

ANNEX B

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ANNEX B-1

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

To both Parties

1. *Could your delegation please indicate whether there is anything you can report in relation to the possible settlement of the matter in dispute?*

Reply

India has held consultations with the European Communities (the "EC") regarding the WTO-consistency of the "Special Arrangements to Combat Drug Production and Trafficking" (the "Drug Arrangements"), which form part of the EC's scheme of generalized tariff preferences for the period 1 January 2002 to 31 December 2004, on various occasions including:

- (i) the meeting between Sri Murasoli Maran, India's Minister for Commerce and Industry and Mr. Pascal Lamy, Commissioner (Trade) European Commission, in the margins of the India-EU Summit held in New Delhi in November 2001,
- (ii) the bilateral consultations held in Brussels on 5-6 February 2002,
- (iii) the formal consultations under the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") held in Geneva on 25 March 2002,
- (iv) the meeting of the India-EU Sub-Commission held on 9 April 2002,
- (v) the meeting of the India-EU Joint Commission held in Brussels on 9-10 July 2002,
- (vi) the India-EU Business Summit held in Copenhagen on 8-9 August 2002,
- (vii) the meeting between Mr. Pascal Lamy, Commissioner (Trade) European Commission and India's Minister for Commerce and Industry in New Delhi on 13 March 2003,
- (viii) the consultations on India-EU Bilateral Issues held in Brussels in January 2003,
- (ix) the meeting between the India's Commerce Secretary Mr. Dipak Chatterjee and Mr. Peter Carl, DG Trade on 22nd January 2003 in Brussels,
- (x) the latest attempt was made during consultations held in Brussels on 7 May 2003.

The EC did not reveal to India during any of these consultations the exact legal basis on which the EC considered the Drug Arrangements to be consistent with its obligations under the WTO Agreements. On each occasion, India indicated its willingness to enter into a mutually agreed settlement. However, the EC has consistently refused to discuss even the possibility of one. It is against this background that India reluctantly sought recourse to the dispute settlement under the DSU for redressal of its grievances.

India remains open to the settlement of the matter in the dispute based on a suitable offer by the EC.

Legal Function

2. *Did the negotiators of the Enabling Clause intend its legal function to be different from the 1971 Decision? Are there different legal bases for the two decisions? Please elaborate. What materials can you point to in support of this view? Please provide any such materials.*

Reply

Legal function of the Enabling Clause and the 1971 Decision

The best evidence of the intention of the negotiators as to the legal function of the Enabling Clause, in comparison with that of the 1971 Decision, is an analysis of the legal effects of both in relation to Article I of the GATT, to which both expressly refer.

The provisions of the Enabling Clause relevant to the "Generalized System of Preferences" ("GSP") read as follows:

"1. Notwithstanding the provisions of Article I of the General Agreement, [Members] may accord differential and more favourable treatment to developing countries¹, without according such treatment to other [Members].

2. The provisions of paragraph 1 apply to the following:²

(a) Preferential tariff treatment accorded by developed [country Members] to products originating in developing countries in accordance with the Generalized System of Preferences,³ ...

¹ The words 'developing countries' as used in this text are to be understood to refer also to developing territories.

² It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.

³ As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of 'generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries.'

The parts of paragraphs 1 and 2(a) and footnote 3 of the Enabling Clause relevant in this dispute can be summarized as follows:

"Members 'may', ... 'notwithstanding the provisions of Article I of the [GATT]', ... 'accord differential and more favourable treatment to developing countries without according such treatment to other [Members]' by way of 'preferential tariff treatment accorded by developed [country Members] to products originating in developing countries in accordance with the [GSP]' ... 'as described in the [1971 Decision], relating to the establishment of 'generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries' "¹

¹ In context, the word "[Members]" in the phrase "notwithstanding the provisions of Article I of the [GATT], [Members] may ..." refers to developed country Members, and the words "other [Members]" in the

Paragraph (a) of the 1971 Decision provides:

"That without prejudice to any other Article of the General Agreement, the provisions of Article I shall be waived for a period of ten years to the extent necessary to permit developed contracting parties ... to accord preferential tariff treatment to products originating in developing countries and territories with a view to extending to such countries and territories generally the preferential tariff treatment referred to in the Preamble to this Decision, without according such treatment to like products of other contracting parties."

Paragraph (a) of the 1971 Decision thus waived the provisions of Article I of the GATT "to the extent necessary to permit developed [country Members] ... to accord preferential tariff treatment to products originating in developing countries [the preferential tariff treatment under the GSP referred to in the Preamble] without according such treatment to like products of other [Members]".²

As far as the GSP is concerned, the legal functions of the 1971 Decision and the Enabling Clause are therefore the same: both permit a developed country member to grant preferential tariff treatment to products originating in developing countries without according such treatment to like products originating in other developed country Members.

India has been unable to find any document relating to the negotiating history of the Enabling Clause that *expressly* confirms that the negotiators *intended* the Enabling Clause would to have the same legal function as the 1971 Decision as far as the GSP is concerned. In this regard however, it might be noted that paragraph (b) of the 1971 Decision provides that the GATT CONTRACTING PARTIES "keep under review the operation of this Decision and decide, before its expiry and in light of the considerations outlined in the Preamble, whether the Decision should be *renewed* and if so, what its terms should be". The Enabling Clause was adopted prior to the expiry of the ten-year period provided for under the 1971 Decision. Subsequent to the adoption of the Enabling Clause, the GATT CONTRACTING PARTIES did not take any other action relative to the 1971 Decision. It can therefore be reasonably assumed that the Enabling Clause is the *renewal* of the 1971 Decision, as contemplated in paragraph 2(b) of the latter.

Legal basis of the 1971 Decision

The 1971 Decision does not make an express reference as to its legal basis. However, paragraph (a) thereof states that "... the provisions of Article I [of the GATT] shall be *waived* ...". Furthermore, the "Minutes of Meeting" of the GATT Council held on 25 May 1971³, at which the 1971 Decision was discussed and approved for submission to the GATT CONTRACTING PARTIES, states, among others (in relation to what ultimately was adopted as the 1971 Decision):

"At the request of a number of prospective preference-giving contracting parties, a communication containing a formal application to the CONTRACTING PARTIES for a waiver in accordance with Article XXV:5 [of the GATT] from the obligations under Article I of the [GATT] had been circulated (C/W/178)."

Document C/W/178 dated 19 May 1971 is entitled "Request for a Waiver" submitted by the Permanent Delegation of Norway, acting on behalf of several developed countries, in which they formally submit their application "for a waiver in accordance with Article XXV:5 [of the GATT]".

phrase "... without according such treatment to *other* [Members]" likewise refer to developed country Members.

² Similarly, in context, the words "*other* [Members]" in the phrase "... without according such treatment to *other* [Members]" likewise refer to developed country Members.

³ C/M/69 dated 28 May 1971.

Attached to that document was a draft decision, the text of which is the same text as that of the 1971 Decision. Article XXV:5 of the GATT provides that "... CONTRACTING PARTIES may waive an obligation imposed upon a contracting party to [the] Agreement ...". It is thus clear that the legal basis for the 1971 Decision is Article XXV:5 of the GATT.

Legal basis of the Enabling Clause

In the process leading to the adoption of the 1971 Decision, the Secretariat issued a note entitled "PREFERENTIAL TARIFF TREATMENT FOR DEVELOPING COUNTRIES ... Technical Note by the Secretariat"⁴ indicating a choice of three possible methods for the adoption of the GSP. It lays down certain principles relating to the GSP and, in respect of the methods, goes on to state:

"These principles could be incorporated in an amendment of the provisions of the GATT ...

The principles could also be incorporated in a waiver under Article XXV:5 ...

"A third possibility ... would be a declaration that, notwithstanding the provisions of Article I, the CONTRACTING PARTIES will allow new preferences of a temporary nature which accord with the general principles suggested above ... [S]uch a declaration could be adopted at a session of the CONTRACTING PARTIES. It would have to be adopted without opposition. The logic of this method is that the CONTRACTING PARTIES are masters in their own house, and can agree that they will concur in temporary derogations from Article I in order to promote the objectives set out in Article XXXVI ..."

The "Summary Record of Fourth Meeting" of the 25th Session of the GATT CONTRACTING PARTIES held on 28 November 1979⁵, at which the Enabling Clause was adopted, states:

"The CHAIRMAN drew attention to Annex III in document L/4884/Add.1 which contained proposals regarding the decisions to be adopted by the CONTRACTING PARTIES on the Framework texts, which were contained in document L/4885.

The CONTRACTING PARTIES agreed to adopt by consensus the Decision Regarding Differential and More Favourable Treatment and Reciprocity and Fuller Participation of Developing Countries (Points 1 and 4)."

Document L/4885 dated 23 November 1979 is a Note Prepared by the Secretariat. Attached to that note is a draft entitled "POINTS 1 AND 4 ... "DIFFERENTIAL AND MORE FAVOURABLE TREATMENT RECIPROCITY AND FULLER PARTICIPATION OF DEVELOPING COUNTRIES". The text of that draft is identical to that of the Enabling Clause. The draft is preceded by the following note:

"The text below has been drawn up without prejudice to the position of any delegation with respect to its eventual legal status. Some delegations consider that such a text should appear as a new Article or set of provisions to be incorporated in the General Agreement. Other delegations consider that it should be adopted by the CONTRACTING PARTIES as a Declaration or Decision. Some consequential amendments to the text may be necessary in the light of the decision taken on this question."

⁴ Spec(70)6 dated 5 February 1970.

⁵ SR.35/4 dated 18 December 1979.

The sub-title of the Enabling Clause is "Decision of 28 November 1979". Among the three legal options mentioned in the Secretariat note, the CONTRACTING PARTIES thus chose the option of a "Declaration or Decision".

3. *Do you agree that in order to determine whether a particular provision lays down a positive right or an exception, it is necessary to examine its legal function in the context of the treaty as a whole? If yes, why so, and what are the implications in the present dispute? If no, why not, and what are the implications in the present dispute?*

Reply

"Positive right" is "a right entitling a person to have another do some act for the benefit of the person entitled".⁶ "[Special] exception" is "something that is excluded from a rule's operation".⁷ "[Statutory] exception" is "a provision in a statute exempting certain persons or conduct from the statute's operation."⁸

In the abstract, if the language of the particular provision is clear, it would not be necessary (in the sense of "indispensable") to examine its legal function in relation to the treaty as a whole to determine whether it is a positive right or an exception; if the language is not clear, it may then be necessary.

In this dispute, it is clear that paragraphs 1 and 2(a) of the Enabling Clause do not lay down a "positive right" for any Member as they do not create a right for the developing countries to benefit from GSP treatment. It is equally clear that the Enabling Clause lays down an exception as it excludes developed country Members granting GSP preferences from the operation of certain aspects of Article I:1 of the GATT.

In order to determine the scope of the exception established by paragraphs 1 and 2(a) of the Enabling Clause, it is necessary to examine the terms of the Enabling Clause in their context. That context includes all the other provisions of the WTO Agreement. However, the scope of an exception can not be determined without examining the rule that made the exception necessary. It is therefore essential to examine paragraphs 1 and 2(a) Enabling Clause in the context of Article I:1 of the GATT since they exempt developed countries from the operation of certain aspects of that article.

4. *With reference to paragraph 1(b)(iv) of GATT 1994, and recognizing that the Enabling Clause was adopted by the GATT Contracting Parties at the end of the Tokyo Round, is it your understanding that the Enabling Clause is/is not an "other decision of the Contracting Parties to GATT 1947"? Is it a part of GATT 1994? Please explain.*

Reply

India is of the view that the Enabling Clause could be considered as forming part of "other decisions of the CONTRACTING PARTIES to GATT 1947" referred to in paragraph 1(b)(iv) of the language of Annex IA of the WTO Agreement incorporating the GATT 1994 into the WTO Agreement.⁹ It was adopted as a "decision" by the GATT CONTRACTING PARTIES. Therefore it is a part of the GATT 1994.

⁶ *Black's Law Dictionary*, 7th ed., B.A. Garner (ed.) (West Group, 1999), p. 1323.

⁷ *Ibid.*, p. 584.

⁸ *Ibid.*

⁹ The Enabling Clause is not included in the list of waivers referred to in the footnote to paragraph 1(b)(iii) of the language of Annex IA of the WTO Agreement incorporating the GATT 1994 into the WTO Agreement. Those waivers are listed in WT/L/3 dated 27 January 1995.

5. *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 the 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

India 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".¹⁰ 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.

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. 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.

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

Reply

This reply is based on India's understanding of "autonomous right", as set forth in the answer to question 5 addressed by the Panel to both parties.

¹⁰ *Black's Law Dictionary*, *supra*, footnote 6, p. 1323.

"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."¹¹

As noted above, India 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.

India 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.

7. *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.*

Reply

To determine the legal function of the Enabling Clause, it is useful to have reference to the exceptions clauses set out in Articles XX, XXI and XXIV of the GATT 1994. Even assuming that Members have the autonomous right to take measures therein authorized, those provisions are exceptions from certain obligations and may be invoked as affirmative defences in a dispute concerning other provisions of the GATT. Similarly, even assuming that the Enabling Clause could be deemed to establish an autonomous right of developed country Members to grant differential and more favourable treatment to developing countries, the Enabling Clause nevertheless is an exception to certain aspects of Article I:1 of the GATT and may be invoked as an affirmative defence in response to a claim under Article I:1.

8. *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.*

Reply

In India's view, even assuming that Articles XX, XXI and XXIV of the GATT 1994 provide autonomous rights, they are exceptions which may be used as affirmative defences. Even assuming that the Enabling Clause similarly provides an autonomous right, that right is, at the same time, an exception to certain aspects of Article I:1 of the GATT and may be invoked as an affirmative defence. (Please see answers to questions 3, 5, and 6 addressed by the Panel to both parties).

¹¹ *Black's Law Dictionary*, *supra*, footnote 6 p.430.

Non-discriminatory

9. 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?

Reply

Within the Enabling Clause itself, the following provide context for the interpretation of 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 their MFN rights in respect of any advantage granted by any other Member to any product originating in any other country.¹²

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 originating in 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 under 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

¹² Subject to the exception in favour of least developed countries pursuant to paragraph 2 (d) of the Enabling Clause.

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."¹³ 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 _____"¹⁴. 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 country beneficiaries to the exclusion of like products originating in other developing country beneficiaries is not beneficial to **the** (all) developing countries.¹⁵
- 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;

¹³ *Black's Law Dictionary*, *supra*, footnote 6, p. 1468.

¹⁴ *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. II, p. 3270.

¹⁵ 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".

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 equivalent advantages to the countries concerned come into operation."¹⁶ (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:

¹⁶ 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.

"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.

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", and
- "no developing country ... should be excluded from the generalized system of preferences at the outset"
- "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 1979¹⁷. 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

¹⁷ TD/232.

would hold compelling¹⁸. 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 Secretariat¹⁹ 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.
- 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.²⁰

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).

¹⁸ 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.

¹⁹ See above, footnote 4.

²⁰ 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.

10. 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

India 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. What is your understanding of the term "generalized" in footnote 3 of the Enabling Clause? What is the difference between this term and the term "non-discriminatory", also in footnote 3?

Reply

The report entitled "Review and evaluation of the generalized system of preferences" dated 9 January 1979²¹ issued by the UNCTAD states:

"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 ...**" (emphasis added)

The foregoing is self-explanatory. Furthermore, the term "generalized" must be construed in relation to the situation prevailing prior to the establishment of the GSP, wherein special preferences were granted by some developed countries to products originating only in *some* developing countries.

In the UNCTAD, 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

²¹ TD/232.

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 equivalent advantages to the countries concerned come into operation."²² (emphasis supplied)

"Generalized" in relation to the GSP may be construed in several senses. As to the GSP donor countries, the intention was that all developing countries should grant preferential tariff treatment to the developing countries. As to the beneficiaries, it was the intention that all developing countries will be beneficiaries. In relation to the then special preferences enjoyed by some developing countries in some developed countries, it was the intention that those special preferences would be replaced by the "generalized" preferences under the GSP.

Paragraph 3(c)

12. *With reference to paragraph 3(c) of the Enabling Clause, what indicators can be used to establish objective criteria responding to development needs of developing countries? In addition to economic indicators, can other types of indicators be used? If so, why and what are they?*

Reply

India is of the view that if it is at all necessary to establish objective criteria, it is not for the purpose of according developed country Members granting preferential tariff treatment under the GSP to discriminate (in the "neutral sense") between like products originating in developing countries. Even the preference-giving countries recognised that "special tariff treatment should be given to the exports of *any* country, territory or area claiming developing status" because of "*the difficulty which would otherwise arise of reaching international agreement on objective criteria to determine relative stages of development.*"²³

The "development, financial and trade needs" of developing countries, as referred to in paragraph 3(c) are many and are potentially infinite. All that paragraph 3(c) requires is that the differential and more favourable treatment that is permitted under the Enabling Clause must "respond positively" to those needs. In this regard, developed countries may establish their own objective criteria as to what those needs are in order to determine, for example, the product coverage, the depth of tariff cuts and similar matters. In any event, after having so determined those elements in accordance with their own "objective criteria" the ensuing preferential tariff treatment must be applied without discrimination (in the "neutral sense") to like products originating in developing countries.

13. *Please provide any relevant drafting history on the interpretation of paragraph 3(c).*

Reply

India has thus far been unable to obtain any document relating to the drafting history on paragraph 3(c).

²² 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.

²³ 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 added).

14. *If paragraph 3(c) of the Enabling Clause requires a collective response to the development needs of developing countries, both in design and modification of a GSP scheme, where within the Enabling Clause is there the possibility for a developed country to modify its scheme so as to take certain products off the preference scheme for individual beneficiary countries or, even, to take individual countries off the preference scheme?*

Reply

In India's view, there is nothing in the Enabling Clause that allows a developed country unilaterally to modify its scheme so as to take either certain products off the preferences scheme for an individual *beneficiary* country or individual countries off its preference schemes except with the concurrence of the developing country Member concerned, as permitted by paragraph 7 of the Enabling Clause. In any case, without prejudice to India's position, in India's view, the Panel may look to the second sentence of paragraph 7 of the Enabling Clause for guidance on this issue.

India notes that whether or not a developed country may take individual countries off its preference scheme may also arise in the context of the definition of the term "developing country". India is a developing country and a beneficiary under the general arrangements in the EC GSP regime. Therefore the Panel need not make any ruling on this issue.

As to the definition of "developing country" 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 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.

Individual developed countries might, however, decline to accord special tariff treatment to a particular country claiming developing status on grounds which they hold to be compelling. Such *ab initio* exclusion of a particular country would not be based on competitive considerations (which would have to be dealt with by the procedure discussed under C and G below)...

C. Exceptions

It is probable that developed countries will find it necessary to exclude from the outset from the benefit of the special tariff treatment a limited number of products in respect of which developing countries are already competitive...

G. Safeguards and Adjustments

Any scheme of special tariff treatment must inevitably include some safeguard or adjustment arrangements to avoid the risks of dislocation of industry and labour.

Safeguards may be either related to the possibility of withdrawal or modification of special tariff treatment when imports of particular products reach certain limits (defined in advance by reference to domestic production, consumption or imports): or they can be related to determination by the developed country concerned of the causing or the threat of injury from such imports.

These questions call for examination with a view to agreement among developed countries. It will be for the countries according special tariff treatment to ensure that safeguards and adjustments are applied in a manner consonant with the principle of equitable sharing of improved access and taking account of the effects of the arrangements on the exports of third countries."

It is not clear whether Part IV 1. of the Agreed Conclusions on "Beneficiaries" is treaty language or whether it is merely descriptive of the position of the preference-giving developed countries.

Assuming that Part IV.1 is treaty language, that portion of the Agreed Conclusions, in relation to TD/56, then confirms that (i) special tariff treatment should be given to **any country claiming developing status** and (ii) individual developed countries might, however, decline to accord special tariff treatment to a particular country claiming developing status on **grounds which they hold to be compelling**, provided that such *ab initio* exclusion of a particular country would not be based on competitive considerations.

However, as stated above, whether or not a developed country may take individual countries off its preference scheme altogether is not an issue in this dispute, as India is a developing country and a beneficiary under the general arrangements in the EC GSP regime.

15. *Does paragraph 3(c) of the Enabling Clause allow a preference-giving country to design different GSP schemes responding, respectively, to development needs, financial needs and trade needs of different developing countries, or would such a reading necessarily result in discrimination among developing countries?*

Reply

It is possible to design a different a GSP scheme to respond to the needs of different countries and nevertheless accord like products originating in all developing countries the same tariff treatment.

For example, suppose that products "A", "B" and "C" are produced predominantly or even exclusively in countries "X", "Y" and "Z", and that a preference-giving country determines that countries "X", "Y" and "Z" have specific development, financial and trade needs. Under the GSP, the preference-giving country may grant preferential tariff treatment to products "A", "B" and "C", thus effectively assisting countries "X", "Y", and "Z". But that preferential tariff treatment must likewise be accorded without discrimination to like products originating in other developing countries, thus preserving the equal competitive opportunity of those other developing countries. That those other developing countries may not be producing or exporting products "A", "B" and "C" for the moment is immaterial. The competitive opportunity accorded to all of them are the same.

16. Does the word "and" in paragraph 3(c) 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 India's view, those needs must be considered in a comprehensive manner.

17. 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)?

Reply

India 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 Member 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.

18. 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", India understands the question to refer to the total exclusion of beneficiary developing countries from a GSP scheme.

In responding to the Panel's question, India 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 India'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".²⁴ Thus, for as long as a developing country remains a beneficiary under a GSP scheme, it cannot be "graduated"

²⁴ Ibid.

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/56²⁵ 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 India'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.

19. *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

As earlier stated, in India's view, 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 _____"²⁶. 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 term "developing countries" in paragraph 3(c) appears 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

²⁵ Ibid.

²⁶ *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. II, p. 3270.

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.

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.

Article XX

20. *Please explain whether Article XX of GATT 1994 is applicable to measures under the Enabling Clause, providing reasons therefor. In the instant case, can Article XX be invoked as an exception to the Enabling Clause or only to Article I:1 of GATT 1994? Please explain.*

Reply

The Enabling Clause exempts certain Members adopting certain measures from certain obligations under Article I:1 of the GATT 1994. Article XX of the GATT 1994 exempts a Member adopting certain measures from all of its obligations under the GATT 1994, including Article I:1. Both the Enabling Clause and Article XX of the GATT 1994 are therefore exceptions.

In respect of both the Enabling Clause and Article XX of the GATT 1994, a claimant's cause of action is not the failure to comply with the terms and conditions for the exercise of the exception; rather, it is the defendant's failure to comply with the obligation that would otherwise apply in the absence of the exception.

In India's view, there could be no independent and self-standing claim for the violation of the Enabling Clause. No Member may compel another Member to adopt a measure under the Enabling Clause. In that sense, there are no "positive obligations" under the Enabling Clause. It merely sets out the conditions under which a Member may be exempted from certain aspects of its obligations under Article I:1 of the GATT 1994.

In the same manner, there could be no independent, self-standing claim for a violation of Article XX of the GATT 1994. No Member may compel another Member to adopt a measure under Article XX of the GATT 1994. There are thus also no "positive obligations" under Article XX of the GATT 1994.

Hierarchically, both the Enabling Clause and Article XX of the GATT 1994 are at the same level; they are exemptions from positive obligations, but they are not exemptions from each other.

In India's view therefore, Article XX of the GATT 1994 cannot be invoked as an exception to the Enabling Clause.²⁷

²⁷ If India's recollection is correct, in the course of the meetings held with the parties and third parties on 14-16 May 2003, the EC is likewise of the view that if the Drug Arrangements are not justified under the Enabling Clause, then there would be a violation of Article I:1 of the GATT 1994; that, as a consequence, the assessment of the EC's defence under Article XX of the GATT 1994 must be in the context of its obligations under Article I:1 of the GATT.

21. *Can the Drug Arrangements be characterized as a measure to protect human health under Article XX(b) of GATT 1994 or a measure providing differential and more favourable treatment to developing countries, or both? Please elaborate.*

Reply

India finds it extremely difficult to see how preferential tariff treatment could reasonably be regarded as a measure "necessary to protect ... human health" for purposes of Article XX(b) of the GATT 1994. The link between the measure – preferential tariff treatment – and the avowed objective – the protection of human health – is based on several assumptions, the principal assumption being that with preferential tariff treatment, drug producers would ultimately switch to the production of other products covered by the preferential tariffs, and that drug traffickers would ultimately switch to trading products covered by preferential tariffs. This assumption disregards the reality that drug production and trafficking are organized crimes, controlled by criminal syndicates motivated by profit alone, and profit beyond the reach of tax authorities.

The EC characterizes the Drug Arrangements as *both* "a measure to protect human health" and "a measure providing differential and more favourable treatment to developing countries". India believes that this simultaneous characterization of the Drug Arrangements is logically contradictory. These two goals are not identical and the measures that must be taken to achieve them are necessarily different.

The range of countries selected under the Drug Arrangements will differ depending on which of these two objectives is invoked. Consider drug trafficking through a country Z where the trafficked drugs do not flow to the EC. Even assuming that the Drug Arrangements might have a positive effect on Z's development and that developed countries can differentiate between products originating in developing countries on objective criteria, including combating drug production and trafficking, the inclusion of country Z under the Drug Arrangements will not have any impact on the health of EC citizens. In such a situation, if the objective is "providing differential and more favourable treatment to developing countries", country Z could be included. However if the objective is to protect the human health of EC citizens, there would be no basis to include country Z. The *a priori* exclusion of developed countries could be justified if the objective is to assist developing countries. However, it makes no sense when the objective is the protection of health because certain drugs are manufactured in developed countries. Furthermore, when the objective is to respond to development needs, countries with drug *problems* would need to be given preferences; when the objective is the protection of health, countries with proper drug *policies* would need to be selected.

22. *Assume for the purpose of this question that the Enabling Clause is in the nature of an exception to Article 1:1 of GATT 1994. If a measure is not consistent with the Enabling Clause, is it nevertheless legally possible to invoke another exception, e.g., Article XX of GATT 1994, to justify such measure in pursuit of a different policy objective? What are the potential systemic implications of seeking – and even cumulating – justification for a measure under multiple exceptions provisions?*

Reply

Theoretically, it is possible for a respondent to invoke one exception as its principal defence and a second exception as an alternative defence. However, in the present case, the EC bases its defence under one exception on the *factual* claim that the measure at issue responds to the needs of developing countries and its defence under the other exception on the *factual* claim that the same measure responds to its own health needs. For the reasons stated above, these two factual claims are contradictory.

23. *Do the criteria under Article XX of GATT 1994 change when applied to a measure under the Enabling Clause? Why or why not? Please elaborate.*

Reply

The criteria under Article XX of the GATT vary with the subparagraph under which justification is sought. However, the criteria in each subparagraph do not vary depending on the nature of the measure at issue.

24. *How can the Drug Arrangements meet the test of "necessary" in Article XX(b) of GATT 1994, in that they are not applied to all countries, including to developed countries?*

Reply

The Drug Arrangements do not include all countries with drug-problems. Myanmar and Thailand, for instance, are excluded even though they have serious drug problems. So are all developed countries and all least-developed countries, irrespective of their drug problems. The EC has failed to explain why tariff preferences for products from the twelve beneficiary countries are "necessary" within the meaning of Article XX(b) while similar preferences for products from other countries with drug-related problems were not deemed to be "necessary".

