

ANNEX C

Third Parties

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ANNEX C-1

Replies of the Andean Community Collectively to Questions from the Panel and from India after the First Panel Meeting

PANEL'S QUESTIONS TO THE THIRD PARTIES

To All Third Parties

Legal Function

1. Assuming that the Enabling Clause is not a waiver, is it an exception or an 'autonomous' right? In either case, what are the differences in legal consequences of characterizing the Enabling Clause as an exception or an autonomous right? Are there legal consequences beyond allocation of the burden of proof?

We view the Enabling Clause as an autonomous right. As we have said in our submissions, the Enabling Clause establishes a 'self-standing' regime.¹ The Enabling Clause affirmatively establishes how developed countries are to assist developing countries, rather than simply providing for a limited exception to Article I:1 GATT.

There are legal consequences to characterizing the Enabling Clause as an exception or an autonomous right. Obviously, an immediate and important consequence in this dispute settlement context has to do with the burden of proof. Since the Enabling Clause is an autonomous right of the EC, it is India who bears the burden of proving that the Drug Arrangements constitute a violation of it. India has to clear this hurdle before the EC bears any burden of justifying the exercise of its right. India has not met its burden. And if at the end of the day the Panel is not convinced, doubt goes to the benefit of the EC, rather than India. On that basis alone, the EC should prevail.

Burden of proof is not the only consequence of characterizing the Enabling Clause as an exception or as an autonomous right. Exceptions are normally subject to a strict or narrow interpretation, as they are a derogation from an obligation. The Enabling Clause is not an exception, and therefore, like the Appellate Body said in the *Hormones* case², it would be inappropriate to apply to the interpretation of the Enabling Clause a reading more narrow or strict than would be warranted by examination of the ordinary meaning of its terms, viewed in the context and in the light of their object and purpose.

The terms of the Enabling Clause, viewed in their context and in light of their object and purpose, do not merit a restrictive interpretation. The Enabling Clause has a fundamentally different purpose than that of an exception like Article XX GATT. There, the EC would be derogating from the GATT in its own interest. With the Enabling Clause, the interest is altruistic – the Enabling Clause enables developed countries to help other countries. When a country acts thus, as the EC has done with the Drug Arrangements, there is no need to look at the measures with special scrutiny.

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

First and foremost, one should look at the text of the provision in question to determine whether it confers an 'autonomous right' or provides for an 'affirmative defence'. As we have

¹ See paras. 33-45 of the Third Party Submissions of the Andean Community of 30 April 2003.

² WT/DS26/AB/R, WT/DS48/AB/R para. 104.

explained in our submissions, the text of the Enabling Clause supports the conclusion that it creates an 'autonomous right'.³

Furthermore, as we said in our submissions, the pivotal role of the Enabling Clause as part of the broader and evolving GATT/WTO regime for the benefit of developing countries also supports the conclusion that it confers an 'autonomous right'.⁴

Non-discriminatory

3. Assume that the Enabling Clause is a self-standing, autonomous right and that the Panel should look at the Enabling Clause itself to interpret its provisions. Could you indicate where in the Enabling Clause the Panel should find the context for the interpretation of the term 'non-discriminatory'? Does this context provide sufficient contextual guidance for the interpretation of this term? Should the Panel also look outside the Enabling Clause for contextual guidance? If so, to which particular Agreements and provisions therein, and why these particular provisions, and not others?

Since the 'Enabling Clause' is a self standing regime, the Panel should indeed look to it first and foremost, viewed in its context and in light of its object and purpose, in order to interpret its terms. Part of the Enabling Clause's context, object and purpose is its pivotal role of as part of the broader and evolving GATT/WTO regime for the benefit of developing countries. In interpreting the term 'non-discriminatory', the Panel must ensure that its interpretation allows the Enabling Clause to 'enable' what it is meant to 'enable'.

For that, the Panel must consider the Enabling Clause as a whole, with due regard for its pivotal role as part of the broader and evolving GATT/WTO regime for developing countries. Within the Enabling Clause, we would point to its paragraphs 1, 2(a), 3(a) and (c) and 5 as particularly relevant.

We think that the Panel, knowing the pivotal role that the Enabling Clause is meant to play, has sufficient context to interpret the term 'non-discriminatory'. We therefore do not think it necessary for the Panel to look outside the Enabling Clause for guidance.

Further, we are sceptical about the appropriateness of doing so. The term 'non-discrimination' appears elsewhere in the WTO, but in provisions that have different contexts and objects and purposes – and therefore where 'non-discrimination' has a different interpretation. In particular, it would not be appropriate for the Panel to be guided by the interpretation of Article I, since non-discrimination is not the same concept as Most Favored Nation treatment.⁵ Likewise, it would not be appropriate for the Panel to use the interpretation in an exception like Article XX.

4. Does the context of the term 'non-discriminatory' in footnote 3 of the Enabling Clause include Articles I:1, III:4, X, XIII, XVII and XX of GATT 1994, and Article XVII of GATS? Why or why not?

As explained above, we do not think so. The context of the term 'non-discriminatory' in footnote 3 of the Enabling Clause is the Enabling Clause.

The context of Articles I:1, III:4, X, XIII, XVII and XX of GATT 1994, and Article XVII of GATS is different. The object and purpose of those provisions is also different.

³ See paras. 33-45 of the Third Party Submissions of the Andean Community of 30 April 2003.

⁴ See paras. 20-32 of the Third Party Submissions of the Andean Community of 30 April 2003.

⁵ See para. 40 of the Third Party Submissions of the Andean Community of 30 April 2003, Oral Statement of 15 May 2003 at para. 3.

Paragraph 3(c)

5. Please give your views on the following questions relating to the meaning of the Enabling Clause, based upon paragraph 9 of Paraguay's Oral Statement. Is it correct to say that under the Enabling Clause developed countries are not obliged to give tariff preferences? Is it also correct that any preferences granted are only in respect of products of the developed country's own choice and only to developing countries of its choice? Are developed countries free to graduate beneficiary developing countries from their GSP schemes?

It is correct to say that under the Enabling Clause developed countries are not obliged to give tariff preferences. They also may decide unilaterally which products and countries are covered by the same.

If they give preferences, they must respect the provisions of the Enabling Clause; the preferences must be 'generalized' and 'non-discriminatory'. As we have explained in our submissions, the Drug Arrangements respect the requirements of the Enabling Clause.

6. Developing countries often have different development needs. Take, for example, Indonesia, the Philippines, Morocco, Brazil and Paraguay, each having different development needs. If we agree with the argument of the Andean Community that it is possible to select some beneficiary countries according to certain criteria (paragraph 6 of the Joint Statement of the Andean Community), would it not be a logical consequence of this argument that any developed country could establish a special GSP tariff preference scheme for each individual developing country in responding to that developing country's own development needs? Is this a proper reading of paragraph 3(c) of the Enabling Clause? Why or why not? If not, where do you draw the line in term of a proper interpretation of paragraph 3(c)?

As we have said above, while developed countries can decide unilaterally which products and countries are covered by their GSP schemes, when doing so they must respect the provisions of the Enabling Clause; they must be 'generalized' and 'non-discriminatory'. [note, you have to put a semi-colon here instead of a comma] A regime designed for one particular country might very well fall foul of provisions of the Enabling Clause, viewed in the context of its object and purpose.

In the Enabling Clause the term "non – discriminatory" must be interpreted having regard to the objective of "special and differential treatment". The requirement that preferences must be "generalized" means that, unlike the "special" preferences traditionally granted to certain countries or groups of countries merely for historical or geographical reasons, the preferences should be "generalized" to all developing countries with similar development needs.

However, it is not feasible, necessary or indeed appropriate for this Panel to consider every possible 'hypothetical' in coming to its decision. Rather, this Panel is called upon to determine whether the Drug Arrangements violate the Enabling Clause.

This concrete application of the Enabling Clause is not a violation of it. As we have explained in our submissions, the Drug Arrangements respect the Enabling Clause as a whole, and in particular its para. 3, because they properly acknowledge a development problem – drugs – that is internationally recognized⁶, and the kind of increased market access that they provide is an effective tool to alleviate the special development needs of countries affected by drug production and trafficking.⁷ Furthermore, the countries that benefit from the Drug Arrangements were properly selected. This is not challenged by India, nor does it argue that it has similar drug problems such that it was discriminatorily excluded.

⁶ See paras. 62 and 63 of the Third Party Submissions of the Andean Community of 30 April 2003.

⁷ See paras. 64 through 66 of the Third Party Submissions of the Andean Community of 30 April 2003.

7. Are the developed countries free to 'graduate' beneficiary developing countries from a GSP scheme? If so, under which paragraph of the Enabling Clause? Please elaborate.

We understand that the issue of graduation is not before the Panel.

8. Does the word 'and' in paragraph 3(c) of the Enabling Clause mean 'or'? In other words, does the word 'and' mean that 'development, financial and trade needs' must be considered in a comprehensive manner or may they be considered separately?

We would not advocate reading the word 'or' for 'and' in para. 3(c) of the Enabling Clause. Development, financial and trade needs should be considered together, but due to the context and objective of the Enabling Clause, which is specifically meant to aid in development, that word has a special emphasis.

9. Paragraph 3(c) of the Enabling Clause refers to 'developed contracting parties' and 'developing countries' in the plural form. Given the common understanding that developed countries may decide individually whether or not they wish to provide GSP, is it also possible to interpret 'developing countries' under paragraph 3(c) as meaning *individual* developing countries?

As we have said above, developed countries can decide unilaterally which products and countries are covered by their GSP schemes, but when they do so they must respect the provisions of the Enabling Clause; they must be generalized and non-discriminatory. Textually this is an interesting parallel. If you can read one as singular, perhaps you can also read the other that way. However, a regime designed for one individual developing country might very well fall foul of provisions of the Enabling Clause, viewed in the context of its object and purpose. However, it would have to be examined concretely rather than in the hypothetical.

10. To the extent that the Drug Arrangements only respond to development needs caused by drug production and trafficking, while not responding to development needs resulting from other problems, such as poverty, low *per capita* GNP, malnutrition, illiteracy and natural disasters, how does this EC programme satisfy the 'non-discriminatory' requirement in footnote 3 of the Enabling Clause? Please elaborate.

Nothing in the Enabling Clause requires developed countries to respond to all or any particular development needs in establishing their GSP programs.

Indeed, somebody could argue that identifying and responding to a concrete need is 'better' for development than to trying to tackle the whole range of development issues.

Paragraph 3c does not require that each single preference be responsive at the same time to the individual needs of each and every developing country.

General

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

No. Please see our answer to question 9 below.

To the Andean Community

1. In paragraph 2 of the Andean Community's Oral Statement, it is stated:

'My starting-point, and you have read and heard this before, is that the Enabling Clause represents a self-standing regime. It is not merely an exception to the GATT's MFN principle.'

Please give your reasoning as to why the Enabling Clause is not an exception, but a self-standing regime. What are the implications of this provision being an exception or a self-standing regime?

Please see our responses to questions 1 and 2 above.

2. Assuming that the Enabling Clause is not a waiver, is it an exception or an 'autonomous' right? In either case, what are the differences in legal consequences of characterizing the Enabling Clause as an exception or an autonomous right? Are there legal consequences beyond allocation of the burden of proof?

Please see our responses to questions 1 and 2 above.

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

Please see our response to question 2 above.

4. To determine the legal function of the Enabling Clause, is it useful to have reference to the exceptions clauses set out in Articles XX, XXI and XXIV of GATT 1994? Please elaborate.

As explained above, the Enabling Clause is neither an exception nor a waiver, but an autonomous right. Therefore, we are sceptical about the relevance and appropriateness of references to Articles XX, XXI and XXIV of GATT 1994, which are exceptions. Their terms must be interpreted in the light of their particular context, object and purpose, which is fundamentally different from that of the Enabling Clause.

5. Article XX and XXI of GATT 1994 provide 'nothing in this Agreement shall be construed to prevent ...' and Article XXIV:3 of GATT 1994 provides '[t]he provisions of this Agreement shall not be construed to prevent ...', and paragraph 1 of the Enabling Clause provides '[n]otwithstanding the provisions of Article I of the General Agreement, contracting parties may ...'. Do you consider that Articles XX, XXI and XXIV of GATT 1994 provide exceptions/'affirmative defences' or not? In light of the similarity/dissimilarity of the above-cited language, do you think the Enabling Clause provides for an exception/'affirmative defence' or an 'autonomous right'? Why or why not? Please elaborate.

Please see our responses to questions 1 and 2 above as to why we consider that the Enabling Clause confers an autonomous right.

Articles XX, XXI and XXIV:3 of GATT are affirmative defenses. As we have noted, we are sceptical about the relevance of other provisions because they each have different wording, different contexts, different objects and purposes. That is even more so with regard to provisions like these, which are justifications for departing from general WTO rules for the country's own benefit, versus the Enabling Clause, whose goal is to enable states to take measures for the benefit of other, developing states.

6. Assume that the Enabling Clause is a self-standing, autonomous right and that the Panel should look at the Enabling Clause itself to interpret its provisions. Could you indicate where in the Enabling Clause the Panel should find the context for the interpretation of the term 'non-discriminatory' in footnote 3? Does this context provide sufficient contextual guidance for the interpretation of this term? Should the Panel also look outside the Enabling Clause for contextual guidance? If so, to which particular Agreements and provisions therein, and why these particular provisions, and not others?

Please see our response to questions 3 and 4 above.

7. With reference to the Preamble to the Agreement on Agriculture, which mentions that developed country Members agreed to take fully into account the particular needs and conditions of developing country Members, including through 'the diversification of production from the growing of illicit narcotic crops', does the Andean Community believe that this commitment on market access is applicable only to the Agreement on Agriculture or also to the Enabling Clause?

