

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

(AB-2004-1)

THIRD PARTICIPANT SUBMISSION OF THE UNITED STATES OF AMERICA

February 2, 2004

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I. INTRODUCTION

1. The United States welcomes this opportunity to present its views to the Appellate Body in this appeal. The United States has taken advantage of the flexibility afforded to it by the Enabling Clause and is a major donor of benefits under the Generalized System of Preferences (“GSP”). As it did before the Panel, the United States takes no position on whether the Drug Arrangements are consistent with the EC’s WTO obligations. Rather, the United States is participating in this proceeding because of the importance of the issues presented from a systemic perspective, particularly for the operation and continued viability of GSP programs generally. Because of the important systemic issues raised in this appeal, it is even more important than usual to adopt a careful, prudent approach to resolving this dispute. The Panel went beyond the specific facts and particular circumstances of this dispute and adopted a broad approach that not only was not called for in this dispute but is fraught with legal error.

II. ARGUMENT

A. The Enabling Clause Is Not an “Exception” to Article I:1 of the GATT

2. First and foremost, the Panel misconceived the relationship between the *Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of the Developing Countries* (“Enabling Clause”)¹ and Article I:1 of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”).² The Panel concluded that the Enabling Clause is an “exception” to Article I:1 by misconstruing the Appellate Body statement in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, that “Articles XX and XI.2(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves.” The Panel appeared to believe that this statement was the dispositive test for all WTO provisions.³ In applying this “test” to the Enabling Clause, the Panel argued that because the Enabling Clause does not oblige Members to offer GSP benefits, it cannot be a positive rule establishing obligations in itself.⁴

3. In the first instance, the United States disagrees that the *Wool Shirts and Blouses* statement should be applied as a mechanical “test” to all WTO provisions, including the Enabling Clause. An analysis of the relationship between the Enabling Clause and Article I:1 should begin with the text of the Enabling Clause itself. Before the Panel, the United States pointed out that, on its terms, it would not be correct to describe the Enabling Clause as an “exception” or “affirmative defense.”⁵ The Enabling Clause applies “[n]otwithstanding the provisions of Article I of the General Agreement.” “Notwithstanding,” by its ordinary dictionary definition, means “in spite of, without regard to or prevention by.”⁶ 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

¹ BISD 26S/203.

² EC Appellant Submission, para. 2.

³ Panel Report, para. 7.35.

⁴ *Id.*, para. 7.37-7.38.

⁵ U.S. Third Party Submission, paras. 6-7.

⁶ THE NEW SHORTER OXFORD DICTIONARY 1947.

obligation contained in Article I to extend MFN treatment unconditionally. The Panel, however, did not examine the meaning of the word “notwithstanding” until *after* it decided that the Enabling Clause is an “exception” in accordance with the *Wool Shirts and Blouses* “test.”⁷

4. Moreover, the United States disagrees that the Enabling Clause is not a positive rule establishing obligations in itself. As the United States pointed out to the Panel,⁸ the predecessor to the Enabling Clause, the Decision of the CONTRACTING PARTIES of 25 June 1971 (“1971 Waiver”),⁹ was a waiver of GATT obligations that applied on a temporary basis “to the extent necessary” to accord the preferential tariff treatment referred to in the Preamble, and “subject to the procedures” of the 1971 Waiver. The Enabling Clause extended the 1971 Waiver on a permanent basis, and moved away from the “to the extent necessary” approach of the 1971 Waiver to provide general authorization for the differential and more favorable treatment described in paragraph 2. The Enabling Clause declares that Members have a right – in other words, “enables” them – to extend trade preferences to developing country Members subject to certain positive requirements. Thus, the Enabling Clause is not an “exception” from obligations under other provisions of the GATT 1994. The Enabling Clause is instead a positive rule providing authorization to Members and establishing obligations in itself.¹⁰

5. The logic used by the Panel in concluding otherwise – that, because Members are not obliged to offer GSP benefits, the Enabling Clause must be an exception¹¹ – would result in a variety of inconsistencies and absurd results with respect to several key provisions of the GATT 1994 if applied generally. Many WTO obligations only apply if a Member chooses to take the action addressed in the provision, and do not apply as strict conditions of Membership. Indeed, under the Panel’s approach, one would be led to the conclusion that traffic rules are not rules but exceptions to some other rules because people are not obliged to drive automobiles.

