognizes that no country intends to invoke its rights to most-favoured-nation treatment with a view to obtaining, in whole or in part, the preferential treatment granted to developing countries in accordance with Conference resolution 21 (II) and that the contracting parties to the General Agreement on Tariffs and Trade intend to seek the required waiver or waivers as soon as possible.

2. The Special Committee takes note of the statement made by the preference-giving countries that the legal status of the tariff preferences to be accorded to the beneficiary countries by each preference-giving country individually will be governed by the following considerations:

*(a)* The tariff preferences are temporary in nature;

*(b)* Their grant does not constitute a binding commitment and, in particular, it does not in any way prevent

(i) their subsequent withdrawal in whole or in part; or

(ii) the subsequent reduction of tariffs on a most-favoured nation basis, whether unilaterally or following international tariff negotiations;

*(c)* Their grant is conditional upon the necessary waiver or waivers in respect of existing international obligations, in particular in the General Agreement on Tariffs and Trade.

## Annex I
## to the agreed conclusions of the Special Committee on Preferences

STATEMENT ON BEHALF OF THE GROUP OF 77

The members of the Group of 77 in UNCTAD take note of the position of the countries members of the Organisation of Economic Co-operation and Development on this subject. These developing countries consider themselves under Conference resolution 21 (II) to be prospective beneficiaries in the generalized system of preferences and therefore entitled to preferential treatment in the markets of all preference-giving countries. The members of this Group as constituted at present are:

The Kingdom of Afghanistan
The Democratic and Popular Republic of Algeria
The Argentine Republic
Barbados
The Republic of Bolivia
The Republic of Botswana
The Federative Republic of Brazil
The Union of Burma
The Republic of Burundi
The Khmer Republic
The Federal Republic of Cameroon
The Central African Republic Ceylon
The Republic of Chad
The Republic of Chile
The Republic of Colombia
The Democratic Republic of Congo
The Republic of Costa Rica
The Republic of Cyprus
The Republic of Dahomey
The Dominican Republic
The Republic of Ecuador
The Republic of El Salvador
The Republic of Equatorial Guinea
The Empire of Ethiopia
The Gabonese Republic
The Republic. of Gambia
The Republic of Ghana
The Republic of Guatemala
The Republic of Guinea
The Republic of Guyana
The Republic of Haiti
The Republic of Honduras
The Republic of India
The Republic of Indonesia
The Empire of Iran
The Republic of Iraq
The Republic of the Ivory Coast
Jamaica
The Hashemite Kingdom of Jordan
The Republic of Kenya
The State of Kuwait
The Kingdom of Laos
The Lebanese Republic
The Kingdom of Lesotho
The Republic of Liberia
The Libyan Arab Republic
The Malagasy Republic
The Republic of Malawi Malaysia
The Republic of Maldives
The Republic of Mali
The Islamic Republic of Mauritania
Mauritius
The United Mexican States
The Kingdom of Morocco
The Kingdom of Nepal
The Republic of Nicaragua
The Republic of the Niger
The Federal Republic of Nigeria
Pakistan
The Republic of Panama
The Republic of Paraguay
The People's Republic of the Congo
The Republic of Peru
The Republic of the Philippines
The Republic of Korea
The Republic of Viet-Nam
The Rwandese Republic
The Kingdom of Saudi Arabia
The Republic of Senegal
Sierra Leone
The Republic of Singapore
The Somali Democratic Republic
The People's Republic of Southern Yemen
The Democratic Republic of the Sudan
The Kingdom of Swaziland
The Syrian Arab Republic
The Kingdom of Thailand
The Togolese Republic
Trinidad and Tobago
The Republic of Tunisia
The Republic of Uganda
The United Arab Republic
The United Republic of Tanzania
The Republic of the Upper Volta
The Eastern Republic of Uruguay
The Republic of Venezuela
The Yemen Arab Republic
The Socialist Federal Republic of Yugoslavia
The Republic of Zambia

Further, they hold the view that no developing country member of this Group should be excluded from the generalized system of preferences at the outset or during the period of the system.

**Annex II**

**to the agreed conclusions of the Special Committee on Preferences**

STATEMENT BY THE SPOKESMAN
ON BEHALF OF GROUP B ON BENEFICIARIES

With regard to the question of beneficiaries, our common introduction to the individual revised or additional submissions (TD/B/AC:5/34) indicates that the views expressed by the prospective preference-giving countries in 1969 (TD/B/AC.5/24) remain unchanged. Furthermore I would like to refer to the position of the preference-giving countries as stated in section IX on legal status, as well as in their individual submissions.

In this connexion I should recall an observation made by the Secretary-General of the Organisation for Economic Co-operation and Development in his letter addressed to the Secretary-General of UNCTAD before the second session of the United Nations Conference on Trade and Development,[2] – i.e. that the membership of that organization includes some developing countries which, like other potential beneficiaries, have an interest in the subject of special tariff treatment. The delegation of Malta, member of Group B, has a similar interest.

