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

(WT/DS246)

THIRD-PARTY ORAL STATEMENT OF THE UNITED STATES
AT THE SECOND MEETING OF THE PANEL

July 9, 2003

Introduction

1. Mr. Chairman and members of the Panel, thank you for providing the United States, as a third party in this proceeding, the opportunity to make a brief statement at this second meeting of the Panel.

Discussion

2. In our third party submission, our oral statement at the first meeting, and our answers to questions, the United States has been able to set forth its views on a number of the issues presented by this dispute, and we certainly do not wish to repeat all those points again. In today's statement, the United States would principally like to reiterate its concern with India's insistence that paragraph 2(a) of the Enabling Clause is an affirmative defense.[1] India claims that the Drug Arrangements violate Article I:1. It is entitled to do so. But its assertion does not convert the Enabling Clause into a so-called affirmative defense to its claim. Instead, as we and others have explained before, as a legal matter the Enabling Clause sets up a positive rule that

[1] India Second Submission at paras. 34-61.

authorizes developed country Members to extend trade preferences to developing country Members under certain circumstances.[2]

3. Not only is India's legal position incorrect, but the consequences of its interpretation would be unfortunate. 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. India's interpretation would have the further unfortunate effect of making treatment under the Enabling Clause more difficult to defend: India would have the Panel conclude that preferential tariff treatment under the Clause should be presumed *not* to be covered by the provisions of the Enabling Clause, and that the developed country must prove that it is.

4. India's argumentation also suffers from internal contradictions. On the one hand, in arguing that the Enabling Clause is an "affirmative defense," India asserts that "paragraph 2(a) of the Enabling Clause does not impose positive obligations or positive rules establishing obligations in themselves."[3] Yet, shortly thereafter, and while still discussing paragraph 2(a), India states that preferential tariff treatment under the Enabling Clause must be non-discriminatory: "There is no dispute that this is a binding requirement."[4] India cannot have it both ways, seeing legal requirements in the text when they would benefit India in this dispute while denying that there are obligations when it wants the EC to bear the burden of proof.

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[2] US Third Party Submission at paras. 4-9; US Answers to Questions from the Panel at para. 2.
[3] India Second Submission at para. 59 (emphasis omitted).
[4] India Second Submission at para. 79.

5. Up to this point, this statement has focused on only one issue in this dispute. It is, however, an example of the more general point that many Members, including the United States, have already made in earlier stages of these panel proceedings: to read legal obligations and interpretations into the Enabling Clause that are not found in the text creates serious difficulties.[5] We respectfully urge the Panel not to accept India's invitation to do so.

6. Let us turn now briefly to the question of Article XX of the GATT 1994. The United States has taken no position on whether the EC measures are inconsistent with Article XX. In fact, this dispute should be able to be resolved by reference to the Enabling Clause and there should be no need to reach the Article XX question. However, the United States would like to make a brief comment on the use, by both the EC and India, of the phrase "least trade restrictive measure" in addressing whether the Drug Arrangements are "necessary" under Article XX(b) of the GATT 1994.[6] Both the EC and India err in urging the Panel to adopt this test.

7. First, nowhere in the text of Article XX does the phrase "less trade restrictive" appear. This is a new phrase and new obligation that is not in Article XX of the GATT 1994. Rather, under Article XX(b) the question is whether a measure is "necessary" to protect life or health. Under customary rules of treaty interpretation, the treaty interpreter would need to look at the ordinary meaning of "necessary" in context and in light of the object and purpose of the

[5] US Oral Statement (May 15, 2003) at para. 14; US Third Party Submission at para. 2.

[6] India Second Submission at para. 156; EC Second Submission at para. 75 (stating that "[t]he only issue before the Panel is whether such access can be provided in a less trade restrictive manner").

agreement. Nowhere in the ordinary meaning of "necessary" is there a meaning of "least trade restrictive," nor does "necessary" take on the meaning of "least trade restrictive" from the context of Article XX or the object and purpose of the GATT 1994. In fact, context would point to the opposite result. The concept of "not more trade-restrictive" (than necessary or required) appears in both the *Agreement on Technical Barriers to Trade* and in the *Agreement on the Application of Sanitary and Phytosanitary Measures*. Clearly the WTO drafters knew how to reflect this concept when they wanted. The fact that they did not use this phrase in the GATT 1994 demonstrates that the drafters did not intend to include this concept in Article XX(b).

8. Second, the United States notes that, in *EC – Asbestos*, the Appellate Body addressed the applicable standard for evaluating whether a measure is "necessary" under Article XX(b), and did not use the standard of "least trade restrictive." Rather, for the Appellate Body the question was whether there is an alternative measure reasonably available that is "not inconsistent with" other GATT provisions, or, if no such alternative measure is reasonably available, whether the measure chosen "entails the least degree of inconsistency with other GATT provisions."[7] The concept of "less inconsistent" is not at all the same as "less trade restrictive." "Less inconsistent" would require one to examine the degree of inconsistency with the agreement. "Less trade restrictive" would require one to examine the degree of trade effect. Presumably a measure that breached four provisions of the GATT 1994 would be less consistent than a measure that only breached one provision, but that does not say anything about trade effect. A

[7] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products ("EC – Asbestos")*, WT/DS135/AB/R, adopted 5 April 2001, paras. 170-171 (internal citations omitted).

measure that breached one provision could be far more trade restrictive than a measure that breached four provisions.

Conclusion

9. This concludes my presentation. The United States appreciates this opportunity to express its views.