6. While the Panel found that the ordinary meaning of “notwithstanding” “is not dispositive as to whether the Enabling Clause excludes the application of Article I:1,”¹² it reached its conclusion about the relationship of the Enabling Clause and Article I:1 without looking at either any other part of the text of the Enabling Clause, or the context, object and purpose of the Enabling Clause and the remainder of the GATT 1994. Both of these, however, are important parts of the analysis. Looking at the Enabling Clause as a whole, for example, reveals that the Enabling Clause clearly cannot be merely an “affirmative defense” to Article I:1, because the Enabling Clause deals with issues not related to Article I:1, such as tariff negotiations.¹³

⁷ Panel Report, para. 7.43.

⁸ U.S. Third Party Submission, para. 7.

⁹ BISD 18S/24.

¹⁰ See *The Tokyo Round of Multilateral Negotiations*, report by the Director General of the GATT, Geneva, April 1979, pp. 98-99 (the Enabling Clause introduces “differential and more favourable treatment as an *integral part of the GATT system*, no longer requiring waivers from the GATT”) (emphasis added).

¹¹ Panel Report, para. 7.37-7.38.

¹² Panel Report, para. 7.44.

¹³ See Enabling Clause, paras. 5-8. These paragraphs on tariff negotiations were not present in the 1971 Waiver, and represent an important way in which the Enabling Clause was a more concrete and comprehensive package than the 1971 Waiver.

7. Further, in light of the context of the Enabling Clause within the GATT 1994 and the WTO Agreement, it is clear that the Enabling Clause is not merely an exception justifying a violation of Article I:1. As the United States argued to the Panel,¹⁴ 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. Thus, the Enabling Clause has co-equal status with the GATT 1947. It is part of the overall balance of rights and obligations agreed to in the GATT 1994 and the WTO Agreement, and is not an “affirmative defense” to the provisions of Article I:1.

8. The Enabling Clause differs in important respects from provisions that are commonly characterized as “exceptions,” such as Article XX of the GATT 1947. As the EC points out, “The WTO Agreement does not merely tolerate the granting of trade preferences to developing countries. It *encourages* Members to grant such preferences under the Enabling Clause.”¹⁵ The notion of encouraging group action to pursue a joint goal is quite distinct from the notion of justifying an individual action to allow a Member to pursue a goal related to a domestic priority, such as under several provisions of Article XX.¹⁶ One doubts, for example, that the words of praise spoken after the 1971 Wavier was granted and that are quoted in the dissenting panelist’s opinion – with several references to an event of historic proportions – would be used at a meeting of Members to describe an action one of them had taken and justified under Article XX.¹⁷

9. The United States pointed out in its Third Party Oral Statement at the second hearing of the Panel in this dispute that interpreting the Enabling Clause to be an “affirmative defense” would have the effect of discouraging use of the Enabling Clause.¹⁸ Placing the burden on developed countries to defend actions they take to benefit developing countries under the Enabling Clause would create a *disincentive* for developed countries to consider taking the voluntary action permitted under the Enabling Clause.

10. Consequently, the United States urges the Appellate Body to reverse the Panel’s finding that the Enabling Clause is an “affirmative defense” to Article I:1 and to find instead that the Enabling Clause is a separate provision authorizing the types of treatment provided therein subject to the requirements specified in it.

B. “Non-Discriminatory” Does Not Mean “Identical to All”

11. The Panel erred in its reliance on and approach to footnote 3 for its finding that the Enabling Clause “requires that identical preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori

¹⁴ U.S. Third Party Submission, para. 5.

¹⁵ EC Appellant Submission, para. 53 (emphasis added).

¹⁶ See Panel Report, para. 9.17 (dissenting opinion).

¹⁷ See *id.*, para. 9.7.

¹⁸ U.S. Third Party Oral Statement (Second Panel Meeting), para. 3.

limitations.”¹⁹ The Panel seized on the term “non-discriminatory” in footnote 3 and assumed its use there imposed a requirement on Members that the Panel then went on to interpret. However, the correct starting point would have been an examination of the use of that term in context. The term “non-discriminatory” is used in describing the 1971 Waiver; footnote 3 references the 1971 Waiver and describes it as “relating to the establishment of ‘generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries.’” This footnote is simply a cross-reference to where the Generalized System of Preferences is described. Nowhere does the footnote itself specify any obligations or requirements for GSP donor countries, much less a requirement to provide “identical preferences to all developing countries.” Accordingly, the Panel’s analysis starts from a false premise and should be rejected on that basis alone.

