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

(WT/DS246)

Third Party Submission of the United States

April 30, 2003

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I. INTRODUCTION

1. The United States welcomes this opportunity to present its views to the Panel in this proceeding on tariff preferences granted by the European Communities ("EC") under the "Special Arrangements to Combat Drug Production and Trafficking" ("Drug Arrangements"), which the EC has explained are part of the EC's Generalized System of Preferences ("GSP").

2. The United States takes no position on whether the Drug Arrangements are consistent with the EC's WTO obligations. Rather, the United States is participating in this proceeding because of the importance of the issues presented both from a systemic perspective and from the perspective of the potential implications of any recommendations and rulings of the Dispute Settlement Body ("DSB") in this dispute for the operation and continued viability of GSP programs generally. In light of the many nuances found in the GSP programs of various Members, we urge the Panel to adopt a careful, prudent approach to resolving this dispute, one which is confined to the specific facts of this case and which takes care to avoid going beyond the particular circumstances of this dispute.

3. In this submission, the United States is addressing a limited set of issues. It will address other issues in its oral statement at the third-party session.

II. ARGUMENT

A. The Enabling Clause Excludes the Application of Article I:1 of the GATT

4. The United States agrees with the EC that "[t]he Enabling Clause is not an 'affirmative defense' justifying a violation of Article I:1."[1] Rather, it is part of the balance of rights and obligations under the *General Agreement on Tariffs and Trade 1994* (GATT).

5. India asserts that the Enabling Clause "constitutes an affirmative defense that the EC might invoke to justify an inconsistency with Article I:1 of the GATT."[2] However, it is clear that the Enabling Clause is not an affirmative defense to a presumed violation of Article I:1. 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. The Enabling Clause thus has co-equal status with the GATT 1947. It 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 the provisions of Article I:1 of the GATT 1947.

6. Furthermore, as the EC points out, even on its own terms, it would not be correct to describe the Enabling Clause as an "affirmative defense." 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."[3] Thus, pursuant to the Enabling

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[1] EC First Submission, para. 14.

[2] India First Submission, para. 43.

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

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.

7. The predecessor to the Enabling Clause, the Decision of the CONTRACTING PARTIES of 25 June 1971 ("1971 Waiver"),[4] applied only on a temporary basis and only "to the extent necessary" to accord the preferential tariff treatment referred to in the Preamble, and "subject to the procedures" of the 1971 Waiver. The Enabling Clause, on the other hand, contemplates a general, permanent and separate authorization that is available "notwithstanding" Article I:1. There is no need to determine if a measure is inconsistent with Article I:1 before applying the Enabling Clause. The Enabling Clause is not a limited exception from obligations under other provisions of the GATT 1994 but is a positive rule providing authorization to Members and establishing obligations in itself. Therefore, the Enabling Clause is not an "affirmative defense" to a violation of the obligations of Article I:1. Rather, the Enabling Clause declares that Members have a right – in other words, "enables" them – to extend trade preferences to developing country Members under certain circumstances.

8. In other words, the situation here is much as the situation confronted by the Appellate Body in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*. There the Appellate Body explained that a provision that was described as an "exception" was not an affirmative defense and in fact 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 of Members."[5] Here too, the Enabling Clause is part and parcel of the balance of rights and obligations with Article I:1.

9. Consequently, India's argument that the tariff preferences granted under the Drug Arrangements are inconsistent with Article I:1 of the GATT is irrelevant,[6] unless India can first establish that the tariff preferences granted under the Drug Arrangements are inconsistent with the Enabling Clause. Equally irrelevant is India's argument that the Drug Arrangements are not justified in the absence of a waiver,[7] because India must first show that the Drug Arrangements are not justified by the Enabling Clause. In order to make this latter point, India asserts only that it is the EC's burden to demonstrate that the Drug Arrangements are consistent with the Enabling Clause because the Enabling Clause is an "affirmative defense."[8] For the reasons just described, it is not.

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[4] BISD 18S/24.

[5] *Wool Shirts and Blouses* (WT/DS33/AB/R) at 16.

[6] India First Submission, paras. 29-37.

[7] *Id.* at paras. 38-42.

[8] *Id.* at para. 43.

B. Article XX(b) of the GATT 1994

10. 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.[9] Given India's position on the burden of proof in this proceeding, 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).

III. CONCLUSION

11. The United States thanks the Panel for providing an opportunity to comment on the important legal and trade policy issues at stake in this proceeding.

[9] EC First Submission, paras. 161-216.