We think that the Enabling Clause is a self-standing regime that must be considered on its own merits. We would also like to point out that the "diversification of production from the growing of illicit narcotic crops" has been specifically linked to the special and differential treatment provisions in the Agreement on Agriculture. At the same time the fact that the problem of the growing of illicit narcotic crops has been mentioned in other places in the WTO underscores the importance of the problem and the legitimacy of the EC efforts to address it.

8. Was the Enabling Clause a part of the results of the overall balance of commitments and concessions made during the Tokyo Round negotiations? If so, does this fact have any bearing on the interpretation of the Enabling Clause?

The Enabling Clause was certainly part of the balance of **commitments and** concessions made by the developing countries during the Tokyo Round, and more significantly it was part of the Uruguay Round WTO package, as it remains integral in the Doha Development Round.⁸

9. The 'Aide-mémoire of the Joint Andean Community – European Commission Technical Evaluation Meeting on the Profitable Use of the Andean GSP' mentions that 'the CAN pointed out the need for the EC to obtain a waiver in order to continue granting preferences to the drug-related régime in the face of pressure brought to bear by other countries that consider themselves affected by that régime' (Exhibit India-3). Is this the official position of the Andean Community? If so, why is it necessary for the EC to obtain a waiver for its Drug Arrangements?

The 'Aide-mémoire of the Joint Andean Community – European Commission Technical Evaluation Meeting on the Profitable Use of the Andean GSP' is not an official document – it is merely a summary from the technical group of experts in the context of the political dialogue of possible future frameworks for the Andean Community – EC relations. Hence due to its nature it has no legally binding effect, nor can it be considered as an statement of the position of the Andean countries.

⁸ See the re-affirmation of the Enabling Clause in the Doha Implementation decision, § 12.2.

INDIA'S QUESTIONS TO THE THIRD PARTIES

To all third parties

1. Do the third parties support the EC's contention that the Drug Arrangements are justified under Article XX(b) of the GATT?

(This question is addressed to Bolivia, Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mauritius, Nicaragua, Pakistan, Panama, Paraguay, Peru, Sri Lanka, the United States and Venezuela)

As Third Parties the Andean countries consider that we need not elaborate on an EC argument which has not been part of our written submission or oral statement.

ANNEX C-2

Replies of Members of the Andean Community Separately to Questions from the Panel and from India after the First Panel Meeting

PANEL'S QUESTIONS TO ECUADOR

1. In what form and to what extent do the "binding political and moral commitments that arise out of international co-responsibility that is incumbent upon all states", as referred to in paragraph 12 of Ecuador's Oral Statement, have a bearing on the legal regime in the WTO?

Article 3.2 of the WTO Dispute Settlement Understanding states that "[t]he Members recognize that [the dispute settlement system of the WTO] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law".

Article 31 (general rule of interpretation), paragraph 3, of the Vienna Convention on the Law of Treaties of 1969 thus stipulates that "[t]here shall be taken into account, together with the context ... (c) any relevant rules of international law applicable in the relations between the parties".

The decisions and resolutions of the General Assembly of the United Nations, as part of international law, contain real obligations that are incumbent on States and other subjects of international law and make it easier to determine matters of substance, i.e. what the subjects of international law may or may not do in the sphere of international relations. Moreover, these decisions and resolutions serve as a basis for the framing and development of public international law.

Since narcotics production and trafficking is a worldwide problem, the United Nations has reaffirmed the need to promote international cooperation in fighting this global scourge. The principle of co-responsibility addressed in the United Nations resolutions and international conventions on the subject merely underscore the fact that the States are committed to working together to combat this situation. These UN resolutions were later embodied in the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, to which Ecuador, India and the European Union Member States are party, thereby undertaking a **legal obligation** in this respect. The principle of international cooperation in this area is hence clearly enshrined in an internationally recognized convention and in UN resolutions and is confirmed by State practice consistent with the relevant legislation.

The GPS-Drug Arrangements thus constitute international cooperation in this sense through the mechanisms they provide. Under the WTO legal regime, it is the Enabling Clause that provides the framework for such international cooperation, which in this connection is also the expression of special and differential treatment.

It can therefore be concluded that we have binding rules in this area. It would be wrong, moreover, to consider that the World Trade Organization can remain uninvolved in regard to the numerous standards laid down by the international community in this sphere.

Ecuador believes that the fulfilment of trade obligations cannot in any circumstances detract from the political or other obligations freely undertaken by the States.

QUESTIONS POSED BY INDIA TO THE THIRD PARTIES

Colombia

2. On 28 December 1987, the United States formally notified Chile of its removal from the United States GSP scheme for not taking measures to grant its workers internationally-recognized rights. Chile raised the issue in the GATT Council and argued that this action violated the 1971 Waiver and the Enabling Clause because it was contrary to the requirement of "non-discrimination" because "... once a developed contracting party had unilaterally chosen to establish a GSP scheme, it could not apply it to some developing countries and not to others". In response, the United States argued that its action was non-discriminatory because the "same criterion applied to all countries and was implemented on a non-discriminatory basis".

The Minutes of the meeting of the GATT Council held on 2 February 1988 state:

"The representative of Colombia said that his delegation was deeply concerned by the US action and in particular by the reasons invoked by the United States."

This implies an agreement with Chile's understanding of "non-discrimination". Is this still the considered view of Colombia?

It is important to specify that the statement by the representative of Colombia does not once refer to Chile's interpretation of the scope of non-discrimination. The statement refers exclusively to the US action.

Furthermore, we understand that the consistency with the multilateral commitments of the linkage to compliance with environmental and labour standards, as a legal argument in this dispute, has been abandoned by India, according to paragraph 21 of its written submission.

Therefore, and given that Colombia's statement was delivered in connection with a withdrawal of preferences for reasons relating to labour standards, we do not consider it appropriate to state our views in this regard.

In any event, we note that according to Mr. Frieder Roessler, writing in 1996 about the situation between the United States and Chile in "Diverging Domestic Policies and Multilateral Trade Integration", a chapter of the book *FAIR TRADE AND HARMONIZATION, PREREQUISITES FOR FREE TRADE?*¹

*WTO Members have the right to give tariff preferences to the developing countries in accordance with the Generalized System of Preferences (GSP). The GSP preferences are accorded on an autonomous basis and **may therefore be withdrawn in whole or in part at any time**. This has led some contracting parties to grant preferences conditional upon the pursuit of policies by the exporting country unrelated to trade....*

Chile, having been denied GSP benefits by the United States because of its labor policies, requested consultations under the GATT with the United States on that denial, claiming that the US action was inconsistent with the principle that GSP benefits must be accorded to all developing countries on a nondiscriminatory basis. Chile did not pursue the matter under the GATT dispute settlement procedures and there is therefore no GATT panel ruling on Chile's claim. While it is debatable whether GSP benefits may be granted on domestic policy

¹ Chapter of the book *FAIR TRADE AND HARMONIZATION, PREREQUISITES FOR FREE TRADE?*, Vol. 2, Legal Analysis, edited by Jagdish N. Bhagwati and Robert E. Hudec, MIT Press (1996), Cambridge, Massachusetts, at pp. 39-40.

conditions, it is undeniable that there is no obligation to grant GSP benefits at all. Any inconsistency resulting from the conditional denial of GSP benefits can therefore always be corrected by denying GSP benefits altogether. As a practical matter, there is therefore little a GSP recipient can do to prevent a donor country from linking the grant of GSP benefits to the pursuit of specified domestic policies. [emphasis added]

(at pp. 39-40)

Colombia would be unable to endorse all of Mr. Roessler's assertions because, unlike his interpretation, our understanding is that the Enabling Clause establishes some restrictions on the developed countries in defining their preferential schemes.

Peru

1. On 28 December 1987, the United States formally notified Chile of its removal from the United States GSP scheme for not taking measures to grant its workers internationally-recognized rights. Chile raised the issue in the GATT Council and argued that this action violated the 1971 Waiver and the Enabling Clause because it was contrary to the requirement of "non-discrimination" because "... once a developed contracting party had unilaterally chosen to establish a GSP scheme, it could not apply it to some developing countries and not to others". In response, the United States argued that its action was non-discriminatory because the "same criterion applied to all countries and was implemented on a non-discriminatory basis".

The Minutes of the meeting of the GATT Council held on 2 February 1988 state:

The representative of Peru said that his delegation was likewise deeply concerned. The GSP could not be used for political reasons, but should be based on GATT Decisions and should be non-discriminatory. His delegation noted with satisfaction that consultations would be held by the interested parties."

This implies an agreement with Chile's understanding of "non-discrimination". Is this still the considered view of Peru?

The case at issue concerns a scheme especially designed to address the needs of developing countries facing serious problems in terms of narcotics production and trafficking. The problem at hand relates to a particular situation which, because of its effects and characteristics, cannot be compared to other situations and/or circumstances in which tariff preferences may be granted or denied.

As regards the principle of non-discrimination, Peru reaffirms its statements at paragraphs 36, 42 and 44 of the joint submission made on behalf of the Andean countries.

Venezuela

1. Paragraph 40 of the Minutes of the Trade Policy Review Body Meeting held on 25-26 November 1997 (WT/TPR/M/30) states:

The representative of Venezuela questioned the linkage of EU's GSP Scheme to the fight against drugs and other environmental or labour standards-related criteria.

Could Venezuela please elaborate on its concerns in this regard?

Venezuela's response to India's question regarding the statement by the representative of Venezuela cited in paragraph 40 of the Minutes of the 1997 Trade Policy Review of the European Union (WT/TPR/M/30) is as follows:

It is important, in our view, to recall that according to the first paragraph of Annex 3 to the Marrakesh Agreement Establishing the World Trade Organization the Trade Policy Review Mechanism "is not ... intended to serve as a basis ... for dispute settlement procedures". Nevertheless, Venezuela considers it relevant to explain that the political context of the statement made in 1997 was an assessment of the GSP with a view to considering a prospective application the labour and environmental incentives to the GSP-Drugs. It was therefore a context of transition in regard to those incentives. We should also specify that, according to the European Union, the special environmental and labour arrangements were entirely voluntary and therefore not of a punitive nature.

Venezuela is also surprised that India should ask this question, because in stating in its first submission to the Panel that it had "informed the EC and the Director-General that it had decided to limit the present complaint to the tariff concessions applied by the EC under the Drug Arrangements", India excluded from the Panel's terms of reference all legal arguments relating to the environmental and labour arrangements.

Ecuador

1. The summary of discussions of the High Level meeting between the European Union and the Andean Community on Drugs (held in Brussels on 11 June 2002) contains the following statement of the representative from Ecuador:

[I]ncluir en este régimen [regimen especial "droga"] a países de fuera de la región, aleja a la UE del marco conceptual dentro del cual estas preferencias fueron concebidas. (*Adding to this arrangement [drug arrangement] countries out of the region, takes the EU away from the conceptual framework in which these preferences were conceived*).

This statement seems to suggest that according to Ecuador, the Drug Arrangements are to be confined exclusively to the Latin American region. Could Ecuador please explain whether this can be reconciled with the assertion that the Drug Arrangements apply to *all* developing countries particularly affected by the drug problem?

In reply to this question, Ecuador wishes to explain that the above statement should be understood in the context of a political and trade meeting and hence in no way prejudices the legal basis of the system or the possibility for the EU to include, on the basis of objective criteria, further beneficiary countries facing the problem of drug production and trafficking.

Bolivia, Colombia, Ecuador, Peru and Venezuela

6. The Aide-Memoire of the Joint Andean Community-European Commission Technical Evaluation Meeting on the Profitable Use of the Andean GSP states:

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.

Could Bolivia, Colombia, Ecuador, Peru and Venezuela please explain why a waiver from the EC's WTO obligations was required?

The response to this question was given in the reply to question 9 of the Panel to the Andean countries.

ANNEX C-3

Reply of Brazil to the Question from India
after the First Panel Meeting

Brazil

1. At the Sixty-third Session of the Committee on Trade and Development, 19 April 1988 the Representative of Brazil stated:

"... although preferential tariff concessions constituted a unilateral act of the donor country the exclusion of countries from GSP was per se a discrimination which was not based on the agreed principles ... developed contracting parties acting individually had been authorized to grant such preferential treatment provided that the corresponding schemes were of a generalized, non-discriminatory and non-reciprocal nature. The fact that such schemes were of a voluntary character and did not constitute a binding obligation for the preference giving countries did not in his view give them the right to ignore the legal framework under which they had been authorized to implement such schemes"(COM.TD/127, p.5).

Does this remain the considered view of Brazil?

Answer:

Yes, the statement made by Brazil at the Committee on Trade and Development on 19 April 1988 continues to be the view of Brazil on the issue. Brazil, in that statement, focused on the essential principles governing the granting of preferential treatment under the Enabling Clause, i.e., that any preference granted must be of a generalized, non-discriminatory and non-reciprocal nature.

ANNEX C-4

Replies of Costa Rica to Questions from the Panel and from India after the First Panel Meeting

Legal Function

1. Assuming that the Enabling Clause is not a waiver, is it an exception or an "autonomous" right? In either case, what are the differences in legal consequences of characterizing the Enabling Clause as an exception or an autonomous right? Are there legal consequences beyond allocation of the burden of proof?