25. *Are the tariff preferences provided under the Drug Arrangements the "least trade-restrictive measure" available to achieve the EC's health policy objective? Given the variety of measures that are being applied by the many signatories to the three UN conventions against the illicit traffic in drugs, why are the Drug Arrangements the least trade-restrictive measures available?*

Reply

As pointed out by India in its first submission, the EC has in the past accorded financial assistance to countries with drug-related problems and could do so in future.²⁸ It also has concluded arrangements for administrative cooperation with countries that have drug-problems. Measures that would not restrict trade at all are thus available to the EC to pursue the policy goal that it alleges to pursue through trade preferences.

General

26. *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?*

Reply

India believes that whether or not the Enabling Clause is "part of the results of the overall balance of commitments and concessions made during the Tokyo Round negotiations" does not have a bearing on the interpretation of the Enabling Clause. In either case, its terms must still be interpreted in accordance with the customary rules of interpretation of public international law. However, the fact that the Enabling Clause was part of a package of concessions call for a particularly thorough analysis of the scope of the concessions that the developing countries made under it.

According to the text of the Enabling Clause, the developing countries renounced their right to MFN treatment in relation to only two benefits: according to paragraph 2(c), the benefits accorded by them to other developing countries in the framework of tariff arrangements between them and,

²⁸ See also EC, First Written Submission, paras. 11, 191.

according to paragraph 2(d) the benefits accorded to the least developed countries. The arguments of the EC imply that the developing countries made an additional concession under paragraph 2(a), namely that they renounced their right to MFN treatment in respect of benefits accorded by developed countries to other developing countries. However, this provision refers only to preferences accorded by developed to developing countries, which implies that the Members that are renouncing their MFN rights under paragraph 2(a) are exclusively the developed countries to whom the GSP benefits are denied. The EC thus claims that the developing countries made a concession during the Tokyo Round to which they never agreed.

27. *Why did the EC request a waiver for the Drug Arrangements? Why was the waiver not granted?*

Reply

In its request for a waiver,²⁹ the EC states:

"Because the [Drug Arrangements] are only available to imports originating in those Members, a waiver from the provisions of paragraph 1 of Article I of the GATT 1994 appears necessary before they can effectively enter into force for reasons of legal certainty."

That the EC requested for a waiver in the first place indicates that, as of the promulgation of the Regulation the EC did not believe, as it *post facto* insists today, that the Drug Arrangements are justified under the Enabling Clause. The EC knew that it had to obtain a waiver before the Drug Arrangements entered into force. Otherwise, it would not have requested a waiver. Waivers are not a matter of routine at the WTO and are not merely requested for reasons of "legal certainty".

The EC's request for waiver was first discussed at the meeting of the Council for Trade in Goods held on 2 November 2001. The Minutes of that meeting contain the following response of the representative of the European Communities to a query from the delegation of Sri Lanka as to why the Drug Arrangements were not notified under the Enabling Clause:³⁰

"2.14 ... On the more general issue of why the European Communities had not used the Enabling Clause, he had certain doubts as to the possibility of using it as a legal basis and this is why the European Communities had made a request for a waiver under Article I."

The foregoing clearly indicate that prior to 5 March 2002, when India requested consultations in this dispute, the EC regarded the waiver as a necessary precondition to the (legitimate) implementation of the Drug Arrangements, and that it did not regard the Enabling Clause as a justification for the Drug Arrangements.

²⁹ "Request for a WTO Waiver" (G/C/W/328) dated 24 October 2001.

³⁰ Paragraph 4 of the Enabling Clause provides:

"Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:

(a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;

(b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties."

Waivers are granted subject to conditions and negotiations with other Members on the nature of these conditions are an intrinsic part of the negotiating process. The reason why the waiver has not been granted is that the EC has failed to negotiate conditions that address the concerns of other Members, including India.

28. *Does the term "non-reciprocal" in the 1971 Decision, referred to in footnote 1 of the 1979 Decision, mean that preferential tariff treatment should be extended by developed countries to developing countries without condition? Why or why not?*

Reply

India notes that it has not made any claim that the EC has violated the requirement that preferential tariff treatment under the GSP must be "non-reciprocal". Therefore, in India's view, the Panel need not address this issue to resolve the dispute.

The term "non-reciprocal" appears in the Preamble to the 1971 Decision, referring to "mutually acceptable arrangements ... drawn up in the UNCTAD concerning the establishment of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries ...".

It is therefore appropriate to refer to how "non-reciprocal" was understood at the UNCTAD. The report entitled "Review and evaluation of the generalized system of preferences" dated 9 January 1979³¹ issued by the UNCTAD states:

"13. The third principle of non-reciprocity is what makes GSP stand out as a landmark in trade relations between developed and developing countries. For the first time, developed countries agreed to make special tariff concessions to developing countries without seeking reciprocity. This deviation from the MFN principle was a tacit recognition of the need to apply special and more favourable treatment to countries at lower levels of economic development. The impact of this change of attitude has been felt even outside the GSP, in particular in the Lomé Convention, which also provides for non-reciprocity.

14. It is clear, however, that under the GSP the principle of non-reciprocity has not been fully observed since, as was seen above, a number of developing countries, must meet certain conditions before they can become eligible for preferences under some schemes. The conditions set out for such eligibility amount to implicit reciprocity. In this connection it may be recalled that the Conference, in resolution 96(IV), agreed that the GSP should not be used "as an instrument of political or economic coercion or of retaliation against developing countries, including those that have adopted or may adopt, singly or jointly, policies aimed at safeguarding natural resources."

The First Conference of the UNCTAD resolved:

"... 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. ... "

³¹ TD/232.

Thus the term "non-reciprocal" was construed in UNCTAD to apply to both concessions and conditions. Accordingly, India is of the view that preferential tariff treatment under the GSP should be extended by developed countries to developing countries without condition.

To India

Legal Function

1. *In its structure and legal function, what distinguishes an exception from a positive/"autonomous" right? Please elaborate on why, in your view (India, para. 53), the Enabling Clause is in the nature of an exception from a fundamental principle of the GATT.*

Reply

Please see answers to questions 3,5 and 8 addressed by the Panel to both parties.

2. *Do you agree/disagree with the EC's explanation (EC, para. 49) that the term "unconditional" in the context of MFN clauses refers to a particular type of condition requiring reciprocal concessions or compensation in return for MFN treatment? Please provide a detailed response.*

Reply

In applying Article I:1 of the GATT, in *Canada – Autos*, the Appellate Body referred to the undisputed finding of the panel that the "term 'unconditionally' refers to advantages conditioned on the 'situation or conduct' of exporting countries".³² The panel had found that:

"... The purpose of Article I:1 is to ensure unconditional MFN treatment. In this context, we consider that the obligation to accord "unconditionally" to third countries which are WTO Members an advantage which has been granted to any country means that the extension of that advantage may not be made subject to conditions with respect to the *situation* or *conduct* of those countries. This means that an advantage granted to the product of any country must be accorded to the like product of all WTO Members without discrimination as to origin."³³ (emphasis added)

A Member granting any advantage to any product originating in any other country has the obligation to accord that advantage to like products *of all other Members regardless of their situation or conduct*.

Thus, the position of the EC that the requirement set out in Article I:1 that MFN treatment be "unconditional" merely establishes the obligation not to demand counter-concessions has no support in GATT and WTO jurisprudence.

³²Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry* ("Canada – Autos"), WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 69.

³³Panel Report, *Canada – Certain Measures Affecting the Automotive Industry* ("Canada – Autos"), WT/DS139/R, WT/DS142/R, adopted 19 June 2000, para. 10.23.

3. *Please comment on the EC's statement (EC, para. 28) that India's reading of paragraph 1 of the Enabling Clause, to the effect that it requires providing GSP to all developing countries, would render the term "non-discriminatory" in footnote 3 of the Enabling Clause redundant?*

Reply

The term "non-discriminatory" appears only once in the Enabling Clause, in footnote 3, which provides:

"As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries."

Footnote 3 is a footnote to the phrase "Generalized System of Preferences" in paragraph 2(a) which, in turn, provides:

"2. The provisions of paragraph 1 shall apply to the following:

(a) Preferential tariff treatment accorded by developed [country Members] to products originating in developing countries in accordance with the Generalized System of Preferences." (footnotes omitted)

It might be noted that prior to the 1971 Decision and the Enabling Clause, the GSP was adopted at the UNCTAD. "Generalized, non-reciprocal and non-discriminatory" is the nomenclature adopted at the UNCTAD. Footnote 3 merely describes what the GSP is, with reference to the 1971 Decision which, in turn, refers to the "mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries". In this context, "non-discriminatory" is used as part of a compound phrase to *describe* what was brought over from the UNCTAD, then to the GATT, and finally to the WTO. The word "non-discriminatory" could not have been omitted from the description, as the omission would have rendered the description inaccurate. Thus, "non-discriminatory" in footnote 3 is not redundant.

4. *Could you please indicate any support from the negotiation history to confirm the argument that the Enabling Clause waived only the MFN treatment to developed countries? Please provide any such materials.*

Reply

As of the date of the submission of this reply, India has been unable to find any document relevant to the negotiating history of the Enabling Clause.

Non-discriminatory

5. *How does India respond to the EC's argument (EC, para. 195) that the Drug Arrangements have not displaced imports from other developing countries?*

Reply

India reiterates that the WTO legal system focuses on conditions of competition for WTO Members, not trade results. India's claim is that the Drug Arrangements are inconsistent with Article I:1 of the GATT 1994. All that India has to establish therefore are the legal and factual elements of its claim under that article. It does not need to establish adverse trade effects. As a matter of fact, since the WTO legal system assures equality of conditions of competition, a Member

does not have to wait until adverse trade effects occur before initiating a dispute on a measure that alters conditions of competition. In this regard, Article 3:8 of the DSU provides:

"In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge."

There is no case in GATT or WTO jurisprudence in which a party whose measure has been declared to be inconsistent with a covered agreement has successfully defended itself on the basis that there are no adverse trade effects (or no nullification and impairment) as a result of the operation of the measure declared to be inconsistent.

In this regard, the EC asserts that "between 1990 and 2001, imports from India under the EC's GSP increased from €2.011 million to €5.336 million", and that "during that period, India's share of all imports under the EC's GSP increased from 9.1% to 12%."³⁴ Even assuming that this is correct, this assertion is irrelevant as it relates to the EC's GSP as a whole. The increase in imports under the EC GSP, whether in absolute amounts or in terms of percentage share, does not establish that there have been no adverse trade effects on India as a result of the operation of the Drug Arrangements.

Furthermore, on the assumption that the EC is correct that there have been no adverse trade effects to India (and other developing countries) as a result of the operation of the Drug Arrangements, then the EC could very well act in a WTO-consistent manner by extending the benefits under the Drug Arrangements to all developing countries. Under the EC's logic, such extension would, conversely, not have any adverse trade effects on the twelve beneficiaries under the Drug Arrangements.

In any event, the *quantification* of adverse trade effects comes, if at all, at a later stage in WTO dispute settlement proceedings – that is, when the party whose measure has been ruled contrary to its obligations does not bring its measure into conformity and the prevailing party requests for authorization to suspend concessions or other obligations. That is the appropriate time to quantify the extent of the adverse trade effects, as the level of suspension is commensurate to the level of nullification and impairment.

At the outset, it is important to understand the changes in the conditions of competition caused by the differential tariff treatment given to Pakistan on products which are eligible for GSP benefits in the EC market in order to estimate the impact of the Drug Arrangements on imports from various supplying countries. Accordingly, the table below gives the differential tariff treatment for some of the main products imported from India and Pakistan that compete in the EC market.

³⁴ EC, First Written Submission, para. 4.

EU TARIFF ON SELECTED PRODUCTS COVERED UNDER
CHAPTER 61 TO 63

CN CODE	PRODUCT	MFN RATE	APPLICABLE TO INDIA AT 20% GSP CONCESSION	APPLICABLE TO PAKISTAN (AT 100% GSP CONCESSION)
6109 10 00	T-Shirts	12	9.6	0
6203 42	Trousers	12.4	9.92	0
6205 20 00	Gents Shirts	12	9.6	0
6206 30 00	Ladies Blouses	12.4	9.92	0
6302 10 10	Bed Linen	12	9.6	0

Source: Official Journal of the EU dated 23rd October 2001 – Commission Regulation (EC) No. 2031/2001 of 6th August 2001

The current Drug Arrangements have been in place since 1 January 2002, thus for barely 16 months. But clear trends have already become visible demonstrating the diversion of trade away from and amongst the suppliers in the developing countries.

An analysis of the statement of EC imports in items covered by Chapters 61-63 (on a cumulative basis) shows that Pakistan has increased its imports in these items by 26.81% in quantity and 19.54% in value. Imports from India, on the other hand, declined by (-) 6.14% in quantity and marginally increased by 1.62% in value.

A comparison with the data on imports from China and Turkey during this period shows that while China increased its imports by 2.28% in quantity, in value terms it increased by 10.23%. Correspondingly, Turkey showed an increase of 11% in terms of quantity and 15% in terms of value.

While the imports from Turkey should be excluded as it already enjoys the benefits of duty free import on account of its customs union with EC, the increase in the case of China is only marginal in quantitative terms considering the fact that imports in the year 2001 over the year 2000 was 62.95%. China already has a very high level of exports accounting for almost 21.47% of the share in Extra EU Imports and is as such an isolated case.

On the other hand, a decline of (-) 24.4% in quantity of imports from extra-EC sources and corresponding increase in imports of 25.8% from Pakistan, shows that even at the time of contraction in demand, Pakistan has increased its import share substantially; even more than China and Turkey.

Other developing countries have also lost market share. However, some of them have shown a growth mainly by lowering their price realisation.

In view of the above, it is not correct on the part of EC to state that the Drug Arrangement has not resulted in displacement of trade from other developing countries.

6. *The EC argues that the term "non-discriminatory" in footnote 3 of the Enabling Clause cannot mean treating all developing countries in the same way, because such reading would effectively render paragraph 3(c) of the Enabling Clause a nullity (EC, para. 71). Please comment on this argument.*

Reply

The EC's argument is based on a wrong premise, namely that the term "development, financial and trade needs of [the]³⁵ developing countries" refers to the *individual* needs of those countries. In fact, however, the terms of paragraph 3(c) do not refer to "individual" needs. The text of paragraph 3(c) does not express this idea. Where the drafters of the Enabling Clause had the needs of individual countries or groups of countries in mind, they referred to those needs explicitly. Paragraphs 5 and 6 of the Enabling Clause, which modify the reciprocity principle governing trade negotiations in favour of the developing countries refer to the "*individual* development, financial and trade needs" of the developing countries and to the "*particular* development, financial and trade needs of the least-developed countries". In the context of the requirements governing GSP preferences, the drafters of the Enabling Clause thus referred to the needs of developing countries in general. In the context of the reciprocity principle governing trade negotiations, they referred to the "individual" or "particular" needs of developing countries. This comparison leaves no doubt that the drafters intended to stipulate that GSP schemes respond to the needs of developing countries in general and that each developing country's individual needs would be taken into account in determining the degree of reciprocity in trade negotiations.

The EC is correct in that the collective needs of developing countries can vary from time to time and therefore paragraph 3(c) mandates that preferences should be modified if necessary. However, it does not follow that they must be modified by differentiating between developing countries. Instead, paragraph 3(c) refers to modification of the product scope of GSP schemes and the depth of tariff cuts provided under GSP schemes. India's interpretation of "non-discriminatory" does not make paragraph 3(c) a nullity precisely because it operates to ensure that the product scope and depth of tariff cuts in GSP schemes respond positively to the collective needs of developing countries. For example, preferential tariff treatment on nuclear reactors would not respond positively to the needs of developing countries; a reduction of 10% on a tariff of 300% applied to products produced in developing countries does not respond positively to the needs of the developing countries.

7. *Recalling the respective arguments of the two parties on the ordinary meaning of "discrimination" (India, para. 57; EC, paras. 66-67), on what basis would India exclude from a definition of "discrimination" the notion of prejudicial or unjust distinction?*

Reply

India does not dispute that the term "discrimination" as used in other contexts is capable of referring to the notions of *prejudicial* or *unjust* distinction. However, in context of its use in the Enabling Clause this is clearly not the relevant meaning of "discrimination".

The meaning of the term "non-discriminatory" as used in Paragraph 2(a) of the Enabling Clause must be determined in accordance with the principles of interpretation contained in the Vienna Convention, that is in accordance with ordinary terms of the GATT 1994 in their context and in the light of its objective and purpose. On the basis of these principles the Appellate Body found:

"The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin . . . Non-discrimination obligations apply

³⁵ Please see reply to question 9 addressed by the Panel to both parties on the inclusion of "the" in the equally-authentic Spanish and French texts.

to all imports of like products, except when these obligations are specifically waived or are otherwise not applicable as a result of the operation of specific provisions of the GATT 1994."³⁶

The Enabling Clause is an integral part of the GATT 1994. It therefore follows from this finding of the Appellate Body that, in the context of the Enabling Clause, non-discrimination means equal treatment of like products except if a specific provision of the Enabling Clause states otherwise.

The GSP covered by paragraph 2(a) of the Enabling Clause deals with preferential tariff treatment. "Discriminatory tariff" is defined as "a tariff containing duties that are applied unequally to different countries or manufacturers.". A "non-discriminatory tariff" in the context of the Enabling Clause is therefore a tariff containing duties that are applied equally to different developing countries. By definition therefore, as it applies to tariffs, unequal treatment is "discrimination".

The basic purpose of the WTO legal system is to protect conditions of competition, not trade volumes. Within that system, a tariff distinction should therefore be deemed prejudicial merely because it denies equality in competitive opportunities.

Furthermore the term "non-discriminatory" in footnote 3 refers to the 1971 Decision, which in turn makes clear that the term is derived from the mutually acceptable arrangements drawn up in the UNCTAD. There is no doubt that, in the context of the GSP agreed in the UNCTAD, "non-discriminatory" refers to non-differentiation between developing countries *per se*, not to GSP schemes which differentiate between developing countries "prejudicially" or "unjustly" in accordance with criteria unilaterally determined by the GSP donor country. (please see answer to question 9 addressed by the Panel to both parties).

The definition of the term "non-discrimination" in the GATT 1994 consistently refers to affording equality of competitive opportunities to like products originating in different countries in respect of tariff measures. This is done by requiring that equal tariff treatment be applied to all. In the present case, the EC utilizes a definition of "non-discrimination" precisely to diminish the competitive opportunities afforded to India and other developing countries excluded from the Drug Arrangements.

The EC's notion of "non-discriminatory" as referring to *prejudicial* or *unjust* discrimination is too vague to provide a basis for policing differentiation in the context of GSP schemes. There is no further multilaterally-accepted standard within the Enabling Clause for determining what makes differentiation "unjust". Thus, adopting the EC's definition will result in leaving the developed countries free to differentiate as they see fit or involve Panels in adjudicating irresolvable distributional conflicts, such as whether difficulties faced on account of serious public health problems are more pressing than difficulties faced on account of drug production and trafficking. This uncertainty will have radical implications on the ability of developing countries to participate in multilateral trade negotiations.

³⁶ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("EC – Bananas III"), WT/DS27/AB/R, adopted 25 September 1997, paras. 190-191.

Paragraph 3(c)

8. *What is your understanding of paragraph 3(c) of the Enabling Clause? Does it permit the design and modification of GSP in response to development needs of individual developing countries? In what way, and to what extent?*

Reply

Paragraph 3(c) of the Enabling Clause applies after measures consistent with paragraph 2 are taken by developed countries. As such it is a further requirement that measures permitted under the sub-clauses of paragraph 2 must meet.

The text of paragraph 3(c) refers to the "financial, trade and development needs of [the]³⁷ developing countries", which refers to the needs of all developing countries. Where the drafters of the Enabling Clause wished to refer to the individual needs of developing countries they did so explicitly – as in paragraph 5 of the Enabling Clause which refers to "the *individual* development, financial and trade needs" of developing countries, and paragraph 6 of the Enabling Clause which refers to the "*particular* development, financial and trade needs of the least developed countries". Further, paragraph 8 of the Enabling Clause also explicitly singles out the specific needs of the category of least developing countries when it refers to their "*special* economic situation and their development, financial and trade needs".

Moreover, the consequence of accepting the EC's argument that paragraph 3(c) refers to the development needs of developing countries considered individually would be that the general arrangements under the EC GSP scheme and almost all other contemporary GSP schemes would be rendered illegal. This is because they treat all developing countries equally in terms of the tariff cuts made available despite the obvious fact that the individual development needs of developing countries differ considerably. Hence they would be inconsistent with paragraph 3(c) as interpreted by the EC.

9. *Does paragraph 3(c) of the Enabling Clause require developed countries to respond to development needs of developing countries collectively? If so, in what way can such collective response to development needs take into account the different level of development needs of different developing countries? Does it permit exclusion, i.e., "graduation", from GSP of (i) certain products imported from certain countries, or (ii) individual countries?*

Reply

Please see above: (i) answer to question 8 addressed by the Panel to India (ii) answer to question 14 addressed by the Panel to both parties (iii) answer to question 15 addressed by the Panel to both parties and (iv) answer to question 18 addressed by the Panel to both parties.

General

10. *Did India ask to be included in the EC's Drug Arrangements? If so, what materials did India provide to the EC in support of its request? Please provide all such materials to the Panel.*

Reply

India requests the Panel to note that there is no provision in the relevant EC regulation which allows non-beneficiary countries to apply for inclusion in the Drug Arrangements. The EC has selectively included countries under the special arrangement to combat drug trafficking, the precise

³⁷ Please see reply to question 9 from the Panel to both parties on the inclusion of "the" in the equally-authentic Spanish and French texts.

rationale for which is not clear. Nevertheless, India had highlighted to the EC its record in combating the drug menace and had pointed out that various international organizations had also praised India's efforts in this direction. In view of this, India believed that it was also eligible for concessions under the 'Drug Arrangements'. However, the EC had conveyed that there was no formal procedure for admitting members for concessions under the 'Drug Arrangements' and that the possibility of India being extended similar concessions appeared to be closed for the time being. The EC added that it would be possible to consider other potential beneficiaries, but only after 2004.

11. *Is there an incompatibility between India's desire to be included in the Drug Arrangements and its legal position that the Enabling Clause only allows developed countries to give GSP tariff preferences to all developing countries non-discriminatorily?*

Reply

There is no incompatibility. The EC requested for a waiver. In requests for waivers, it is routine and certainly not unusual that a Member which determines that its interests will be adversely affected by the implementation of the measure subject of the request (i) manifest its concern to the Member requesting for the waiver and, (ii) seek compensation that addresses its concerns. India had determined that its concerns could be addressed by its inclusion as a beneficiary under the Drug Arrangements. Other Members are free to determine what compensation to seek in exchange for their consent to a waiver. Even if India were to be included as a beneficiary under the Drug Arrangements a waiver would still be required.

12. *In India's view, are the Drug Arrangements inconsistent with the Enabling Clause regardless of the manner in which they have been applied?*

Reply

In India's view, the Drug Arrangements are inconsistent with the Enabling Clause regardless of the manner in which they have been applied. They could be rendered GATT-consistent only through a waiver.

13. *What adverse effects, if any, has India suffered as a result of being excluded from the Drug Arrangements? Could India provide relevant documentation and data on the extent of any such adverse effects.*

Reply

India reiterates that the WTO legal system focuses on conditions of competition for WTO Members, not trade results. (Please see reply to question 5 addressed by the Panel to India.)

India and Pakistan – competitive in same products

India and Pakistan have stark similarities in their product ranges, they cater to the same market segment and even have common buyers. Both countries have a strong raw material base in cottons, low conversion costs, vertical production units, comparable unit values and bilateral quotas in the same range of products. The EC even initiated trade defence measures simultaneously for both the countries for cotton bed linen falling under Chapter 63.

Indeed the EC, while justifying the cumulative assessment of the effects of dumped imports on injury suffered by the community industry at the time of imposing provisional anti-dumping duties on imports of cotton type bed linen originating in India, Pakistan and Egypt (Commission Regulation EC No. 1069/97 dated 12th June 1997), stated in para. 65 as follows :

"In accordance with the terms of Article 3 (4) (b), the conditions of competition between imported products, and between imported products and the like Community products, were analysed. It was found that the imports compete directly with each other with the like Community product, and that in particular a number of large purchasers of bed linen buy both from the Community industry and from the countries concerned. While there are variations in the proportions by type and destination of exports from each of the countries concerned, it was found that products from each exporting country were substitutable and competed with each other with the products of Community producers on the Community market".

Competitiveness of India compared to Pakistan –effects of the Drug Arrangements

The competitiveness of the suppliers of products like clothing and made ups have been adversely affected by the tariff advantage conferred on Pakistan by the EC under the Drug Arrangements. This becomes clear from the fact that while Pakistan increased its imports for items covered by Chapter 61-63 by 19.54% in value and 26.81% in quantity in the year 2002 over the year 2001, imports from India on the other hand increased by 1.62% in terms of value but declined by (-) 6.14% in terms of quantity during the same period. This trend is not evident in textile Chapters 50-60 where both India and Pakistan have been graduated and Pakistan does not have tariff advantages under the Drug Arrangements.

A further analysis of the trade data shows that for the calendar years 1997-2000, in respect of products falling under Chapter 61, India's exports grew by 73%, while Pakistan's exports increased from Euros 228.30 million to Euros 250.55 million, i.e. only by 9.65%. There has been a this trend during the year 2002. While Pakistan's exports have increased by reversal of 14.31% during the year 2002 compared to year 2001, India's exports have increased only by 0.64%. India's percentage share has also gone down for the first time after 1997 while Pakistan's share has gone up for the first time after the year 1997, i.e. only after the duty free access provided to it under the Drug Arrangements.

As regards Chapter 62, it may be pointed out that while imports from India grew by 27.06% in terms of quantity in the year 2001 they declined in the year 2002 by (-) 0.04%. On the other hand, imports from Pakistan which increased by 13.07% in terms of quantity in the year 2001, recorded a further phenomenal increase of almost 30% in the year 2002 – an increase primarily on account of the zero duty benefit under the Drug Arrangements.

As regards chapter 63 products, India's exports were steadily rising from the year 1997 to the year 2001. For the first time they saw a drop in the year 2002 and exports were only valued at 1510.70 million during the year 2002. In the case of Pakistan, on the other hand, there has been a sharp growth during 2002. Exports have increased from Euros 499.59 million in 2001 to Euros 623.84 million in the year 2002 – a growth of around 25%. India's overall share in terms of value fell sharply from 12.41% in the year 2001 to 10.61% in year 2002, while Pakistan's share increased from 10.83% in year 2001 to 13.05% in year 2002.

Change in competition not explained by increase in quotas alone

A question is sometimes raised that Pakistan's exports to EU have increased due to increase in quota levels. There is some increase in exports due to increase in quotas but the data regarding increase in exports does not support the view that increase in exports is only due to increase in quotas. For instance, in Category 7 (Ladies Blouses) and Category 8 (Gents Shirts), quotas were never the issue. The levels are always available for use. Tariffs made the difference and Pakistan increased its exports to EU by 107% in Category 7 (by 3.2 million pieces) and by 110% in Category 8 (by 1.4 million pieces) in the year 2002 compared to the year 2001.

Effect on Unit value realization

Apart from increases in exports from Pakistan, the duty free regime under the Drug Arrangements has also affected Indian exporters in terms of product pricing. For example, the Table below gives the pricing structure for a standard quality, bleached cotton bed sheet of dimensions 20/20 60/60 "70x108" supplied to UK from India & Pakistan:

Sr.No.		India (£)	Pakistan (£)
1.	CIF value/price	£ 1.62	£1.70
2.	Duty rate	9.6%	Nil
3.	Duty charged	£0.16	Nil
4.	Total CIF + duty amount	£1.78	£ 1.70

From the above, it can be observed that a producer in Pakistan is not only able to realize a better price than the corresponding Indian supplier, he is also in a position to supply the product cheaper to the customer in the European Union primarily on account of the tariff concession.

