European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246)

Answers from the United States to Questions from the Panel and India in connection with the First Substantive Meeting of the Panel 4 June 2003

I. QUESTIONS FROM THE PANEL (TO ALL THIRD PARTIES)

A. *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?

1. 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.

2. 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.

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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.

Q2. How does one identify whether a legal provision confers an "autonomous right" or provides for an "affirmative defence"?

3. As noted in the U.S. 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." "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.

B. *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?

4. 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

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[4] US Third Party Submission at para. 5-7.

[5] WEBSTER'S NEW WORLD DICTIONARY 513 (2nd Concise ed. 1982).

[6] *See* EC First Submission at paras. 66-67.

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.

5. 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 U.S. 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.

6. 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 interpretation of "non-discriminatory" that allows differentiation among unequal situations; "generalized" must mean something different than "non-discriminatory."[8]

7. 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.

8. 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]

9. 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-

[7] US Oral Statement at para. 13.
[8] US Oral Statement at para. 12 (footnote omitted).
[9] US Oral Statement at para. 12 (footnote omitted).

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 U.S. 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?

10. 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 U.S. 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 U.S. answer to Question 1, the Enabling Clause excludes the application of Article I:1 altogether, including Article I:1's "unconditionally" requirement.

11. 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.

12. 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

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[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.

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.

13. 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]

14. 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 U.S. 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]

15. 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.

C. *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

[14] *See also* EC First Submission at paras. 78-79.
[15] *See also* EC First Submission at para. 77.

countries of its choice? Are developed countries free to graduate beneficiary developing countries from their GSP schemes?

16. 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]

17. 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)?

18. As mentioned in the U.S. oral statement, paragraph 3(c) (as well as paragraph 7) of the Enabling Clause appears to contemplate explicitly that preferences extended pursuant to the

[16] *See* US Oral Statement at para. 9.

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.

19. Please see the second part of the U.S. 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?

20. 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.

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?

21. 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

[17] US Oral Statement at para. 12.
[18] India Oral Statement at para. 14.

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 U.S. 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.

22. 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 U.S. 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.

D. *General*

Q11. Please indicate whether or not you consider that the Drug Arrangements need to be covered by a waiver. Please elaborate.

23. 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.

II. 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

[19] *See* US Oral Statement at para. 2-6.

[20] US Third Party Submission at para. 2.

their own list of developing countries? Does the United States provide identical treatment under its GSP scheme to all developing countries on its list?

24. 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.

25. 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 U.S. 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.

26. 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?

27. 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

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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.").

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?

28. 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).

III. 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?

29. 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).