The Enabling Clause is an autonomous right. The legal consequence of such characterization is that India, the party making the assertion of illegality, bears the burden of proving that GSP drug program is not consistent with the Enabling Clause and a violation of Article I. If it were an exception, which it is not, then the EC would bear the burden of proving that the drug program is consistent with the Enabling Clause and thus falls within the exception that excuses the violation of Article I of GATT. Also, as an exception, it would have to be interpreted narrowly

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

By looking at its ordinary meaning in its context, and in light of the object and purpose of the treaty, and by determining the legal function of the provision at issue (in this case, paragraph 1 and 2(a) of the Enabling Clause). The context includes, for that purpose, the treaty as a whole. The provisions of the WTO Agreements and the GATT decisions cannot be interpreted in clinical isolation. As the AB noted in *Brazil-Desiccated Coconut*, the WTO Agreement is a single treaty instrument which was accepted by the WTO Members as a "single undertaking". It is an integrated system and in that sense "fundamentally different from the GATT system which preceded it." (p. 13, AB report) Therefore, the legal function of a provision, in this case paragraph 1 and 2(a) of the Enabling Clause, must be considered in the context of the treaty *as a whole*. The legal function in such broad context is relevant for the interpretation of the provisions, including whether it is an exception or a affirmative defence.

The Enabling Clause is an autonomous right. The provisions of Article XX, XXI, and XXIV, all recognized exceptions to GATT rules and authorize certain conduct by establishing the boundaries of all other provisions of the GATT. The limitation that these exceptions impose on all other provisions of the GATT is evidenced by their specific wording, i.e., "nothing in this Agreement shall be construed to prevent" or "the provisions of this Agreement shall not be construed to prevent." They establish a limitation on what all other provisions can do or preclude. By contrast, the Enabling Clause does not seek to detract in any way from Article I. In fact, it reinforces Article I. The phrase "notwithstanding the provisions of Article I" clarifies that the Enabling Clause and Article I co-exist harmoniously, and that one will not detract from the other.

It is also noteworthy that, contrary to the preceding Decision of 1971, the negotiators did not intend the Enabling Clause to be a waiver, thus demonstrating that the contracting parties did not deem such instrument as an exception or affirmative defence, but rather as an autonomous right.

Non-discriminatory

3. *Assume that the Enabling Clause is a self-standing, autonomous right and that the Panel should look at the Enabling Clause itself to interpret its provisions. Could you indicate where in the Enabling Clause the Panel should find the context for the interpretation of the term "non-discriminatory"?*

The *immediate* context for the interpretation of the term "non-discriminatory" is, by direct reference of footnote 3 of the Enabling Clause, the Decision of 1971 that authorized the GSP system. The object and purpose of the Decision of 1971 is therefore relevant as well for purposes of interpreting the term non-discriminatory.

Does this context provide sufficient contextual guidance for the interpretation of this term? Should the Panel also look outside the Enabling Clause for contextual guidance?

In this case, the immediate context of the ordinary meaning of the term "non-discriminatory", i.e., the Decision of 1971, provides sufficient contextual guidance for the interpretation of that term. The Panel should look beyond the Decision of 1971 only if that immediate context does not enable it to adopt an interpretation that gives full meaning to the terms of the Enabling Clause and the other relevant provisions of the WTO Agreement, in accordance with the object and purpose of the treaty. In this case, however, the complainants' interpretation of the term "non-discriminatory," in the context of the Enabling Clause and the Decision of 1971, gives full meaning to that term and furthers the object and purpose of the Enabling Clause and the GATT.

If so, to which particular Agreements and provisions therein, and why these particular provisions, and not others?

NA

4. *Does the context of the term "non-discriminatory" in footnote 3 of the Enabling Clause include Articles I:1, III:4, X, XIII, XVII and XX of GATT 1994, and Article XVII of GATS? Why or why not?*

It would, but only in limited circumstances which are not present in this case. Costa Rica insists that the Panel should rely on the broader context in which the term "non-discriminatory" must be interpreted *only* if it finds that the *ordinary meaning* of the term, considered in its immediate context and in light of the Enabling Clause's object and purpose, is equivocal or vague. As indicated above, the immediate context is the Decision of 1971. The provisions mentioned in the question are indeed context because they are part of GATT; the Decision of 1971 in turn is part of GATT by virtue of Art. 1(b)(iv) of GATT 1994. However, the legal function of the Enabling Clause is very different from the legal function of Articles I:1, III:4, X, XIII, XVII and XX of GATT 1994, and Article XVII of GATS. Unlike these provisions, the Enabling Clause is not concerned, first and foremost, with ensuring the equality of competitive conditions between like products. The purpose and fundamental objective of the Enabling Clause is to authorize developed countries to grant differential and more favourable treatment to developing countries, notwithstanding the Most-Favoured-Nation principle of Article I of the General Agreement. Therefore, even if paragraph 2(a) and footnote 3 of the Enabling Clause and Article I:1 of GATT, are part of the same context, broadly speaking, it is incorrect to extrapolate the non-discrimination notion found in Article I to the Enabling Clause and the Decision of 1971.

Paragraph 3(c)

5. Please give your views on the following questions relating to the meaning of the Enabling Clause, based upon paragraph 9 of Paraguay's Oral Statement. Is it correct to say that under the Enabling Clause developed countries are not obliged to give tariff preferences?

Yes, it is correct. The GSP is an autonomous system. As evidenced by the "Agreed Conclusions" of the Special Committee on Preferences of UNCTAD's Trade Development Board, the grant of the tariff preferences does not constitute a "binding commitment" and it does not in any way prevent their subsequent withdrawal in whole or in part, or the subsequent reduction of tariffs on a MFN basis. Likewise, per the terms of the Decision of 1971, the grant of tariff preferences does not constitute a binding commitment and is only temporary in nature.

Is it also correct that any preferences granted are only in respect of products of the developed country's own choice and only to developing countries of its choice?

It is correct that the preferences granted are only in respect of the products of the developed country's own designation. However, the choice of developing countries beneficiaries cannot be arbitrary nor is it entirely discretionary. The choice of beneficiaries has to be based on objective, non-discriminatory, criteria.

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

The obligation to take into account the specific level of economic and trade development, for the purpose of determining which developing countries meet the objective criteria that make them eligible to receive preferences, exists also for the purpose of determining which countries no longer meet such conditions. The arbitrary removal of tariff preferences accorded to a beneficiary country that continues to meet the conditions would be just as discriminatory and inconsistent with the Decision of 1971 as according tariff preferences to a country that does not meet such conditions. Therefore, the non-discrimination requirement of the Generalized System of Preferences requires that the withdrawal of preferences by the donor country be based on objective, non-discriminatory criteria.

Developing countries often have different development needs. Take, for example, Indonesia, the Philippines, Morocco, Brazil and Paraguay, each having different development needs. If we agree with the argument of the Andean Community that it is possible to select some beneficiary countries according to certain criteria (paragraph 6 of the Joint Statement of the Andean Community), would it not be a logical consequence of this argument that any developed country could establish a special GSP tariff preference scheme for each individual developing country in responding to that developing country's own development needs? Is this a proper reading of paragraph 3(c) of the Enabling Clause? Why or why not? If not, where do you draw the line in term of a proper interpretation of paragraph 3(c)?

No. The Enabling Clause does not require, or even authorize, developed countries to grant specific tariff preferences to developing countries on an individual basis. The requirement that the GSP tariff preference scheme be *generalized* would preclude donor countries from establishing an atomized GSP scheme made up of a multitude of individual tariff preferences. Nevertheless, the term "generalized" cannot be interpreted as rigidly *requiring* donor countries to grant the same preferences to *all* developing countries without consideration to their specific development, financial, and trade needs. Paragraph 5 is the only provision of the Enabling Clause that makes reference to the *individual* development, financial and trade needs of developing countries.

6. Are the developed countries free to "graduate" beneficiary developing countries from a GSP scheme? If so, under which paragraph of the Enabling Clause? Please elaborate.

Concerning the first question see answer to question No. 5. There is no specific provision in the Enabling Clause that addresses the removal of preferences. However, such authority is implicit in (i) paragraph 3(c) of the Enabling Clause, (ii) in the autonomous, non-binding nature of the tariff preferences granted by donor countries to developing countries, and (iii) the right to grant preferences to some but not all developing countries, provided that such differential and more favourable treatment is non-discriminatory.

7. Does the word "and" in paragraph 3(c) of the Enabling Clause mean "or"? In other words, does the word "and" mean that "development, financial and trade needs" must be considered in a comprehensive manner or may they be considered separately?

The "development, financial and trade needs" can be considered separately under paragraph 3(c). In any event, drug production and trafficking affects the development, financial *and* trade needs of the developing countries that face that problem. Therefore, the EC's special arrangement to combat drug production and trafficking, positively responds to the development, financial *and* trade needs of the beneficiary developing countries.

8. Paragraph 3(c) of the Enabling Clause refers to "developed contracting parties" and "developing countries" in the plural form. Given the common understanding that developed countries may decide individually whether or not they wish to provide GSP, is it also possible to interpret "developing countries" under paragraph 3(c) as meaning individual developing countries?

Yes, paragraph 3(c) can be interpreted as requiring a donor country to consider the individual development, financial and trade needs of developing countries when designing or modifying its differential and more favourable treatment. However, as stated above, that does not mean that developed countries are required or even authorized to grant specific tariff preferences to developing countries on an *individual* basis. It is one thing to design a *generalized* system that responds to the individual development, financial and trade needs of developing countries, pursuant to the Decision of 1971 and the Enabling Clause, and it is quite a different thing to have a specific system for each individual developing country. The latter is not a direct or necessary consequence of the former.

Developing countries cannot be grouped into one single unified, undifferentiated category. Although similar in various ways, developing countries have widely different development, financial and trade needs. Nevertheless, there are common problems or challenges that are shared by either a wide or narrow group of developing countries. Paragraph 3(c) requires donor countries to respond positively to the differing levels of development through programs that can be more efficiently applied to a category of developing countries that share, overall, the same development, financial and trade needs. It simply would not be efficient or even practicable to design individual preferential systems for each developing country. It is far more feasible and efficient to respond to the common development, financial and trade needs shared by some but not necessarily all developing countries through special preferential schemes that considers and responds to those shared needs. In fact, it is absurd, given the wide disparity between developing countries, to suggest that a donor country can respond to the needs of developing countries through one single GSP scheme, and still give full meaning to the requirement in paragraph 3(c). The donor country must consider the individual needs of the developing countries when determining which countries share the same developmental problems or obstacles, in order to apply a generalized, but not single, GSP system that adequately responds to those needs. That is the meaning of paragraph 3(c) of the Enabling Clause and that is exactly what the EC GSP drug program does. It responds to the development, financial and trade needs of a group of developing countries that share a common problem, viz., drug production or trafficking.

9. To the extent that the Drug Arrangements only respond to development needs caused by drug production and trafficking, while not responding to development needs resulting from other problems, such as poverty, low per capita GNP, malnutrition, illiteracy and natural disasters, how does this EC programme satisfy the "non-discriminatory" requirement in footnote 3 of the Enabling Clause? Please elaborate.

The non-discriminatory requirement of the Decision of 1971 does not prevent or preclude donor countries from responding *both* to development needs caused by drug production and trafficking, *and* to development needs resulting from other problems, such as poverty, low per capita GNP, malnutrition, illiteracy and natural disasters. Therefore, it is a mistake to force donor countries to choose between which specific developmental or trade problems to address, to the exclusion of all other problems. Yet, India appears to be suggesting that the EC needs to choose between addressing either drug production and trafficking *or* child malnutrition. India's suggested response is to either treat all problems and challenges faced by developing countries through one single, rigid GSP system, as if all problems were the same, or to not address the specific problems at all. This approach ignores the possibility that, pursuant to the Enabling Clause, a donor country can establish a GSP scheme that would provide additional preferences to developing countries that, according to objective criteria, faced, for instance, a grave child malnutrition problem.

The EC responds to the non-discriminatory requirement referred to in footnote 3 by according differential and more favourable treatment to developing countries that, objectively, face a specific development, financial and trade problem.

General

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

A waiver would add legal certainty to the multilateral trading system by strengthening the legal basis of what all recognize as a vital trade program that is essential to the development of developing countries.

QUESTIONS POSED BY INDIA TO THE THIRD PARTIES

1. Do the third parties support the EC's contention that the Drug Arrangements are justified under Article XX(b) of the GATT?¹

Costa Rica is of the opinion that, given that Article XX(b) of GATT constitutes a general exception and is in the nature of an affirmative defense, it is appropriate only for the EC to assert it and to provide the reasons that, in its view, justify its invocation.

¹ This question was addressed by India to Bolivia, Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mauritius, Nicaragua, Pakistan, Panama, Paraguay, Peru, Sri Lanka, the United States and Venezuela.

ANNEX C-5

Replies of El Salvador, Guatemala, Honduras and Nicaragua to Questions from the Panel after the First Panel Meeting

PANEL'S QUESTIONS TO THE THIRD PARTIES

To Guatemala, El Salvador, Honduras and Nicaragua

1.1 What, in your view, is the principle of shared responsibility, and what is the relevance of this principle in this case?

Definition of the principle of shared responsibility¹

Action against the world drug problem is a common and shared responsibility requiring an integrated and balanced approach in full conformity with the purposes and principles of the Charter of the United Nations and international law.

Relevance of the principle of shared responsibility in this case

The multinational dimension of drug trafficking is such that it does not lie within the power of any of the world's countries single-handedly to eliminate this threat.² In the fight against drugs, every State should have a task to accomplish that is commensurate with its own circumstances and capacities.

The special arrangements to combat drug production and trafficking (Drug Arrangements) are one of the means used by the EC to address this global task of fighting drug production and trafficking, by providing beneficiary countries *inter alia* with opportunities to conduct lawful activities to replace those related to the narcotics trade.