The tariff preferences available to Pakistan under the Drug Arrangements have also affected the unit value realization for comparable products being sourced from the two countries for the above-mentioned reasons. Thus for example in Cat 4 (T shirts) and Cat 5 (Pullovers) where both India and Pakistan have comparable levels of quota, the average unit price in case of India has increased from US\$2.52 in 2001 to US\$2.55 in 2002. In the case of Pakistan, it has increased from US\$1.78 in the year 2001 to US\$1.89 in the year 2002. In the case of Cat 5, while the unit value realization in the case of India has gone down from US\$3.59 to US\$3.54 in the case of Pakistan, it has gone up from US\$3.73 to US\$4.08. Pakistan is thus able to increase its unit price while at the same times it manages to sell the product at a cheaper price owing primarily to the duty advantage of approximately 9.6%.

Correspondence with importers

The change in competitive conditions is also evidenced in the messages and faxes received by Indian exporters from their importers in EC. Indian exporters have been receiving letters from their buyers regarding shifting of their sourcing from India to Pakistan in view of the duty concessions extended to the latter by EC. In this connection, some of the communications received from importers based in Denmark, Sweden, UK and Italy will be provided in India's rebuttal submission.

The feedback from Indian exporters participating in various overseas buyer-seller meets / exhibitions corroborates the large-scale shift of orders in favour of Pakistan in respect of those textile items in which India has traditionally enjoyed higher market share and growth in the past. For instances, at the HEIMTEXTIL fair held in Germany 2002, exporters from Pakistan displayed banners proclaiming the price advantage on account of duty free access for made up articles originating from Pakistan. Consequently, all the Indian participants reported low business turnout than the normal while Pakistani stalls received overwhelming response from the buyers.

ANNEX B-2

Replies of the European Communities to Questions from the Panel after the First Panel Meeting

To both parties

Question 1

Could your delegation please indicate whether there is anything you can report in relation to the possible settlement of the matter in dispute?

1. The EC has made clear to India in a number of occasions that it considers that it owes no "compensation" to India for the implementation of the Drug Arrangements. The EC's GSP system is the most generous in the world. India is the second largest beneficiary of the EC's GSP. India's exports to the EC under the GSP have increased from 2 to more than 6 billion Euros since the introduction of the Drug Arrangements.

Question 2

Did the negotiators of the Enabling Clause intend its legal function to be different from the 1971 Decision? Are there different legal bases for the two decisions? Please elaborate. What materials can you point to in support of this view? Please provide any such materials.

2. The 1971 Decision and the Enabling Clause have both a different legal base and a different legal function within the GATT.

3. The 1971 Decision is a waiver. Although it does not mention expressly Article XXV:5 of the 1947 GATT, it was adopted on the basis of a communication from the prospective donor countries applying for a waiver in accordance with that provision.¹ Furthermore, that provision was also mentioned by the sponsors during the subsequent debate by the GATT Council.²

4. The 1971 Decision was temporary (10 years). Also, in accordance with the standard formula used in waivers, the 1971 Decision did not exclude completely the application of the waived provision (Article I:1 of the GATT), but only "to the extent necessary".

5. The developing countries were unsatisfied with the 1971 Decision. They considered the waiver approach unwarranted and unsuitable for the GSP because it was temporary and failed to recognise that, following the insertion of Part IV in the GATT, special and differential treatment for developing countries had become one of the basic principles of the GATT.³ Thus, the representative of Uruguay at the GATT council meeting where the 1971 Decision was taken noted that

The use of Article XXV of the General Agreement in the present case was very debatable. The concept in Article XXV of exceptional circumstances was absolutely different from the present situation ... [T]he objectives which were taken into account in this draft decision were the objectives of the General Agreement since the entry

¹ C/W/178 cited in C/M/69, p. 1. (Exhibit CR-1).

² C/M/69, p.1.

³ See the criticisms addressed by Hector Gross Espiell, Ambassador of Uruguay before the GATT, to the waiver approach in *GATT: Accommodating Generalized Preferences*, Journal of World Trade Law, Vol. 8, No. 4, 1974, p. 341. See also, Abdulqawi Yusuf, *Legal Aspects of Trade Preferences for Developing Countries*, Martinus Nijhof, 1982, p. 90.

into force of Part IV. Reference to Part IV could not be left aside because the objectives of Part IV, according to which international trade should be an instrument of progress and development in favour of developing countries, were embodied in the draft decision. ... [T]he use of a waiver was not the right approach to the situation. He would have preferred an interpretative statement based on Part IV which would have expressly indicated that nothing in the General Agreement and consequently in Article I prevented the implementation of the Generalised System of Preferences.⁴

6. When the Tokyo Round of Multilateral Trade Negotiations was launched in 1973, the Declaration of Ministers called for consideration to be given "to improvements in the international framework for the conduct of world trade".⁵ Consequently, the Trade Negotiations Committee of the Tokyo Round established in November 1976 a "Framework Group" which would seek

To negotiate improvements in the international framework for the conduct of world trade, particularly with respect to trade between developed and developing countries and differential and more favourable treatment to be adopted in such trade.⁶

7. One of the major achievements of that group was the Enabling Clause. Unlike the 1971 Decision, the Enabling Clause is not a waiver.⁷ It is not based on Article XXV:2. Rather, it is a *sui generis* decision adopted by the CONTRACTING PARTIES to GATT 1947 within the framework of the Tokyo Round Multilateral Trade Negotiations, which is not based expressly on any provision of the GATT 1947. Also, unlike the 1971 Decision, the Enabling Clause is permanent.

8. Furthermore, unlike the 1971 Decision, the Enabling Clause does not say that Members may derogate from Article I:1 to "the extent necessary". Rather, it enables Members to grant differential and more favourable treatment "notwithstanding Article I:1" and, therefore, excludes completely the application of that provision.

Question 3

Do you agree that in order to determine whether a particular provision lays down a positive right or an exception, it is necessary to examine its legal function in the context of the treaty as a whole?

9. Yes.

If yes, why so, and what are the implications in the present dispute?

10. The suggested approach is in accordance with the basic rule of treaty interpretation codified in Article 31.1 of the *Vienna Convention on the Law of the Treaties* (the "Vienna Convention"), which requires to interpret the terms of a treaty "in their context" and "in the light of the object and purpose" of the treaty.

11. The Enabling Clause is one of the most important forms of "special and differential treatment" for developing countries under the WTO Agreement. In turn, "special and differential treatment" is the main instrument to achieve one of the basic objects and purposes of the WTO

⁴ C/M/69, pp. 8-9.

⁵ Declaration of Ministers Approved at Tokyo on 14 September 1973, GATT Doc. Min. (73) 1, at para. 9.

⁶ GATT Doc. MTN/17 of 18 November 1976, para. 1.

⁷ The Enabling Clause is not included in the list of waivers established by the Ministerial Conference pursuant to the footnote to Annex IA, Section on GATT 1994, sub-paragraph 1(b)(iii) of the WTO Agreement (WT/L/3).

Agreement: "to ensure that developing countries ... secure a share in the growth in international trade commensurate with the needs of their economic development".⁸

12. The provisions according "special and differential treatment" are not mere deviations or derogations from the rules applicable among developed countries. Rather, they constitute a comprehensive set of alternative rules which co-exist, side-by-side and on an equal level, with such rules. For that reason, as illustrated by the ruling of the Appellate Body in *Brazil – Aircraft*⁹, "special and differential treatment" cannot be characterised as a mere "affirmative defence" for the purposes of dispute settlement.¹⁰

Question 4

With reference to paragraph 1(b)(iv) of GATT 1994, and recognizing that the Enabling Clause was adopted by the GATT Contracting Parties at the end of the Tokyo Round, is it your understanding that the Enabling Clause is/is not an "other decision of the Contracting Parties to GATT 1947"? Is it a part of GATT 1994? Please explain.

13. The Enabling Clause is an "other decision of the CONTRACTING PARTIES to GATT 1947" within the meaning of subparagraph 1(b)(iv) of the GATT 1994 and, as such, is part of the GATT 1994.

14. The introductory sentence of the Enabling Clause reads as follows:

Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES *decide* as follows:¹¹

15. Therefore, it is beyond question, first, that the Enabling Clause is a "decision" and, second, that it was taken by the CONTRACTING PARTIES to GATT 1947.

16. As explained, the Enabling Decision is not one of the waiver decisions taken by the CONTRACTING PARTIES to GATT 1947 under Article XXV:5 of the GATT 1947 referred to in subparagraph 1(b)(iii) of the GATT 1994. Therefore, it falls within the residual category of "other decisions of the CONTRACTING PARTIES to GATT 1947" described in paragraph 1(b)(iv).

Question 5

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 the 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?

17. For the reasons explained above, the Enabling Clause is not an "affirmative defence" but rather an autonomous right. As noted in the EC's First Submission¹², the fact that the Enabling Clause is not an "affirmative defence" has two important implications for this dispute:

⁸ Cf. second recital of the Preamble to the WTO Agreement.

⁹ Appellate Body report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R ("*Brazil – Aircraft*"), para. 140.

¹⁰ EC's First Submission, paras. 17-18.

¹¹ Emphasis added.

¹² EC's First Submission, para. 19.

- first, in order to establish a violation of Article I:1 of the GATT, India must establish first that the Drug Arrangements are not covered by Paragraph 2(a) of the Enabling Clause; and
- second, as the complaining party, India bears the burden of proving that the Drug Arrangements are not covered by Paragraph 2(a) and, if covered, that they are inconsistent with Paragraph 3(c).

Question 6

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

18. In order to establish whether a provision is an "affirmative defence" it is necessary to consider not only the terms in which the "link" between that provision and other provisions of the WTO Agreement is expressed but also the content of the provision in question, as well as its "legal function" within the WTO Agreement.

19. As regards the content, the exercise of an "affirmative defence" may be subject to certain requirements in order to prevent its abuse (e.g. the requirements of the *chapeau* of Article XX). But those requirements do not seek to regulate positively the matter concerned. For example, the *chapeau* of Article XX is not an alternative to the rules on national treatment contained in Article III. In contrast, the Enabling Clause lays down a comprehensive set of rules (including both rights and obligations) which purports to regulate positively a certain matter (the granting of tariff preferences to developing countries) in place of the rules contained in Article I:1 of the GATT.

20. As regards the "legal function", "affirmative defences" typically allow Members to pursue legitimate policy objectives which, while not being among the WTO Agreement's own specific objectives, are deemed compatible with such objectives. Nevertheless, "affirmative defences" do not seek to promote actively those objectives. For example, Article XX(a) of the GATT allows Members to take measures that are necessary to protect public morals. But the protection of public morals is not one of the specific objectives of the WTO Agreement. There is nothing in the WTO Agreement which encourages Members to take any measures for that purpose.

21. In contrast, special and differential treatment provisions, including the Enabling Clause, are the main instrument to achieve one of the fundamental objectives of the WTO Agreement. The WTO Agreement does not merely tolerate the granting of trade preferences to developing countries. Rather, it encourages developed country to grant such preferences under the Enabling Clause. In view of that, the Enabling Clause, like the other provisions on special and differential treatment, cannot be considered as mere "affirmative defences".

Question 7

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.

22. Like any other GATT provision, those provisions may provide relevant context for the interpretation of the Enabling Clause, which is also part of the GATT.

23. As discussed below, the differences between those provisions and the Enabling Clause support the view that the Enabling Clause, unlike those provisions, is not an affirmative defence.

Question 8

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.

24. By now it is well established that Article XX of the GATT is an "affirmative defence". On the other hand, it is still an unsettled question whether Article XXIV:5 of the GATT is an "affirmative defence".¹³ Article XXI of the GATT has not been considered yet by any adopted report.

25. The wording of the introductory clauses of GATT Articles XX, XXI and XXIV:5 is virtually the same and different from that of Paragraph 1 of the Enabling Clause. However, the fundamental difference is that, unlike the Enabling Clause, Articles XX, XXI and XXIV:5 do not provide "special and differential treatment" to developing countries.

Question 9

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?

26. The most direct and relevant context for the interpretation of the term "non-discriminatory" is found in paragraphs 1, 2 and 3, which are those dealing with "differential and more favourable treatment".

27. Specifically, the EC considers that the following contextual elements are relevant for the interpretation of the term "non-discriminatory":

- Paragraph 2(a) applies within the terms of Paragraph 1, which contrary to India's claim, does not require to grant differential and more favourable treatment to *all* developing countries.¹⁴
- Footnote 3 requires that the preferences must be "generalised". If "non-discriminatory" meant that it was necessary to grant identical preferences to *all* developing countries, the term "generalised" would be redundant.¹⁵
- The objective to respond positively to "the development, trade and financial needs of developing countries" stated in Paragraph 3(c) could not be achieved if donor

¹³ The Appellate Body referred to Article XXIV as a "defence" in *Turkey – Restrictions on Imports of Textile and Clothing Products* (WT/DS34/AB/R, para. 58). But the issue does not appear to have been argued by the parties either before the Appellate Body or before the Panel. (Panel report, WT/DS34/R, paras.9.57-9.59).

¹⁴ EC's First Submission, paras. 24-31; Third Party Submission of Bolivia, Colombia, Ecuador, Perú and Venezuela, paras. 49-52; Third Party Submission of Costa Rica, paras. 15-20; Third Party Oral Statement of the United States, paras. 2-6; Third Party Oral Statement of Costa Rica, paras. 9-16.

¹⁵ Third Party Oral Statement of the United States, para. 12.

countries were required, by virtue of the term "non-discriminatory", to grant identical preferences to all developing countries.¹⁶

28. Also relevant is Paragraph 7 of the Enabling Clause, which provides that developing countries "expect to participate more fully in the framework of rights and obligations under the GATT" with the "progressive development of their economies and improvement in their trade situation".¹⁷

29. When interpreting the term "non-discriminatory", it must be taken into account also the "object and purpose" of the Enabling Clause, which is expressed in

- the first recital of the 1971 Waiver, to which Footnote 3 of the Enabling Clause refers, and which recognises that

A principal aim of the CONTRACTING PARTIES is promotion of the trade and export earnings of developing countries for the furtherance of their economic development.

- Article XXXVI of the GATT, including in particular its Paragraphs 2, which states that

There is need for positive efforts designed to ensure that less developed [Members] secure a share in the growth in international trade commensurate with the needs of their economic development.¹⁸

- the second recital of the Preamble to the WTO Agreement, which provides that

There is 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.

30. The object and purpose of the Enabling Clause is reflected also in Paragraph 3(a), which provides that the preferences shall be "designed to facilitate and promote the trade of developing countries"; and in Paragraph 3(c), which states that the treatment provided under Paragraph 2(a) must be "designed and, if necessary, modified to respond positively to the development, financial and trade needs of developing countries".

31. The object and purpose of the Enabling Clause is of crucial importance in interpreting the term "non-discriminatory". As shown in the EC's First Submission, "non-discrimination" is not synonymous with formally equal treatment, something which India now admits. Rather, there is "discrimination" if equal situations are treated unequally (or if unequal situations are treated equally).

¹⁶ EC's First Submission, paras. 70-71. Third Party Submission of Bolivia, Colombia, Ecuador, Perú and Venezuela, paras. 57-59. Third Party Submission of Costa Rica, paras. 22 and 25. Third Party Oral Statement of the United States, para. 12.

¹⁷ Third Party Submission of Costa Rica, para. 24; Third Party Oral Statement of the United States, para. 12.

¹⁸ Paragraph 7 of the Enabling Clause recalls that the obligations assumed by developed and developing countries under the GATT (including therefore the Enabling Clause) "should promote the basic objectives of the Agreement, including those embodied in the Preamble and Article XXXVI".

In turn, Paragraph 1(e) of Article XXXVI of the GATT recognises that

International trade as a means of achieving economic and social advancement should be governed by such rules and procedures – and measures in conformity with such rules – as are consistent with the objectives set forth in this Article.

In turn, this requires to consider whether the difference in treatment pursues a legitimate objective and whether the distinction is reasonably justified in order to attain such objective.

32. Accordingly, the EC considers that, in order to establish whether the Drug Arrangements are "non-discriminatory" within the meaning of Paragraph 2(a), the Panel should address the following two issues:

- first, the Panel should establish whether the Drug Arrangements pursue an objective which is consistent with the object and purpose of the Enabling Clause, and more specifically with the objective stated in Paragraph 3(c);
- second, if so, the Panel should establish whether the Drug Preferences constitute a reasonable means to achieve that objective.

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?

33. The EC is of the view that an examination of the context provided by the Enabling Clause, together with the relevant object and purpose, as expressed in the Enabling Clause itself, Part IV of the GATT and the Preamble to the WTO Agreement, may be sufficient to reach a correct interpretation of the term "non-discriminatory". Nevertheless, it may be useful to examine also, by way of context, other provisions of the WTO Agreement, and in particular of the GATT.

Question 10

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?

34. The EC considers that Article I:1 of the GATT does not provide relevant context for the interpretation of the Enabling Clause. The Enabling Clause excludes expressly the application of the requirements of Article I:1 of the GATT ("notwithstanding Article I:1"). Accordingly, it would be entirely inappropriate to introduce those requirements into the Enabling Clause through the backdoor of a purportedly "contextual" interpretation.

35. The EC has referred to Articles III:4 and XIII of the GATT, as well as to Article XVII of the GATS, in order to illustrate the proposition that formally unequal treatment is not necessarily discriminatory. India now agrees with that proposition.¹⁹

36. At the same time, the EC has emphasised that there is an essential difference between the above mentioned GATT and GATS provisions and the Enabling Clause.²⁰ As noted by India, all those provisions "have equality of competitive opportunities as their fundamental objective".²¹ The EC agrees. However, the Enabling Clause has a different "fundamental objective". The Enabling Clause is a form of "special and differential treatment" for developing countries. It is not concerned with conditions of competition, but rather with responding to the development needs of the developing countries. Having regard to that fundamental objective, formally different treatment of developing countries does not violate the "non-discrimination" requirement of footnote 3, where it is necessary to provide equal "development opportunities" to developing countries with different development needs.

¹⁹ India's Oral Statement, para. 19.

²⁰ EC's First Submission, paras. 75 and 79.

²¹ India's Oral Statement, para. 19.

37. India asserts the existence of a "principle of non-discrimination", which it defines as prohibiting the "denial of equal competitive opportunities to like products of different origins"²², and which would apply uniformly throughout the WTO Agreement. That principle, however, is nowhere stated in the WTO Agreement²³ and the EC rejects its existence.

38. The term "discrimination" may have different meanings in different WTO contexts. As explained, the existence of discrimination must be examined always in light of the relevant object and purpose. A difference in treatment may be discriminatory in relation to one treaty objective, but not when considered in the light of a different objective. India's position postulates that the only objective of the WTO Agreement is the liberalisation of trade among Members in accordance with the principle of competitive advantage. That is indeed one of the main objectives of the WTO Agreement, but by no means the only one. India's position that the WTO Agreement is only about competitive opportunities is incorrect and, indeed, astonishing when expressed by a developing country such as India. It would have been mistaken under the GATT 1947. And it is manifestly untenable in the context of the WTO Agreement which, as made clear by its Preamble, recognises a plurality of objectives. Prominent among them is promoting the development of developing countries.

39. The very existence of the Enabling Clause demonstrates the non-existence of the "non discrimination principle" alleged by India. The Enabling Clause, like all the other provisions granting "special and differential treatment", does not seek to provide equal competitive opportunities for like products of different origins. To the contrary, "special and differential treatment" provisions seek to create unequal competitive opportunities in order to respond to the special needs of developing countries. In the context of the Enabling Clause, the term "non-discriminatory" must be interpreted having regard to the specific objectives of "special and differential treatment". Seen in that light, granting special preferences to some developing countries with special development needs is no more "discriminatory" than granting preferences to developing countries, but not to the developed countries.

40. Finally, India does not address Article XX of the GATT. The Appellate Body has noted that the discrimination standard in the *chapeau* of Article XX is different from that in Article III.²⁴ This shows, once again, that in the WTO Agreement the notion of "non-discrimination" does not have the uniform meaning alleged by India. Consider, for example, the case of a Member which applies a sanitary restriction to imports from some Members, but not to imports of like products from other Members where different sanitary conditions prevail. Such difference in treatment denies equal competitive opportunities to like products of different origins. Yet it would not be "discriminatory" for the purposes of Article XX because it is justified in the light of the specific objective of Article XX(b), which is to protect human life or health, rather than liberalising trade according to the principle of competitive advantage.²⁵

²² Ibid.

²³ As noted by India, the Preamble to the WTO Agreement alludes to the "elimination of discriminatory treatment in international trade relations". But this does not prejudge the meaning of "discrimination". Nor does it imply that the notion of "discrimination" must be given identical meaning throughout the Agreement.

²⁴ Appellate Body report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 150. Appellate Body report, *United States – Standards for Reformulated Gasoline*, WT/DS2/AB/R., p. 23

²⁵ The same is true of Articles 2.3 and 5.5 of the *SPS Agreement*. See Appellate Body Report, *EC - Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R, para. 237, where the Appellate Body chastised the panel for importing the interpretation of discrimination made under Article III:2 of the GATT into Article 5.5 of the *SPS Agreement*.

Question 11

What is your understanding of the term "generalized" in footnote 3 of the Enabling Clause? What is the difference between this term and the term "non-discriminatory", also in footnote 3?

41. The drafting history of the Enabling Clause suggests that the term "generalised" was used in order to distinguish the system of preferences developed in UNCTAD from the existing "special" preferences granted by some developed countries to some developing countries, mainly former colonies. As originally envisaged, the UNCTAD system would have subsumed and replaced those existing "special" preferences by "generalising" them, i.e. by making them available to all, or at least most developing countries. Hence the term "generalised".²⁶

42. The requirement that the preferences must be "generalized" does not imply that "all" developing countries must be given the same preferences. Rather, it 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 "generalised" to all the developing countries with similar development needs.

43. At the same time, and in accordance with its ordinary meaning²⁷, the term "generalised" appears to presuppose the existence of a given class or category of beneficiaries to which the preferences must be "generalised". Accordingly, it seems that a preference granted exclusively to one country could not be considered as "generalised" even if it could qualify as "non-discriminatory".

44. India has argued that the term "generalised" alludes to the "range of countries that would accord and receive preferences"²⁸, while the term "non-discriminatory" refers to the "degree of differentiation between the countries that the donor countries selected as beneficiaries".²⁹ But this interpretation is not supported by the text of Footnote 3. The terms "generalised" and "non-discriminatory" both qualify the term "preferences". Therefore, it is the preferences themselves, rather than the system as a whole, which must be both "generalised" and "non-discriminatory".

²⁶ Thus, for example, General Principle Eight, adopted by UNCTAD at its First Conference, stated that Special preferences at present enjoyed by certain developing countries in certain developed countries should be regarded as transitional and subject to progressive reduction. They should be eliminated as and when effective international measures guaranteeing at least equivalent advantages to the countries concerned come into operation.

²⁷ The term "generalized" is an adjective derived from the verb "generalize", which means "to make general". In turn, "general" means

Pertaining to all, or most, of the parts *of a whole*; completely or approximately universal *within implied limits*.

The New Shorter Oxford Dictionary, 1993.

Similarly, the French word "generaliser" means "étendre, appliquer à l'ensemble ou à la majorité des individus", while "general" is defined as

Qui s'applique à l'ensemble ou à la majorité des cas ou des individus *d'une classe*.

Le Petit Robert, 1999

²⁸ India's Question To the EC No 30.

²⁹ Ibid.

Question 12

With reference to paragraph 3(c) of the Enabling Clause, what indicators can be used to establish objective criteria responding to development needs of developing countries? In addition to economic indicators, can other types of indicators be used? If so, why and what are they?

45. There are multiple indicators of development. As illustrated by the UN definition of Least Developed Countries ("LDCs"), non-economic indicators may also be relevant. (The list of the criteria is provided as Exhibit EC - 17).

46. However, this does not mean that any difference with respect to any of those indicators is, in and of itself, relevant for the purposes of Paragraph 3(c). For example, while the literacy rate is certainly a relevant development indicator which, together with other indicators, may allow to measure the overall level of development of one country, the EC would submit that the mere fact that two countries score differently with respect to that indicator does not imply that they have different "development needs" for the purposes of Paragraph 3(c), let alone that they should be granted different trade preferences.

47. If any difference with respect to any of the many conceivable development indicators were sufficient to establish the existence of different development needs requiring different trade preferences, Paragraph 3(c) would impose an impossible task upon developed countries and become wholly unworkable.

48. Moreover, that interpretation could be a source of discrimination. As explained, in order to establish that formally unequal treatment of developing countries is "non-discriminatory" for the purposes of Footnote 3 it must be shown, first, that the difference in treatment pursues a legitimate aim having regard to the object and purpose of the Enabling Clause and, in addition, that the difference in treatment is a reasonable means to achieve that aim. Thus, for example, while a low literacy rate or a low electrification rate³⁰ may be relevant indicators of development, the most appropriate and immediate response to address specifically those problems would be to provide technical and financial assistance in order to build schools or power plants, rather than granting trade preferences.

49. In this regard, the EC would recall once again that the United Nations have recommended repeatedly to provide greater market access to the products from the countries affected by the drug problem.³¹ Similarly, the Preamble to the *Agreement on Agriculture* records the commitment of the WTO Members to take into account the "particular needs" of the drug-affected countries in implementing their market access commitments.³² This implies a recognition that trade measures are an appropriate response to the drug problem. In contrast, the EC is not aware that the United Nations, or any other international agency, has recommended providing greater market access as a solution to development problems such as illiteracy or lack of electrification.

Question 13

Please provide any relevant drafting history on the interpretation of paragraph 3(c).

50. The EC is not aware of any relevant drafting history materials.

³⁰ Third Party Written Submission of Paraguay, para. 15.

³¹ EC's First Submission, paras. 109-111. See also the Joint Ministerial Statement recently adopted by the UN Commission on Narcotic Drugs at its Forty Sixth session, at para 21. (Exhibit EC-18).

³² EC's First Submission, paras. 112-113.

Question 14

If paragraph 3(c) of the Enabling Clause requires a collective response to the development needs of developing countries, both in design and modification of a GSP scheme, where within the Enabling Clause is there the possibility for a developed country to modify its scheme so as to take certain products off the preference scheme for individual beneficiary countries or, even, to take individual countries off the preference scheme?

51. The EC does not agree with the premise that Paragraph 3(c) requires a "collective response" to the development needs of developing countries. See answer to the Panel's Question to India No. 8 below.

Question 15

Does paragraph 3(c) of the Enabling Clause allow a preference-giving country to design different GSP schemes responding, respectively, to development needs, financial needs and trade needs of different developing countries, or would such a reading necessarily result in discrimination among developing countries?

52. See answer to Question 16 below.

Question 16

Does the word "and" in paragraph 3(c) 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?

53. The EC considers that "development, financial and trade needs" are closely interrelated and must therefore be considered in a "comprehensive manner". In fact, the trade and financial needs of developing countries may be considered to be part of their "development needs", when the latter term is used in a broad sense. Thus, the Preamble of the WTO Agreement refers exclusively to the "needs of economic development" of the developing countries³³. The EC would submit that this language is meant to cover also the trade and financial needs of developing countries referred to in Paragraph 3(c).

54. In its First Submission the EC has sometimes used the term "development needs" as shorthand for "development, financial and trade needs" within the meaning of Article 3(c). The Drug Arrangements, nevertheless, take into account not only the development needs *stricto sensu* of the beneficiaries but also their "trade" and "financial" needs, all of which, to repeat, are closely interrelated.