12. And from that false premise the Panel errs further. Curiously, the Panel begins its interpretation of “non-discriminatory” by interpreting paragraph 3(c) of the Enabling Clause.²⁰ Somehow, as a result of the Panel’s interpretation, developed country Members who started off agreeing to “respond positively” to the development, financial and trade needs of developing countries²¹ in paragraph 3(c) end up with a hard and fast obligation not to provide GSP benefits unless they can ensure that they do not “result in a differentiation in the treatment of different developing countries.”²² The Panel arrives at this conclusion despite its observation that, while there is (in the Panel’s view) a “requirement of responsiveness” for Members offering GSP benefits, “there are no specific criteria for measuring the responsiveness of individual GSP schemes.”²³

13. The *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) makes it clear that panels are barred from reading legal obligations into the Enabling Clause that are not found in the text.²⁴ It is ironic that the two panel members who wrote the majority portion of the panel report suggest in their discussion of paragraph 3(c) that, if the Panel does not read the obligation to treat all developing countries exactly the same into the Enabling Clause, “[t]he end result would be the collapse of the whole GSP system.”²⁵ Those panelists read into the Enabling Clause an obligation that is not only not legally supported in the text, but is also an obligation that, as a matter of trade policy, would create a *disincentive* for Members to extend tariff preferences to developing countries by limiting their discretion and trampling on the idea that GSP schemes are supposed to be “mutually acceptable.”²⁶

¹⁹ Panel Report, para. 7.161.

²⁰ *Id.*, para. 7.65.

²¹ This sentiment is similar to the hortatory statements in the Preamble to the WTO Agreement and Article XXXVI:3 of the GATT 1994. *See* Preamble to the WTO Agreement (“There is a need for *positive efforts* designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.”) (emphasis added); *see also* Article XXXVI:3 of the GATT 1994.

²² Panel Report, para. 7.116.

²³ *Id.*, para. 7.105.

²⁴ *See, e.g.*, Article 3.2: “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”

²⁵ *Id.*, para. 7.102.

²⁶ *See* the Preamble to the 1971 Decision.

14. Further, the Panel’s concern that leaving any amount of discretion to developed country Members in the way they “respond positively” to the needs of developing countries under paragraph 3(c) would result in “an unlimited number of special preferences favouring different selected developing countries” is unfounded.²⁷ As the United States explained before the Panel,²⁸ at the same time that GSP schemes must “respond positively” to the needs of developing countries, they must also be “generalized.” Thus, read in the context of the term “generalized,” which the Panel ignores in this context,²⁹ paragraph 3(c) would not seem either to 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.

15. When the Panel finally turns its attention to the term “non-discriminatory,” its analysis again suffers from the flaw of reading legal obligations into the Enabling Clause that are not found in the text. Moreover, the Panel commits a major interpretive error in reading obligations into the text on the basis of negotiating history, which the Panel uses as though it were treaty text, rather than as a means of confirming the meaning of treaty text. Neither the DSU nor the customary rules of treaty interpretation countenance such a methodology. DSU Article 3.2 is clear: “The Members recognize that [the dispute settlement system] 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.” And, while the customary international law rules reflected in Article 32 of the Vienna Convention do permit a treaty interpreter to have recourse to negotiating history in certain limited circumstances, such recourse is *supplementary* to the general principles found in Article 31 -- not a substitution for them.

16. For example, from two reports to the Second UNCTAD, one from developing countries and one from developed countries – historical documents deeply embedded in the chain of events that led to the Enabling Clause – the Panel draws the conclusion that the term “non-discriminatory” means that GSP benefits must “be provided to *all* developing countries *equally*, without the possibility of differentiation in treatment among developing countries by preference-giving countries.”³⁰ Neither of the sections cited from these reports, however, uses any term related to “non-discriminatory.”³¹ Further, the sections cited use language like, “should aim,” “important objective,” and “movement in the direction.” The United States has difficulty understanding how the Panel read a new obligation into the text of the Enabling Clause on the

²⁷ Panel Report, para. 7.102.

²⁸ U.S. Third Party Oral Statement, para. 12; U.S. Answers to Questions, para. 18.