¹ Political Declaration, Special Session of the General Assembly of the United Nations, 1998.

² Paragraph 1 of the first written submission by El Salvador, Guatemala, Honduras and Nicaragua: "The drug problem is a multilateral issue that calls for constructive solutions on the part of countries affected by drug production and trafficking, as well as destination countries. Ultimately, the effort must be made by both developed and developing countries."

ANNEX C-6

Replies of Panama to Questions from the Panel and from India after the First Panel Meeting

PANEL'S QUESTIONS TO ALL THIRD PARTIES

To All Third Parties

Legal Function

1. Assuming that the Enabling Clause is not a waiver, is it an exception or an "autonomous" right? In either case, what are the differences in legal consequences of characterizing the Enabling Clause as an exception or an autonomous right? Are there legal consequences beyond allocation of the burden of proof?

The Enabling Clause is an autonomous right and not an exception or a waiver. It is a Decision taken by Members on 28 November 1979 under the title "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries". Its title so specifies, and as a Decision taken by the GATT CONTRACTING PARTIES in 1994, it is included in paragraph 1(b)(iv) of the GATT 1994. If it were a waiver, it would be included under paragraph 1(b)(iii) of the GATT 1994, or it would appear on its own, like, for example, the exemption granted under paragraph 3 of the GATT 1994.

The fact that the Enabling Clause was created by a Decision as a separate and distinct statute for the purpose of providing "special and more favourable treatment" distinguishes it from the exception regimes which are conceived as derogations from the General Agreement itself that are permitted for other purposes than granting "special and more favourable treatment" to developing countries. It is this development dimension that gives the Enabling Clause its distinct and autonomous status. Exceptions can be invoked by any Member State regardless of its level of development, and they are normally used to protect or promote specific interests of the Member State invoking them. The Enabling Clause, on the other hand, establishes a separate and distinct statute whose purpose is to enable benefits to be granted to third parties, and those benefits can only be accorded to developing or least-developed countries. It is different from an exception in that it precludes the rights and obligations contained in the Agreement only when preferential treatment is given to third parties, taking account of the development dimension.

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

The context of the question leads us to consider the question of why the Enabling Clause is an autonomous right. In response to that question, we conclude that the following conditions indicate that it is:

- (a) It is and has been (since 1979) a right recognized by the CONTRACTING PARTIES (Tokyo Round involved in multilateral trade negotiations);
- (b) it is recognized in paragraph 1 thereof that notwithstanding Article I of the GATT, favourable treatment may be accorded to third parties with a particular development status;

- (c) among its basic provisions is the requirement that such treatment should be provided for particular purposes (paragraph 3).

A legal provision is identified as an autonomous right when it confers a permanent right on one or several parties without any mention of contingency on other provisions. Thus, the autonomy of a right exists where the exercise of a right deriving from a provision is regulated by the same provision. In the case of the Enabling Clause, the reason for its autonomy is to provide for "special and more favourable treatment" in response to a development dimension. If it were an "affirmative defence", it would be based on a whole set of rights and obligations which would be equal for all and would not be associated with any specific purposes or level of development.

3. Assume that the Enabling Clause is a self-standing, autonomous right and that the Panel should look at the Enabling Clause itself to interpret its provisions. Could you indicate where in the Enabling Clause the Panel should find the context for the interpretation of the term "non-discriminatory"? Does this context provide sufficient contextual guidance for the interpretation of this term? Should the Panel also look outside the Enabling Clause for contextual guidance? If so, to which particular Agreements and provisions therein, and why these particular provisions, and not others?

The meaning of "non discriminatory" can be found throughout the text of the Clause, but above all in paragraphs 1, 2 and 3. The context of "non-discrimination" should be found in the very reason for the Enabling Clause's existence. As a cooperation and development mechanism, it unquestionably constitutes a means of stimulating growth in the beneficiary countries by promoting their trade. This promotion does not need to take account of the provisions of Article I.1 of the GATT; in other words we are able, in our view, to exercise a right (the granting of certain benefits), with elements of discretionality that are distinct from those contained in Article I.1 of the GATT (MFN). The exercise of this discretion can only be judged on the basis of the object and *raison d'être* of the Clause itself. And indeed, this discretionality is confirmed by the final part of paragraph 1 with the words "without according such treatment to other contracting parties".

The use and meaning of the terms as they appear in the Enabling Clause must also be taken into account in determining the limits imposed by the Clause itself. The wording of the Enabling Clause does not reflect any doubt in establishing the appropriate distinctions and clarifications when it wishes to distinguish between the developed and developing parties and countries. The Enabling Clause uses the term "CONTRACTING PARTIES"¹ on several occasions to mean both the developed members and the developing members. The authors did not see any need to make the distinctions and clarifications in this case that it had made in other cases ², so that what was meant was all members without distinction as to their level of development. It is possible, therefore, not to grant schemes accorded under the Clause to other contracting parties (not to all) whatever of their level of development.

The Panel must look for any meaning within the Clause itself – it is there that the meaning of "non-discriminatory" can be found. The meaning of "non-discriminatory" in respect of a scheme accorded under Article 2(a) of the Enabling Clause must be established by answering the following questions:

- (d) Is the preference scheme granted under paragraph 2(a) of the Enabling Clause in fact consistent with the objectives and purposes of the Clause?

¹ Paragraphs 1, 2(c), 4(a), 4(b) and 9 of the Enabling Clause

² "Developed contracting party or developed party": Paragraphs 2(a), 3(c), 5 and 7 of the Enabling Clause. On all of these occasions, the term is contrasted with terms such as "developing countries" (paragraphs 2(a) and 3(c) or "developing contracting parties" (paragraphs 5 and 7).

- (e) Is the preference scheme granted under paragraph 2(a) of the Clause in fact consistent with the guidelines on differential and more favourable treatment in paragraph 3(c) of the Clause?
- (f) Does the preference scheme in fact constitute a means granted for the purposes it is supposed to achieve?

The Enabling Clause in itself provides sufficient guidance as to how the term should be interpreted. With respect to the question as to whether the Panel should look outside the Enabling Clause for other guidance, we believe that Members may use all of the resources available to them as they deem necessary in the light of their experience and expertise. We think that the meaning can be found in the Clause itself to the extent that it introduces a concept that is separate and distinct from the General Agreement, as is the Most Favoured Nation Principle, and any help that could be derived from the different Agreements (including the GATT) would be limited and illustrative, since they are governed by Article 1 of the GATT and do not invalidate it as does the Enabling Clause. If we were to proceed otherwise, we would be undermining the autonomy of a right that could literally be jeopardized if we tried to relate it directly to the general context of the GATT provisions.

4. Does the context of the term "non-discriminatory" in footnote 3 of the Enabling Clause include Articles I:1, III:4, X, XIII, XVII and XX of GATT 1994, and Article XVII of GATS? Why or why not?

The context of the term "non discriminatory" in footnote 3 of the Enabling Clause does not include Article I of the GATT. Its status as a separate and distinct statute with a specific purpose precludes the use of the principles of Article I to interpret the way in which "special and differential treatment" must be granted. The Enabling Clause would lack coherence if it were subsumed, through interpretative context, under the same provision from which it is expressly excluded.

Footnote 3 makes it clear that differentiated and more favourable treatment schemes under paragraph 2 (a) of the Clause must be generalized (to several), but does not imply that it must be universalized to all). If footnote 3 implied universality of the benefits granted by the inclusion in its interpretative context of the concepts set forth in Article III.4, X, XIII, XVII and XX of the GATT 1994, we would be depriving the Clause of its "legal autonomy" and in fact applying it as if it were an exception to the General Agreement. Reference to the different meanings of the term "non-discrimination" may be a good illustrative exercise, but cannot and should not turn into an interpretation which results in depriving it of its status as a statute which is separate and distinct from the Clause. To the extent that we apply the general principles of the GATT within the non-discrimination obligation (beyond simply trying to understand the differences with the Enabling Clause), we will be losing the autonomous right that was there from the start.

Our delegation has given much attention to Article XVII of the GATS. We do not consider that provisions of the Services agreement such as Article XVII which concern conditions of competitions between services suppliers should be transposed or used to judge incentive schemes on the basis of special and more favourable treatment for the developing countries. The equality of opportunities to compete is an element alien to the motivation behind the granting of incentive schemes on the basis of special and more favourable treatment. Our understanding is that the Communities mentioned this Article in order to "illustrate" the point that formerly different treatment is not necessarily discriminatory³ India seems to concur in this respect.⁴ Their dispute currently before the panel does not involve the supply of services so that in our view, any interpretation of Article XVII of the GATS should be confined to the illustrative purposes for which the parties used

³ ... written submission of the European Communities, paragraph 74 and 75.

⁴ Statement of India before the panel of 14 May 2003, paragraph 19.

and accepted them, and not to create precedence for future interpretations of Article XVII of the GATS.

5. Please give your views on the following questions relating to the meaning of the Enabling Clause, based upon paragraph 9 of Paraguay's Oral Statement. Is it correct to say that under the Enabling Clause developed countries are not obliged to give tariff preferences? Is it also correct that any preferences granted are only in respect of products of the developed country's own choice and only to developing countries of its choice? Are developed countries free to graduate beneficiary developing countries from their GSP schemes?

The purpose of the Enabling Clause is to encourage the granting of preferences under a system of differential and more favourable treatment for the developing countries. The text of the Enabling Clause reflects the unilateral and non-mandatory nature of the "differential and more favourable treatment" by using the clear terms "*may accord*". These concessions are clearly made outside (through a separate and distinct statute) the obligations contained in the General Agreement, where the concessions were granted under a different system necessarily involving negotiation, in which reciprocal concessions and case by case examination would play a relevant role. This interpretation is reaffirmed by footnote 2 of the Clause which states that any measures involving differential and more favourable treatment other than those stipulated in the Enabling Clause should be considered on a different basis from those covered by the Clause.

It is correct that a country that unilaterally grants certain preferences in exercise of its discretionary rights under the Enabling Clause chooses the products for which they are granted. Who, otherwise, would have the discretion to take the final decision on what product should be included or excluded from a particular scheme? The modification of tariffs continued to be the sovereign right of Members, so that only the Member granting the tariff benefit can decide whether or not to include in its legislation and give it a force of law. The exercise of this sovereign authority can be the subject of consultation as to the consistency of the measures taken with that Member's international obligations. Since the said member can be held responsible for its actions as demonstrated by the appearance of the European Communities before this panel, there is no doubt in our minds that it is the granting Member that must make that choice.

Paragraph 3(c) imposes on developed countries the obligation to ensure that any differential and more favourable treatment granted under the Clause is "designed and, if necessary, modified, to respond positively to the development, financial and trade needs of the developing countries." This obligation cannot be properly fulfilled if the country granting the benefits is not given a certain amount of flexibility to draw up preference schemes that respond effectively to the "generalized" needs (of some) instead of the universal needs (of all). The generalized (to some) nature provided for in paragraph 2(a) requires that the countries granting such benefits should create a reference framework or process on the basis of which the benefits will be accorded.

Graduation is not an issue that Panama has argued during these proceedings and it does not fall within the terms of reference of the panel for this dispute. Consequently, we do not wish to discuss this particular issue.

6. Developing countries often have different development needs. Take, for example, Indonesia, the Philippines, Morocco, Brazil and Paraguay, each having different development needs. If we agree with the argument of the Andean Community that it is possible to select some beneficiary countries according to certain criteria (paragraph 6 of the Joint Statement of the Andean Community), would it not be a logical consequence of this argument that any developed country could establish a special GSP tariff preference scheme for each individual developing country in responding to that developing country's own development needs? Is this a proper reading of paragraph 3(c) of the Enabling Clause? Why or why not? If not, where do you draw the line in term of a proper interpretation of paragraph 3(c)?

Paragraph 3 (c) does not speak of granting a preference system to one developing country only; the complete text of the Clause speaks of a group of developing countries – it does not say all, nor does it suggest only one. Development needs can unquestionably be different among the developing countries as the question states. Clearly, the system of preferences (drugs) in question responds to the development needs of developing countries suffering from the adverse influence of a common phenomenon, which is the vast production and/or trafficking of drugs, and/or money laundering.

7. Are the developed countries free to "graduate" beneficiary developing countries from a GSP scheme? If so, under which paragraph of the Enabling Clause? Please elaborate.

Graduation is not an issue that has been argued by Panama during these proceedings, and it does not fall within the panel's terms of reference with respect to this dispute. Consequently, we do not wish to discuss this particular issue.

8. Does the word "and" in paragraph 3(c) of the Enabling Clause mean "or"? In other words, does the word "and" mean that "development, financial and trade needs" must be considered in a comprehensive manner or may they be considered separately?

Drugs represent a phenomenon which negatively affects development potential in its totality. It causes economic distortion that has nothing to do with market dynamics. It generates additional public health needs, crime and the disintegration of families. The economic power generated by drugs can go as far as infiltrating, corrupting and rendering useless our institutions and the political system. The combat against this phenomenon calls for resources which could otherwise be used for development. It seems to ... the phrase "development, financial and trade needs." should be viewed comprehensively, since any effort to improve one of these elements would, one way or another, help the others.

9. Paragraph 3(c) of the Enabling Clause refers to "developed contracting parties" and "developing countries" in the plural form. Given the common understanding that developed countries may decide individually whether or not they wish to provide GSP, is it also possible to interpret "developing countries" under paragraph 3(c) as meaning *individual* developing countries?

At no time has this delegation considered that one single developing country could benefit from the treatment; rather, the treatment would be granted to a group of developing countries which, in turn, does not mean that it is granted to all developing countries.