55. Drug production and trafficking have a negative effect on the trade balance of the developing countries.³⁴ Furthermore, as explained, licit alternative economic activities are not sustainable unless the products of those activities can be exported. Thus, the countries affected by the drug problem have

³³ See also GATT Article XXXVI.3, which also alludes to "the needs of their economic development" and Article XXXVI.6, which recognises that

Because of the chronic deficiency in the export proceeds and other foreign exchange earnings of less-developed contracting parties, there are important interrelationships between trade and financial assistance to development. [...]

³⁴ See the INCB Report (Exhibit EC-5), at paras. 36 and 37.

particular trade needs. Those needs have been recognised by the United Nations, as well as by the WTO.³⁵

56. Drug production and trafficking also have negative effects on the financial system of the countries concerned.³⁶ Moreover, as emphasised by some of the third parties, the cost of the fight against drugs imposes a massive financial burden on the countries concerned, which prevents them from making necessary investments in development.³⁷

Question 17

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)?

57. Paragraph 3(c) is worded in rather imprecise terms. Indeed, it might be argued that it is a purposive provision, which informs the interpretation of the other provisions of the Enabling Clause, but does not, of itself, impose any legally binding obligation.³⁸ As noted by the panel in *U.S - Steel Plate*, "Members cannot be expected to comply with an obligation whose parameters are entirely undefined".³⁹

58. To the extent that Paragraph 3(c) imposes a legally binding obligation, it should be interpreted in a manner which makes it possible for developed countries to comply with it.

59. The question suggests that the development needs of each developing country are different from those of any other developing country. The EC would agree that the situation of each developing country is indeed unique and unlike that of any other developing country. But this does not mean that each developing country should be deemed to have different "development needs" for the purposes of Paragraph 3(c).

60. Donor countries cannot be required to identify and monitor on a permanent basis, having regard to a multiplicity of possible indicators, each and every possible difference between developing countries, and to adapt their GSPs accordingly. Any attempt to do so would necessarily fail. Furthermore, it seems that a GSP which was a mere bundle of individual ad-hoc preferences for each developing country could hardly be described as a "generalised" system.

³⁵ EC's First Submission, paras. 109-115.

³⁶ See the UNDCP study (Exhibit EC-6), p. 10.

³⁷ See e.g. Oral Statement of Colombia, para. 8.

³⁸ The use of the term "shall" in Paragraph 3(c) would not necessarily be an obstacle to that interpretation. See Appellate Body report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (Recourse to Article 21.5 of the DSU by the United States)*, WT/DS132/AB/RW, at para. 74, where the Appellate Body concluded that the obligation imposed by Article 3.7 of the DSU was "largely self-regulating" despite the presence of the term "shall".

³⁹ Panel report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India ("US – Steel Plate")*, WT/DS206/R, at para. 7.110. The Panel held that the first sentence of Article 15 of the *Anti-Dumping Agreement* did not impose any binding obligation. That provision states that

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures ...

61. India's response to this is to dispense with Paragraph 3(c). According to India, the sole purpose of Paragraph 3(c) would be to make the obvious point that trade preferences must respond to the needs ("in general") of the developing countries which receive them, rather than to the needs of the developed countries which grant them. This interpretation, however, is not supported by the text of Paragraph 3(c) (see below the EC's response to the Panel's Question to India No. 8) and would render that provision irrelevant.

62. The EC, therefore, would submit that Paragraph 3(c) must be interpreted in a manner which, while giving proper meaning to Paragraph 3(c), is both workable for the developed countries and consistent with the requirements that the preferences be "generalised" and "non-discriminatory". The fact that developed countries cannot take into account each and every difference between developing countries when designing their GSP does not mean that they should be prevented from taking into account the most important ones.

63. More specifically, the EC is of the view that developed countries should not be prevented from approaching the objective stated in Paragraph 3(c) by applying horizontal "graduation" criteria, such as those included in the EC's GSP regulation, and/or by defining subcategories of developing countries which capture the most significant differences between them on the basis of a comprehensive set of criteria.

64. The UN definition of LDCs provides a good example of this. Like Paragraph 2(a), Paragraph 2(d) is subject to Paragraph 3(c). If it is considered that providing the same preferences to all the countries falling within the UN definition of LDCs is consistent with the obligation under Paragraph 3(c) to respond positively to the individual needs of those countries, then providing special preferences to similarly defined sub-categories of other developing countries should also be consistent with that paragraph.

65. Like the UN definition of LDCs, the Drug Arrangements are not based on just one narrow criterion such as those suggested by India or Paraguay. As demonstrated in the EC's submission, the negative economic and social effects of the drug problem are multifaceted and pervasive. The selection analysis conducted by the EC authorities aims at taking into account all such effects.

66. Moreover, while the criteria suggested by India are indicators of the level of development, and as such are or could have been included in the UN definition of LDCs, the drug problem is a factor which affects developing countries with different levels of development by impairing their economies and undermining their social and political integrity to the point of preventing and even setting back their development. The particular effects of the drug problem are not captured by the criteria used in the definition of LDCs. Hence the need to create a specific category for those countries.

Question 18

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.

67. Donor countries may graduate developing countries, or products or sectors, in accordance with the requirements of the Enabling Clause, including those stated in footnote 3.

Question 19

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?

68. Yes. As explained in the EC's response to the Panel's Question to India No. 8, the EC considers that Paragraph 3(c) refers to the needs of *individual* developing countries. This is not saying, however, that Paragraph 3(c) allows to grant preferences to just one country. In accordance with Footnote 3, the preferences must be "non-discriminatory" and "generalised".

Question 20

Please explain whether Article XX of GATT 1994 is applicable to measures under the Enabling Clause, providing reasons therefor.

69. The chapeau of Article XX states that "*nothing* in this Agreement shall be construed to prevent the adoption or enforcement" of the measures listed therein. Thus, Article XX provides an exception with respect to any of the obligations included in the GATT. As explained above, the Enabling Clause is part of the GATT. Therefore, Article XX applies also with respect to the Enabling Clause.

In the instant case, can Article XX be invoked as an exception to the Enabling Clause or only to Article I:1 of GATT 1994? Please explain.

70. The Enabling Clause and Article I:1 of the GATT are mutually exclusive. The EC has invoked Article XX of the GATT as an exception to a potential violation of either of those two provisions, depending on which of them is found to be applicable to the Drug Arrangements by the Panel.

71. It is possible, therefore, to envisage the following situations:

- (1) the Panel finds that the Drug Arrangements fall within Paragraph 2(a) of the Enabling Clause and are consistent with Paragraph 3(c);
- (2) the Panel finds that the Drug Arrangements fall within Paragraph 2(a) of the Enabling Clause but are inconsistent with Paragraph 3(c);
- (3) the Panel finds that the Drug Arrangements fall outside the scope of Paragraph 2(a) and are consistent with Article I:1 of the GATT; and
- (4) the Panel finds that the Drug Arrangements fall outside the scope of Paragraph 2(a) and are inconsistent with Article I:1 of the GATT.

72. In situations 1 and 3, there would be no violation of the GATT and, accordingly, no need to consider Article XX. In situations 2 and 4 the Panel would have to examine whether Article XX provides an exception to the violations of the Enabling Clause and Article I:1, respectively.

Question 21

Can the Drug Arrangements be characterized as a measure to protect human health under Article XX(b) of GATT 1994 or a measure providing differential and more favourable treatment to developing countries, or both? Please elaborate.

73. Both.

74. Contrary to India's allegations, there is no contradiction in characterizing the Drug Arrangement as being a measure to address the special development needs of the beneficiaries and, at the same time, a measure to protect the health and life of the EC population by reducing drug abuse.

75. Drug production and trafficking are a cause of underdevelopment in the beneficiary countries. At the same time, the supply of drugs from those countries poses a threat to the life and health of the EC population. The preferences provided under the Drug Arrangements address simultaneously both problems. They support the beneficiaries' efforts to replace drug production and trafficking with licit alternative economic activities, thereby contributing to the development of those countries. In turn, limiting the production and trafficking of drugs in the beneficiary countries has the effect of reducing the supply of drugs from those countries to the EC and, hence, contributes to the health policy objective of combating drug abuse within the EC.

Question 22

Assume for the purpose of this question that the Enabling Clause is in the nature of an exception to Article I:1 of GATT 1994. If a measure is not consistent with the Enabling Clause, is it nevertheless legally possible to invoke another exception, e.g., Article XX of GATT 1994, to justify such measure in pursuit of a different policy objective? What are the potential systemic implications of seeking – and even cumulating – justification for a measure under multiple exceptions provisions?

76. As a preliminary remark, if the Enabling Clause were an affirmative defence it would not impose any autonomous obligation. Accordingly, a measure could not be "inconsistent" with the Enabling Clause, just like a measure cannot be said to be "inconsistent" with Article XX of the GATT, but only with Article I:1 of the GATT.

77. In any event, the EC considers that there is nothing in WTO law which prevents a defendant from asserting different defences based on different policy objectives, either in the alternative or cumulatively. Indeed, this is a frequent occurrence in practice. For example, in *US – Gasoline*, the first case under the WTO Agreement, the United States claimed that the measure in dispute was justified under paragraphs (b), (d) and (g) of Article XX.

Question 23

Do the criteria under Article XX of GATT 1994 change when applied to a measure under the Enabling Clause? Why or why not? Please elaborate

78. It is unclear to the EC whether the Panel envisages the situation where the Enabling Clause "applies" because the measure falls within Paragraph 2(a) but the obligation under Paragraph 3 (c) is not satisfied, or rather to the situation where the measure falls outside the scope of the Enabling Clause and is inconsistent with Article I:1 of the GATT.

79. In any event, the EC sees no basis whatsoever in Article XX for the proposition that different criteria should be applied with respect to a measure that is "applied under the Enabling Clause". Under Article XX, the same criteria apply to all measures. Moreover, the EC fails to see what could be the rationale for applying different criteria to measures "applied under the Enabling Clause".

Question 24

How can the Drug Arrangements meet the test of "necessary" in Article XX(b) of GATT 1994, in that they are not applied to all countries, including to developed countries?

80. In order to answer this question, it is useful to distinguish three categories of countries not covered by the Drug Arrangements:

- (1) Developed countries;
- (2) Developing countries which benefit from more favourable tariff treatment under other unilateral (the GSP special arrangements for LDCs) or bilateral arrangements (the Cotonou Agreement and the Free Trade Agreements concluded with certain developing countries). These countries may or may not be seriously affected by drug production or trafficking;
- (3) Developing countries which do not benefit from more favourable tariff treatment under other arrangements and which are not included in the Drug Arrangements because they are not seriously affected by drug production or trafficking.

81. As regards category 1), the EC is not aware of any developed country which is as severely affected by drug production or trafficking as the beneficiaries. In any event, the developed countries have sufficient resources and do not require the EC's support in the form of trade preferences in order to fight effectively against drug production and trafficking.

82. As regards category 2), the EC would agree that some of those countries qualify as countries seriously affected by drug production or trafficking (e.g. Afghanistan or Laos). However, the inclusion of those countries in the Drug Arrangements would be redundant because in any event they benefit already from more generous tariff treatment.

83. Finally, as regards category 3), the criteria used in order to select the beneficiaries of the Drug Arrangements ensure that the excluded developing countries are not an significant source of supply of drugs to the EC and, therefore, do not pose a serious threat to the life or health of the EC population.

84. Colombia, Peru and Bolivia are the source of virtually all the cocaine consumed in the EC, while the neighbouring Andean Countries and the Central American countries are on the main route through which that narcotic reaches the EC. In turn, Pakistan is a transit country for the heroin and other opium products from Afghanistan (a least developed country), which is, by far, the main producing country and the main source of supply to the EC.

85. In contrast, neither India nor Paraguay represent a serious threat to the EC's health situation. Their production of illicit drugs is negligible. Further, neither of them is on a main transit route. The volume of seizures are negligible in the case of Paraguay, and relatively small in the case of India, as compared with the size of its population and economy. It is considered that in both countries most drug trafficking relates to internal consumption. (See below the response to Panel's Question to the EC No. 14).

86. In any event, the EC considers that the exclusion from a certain country falling within categories 2 or 3 from the Drug Arrangements is not part of the "structure and design" of the Drug Arrangements, but rather of its "application".⁴⁰ Therefore, it should be examined under the *chapeau* of Article XX and not in considering whether the Drug Arrangements are "necessary" for the purposes of paragraph (b) of that Article.

⁴⁰ EC's First Submission, paras. 197-204 and 205-208.

Question 25

Are the tariff preferences provided under the Drug Arrangements the "least trade-restrictive measure" available to achieve the EC's health policy objective? Given the variety of measures that are being applied by the many signatories to the three UN conventions against the illicit traffic in drugs, why are the Drug Arrangements the least trade-restrictive measures available?

87. The question suggests that countries can choose among a variety of alternative strategies to fight the drug problem and that the EC's approach is just one among many possible options. That suggestion is incorrect.

88. The three UN conventions mentioned in the question must be read together with the numerous resolutions and other texts adopted by the General Assembly of United Nations and the competent UN agencies and bodies which, over the last 30 years, have established a comprehensive and well-defined international strategy against the drug problem. The Drug Arrangements implement that strategy and, hence, must be deemed "necessary" for the purposes of Article XX(b) of the GATT.

89. As explained at length in the EC's First Submission⁴¹, the United Nations have resolved in many occasions that the fight against drugs must be conducted in accordance with the principle of "shared responsibility" and requires a "comprehensive and balanced approach" which includes initiatives to reduce both illicit demand and illicit supply. Thus, Paraguay's suggestion that the EC should limit itself to control the demand is at odds with well-established international anti-drug policy.⁴²

90. The United Nations also have resolved that, in order to reduce the illicit supply of drugs, the countries concerned must adopt comprehensive measures, including not only crop eradication and law enforcement, but also the development of alternative economic activities. The United Nations have further recommended that, in order to support those alternative activities, other countries should provide not only financial assistance but also greater market access. Only a few weeks ago, the ministers participating in the 46th session of the Commission on Narcotic Drugs held in Vienna renewed this recommendation:

In accordance with the principle of shared responsibility, States are urged to provide greater access to their market for products of alternative development programmes, which are necessary for the creation of employment and the eradication of poverty.⁴³

91. It would be odd, to say the least, if a WTO Panel were to rely on the fact that other countries fail to comply with their duty to implement a policy "urged" by the United Nations in order to conclude that such policy is "unnecessary" and that the EC is in breach of its WTO obligations.

92. Furthermore, the EC bears a special responsibility in implementing the UN recommendations in this field. Together with the United States, the EC is the main export market for the beneficiaries. The fact that a developing country, or a developed country with a relatively small market, does not provide preferential access to imports from, for example, Colombia is unlikely to have much impact on Colombia's fight against drug production or on that country's own fight against drug abuse. On the other hand, whether or not the EC provides market access for the products of alternative activities from Colombia is of crucial importance for the sustainability of those activities and, consequently, for the success of Colombia's fight against drugs, of the EC's own health policy, and also of the health policies of other drug consuming countries. The same is true of the United States, which also provides

⁴¹ EC's First Submission, paras. 100-115.

⁴² Paraguay's Oral Statement, para 20.

⁴³ E/CN.7/2003/L.23/Rev.1, p.7, para. 21. (Exhibit EC-18).

preferences with the objective of promoting alternative activities in some of the countries covered by the Drug Arrangements.

93. The UN recommendations cited by the EC make it clear that there is no alternative to providing greater access to the EC market. The only issue before the Panel is thus whether such access can be provided in a less trade restrictive manner.

94. In this regard, the EC refers the Panel to the arguments made at paragraphs 194-196 of its First Submission, which remain unanswered by India.

95. The EC is not aware of any alternatives which would be equally effective in order to provide effective market access to the products from beneficiaries. India has suggested that the EC should grant the same tariff preferences to all developing countries. However, this would be much less effective because those countries which are not handicapped by the drug problem would capture most of the additional market opportunities created by the tariff preferences.

Question 26

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?

96. Yes. As explained above, the developing countries were dissatisfied by the 1971 Decision. The Enabling Clause must be seen as a concession made by the developed countries to the developing countries in exchange for the concessions made by the developing countries elsewhere. India's position that there is no difference between the 1971 Decision and the Enabling Clause fails to recognise this.

Question 27

Why did the EC request a waiver for the Drug Arrangements? Why was the waiver not granted?

97. As indicated in the request for the waiver, it was made for reasons of legal certainty. The request is still under consideration.

Question 28

Does the term "non-reciprocal" in the 1971 Decision, referred to in footnote 1 of the 1979 Decision, mean that preferential tariff treatment should be extended by developed countries to developing countries without condition? Why or why not?

98. Footnote 3 does not prohibit all kinds of "conditions", but only the conditions of reciprocity. As explained⁴⁴, the conditions of reciprocity are a specific type of conditions involving a mutual exchange of the same or similar benefits. In the specific context of a trade agreement such as the WTO Agreement, the term "reciprocal" refers to those conditions which require the granting of equivalent trade concessions by way of compensation for the trade benefits received from another Member.

99. India does not argue that the Drug Arrangements are "non-reciprocal". Indeed, that claim would be manifestly unfounded, as it is plain that the beneficiaries are not required to provide any trade concessions to the EC. Instead, India argues that the Enabling Clause does not exempt the EC from the requirement provided for in Article I:1 of the GATT to grant the preferences

⁴⁴ EC's First Submission, paras. 33 and 55. Oral Statement of Costa Rica, para. 19.

"unconditionally".⁴⁵ Thus, implicitly, India recognises that there is a difference between the term "unconditionally" used in Article I:1 of the GATT and the term "non-reciprocal" included in Footnote 3.

100. The EC has demonstrated that the Enabling Clause excludes the application of Article I:1 of the GATT and, therefore, that Paragraph 2(a) is not subject to the "unconditionally" requirement of Article I:1.⁴⁶ The EC also has shown that, in any event, the Drug Arrangements are not "conditional" within the meaning of Article I:1 of the GATT, because they do not require any kind of compensation (whether reciprocal or of any other kind) from the beneficiaries.⁴⁷

To India

Question 8

What is your understanding of paragraph 3(c) of the Enabling Clause? Does it permit the design and modification of GSP in response to development needs of individual developing countries? In what way, and to what extent?

101. India argues that Paragraph 3(c) does not permit to take into account the individual needs of developing countries, but only the needs of all the developing countries "in general".⁴⁸

102. India's interpretation is not supported by the text of Paragraph 3(c). The term "developing countries" is not preceded by any qualifying term which might suggest that only the collective needs of the developing countries taken together must be taken into account.⁴⁹

103. India's position is based on an interpretation *a contrario* of Paragraphs 5 and 6 of the Enabling Clause, which refer, respectively, to the "individual" needs of developing countries and to the "particular" needs of least developed countries.

104. A *contrario* reasoning, however, is often unreliable and should be used only with extreme caution. The Appellate Body has warned that "omissions in different contexts may have different meanings, and omission, in and of itself, is not necessarily dispositive".⁵⁰

105. The Enabling Clause is less consistent when using the terms "individual" and "particular" than India suggests:

⁴⁵ See e.g. India's First Submission, paras. 51 and 58.

⁴⁶ EC's First Submission, paras. 32-35. See also Oral Statement of the United States, para. 10 and Third Party Submission of the Andean Community, para. 43.

⁴⁷ EC's First Submission, paras. 36-56.

⁴⁸ Oral Statement of India, para. 12.

⁴⁹ Professor Abdulqawi Yusuf has given the following interpretation of Paragraph 3(c):

Developed countries wishing to accord preferential treatment to developing countries are required to do it in such a way as to respond positively to their development, financial and trade needs. Moreover, in view of the evolving nature of such needs, *and the different degrees of development of the beneficiaries*, preferential arrangements must be modified, if necessary, in order to meet the varying requirements of developing States. In other words, *the specific circumstances and the degree of development of each country must be taken into account in such arrangements*. [emphasis added][footnotes omitted].

Abdulqawi Yusuf, Legal Aspects of Trade Preferences for Developing States, Marinus Nijhoff, 1982, p. 91.

⁵⁰ Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, para. 138. The Appellate Body concluded that Article 3.1 (b) of the *SCM Agreement* prohibits subsidies that are contingent *de facto* upon the use of domestic over imported goods, even though that provision, unlike Article 3.1(a) of the *SCM Agreement* with respect to export subsidies, does not refer expressly to *de facto* contingency.

- the second sentence of Paragraph 5, which is the operative part of that provision, does not use the term "individual" before "development, financial and trade needs";
- Paragraph 8, which states a similar obligation to that provided in Paragraph 6, does not use the term "particular" when referring to the "development, financial and trade" needs of least developed countries.

106. Unlike Paragraph 3(c), Paragraphs 5 and 6 are not concerned with "differential and more favourable treatment" but with "reciprocity". In the context of bilateral trade negotiations between developed and developing countries it makes perfect sense to specify that the relevant needs are the "individual" needs of each developing country, and only those "individual" needs. On the other hand, for the purposes of designing a GSP, it is reasonable to take into account all relevant needs, including the individual needs of each country, as well as those which are common to all or to certain sub-categories of developing countries.

107. India overlooks that Paragraph 3(c) applies also with respect to the preferences for least developed countries envisaged under Paragraph 2(d). It is obvious that those preferences must respond to the particular needs of those countries. Yet, on India's interpretation of Paragraph 3(c), the preferences for least developed countries would have to be designed also so as to respond to the development, financial and trade needs of all developing countries "in general".

108. Moreover, India's interpretation would render Paragraph 3(c) irrelevant. It is difficult to believe that Paragraph 3(c) was inserted in the Enabling Clause with the only purpose to make the obvious point that trade preferences must respond to the needs of the developing countries which receive them, rather than to the needs of the developed countries which grant them.

109. India argues that its interpretation does not make Paragraph 3(c) irrelevant, because a "scheme providing for minimal tariff reductions or excluding all sectors of export interest to the developing countries would meet the requirement of non-discrimination but not the obligation to respond positively to the needs of developing countries".⁵¹ In other words, India is suggesting that, for example, a Member which grants no preferences with respect to agricultural products should be prevented from granting preferences with respect to industrial products. Or that a Member which grants a "small" tariff reduction (say a 3 percentage points margin) on all imports from developing countries should be forced to choose between granting a sufficiently "responsive" margin (say 10 percentage points) or nothing.

110. The EC takes issue with this interpretation of Paragraph 3(c). Developed countries are completely free to decide whether or not to apply a GSP. By the same token, they are also free to decide whether or not to grant preferences with respect to certain products, as well as to choose the depth of the tariff cuts that they wish to offer. Paragraph 3(c) cannot change this basic premise. It cannot be invoked in order to force developed countries to grant more preferences than they wish. India's "all or nothing" approach has no basis in the Enabling Clause, would greatly discourage donor countries and is clearly against the interest of the developing countries.

111. India's interpretation of Paragraph 3(c) could have yet another perverse result. As noted by the United States⁵², under India's approach, any GSP would have to be administered on a "lowest common denominator basis". That is, a GSP could be applied only to the extent that it addressed needs that were identical among developing countries. This would lead to unacceptable results. For example, a developed country could be prevented from granting preferences for tropical timber because that item is not a product of interest to all developing countries "in general".

⁵¹ Oral Statement of India, para. 13.

⁵² Third Party Oral Statement of the United States, para. 13.

To the European Communities

Question 1

Is it your understanding that Article I:1 of GATT 1994 is not applicable whenever the Enabling Clause is applicable? Are they completely, mutually exclusive in their application?

112. Yes. The EC's position is that if a preference falls under one of the heads of Paragraph 2 of the Enabling Clause, then Article I:1 does not apply at all. This is reflected in the wording of Paragraph 1 of the Enabling Clause, which enables Members to provide the preferences specified in Paragraph 2 "notwithstanding Article I:1", rather than "to the extent necessary", in contrast with the 1971 Decision and other waivers.

Question 2

To what extent, if any, is the principle of non-discrimination under Article I:1 of GATT 1994 applicable to GSP schemes under the Enabling Clause?

113. Article I:1 of GATT does not establish "a principle of non-discrimination". Rather it lays down the obligation to accord most-favoured-nation to imports of like products originating in all Members with respect to certain matters, including tariffs.

114. The "non-discrimination" standard set out in Paragraph 2(a) is different from the MFN standard in Article I:1 of the GATT. Had the drafters of the Enabling Clause wished to transpose into Paragraph 2(a) the MFN standard of Article I:1 they would have done so expressly. Instead, they chose to lay down a different standard providing that the preferences must be "non-discriminatory". Furthermore, Paragraph 2(a) makes no reference to the notion of "like products"

115. The term "non-discriminatory" must be interpreted in accordance with its own ordinary meaning, in the specific context of the Enabling Clause and in the light of the object and purpose of the Enabling Clause, which is different from that of Article I:1 of the GATT. Article I:1 of the GATT is concerned with providing equal conditions of competition for imports of like products originating in all Members. In contrast, the Enabling Clause is concerned with promoting development. Specifically, the purpose of the Enabling Clause, which is also one of the basic objectives stated in the preamble of the WTO Agreement, is to promote the trade of all developing country Members commensurately with their respective development needs. Having regard to that objective, formally different treatment of developing countries does not violate the "non-discrimination" standard under the Enabling Clause, where it is necessary to provide equal development opportunities to developing countries with different development needs.

Question 3

In its structure and legal function, what distinguishes an exception from a right? Please elaborate on why, in your view (EC, para. 15), the Enabling Clause is in the nature of an autonomous and permanent right. What precisely does the EC mean by an "autonomous" right? Is it part of GATT 1994? What are the implications of it being "autonomous"?

116. The Enabling Clause is an "autonomous right" in the sense that it is not a derogation or deviation from the obligation stated in Article I:1 of the GATT. Rather, as explained, the Enabling Clause provides for alternative rules, which co-exist, side-by-side and on the same level, with those applicable among developed countries pursuant to Article I:1 of the GATT. It is "permanent" because, unlike the 1971 Decision, the Enabling Clause has been agreed for an indefinite period of time.

117. As also explained, the Enabling Clause is an integral part of the GATT 1994. It is one of the main expressions of the principle of "special and differential treatment" for developing countries in the WTO Agreement. That principle, in turn, is one of the basic principles of the WTO Agreement, as well as a recognised principle of international economic law.⁵³

118. As already explained, the fact that the Enabling Clause is an "autonomous right", rather than an "affirmative defence", has two important implications for this dispute:

- first, in order to establish a violation of Article I:1 of the GATT, India must establish first that the Drug Arrangements are not covered by Paragraph 2(a) of the Enabling Clause; and
- second, as the complaining party, India bears the burden of proving that the Drug Arrangements are not covered by Paragraph 2(a) and, if covered, that they are inconsistent with Paragraph 3(c).

Question 4

Do you agree with the statement, "While discrimination in favour of developing countries is allowed, there should be no discrimination between them, except for the benefit of least developed countries (LDCs)", which India excerpts from the "User's Guide to the European Union's Scheme of Generalised Tariff Preferences – February 2003" (India, para. 4; Exhibit India-1, p. 3)? Do you consider this statement to be an official position of the EC's understanding of the Enabling Clause, in that it appears on an official EC website? If so, what is the meaning of "there should be no discrimination between [developing countries]"?

119. The "User's Guide" has the limited purpose of providing practical guidance to traders with a view to promoting the utilisation of the EC's GSP. It is not an official legal interpretation by the EC of the Enabling Clause.

