

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

Report of the Panel

TABLE OF CONTENTS

	<u>Page</u>
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. <i>Factual background</i>	6
2. <i>Legal arguments</i>	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. <i>The Enabling Clause</i>	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 obligation 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. <i>Article XX(b) of GATT 1994</i>	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. <i>Procedural arguments</i>	25
(a) Joint representation of India and Paraguay by the same staff of the Advisory Centre on WTO Law	25
2. <i>Substantive arguments</i>	26
D. ORAL STATEMENT OF THE EUROPEAN COMMUNITIES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL.....	31
1. <i>Procedural arguments</i>	31
(a) Joint representation of India and Paraguay by the same staff of the Advisory Centre on WTO Law	31

2.	<i>Substantive arguments</i>	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.	<i>The Drug Arrangements are inconsistent with Article I:1 and the European Communities bears the burden of proof under the Enabling Clause</i>	34
2.	<i>The Enabling Clause does not exclude the application of Article I:1 but authorizes limited derogation</i>	37
3.	<i>"non-discriminatory"</i>	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.	<i>The application of the Drug Arrangements is not "non-discriminatory"</i>	43
5.	<i>The Drug Arrangements are not justified under Article XX</i>	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.	<i>Relationship between GATT Article I:1 and the Enabling Clause</i>	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.	<i>The Enabling Clause</i>	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.	<i>Article XX of GATT 1994</i>	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.	<i>Introduction</i>	54
2.	<i>The allocation of the burden of proof</i>	55
3.	<i>The relationship between the Enabling Clause and Article I:1 of GATT 1994</i>	56

4.	<i>The legal interpretation of the term "non-discriminatory" and the UNCTAD arrangements</i>	56
5.	<i>Paragraph 3(c) of the Enabling Clause</i>	57
6.	<i>Alternative arguments on non-discrimination</i>	59
H.	ORAL STATEMENT OF THE EUROPEAN COMMUNITIES AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL.....	60
1.	<i>Relationship between Article I:1 of the GATT and the Enabling Clause</i>	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.	<i>The Enabling Clause</i>	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.	<i>Article XX of GATT 1994</i>	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.	<i>Introduction</i>	65
2.	<i>The important implications of this dispute for the Andean Community</i>	65
3.	<i>The pivotal role of the Enabling Clause as part of the GATT/WTO regime for developing countries and as a self-standing regime</i>	68
4.	<i>"Other contracting parties" in paragraph 1</i>	70
5.	<i>Paragraph 3(c) of the Enabling Clause</i>	70
6.	<i>The interpretation of the term "non-discriminatory" in footnote 3 of the Enabling Clause</i>	71
B.	COSTA RICA.....	72
1.	<i>Introduction</i>	72
2.	<i>The important implications of this dispute for Costa Rica</i>	73
3.	<i>The Enabling Clause does not prohibit the granting of preferential tariff treatment to some developing countries</i>	73
4.	<i>The Enabling Clause requires donor countries to differentiate between developing countries</i>	74
5.	<i>The Drug Arrangements provided by the European Communities are non-discriminatory</i>	75
6.	<i>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</i>	76
C.	THE CENTRAL AMERICAN COUNTRIES OF EL SALVADOR, GUATEMALA, HONDURAS AND NICARAGUA.....	76
1.	<i>Introduction</i>	76
2.	<i>The designation of the beneficiaries of the Drug Arrangements and the assessment of the gravity of the drug problem in Central America</i>	77
3.	<i>The Enabling Clause is applicable to the Drug Arrangements</i>	77
4.	<i>The Drug Arrangements are a positive response to the needs of developing countries</i>	78
D.	MAURITIUS.....	78
1.	<i>Introduction</i>	78
2.	<i>India bears the burden of proof</i>	79
3.	<i>The Drug Arrangements are non-discriminatory</i>	79

4.	<i>The Drug Arrangements are justified through recourse to Article XX(b) of GATT 1994</i>	80
E.	PAKISTAN.....	80
1.	<i>Introduction</i>	80
2.	<i>Article I:1 of the GATT 1994 does not apply to the Enabling Clause</i>	80
3.	<i>The Drug Arrangements do not require a waiver</i>	80
4.	<i>The inclusion of Pakistan in the Drug Arrangements is not to further the policy objectives of the European Communities</i>	80
F.	PANAMA.....	81
1.	<i>Introduction</i>	81
2.	<i>The important implications of this dispute for Panama</i>	81
3.	<i>The Enabling Clause is drafted as a statute separate and distinct from the provisions of Article I:1 of GATT 1994</i>	82
4.	<i>The Drug Arrangements are not in contravention of Article I:1 of GATT 1994, and paragraph 2(a) of the Enabling Clause</i>	82
5.	<i>The Enabling Clause authorizes differentiation between beneficiaries without establishing discrimination</i>	83
6.	<i>The Drug Arrangements are a positive response to the development needs of Panama and are supported by paragraph 3(c) of the Enabling Clause</i>	83
G.	PARAGUAY.....	84
1.	<i>Introduction</i>	84
2.	<i>Preliminary issue of joint representation</i>	84
3.	<i>Systemic concerns</i>	85
(a)	<i>The elimination of discrimination is a primary objective of the multilateral trading system</i>	85
(b)	<i>The issue of discrimination on the basis of "objective criteria" is not a matter before the Panel</i>	86
(c)	<i>The Enabling Clause in any case does not permit differentiation in treatment between developing countries in the context of GSP schemes</i>	86
(d)	<i>The waiver mechanism provides the required flexibility</i>	89
4.	<i>Concerns specific to the situation of Paraguay</i>	89
5.	<i>Conclusion</i>	90
H.	UNITED STATES.....	91
1.	<i>Introduction</i>	91
2.	<i>The preliminary issue of legal representation</i>	91
3.	<i>The Enabling Clause excludes the application of Article I:1 of GATT 1994</i>	91
4.	<i>"All" developing countries</i>	93
5.	<i>The Enabling Clause reference to "non-discriminatory"</i>	93
6.	<i>Article XX of GATT 1994</i>	95
VI.	INTERIM REVIEW	95
A.	INTRODUCTION.....	95
B.	COMMENTS BY THE EUROPEAN COMMUNITIES.....	96
1.	<i>Joint Representation of India and Paraguay</i>	96
2.	<i>Paragraph 3(c)</i>	97
3.	<i>"Non-discriminatory" in footnote 3</i>	99
4.	<i>Paragraph 2(a)</i>	100
5.	<i>Dissenting Opinion</i>	101
VII.	FINDINGS	103
A.	PROCEDURAL ISSUES.....	103
1.	<i>Joint representation of India and Paraguay</i>	103
(a)	<i>Introduction</i>	103
(b)	<i>Conflict of interest</i>	104
(c)	<i>Confidentiality</i>	105
(d)	<i>Blurring the distinction between parties and third parties</i>	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.	<i>Introduction</i>	107
2.	<i>Arguments of the parties</i>	107
3.	<i>Panel's analysis</i>	109
(a)	<i>Nature of the Enabling Clause</i>	109
(b)	<i>Burden of proof under the Enabling Clause</i>	111