10. To the extent that the Drug Arrangements only respond to development needs caused by drug production and trafficking, while not responding to development needs resulting from other problems, such as poverty, low *per capita* GNP, malnutrition, illiteracy and natural disasters, how does this EC programme satisfy the "non-discriminatory" requirement in footnote 3 of the Enabling Clause? Please elaborate.

The GSP-drugs scheme was introduced in response to a phenomenon which has repercussions on all aspects of development needs of the countries affected. We consider that the ultimate aim of this scheme is to achieve a certain level of development, alleviate poverty and increase per capita income. As we mentioned in our statement of 15 May to the panel, we think that the GSP drugs scheme offers the economies and societies that are truly affected by the impact of drugs benefits that enable them to a certain extent to alleviate the dire situation in which they find themselves and, by offering them the possibility of expanding their exports, provides them with a means of improving their production capacity and achieving their development objectives. Although the needs of the developing countries are similar, the causes for these needs are different and can require different

approaches (without singling out any country). The GSP drugs scheme addresses the needs of countries that are severely affected by the phenomenon. As with the scheme for the least developed countries, beneficiaries must be elected on the basis of certain criteria or parameters. This does not mean that the development needs of the other developing countries do not exist, but that the approach and the beneficiaries may be different. The GSP drugs scheme of European Communities has enabled new countries to join as beneficiaries at various different stages. This clearly means that the scheme is not singular or closed. Thus, there is one contradiction with the term "non-discrimination" in footnote 3 of the Clause.

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

We do not think that the GSP drugs scheme should be covered by a "waiver". Firstly, we repeat what we said in the first paragraph of our answer to question 1 above. Moreover, the difference with a "waiver" is clearly stated in footnote 2 of the Clause where it refers to "differential and more favourable treatment" schemes different from those covered by the Clause. The schemes that are different from those covered by the Clause may be considered consistent with the provisions of the General Agreement on collective action. Since the GSP drug scheme is based on the exercise of an autonomous right, its implementation and interpretation must come within the framework of the Enabling Clause, and hence not Article XXV (5) of the GATT.

QUESTIONS POSED BY INDIA TO THIRD PARTIES

To all third parties

1. Do the third parties support the EC's contention that the Drug Arrangements are justified under Article XX(b) of the GATT?

(This question is addressed to Bolivia, Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mauritius, Nicaragua, Pakistan, Panama, Paraguay, Peru, Sri Lanka, the United States and Venezuela)

Without wishing to take position on whether the GSP drugs arrangements are justified under Article XX(b) of the GATT, Panama would like to note that for the moment it has not challenged the invocation of that article by the European Communities in this specific case. Moreover, the invocation of Article XX (b) of the GATT is a right of all Members which, in our view, should be considered case by case as an affirmative defence and not as an autonomous right under the Enabling Clause. Nothing precludes a scheme from being a measure designed to address the development needs of certain countries severely affected by the drugs problem on the one hand, while at the same time being a measure intended to safeguard public health. As we stated earlier, each case should be judged on its merits and on the basis of its legal status. Nor is there anything to prevent different lines of a defence being followed in the same case concerning policies with different objectives.

ANNEX C-7

Replies of Paraguay to Questions from the Panel and from India after the First Panel Meeting

To All Third Parties

Legal Function

1. *Assuming that the Enabling Clause is not a waiver, is it an exception or an "autonomous" right? In either case, what are the differences in legal consequences of characterizing the Enabling Clause as an exception or an autonomous right? Are there legal consequences beyond allocation of the burden of proof?*

Reply

Paraguay is not aware of a commonly accepted definition of "autonomous right". A "conditional right" is "a right that depends on an uncertain event; a right that may or may not exist".¹ Thus an "autonomous right" could be understood to be a right that does not depend on an uncertain event for its existence but solely on the will of the right holder. An autonomous right, like all other rights, may however be exercised only consistently with the law. In the present context, the developed countries have the right to deviate from certain aspects of Article I of the GATT *if* they decide to accord GSP preferences, but the exercise of that right is subject to disciplines.

The question seems to imply that "autonomous right" and "exception" are necessarily mutually exclusive. Paraguay is of the view that they are not necessarily mutually exclusive, and situations must be analyzed on a case-to-case basis. For example, based on the above definition of "autonomous right", even assuming that the right to take measures under Article XX of the GATT, and to form customs unions or free trade areas under Article XXIV of the GATT are autonomous rights, they are also exceptions to the basic rules of the GATT. Again, the exercise of the right is subject to applicable disciplines.

The 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. In this dispute, India's claim is that the Drug Arrangements are inconsistent with Article I:1 of the GATT. To establish that claim, all that India has to do is to assert, and by virtue of that assertion, prove, that: (i) the EC grants an advantage by way of tariff preferences to products originating in one or some countries, and (ii) the EC does not accord the same advantage immediately and unconditionally to products originating in other Members. India has so asserted and proven. With this, India has established that the Drug Arrangements are inconsistent with Article I:1 of the GATT. India's claim in this proceeding is based on Article I:1 of the GATT and not on paragraph 1 or 2(a) of the Enabling Clause. The latter provisions are therefore not a material element of the claims that India has submitted to this Panel.

To defeat India's claim, the EC *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 EC to prove that the Drug Arrangements are in fact covered by that Clause regardless of whether the Enabling Clause is an autonomous right or an exception or both.

To summarize: The Enabling Clause is, by definition, an exception to certain aspects of Article I:1 of the GATT. Even assuming that it is also an autonomous right, the issue of burden of proof does not necessarily flow from its characterization as an exception or an autonomous right.

¹ *Black's Law Dictionary*, 7th ed., B.A. Garner (ed.) (West Group, 1999), p. 1323.

Rather, it flows from the fact that the Enabling Clause is not a material element of India's claim of violation of Article I:1 of the GATT, while it is a material element of the EC's defence.

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

Reply

This reply is based on Paraguay's understanding of "autonomous right", as set forth in the answers to question 1 addressed by the Panel to the third parties.

"Affirmative defence" is "a defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true."²

As noted above, Paraguay is of the view that an "autonomous right" could also be an "affirmative defence". For example, even assuming that the right to take measures under Article XX of the GATT could be deemed as an "autonomous right", at the same time, the exercise of that right could be an "affirmative defence" in a dispute concerning other provisions of the GATT. In the same manner, even assuming that the right to form customs unions or free trade areas under Article XXIV of the GATT could be deemed an "autonomous right", in the same manner, the exercise of that right could be an "affirmative defence" in a dispute concerning other provisions of the GATT.

Paraguay believes that a case-to-case assessment is necessary in order to determine whether a particular provision is an "autonomous right", an "affirmative defence", or both.

Non-discriminatory

3. *Assume that the Enabling Clause is a self-standing, autonomous right and that the Panel should look at the Enabling Clause itself to interpret its provisions. Could you indicate where in the Enabling Clause the Panel should find the context for the interpretation of the term "non-discriminatory"? Does this context provide sufficient contextual guidance for the interpretation of this term? Should the Panel also look outside the Enabling Clause for contextual guidance? If so, to which particular Agreements and provisions therein, and why these particular provisions, and not others?*

Reply

Within the Enabling Clause itself, the following provide context to the term "non-discriminatory":

- Paragraph 1 of the Enabling Clause refers to Article I of the GATT and indicates what is permitted notwithstanding that article. Article I:1 of the GATT provides that "... 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 other [Members]". Thus, notwithstanding the MFN rights of all Members under Article I:1 of the GATT, the Enabling Clause permits a developed country Member not to accord MFN treatment to like products originating in other developed country Members in respect of preferential tariff treatment accorded to products originating in developing country Members *in accordance with the GSP*. This is all that paragraph 1 permits. There is nothing in paragraph 1 which could be construed as a waiver by developing country Members of

² *Ibid*, p. 584.

their MFN rights in respect of any advantage granted by any other Member to any product originating in any other country.³

Stated in a different manner, it is necessary that each developed country Member be permitted not to accord MFN treatment to like products originating in other developed country Members to enable that developed country Member to accord preferential tariff treatment to products originating in developing countries in accordance with the GSP. For this purpose, it is not necessary to permit that developed country Member not to accord MFN treatment to like products originating in developing countries.

Thus, the very first paragraph of the Enabling Clause reaffirms the MFN rights of developing country Members under Article I:1 of the GATT. In this context, "non-discriminatory" means immediate and unconditional MFN treatment between like products of developing countries.

The Enabling Clause was adopted for the benefit of developing countries. Aside from the absence of clear language indicating that developing countries waived their MFN rights under Article I:1, an interpretation to the effect that paragraph 2(a) of the Enabling Clause curtails the benefits accruing to developing countries Article I:1 runs counter to the very purpose of that paragraph, which is to create additional benefits for the developing countries in the legal framework of the GATT.

- Paragraph 2(a) refers to "preferential tariff treatment accorded ... to *products* originating in developing countries ..." The preferential treatment is in respect of tariffs, and the object of the treatment is "products". "Like products" will always be *like products* regardless of their origin. Unless the Enabling Clause expressly so provides (which it does not) there can be no valid basis for differentiation in treatment between like products for the purpose of the imposition of tariffs. In all GATT provisions and in GATT and WTO jurisprudence the term "discriminatory" has been used to describe the denial of equal competitive opportunities to *like* products originating in different countries. "Non-discriminatory" thus refers to treatment of *like* products, and not to treatment of Members, as such.
- "Discriminatory tariff" is defined as "a tariff containing duties that are applied unequally to different countries or manufacturers."⁴ A "non-discriminatory tariff" in the context of the Enabling Clause therefore is a tariff containing duties that are applied equally to different developing countries.
- Footnote 3 refers to the "establishment of 'generalized, non-reciprocal and non-discriminatory preferences beneficial to **the** developing countries". (emphasis added). The use of the definite article "the" with reference to "developing countries" indicates that the GSP must be beneficial to *all* developing countries. The dictionary meaning of "the" is ... "used preceding a (sing.) noun used generically or as a type of its class; (with a pl. noun) all those described as _____"⁵. Thus, in this instance, the phrase "the developing countries" means "all those described as developing countries". Preferential tariff treatment to products originating in some developing

³ Subject to the exception in favour of least developed countries pursuant to paragraph 2(d) of the Enabling Clause.

⁴ *Black's Law Dictionary*, 7th ed., B.A. Garner (ed.) (West Group, 1999), p. 1468.

⁵ *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. II, p. 3270.

country beneficiaries to the exclusion of like products originating in other developing country beneficiaries is not beneficial to all developing countries.⁶

- The equally authentic Spanish and English texts likewise use the phrase "of *the*" in their title, with reference to "differential and more favourable treatment ..." – "TRATO DIFERENCIADO Y MAS FAVORABLE, RECIPROCIDAD Y MAYOR PARTICIPACION **DE LOS PAISES EN DESARROLLO**" and "TRAITEMENT DIFFERENCIE ET PLUS FAVORABLE, RECIPROCITE ET PARTICIPATION PLUS COMPLETE **DES PAYS EN VOIE DE DEVELOPPEMENT**".
- If "non-discriminatory" were to have the "negative meaning" attributed to it by the EC, paragraph 2(d) would be redundant as there is a clear distinction between least developed countries and other developing countries.

Footnote 3 to paragraph 2(a) refers to the GSP as described in the 1971 Decision. Paragraph (a) of the 1971 Decision refers to "the preferential tariff treatment referred to in the "Preamble to this Decision ..." The relevant provisions of the Preamble provide:

"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 of 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..."

The preferential tariff treatment referred to in paragraph (a) of the 1971 Decision and its Preamble must therefore be construed in relation to the "mutually acceptable arrangements [that] 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".

The GSP had its beginnings at the First Conference of the UNCTAD in 1964, which resolved:

"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 trading interests of other countries. However, developed countries should grant concessions to all developing countries and to extend to developing countries all concessions they grant to one another and should not, in granting these or other concessions, require any concessions in return from developing 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.** Developing countries need not extend to developed countries preferential treatment in operation amongst them. **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

⁶ The equally authentic Spanish and French texts likewise use the definite article "the" – "en beneficio de **los** países en desarrollo" and "avantageux pour **les** pays en voie de développement".

equivalent advantages to the countries concerned come into operation."⁷ (emphasis added)

As early as UNCTAD I therefore, the following concepts were affirmed or endorsed:

- International trade should be conducted to mutual advantage on the basis of the MFN principle.
- As an exception to the MFN principle, new preferential concessions, both tariff and non-tariff, should be made [by developed countries] to developing countries as a whole - and such preferences should not be extended to developed countries.
- Special preferences then enjoyed by certain developing countries in certain developed countries should be regarded as transitional and subject to progressive reduction. It was thus the intention that the GSP, the benefits of which will be made available to developing countries, would replace the special preferences then enjoyed by certain developing countries in certain developed countries.

At UNCTAD II held in New Delhi in 1968, the foregoing resolution adopted in UNCTAD I was confirmed by the adoption of Resolution 21 (II) which provides, among others:

"Recognizing the unanimous agreement in favour of the early establishment of mutually acceptable system of generalized non-reciprocal and non-discriminatory preferences which would be beneficial to developing countries ...

1. *Agrees* that the objectives of the generalized non-reciprocal, non-discriminatory system of preferences in favour of **the developing countries**, including special measures in favour of the least advanced among the developing countries, should be:

- (a) To increase **their** export earnings;
- (b) To promote **their** industrialization;
- (c) To accelerate **their** rates of economic growth; ..."(emphasis added)

To give effect to the resolution, a specialized UNCTAD Trade and Development Board was established. The "mutually acceptable arrangements" referred to in paragraph (a) in relation to the Preamble of the 1971 Decision are contained in the Agreed Conclusions of the Special Committee on Preferences adopted at the Fourth Special Session of the Trade and Development Board. The Agreed Conclusions state that "there is agreement with the objective that in principle all developing countries should participate as beneficiaries from the outset."