120. The statement that "there should be no discrimination between [developing countries]" is a mere restatement of the requirement contained in footnote 3 of the Enabling Clause. The second part of the statement may be misleading in that it could suggest that the special preferences accorded to least developed countries are *per se* "discriminatory". That is not the EC's official position.

Question 5

India suggests that it would have been unnecessary to include the exception in paragraph 2(d) of the Enabling Clause for special treatment to LDCs if paragraph 2(a) of the Enabling Clause already permitted selective treatment as between developing countries (India, paras. 49-50)? Do you agree with this assessment? Why or why not?

121. As a preliminary remark, Paragraph 2 d) is not an "exception" but rather one of the four types of measures covered by Paragraph 1.⁵⁴

122. Paragraph 2(a) does not render redundant Paragraph 2(d). In the first place, Paragraph 2(a) is concerned exclusively with tariff treatment, whereas Paragraph 2(d) covers any kind of "special treatment", including therefore non-tariff preferences. Furthermore, paragraph 2(d) applies in the

⁵³ See e.g. A.A. Fatouros, entry on "Developing States", in Encyclopaedia of Public International Law, Max Planck Institute, 1992, Vol. I, 1017, at 1022.

⁵⁴ EC's First Written Submission, para. 29.

context of "any general or specific measures" in favour of developing countries, whereas the preferences envisaged in Paragraph 2(a) must be part of a System of Generalised Preferences.⁵⁵

Question 6

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?

123. Yes.

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?

124. Donor countries are free to choose in respect of which products they grant preferences.

125. The beneficiaries of the preferences must be designated in accordance with the requirements of the Enabling Clause, including those stated in footnote 3.

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

126. Developed countries may graduate developing countries in accordance with the requirements of the Enabling Clause, including those stated in footnote 3.

Question 7

What is your understanding of the term "non-reciprocal" in footnote 3 of the Enabling Clause? Is it permissible to establish conditions for GSP schemes under the Enabling Clause? Would not any conditions attached to GSP schemes violate the requirement of "non-reciprocal" in footnote 3?

127. See the response to the Panel's Question to Both Parties No 28.

Question 8

Do the beneficiary countries need to satisfy any conditions in order to benefit from the Drug Arrangements?

128. As explained, the EC considers that the Enabling Clause excludes the application of Article I:1 of the GATT, including the "unconditionally" requirement. Instead, the Enabling Clause provides that the preferences must be "non-reciprocal". To repeat, India has not argued that the Drug Arrangements are "reciprocal". In any event, the EC has demonstrated that the Drug Arrangements are not subject to any "condition" within the meaning of Article I:1 of the GATT, i.e. to any condition requiring the beneficiaries to provide some form of compensation.⁵⁶

⁵⁵ EC's First Written Submission, para. 30. The same point has been made by the Andean Community in its Oral Statement, paras. 7-9.

⁵⁶ Ibid.

Question 9

Are the conditions referred to in Article 26.1(d) of the EC Council Regulation No. 2501/2001 applicable to beneficiary countries under the Drug Arrangements?

129. Article 26.1 (d) applies with respect to all the preferences provided under the EC's GSP, including the Drug Arrangements. India has not submitted any claim with respect to Article 26.1(d) which is, therefore, outside the Panel's terms of reference.

130. Moreover, Article 26 allows but does not mandate the EC authorities to withdraw the preferences in the circumstances listed therein.⁵⁷ The EC authorities enjoy considerable discretion in order to decide whether or not to withdraw the preferences. In practice, such discretion is exercised with considerable restraint. Thus, since the possibility to withdraw trade preferences was first introduced in the GSP Regulation, the EC authorities have taken only one suspension decision, concerning the imports from Myanmar. (The decision is based on paragraph a) of Article 26.1, concerning slavery and forced labour as defined in the ILO Conventions.)

131. The EC considers that the requirements stated in Article 26.1 d) are not "conditions" within the meaning of Article I:1 of the GATT because they do not amount to a form of compensation. In any event, the EC considers that the Enabling Clause excludes the application of Article I:1 of the GATT.

Would these conditions comply with the requirement of "non-reciprocal" in footnote 3 of the Enabling Clause?

132. Yes. The requirements contained in Article 26.1 d) do not require to provide compensation in the form of trade concessions. In any event, Article 26.1 d) is not within the Panel's terms of reference. Furthermore, even if it were, India has not argued that the Drug Arrangements are "non-reciprocal".

Are the attainment of the EC's health policy objectives aided by the fact that the beneficiary countries are required to meet certain conditions under Article 26.1(d)?

133. As explained, the requirements stated in Article 26.1(d) are not "conditions". Under UN conventions to which almost all states are parties, exporting countries are required to take all the necessary measures in order to prevent the exportation of illicit drugs.⁵⁸ The enforcement of those conventions contributes *inter alia* to the EC's health policy objectives.

Question 10

Could the EC indicate how its Drug Arrangements are made available to all developing countries? Please describe the selection process. Is this selection process made known to all potential beneficiaries? In what manner is it made known? Are there any published eligibility criteria or application procedures?

134. The Drug Arrangements are part of the EC's GSP system and, as such, may apply potentially to any of the developing countries and territories listed under Annex I of the GSP Regulation.

⁵⁷ Cf. Articles 26.1 ("The Preferential arrangements provided for in this Regulation *may* be temporarily withdrawn ...") and 31.1 ("After informing the Committee, the Commission *may* suspend the preferential treatment ...")

⁵⁸ EC 's First Submission, paras. 172-175.

135. The benefits of the Drug Arrangements are granted to any developing country which is deemed to be sufficiently affected by the drug problem and which does not benefit already from more favourable tariff treatment under other GSP arrangement or under a bilateral agreement such as the Cotonou Agreement or the Free Trade Area Agreements concluded by the EC with certain developing countries (Mexico, Chile, Morocco, Algeria, Tunisia, Egypt, Lebanon, the Palestinian Authority and South Africa) .

136. Since no application is required, it is not necessary to publish the relevant eligibility criteria.

137. India seeks to demonstrate that the Drug Arrangements are "discriminatory" by contrasting the procedures for the application of the Drug Arrangements to those relating to the application of the social and environmental incentives.⁵⁹ That comparison, however, is inapposite because it fails to take into account that there are important substantive differences between those arrangements.

138. In order to benefit from the social or the environmental incentive, a developing country must apply certain internationally agreed standards.⁶⁰ Any developing country is capable of applying those standards and, therefore, of becoming a beneficiary. For that reason, it is necessary to provide in the GSP Regulation for an application procedure and to state the eligibility criteria.

139. In contrast, the Drug Arrangements are granted to the developing countries which are in a certain factual situation. There is nothing that a Member which is not seriously affected by the drug problem can do in order to become eligible for the preferences. For that reason, it is unnecessary to lay down an application procedure and to specify the eligibility criteria. In this respect, the Drug Arrangements are similar to the special arrangements for the LDCs.⁶¹ Those arrangements do not provide an incentive to the LDCs to implement certain policies. Rather, like the Drug Arrangements, they are based on the development situation of those countries. The EC grants the special arrangements for LDCs to any country which is deemed to be an LDC. For that reason, the GSP Regulation neither sets out eligibility criteria for the LDCs nor provides for the possibility to apply for such status.

Question 11

Is there a possibility for developing countries to apply to be covered under the Drug Arrangements?

140. Any developing country may apply to be covered under the Drug Arrangements. But, as explained, no such application is required. The EC authorities will include any developing country which is deemed to meet the criteria, whether or not it has made an application.

141. The EC recalls that the Drug Arrangements were first introduced in 1990 for Bolivia, Colombia, Ecuador and Peru. In 1991, the preferences were extended to Costa Rica, Guatemala, Honduras, Nicaragua and El Salvador and Panama. In 1994, Venezuela was added to the list of beneficiaries. Finally, in 2001 Pakistan was included in the Drug Arrangements. This shows that the Drug Arrangements are not a "closed list" but, instead, are potentially open to all developing countries facing severe drug related development problems.

⁵⁹ Oral Statement of India, para. 25.

⁶⁰ Cf. Article 14.2 and 21.2 of the GSP Regulation.

⁶¹ Cf. Article 9 of the GSP Regulation.

Question 12

Does the EC carry out a world-wide survey of all countries which are involved in drug production or trafficking in order to designate beneficiaries? Please indicate all the relevant materials relied upon in carrying out any such world-wide survey. Did the EC apply a qualitative and/or quantitative threshold in designating the 12 beneficiaries under its Drug Arrangements? If so, what was it?

142. The EC authorities monitor regularly the situation of the drug problem in all developing countries.

143. Each GSP Regulation has a limited duration (as a rule 4 years). Prior to the enactment of a new GSP Regulation, the EC authorities conduct an assessment of those countries which are susceptible to benefit from the Drug Arrangements (i.e. those which do not benefit already from more favourable tariff treatment as LDCs or under bilateral agreements) in order to decide which of them should be covered by the Drug Arrangements.

144. For that purpose, the EC authorities rely mainly on publicly available information from competent international organisations and bodies, such as the *United Nations Office for Drug Control and Crime Prevention* and the *International Narcotics Control Board*. The main publications from those entities have been cited in the EC's First Submission and can be supplied upon request. In addition, the EC authorities take into account the reports from the EC Commission delegations in the countries concerned.

145. The EC authorities do not apply any quantitative or qualitative "threshold". Rather the designation is based on an overall assessment of the situation of the countries concerned.

Question 13

Please elaborate upon the elements that constitute the "objective criteria" on which the EC bases its selection of beneficiary countries under the Drug Arrangements.

146. The designation of beneficiary countries is made on the basis of an overall assessment of the seriousness of the drug problem in each developing country.

147. The EC authorities consider first the statistical data on the volume of drug production and seizures. The latter is considered to be the most reliable indication of the level of trafficking. This statistical analysis allows to identify those countries which are *prima facie* most affected by the drug problem.

148. Subsequently, the EC authorities refine the selection by conducting an assessment of the effects of drug problem in each country. The EC authorities take into account the entire range of effects which have been described at length in the EC's First Submission (paragraphs 86-99) and in particular the impact on the economic situation, the civil society, the political institutions, the health situation and the environment.

Question 14

What are the differences in terms of the seriousness of drug problems in the countries cited in the "Report of the International Narcotics Control Board for 2002" (Exhibit EC-5, portion missing from document as submitted), as compared to those in the 12 beneficiary countries designated under the Drug Arrangements? Is the exclusion of other countries, cited in the report, based on objective criteria? If so, what are these criteria?

149. The EC would first recall that the burden of proof is on India, as the complaining party, to show that the selection of beneficiary countries is discriminatory. Yet, the EC notes that thus far India has failed to submit any evidence, or indeed argument, to that effect.

150. The EC would further recall the observation of the Appellate Body in *Japan - Agricultural Products II* that

A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the *SPS Agreement*, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party.⁶²

151. Notwithstanding the above, the EC will use its best efforts in order to reply to the Panel's question. The INCB report mentions many countries (including many developed countries and developing countries which benefit from more favourable tariff treatment under other unilateral or bilateral arrangements), for very different reasons, not all of which are relevant for this dispute (e.g. traffic of psychotropics, conclusion of co-operation agreements, etc).

152. The EC, nevertheless, understands from the discussions during the first oral hearing that the Panel is interested in particular in three countries: Thailand, the Philippines and Indonesia. The EC will address the situation of each of these countries in turn here below. Nevertheless, the EC would like to stress its willingness to reply to any additional requests from the Panel concerning other countries, should the Panel consider it necessary.

153. Thailand has not been included in the Drug Arrangements considering that its opium production since 1994 has been on average only about 5 tons per year, compared to Afghanistan with an average of 2,700 tons per year. The INCB concluded:

Thailand, with its continuing highland development programmes and sustained measures against illicit opium poppy cultivation, is no longer a major source of opium and heroin.⁶³

154. Thailand's seizure figures were also relatively small with a yearly average of 1,235 kg of opium and 456 kg of heroin between 1995 and 2000 (in comparison, Pakistan's average seizure figures during the same period were 25,900 kg of opium and 6,770 kg heroin, yearly).⁶⁴

155. As for the Philippines and Indonesia, according to UN statistics, neither of them produces opium or coca. As regards drug trafficking, the Philippines reported no opium seizures and only an annual average of 1.05 kg of heroin during the years 1995 to 2000. In turn, Indonesia, with a

⁶² Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, para. 129.

⁶³ INCB report, para. 355.

⁶⁴ *Ibid.*, p. 47, 83, 99.

population of 212 million people (thus making it the fourth most populous country in the world) reported between 1995 and 2000 an annual average of 540 g of opium and 14.61 kg of heroin.⁶⁵

Table 1: Opium seizures (in kg):⁶⁶

	1995	1996	1997	1998	1999	2000
Pakistan	109,420	7,423	7,300	5,022	16,320	8,867
Thailand	927	381	1,151	1,631	422	1,592
Philippines	No report					
Indonesia	0.03	0.03	No report	0.03	3.097	0.034

Table 2: Heroin seizures (in kg):⁶⁷

	1995	1996	1997	1998	1999	2000
Pakistan	10,760	5,872	6,156	3,363	4,974	9,492
Thailand	518	598	323	508	405	386
Philippines	No report	1.5	3	1.7	0.022	No report
Indonesia	1.7	1.7	20.4	27.8	14	22.7

Question 15

On what "objective criteria" did the EC exclude India and Paraguay from its list of beneficiaries under the Drug Arrangements?

India

156. The UNDCP reports no illicit production of opium or coca in India. As to drug trafficking, India reported from 1995 to 2000 annual average seizure figures for opium of 2,306 kg and for heroin of 1,167 kg. The corresponding figures for Pakistan, a country with a much smaller population, are 27,500 kg and 6,770 kg respectively. The volume of coca seizures in India is negligible.⁶⁸

Table 4: Heroin seizures (in kg):⁶⁹

	1995	1996	1997	1998	1999	2000
India	1,681	1,257	1,332	655	839	1,240
Pakistan	10,760	5,872	6,156	3,363	4,974	9,492

Table 5: Opium seizures (in kg):⁷⁰

	1995	1996	1997	1998	1999	2000
India	1,349	2,867	3,316	2,031	1,588	2,684
Pakistan	109,420	7,423	7,300	5,022	16,320	8,867

157. The above figures are even more negligible when considered in relation to the size of India's population and economy. Additionally, drug trafficking had no significant impact on the political

⁶⁵ Ibid., p. 83, 99.

⁶⁶ Ibid., p. 83.

⁶⁷ Ibid., p. 99.

⁶⁸ Ibid., pp. 84, 100 and 121.

⁶⁹ Ibid., p. 99, 100.

⁷⁰ Ibid., 83, 84.

stability of the country. India is considered to be the world's largest democracy, which guaranteed considerable domestic political stability.

158. For the above reasons, it is considered that India does not have drug-related development problem comparable to those of the beneficiary countries.

Paraguay

159. UNODCCP did not report any production of coca or opium in Paraguay. Neither were there any seizures of opium or heroine.

160. Paraguay reported only small seizures of cocaine (yearly average between 1995 to 2000: 99.4 kg compared to Colombia's 83,049.7 kg). Furthermore, unlike the Central American countries, Paraguay is not on any major transit route for cocaine. In 2000 the volume of cocaine seizures was less than 25 % of El Salvador's, which reported the lowest figure in this year for all Central American countries. The *Organization of American States* in its "Statistical summary on Drugs 2001" breaks down per country the cocaine seizures for South America in 2000. Paraguay accounted for 0% of all seizures.⁷¹

Table 5: Cocaine seizures (kgs)⁷²

Colombia	59,030	45,779	42,044	107,480	63,945	110,428
Bolivia	8,497	8,305	13,689	10,102	7,707	5,559
Peru	22,661	19,695	8,796	9,937	11,307	11,848
Venezuela	6,650	5,906	16,741	8,159	12,149	14,771
Ecuador	4,284	9,534	3,697	3,854	10,162	3,308
Paraguay	59	47	77	222	95	96

Question 16

How does the EC respond to India's argument (India, para. 62) that the Drug Arrangements simply cause a shift in market access opportunities from excluded countries to selected beneficiary countries? If there is such a shift in market-access opportunities, in what way is the EC responding to the development needs of developing countries, as required by paragraph 3(c) of the Enabling Clause?

161. It is not correct that the Drug Arrangements "simply cause a shift in market access opportunities from excluded to selected beneficiary countries". The Drug Arrangements cover "sensitive products", i.e. products where the EC domestic industry is particularly vulnerable to competition from imports. By providing preferences with respect to those products, the Drug Arrangements create new market opportunities at the expense of the EC's domestic industry.

162. In any event, the argument mentioned in the question has not been raised by India in connection with Paragraph 3(c), but rather in connection with the requirement in Footnote 3 that preferences must be "beneficial to the developing countries". The EC has addressed at length this claim at paragraphs 141-152 of its First Submission.

⁷¹ Organization of American States, Statistical Summary on Drugs 2001, p. 30.

⁷² United Nations Office for Drug Control and Crime Prevention, Global Illicit Drug Trends 2002, p. 119, 120.

Question 17

In setting out objective criteria for a GSP scheme, do you agree that, pursuant to paragraph 3(c) of the Enabling Clause, a preference-giving country must only consider the development, financial and trade needs of developing countries, but not other types of objectives? Please elaborate.

163. Paragraph 3(c) says that preferences must be responsive to the development, financial and trade needs of developing countries, not that they must be responsive *only* to such needs. Donor countries may take into account also other considerations, as long as they do not detract from the objective set out in Paragraph 3(c).

164. Also, by responding to the needs of developing countries, the donor countries may achieve an objective which is also in the interest of the donor country or even of the international community as a whole. Thus, in the present case, by responding to the development needs of the countries affected by the drug problem, the EC achieves simultaneously the health policy objective of limiting the supply of drugs to the EC. It would be absurd to consider that a measure which is fully responsive to the development needs of developing countries is nonetheless incompatible with Paragraph 3(c) simply because it has, at the same time, also a beneficial effect for the donor country or the international community. Indeed, by that logic, all preferences would be contrary to Paragraph 3(c) because the development of the developing countries provides a benefit to all WTO members (e.g. in the form of larger markets for the exports from the developed countries).

Question 18

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?

165. Low per capita GNP, malnutrition and illiteracy are already taken into account in the UN definition of LDCs, which is used by the EC for the purposes of the special arrangements for LDCs provided for in its GSP. Poverty is a function of other criteria which are also included in the definition of LDCs. Thus, it would have been redundant to include these criteria also in the Drug Arrangements.

166. Natural disasters are a conjunctural factor which, at first sight, do not seem to warrant special trade preferences. Rather, the appropriate response is the provision of humanitarian aid and financial assistance.

167. In any event, the EC considers that the mere fact that the Drug Arrangement failed to take into account other possible criteria justifying the granting of special preferences would not make the Drug Arrangements "discriminatory". Paragraph 3(c) does not require that each single preference must be responsive at the same time to the individual development needs of each and every developing country. Indeed, that would be a logical impossibility. Rather, it is the system of preferences as a whole which must be responsive to the individual needs of all developing countries.

168. The objective stated in Paragraph 3(c) can be approached only by applying horizontal "graduation" criteria or by creating different arrangements which address the different development needs of different sub-categories of developing countries. If India considers that it has special development needs which are not sufficiently taken into account under any of the existing arrangements, it should have brought a claim under Paragraph 3(c) against the EC's failure to establish the necessary arrangements for addressing such needs, instead of complaining that the Drug Arrangements are discriminatory.

Question 19

Given that the EC does not provide similar tariff preferences to all drug-affected developing countries, nor to any drug-affected developed countries, how do the Drug Arrangements comply with the requirements of the "chapeau" of Article XX of GATT 1994?

169. The Drug Preferences seek to include all the developing countries which the EC considers to be particularly affected by drug production and trafficking, with the only exception of those which benefit already from more generous access under other unilateral or bilateral arrangements. India has provided no argument or evidence to show that India, or any other developing country, is similarly affected by drug production or trafficking and has been unjustifiably excluded from the Drug Arrangements.

170. The exclusion from the Drug Arrangements of the developing countries already covered by other tariff arrangements does not discriminate against those countries, which in fact benefit from more favourable treatment than those included in the Drug Arrangements.

171. The EC considers that the exclusion of developed countries from the Drug Arrangements is part of the "structure and design" of the Drug Arrangements, and not of their "application". Assuming that it had to be examined under the *chapeau*, the EC would submit that the "prevailing conditions" in the developed countries are different from those prevailing in the developing countries, in that the former have the necessary resources to fight against drug production and trafficking and do not need the assistance of the EC in the form of trade preferences. Moreover, the EC is not aware of any developed country which is as affected by the drug problem as the beneficiaries.

Question 20

Despite the existence of many measures being applied to address drug abuse, as described in the relevant international conventions (e.g., Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol and UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988) and in the Report of the International Narcotics Control Board for 2002, does the EC consider that its Drug Arrangements are the least trade-restrictive measure available to meet its policy objective of protecting the health of citizens within the EC?

172. See above the response to the Panel's Question to Both Parties No. 25. See also the EC's First Submission, at paragraphs 194-196.

Question 21

Given that the 1971 Decision and the Enabling Clause were negotiated by developing countries through the Group of 77, could it be said that the developing countries all expected equivalent benefits from a GSP?

173. It is unclear to the EC whether by "equivalent" the Panel means the "same" or different but of equivalent value having regard to the respective developing needs of each country. In any event, the EC considers that it would be inappropriate to attach any legal consequences to the fact that the 1971 Decision and the Enabling Clause was negotiated through the Group of 77.

Question 22

Please explain why the EC considers (EC, para. 40) that the case of Belgian Family Allowances is not relevant for the interpretation of "unconditionality"?

174. As noted by India⁷³, Article I:1 of the GATT imposes two distinct obligations: first, to grant MFN treatment to all imports of like products from all Members; and second, to do so "unconditionally". The EC's contention is that *Belgian Family Allowances* is concerned with the first of those two obligations, and not with the second.

175. For the reasons explained in the EC's First Submission⁷⁴, whether or not a country has a certain system of family allowances in place is not a "condition" within the meaning of Article I:1 of the GATT, because that requirement does not provide any compensation to the country granting MFN treatment.

176. However, this is not saying that the measures at issue in *Belgian Family Allowances* were consistent with Article I:1. Rather, the EC's position is that those measures were in violation of the first obligation imposed by Article I:1, because the fact that a country has in place a certain system of family allowances does not make the products originating in that country "unlike" the products originating in another country without the same system of family allowances.

⁷³ India's First Submission, para. 51.

⁷⁴ EC's First Submission, paras. 49-56.

ANNEX B-3

Replies of the European Communities to Questions from India after the First Panel Meeting

Question 1

In para. 19 of its submission, the European Communities ("EC") asserts that the Enabling Clause is an "autonomous right" and therefore, it must be established that the Drug Arrangements are outside the scope of the Enabling Clause as a precondition for pleading a violation of Article I:1 of the GATT. Is this a precondition for pleading a violation of Article I:1 of the GATT in respect of any measure? If not, please elaborate on the types of measures for which this precondition applies.

1. Yes. In order to establish a violation of Article I:1 of the GATT the complaining party must establish that the disputed measure falls within the scope of that provision rather than within the scope of the Enabling Clause.

2. There is nothing extraordinary about this. It is always for the complaining party to show that the disputed measure falls within the scope of the provision which it invokes, rather than within the scope of another, mutually exclusive, provision. For example, the complaining party bears the burden to prove that:

- an import restriction falls within Article XI:1 of the GATT, rather than within Article III:4;
- an import duty falls within Article II of the GATT, rather than within Article VI;
- a technical regulation falls within the scope of the TBT Agreement, rather than that of the SPS Agreement.

Question 2

Does the EC dispute India's claim that that the EC violates Article I:1 of the GATT by failing to accord the advantage of tariff preferences under the Drug Arrangements to like products originating in the territories of all other Members (para. 36 of India's First Submission)?

3. The EC's position is that the Drug Arrangements fall within the scope of Paragraph 2(a) of the Enabling Clause and, therefore, are not subject to Article I:1 of the GATT.

Question 3

Does the EC interpret the term "unconditionally" in Article I:1 of the GATT as prohibiting only the grant of advantages contingent on a future or uncertain event (para. 45 of the EC's First Submission)?

4. The EC's view is that, in the context of Article I:1 the term "unconditionally" alludes to those conditions which require a Member to provide some form of compensation in exchange for receiving MFN treatment from another Member. See EC's First Submission, paragraphs 49-56.

Question 4

The EC asserts that the designation of beneficiary countries under the Drug Arrangements is made in accordance with objective criteria. Are these criteria set out in the Regulation? Are they set out in any other document that is publicly available?

5. The criteria are not set out in the GSP Regulation. They are not contained in a public document. See the EC's reply to the Panel's Question to the EC No. 10.

Question 5

What are the objective criteria that India would have to meet in order to be designated a beneficiary country under the Drug Arrangements?

6. Please see the EC's response to the Panel's Question to the EC No. 13.

Question 6

What are the procedures followed in designating a country as a beneficiary under the Drug Arrangements?

7. Please see the EC's response to the Panel's Question to the EC No. 10.

Question 7

Is a country required to apply for beneficiary status or is the evaluation (if any) conducted suo moto by the EC?

8. No application is required. The EC will include in the Drug Arrangements any developing country which is found to satisfy the criteria.

Question 8

If the evaluation (if any) is conducted suo moto by the EC, does the EC consult with the countries concerned in the course of the evaluation?

9. The EC authorities maintain regular contacts with the authorities of all the developing countries. Within this context, the problem of drug production or trafficking is often discussed. No formal consultation is required as part of the evaluation process before a country is designated as a beneficiary of the Drug Arrangements.

Question 9

If a beneficiary country no longer meets the criteria (if any), is there a procedure for revocation of beneficiary status? If so, please elaborate.

10. The EC authorities monitor the situation of the drug problem in the beneficiary countries. If it were established that a beneficiary country is no longer affected by that problem, the Commission would propose an amendment to the GSP Regulation in order to exclude it from the Drug Arrangements. Unfortunately, this situation has not arisen yet since the introduction of the Drug Arrangements.

Question 10

Have the criteria (if any) been applied to all developing countries? If so, can the EC provide the relevant internal documentation and the reasons for exclusion of all non-beneficiary developing countries?

11. The criteria for the selection of beneficiary countries are applied to all developing countries which do not benefit from more favourable tariff treatment under other arrangements.

12. The requested internal documents are not public. If India has concerns regarding the exclusion of any specific countries from the Drug Arrangements, the EC is willing to explain the reasons which led to the exclusion of those countries.

Question 11

Could the EC provide details of the dates at which various beneficiaries were included under the Drug Arrangements and references to the relevant legal instrument designating each country as a beneficiary?

13. In 1990, Colombia, Peru, Ecuador and Bolivia were given special preferences by Council Regulation (EEC) No 3835/90 of 20 December 1990 (OJ L 370 of 31.12.1990, p. 126)

14. In 1991, preferences were granted to Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama by Council Regulation (EEC) No 3900/91 of 16 December 1991 (OJ L 368 of 31.12.1991, p. 11).

15. In 1994, Venezuela was added to the list of beneficiary countries by Council Regulation (EC) No 3281/94 of 19 December 1994 (OJ L 348 of 31.12.1994, p. 1).

16. In 2001, Pakistan was included in the Drug Arrangements by Council Regulation (EC) No 2501/2001 of 10 December 2001 (OJ L 346 of 31.12.2001, p. 1).