(c)	Applicability of Article I:1	111
(d)	Relevant jurisprudence	113
(e)	Relevance of the importance of the policy objective pursued.....	114
4.	<i>Summary of findings on the nature of the Enabling Clause and its relationship to Article I:1</i>	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.	<i>Introduction</i>	116
2.	<i>Paragraph 3(c)</i>	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.	<i>"Non-discriminatory" in footnote 3</i>	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.	<i>Paragraph 2(a)</i>	136
(a)	Arguments of the parties	136
(b)	Panel's analysis.....	137
5.	<i>Conclusion on the Enabling Clause</i>	138
F.	ARTICLE XX(B) OF GATT 1994 AS A JUSTIFICATION FOR THE DRUG ARRANGEMENTS.....	138
1.	<i>Introduction</i>	138
2.	<i>Arguments of the parties</i>	139
3.	<i>Panel's analysis</i>	142
(a)	Whether the Drug Arrangements constitute a measure under Article XX(b)	142
(b)	Necessity of the measure	145
(c)	"Chapeau"	147
4.	<i>Summary of findings on Article XX</i>	149
VIII. CONCLUSIONS AND RECOMMENDATIONS		150
IX. DISSENTING OPINION BY ONE MEMBER OF THE PANEL		151

TABLE OF CASES CITED IN THIS REPORT

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<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1 adopted 22 April 1998, DSR 1998:III, 1003
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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 Countries¹, (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.

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 Shimizu⁵

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.

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. 2501/2001⁸ ("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

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:1 of 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.

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 advantage²³ 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.

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 "1. 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.

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.

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 'sis tema 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 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 obligation 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 Drug 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 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 Waiver⁴⁶ 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 46th 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 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".

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.

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 document⁵⁶ 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

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 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 prejudice 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. 126-131 of 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 studies⁶⁴, 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

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 issues⁸¹, 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.

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.

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

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

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 1971¹⁰⁶ 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 latter's 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

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

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

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 United 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 cent in 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.

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 all 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 enables 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 exceptional circumstances, 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

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

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

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 issue¹⁷¹, 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 acknowledged 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 1994¹⁹³, 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

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 countries, 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

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

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.

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 text²²⁰ 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

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

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 objective²⁴⁰, 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:

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

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 by 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 submission²⁴⁵ 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 Panel²⁴⁸, 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.

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 Body²⁴⁹, 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 14.1²⁵¹ 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

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.

Communities responds that the problem is mitigated but not totally disposed of, as there is still the 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 Communities²⁵⁴, 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 whole²⁷³, 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

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:1 of 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 Clause²⁸² 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. 2501/2001²⁸⁷, 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.

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 countries¹, 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 countries 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

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

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").

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 countries³¹⁷, 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

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.

coverage and depth of tariff cuts in general could be less than the level and depth offered and accepted in the Agreed Conclusions.

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

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).

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 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

³²⁸ TD/B/330, Section III.

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.

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

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.

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.

(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 improvements³³³; (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

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.

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 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

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.

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-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

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.

Resolution 21(II), there are two formal submissions from the OECD Group³⁵⁴ and the Group of 77.³⁵⁵ There is also the earlier Recommendation from the First Session of UNCTAD³⁵⁶, 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 Algiers³⁵⁷ 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

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.

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.

7.132 The principles for the GSP system as stated in the Report by the Special Group on Trade with Developing Countries of the OECD³⁶⁰, include, *inter alia*, the following:

- "(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.

³⁶⁰ TD/56.

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.

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 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:

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)

"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 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

³⁶⁵ First Session of UNCTAD, Final Act and Report, Rec. A.II.1.II.A.6. (Emphasis added)

paragraph 2(a), authorizing special treatment to the least-developed countries, *inter alia*, in GSP schemes.

(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*

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.

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 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.

³⁶⁷ TD/B/AC.5/34.

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 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. 9 from 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 limitations³⁷⁵, "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

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

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 2501/2001⁴⁰³ and the Explanatory Memorandum of the Commission⁴⁰⁴, 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.

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 Countries⁴²⁶ (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 Waiver⁴²⁷, 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 obligation⁴⁴³, as made possible by Article XXV:5. They applied for,

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 kind⁴⁴⁹, 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

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 report⁴⁵⁰ 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

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 1994⁴⁵⁷ 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 agreements⁴⁶⁰, 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.

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.
