BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

(AB-2004-1)

Executive Summary of the

Third Participant Submission of the United States of America

February 2, 2004

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.

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."

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. Moreover, the United States disagrees that the Enabling Clause is not a positive rule establishing obligations in itself.

4. The Panel 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, and help confirm that the Enabling Clause clearly cannot be merely an "affirmative defense" to Article I:1, but rather the Enabling Clause is part of the overall balance of rights and obligations agreed to in the GATT 1994 and the WTO Agreement.

5. 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.[3]

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[1] BISD 26S/203.

[2] EC Appellant Submission, para. 2.

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

B. "Non-Discriminatory" Does Not Mean "Identical to All"

6. 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 limitations."[4] 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.

7. 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.[5] 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 countries[6] 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."[7] 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.[8]

8. The Panel also ignores the term "generalized" in this context,[9] and basis its reasoning on unfounded concerns that allowing GSP donor countries any discretion in treating developing countries differently would result in a resurgence of "special preferences."[10]

9. 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. 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. The Panel explains that it took this interpretive

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[4] Panel Report, para. 7.161.

[5] *Id.*, para. 7.65.

[6] 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.

[7] Panel Report, para. 7.116.

[8] *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."

[9] 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 providing any support for its suggestion.

[10] Panel Report, para. 7.102.

approach to "prevent abuse in providing GSP."[11] 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. In any event, those two panelists' concerns are unfounded.

10. The United States recalls again[12] 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. The Panel read into the Enabling Clause an obligation that is not legally supported in the text and that, as a matter of trade policy, would create a *disincentive* for Members to extend tariff preferences to developing countries.

C. "Developing Countries" Does Not Mean "All Developing Countries"

11. The United States made several 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."[13] 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.[14]

[11] *Id.*, para. 7.158; *see also* para. 7.137.

[12] *See* U.S. Third Party Oral Statement, para. 13.

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

[14] *See* U.S. Third Party Oral Statement, paras. 2-6.