Question 12

The EC asserts that the inclusion of new beneficiaries under the Drug Arrangements is possible (para. 212 of the EC's First Submission). However, the Draft Minutes of the 2397th Meeting of the Council held in Brussels on 10 December 2001 (15131/01- PV/CONS 79) contain the following statement by the Commission:

"The Commission confirms that it does not intend to propose that the advantages of the special regime to combat drug production and trafficking be extended to countries other than those on the list of beneficiaries of that regime, which is set out in Annex I to the Regulation"

How can this statement be reconciled with EC's assertion that the inclusion of new beneficiaries under the Drug Arrangements is possible and will be based on the same criteria applied to the current beneficiaries? In any event, does the Regulation have to be amended to include any other Member as a beneficiary under the Drug Arrangements?

17. The statement means that, based on its assessment of the situation at that point in time, the EC Commission did not consider it appropriate to add other countries to the list of beneficiaries. It does not preclude the possibility to include other countries if a subsequent change in the situation of those countries so required.

18. The GSP Regulation is adopted for a limited period of time (as a rule, 4 years). Accordingly, depending on the timing, the inclusion of a beneficiary in the Drug Arrangements could be effected either by amending the GSP Regulation by means of another Council regulation *ad hoc* or simply by including it in the list annexed to the next GSP Regulation.

Question 13

The EC asserts that all the beneficiaries are included based on the application of objective criteria. However, the Draft Minutes of the 2397th Meeting of the Council held in Brussels on 10 December 2001 (15131/01- PV/CONS 79) contain the following statement by the Portuguese delegation:

"this regime was established to meet specific objectives. Extending it to Pakistan would run counter to these objectives and would furthermore create a serious precedent with regard to the other GSP beneficiary countries ... The countries which are currently beneficiaries of the drugs regime provided for under the GSP back this solution; they consider that Pakistan does not meet the criteria governing the application of the regime."

Could the EC confirm that the beneficiary countries considered that Pakistan does not meet the criteria governing the application of the regime? In light of these comments please clarify the basis for the including Pakistan as a beneficiary under the Drug Arrangements.

19. The EC authorities neither request nor take into account the views of the existing beneficiaries in deciding whether to add other beneficiaries to the Drug Arrangements. The selection is based exclusively on the assessment of the situation in each country. Therefore, the EC cannot confirm whether other beneficiaries were opposed to the inclusion of Pakistan.

20. The EC has explained the reasons for including Pakistan in the Drug Arrangements at paragraphs 136 to 139 of its First Written Submission.

Question 14

In this connection, could the EC please furnish India with a copy of the report by the Permanent Representatives Committee (15083/01)?

21. The requested document is not public.

Question 15

A note from Mr. Bernard Zepter (Deputy Secretary General of the European Commission) to Mr. Javier Solana (the Secretary-General) regarding the Amended Proposal for the present Regulation (Inter-institutional File: 2001/0131 (ACC)/ 14176/01 dated 19 November 2001) states in para. 35 that the benefits under the drug regime "... are given without any prerequisite...". Can this be reconciled with the EC's assertion that the tariff preferences under the Drug Arrangements are granted in accordance with objective criteria?

22. The statement means that the selection of beneficiaries is made on the basis of the situation of each country concerned and that the beneficiaries are not required to undertake any specific action in order to qualify for them, such as for example enforcing certain anti-drug policies.

Question 16

Is it correct to state that under the EC's interpretation of "non-discrimination", a developed country can accord preferential tariff treatment to a single developing country as long as this country has "according to objective criteria different development needs"?

23. The EC's view is that differences in tariff treatment between developing countries are non-discriminatory if they pursue a legitimate objective, having regard to the object and purpose of the Enabling Clause, as specified in particular in Paragraph 3 (c); and if such difference in treatment is a reasonable means to achieve that objective. This means that differences in tariff treatment based on minor or irrelevant differences between countries or in differences which should be addressed through other means could be "discriminatory".

24. The EC considers that, in practice, it would be unlikely that the criteria used in defining a category which in practice consists of only one developing category could qualify as non-discriminatory.

Question 17

Does the EC claim that, under the GSP, a mere difference in development needs justifies a difference in treatment? Or does the EC claim that countries with more pressing development needs should be given more favourable treatment than countries with less pressing development needs?

25. As explained, the EC's view is that not *any* difference in development needs may justify *any* difference in tariff treatment. The difference in tariff treatment must be a reasonable response to the difference in development needs, having regard to the object and purpose of the Enabling Clause.

26. For example, assuming that the income level were an appropriate criterion to measure development needs, according better tariff treatment to a country with a relatively high income level than to another country with a relatively low level would be, in the light of the objectives pursued by the Enabling Clause, a manifestly unreasonable response to the difference in development needs between those two countries and, hence, discriminatory.

Question 18

Is it correct to state that under the EC's interpretation of "non-discrimination", a developed country can grant preferential tariff treatment to a group of developing countries that is more favourable than that granted to the least developed countries, as long as this group, "according to objective criteria [has] different development needs"?

27. To repeat, the difference in tariff treatment has to be reasonably justified having regard to the objectives of the Enabling Clause.

28. In principle, it would seem unjustified, and hence discriminatory, to give more favourable tariff treatment to other developing countries than to the LDCs. But this question cannot be answered in the abstract. It would be necessary to know what are the development needs of the other category of countries on which the preference purports to be based.

29. The EC recalls that, under the GSP Regulation, the LDCs receive the most favourable tariff treatment. Thus, India's question is, once again, hypothetical and not directly relevant for this dispute.

Question 19

In para. 144 of its First Submission, the EC posits an alternative interpretation of the phrase "beneficial to the developing countries" whereby "...India would have to demonstrate that the detriment allegedly suffered by some developing countries outweighs the benefits enjoyed by the countries covered by the Drug Arrangements." Could the EC please elaborate on the methodology to be used in evaluating and comparing the "detriment" and the "benefits"?

30. It is not for the EC to make India's case. The EC believes that it would not be an impossible task for a competent econometrician to design a methodology to estimate the trade creating and trade diverting effects of the Drug Arrangements.

Question 20

Could the EC please clarify whether beneficiary countries are chosen according to the impact that activities within their borders have on the health of EC citizens or are chosen based on their development needs?

31. The beneficiaries are selected on the basis of an overall assessment of the seriousness of the drug problem in each developing country. Nevertheless, the criteria used in making that assessment ensure that the selected countries are also those which pose a more serious threat to the health situation within the EC. See EC's response to Panel's Question to Both Parties No. 24.

Question 21

Could the EC please clarify whether the beneficiary countries were chosen on the basis of their drug problems or their drug policies? Does a resolution of the drug problems or a change in drug policies lead to a withdrawal of the beneficiary status under the Drug Arrangements?

32. The selection of the beneficiary countries is based on an overall assessment of the seriousness of the drug problem in each developing country. The drug policies implemented by them are not part of that assessment.

33. In accordance with Article 25.1 of the GSP regulation, the EC Commission must assess, among other things, the drug policies of the beneficiaries. However, Paragraph 25.3 makes it clear that the results of that assessment shall not prejudice the continuation of the Drug Arrangements.

34. As explained, if it were established that a country is no longer affected by the drug problem, it would be withdrawn from the list of beneficiaries. On the other hand, a change in a country's drug policies would not be a cause for withdrawing the preferences.

35. The EC considers that the developing countries affected by the drug problem do not require external incentives in order to comply with their obligations under the relevant U.N. Conventions, since it is in their own interest to fight against the drug problem. What those countries need is assistance, including both technical and financial assistance and trade preferences.

36. The EC, therefore, rejects the suggestion made on India's behalf to the effect that, since the drug policies of the beneficiaries are not taken into account, the Drug Arrangements provide an "incentive to perpetuate the drug problem" rather than fight against it. By the same token, the EC does not require the LDCs to implement any specific development policies. Yet, the EC assumes that even India would agree that the special arrangements for the LDCs included in the EC GSP Regulation are not an incentive for those countries to keep their children undernourished and illiterate.

Question 22

In previous cases where developed countries wished to grant tariff preferences to some but not all developing countries, a waiver was sought. See United States Caribbean Basin Economic Recovery Act waiver adopted 15 February 1985 (L/5579, BISD 31S/20) (renewed 15 November 1995 [WT/L/104]); Canada CARIBCAN waiver adopted 26 November 1986 (L/6102, SR42/4) (renewed 14 October 1996 [WT/L/185]); United States Andean Trade Preference Act waiver adopted 19 May 1992 (L/6991) (renewed 14 October 1996 [WT/L/183 and WT/L/184]). Could the EC explain why, in its view, a waiver was required for these arrangements but not for the Drug Arrangements?

37. The CBERA and the CARIBCAN preferences do not purport to be based on any special development needs of the beneficiary countries, as compared to those of other developing countries in different regions. Rather, the selection criterion is strictly geographical.

38. Like the Drug Arrangements, the APTA preferences are a response to the special development needs related to drug production and trafficking. However, unlike the Drug Arrangements, the scope of the APTA preferences is permanently limited to just four South American countries. The EC understands that it is not the U.S. position that those four countries are the only developing countries in the world which are seriously affected by the drug problem. Rather, the United States has made a deliberate choice to restrict its assistance to only some of the affected countries. In contrast, the Drug Arrangement purport to apply to all the developing countries which are seriously affected by the drug problem, regardless of their geographical location.

Question 23

The EC claims that the term "unconditional" in Article I of the GATT does not imply that Members must extend the benefits of import tariff reductions irrespective of the situation or policies of the exporting country. In its view, this term merely implies that the extension of the benefit of such reductions must not be "in exchange for some form of compensation" (para. 33 of the EC's first written submission). Is this understanding of the EC's claim correct? If so, would the EC please explain how Members could effectively negotiate market access concessions in the framework of the GATT if Article I were interpreted to permit Members to vary the level of their import tariffs with the situation and policies of the exporting country?

39. India has misunderstood the EC's position.

40. The EC's view is that the term "unconditionally" refers to the conditions which require to provide some form of compensation in exchange for receiving MFN treatment. This is not saying, however, that Article I:1 permits Members "to vary the level of their import tariffs with the situation and policies of the exporting countries".

41. India fails to distinguish between the two obligations imposed by Article I:1: to grant MFN treatment; and to do so "unconditionally". The EC's position is that it could be contrary to the first of those obligations, but not to the second, if a Member applied different import tariffs according to "the situation or policies" of the exporting country, unless such situation or policies made the products exported from a country "unlike" those from other countries. See the EC's response to the Panel's Question to the EC No. 21.

Question 24

The function of the Enabling Clause, as made explicit in its paragraph 1, is to confer upon WTO Members the right to "accord differential and more favourable treatment to developing countries, without according such treatment to other [Members]" notwithstanding their MFN obligations under Article I of the GATT. The "other Members" to which this provision refers are the Members that are not accorded differential and more favourable treatment under the circumstances set out in paragraph 2.

In the case of paragraph 2 (a), these "other Members" are the developed countries to whom GSP benefits are denied.

In the case of paragraph 2 (c), the "other Members" are the developed and developing countries to whom the benefits of tariff arrangements among developing countries are denied.

In the case of paragraph 2 (d), the "other Members" are the developed and developing countries to whom the special treatment accorded to the least developed countries are denied.

This implies that the Members defined as "other Members" have made three "gifts" to permit the realisation of the principle of differential and more favourable treatment of developing countries: The developed countries renounced their right to MFN treatment in relation to benefits accorded to developing and the least developed countries. The developing countries renounced their right to MFN treatment in relation to two benefits: first, benefits accorded by them to other developing countries in the framework of tariff arrangements among them and, second, to the benefits accorded to the least developed countries.

The arguments of the EC imply that the developing countries made an additional "gift" under paragraph 2(a), namely, that they renounced their right to MFN treatment in respect benefits accorded by developed countries to other developing countries. However, this provision refers only to preferences accorded by developed to developing countries, which implies that the "other Members" that are renouncing their MFN rights under paragraph 2(a) are exclusively the developed countries to whom the GSP benefits are denied.

Would the EC please comment on the above observations and explain where, in the text of paragraphs 1 and 2 and in the overall construction of these provisions, it finds the basis for its claim that, under paragraph 2(a), the "other Members" renouncing their MFN rights include the developing countries?

The concept that the developing countries made this "gift" to each other under paragraph 2(a) is not expressed in the wording of paragraphs 1 and 2 of the Enabling Clause. The Appellate Body has stated that "the duty of the interpreter is to examine the words of the treaty to determine the intentions of the parties" and that the principles of interpretation do not "condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".¹ The Appellate Body further stated in one case that, to sustain an interpretation with far-reaching consequences, "specific and compelling" treaty language was required.² Would the EC please identify the specific and compelling treaty language that sustains an interpretation of paragraph 2(a) of the Enabling Clause according to which all developing country Members of the WTO have renounced all of their MFN rights in respect of benefits accorded under any GSP scheme?

¹ Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("India – Patents"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, at 24.

² Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, at 198.

42. The EC and some third parties have thoroughly rebutted India's interpretation of the term "other Members". India does not address any of those arguments.

43. The EC would agree that the same words may have different meaning in the context of different treaty provisions. However, India's position that one and the same provision (Paragraph 1) may have simultaneously three different and conflicting meanings is contrary to basic principles of legal interpretation and indeed of elementary logic.

44. India's "gift theory" is entirely predicated on the unverifiable claim that developing countries would not have agreed to the result of the EC's interpretation. However, by the same token, the EC could claim that the developed countries would not have agreed to the results of India's own interpretation. More specifically, the EC could claim that the EC would not have agreed to relinquish all its MFN rights vis-à-vis all developing countries but for the expectation that countries like India (the fourth largest economy in the world, with a competitive and diversified export sector, including a significant share of high tech goods) would likewise renounce its MFN rights vis-à-vis much smaller and less fortunate developing countries, such as those ravaged by the drug problem. It is evident, however, that this kind of arguments is of little value for the interpretation of the Enabling Clause.

Question 25

The EC and India agree that paragraph 2(a) of the Enabling Clause covers only "non-discriminatory preferences beneficial to the developing countries". Their dispute relates to the interpretation of the term "non-discriminatory". The EC and India further agree that this term has to be interpreted in its context and that the other provisions of the Enabling Clause provide contextual guidance. The EC claims that the term "non-discriminatory" cannot be interpreted to prevent responses to the specific problems of individual developing countries because this would prevent developed countries from fulfilling their obligation to respond to the development, financial and trade needs of the developing countries in accordance with paragraph 3(c) of the Enabling Clause. Paragraph 3(c) provides the contextual guidance sought by the EC only if its is interpreted to establish the obligation to respond to the individual trade, financial and trade needs of developing countries rather than their needs in general.

Paragraph 3(c) mentions developed and developing countries but – unlike other provisions of the Enabling Clause - not the needs of "individual" developing countries. This suggests that paragraph 3(c) contrasts the needs of the developing countries with those of the developed countries. Its rationale is to ensure that developed countries design and, if necessary modify, the product coverage and tariff cuts under their GSP schemes to satisfy the needs of developing countries rather than those of domestic industries, in other words, that GSP schemes are adopted and administered with an outward look to the Third World rather than an inward look to domestic pressure groups.

Against this background, India would like to ask the following questions:

- The terms of paragraph 3(c) do not refer to "individual" needs. Explicit references to "individual" needs are however contained in the rules on reciprocity in trade negotiations contained in paragraphs 5 and 6 of the Enabling Clause. This difference in wording implies in the view of the India that "individual" needs of each of the developing countries are to be taken into account in determining the degree of reciprocity demanded from them while the needs of the developing countries in general should be taken into account in determining the product coverage and tariff cuts under GSP schemes. Against this background, would the EC please explain the textual basis for its claim that paragraph 3(c) refers to "individual" needs?*
- Would the EC please indicate whether there is a principle of interpretation that would permit the Panel to ignore the decision of the drafters of the Enabling Clause to qualify the terms*

"development, financial and trade needs" with a reference to "individual" in paragraphs 5 and 6 but not in paragraph 3(c)?

45. Please see the EC's response to the Panel's Question to India No. 8.

Question 26

Paragraph 3(c) establishes an obligation ("shall"). If the interpretation of this provision advanced by the EC were correct, the developed countries would be under an obligation to differentiate between developing countries in accordance with their individual needs. However, in its first submission, the EC uses paragraph 3(c) as the contextual basis for its argument that it has the discretion to differentiate between developing countries with different needs. Against this background, India would like to ask the following questions:

- Does the EC agree that it has the obligation to differentiate between developing countries in accordance with their individual needs? If so, how can this position be reconciled with the fact that most of the tariff preferences accorded under GSP schemes (including those accorded by the EC under its general GSP arrangements for developing countries and its "Everything But Arms" arrangement for the least developed countries) do not distinguish between each of the beneficiary countries in accordance with their individual needs?*

46. Please see the response to the Panel's Question to both Parties No. 17.

47. India's description of the EC's GSP overlooks that, within each arrangement, the EC takes into account the individual needs of developing countries through the graduation mechanisms.

- How could the obligation set out in paragraph 3(c) be observed by a WTO Member that has decided to reduce its tariffs on products from all developing countries to zero? Would the obligation of that Member to "modify if necessary" its GSP to respond to individual countries' needs constitute in these circumstances an obligation to reintroduce tariffs on products from developing countries that have lesser needs? Would the EC's interpretation of paragraph 3(c) not imply that it would be illegal for a developed country to adopt the most constructive response to the developing countries' needs that can be conceived - the elimination of all duties on products from all developing countries?*

48. As a matter of fact, the EC does take into account the need to preserve the margins of preference for LDCs and for the countries covered by the Drug Arrangements when designing its GSP. Whether or not this is legally required under Paragraph 3(c) is an interesting theoretical question which is not before the Panel.

49. It should be noted, moreover, that even if a country applied a zero duty to all developing countries it could still take into account their different development needs through graduation mechanisms for sectors and countries such as those applied by the EC.

Question 27

Paragraph 3(c), just like paragraphs 5 and 6, uses the conjunctive "and" when referring to the development, financial and trade needs of developing countries. In the view of India, this implies an obligation to respond, both in GSP schemes and trade negotiations, to the development needs, the financial needs and the trade needs taken together. If the drafters had intended to establish an obligation to respond to specific needs of individual developing countries, they would have used the conjunctive "or". Against this background, would the EC please explain how its claim that paragraph 3(c) obliges developing countries to respond to specific drug-related needs can be reconciled with the requirement that this provision refers to development, financial and trade needs?

50. Please see the response to the Panel's question to both parties No 12.

Question 28

During the first meeting of the Panel, the representative of the EC stated that development, financial and trade needs were in fact the same because all these needs were economically interrelated. Would the EC please explain on the basis of which interpretative principle the Panel can assume that the references to "financial" needs and "trade" needs are redundant?

51. Please see the response to the Panel's question to both parties No. 12.

Question 29

India maintains that, in the legal framework of the GATT and the other WTO agreements, discrimination means denial of equal competitive opportunities to like products of different origins. India recognises that, outside of the legal framework of the WTO, other meanings have been attached to the term discrimination. Would the EC please explain whether in its view treaties other than the WTO agreements and jurisprudence and legal opinions unrelated to the world trade order can provide the Panel with contextual guidance to determine the meaning of the term "discrimination" in a legal instrument that is part of the GATT? As pointed out above, according to the Appellate Body, the duty of the interpreter is to examine the words of the treaty to determine the intention of the parties.³ On the basis of which interpretative principle could the Panel conclude that the drafters of the Enabling Clause meant to use a concept of discrimination foreign to the GATT?

52. Please see the response to the Panel's question to both parties No. 10.

Question 30

In its first submission, the EC claims that "non-discriminatory" does not necessarily mean formally equal treatment and concludes from this that the more favourable treatment of the beneficiary countries under its Drug Arrangements is not discrimination. In view of the fact that (a) it is not in dispute that the GATT provisions implementing the principle of discrimination do not all require formally equal treatment (cf. Articles I, XIII and XVII of the GATT) and (b) there is no provision in the GATT and other WTO agreements in which the denial of an effective equality of competitive opportunities is described as non-discriminatory, India would appreciate it if the EC were to explain further the concept of discrimination that it wishes the Panel to apply.

- *Is the EC of the opinion that, according to its concept of non-discrimination, any difference in the needs of individual developing countries justifies a more favourable tariff treatment of the countries facing those needs or would, in accordance with some generally applicable principle, the needs of the favoured developing countries have to rank higher than the needs of the countries to whom the tariff preferences are being denied?*

53. Please see the responses to India's questions Nos. 16, 17 and 18 above, and the response to the Panel's question to both parties No. 17.

- *If the latter, what principle would WTO panels have to apply when ranking the different needs of individual developing countries accorded different market access opportunities? For instance, on the basis of what principle would panels have to evaluate and compare the needs of developing countries with drug-related problems and the needs of developing countries facing starvation? Where would panels find a textual basis that could guide them on this*

³ Appellate Body Report, *India – Patents*, *Ibid*.

issue? If there is no such textual basis, would panels not have to resolve the intense distributional conflicts to which all trade discrimination gives rise in a complete normative void and hence turn into political bodies?

54. The EC would agree that its interpretation of the term "non-discriminatory" is more nuanced and, as a result, more difficult to apply by Panels than India's "one-size fits all" interpretation. But the EC's is not aware of any interpretative principle whereby easy-to-apply interpretations should be preferred only for that reason. The interpretation of the notion of discrimination made by the EC is in line with the interpretation routinely applied by many other international and municipal tribunals around the world dealing with a large variety of legal issues (including trade law). The EC does not believe that WTO Panels are less qualified than those tribunals. Nor does the EC believe that those tribunals have become political bodies as a result of applying that interpretation.

55. Furthermore, WTO panel are used to apply complex, relatively indeterminate legal standards. For example, this Panel must decide whether a measure is "necessary" to protect human life. There is no further "textual legal basis" in Article XX to guide the Panel on the issue of what is "necessary". Whatever guidance is available to this Panel has been handed over by previous panel and Appellate Body decisions. And yet both India and the EC agree that panels are qualified for deciding an issue of such importance and that by doing so they are not assuming a political role, but simply carrying out the often difficult task of applying the law to the facts of each case.

56. Finally, the EC would observe that India's own interpretation of Paragraph 3(c) would require Panels to make even more difficult judgements. Indeed, on India's interpretation of that provision, a panel would have to decide issues such as whether the depth of a tariff cut is sufficiently "responsive" to the needs of developing countries. (See EC's Response to Panel's Question No. 8 to India.) There is no "textual basis" in Article 3(c) to decide those issues. Yet India seems totally unconcerned by the obvious difficulty of the task, or by the risk that in deciding by how much a developed country should cut its tariffs a Panel may be assuming a political role.

- *At the first meeting, the EC stated that the freedom of GSP donor countries to establish criteria for the grant of supplementary GSP preferences, such as those accorded under the Drug Arrangements, was curtailed by the requirement that GSP preferences be "generalised". India's understanding of the drafting history is that the term "generalised" was meant to refer to the range of countries that would accord and receive preferences but not to the degree of differentiation between the countries that the donor countries selected as beneficiaries. In view of the fact that the countries that are denied the benefits accorded under the Drug Arrangements are not excluded from the EC scheme, the question of whether the EC's GSP scheme is sufficiently "generalised" does not arise in the case before the Panel. Could the EC point to any drafting history that shows that the term "generalised" was meant to establish a standard for differentiation between countries that donor countries have already selected as beneficiaries?*

57. Please see the EC's response to the Panel's question to both parties No. 11.

Question 31

The principal function of the GATT, as its preamble makes clear, is to provide a legal framework for the exchange of market access concessions. Article I of the GATT is the cornerstone of this framework because it ensures that two Members can exchange tariff concessions without having to fear that preferential treatment subsequently accorded to third countries effectively eliminates the negotiated competitive opportunities, except when a provision of the GATT states otherwise or, put differently, except when Members have explicitly agreed otherwise. The developing countries compete mainly with other developing countries in the markets of the GSP donor countries. If the EC's interpretation of the Enabling Clause were endorsed, the developing countries would therefore always have to fear

that the market access commitments that they negotiate with GSP donor countries will become commercially valueless because of the subsequent more favourable treatment of other developing countries under their GSP. Against this background, India would like to ask the following questions:

- *Suppose India wanted to negotiate with the EC a reduction of the import tariff for T-shirts from 12 % to 6 % ad valorem. What incentive would India have to exchange such a concession in the framework of the GATT if the EC were given the right to reduce the tariff charged on T-shirts originating in Pakistan to zero merely because it determines in accordance with its own criteria that the needs of Pakistan and India are different from each other and that Pakistan's needs rank higher than those of India?*

58. The EC considers that the requirements imposed by the Enabling Clause, and in particular by footnote 3, as interpreted by the EC, would provide a sufficient guarantee to India.

- *Would the EC please explain how it could effectively negotiate market access concessions with the developing countries during the Doha Round if the Panel were to endorse its interpretation of the Enabling Clause?*

59. The Drug Arrangements have been in place since 1990. They did not prevent the EC from negotiating successfully tariff concessions during the Uruguay Round.

- *Given that the EC's ability to negotiate concessions with the developing countries would be seriously impaired if its interpretation of the Enabling Clause were adopted, would the EC please explain on the basis of which considerations the EC and its Member States concluded that it would be in their interest to seek an endorsement of the Drug Arrangements under the Enabling Clause rather than to negotiate a waiver with terms and conditions acceptable to the WTO Members adversely affected by the Drug Arrangements?*

60. The EC thanks India for its concerns about the EC's interests. The internal considerations which have led the EC to take the positions expressed before the Panel are not relevant for the adjudication of the legal issues in dispute. Likewise, the internal considerations which have led India to express views that undermine the principle of special and differential treatment, contradict India's negotiating positions, endanger the viability of the most important and generous GSPs, of which India is one of the largest beneficiaries, and call into question India's standing and credibility among the developing country Members of the WTO which it aspires to lead, are also not relevant for the adjudication of the legal issues in dispute.

Question 32

According to the EC's interpretation of Article XX(b) of the GATT, WTO Members may accord preferential tariff treatment to selected WTO Members if this makes a "necessary contribution" to the resolution of a health problem. The EC argues that the margins of preference enjoyed by the beneficiary countries under the Drug Arrangements are "necessary" within the meaning of Article XX(b) because they make such a contribution. The logical implication of the EC's argument therefore is that the EC would not be under an obligation to implement the market access concessions negotiated in the Doha Round if the beneficiary countries' drug problems were to continue beyond the conclusion of that Round. Against this background, would the EC please explain:

- *How could the EC effectively negotiate market access concessions with other Members in the framework of the GATT and, more generally, how could the GATT still serve as a legal framework for market access concessions if the Panel were to endorse the EC's interpretation of Article XX(b)?*

61. When negotiating tariff concessions the EC takes into account, among other considerations, the need to maintain appropriate margins of preference under the GSP Regulation.

62. The EC does not agree with the "logical implication" drawn by India. It is never "necessary" for a Member to breach a tariff binding because it is within its disposition to undo the binding in accordance with Article XXVIII of the GATT. In contrast, a Member has no right to a waiver, which is within the complete discretion of the Ministerial Conference.

- *Given the systemic implications that the acceptance of the EC's claims under Article XX(b) would have, what were the considerations that led the EC and its Member States to conclude that the invocation of Article XX(b) to defend the Drug Arrangements is to their advantage?*

63. See above India's response to Question 31.

- *Would the EC consider withdrawing its invocation of Article XX (b)?*

64. No.

Question 33

The EC claims that the Enabling Clause is not an affirmative defence and that India bears the burden of establishing that the Drug Arrangements are not justified under the Enabling Clause.

In the course of the consultations relating to this dispute, when asked for the justification of the exclusion of all other Members from the tariff preferences granted to the twelve beneficiaries, the EC did not give any reply except to say that the dispute settlement proceedings are there precisely to settle the issue.