In the statement made by India on behalf of the Group of 77 incorporated as Annex I to the Agreed Conclusions, the Group of 77 stressed that no developing country member of the Group "should be excluded from the generalized system of preferences at the outset or during the period of the system". The Group of 77 on whose behalf the statement was made includes all the third parties in this dispute that are beneficiaries under the Drug Arrangements.

⁷ Principle 8 of Recommendation A:I:1 in Final Act of the First United Nations Conference on Trade and Development (Geneva:UNCTAD, Doc E/CONF.46/141, 1964), Vol 1, at 20, cited in Lorand Bartels, "The WTO Enabling Clause and Positive Conditionality in the European Community's GSP program", *Journal of International and Economic Law*, Vol. 6, No.2 (2003), p. 507.

Part IV 1. of the Agreed Conclusions on "Beneficiaries" provides:

"1. The Special Committee noted the individual submissions of the preference-giving countries on this subject and the joint position of the countries members of the Organisation for Economic Cooperation and Development as contained in paragraph 13 of the introduction to the substantive documentation containing the preliminary submissions of the developed countries (TD/B/AC.5/24), namely: 'As for beneficiaries, donor countries would in general base themselves on the principle of self-election. With regard to this principle, reference should be made to the relevant paragraphs in document TD/56 i.e., section A in Part I.'

Section A, Part I of document TD/56, which lays down the position of preference-giving countries, including the then Member States of the EC, provides:

"A. Beneficiary countries

Special tariff treatment should be given to the exports of any country, territory or area claiming developing status. This formula would get over the difficulty which would otherwise arise of reaching international agreement on objective criteria to determine relative stages of development." (emphasis added)

In light of the foregoing, it is therefore clear that the "generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries" referred to in the Preamble to the 1971 Decision contemplated the participation of all developing countries as beneficiaries of the GSP. Furthermore, and of particular relevance in this dispute, the GSP was intended to replace special preferences then enjoyed by certain developing countries in certain developed countries, which were then regarded as "transitional and subject to progressive reduction".

The phrases

- "new preferential concessions, both tariff and non-tariff, should be made to developing countries **as a whole**",
- "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 of **these countries**",
- "with a view to extending to such countries and territories **generally** the preferential tariff treatment referred to in the Preamble to this Decision, without according such treatment to like products of other [Members]",
- "there is agreement with the objective that in principle **all developing countries** should participate as beneficiaries from the outset",
- "no developing country ... should be excluded from the generalized system of preferences at the outset", and
- "special tariff treatment should be given to the exports of any country, territory or area claiming developing status"

all indicate that, as agreed in the UNCTAD, the benefits under the GSP were intended to apply to **all** developing countries, and not just to **some** developing countries. Furthermore, in light of the resolution adopted in UNCTAD I, the GSP was intended precisely to replace "special preferences [then] enjoyed by certain developing countries in certain developed countries". The 1971 Decision refers to the GSP as adopted at the UNCTAD. The Enabling Clause defines the GSP as the GSP described in the 1971 Decision, and hence to the GSP as it was adopted at the UNCTAD.

Various subsequent UNCTAD documents confirm this agreement. Among these is the Report by the UNCTAD Secretariat on the "Review and evaluation of the generalized system of preferences" dated 9 January 1979⁸. The Report states, among others:

"10. Conference resolution 21 (II) called for the establishment of a generalized, non-discriminatory and non-reciprocal system of preferences in favour of exports from developing countries to developed countries. **Generalized preferences imply that preferences would be granted** by all developed countries **to all developing countries** ...

11. **Non-discrimination implies that the same preferences were to be granted to all developing countries.** This concept presented great difficulty from the start, since there was no agreed objective criteria for defining or classifying countries on the basis of relative stages of economic development. The principle of self-election appeared to be the only remaining possibility – i.e., preferences would be granted to any country or territory claiming developing status; however, individual preference-giving countries might decline to accord such preferences on grounds which they would hold compelling.⁹ An additional proviso was that such *ab initio* exclusion of a particular country would not be based on competitive considerations. As a result each preference-giving country has its own list of beneficiaries and there are thus certain differences among these lists." (emphasis and footnote added)

In the GATT itself, the Technical Note of the Secretariat¹⁰ issued in the process of the adoption of the GSP by the GATT provides:

"As long ago as 1963 the CONTRACTING PARTIES provided for the study of (a) 'the granting of preferences on selected products by industrialized countries to less-developed countries **as a whole**'. (emphasis added)

Taking all of the foregoing into consideration, the following were the consequences of the adoption of the 1971 Decision:

- Each developed country Member was authorized to grant preferential tariff treatment to products originating in developing countries in accordance with the GSP without according the same treatment to like products originating in other developed country Members.
- Correspondingly, each developed country Member waived its MFN rights in respect of the preferential tariff treatment granted by other developed country Members to products originating in developing countries in accordance with the GSP.

⁸ TD/232.

⁹ This is not an issue in this dispute as India is a beneficiary under the general arrangements of the EC GSP scheme and is therefore not subject to an *ab initio* exclusion.

¹⁰ Preferential Tariff treatment for Developing Countries- Technical Note by the Secretariat, Spec (70) 6 dated 5 February 1970.

- Each developing country Member retained its MFN rights in respect of any advantage granted by any other Member to any product originating the territory of any other country.¹¹

On all matters relating to the GSP that are relevant in this dispute, the Enabling Clause did not change the 1971 Decision. On the contrary, the Enabling Clause expressly refers to the GSP "as described" in the 1971 Decision.

Thus, with the sole exceptions of (i) "special treatment of the least developed countries among the developing countries in the context of any general or specific measures in favour of developing countries" referred to in paragraph 2(d) of the Enabling Clause and (ii) the limited duration of the 1971 Decision as compared to the indefinite duration of the Enabling Clause, the GSP authorized under the Enabling Clause and the GSP authorized under the 1971 Decision are the same in all material respects.

The only other difference between the 1971 Decision and the Enabling Clause is that the latter deals with the situations referred to in paragraphs 2(b) and 2(c), which are not dealt with in the former. Paragraphs 2(b) and 2(c) are not an issue on this dispute. Paragraph 2(d) provides further contextual guidance to paragraph 2(a).

4. *Does the context of the term "non-discriminatory" in footnote 3 of the Enabling Clause include Articles I:1, III:4, X, XIII, XVII and XX of GATT 1994, and Article XVII of GATS? Why or why not?*

Reply

Paraguay is of the view that the context of the term "non-discriminatory" in footnote 3 of the Enabling Clause includes Article I:1 only, and not Articles III:4, X, XIII, XVII and XX of the GATT 1994 and Article XVII of the GATS.

Paragraph 1 of the Enabling Clause permits developed country Members to accord differential and more favourable treatment to developing countries under any of the situations specified in paragraph 2, "notwithstanding Article I of the [GATT]". There are no references to other articles of the GATT or the GATS.

Footnote 3 is a footnote to paragraph 2(a) which refers to "preferential tariff treatment accorded by developed [country Members] to products originating in developing countries in accordance with the [GSP]". More specifically, footnote 3 is a footnote to "[GSP]", referring to it as that which is "described in [1971 Decision] ... relating to the establishment of 'generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries.'" Preferential tariff treatment accorded by developed country Members to products originating in developing countries without according the same treatment to products originating in other Members is otherwise inconsistent with Article I:1 of the GATT, and not with any other article of the GATT or the GATS.

¹¹ On the assumption that the *ab initio* exclusion of a particular country is authorized under the GSP, in respect of any particular GSP regime, MFN rights are retained by all developing countries which have not been excluded as beneficiaries.

Paragraph 3(c)

5. Please give your views on the following questions relating to the meaning of the Enabling Clause, based upon paragraph 9 of Paraguay's Oral Statement. Is it correct to say that under the Enabling Clause developed countries are not obliged to give tariff preferences? Is it also correct that any preferences granted are only in respect of products of the developed country's own choice and only to developing countries of its choice? Are developed countries free to graduate beneficiary developing countries from their GSP schemes?

Reply

Paraguay reasserts what was stated in its Oral Statement, including paragraph 9 thereof.

By "graduate", Paraguay understands the question to refer to the total exclusion of beneficiary developing countries from a GSP scheme.

In responding to the Panel's question, Paraguay notes that "graduation" is not at issue in this dispute as India is a beneficiary under the EC's general arrangements in the EC GSP regime.

In Paraguay's view, there is nothing in the Enabling Clause which allows any preference-giving country to "graduate" any developing country as such. Again, the question might be related to the definition of "developing country". As earlier stated, the principle of "self-election" was earlier recognized – meaning that a "developing country" is one "claiming developing status".¹² Thus, for as long as a developing country remains a beneficiary under a GSP scheme, it cannot be "graduated" from that scheme. As to whether or not a preference-giving country may deny the claim of a country that it has developing status, the position of preference countries is indicated in TD/56¹³ which provides, in relevant part, as follows:

"It is expected that no country will claim developing status unless there are *bona fide* grounds for it to do so; and that such claim would be relinquished if those grounds ceased to exist".

It would thus seem that developed countries sought to impose a moral obligation ("expected") on each country not to claim developing status unless there are *bona fide* grounds for it to do so; that once those grounds cease to exist, that country has the moral obligation to relinquish that status. However, in Paraguay's view, a preference-giving country does not have a legal right (as distinguished from a moral right arising from the moral obligation of a country claiming developing status) to exclude any country claiming developing status for as long as that country maintains that claim.

6. *Developing countries often have different development needs. Take, for example, Indonesia, the Philippines, Morocco, Brazil and Paraguay, each having different development needs. If we agree with the argument of the Andean Community that it is possible to select some beneficiary countries according to certain criteria (paragraph 6 of the Joint Statement of the Andean Community), would it not be a logical consequence of this argument that any developed country could establish a special GSP tariff preference scheme for each individual developing country in responding to that developing country's own development needs? Is this a proper reading of paragraph 3(c) of the Enabling Clause? Why or why not? If not, where do you draw the line in term of a proper interpretation of paragraph 3(c)?*

¹² See Report of the Special Group of the Organization for Economic Co-operation and Development (OECD) on Trade with Developing Countries, UNCTAD document TD/56, p.5 (emphasis supplied).

¹³ Ibid.

Reply

Paraguay is of the view that if the argument of the Andean Community - that it is possible to select some beneficiary countries according to objective criteria - were to be validated, then the logical consequence would be that any developed country could establish a special GSP tariff preference scheme for each individual developing country in responding to that developing country's specific development needs. It would not be difficult to identify criteria which apply exclusively or predominantly to a group of pre-selected beneficiaries, even, as in this case, on a *post facto* basis. This is not a proper reading of paragraph 3(c).

Paragraph 3(c) does not authorize discrimination between beneficiaries. It mandates a positive response to needs. A preference-giving country may respond to the specific needs of a specific beneficiary or group of beneficiaries. But once preferential tariff treatment is granted to products originating in those beneficiaries, that treatment must be granted immediately and unconditionally to like products originating in other developing countries.

7. *Are the developed countries free to "graduate" beneficiary developing countries from a GSP scheme? If so, under which paragraph of the Enabling Clause? Please elaborate.*

Reply

By "graduate", Paraguay understands the question to refer to the total exclusion of beneficiary developing countries from a GSP scheme.

In responding to the Panel's question, Paraguay notes that "graduation" is not at issue in this dispute as India is a beneficiary under the EC's general arrangements in the EC GSP regime.

In Paraguay's view, there is nothing in the Enabling Clause which allows any preference-giving country to "graduate" any developing country as such. Again, the question might be related to the definition of "developing country". As earlier stated, the principle of "self-election" was earlier recognized - meaning that a "developing country" is one "claiming developing status".¹⁴ Thus, for as long as a developing country remains a beneficiary under a GSP scheme, it cannot be "graduated" from that scheme. As to whether or not a preference-giving country may deny the claim of a country that it has developing status, the position of preference-giving countries is indicated in TD/56¹⁵ which provides, in relevant part, as follows:

"It is expected that no country will claim developing status unless there are *bona fide* grounds for it to do so; and that such claim would be relinquished if those grounds ceased to exist".

It would thus seem that developed countries sought to impose a moral obligation ("expected") on each country not to claim developing status unless there are *bona fide* grounds for it to do so; that once those grounds cease to exist, that country has the moral obligation to relinquish that status. However, in Paraguay's view, a preference-giving country does not have a legal right (as distinguished from a moral right arising from the moral obligation of a country claiming developing status) to exclude any country claiming developing status for as long as that country maintains that claim.

¹⁴ See Report of the Special Group of the Organization for Economic Co-operation and Development (OECD) on Trade with Developing Countries, UNCTAD document TD/56, p.5 (emphasis supplied)

¹⁵ Ibid.

8. *Does the word "and" in paragraph 3(c) of the Enabling Clause mean "or"? In other words, does the word "and" mean that "development, financial and trade needs" must be considered in a comprehensive manner or may they be considered separately?*

Reply

The ordinary meanings of the conjunctives "and" and "or" are different. The text of paragraph 3(c) uses "and". Therefore, in Paraguay's view, those needs must be considered in a comprehensive manner.

