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

(AB-2004-1)

THIRD PARTICIPANT ORAL STATEMENT OF THE UNITED STATES

February 19, 2004

Introduction

1. Mr. Chairman and members of the Division, it is my honor to appear before you to present the views of the United States as a third participant in this appeal. In our written submission, the United States set forth its views on a number of aspects of the Panel's report. In today's statement, the United States would like to focus on two of the positions that India set out in its Appellee's Submission: *first*, the assertion that the Enabling Clause of the GATT 1994 is an "exception" to the most-favored-nation (MFN) principle of Article I:1 of the GATT 1994; and, *second*, the assertion that Article I:1 requires countries that wish to extend GSP benefits to do so on a "one-size-fits-all" basis.

The Enabling Clause is Not an Affirmative Defense

2. India's Appellee's Submission begins with, and generally relies on, its version of the history of the Enabling Clause. In the story India tells in its first few paragraphs -- a story for which it provides no citation or other support -- the Enabling Clause allows certain kinds of differential and more favorable treatment in favor of developing countries, but developing

countries did not "relinquish their MFN rights" vis-à-vis each other.[1] According to India, the Enabling Clause must therefore be interpreted to authorize "discriminatory tariff treatment *in favor of the developing countries* but not *between the developing countries*."[2] Regrettably, the assertions that India makes are not arguments based on the text of the WTO Agreement. Instead, India makes assumptions about the Enabling Clause's history, and presents broad policy arguments, to argue for India's vision -- for purposes of this dispute -- of how the WTO system should operate. India's approach is no substitute for an evaluation of the text of the agreement as negotiated and agreed by Members.

3. India asserts that the MFN obligation in Article I:1 governs the treatment afforded under the Enabling Clause, unless the Enabling Clause itself provides a specific exception. We disagree. As we explained in our submission, the Enabling Clause of the GATT 1994 is a self-standing provision that in fact *authorizes* GSP programs: it is a decision by the GATT CONTRACTING PARTIES acting jointly to authorize "differential and more favourable treatment to developing countries, without according such treatment to other contracting parties" (including through GSP programs). The authorization provided by the Enabling Clause is a separate and distinct legal regime from that which exists under Article I:1.

4. The text of the Enabling Clause does not support India's argument that the Enabling Clause is an "affirmative defense" to Article I:1. The word "notwithstanding" at the beginning

[1] *Id.*, para. 5 .
[2] *Id.*, para. 92 (emphasis in original).

of the Enabling Clause indicates that donor countries are allowed to offer the preferential treatment on the terms specified, even though there would be an Article I:1 violation if the Enabling Clause did not exist.

5. Indeed, it is peculiar that India would choose to focus on Article I:1 and ignore other provisions of the GATT 1994, such as Article XXXVI (which is specifically devoted to trade and development) and the other paragraphs of Article I itself. Given the reference to Article XXXVI in paragraph 7 of the Enabling Clause, the Enabling Clause may be viewed as "joint action" under paragraph 1(d) of Article XXXVI to further the principles and objectives of trade and development in that Article. This supports the view that the Enabling Clause is not merely an "affirmative defense" to violations of Article I:1, because it functions in part to elaborate further a different provision of the GATT: Article XXXVI.

6. The other paragraphs of Article I also support the view that the Enabling Clause is not an "affirmative defense." These provisions, like the Enabling Clause, are self-standing provisions that allow preferential tariff treatment to be maintained. Article I:4(a) makes clear that preferential and MFN rates can coexist. One would not describe such preferential rates as requiring an "affirmative defense" to a departure from the MFN rates; instead, like the Enabling Clause, they are an integral part of the rights and obligations of WTO Members.

7. Moreover, India and the Panel appear to have failed to appreciate the significance of the change from a waiver to a joint decision of the CONTRACTING PARTIES.[3] Rather than waiving previously existing rights, the Enabling Clause creates new rights and obligations, and is a positive contribution to the development of trade, especially trade between developed and developing countries. India's position seems to be that the Enabling Clause should be viewed as though it were simply a continuation of the 1971 waiver -- or in fact perhaps even something *narrower* than the waiver, insofar as the 1971 waiver operated to waive all application of Article I:1 to like products of other contracting parties. This ignores that the Enabling Clause replaced the waiver with a new legal regime that exists "notwithstanding"-- *not* "to the extent inconsistent with" -- Article I:1.

8. Lastly, India's argument stumbles on the logical error of circularity. India asserts that the MFN obligation should be imported into the Enabling Clause in order to "minimi[ze] the conflict" between Article I:1 and the Enabling Clause.[4] This of course assumes that there is a conflict between the two. If, however, the Enabling Clause separately authorizes certain types of treatment, it is simply not accurate to say that it is in conflict with Article I:1, and thus the presumption against conflicts in treaty interpretation is irrelevant in this case.[5]

[3] India Submission, paras. 3, 94, 97.

[4] *Id.*, para. 92.

[5] *See, e.g., Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico* (WT/DS60/AB/R), at para. 65.

There is no "One Size Fits All" Requirement

9. The United States disagrees with India's and the Panel's view that, because the MFN obligation of Article I:1 remains in place under the Enabling Clause, no differentiation between developing countries is permitted. Tellingly, in its Appellee's Submission, India limits the discussion of the relationship between the Enabling Clause and Article I:1 to one paragraph of the Enabling Clause – paragraph 2(a).[6] In so doing, India ignores other parts of the Enabling Clause, including paragraphs 2(c), 2(d), 3(c), and 4(b), which provide evidence that differentiation between developing countries is permitted. For example, paragraph 2(c) allows developing countries to enter into "regional" arrangements, which allows *developing countries* to differentiate between the developing countries it has a regional arrangement with and those it does not (and thus makes clear that, contrary to India's assertions early on, developing countries *did* accept the notion that they would relinquish some of their MFN rights vis-à-vis each other).

10. India's "one-size-fits-all" approach is also unworkable because it would render terms of the Enabling Clause meaningless, contrary to the customary rules of treaty interpretation. If the relationship between the Enabling Clause and Article I:1 already means that there can be no differentiation among developing countries, there would be no point to incorporate into footnote 3 the word "non-discriminatory" from the 1971 Waiver. Similarly, if *all* developing countries must receive *all* GSP benefits by virtue of the relationship between the Enabling Clause and Article I:1, India's approach would render the term "generalized" meaningless. In an attempt to avoid this result, India has adopted the mutually contradictory position that "generalized" refers

[6] *E.g.,* India Appellee Submission, paras. 81-82.

to which Members are beneficiaries of a GSP program, while "non-discriminatory" means that the identical treatment must be given to all developing countries. India's position cannot be reconciled with the Panel's findings, according to which there is no room for a developing country Member to be excluded from all the benefits of a GSP program, except benefits granted to least developed countries.

11. The Appellate Body should reject India's arguments. Not only are those arguments based on policy arguments rather than the relevant text, but they would, if accepted, create an immense disincentive to maintenance of those mutually acceptable GSP schemes that have provided benefits to developing countries for three decades or more. We urge the Appellate Body to look at the Enabling Clause as a whole, and as part of the overall balance of rights and obligations agreed to in the GATT 1994, with these considerations in mind.

Conclusion

12. This concludes my presentation. The United States appreciates this opportunity to express its views. We look forward to any questions the Division may have.