In the course of the hearings held on 14-16 May 2003, the EC claimed that at all times, it has always been the position of the EC that the Drug Arrangements are justified under the Enabling Clause.

In the Minutes of the Meeting of the Council for Trade in Goods held on 2 November 2001 (G/C/M/55 dated 19 November 2001), the representative of Sri Lanka "requested the EC to clarify why this arrangement was notified under Article I of the GATT", in light of the fact that "changes to GSP should be notified under the Enabling Clause" (paragraph 2.5). In his response, the representative of the EC said that on "why the European Communities had not used the Enabling Clause, he had certain doubts as to the possibility of using it as a legal basis and this is why the European Communities had made a request for a waiver under Article I" (paragraph 2.14).

Could the EC clarify the apparent inconsistency between its assertion at the hearings held on 14-16 May 2003 (that it has always been of the position that the Drug Arrangements are justified under the Enabling Clause), on the one hand, and (i) its failure to assert such position in the course of the consultations and (ii) the "certain doubts as to the possibility" of using the Enabling Clause "as a legal basis" which it expressed at the meeting of the Council for Trade in Goods on 2 November 2001?

65. India's allegations that the EC did not invoke the Enabling Clause during the consultations are not true.

66. As shown by the minutes of the meeting drawn by the EC Commission (Exhibit EC-19), the EC representatives explained repeatedly during the consultations that the EC considered that the Drug Arrangements were covered by the Enabling Clause.

67. Specifically, in response to India's question "Are the Special arrangements for combating drug production and trafficking in the view of the EC consistent with WTO law", the unequivocal answer of the EC was:

"Yes they are fully compatible with the enabling clause. If India believes otherwise, it can have recourse to the appropriate mechanism of the DSU."

68. India misleadingly persists on citing only the last part of the EC's response.

Has the EC notified the Drug Arrangements pursuant to paragraph 4 of the Enabling Clause? If so, when? Which WTO document indicates that it has done so?

69. The Drug Arrangements were introduced by Council Regulation (EC) 3835/90. That regulation was notified to the WTO under the Enabling Clause on 2 May 1991. Subsequently, the Drug Arrangements have been notified as part of the successive EC's GSP Regulations in which they were included. The EC is providing copies of the notifications as Exhibit EC – 20.

The WTO-consistency of the Enabling Clause had earlier been raised in the WTO and in the consultations in this dispute. The EC publicly asserted the defence of justification under the Enabling Clause for the first time only in its own First Submission. In the EC's view, given the circumstances, how could India or any other complainant similarly-situated have anticipated the EC's reliance on the Enabling Clause?

70. India could have anticipated, and indeed did anticipate, that the EC would rely on the Enabling Clause:

- the Drug Arrangements are tariff preferences granted by a developed country to developing countries and, therefore, fall *prima facie* within the scope of Paragraphs 1 and 2 (a) of the Enabling Clause;
- the Drug Arrangements have always been included in the EC's GSP Regulation;
- the Drug Arrangements have been notified under the Enabling Clause as part of the EC's GSP system;
- the EC explained during the consultations that it considered that the Drug Arrangements were covered by the Enabling Clause.

71. In any event, whether or not India could have anticipated that the EC would invoke the Enabling Clause is irrelevant. As explained in the response to Question 1, the complaining party always bears the burden to prove that the disputed measure falls within the scope of the provision which it invokes, rather than within the scope of another, mutually exclusive provision.

This is a dispute under Article I of the GATT initiated by a developing country Member against a developed country Member involving tariff preferences which the latter grants to developing countries to the exclusion of all other Members. Is the EC of the view that, under the circumstances, a claim under Article I of the GATT could only succeed if the complainant likewise establishes that the discriminatory tariff preferences are not justified under the Enabling Clause?

72. Yes. See the response to India's Question No 1.

ANNEX B-4

Replies of India to Questions from the Panel after the Second Panel Meeting

To both Parties

Legal Function

29. What is the difference between the Enabling Clause and the 1971 Waiver Decision? What did the Enabling Clause add to the 1971 Waiver Decision?

Reply

In establishing the differences between the Enabling Clause and the 1971 Waiver Decision, it would be appropriate to start with a discussion on their *material* similarities. These are:

- Both permit developed country Members to grant preferential tariff treatment to products originating in developing countries in accordance with the Generalized System of Preferences ("GSP") without according the same treatment to products originating in other Members, notwithstanding Article I of the GATT.
- The GSP referred to in the Enabling Clause is the same GSP referred to in the 1971 Waiver Decision which, in turn, is the same GSP referred to in the mutually acceptable arrangements that had been drawn up in the UNCTAD.

Paragraph 2(a) of the Enabling Clause refers to "preferential tariff treatment accorded by developed [country Members] to products originating in developing countries in accordance with the Generalized System of Preferences".

Footnote 3 to paragraph 2(a) refers to the GSP as that which is "... described in the [1971 Waiver Decision] relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries".

Paragraph (a) of the 1971 Waiver Decision refers to "the preferential tariff treatment referred to in the Preamble to this Decision ..."

The relevant provision of the Preamble of the 1971 Waiver Decision refers 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 *material* differences are as follows:

- The 1971 Waiver Decision was applicable for a limited ten-year period. The Enabling Clause has an indefinite period.
- The Enabling Clause likewise permits the acts referred to in paragraphs 2(b), 2(c), and 2(d), all of which were not covered by the 1971 Waiver Decision.

There are *other* differences, among which are the texts of paragraphs 3(c), 5, 6, 7 and 8, all of which were not contained in the 1971 Waiver Decision.

30. *Are there any options other than construing the Enabling Clause as either an autonomous right or as an exception?*

Reply

The facts upon which India relies in support of its claim under Article I:1 of the GATT are not in dispute. Under the Drug Arrangements, the EC grants tariff advantages to products originating in the twelve beneficiaries without according the same treatment to like products originating in all other Members. This fact is not disputed.

In its defence, the EC claims that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause because the term "non-discriminatory" permits developed country Members to differentiate between developing countries in the context of the GSP. This is a legal argument. The defence of the EC could therefore be resolved relying on the same undisputed facts upon which India relies for India's claim under Article I:1 of the GATT.

To the extent that the characterization of the Enabling Clause – whether as an autonomous right or an exception – is linked with burden of proof, the Panel therefore need not delve into the issue of characterization in order to resolve this dispute. The facts are undisputed.

In respect of the EC's legal argument, the Appellate Body has decided that the principles of *interpretation* that apply do not differ depending on the characterization of the provision at issue.¹

Paragraph 1 and the introductory phrase of paragraph 2 of the Enabling Clause make clear that the legal function of paragraph 2(a) of the Enabling Clause is to permit preferential tariff treatment that would otherwise have been prohibited by Article I:1 of the GATT if paragraph 2(a) did not exist. The question of whether the Drug Arrangements are covered by paragraph 2(a) of the Enabling Clause consequently has to be answered by examining whether the terms of this provision, interpreted in the context in which they appear and in the light of the object and purpose of the GATT, justify the conclusion that by agreeing to paragraph 2(a), the developing countries waived their right to most-favoured-nation ("MFN") treatment under Article I:1 of the GATT. This interpretative issue does not present itself differently depending on whether paragraph 2(a) is regarded as an autonomous right or an exception.

31. *In light of the fact that the Enabling Clause was part of a treaty negotiation, did the developing countries "pay" for it?*

Reply

The Tokyo Round negotiations were conducted in accordance with the principle of individually graduated non-reciprocity set out in Article XXXVI:8 of the GATT and the interpretative note thereto (the same principle that is set out in paragraph 5 of the Enabling Clause). The developing countries were therefore expected to make concessions in return for market access opportunities they

¹ " ... merely characterizing a treaty provision as an exception does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in light of the treaty's object and purpose or, in other words, by applying the normal rules of treaty interpretation." Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ("EC – Hormones"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 104.

obtained. However, in determining the level of these concessions, their individual development needs were taken into account.

32. *What are relevant criteria to determining whether a provision can be characterized as an affirmative defence?*

Reply

"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 Based on this definition, the following are the relevant criteria in determining whether a provision can be characterized as an affirmative defence:

- It is an *assertion* by a defendant
- The assertion raises *new facts and arguments*.
- If those new facts or arguments are true, the *plaintiff's or prosecution's claim will be defeated*, even if all allegations in the complaint are true.

Applying the foregoing criteria to this dispute, India claims that the Drug Arrangements are inconsistent with Article I:1 of the GATT 1994 because under those arrangements, the EC grants tariff preferences to products originating in the twelve developing country beneficiaries, and the EC does not accord the same treatment immediately and unconditionally to products originating in all other Members.

The EC claims that the Drug Arrangements are justified under Paragraph 2(a) of the Enabling Clause. Paragraph 2(a) of the Enabling Clause is thus an affirmative defence:

- The defence of justification under Paragraph 2(a) of the Enabling Clause is an assertion by the EC which is material to the EC's defence, and not to India's claim.
- The EC's assertion raises new facts and arguments in relation to the facts and arguments raised by India in support of India's claim under Article I:1 of the GATT 1994). Thus, the EC asserts that the Drug Arrangements are covered by paragraph 2 (a) of the Enabling Clause and are therefore justified under the Enabling Clause.
- Should the Panel find the EC's assertion to be true, India's claim under Article I:1 of the GATT 1994 would be defeated, even if all the allegations of India in support of that claim are true.

As an affirmative defence, the Enabling Clause is similar to Articles XX and XXIV of the GATT 1994. Thus, for a example, a claim under Article I:1 or any other provision of the GATT 1994 would be defeated if the defendant were able to establish that the measure at issue is justified under Article XX; similarly, a claim under any relevant provision of the GATT 1994 would be defeated if the defendant were able to establish that the failure to adopt the measure at issue would have prevented the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or a free-trade area.

² *Black's Law Dictionary*, 7th ed., B.A. Garner (ed.) (West Group, 1999), p.430.

Non-discriminatory

33. *The EC has stated in response to Panel Question 12 to both Parties that, for a measure under the Enabling Clause to be "non-discriminatory", the aim must be legitimate and the means used to achieve the legitimate aim must be reasonable. In this context, how should one determine whether or not a measure to achieve a legitimate aim is reasonable, both in general and specifically with respect to the Drug Arrangements?*

Reply

India is not aware of any generally accepted standard or generally applicable rule that could give the Panel normative guidance on this point. In the view of India, the interpretation of "non-discriminatory" advanced by the EC would effectively create a normative void and deprive panels of the opportunity to adequately review measures discriminating between developing countries.

India's interpretation of the term "non-discriminatory" would not prevent trade measures responding to special needs of particular developing countries. WTO law provides for special treatment, among others, of the least developed countries, ACP countries and countries with economies in transition, and waivers have been granted to permit preferences to countries with drug problems. Indeed, footnote 2 to the Enabling Clause itself provides that "it would remain open for [Members] to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of [paragraph 2 of the Enabling Clause]". This footnote confirms that the issue question of whether further preferences should be permitted is a question for the Ministerial Conference and not for individual Members or Panels.³

The only consequence of the ruling requested by India would be that the right to determine which needs deserve special treatment would remain with the membership of the WTO, and not be conferred upon individual preference-giving donors pursuing their own interests. India therefore urges the Panel to leave the issue be resolved by the Ministerial Conference, which is the organ of the WTO competent to decide on whether trade preferences are reasonable means to achieve a legitimate goal.

34. *Is the term "non-discriminatory" in footnote 3 a provision aimed at preventing abuse of GSP? If so, in what way does this contribute to the correct interpretation of the term "non-discriminatory"?*

Reply

It is not clear that characterizing the term "non-discriminatory" in footnote 3 as a provision aimed at preventing abuse would alter the interpretative approach to be applied. The term still has to be interpreted in accordance with its ordinary meaning, viewed in context and in light of the treaty's object and purpose or, in other words, by applying the normal rules of treaty interpretation.

India notes that the requirement of "non-discriminatory" considerably reduces the scope for developed countries to abuse GSP schemes in order to pursue their own foreign policy goals. However, in India's view the requirement of "non-discriminatory" is something more than just preventing abuse of GSP schemes; rather, it is a fundamental requirement that defines the nature of the GSP itself and which was meant to preserve the MFN rights of developing countries and eliminate the differentiation between developing countries in the context of pre-existing special preference schemes available only to certain developing countries.

³ For example the waiver granted for the United States – Andean Preference Act was granted pursuant to footnote 2 to the Enabling Clause, in relation to Article XXV of the GATT. See *Request for a Waiver, United States – Andean Trade Preference Act* (L/6980 dated 18 February 1982) p.1.

35. *Noting that the Enabling Clause refers to GSP in footnote 3 "[a]s described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of 'generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries'", does the wording of the footnote incorporate the 1971 Waiver Decision as a whole (other than the temporal limitation), including the Agreed Conclusions? If not, why not?*

Reply

Footnote 3 describes the GSP referred to in paragraph 2(a). Footnote 3 refers to the Generalized System of Preferences ("GSP") as that which is "... described in the [1971 Waiver Decision] relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries". The Enabling Clause therefore incorporates the *description* of the GSP as set forth in the 1971 Waiver Decision.

Paragraph (a) of the 1971 Waiver Decision, refers to "the preferential tariff treatment referred to in the Preamble to this Decision ...". The relevant provision of the Preamble of the 1971 Waiver Decision refers 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... "

Thus, the 1971 Waiver Decision does not itself expressly describe the GSP. It refers to the GSP described in the mutually acceptable arrangements that had been drawn up at the UNCTAD. Those arrangements are in the Agreed Conclusions. What is therefore incorporated in the Enabling Clause is the *description* of the GSP in the Agreed Conclusions.

36. *In respect of GSP, should the context of the Agreed Conclusions be used any differently in interpreting the Enabling Clause than in interpreting the 1971 Waiver Decision? If so, why? Please elaborate.*

Reply

In respect of the GSP, the context of the Agreed Conclusions cannot be used differently in interpreting the Enabling Clause and the 1971 Waiver Decision, respectively. Please see India's response to Panel Question 29 to both parties.

37. *Assuming that different treatment is not necessarily discriminatory treatment and is permitted by the term "non-discriminatory" under the Enabling Clause, what then is not permitted by this term? Where do we draw the line?*

Reply

The text of the Enabling Clause does not provide any guidance as to what types of differentiation between developing countries are permissible, except to the extent that paragraph 2(d) permits special treatment to least developed countries. Thus, Members did not draw the line between what is permissible and what is not. The existence of such line is premised on the notion that different treatment is not necessarily discriminatory treatment. That the Members did not draw the line argues against the validity of the premise.

India also notes that *if* the EC's interpretation of "non-discrimination" were to be validated by the Panel,⁴ then a legal standard must also have been established to determine when *identical*

⁴ According to the EC equal treatment of unequals is also prohibited by the term "non-discriminatory". EC, *First Written Submission* ("FWS"), para. 65, 69, footnote 52.

treatment of developing countries is impermissible. On this matter, the Enabling Clause is equally silent.

The EC proposes varying formulations of the test to be applied in determining whether identical or differential treatment between developing countries is impermissible. However, all of these formulations find no basis in the text of the Enabling Clause.

For these reasons India can only confess to its inability to "draw the line" on the basis of the text of the Enabling Clause.

38. *Taking account of the contents of footnote 3, please indicate what changes – if any – the Enabling Clause made to the pre-existing GSP regime.*

Reply

Taking into account the contents of footnote 3, the Enabling Clause did not introduce any change to the pre-existing GSP regime. (Please see India's response to Panel Question 29 to both parties.)

39. *Did Centrally Planned Economies that were GATT contracting parties participate in the negotiations of GSP? Did the Enabling Clause affect their rights and obligations under GATT Article I:1? If so, how were they affected?*

Reply

Paragraphs 60-64 of Part Two of the Agreed Conclusions under the heading "Socialist Countries of Eastern Europe" indicates that interventions were made at least by (i) Bulgaria, speaking on its own behalf and on behalf of (then) Czechoslovakia, Hungary, Poland, and the (then) Union of Soviet Socialist Republics (ii) Romania, and (iii) Poland, speaking on its own behalf. The Agreed Conclusions were adopted in the course of the Second Part of the Fourth Session of the UNCTAD Special Committee on Preferences held on 21 September – 12 October 1970. As of that period, of these countries, only Czechoslovakia (original GATT Contracting Party) and Poland (as of 18 October 1967) were GATT Contracting Parties. (In addition to Czechoslovakia and Poland, (then) Yugoslavia was likewise a GATT Contracting Party (as of 25 August 1966).

To the extent that a country falling within the category of "Centrally Planned Economies" was a *beneficiary* under the GSP, the GSP under the 1971 Waiver Decision and the Enabling Clause did not affect its rights and obligations under Article I:1 of the GATT because it retained its MFN rights in full (except in respect of special preferences for the benefit of the least-developed countries under paragraph 2(d) of the Enabling Clause).

To the extent that a country falling within the category of "Centrally Planned Economies" was a *donor* under the GSP, the GSP under the 1971 Waiver Decision and the Enabling Clause affected its rights under the Article I:1 of the GATT because it effectively waived its right to MFN treatment vis-à-vis benefits accorded to other developing countries.

40. *Please indicate any preferential tariff preference granted at any time by individual GATT contracting parties or WTO Members to limited groups of developing countries which have been notified under paragraph 4(a) of the Enabling Clause and whether they were the object of the granting a waiver under GATT Article XXV.*

Reply

India has been unable to obtain a complete listing of preferential tariff schemes notified under the Enabling Clause. In this regard a WTO Secretariat document on GSP schemes has noted that "the difficulties in the preparation of this document from WTO source material suggests that there is a need for improvements in notifications and in statistical reporting."⁵

Nonetheless, an examination of the waiver practice indicates that there has been a consistent trend of obtaining a waiver for preferential tariff treatment accorded to a limited group of developing countries, even where the justification for the differentiation in treatment is the differing development needs of the favoured countries.

Based on information presently available to India, the following are the waivers that have been granted for preferential tariff treatment that apply to a limited group of developing countries:

1. United States Caribbean Basin Economic Recovery Act waiver adopted 15 February 1985 (L/5579, BISD 31S/20) (renewed 15 November 1995 [WT/L/104])
 - The United States waiver request specifically indicates that the Caribbean Basin Economic Recovery Act is intended to help the Caribbean countries to resolve special development problems.⁶ It also states that this measure is not covered under any of the sub-paragraphs of the Enabling Clause.⁷
2. Canada CARIBCAN waiver adopted 26 November 1986 (L/6102, SR42/4) (renewed 14 October 1996 [WT/L/185])
3. United States Andean Trade Preference Act waiver adopted 19 May 1992 (L/6991) (renewed 14 October 1996 [WT/L/183 and WT/L/184])
 - The United States waiver request refers to the economic difficulties faced by the beneficiary countries on account of drug production and trafficking.⁸ It

⁵ Note by the Secretariat, The Generalised System of Preferences: A preliminary analysis of GSP schemes in the Quad (WT/COMTD/W/93 dated 5 October 2001) para. 90.

⁶ *Caribbean Basin Economic Recovery Act, United States request for a waiver* (L/5573 dated 1 November 1983) p. 2 ("The Caribbean Basin Initiative is a development program, which seeks to use trade, tax and assistance measures to facilitate the revitalization of economies of the Caribbean Basin. The small and fragile economies of this region have been seriously affected by escalating costs of imported oil, declining prices for their major exports (sugar, coffee etc.) and a shrinking of export markets due to world-wide recession and a decline in tourism. The measures are designed to help the Caribbean nations to solve these problems by encouraging the expansion of productive capacity in response to the opening of new markets for Caribbean exports as well as to assist the service sectors of their economies, especially tourism").

⁷ *Ibid*, ("The duty-free provision of the CBI do not fall specifically within any of the categories of programs authorized in sections (a) through (d) of paragraph 2 of the Framework Agreement").

⁸ *United States, Andean Trade Preference Act, Request for a Waiver* (L/6980 dated 31 January 1992), p.3 ("The tariff preference in the ATPA is an essential part of the Andean Trade Initiative, which is designed to respond to the serious economic difficulties facing the Andean nations as a result of the scourge of drug production. The ATPA augments the benefits provided to the region under the GSP, as well as efforts of other nations to promote trade and economic development in the region").

also states that the Andean Trade Preference Act is not covered under any of the sub-paragraphs of the Enabling Clause.⁹

4. European Communities Fourth ACP-EEC Convention of Lomé waiver adopted 9 December 1994 (L/7604) (renewed 14 October 1996 [WT/L/186 and WT/L/187])
5. European Communities – The ACP-EC Partnership Agreement waiver adopted 14 November 2001 (WT/MIN [01]/15).

41. *Under the initial application of the 1971 Waiver Decision, did any contracting party granting preferences to developing countries exclude any developing country or countries from its GSP?*

Reply

India has only been able to obtain details of the initial schemes applied by Canada,¹⁰ the EC,¹¹ Japan¹² and the United States¹³ on the basis of the notifications of these countries to the GATT.

India notes that in all these initial schemes, there was no differentiation between countries recognized to be beneficiaries on the ground that they had differing development needs.

On the distinct issue of which countries were recognized as beneficiaries, Japan and the United States had provisions permitting exclusion of certain developing countries. For instance, the United States excluded all member countries of the Organization of Petroleum Exporting Countries¹⁴ and Japan provided for the future exclusion of all developing countries which invoked Article XXV of the GATT against Japan or which discriminated in trade or tariffs against Japan.¹⁵ These exclusions however are based on the purported power of developed countries to exclude certain developing countries *ab initio* from beneficiary status for compelling reasons, which is not at issue in this dispute. These exclusions are not related to the issue of the purported power of developed countries to differentiate between developing countries recognized as beneficiaries on the basis of their particular development needs.

42. *What elements of Article I:1 of GATT 1994 do not apply under paragraph 2(a) GSP schemes covered by the Enabling Clause? For example, do commitments regarding charges imposed in the international transfers of payments for imports and exports, or rules and formalities in connection with importation and exportation, change in any way when trade under GSP takes place, or do they retain their validity, as set out in Article I:1?*

Reply

Without the Enabling Clause, Article I:1 of the GATT 1994 applies in its totality. The MFN obligation under Article I:1 of the GATT 1994 applies to:

⁹ *Ibid*, p.2 ("The tariff preference provisions of the ATPA do not fall specifically within any of the categories of programs authorized in sections (a) through (d) of paragraph 2 of the Framework Agreement").

¹⁰ Generalized System of Preferences-Notification by Canada (L/4027 dated 14 May 1974).

¹¹ Generalized System of Preferences-Notification by the European Communities (L/3550 dated 16 July 1971).

¹² Generalized System of Preferences-Notification by Japan (L/3559 dated 20 August, 1971).

¹³ Generalized System of Preferences-Notification by the United States (L/4299 dated 13 February 1976).

¹⁴ *Ibid*, p.3.

¹⁵ Generalized System of Preferences-Notification by Japan (L/3559 dated 20 August, 1971) p.3.

- "customs duties or charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports",
- "the method of levying such duties and charges,
- "all rules and formalities in connection with importation or exportation", and
- "all matters referred to in paragraphs 2 and 4 of Article III ...".

Paragraph 2(a) of the Enabling Clause refers solely to "preferential tariff treatment accorded by developed [country Members] to products originating in developing countries in accordance with the [GSP]". Thus the only element of Article I:1 of the GATT 1994 which does not apply, pursuant to paragraph 2(a) of the Enabling Clause, is preferential *tariff treatment* accorded by developed country Members to products originating in developing countries (*imports* from developing countries) in accordance with the GSP. Thus, all of the other elements of Article I:1 of the GATT 1994 which define its scope still apply. In respect of developed country Members, notwithstanding paragraph 2(a) of the Enabling Clause, the MFN obligation under Article I:1 of the GATT 1994 thus still applies with respect to:

- customs duties or charges of any kind imposed on or in connection with (i) importation *not* in accordance with the GSP, (ii) exportation, or (iii) imposed on the international transfer of payments for imports or exports,
- the method of levying such duties and charges,
- all rules and formalities in connection with importation or exportation, and
- all matters referred to in paragraphs 2 and 4 of Article III of the GATT 1994.

43. *Please give your full interpretation of the term "non-discriminatory" in footnote 3.*

Reply

The Preamble to the WTO Agreement provides, among others:

"Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of **discriminatory** treatment in international relations," (emphasis supplied)

The foregoing is a virtual reproduction of the relevant portion of the Preamble to the GATT. Discriminatory treatment in international relations as a means to attain the objectives of the WTO Agreement is implemented through among others, the MFN principle under Article I:1 of the GATT. "Non-discriminatory" must therefore be construed in accordance with the standard established under that article – immediate and unconditional MFN treatment of like products originating in all Members.

The Enabling Clause permits certain acts which Article I of the GATT 1994 otherwise prohibits. The interpretation of the Enabling Clause or any provision thereof cannot therefore be made in isolation from Article I of the GATT 1994.

The Drug Arrangements are inconsistent with the Enabling Clause because under those arrangements, the EC grants tariff preferences to products originating in the twelve developing country beneficiaries without according the same treatment immediately and unconditionally to products originating in other Members.

Paragraph 2(a) of the Enabling Clause permits developed country Members to grant preferential tariff treatment to products originating in developing countries without according the same treatment to products originating in all other Members in the context of the GSP. As India has pointed out, to enable developed country Members to grant preferential tariff treatment to products originating in developing countries, it is not necessary for those developed country Members to be permitted to treat like products originating in developing countries differently.¹⁶ Thus, developing countries retain their MFN rights as between themselves.

The term "non-discriminatory" in footnote 3 does not contradict the retention of MFN rights by developing country Members. On the contrary, it reinforces that retention.

The GSP deals with preferential tariff treatment. The ordinary meaning of "discriminatory tariff" is "a tariff containing duties that are applied unequally to different countries or manufacturers."¹⁷ The ordinary meaning of "non-discriminatory tariff" in the context of the Enabling Clause is therefore a tariff containing duties that are applied equally to different developing countries.

The EC attempts to impute a meaning to the term "non-discriminatory" which is inconsistent with the MFN rights of developing country Members. In support of its contention, the EC relies on the argument that, otherwise, the term "non-discriminatory" in footnote 3 would be redundant.

It must be recalled that the GSP was formulated at the UNCTAD, and that the 1971 Waiver Decision and the Enabling Clause were adopted at the GATT – two separate organisations. The term "non-discriminatory" was first used at the UNCTAD to describe the GSP in the mutually acceptable arrangements that were drawn up therein. That description of the GSP was incorporated into the 1971 Waiver Decision, and subsequently into the Enabling Clause. The term "non-discriminatory" in footnote 3 is therefore not redundant because it merely describes the norm applicable to the GSP as it was originally formulated. Had the term "non-discriminatory" been omitted in footnote 3, that footnote would have described the GSP inaccurately.

Paragraph 3(c)

44. *Is it your understanding that the Agreed Conclusions (TD/B/330) were agreed to by consensus in UNCTAD? If so, do you consider that they are part of the context of the 1971 Waiver Decision, within the meaning of Article 31.2(a) of the Vienna Convention? Are they also part of the context of the Enabling Clause, by virtue of its footnote 3? If not, are they part of the preparatory work of the 1971 Waiver Decision and of the Enabling Clause? Please elaborate.*

Reply

It is India's understanding that the Agreed Conclusions were agreed to by consensus in UNCTAD. As stated above, the Enabling Clause incorporates the description of the GSP in the 1971 Waiver Decision, which in turn refers to the mutually acceptable arrangements drawn up at the UNCTAD. (Please see India's response to Panel Question 29 to both parties.). That description refers to the GSP as " ... non-discriminatory ...". The term "non-discriminatory" and the Agreed Conclusions, incorporated in the Enabling Clause through the 1971 Waiver Decision, are therefore part of the "terms" of the Enabling Clause in the context of Article 31.1 of the Vienna Convention and

¹⁶ India, Second Written Submission, para. 67-68.