9. *Paragraph 3(c) of the Enabling Clause refers to "developed contracting parties" and "developing countries" in the plural form. Given the common understanding that developed countries may decide individually whether or not they wish to provide GSP, is it also possible to interpret "developing countries" under paragraph 3(c) as meaning individual developing countries?*

Reply

Paraguay is of the view that paragraph 3(c) does not authorize developed contracting parties to discriminate between like products originating in developing countries. It merely mandates that "any differential and more favourable treatment" ... shall respond positively to the ... needs of [the] developing countries".

The word "the " preceding "developing countries" does not appear in the English text. However, it appears in the equally authentic Spanish and French texts. Thus, "responda positivamente a las necesidades de desarrollo, financieras y comerciales **de los países en desarrollo**" and "répondre de manière positive aux besoins du développement, des finances et du commerce **des pays en voie de développement**." (emphasis added). The word "the" preceding "developing countries" in the phrase "shall respond positively to the ... needs of **the** developing countries therefore refers to the needs of **all** developing countries. The appropriate meaning of "the" is ... "used preceding a (sing.) noun used generically or as a type of its class; (with a pl. noun) all those described as _____"¹⁶. Thus, in this instance, as in the phrase "beneficial to the developing countries" in footnote 3 of the Enabling Clause, "the ... needs of the developing countries" means the needs of all developing countries.

The introductory phrase of paragraph 3 of the Enabling Clause refers to "any differential and more favourable treatment". In the context of the GSP, such treatment is granted only by developed country Members. The obligation to respond positively to the needs of developing countries is thus imposed equally on each developed contracting party according differential and more favourable treatment.

The terms "developing countries" in paragraph 3(c) appear in the phrase "development, financial and trade needs of developing countries". The phrase "development, financial and trade needs of developing countries" are qualified in paragraph 5 of the Enabling Clause as follows: "... the developed countries do not expect developing countries ... to make contributions which are inconsistent with their **individual** development, financial and trade needs". (emphasis added). The word "individual" in relation to "needs" does not appear in paragraph 3(c). This permits the conclusion that, when the drafters of the Enabling Clause wanted to refer to "individual ... needs" of developing countries, they did so expressly. The fact that they did not refer to "individual" needs in paragraph 3(c) is thus a clear indication that they meant to refer to the collective needs of the developing countries as a whole.

¹⁶ *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. II, p. 3270.

Finally, there is nothing in the Enabling Clause, including paragraph 3 (c), which might reasonably be construed that developing countries waived their MFN rights under Article I. It has always been the intention that the benefits of any GSP scheme shall be extended without discrimination to like products originating in all developing countries.

10. *To the extent that the Drug Arrangements only respond to development needs caused by drug production and trafficking, while not responding to development needs resulting from other problems, such as poverty, low per capita GNP, malnutrition, illiteracy and natural disasters, how does this EC programme satisfy the "non-discriminatory" requirement in footnote 3 of the Enabling Clause? Please elaborate.*

Reply

Even assuming that the Drug Arrangements respond to development needs caused by drug production and trafficking, the Drug Arrangements do not satisfy the "non-discriminatory" requirement in footnote 3 of the Enabling Clause because the preferential tariffs granted therein are not accorded to all developing countries. The failure to satisfy the "non-discriminatory" requirement does not arise from its failure to respond to other development needs, including low per capita GNP, malnutrition, illiteracy and natural disasters. Paragraph 3(c) does not authorize developed country Members implementing GSP schemes to discriminate between like products originating in developing countries.

General

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

Reply

The Drug Arrangements need to be covered by a waiver. The Drug Arrangements are inconsistent with Article I:1 of the GATT 1994 because the preferential tariffs granted therein are not granted immediately and unconditionally to like products originating in all other Members. The Drug Arrangements are likewise not justified under the Enabling Clause because the preferential tariffs granted to the twelve beneficiaries are not granted immediately and unconditionally to all other developing country Members.

To Paraguay

1. *Is it your understanding that the term "non-discriminatory" in footnote 3 of the Enabling Clause has the same meaning as the non-discrimination principle under Article I:1 of GATT 1994? Please justify your position.*

Reply

It is Paraguay's understanding that the term "non-discriminatory" in footnote 3 of the Enabling Clause has the same meaning as the non-discrimination principle under Article I:1 of the GATT 1994.¹⁷ The GSP was never intended to grant developed countries the authority to treat like

¹⁷ Subject to the qualification that "non-discriminatory" under footnote 3 of the Enabling Clause applies to like products originating in developing countries, and the non-discrimination principle under Article I:1 of the GATT 1994 applies to like products originating in all (other) Members; and the further qualification that pursuant to paragraph 2 (d) developed country Members may provide special treatment to products originating in least-developed countries, but as between like products originating in least-developed countries, there could likewise be no discrimination.

products originating in developing countries differently in the context of the GSP. (Please see reply to question 3 addressed by the Panel to all third parties for the meaning of the term "non-discriminatory").

Under the 1971 Decision, only developed country Members effectively waived their MFN rights under Article I:1 of the GATT. Developing countries did not waive their MFN rights as between themselves. Such a waiver was not necessary in order to allow developed country Members to accord differential and more favourable treatment to products originating in developing countries. The GSP was established for the benefit of **the**, and therefore **all**, developing countries. In all respects material in this dispute, the Enabling Clause did not change the 1971 Decision as far as the GSP is concerned.

Thus, developing countries, as between themselves and in relation to developed country Members have never waived, and still maintain, their immediate and unconditional right to MFN treatment under Article I:1 of the GATT 1994.

Question addressed by India

1. Do the third parties support the EC's contention that the Drug Arrangements are justified under Article XX(b) of the GATT?

No, Paraguay does not support the EC's contention that the Drug Arrangements are justified under Article XX(b) of the GATT.

ANNEX C-8

Replies of the United States to Questions from the Panel and from India after the First Panel Meeting

PANEL'S QUESTIONS TO THE THIRD PARTIES

Legal Function

Q1. Assuming that the Enabling Clause is not a waiver, is it an exception or an "autonomous" right? In either case, what are the differences in legal consequences of characterizing the Enabling Clause as an exception or an autonomous right? Are there legal consequences beyond allocation of the burden of proof?

2. The phrasing used in this question ("exception or an 'autonomous' right") and the next one ("autonomous right" or ... 'affirmative defence') could be read to suggest a dichotomy between "autonomous rights" on the one hand and affirmative defenses/exceptions on the other hand. As an initial matter, this dichotomy would appear to be too limited. The choice is not simply between whether the Enabling Clause is an "exception"/"affirmative defense" or an "autonomous right." Rather, as the United States noted in its written submission, the Enabling Clause is part of the overall balance of rights and obligations agreed to in the GATT 1994 and the WTO Agreement. For example, Members agreed to provide the treatment called for under Article I of the GATT 1994 at the same time that they agreed to permit the treatment provided under the Enabling Clause as part of the GATT 1994, notwithstanding Article I. Together these provisions are part of the overall balance of concessions under the WTO Agreement.

3. Furthermore, it is useful to distinguish between an "affirmative defense" and an "exception". As the Appellate Body explained in the *EC Hormones* case, simply describing a provision as an "exception" does not shift the burden of proof to the defending party;¹ a party to a dispute does not have the burden of proof unless it asserts the affirmative of the claim or defense.² The Enabling Clause is not merely an "affirmative defense" to the provisions of Article I:1 of the GATT 1947.³ Rather, the Enabling Clause is a positive rule providing authorization to extend trade preferences to developing country Members under certain circumstances. Consequently, the analysis should be directed at the question of whether India has established that the measure in question does not meet the requirements of the Enabling Clause. If India fails to do so, its claims should be rejected.

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

4. As noted in the US written submission, paragraph 1 of the GATT 1994 provides that the GATT 1994 shall consist not only of the provisions of the GATT 1947 (Paragraph 1(a)), but also the provisions of "other decisions of the CONTRACTING PARTIES to GATT 1947" (Paragraph 1(b)(iv)), of which the Enabling Clause is one.⁴ The Enabling Clause thus is as much a part of the GATT 1994 as is the text of the GATT 1947. As stated above, the Enabling Clause is part of the overall balance of rights and obligations agreed to in the GATT 1994 and the WTO Agreement, and is not an "affirmative defense" to the provisions of Article I:1 of the GATT 1947. The Enabling Clause applies "[n]otwithstanding the provisions of Article I of the General Agreement."

¹ Appellate Body Report, *EC Measures Concerning Meat and Meat Products* ("EC Hormones"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 105.

² See Appellate Body Report, *United States - Measures Affecting Imports of Woven Shirts and Blouses from India* ("US Wool Shirts"), WT/DS33/AB/R, adopted 23 May 1997, p. 14.

³ US Third Party Submission at paras. 4-9.

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

"Notwithstanding," by its ordinary dictionary definition, means "in spite of."⁵ Thus, pursuant to the Enabling Clause, Members may "accord differential and more favorable treatment to developing countries, without according such treatment to other contracting parties," in spite of the obligation contained in Article I to extend MFN treatment unconditionally. This means, for example, that there is no need to determine if the measure in question is inconsistent with the general obligation contained in Article I:1 before applying the Enabling Clause.

Non-discriminatory

Q3. Assume that the Enabling Clause is a self-standing, autonomous right and that the Panel should look at the Enabling Clause itself to interpret its provisions. Could you indicate where in the Enabling Clause the Panel should find the context for the interpretation of the term "non-discriminatory"? Does this context provide sufficient contextual guidance for the interpretation of this term? Should the Panel also look outside the Enabling Clause for contextual guidance? If so, to which particular Agreements and provisions therein, and why these particular provisions, and not others?

5. The Panel should interpret the term "non-discriminatory" according to its ordinary meaning in its context, and in light of the object and purpose of the 1971 Decision as referred to in the Enabling Clause. With respect to the term's ordinary meaning, we note first the EC's demonstration, through references to various dictionary definitions, that the ordinary meaning of "non-discriminatory," especially when used in a legal context, allows differentiation among unequal situations.⁶ To put that ordinary meaning in its proper context, the United States notes that the Enabling Clause does not use the term "non-discriminatory" itself; rather, it merely quotes (in footnote 3) the preamble of the 1971 Decision, which uses the term "non-discriminatory." Thus, the 1971 Decision provides the immediate context for interpretation of the term "non-discriminatory" in the Enabling Clause. The Enabling Clause does not provide any new requirement for "non-discriminatory" treatment. Rather, it permits treatment "described in" the 1971 Decision. In other words, the 1971 Decision provides a description of the type of treatment permitted under paragraph 2(a) of the Enabling Clause, and that description includes the concept that the treatment is to be provided "with a view to" extending "mutually acceptable" "generalized" "non-reciprocal" and "non-discriminatory" preferences.

6. Interpreting the term "non-discriminatory" so as to maintain the flexibility of donor countries to adapt GSP programs to differentiate among unequal situations is consistent with the object and purpose expressed in the 1971 Decision that GSP programs are "to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth" of developing countries. As explained in the US oral statement,⁷ if differentiation among unequal situations were not allowed, any GSP program would have to be administered on a "lowest common denominator" basis. That is, a GSP program could be applied only to the extent it addressed needs that were identical among developing countries, and it could not be adapted with respect to particular needs of sub-sets of developing countries. Further, the 1971 Decision calls for a "mutually acceptable system" of preferences, and a Member has the right, *not* the obligation, to extend preferences. While a "one size fits all" obligation to grant any preference to all developing countries may be acceptable to India for purposes of this dispute, it is doubtful that it would be acceptable to other beneficiary countries or to GSP donor countries, or even to India in a different dispute.

7. The 1971 Decision provides another source of context as well. As the United States has already explained, use of the term "generalized" in the preamble of the 1971 Decision also supports an

⁵ Webster's New World Dictionary 513 (2nd Concise ed. 1982).

⁶ See EC First Submission at paras. 66-67.

⁷ US Oral Statement at para. 13.

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

8. For these reasons, an interpretation of "non-discriminatory" that allows differentiation among unequal situations comports with the term's ordinary meaning in the context of the 1971 Decision and in light of the Decision's object and purpose.

9. Should the Panel find it necessary to go beyond the context of the 1971 Decision, the next source of context is the Enabling Clause itself. As the United States described in its oral statement, paragraphs 3(c) and 7 of the Enabling Clause also support an interpretation of "non-discriminatory" that allows differentiation among unequal situations.⁹

10. The United States notes that the 1971 Decision expired before the WTO Agreement was negotiated, and thus is not itself part of the GATT 1994. Consequently, other provisions of the WTO Agreement may provide, at best, limited context for interpreting the term "non-discriminatory" in the 1971 Decision. The drafters of the 1971 Decision and, subsequently, the Enabling Clause, chose not to define the term "non-discriminatory." Therefore, if the Panel does consider these other provisions, it should do so with caution, so as not to read into the Enabling Clause legal obligations not found there.¹⁰ For further discussion of particular provisions, please see the US answer to Question 4 below.

Q4. Does the context of the term "non-discriminatory" in footnote 3 of the Enabling Clause include Articles I:1, III:4, X, XIII, XVII and XX of GATT 1994, and Article XVII of GATS? Why or why not?

11. The language of Articles I:1 and III:4 of the GATT 1994 differs from that in the Enabling Clause, most fundamentally in the absence in either Article I:1 or Article III:4 of the term "discrimination," and the absence in the Enabling Clause of the specific and detailed language in these articles which gave rise to the "conditions of competition" and "like product" analyses applied in the past by GATT and WTO panels. There is no basis to read the term "discrimination" into these provisions, and consequently no basis to use these provisions as context for understanding the term "non-discriminatory" in the 1971 Decision. For the same reason, as explained in the US oral statement, it would be incorrect to interpret "non-discriminatory" to mean "unconditionally," as that term is used in Article I:1 of GATT 1994.¹¹ The word "unconditionally" is not found in the text of the 1971 Decision or the Enabling Clause. Moreover, as described in the US answer to Question 1, the Enabling Clause excludes the application of Article I:1 altogether, including Article I:1's "unconditionally" requirement.