[2] See *Proceedings of the United Nations Conference on Trade and Development, Second Session*, vol. III, *Problems and Policies of trade in manufactures and semi-manufactures* (United Nations publication, Sales No.: E.68.II.D.16), document TD/56, p. 78.

# ANNEX E

List of Waivers for Preferences

| Country | Type | Decision of | Expiry | Document |
|---|---|---|---|---|
| United States | Trust territory of Pacific Islands | 8 September 1948 | No time-limit | BISD II/9 |
| United Kingdom | Items traditionally admitted free of duty from countries of the Commonwealth | 24 October 1953 | No time-limit | BISD 2S/20 |
| United Kingdom | Amendment – Items traditionally admitted free of duty from countries of the Commonwealth | 5 March 1955 | No time-limit | BISD 3S/25 |
| United Kingdom | Special problems of dependent overseas territories of the United Kingdom, increase in margins of preferences etc. | 5 March 1955 | No time-limit | BISD 3S/21 |
| Australia | Tariff preferences for less developed countries | 28 March 1966 | No time-limit | BISD 14S/23 |
| United States | Caribbean Basic Recovery Act | 15 February 1985 | 30 September 1995<br>Extended until<br>31 December 2005 | BISD 31S/20 |
| Canada | CARIBCAN | 26 November 1986 | 15 June 1998<br>Extended until<br>31 December 2006 | L/6102,<br>SR 42/4 |
| United States | Andean Trade Preference Act | 19 May 1992 | 4 December 2001 | L/6991 |
| European Communities | Fourth ACP-EEC Convention of Lomé | 9 December 1994 | | BISD 41S/26 |
| United States | Caribbean Basin Economic Recovery Act Renewal of waiver | 15 November 1995 | 31 December 2005 | WT/L/104 |
| Canada | CARIBCAN - Extension of waiver pursuant to paragraph 2 of the Understanding in respect of waivers of obligations under GATT 1994 | 14 October 1996 | 31 December 2006 | WT/L/185 |
| European Communities | Fourth ACP-EC Convention of Lomé - Extension of waiver pursuant to paragraph 2 of the Understanding in respect of waivers of obligations under GATT 1994 | 14 October 1996 | 29 February 2000 | WT/L/186 |
| France | Trading Arrangements with Morocco - Extension of waiver pursuant to paragraph 2 of the Understanding in respect of waivers of obligations under GATT 1994 | 14 October 1996 | 31 December 1997 | WT/L/250 |

| Country | Type | Decision of | Expiry | Document |
|---|---|---|---|---|
| United States | ANDEAN Trade Preference Act – Extension of waiver pursuant to paragraph 2 of the Understanding in respect of waivers of obligations under GATT 1994 | 14 October 1996 | 4 December 2001 | WT/L/184 |
| United States | Former Trust Territory of the Pacific Islands - Extension of waiver pursuant to paragraph 2 of the Understanding in respect of waivers of obligations under GATT 1994 | 14 October 1996 | 31 December 2006 | WT/L/183 |
| United States | Imports of automotive products - Extension of Time-Limit | 7, 8 and 13 November 1996 | 1 January 1998 | WT/L/198 |
| France | French Trading Arrangements with Morocco | 19 November 1996 | No time-limit | BISD 9S/39 |
| France | Trading Arrangements with Morocco - Extension of waiver | 10 December 1997 | 31 December 1998 | WT/L/187 |
| France | Trading Arrangements with Morocco - Extension of waiver | 9 – 11 and 18 December 1998 | 31 December 1999 or upon entry into force of the Euro-Mediterranean Agreement, whichever is the earlier | WT/L/294 |
| Developing Countries | Preferential Tariff Treatment For Least Developed Countries | 15 June 1999 | 30 June 2009 | WT/L/304 |
| EC/France | Trading arrangements with Morocco - Extension of waiver | 17 July 2000 | Extended Until the entry into force of the Euro-Mediterranean Agreement. | WT/L/361 |
| European Communities | Autonomous preferential treatment to the countries of the Western Balkans | 8 December 2000 | 31 December 2006 | WT/L/380 and Corr.1 |
| Turkey | Preferential treatment for Bosnia-Herzegovina | 8 December 2000 | 31 December 2006 | WT/L/381 |
| Switzerland | Preferences for Albania and Bosnia-Herzegovina | 18July 2001 | 31 March 2004 | WT/L/406 |
| European Communities | The ACP-EC Partnership Agreement | 14 November 2001 (Ministerial Conference) | 31 December 2007 | WT/L/436 |
| European Communities | Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas | 14 November 2001 (Ministerial Conference) | 31 December 2005 | WT/L/437 |