²⁹ The Panel does address the term “generalized” in paragraph 7.175 in the context of a discussion of the term “developing countries,” but does so by giving “generalized” *two* functions simultaneously. Without agreeing that “generalized” in fact serves both these functions, the United States notes that the Panel failed to provide any support for its suggestion of two functions and failed to explain how its approach to “non-discriminatory” leaves any room for the term “generalized” to have any meaning, at least with respect to one of the functions that the Panel conceded that “generalized” served.

³⁰ Panel Report, para. 7.134.

³¹ *Id.*, para. 7.132-7.133.

basis of such clearly hortatory language, which is, moreover, in documents that are merely negotiating history. Under the Panel's approach, since the report from the developed countries refers to "all developed countries," it would have to follow that *all* developed countries would be obliged to provide GSP schemes, notwithstanding the clearly permissive language of the Enabling Clause.

17. Similarly, in its discussion of the Agreed Conclusions and the results of the First Session of UNCTAD, the Panel quotes passages that use words like "objectives," "principles," "recommendations," "as far as possible," "as appropriate," "consider," "should," and "expect." From these, the Panel inexplicably draws the conclusion that the term "non-discriminatory" "*obliges* preference-giving countries to provide GSP benefits to *all* developing countries without differentiation, except for the implementation of a priori limitations in GSP schemes."³² The fact that a priori exclusions are allowed demonstrates that the term "non-discriminatory" does not preclude *all* conditions, and there is nothing in the term to suggest that a priori exclusions are the *only* conditions allowed. Moreover, as the EC points out, the Panel ignores language in these historical documents and others that would argue against its interpretation of "non-discriminatory."³³

18. The Panel commits a further error in its assessment of these historical materials. The United States notes that the GSP program it notified to the GATT pursuant to the 1971 Waiver, *and that was in place at the time the Enabling Clause was adopted*, contains a number of eligibility criteria that the President was required to consider before designating a country as a beneficiary of the U.S. GSP program.³⁴ If the Panel wished to look at the historical record (rather than, as it should have done, focusing on the text), it needed to consider this fact as well: the fact that the program of at least one major donor in 1979 contained certain conditions on benefits is evidence that such conditions were not viewed by the Contracting Parties as contravening any "requirement" of the Enabling Clause that they were adopting (or any "requirement" of the 1971 Waiver, which the Enabling Clause extended).

19. Moreover, the United States is baffled by the Panel's decision, in its discussion of "*Object and Purpose*," to elevate an objective *not* directly reflected in the Enabling Clause - "expanding the production and exchange of goods" by "eliminat[ing] discriminatory treatment in international commerce" - over an objective that admittedly *is* directly reflected in the Enabling Clause - "to secure, for the developing countries, a share in the growth in international trade commensurate with their development needs" by providing GSP benefits.³⁵

20. The Panel explains that it took this interpretive approach to "prevent abuse in providing GSP."³⁶ The Panel majority's decision to focus not on the text but on this policy concern is startling and is, once again, inconsistent with Article 3.2 of the DSU. To determine what is

³² *Id.*, para. 7.144 (first emphasis added).

³³ EC Appellant Submission, paras. 88-93, 158-183.

³⁴ See L/4299 (13 February 1976), pp. 2-5 (Sections 502(b) and (c) of Title V of the Trade Act of 1974).

³⁵ Panel Report, para. 7.154-158.

³⁶ *Id.*, para. 7.158; see also para. 7.137.

“abuse” requires in the first instance prejudging what the system is supposed to look like, which is to approach the interpretive task backwards. Under the Panel majority’s approach, these two panelists determine what type of GSP is preferred, and then interpret the text so as to prevent abuse of their preferred system. In any event, those two panelists’ concerns are unfounded. It is clear from the history of the Enabling Clause that the impetus behind the development of GSP schemes was a desire on the part of both developed and developing countries to move away from the “special preferences” associated with developed countries’ colonial pasts. This notwithstanding, the Panel’s focus on this motivating factor behind the Enabling Clause in interpreting the term “non-discriminatory,” because of its apparent fear that allowing developed countries any discretion in operating their GSP schemes could lead to a recurrence of “special preferences,” appears unjustified to the United States. As a matter of fact, both the EC and the United States have demonstrated dedication over the past three decades to offering GSP benefits to a large number of developing countries for a large number of products.

