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

(WT/DS246)

THIRD-PARTY ORAL STATEMENT OF THE UNITED STATES

May 15, 2003

Introduction

1. Mr. Chairman and members of the Panel, it is my honor to appear before you to present the views of the United States as a third party in this proceeding. I will take this opportunity to address two issues not addressed in the third party submission of the United States: first, the lack of foundation for India's argument that the Enabling Clause requires any preference extended to any developing country to be extended to all developing countries; and second, the view of the United States with respect to the reference in the Enabling Clause to "non-discriminatory" preferences.

Discussion

"All" developing countries

2. In its first written submission to the Panel, India argues that the Enabling Clause contains an "obligation to extend to all developing countries any advantage accorded to one of them."[1]

3. The United States disagrees with India. The text of the Enabling Clause does not support India's approach; in fact an examination of the text leads to the opposite conclusion.

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[1] India First Submission, para. 48; *see generally* paras. 45-54.

4. India has made two arguments based on paragraph 1 of the Enabling Clause for its approach. Neither argument withstands scrutiny. In the first instance, India claims that "developing countries" in paragraph 1 must be read as though the term "all" had been inserted before "developing countries." As pointed out by the EC and several of the third parties, the Enabling Clause refers in all cases to either "developing countries" or "the developing countries"; the Enabling Clause never refers to "*all* developing countries."[2] There is no basis for inserting words into the text. Furthermore, India's interpretative approach does not work in other parts of the Enabling Clause. In paragraph 2(a), the Enabling Clause refers to "developed contracting parties." However, India would certainly not support the parallel argument that the use of the word "parties" in this case means that "*all* developed countries" must accord preferential tariff treatment under paragraph 2(a) in order for *any* developing country to take advantage of it.

5. Second, India argues that the reference to "other contracting parties" supports its approach that paragraph 1 requires any preferential treatment to one developing country to be accorded to all other developing countries. Again, India's reading is contradicted by the text. The United States agrees with the analysis of the EC and several of the 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.[3] Paragraph 1 must be read in a

[2] *See* EC First Submission at para. 25; Third Party Submission of Costa Rica at para. 16; Third Party Submission of Panama, p. 4;

[3] *See* EC First Submission at para. 26; Third Party Submission of Costa Rica at paras. 16-18; Third Party Submission of Bolivia, Colombia, Ecuador, Peru, and Venezuela at paras. 49-5.

manner that encompasses all the circumstances provided in paragraph 2 of the Enabling Clause. Paragraph 1 of the Enabling Clause grants to "contracting parties" in general the right to accord differential and more favorable treatment to developing countries. The Enabling Clause permits India, as a developing country, to accord differential and more favorable treatment to other developing countries. Indeed, the Enabling Clause specifically provides for developing countries to provide preferential treatment to other developing countries, as in the case of paragraph 2(c). And under paragraph 2(c), developing countries would only be according preferential treatment to some but not all developing countries. In those circumstances, "other contracting parties" cannot be limited to developed contracting parties.

6. Moreover, if India's reading of paragraph 1 were correct, then the less-developed countries that had entered into an arrangement under paragraph 2(c) would have to extend the differential and more favorable treatment to *all developing* countries, including those that had not entered into the arrangement. This would render paragraph 2(c) a nullity, a result incompatible with basic principles of treaty interpretation.[4] In addition, paragraph 2(d) allows for "special treatment" of the "least developed among the developing countries," and is thus also directly at odds with India's argument that all developing countries must be treated the same.[5] Lastly, the United States agrees with the analysis of several other Members involved in this

[4] *United States – Standards for Reformulated and Conventional Gasoline* (*"US – Gasoline"*), WT/DS2/AB/R, adopted 20 May 1996, p. 21; *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 106; *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB, R, adopted 12 January 2000, paras. 80-82.

[5] *See* EC First Submission at paras. 29-31.

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.[6]

Enabling Clause reference to "non-discriminatory"

7. I will now turn to the arguments relating to the parameters of paragraph 2(a) of the Enabling Clause. I think we all would agree that understanding the scope of paragraph 2(a) is a bit complicated since the reader must refer to the 1971 Decision on "generalized, non-reciprocal and non discriminatory preferences" which, according to the Enabling Clause, describes the Generalized System of Preferences.

8. 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 Decision does not further elaborate on the significance of the use of the term "with a view to" rather than simply requiring that the treatment must be that referred to in the Preamble. However, we understand that this is not an issue in this dispute since the EC is not relying on this language for its arguments. The preamble notes unanimous UNCTAD agreement on establishment of "a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing

[6] *See also* EC First Submission at paras. 70-71; Third Party Submission of Costa Rica at paras. 22-25; Third Party Submission of Bolivia, Colombia, Ecuador, Peru, and Venezuela at paras. 35, 57-59.

countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries."

9. From the 1971 Decision, then, the parameters for the GSP would appear to include at least the following elements:

1) mutually acceptable

2) generalized

3) non-reciprocal

4) non-discriminatory.

India's arguments ignore the elements other than non-discriminatory.

10. With respect to "non-discriminatory," as an initial matter, 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 because, according to India, Article I:1's "unconditionally" requirement is not addressed in the Enabling Clause.[7] First, as other Members involved in this dispute point out, the word "unconditionally" is simply not found in the text of the Enabling Clause.[8] Second, for the reasons set forth in the U.S. written submission and those of the EC and other third parties, the Enabling Clause excludes the application of Article I:1 altogether, including Article I:1's "unconditionally" requirement.[9] The

[7] India First Submission, paras. 51, 58.