12. Likewise, it would be incorrect to treat the term "non-discriminatory" as involving a "like product" or "like services and service suppliers" analysis similar to that under GATT Articles I or III, or GATS Article XVII, since these provisions explicitly call for a comparison of treatment of "like" products or services and service suppliers, while the Enabling Clause does not.¹² Unlike these articles, the 1971 Decision simply uses the term "non-discriminatory," without linking that term to the treatment of products as such. Indeed, the Appellate Body has recognized that "discrimination" is not the same as Article III's "national treatment" test.¹³ Whatever context these articles provide thus reinforces the point that the application of the "non-discriminatory" requirement is not the same as that under provisions which specifically direct an analysis based on comparisons of treatment of imported and "like" products or services and service suppliers.

⁸ US Oral Statement at para. 12 (footnote omitted).

⁹ US Oral Statement at para. 12 (footnote omitted).

¹⁰ See US Oral Statement at para. 14.

¹¹ US Oral Statement at para. 10.

¹² See US Oral Statement at para. 11.

¹³ See Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("US – Gasoline"), WT/DS2/AB/R, adopted 20 May 1996, p. 23.

13. Similarly, Article X:3(a) of GATT 1994 does not use the term "discrimination," and by its terms directs a very specific analysis of whether laws, regulations, decisions and rulings have been administered in a uniform, impartial and reasonable manner. It thus provides little, if any, useful context for interpreting "non-discriminatory" as used in the 1971 Decision.

14. Article XIII of GATT 1994 refers to "non-discriminatory administration" in its title, and thus, to the extent the GATT 1994 provides context to the 1971 Decision, Article XIII would appear more relevant to an understanding of "non-discriminatory." The United States observes that Article XIII permits differentiation among countries in terms of the shares allocated to various countries and even in terms of who may receive an allocation. Article XIII also allows use of "special factors affecting trade" in making an allocation, so Article XIII clearly contemplates taking into account the individual situations of countries and differentiating on the basis of any "special factors." This is thus clearly not a "one size fits all" approach to "non-discriminatory," and serves to confirm that the meaning of "non-discriminatory" allows differentiation among unequal situations.¹⁴

15. Similarly, while the chapeau of Article XX of GATT 1994 does use the term "discrimination," it provides, at best, attenuated context for the term "non-discriminatory" as used in the 1971 Decision, for the reason explained in the US answer to Question 3. Further, the term "discrimination" is preceded by the qualifying terms "arbitrary and unjustifiable," whereas the 1971 Decision simply uses the term "non-discriminatory." Consequently, the chapeau of Article XX would at best provide limited context. And in that limited context, the reference to "arbitrary and unjustifiable discrimination *between countries where the same conditions prevail*" reinforces the notion that the ordinary meaning of "discrimination" allows differentiation among unequal situations.¹⁵

16. GATT 1994 Articles XVII and XX(i) both define "discrimination" in terms of other GATT provisions without specifying exactly what those provisions are ("the general principles of non-discriminatory treatment prescribed in this Agreement" and "the provisions of this Agreement relating to non-discrimination," respectively). By contrast, the 1971 Decision, and the quote from it included in footnote 3 of the Enabling Clause, simply use the term "non-discriminatory," and do not rely on other WTO provisions to define "non-discriminatory" for purposes of GSP programs.

Paragraph 3(c)

Q5. Please give your views on the following questions relating to the meaning of the Enabling Clause, based upon paragraph 9 of Paraguay's Oral Statement. Is it correct to say that under the Enabling Clause developed countries are not obliged to give tariff preferences? Is it also correct that any preferences granted are only in respect of products of the developed country's own choice and only to developing countries of its choice? Are developed countries free to graduate beneficiary developing countries from their GSP schemes?

17. Under paragraph 1 of the Enabling Clause, Members "*may* accord differential and more favorable treatment to developing countries" in the ways described in paragraph 2. Thus, developed countries are not obligated by the terms of the Enabling Clause to extend tariff preferences pursuant to a GSP scheme. The United States does not agree, however, that this means that a donor country has complete discretion in granting such preferences to products and developing countries. Rather, the Enabling Clause, through its reference to the 1971 Waiver, sets out certain parameters for any GSP scheme; namely, that GSP schemes must at least be provided with a view to being mutually acceptable, generalized, non-reciprocal, and non-discriminatory.¹⁶

¹⁴ See also EC First Submission at paras. 78-79.

¹⁵ See also EC First Submission at para. 77.

¹⁶ See US Oral Statement at para. 9.

18. With respect to graduation, the United States notes that this is not an issue presented in this dispute; under the terms of reference for this dispute, there is therefore no reason for the Panel to reach this issue. However, there is nothing to indicate that a GSP scheme applied with a view to being "mutually acceptable," "generalized" and "non-discriminatory" would prevent "graduating" some developing countries as their situation changes. In fact, the Enabling Clause contemplates that a developed country may graduate beneficiary developing countries from its GSP scheme since, under paragraph 7, it is explicitly stated that developing countries "expect to participate more fully in the framework of rights and obligations under the General Agreement" as they develop. If graduation were not allowed, it would reflect a presumption that "developing" countries could never become "developed" countries, that their needs could never change, and that a developing country could never become competitive with respect to certain products. Such a presumption would run directly counter to the underlying principles of the Enabling Clause.

Q6. Developing countries often have different development needs. Take, for example, Indonesia, the Philippines, Morocco, Brazil and Paraguay, each having different development needs. If we agree with the argument of the Andean Community that it is possible to select some beneficiary countries according to certain criteria (paragraph 6 of the Joint Statement of the Andean Community), would it not be a logical consequence of this argument that any developed country could establish a special GSP tariff preference scheme for each individual developing country in responding to that developing country's own development needs? Is this a proper reading of paragraph 3(c) of the Enabling Clause? Why or why not? If not, where do you draw the line in term of a proper interpretation of paragraph 3(c)?

19. As mentioned in the US oral statement, paragraph 3(c) (as well as paragraph 7) of the Enabling Clause appears to contemplate explicitly that preferences extended pursuant to the Enabling Clause, including GSP schemes, need not be extended on a "one size fits all" basis, and that distinctions among developing countries based on their different development needs are specifically contemplated.¹⁷ At the same time, GSP schemes must be "generalized." Thus, paragraph 3(c), read in the context of other provisions of the Enabling Clause, would not seem to either require or permit donor countries to design a tariff preference program for each individual country, but would allow "generalized" GSP schemes to contain features that are designed to respond positively to the different needs of different developing countries.

Q7. Are the developed countries free to "graduate" beneficiary developing countries from a GSP scheme? If so, under which paragraph of the Enabling Clause? Please elaborate.

20. Please see the second part of the US answer to Question 5.

Q8. Does the word "and" in paragraph 3(c) of the Enabling Clause mean "or"? In other words, does the word "and" mean that "development, financial and trade needs" must be considered in a comprehensive manner or may they be considered separately?

21. Paragraph 3(c) identifies categories of needs to which developed countries must "respond positively" through their GSP programs, but does not, contrary to India's suggestion, prevent developed countries from responding to a particular need simply because of the use of the term "and."¹⁸ Indeed, such a requirement would seem inconsistent with the obligation developed countries have under paragraph 3(c) to "modify" their GSP programs to respond positively to the changing needs of developing countries, since a developing country's needs may change in one but not all three categories of need. It is not necessary to interpret "and" to mean "or" to arrive at this conclusion. While all factors must be considered, not all factors need to be dispositive of treatment in a specific case.

¹⁷ US Oral Statement at para. 12.

¹⁸ India Oral Statement at para. 14.

Q9. Paragraph 3(c) of the Enabling Clause refers to "developed contracting parties" and "developing countries" in the plural form. Given the common understanding that developed countries may decide individually whether or not they wish to provide GSP, is it also possible to interpret "developing countries" under paragraph 3(c) as meaning *individual* developing countries?

22. Yes. Certainly a developed country Member could, for example, modify its GSP scheme to respond to the changing needs of an individual developing country. The text of paragraph 3(c) is flexible enough that "developing countries" may be interpreted to refer to one or more developing countries, and thus allow developed countries to respond to the development needs of one or more developing countries without requiring all developing countries to have the exact same needs before the developed country could modify its GSP scheme.¹⁹ Please see also the US answer to Question 6.

Q10. To the extent that the Drug Arrangements only respond to development needs caused by drug production and trafficking, while not responding to development needs resulting from other problems, such as poverty, low *per capita* GNP, malnutrition, illiteracy and natural disasters, how does this EC programme satisfy the "non-discriminatory" requirement in footnote 3 of the Enabling Clause? Please elaborate.

23. The United States is not taking a position on the EC program. However, the United States does not read the objective that preferences be "non-discriminatory" to refer to discrimination between "needs" but rather to refer to discrimination between Members. "Non-discriminatory" does not mean that it is "discriminatory" to respond to certain needs and not others. As explained in the US answer to Question 8, paragraph 3(c) does not prevent developed countries from responding to a particular need, even while recognizing that developing countries have many needs. Consequently, it cannot be "discriminatory" to respond to a particular need, otherwise paragraph 3(c) and the "non-discriminatory" concept in footnote 3 of the Enabling Clause would be at odds. Rather, the question appears to go to the scope of the obligation in paragraph 3(c) rather than to the scope of "non-discriminatory." And paragraph 3(c) cannot be read so rigidly as to require that a program be at once both "generalized" and tailored to every single difference in every need in every individual country.

General

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

24. As indicated in its written submission, the United States takes no position on whether the Drug Arrangements are consistent with the EC's WTO obligations.²⁰ As such, the United States takes no position on whether the Drug Arrangements need to be covered by a waiver.

¹⁹ See US Oral Statement at para. 2-6.

²⁰ US Third Party Submission at para. 2.

QUESTIONS FROM THE PANEL TO THE UNITED STATES

Q12. Under its current GSP scheme, does the United States include all developing countries who have designated themselves as such or does the United States use their own list of developing countries? Does the United States provide identical treatment under its GSP scheme to all developing countries on its list?

25. The President of the United States designates countries as beneficiary developing countries under its GSP program after considering statutory eligibility criteria related to economic development and competitiveness.²¹ The United States publishes an updated list of beneficiary developing countries each year in General Note 4 to the Harmonized Tariff Schedule of the United States.

26. Upon designation, a beneficiary developing country is automatically eligible to receive duty-free treatment for all GSP-eligible products. Countries that the President designates as least-developed beneficiary developing countries under the US GSP program are eligible to receive duty-free treatment for additional products that are GSP-eligible only when imported from such countries. A beneficiary developing country may become ineligible to receive duty-free treatment for a GSP-eligible product if the value of imports of the product exceeds statutory limits called competitive need limits, or if the President determines to withdraw, suspend, or limit the application of duty-free treatment after considering the statutory eligibility criteria.

Q13. Is it your understanding that paragraph 2(a) of the Enabling Clause requires identical treatment to *all* developing countries in any GSP scheme? If so, why? If not, why not and how narrowly can a GSP scheme be drawn? Please elaborate.

27. The United States, for the reasons explained in its oral statement and its response to Question 6, does not consider that the Enabling Clause may be read to require identical treatment of all developing countries in an GSP scheme.²² GSP schemes should be designed in line with the provisions of the Enabling Clause, which serves as a guide for countries wishing to extend GSP preferences.

Q14. If paragraph 2(a) of the Enabling Clause does not require a preference-giving country to provide GSP to *all* developing countries, what does the term "generalized" in footnote 3 mean?

28. As the United States explained in its oral statement,²³ "generalized" does not mean "all." "Generalized" permits "less than all."²⁴ If negotiators had meant to say "all," they could just have said "uniform" or "preferences to all developing countries." The United States notes, with respect to the question of what number "less than all" may still be considered "generalized," that the parties to this dispute have not raised the issue of whether the EC's Drug Arrangements are "generalized," so there is no need for the Panel to address it.

Q15. Why do you consider a waiver is needed to provide a GSP scheme to certain drug-affected countries (e.g., APTA), in light of the requirements of the Enabling Clause?

29. The United States requested a waiver for its ATPA program because it was not certain that the program provides the "generalized" coverage specified in the Enabling Clause. The ATPA program is limited by law to four countries (*i.e.*, Bolivia, Colombia, Ecuador, and Peru).

²¹ See 19 U.S.C. 2461 et seq.

²² US Oral Statement at para. 2-6.

²³ US Oral Statement at para. 12.

²⁴ See THE NEW SHORTER OXFORD DICTIONARY 1074 (defining "generalize" as "Bring into general use; make common, familiar, or generally known; spread or extend; apply more generally; become extended in application.").

QUESTION FROM INDIA TO ALL THIRD PARTIES

Q16. Do the third parties support the EC's contention that the Drug Arrangements are justified under Article XX(b) of the GATT?

30. As explained in our written submission, the United States does not consider it necessary for the Panel to reach the arguments of the EC justifying the Drug Arrangements under Article XX(b) of the GATT 1994.²⁵ Given India's burden of proof in this proceeding, and the arguments it has presented, India has not thus far demonstrated that the Drug Arrangements are not in accordance with the Enabling Clause; as such, there is no need for the Panel to reach the EC's argument in the alternative that the Drug Arrangement falls under an "exception" to the obligations of the covered agreements pursuant to Article XX(b).

²⁵ US Third Party Submission at para. 10 (footnote omitted).