21. Further, even assuming the Drug Arrangements are in the nature of the kind of “special preferences” that GSP schemes were supposed to replace, the Panel’s interpretation of “non-discriminatory” goes far beyond the circumstances of this dispute to introduce new, strict obligations on GSP donor countries that are simply too broad, because they prohibit actions otherwise permitted under the Enabling Clause. For example, as the United States has pointed out,³⁷ the term “generalized” does not mean “all” (otherwise negotiators could just have said “uniform” or “preferences to all developing countries”). Rather, “generalized” permits “less than all” and is inconsistent with the Panel’s interpretation of “non-discriminatory.”³⁸ And in fact the United States may exclude certain developing countries from its GSP scheme, or may limit the ability of others to enjoy the full benefits of its GSP scheme, if the President determines to withdraw, suspend, or limit the application of duty-free treatment after considering the statutory eligibility criteria.³⁹ The United States also “graduates” developing countries from its GSP scheme on the basis of statutory criteria related to level of development, in accordance with paragraph 7 of the Enabling Clause.⁴⁰ Indeed, the United States also notes that the Panel nowhere grapples with the definitional difficulties posed by a requirement of identical treatment of “all developing countries,” because it would appear impossible to administer that requirement absent an agreed-upon WTO-wide definition of “all developing countries.” The Panel’s approach is likely to engender extensive dispute settlement over which Member does or does not qualify as a developing country for purposes of the WTO.

22. The Panel’s goal of preventing “abuse” by GSP donors made it over-zealous in its interpretation of the term “non-discriminatory.” The United States encourages the Appellate

³⁷ U.S. Third Party Oral Statement, para. 12.

³⁸ 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.”).

³⁹ See U.S. Answers to Questions, paras. 24-25. The United States notes that, contrary to the suggestion of India in its Reply to the Panel’s Question to both Parties No. 41 (as quoted by the EC in its Appellant Submission at para. 94), the United States no longer excludes countries from becoming beneficiaries of its GSP program solely on the basis of membership in the Organization of Petroleum Exporting Countries. See 19 U.S.C. 2462(b)(2)(B).

⁴⁰ See U.S. Answers to Questions, para. 17.

Body to adopt an interpretation of “non-discriminatory” that works in the context of the Enabling Clause.⁴¹ The United States recalls again⁴² that the 1971 Decision calls for a “mutually acceptable system” of preferences, and that a Member has the right, *not* the obligation, to extend preferences. It is important to keep in mind that, while a “one size fits all” obligation to grant any preference to all developing countries may be acceptable to India for purposes of this dispute, it is doubtful that it would be acceptable to other beneficiary countries or to GSP donor countries, or even to India in a different dispute.

C. “Developing Countries” Does Not Mean “All Developing Countries”

23. The EC is correct in noting that the Panel’s interpretation of the term “developing countries” to mean “all developing countries” in the Enabling Clause is completely dependent on the Panel’s interpretation of “non-discriminatory.”⁴³ The EC concludes, therefore, that “[i]f the Appellate Body allows differentiation between developing countries with different development needs, it would follow that, for the same reasons, Paragraph 2(a) does not require to grant identical preferences to *all* developing countries.”⁴⁴

24. The United States made several additional arguments before the Panel as to why “developing countries” in paragraph 2(a) should not be interpreted as “*all* developing countries. Most significantly, the Enabling Clause refers in all cases to either “developing countries” or “the developing countries”; the Enabling Clause never refers to “*all* developing countries.” There is no basis for inserting words into the text. For its other arguments on this point, the United States refers the Appellate Body to its Third Party Oral Statement at the first meeting of the Panel.⁴⁵

25. For these reasons, the United States encourages the Appellate Body to reverse the Panel’s finding that the term “developing countries” in paragraph 2(a) should be interpreted to mean *all* developing countries.

III. CONCLUSION

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

⁴¹ In this connection the United States recalls its statements to the Panel that the United States generally agrees with the EC that a GSP program may be described as “non-discriminatory” if it differentiates among unequal situations, and that it did not disagree with the EC that a GSP scheme may be described as “non-discriminatory” if the benefits are granted on the basis of objective criteria that do not operate *prima facie* to exclude any one country, and “based on an overall assessment of all relevant circumstances.” U.S. Third Party Oral Statement, paras. 12 and 13.

⁴² See U.S. Third Party Oral Statement, para. 13.

⁴³ EC Appellant Submission, para. 194.

⁴⁴ *Id.*, para. 195.

⁴⁵ See U.S. Third Party Oral Statement, paras. 2-6.