[8] EC First Submission, para. 32; Third Party Submission of Bolivia, Colombia, Ecuador, Peru, and Venezuela at para. 43.

[9] Third Party Submission of the Untied States, paras. 4-9; EC First Submission, paras. 14-20; Third Party Submission of Bolivia, Colombia, Ecuador, Peru, and Venezuela at paras. 33-45; Third Party Submission of Panama, pp. 2-3; Third Party Submission of El Salvador, Guatemala, Honduras, and Nicaragua at para. 22.

United States therefore urges the Panel to reject India's effort to import the obligation to extend advantages "unconditionally" contained in Article I:1 into the Enabling Clause. Finally, in light of the fact that the Enabling Clause simply excludes the application of Article I:1, and that the Enabling Clause does not include an "unconditionally" requirement, it is not necessary for the Panel to address the EC's extended arguments on the meaning of the word "unconditionally."[10]

11. Much as India seeks to import into the Enabling Clause the "unconditionally" requirement of Article I:1, 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 GATT Articles I and III.[11] However, unlike Articles I and III, the 1971 Decision simply uses the term "non-discriminatory," and there is no indication that the analysis of this provision is intended to be the same as that under a "like product" analysis. Indeed, the Appellate Body has recognized that "discrimination" is not the same as Article III's "national treatment" test.[12]

12. Without expressing an opinion on whether the Drug Arrangements are non-discriminatory, the United States generally agrees with the EC that a GSP program may be described as "non-discriminatory" if it differentiates among unequal situations.[13] As mentioned earlier, paragraphs 3(c) and 7 of the Enabling Clause appear to contemplate explicitly that preferences extended pursuant to the Enabling Clause, including paragraph 2(a), need not be extended on a "one size fits all" basis, and that distinctions among developing countries tailored

[10] EC First Submission at paras. 38-58.
[11] *See, e.g.*, India First Submission, paras. 53, 56; India First Oral Statement, para. 18.
[12] *See US – Gasoline*, WT/DS2/AB/R, p.23.
[13] *See* EC First Submission at paras. 66-69.

to their development, financial and trade needs are specifically contemplated. Further, India's interpretation of "non-discriminatory" raises concerns in light of the fact that the Enabling Clause separately calls for a "generalized" system. India's approach to "non-discriminatory" would appear to render "generalized" redundant or meaningless. "Generalized" does not mean "all" (otherwise negotiators could just have said "uniform" or "preferences to all developing countries"). Rather, "generalized" permits "less than all" and is inconsistent with India's definition of "non-discriminatory."[14]

13. In addition, the United States does not disagree with the EC that a GSP scheme may be described as "non-discriminatory" if the benefits are granted on the basis of objective criteria that do not operate *prima facie* to exclude any one country, and "based on an overall assessment of all relevant circumstances."[15] Under India's approach, any GSP 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. Recalling that the 1971 Decision calls for a "mutually acceptable system" of preferences, and that a Member has the right, *not* the obligation, to extend preferences, it is important to keep in mind that, 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

[14] *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.").

[15] EC First Submission at para. 125; *see also* paras. 63, 116-117.

acceptable to other beneficiary countries or to GSP donor countries, or even to India in a different dispute.

14. The United States would like to reiterate a point made in our written submission. While various Members have established GSP programs to the benefit of developing country Members, those different programs have many different nuances. India has made very specific points about only one aspect of one such program. In light of those considerations, we would respectfully encourage the Panel to resolve this dispute in a manner that is confined to the specific facts of this case and that takes care to avoid going beyond the particular circumstances that this dispute concretely presents.[16] Lastly, the United States joins the many developing country third parties to this dispute that have pointed out the practical difficulty of reading legal obligations into the Enabling Clause that are not found in the text.[17] 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 to the purpose of the Enabling Clause, create a *disincentive* for Members to extend tariff preferences to developing countries.

Legal Representation Issue

15. I would also like to touch briefly on the issue of legal representation that the EC has raised. We certainly agree that the situation is unprecedented and can understand why the EC would like to make sure all the implications are thought through. The situation here is different

[16] Third Party Submission of the United States at para. 2.

[17] *See* Third Party Submission of Costa Rica at para. 26; Third Party Submission of Bolivia, Colombia, Ecuador, Peru, and Venezuela at para. 48; Third Party Submission of Panama, pp. 4-5.

from a representative of a third party speaking on behalf of other third parties (or of a complainant speaking on behalf of a co-complainant). Here, the common representation is of a party and a third party. If the EC's 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 the dispute, the United States would agree, although there is no indication that this is the case in this dispute. To address this concern, it should be clear when the Advisory Centre on WTO Law is speaking for India, and when it is speaking for the other delegations. Further, the Advisory Centre should only be allowed to speak for third parties when third parties have a right to speak under the panel's procedures. However, the United States does not see a bar in principle to the Advisory Centre representing more than one party in this particular dispute. Conflicts of interest concerns would normally be the primary concern of the individual Members involved. Moreover, given the decision on expanded third party rights, it is not clear that there is a confidentiality issue in this case.

Conclusion

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