¹⁷ Black's Law Dictionary, *supra* note 2, p. 1468.

must therefore be interpreted "in good faith in accordance with [their] ordinary meaning ... in their context and in the light of [the] object and purpose" of the GATT 1994.

45. *In light of Articles 31 and 32 of the Vienna Convention, are the Agreed Conclusions context, object and purpose, preparatory work or something else?*

Reply

Please see India's response to Panel Question 44 to both parties.

46. *Do you consider that the developing countries agreed in the Agreed Conclusions or in the 1971 Waiver Decision that GSP schemes could contain as little as a single product? If so, please provide documentary support for this contention. If not, what in the Agreed Conclusions prevent this?*

Reply

There is no specific provision in the Agreed Conclusions or in the 1971 Waiver Decision indicating that the developing countries agreed that GSP schemes could contain as little as a single product. Portions of the Agreed Conclusions do have a bearing on the expectations as to product coverage, including:

- The reference in paragraph 1 of Part One I to Resolution 21 (II) of the UNCTAD calling for the early establishment of GSP preferences "which would be beneficial to the developing countries";
- The reference in paragraph 2 of Part One II to the agreement that the objectives of the GSP, in relation to the developing countries, are: "(a) to increase their export earnings; (b) to promote their industrialization; and (c) to accelerate their rates of economic growth."

The foregoing indicate the expectations of the Members of the UNCTAD, including the developing countries, as to product coverage. The more products covered by the GSP the more that the GSP would be "beneficial to the developing countries" and the more that it could promote the attainment of the specified objectives.

47. *Please give your full interpretation of paragraph 3(c).*

Reply

Paragraph 3(c) has been invoked by the EC in support for the interpretation of the term "non-discriminatory" as permitting differentiation between developing countries. India contends that that the EC wrongly interprets paragraph 3(c) and that the paragraph 3(c), properly understood, does not support the EC's interpretation of "non-discriminatory".

Paragraph 3(c) is a requirement applied to all measures taken by developed countries to favour developing countries under the Enabling Clause. As such it applies to preferential tariff treatment, differential and more favourable treatment in the context of non-tariff barriers, differential and more favourable treatment in the context of negotiations and any further types of measures for differential and more favourable treatment that may be authorized under joint action taken under footnote 2 of the Enabling Clause.

Paragraph 3(c) requires that measures taken under the Enabling Clause respond positively to the development, financial and trade needs of developing countries.

- This requires that measures taken under the Enabling Clause respond to the needs of developing countries and not the developed countries.
- This requires that measures taken under the Enabling Clause must respond to "development, financial and trade" needs of developing countries.
- This requires that the measures respond to the development, financial and trade needs of developing countries considered as a whole and not individually or in terms of sub-groups. Where the drafters of the Enabling Clause referred to the needs of individual developing countries or sub-groups of developing countries, they did so expressly – as in paragraph 5 ("their individual development, financial and trade needs") and paragraph 6 ("their particular situation or problems").

As applied to the context of preferential tariff treatment taken under paragraph 2(a), the primary function of paragraph 3(c) is to ensure that the product range and depth of tariff cuts in GSP schemes are of a nature and magnitude that respond to the development, financial and trade needs of developing countries as a whole.

Paragraph 2(a)

48. *What was your position on the meaning of GSP during the negotiation in the late 1960s? Did this position change over time, through to the Enabling Clause in 1979? Please provide documentary evidence in support of your answer.*

Reply

In connection with the adoption of the Agreed Conclusions, India delivered a statement on behalf of the Group of 77, which states: "No developing country member of this Group should be excluded from the [GSP] at the outset or during the period of the system."¹⁸ India held the view then that no developing country should be excluded from the GSP.

At the GATT Council meeting where the 1971 Waiver Decision was adopted, India emphasized that the arrangements drawn up in the UNCTAD must be adhered to and cannot be re-opened.¹⁹

At the GATT Council meeting where the exclusion of Chile from the United States GSP scheme was discussed, and India's position was expressed in the Minutes as follows:

"The representative of India said in his delegation's view, the application of unilateral and subjective criteria for preference schemes such as GSP could only be a matter of grave concern to all contracting parties. India would follow developments in this matter with great interest."²⁰

India has also consistently raised concerns about GSP schemes which violate the requirements of paragraph 2(a) in the context of trade policy reviews.²¹

¹⁸ UNCTAD, Annex 1 to the Report of the Trade and Development Board on its Fourth Special Session, TD/B/330, 14 October 1970, p. 8-9.

¹⁹ Minutes of Meeting held on 25 May 1971 (C/M/69 dated 28 May 1971) pp. 14-15.

²⁰ Minutes of Meeting held on 2 February 1988 (C/M/217 dated 8 March 1988) p. 7.

²¹ See e.g., Minutes of Trade Policy Review Body Meeting held on 14 and 17 September 2001 (WT7TPR/M/88) pp.18,35 (comments by India regarding the United States); Minutes of Trade Policy Review Meeting held on 12 and 14 July 2000 (WT/TRP/M/72/Add. 1) pp. 77-78, 88 (comments by Brazil and India).

India's position has not changed and has been consistent.

49. *Do you agree that a major objective of the introduction of GSP was to replace the previously existing special preferences? If so, is it possible to set up GSP programmes addressing development problems of less than all developing countries? What is the basis for this possibility? What are the systemic consequences of such reading?*

Reply

India agrees that a major objective of the introduction of the GSP was to replace the previously existing special preferences.

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 equivalent advantages to the countries concerned come into operation.**"²² (emphasis added)

As early as UNCTAD I therefore, it was agreed that 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 all developing countries, would replace the special preferences then enjoyed by certain developing countries in certain developed countries.

The special preferences responded to the problems of a sub-set of developing countries, and not to those of all developing countries. The instrument of such response was discriminatory preferential tariff treatment. What was objectionable under the then special preferences was that the tariff preferences granted to certain products originating in certain developing countries were not accorded to like products originating in other developing countries, thus depriving those other developing countries of equal competitive opportunities. The provision of unequal competitive opportunities to a sub-set of developing countries vis-à-vis developed countries and other developing countries was therefore a response solely to the development problems of those countries. The GSP was established both (i) to establish and preserve equality of competitive opportunities between

regarding the EC); Minutes of Trade Policy Review Body Meeting held on 12 and 14 July 1999 (WT/TPR/M/56)p. 22 (comments by India regarding the United States); Minutes of Trade Policy Review Meeting held on 24-25 July 1995 (WT/TPR/M/3) pp. 7, 11,15, 19 (comments by ASEAN countries, Chile and India regarding the EC).

²² 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.

developing countries and (ii) to enhance the competitive opportunities of developing countries as a whole vis-à-vis developed countries.

In the context of the foregoing major objective, and in light of the term "non-discriminatory", it is therefore not possible to set up GSP programmes addressing the development problems of less than all developing countries by providing enhanced competitive opportunities to a sub-set of developing countries vis-à-vis other developing countries. Thus, no GSP scheme could be designed which differentiates in the tariff treatment of like products originating in developing countries.

The systemic consequences of allowing GSP schemes which address the development problems of less than all developing countries by altering the competitive opportunities for other developing countries would be considerable. Market access concessions granted by a developed country to a developing country would become insecure. A market access concession could easily be made ineffective by granting better competitive opportunities to a favoured group of developing countries as part of a GSP scheme. This power to alter competitive opportunities between developing countries would have considerable trade effects because the main competitors of a developing country are usually the other developing countries. Consequently, developing countries would be deprived of the fundamental safeguards they need to participate effectively in multilateral trade negotiations. Lastly, the power to vary competitive opportunities to respond to the needs of less than all developing countries can be abused by developed countries to split the negotiating leverage of developing countries as a group, or as a foreign policy tool that could undermine the policy autonomy of individual developing countries. In the absence of any normative guidance from the text of the Enabling Clause on differentiation between developing countries, the judicial organs of the WTO cannot themselves provide that normative guidance.

50. *Does "generalized" include either product coverage or country coverage or both? And does "non-discriminatory" include either of these or both?*

Reply

The Agreed Conclusions do not directly define the term "generalized". The report entitled "Review and evaluation of the generalized system of preferences" dated 9 January 1979²³ issued by the UNCTAD states:

"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 ...**" (emphasis added)

"Generalized" in relation to the GSP can be given different meanings. As to the GSP donor countries, the intention was that all developing countries should grant preferential tariff treatment to the developing countries. As to the beneficiaries, it was the intention that all developing countries will be beneficiaries. In relation to the then special preferences enjoyed by some developing countries in some developed countries, it was the intention that those special preferences would be replaced by the "generalized" preferences under the GSP.

In India's view, based on references presently available to India, "generalized" refers to country coverage, whether as to donor countries or beneficiary countries. The term "non-discriminatory" refers to the treatment of products originating in beneficiary countries. Thus, "generalized" means that all developing countries could qualify as beneficiaries. "Non-discriminatory" means that the like products of the beneficiaries shall be treated equally.

²³ TD/232.

51. If "generalized" does not mean to all and does not allow to one, then what does it mean? How does one determine whether a GSP scheme is "generalized" or not? Would four countries be sufficiently generalized, as was the situation in the earlier years of implementation of the Drug Arrangements? Would a scheme covering, say, 50 per cent of all developing countries be "generalized"?

Reply

In India's view, "generalized" means to all, and does not allow to one. Thus, a scheme purporting to be a GSP scheme and which applies only to four countries or 50 percent of all developing countries is not "generalized". It is not even a question of degree ("sufficiently generalized"). It is either "generalized", or it is not. India emphasizes that this issue is distinct from the issue of whether differentiation in treatment between developing countries recognized as beneficiaries is permissible.

52. Please give your full interpretation of paragraph 2(a). Please also give your interpretation of the term "generalized" in footnote 3.

Reply

Paragraph 2(a) authorizes derogation from Article I:1 in respect of preferential tariff treatment accorded by developed country Members to developing countries which is in *accordance* with the Generalized System of Preferences. The GSP in turn is described in the Agreed Conclusions drawn up at the UNCTAD. A measure which is not "generalized" "non-discriminatory" and "non-reciprocal" is clearly not in accordance with the GSP and hence cannot fall within the protection of paragraph 2(a).

As to the interpretation of the term "generalized" please see India's response to Panel Questions 51 and 52 addressed to both parties.

Article XX(b)

53. What in your view should be the test for "necessary" under Article XX(b)?

Reply

In assessing whether a measure is provisionally justified under the respective subparagraphs of Article XX, the Appellate Body has endorsed the a two-fold analysis: (i) determining whether the measure at issue is designed to achieve the objectives envisaged under the subparagraph concerned; and (ii) determining whether the measure at issue "responds" to the *degree of connection or relationship* (e.g. necessary, essential, relation) with the state interest or policy sought to be promoted or realized.²⁴

In its Second Submission (paragraphs 135-144), India has demonstrated that the Drug Arrangements "are not designed to achieve" the protection of human life or health of the EC population.

²⁴ Panel Report, *United States – Standards for Reformulated and Conventional Gasoline* ("US – Gasoline"), WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R, DSR 1996:I, 29, at. 76-77; Appellate Body Report, *United States – Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, at 12-20; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("EC – Asbestos"), WT/DS135/AB/R, adopted 5 April 2001, para. 155-163; Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* ("Korea – Beef"), WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, para. 157.

In determining whether the measure at issue responds to the degree of connection or relationship – in this case, "necessary" – with the state interest or policy sought to be promoted or realized, in *Korea – Beef*, the Appellate Body described the "continuum of necessity" as follows:

At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located **significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to"**.²⁵ (emphasis supplied)

To what extent a measure "makes a contribution to" the protection of human life or health requires an examination of the *appropriateness and efficiency of the measure itself* (independent of other available measures) as a means to achieve the desired objective. There must be a direct nexus between the means and the objective. It is insufficient for the measure to be "related to" the relevant policy goal it must be "necessary" to achieve that policy goal.

To what extent a measure is "indispensable" depends on the availability of other measures to achieve the desired objective. Thus, moving towards the opposite pole of "indispensable" (as distinguished from "making a contribution to") entails not only an examination of the appropriateness and efficiency of the measure itself, but also a comparison of that measure with other available measures which could achieve the same objective. The degree of indispensability has to be determined by examining the effectiveness, cost and appropriateness of resorting to the alternative measures. For these reasons, a measure can contribute very much to the protection of life or health but nevertheless not be indispensable because an alternative measure is readily available.

54. *In light of the Appellate Body's interpretation and description of the term "necessary" as being somewhere along a continuum between "contributing to" and "indispensable", please provide your views on how and where along this continuum the Drug Arrangements qualify as "necessary" according to the interpretation enunciated by the Appellate Body.*

Reply

The specific measure requiring justification under Article XX(b) is the tariff discrimination between (i) the twelve beneficiaries and (ii) other WTO Members. The EC grants discriminatory preferences to the twelve beneficiaries purportedly because of the drugs-related situation in those beneficiaries which, in turn, affects the life and health of the EC population. This necessarily implies that the similar situation in other WTO Members does not affect the life and health of the EC population.

India is of the view that Article XX(b) cannot be invoked by any Member to justify burdening the trade of Members which are not the source of the problems which a measure (justification for which is sought under that provision) seeks to address. Thus, for example, Article XX(b) may be invoked by any Member to ban the importation of products from contaminated sources where those products could adversely affect the life or health of that Member's population. The trade of the contaminated source is thereby burdened. But that Member may not burden the trade of other Members.

In the present dispute, the importation into the EC of products originating in Members other than the twelve beneficiaries (including products covered by the tariff preferences under the Drug Arrangements) is not, according to the EC, the source of the problems which the EC seeks to address. Article XX cannot be interpreted to permit measures taken by a Member that has the effect of

²⁵ Appellate Body Report, *Korea-Beef* supra footnote 24, para.161.

transferring resources from a country which is not the source of a health problem to countries which are actually the source of a health problem. It would therefore *not be appropriate for the EC to burden the trade of Members other than the twelve beneficiaries.* .

As to the efficiency of the discriminatory tariff preferences to achieve the desired objective, the EC contends that the Drug Arrangements seek to promote the development of alternative economic activities to replace drug production and trafficking and, more generally, to raise the overall level of economic development of the countries concerned, in order to generate resources and capacity required for enforcing an effective system of drug control.²⁶

The nexus that the EC draws between discriminatory tariff preferences and the protection of the life or health is based on several cumulative assumptions, resulting in an extended chain of causality. As India has demonstrated in its Second Submission (paragraphs 145-158), this extended chain of causality renders the link between the Drug Arrangements and the protection of human life or health of the EC population remote. Thus, the Drug Arrangements do not respond to the degree of connection or relationship – in this case, "necessary" – with the protection of the life or health of the EC population.

India notes that the EC presents no empirical evidence of the connection between the drug arrangements and the health of citizens of the EC. It relies exclusively on various texts adopted by United Nations bodies and the GATT/WTO to establish this required link. These texts cannot establish any empirical link.

In any case, these texts do not even indirectly support the contentions of the EC. Nothing in the cited texts support the proposition that market access through discriminatory GSP schemes is what is intended. These texts refer to binding multilateral trade liberalization, not discriminatory market access that can be withdrawn at any time. Contrary to the EC's contention, such non-binding market access measures cannot contribute to a "sustainable" resolution of the drug problem.²⁷ Further, these texts primarily refer to market access in the context of the facilitation of substitution crops in producer countries.

In India's view therefore, the Drug Arrangements are not even within the opposite poles of the continuum of necessity. At best, they "make a contribution to", the opposite of the pole of "indispensable". Therefore, it is not "substantially closer" to "indispensable", and cannot qualify as "necessary".

On this regard, it might be noted that the EC itself categorically characterizes the Drug Arrangements as precisely at the pole of "making a contribution to": Thus, according to the EC:

- "... the Drug Arrangements **contribute to** the objective of preserving the life and health of the EC population by limiting the supply of narcotic drugs to the EC";
- "... the Drug Arrangements **contribute to** the objective of preserving the life and health of the EC population against the risks from the consumption of narcotic drugs by supporting the measures taken by other countries against the illicit production and trafficking of those substances, thereby reducing their supply to the EC."²⁸ (emphasis supplied)

On the basis of the foregoing, the tariff discrimination between (i) the twelve beneficiaries and (ii) all other WTO Members cannot qualify as "necessary" for purposes of Article XX(b).

²⁶ EC, FWS, para. 188.

²⁷ See EC, Second Written Submission, para. 74.

²⁸ EC, FWS, para. 183- 185.

Even assuming that tariff discrimination falls within the continuum of necessity, only a measure that in principle applies equally to all countries with actual or potential drug-related problems could conceivably be deemed to indispensable or "substantially closer" to indispensable. The EC cannot logically claim that it is "substantially closer" to indispensable to adopt a measure that *a priori* applies only to twelve countries in view of the fact that many more countries, actually or potentially, suffer from or are confronted with drug-related problems.

Furthermore, on the same assumption (that tariff discrimination falls within the continuum of necessity), financial and technical assistance in law enforcement and development, combined with multilateral trade negotiations in sectors of export interest of the developing countries (as foreseen in the preamble to the Agreement on Agriculture and the UN resolutions cited by the EC), would be equally – if not more – effective, WTO-consistent, and non-trade restrictive measures available to the EC.

Considering the foregoing, the Drug Arrangements are not "substantially" closer to "indispensable" in the continuum of necessity, and do not meet the requirement of necessity under Article XX(b).

55. *The EC has stated at the Second Meeting with the Parties that the existence of the Drug Arrangements tariff preference margins will not prevent it from fully contributing to the Doha tariff reduction negotiations. If the EC is ready to reduce the Drug Arrangement margins of preference, how can these preferences be considered "necessary" to protect human life and health in the EC?*

Reply

The EC asserts that the existence of the Drug Arrangements tariff preference margins will not prevent it from fully contributing to the Doha tariff negotiations. However, if the Panel were to validate the EC's defence under Article XX(b) of the GATT, nothing will prevent the EC from subsequently maintaining or even increasing the Drug Arrangements tariff preference margins, notwithstanding its present protestations to the contrary. The EC's present assertion that it is ready to reduce the Drug Arrangements tariff preference margins merely confirms that there are other equally, if not more, effective and less WTO-inconsistent and less trade-restrictive means to protect the health of the EC population arising from drug-related problems. Thus, in the continuum of necessity, the Drug Arrangements tariff preference margins are closer to "contributing to", rather than "substantially closer" to "indispensable" - assuming in the first place that the Drug Arrangements tariff preference margins fall within the continuum of necessity.

56. *Please briefly state the criteria under Article XX(b) of GATT 1994 for determining whether a measure is: (i) necessary; (ii) necessary to protect human life or health; (iii) necessary because there is no less trade-restrictive measure available; or (iv) there is no consistent or less inconsistent measure available.*

Reply

Please see India's response to Panel Questions 53, 54 and 55 to both parties.

57. *What in your view should be the test under the chapeau?*

Reply

Assuming that the Drug Arrangements qualify as "necessary" in the context of Article XX(b), the EC must establish that the tariff preferences under the Drug Arrangements – as the Drug Arrangements presently stand - are equally available to all countries where the same conditions

prevail, i.e., to countries which, actually or potentially, suffer from or are confronted with drug-related problems.

The Drug Arrangements are limited *a priori* to the twelve beneficiaries. There is no criteria under which any other country suffering from or confronted with the same drug-related problems, whether presently or in the future, may qualify. This being the case, the Drug Arrangements are applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

58. *In terms of the chapeau of Article XX of GATT 1994, can it be said that the same conditions prevail in all 12 beneficiaries of the Drug Arrangements, or are there differences among them? Assuming the conditions within the 12 countries differ, are the differences between the conditions in these 12 countries and in other drug-affected developing countries greater than those between the 12? Please provide justification and evidence for your response.*

Reply

The EC has the burden of establishing that the Drug Arrangements are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. For this purpose, it is not sufficient for the EC merely to assert that the twelve beneficiaries are confronted with drug-related problems, as this is a worldwide phenomenon. The EC must establish the *specific* conditions prevailing in the twelve beneficiaries which the Drug Arrangements seek to address, and must likewise establish that these conditions do not obtain in other countries. *Specific* conditions necessitate the establishment of equally-specific criteria. There are no such criteria under the Drug Arrangements. The EC has not provided those criteria to the Panel, notwithstanding several requests.

In the context of this dispute, an appropriate response to the Panel's question must be germane to the *specific* "conditions" which the EC seeks to address through the Drug Arrangements. India can cite readily-available statistics on various conditions prevailing in the twelve beneficiaries and other WTO Members – e.g., literacy rate, infant mortality rate, or even conditions relevant to drug-related problems. For example, the 1999 report entitled "Global Illicit Drug Trends" issued by the United Nations Office for Drug Control and Crime Prevention states that as of 1998, global illicit cultivation of opium poppy was as follows:

Cultivation in Hectares	
Asia	
Southwest Asia	
Afghanistan	63,612
Pakistan	950
Sub-total	64,562
Southeast Asia	
Lao PDR	26,837
Myanmar	130,300
Thailand	716
Vietnam	442
Sub-total	158,295
Other Asian Countries	
Combined	2,050
Total Asia	224,907
Latin America	
Colombia	7,466
Mexico	5,500
Total Latin America	12,996
Global Total	237,873

Thus, based on the foregoing, India may cite the following, *among others*:

- The area devoted to opium cultivation in Myanmar (130,000 hectares) is many times over the similar area in Colombia (7,466 hectares), and yet Myanmar is excluded from the Drug Arrangements.
- Opium is cultivated in Mexico (5,500 hectares) and other Asian countries (2,050) and there is no similar cultivation in the 10 other Latin American countries which are beneficiaries under the Drug Arrangements, and yet Mexico and other Asian countries are excluded from the Drug Arrangements.

Many other statistics related to illicit drugs are available, but unless the EC itself has specified (which it has not) the "conditions" prevailing which it seeks to address in the context of Article XX, all of those statistics would not be truly responsive to the Panel's question.

59. *Would human life and health in the EC be better protected if the Drug Arrangements were extended to all the developing countries involved with drug production and traffic which appear in the 2002 report of the International Narcotics Control Board?*

Reply

As stated above in India's response to Panel Questions 53 and 54 to both parties, tariff preferences are not necessary to protect human life or health. Expansion of the coverage of the Drug Arrangements to more countries does not render tariff preferences "substantially closer" to "indispensable".

To India

Legal Function

14. *Is it India's position that the Framework Negotiations in the Tokyo Round, which led to the adoption of the Enabling Clause, added nothing substantive to the Enabling Clause? Was what was obtained with the adoption of the Enabling Clause limited to putting the GSP on a permanent basis and providing special treatment for LDCs?*

Reply

The phrase "added nothing substantive to the Enabling Clause" can only be construed with reference to the 1971 Waiver Decision. As to what the Enabling Clause added substantively to the 1971 Waiver Decision, please see India's response to Panel Question 29 to both parties.

15. *In its title, the Enabling Clause has several parts, and India's argument is that one should separate those parts. Some parts relate to tariff preferences, another part is linked to Article XXIV and the non-reciprocity part seems linked to Article II. Is the Enabling Clause a package that cannot be broken apart? Is the whole of the Enabling Clause more than just an exception to Article I:1?*

Reply

India is not arguing that one should separate the various parts of the Enabling Clause. It also does not believe that its interpretation of paragraph 2(a) would break apart those parts. On the contrary, its interpretation would be entirely consistent and in harmony with the other parts of the Enabling Clause. Paragraphs 1 and 2 of the Enabling Clause are by their own terms exceptions from Article I of the GATT. Other elements of the Enabling Clause, in particular paragraphs 5 and 6, are unrelated to Article I of the GATT. The existence of these other elements cannot guide the interpretation of the term "non-discriminatory" because they are not related to the issue of discrimination.

Non-discriminatory

16. *What specifically do the Agreed Conclusions tell us about the term "non-discriminatory"?*

Reply

The meaning of the term "non-discriminatory" can be discerned from the following, all contained in the Agreed Conclusions:

- The reference in paragraph 1 of Part One I to Resolution 21 (II) of the UNCTAD calling for the early establishment of GSP preferences "which would be beneficial to the developing countries";
- The reference in paragraph 2 of Part One II to the agreement that the objectives of the GSP, in relation to the developing countries, are: "(a) to increase their export earnings; (b) to promote their industrialization; and (c) to accelerate their rates of economic growth";
- The provision of paragraph 1 of Part One II that, " ... consistent with Conference resolution 21 (II), there is agreement with the objective that in principle all developing countries should participate as beneficiaries ...";

- The provision of paragraph 1 of Part One IV noting the following position of the preference-giving countries:

"... 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."

The provision of Section A, Part I of document TD/56 elaborating on the position of preference-giving countries states:

"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."

- The statement on behalf of the Group of 77 contained in Annex I:

"... no developing country member of this Group should be excluded from the generalized system of preferences at the outset or during the period of the system".

The foregoing indicate that, as agreed in the UNCTAD, the benefits under the GSP were intended to apply to *all* developing countries – at least to all claiming developing country status - and not just to *some* developing countries.

Further, Paragraph 2 of Part One V of the Agreed Conclusions provides:

"The preference-giving countries will consider, as far as possible, on a case-by-case basis, the inclusion in the generalized system of preferences of products of export interest mainly to the least developed among the developing countries, and as appropriate, greater tariff reductions on such products".

Thus, the means to address the different development needs of the least-developed among the developing countries was not discriminatory tariff treatment between developing countries; rather, it was the inclusion in the GSP of products of export interest mainly to them and greater tariff reductions on such products.

As to the treatment of developing country beneficiaries as between themselves, paragraph 1 of Part One IX provides:

"The Special Committee recognizes that no country intends to invoke its rights to most-favoured-nation treatment with a view to obtaining, in whole or in part, the preferential tariff treatment granted to developing countries ..."

Thus, since all developing countries – or those countries claiming developing country status – were intended to be the beneficiaries under the GSP, the other countries which are not beneficiaries assumed the obligation not to invoke their MFN rights (or to waive their MFN rights). The beneficiaries therefore did not assume the obligation to waive their MFN rights. Thus, "non-discriminatory" as between developing countries means exactly the MFN rights of developing country Members under Article I:1 of the GATT.

Various subsequent UNCTAD documents confirm this interpretation. Among these is the Report by the UNCTAD Secretariat on the "Review and evaluation of the generalized system of preferences" dated 9 January 1979²⁹. The Report states, among others:

"11. Non-discrimination implies that **the same preferences** were to be granted to all developing countries ... " (emphasis supplied).

17. *Where, in the Agreed Conclusions, was special treatment to least-developed countries expressly prohibited?*

Reply

The terminology used in the GSP to refer to "least-developed countries" was "least developed among the developing countries". In terms of preferential tariff treatment under the GSP, least-developed countries were not singled out as such in the sense that no discriminatory tariff treatment for their benefit (to the exclusion of other developing countries) was authorized. Since they were included in the category of "developing countries", and the tariff preferences under the GSP were intended to be "non-discriminatory" between developing countries, there was no need for an express prohibition against discriminatory tariff treatment for the benefit of the least-developed countries (to the exclusion of other developing countries).

However, "special measures" for the benefit of the least-developed countries were contemplated under the Agreed Conclusions. Paragraph 2 of Part One V of the Agreed Conclusions provides:

"The preference-giving countries will consider, as far as possible, on a case-by-case basis, the inclusion in the generalized system of preferences of products of export interest mainly to the least developed among the developing countries, and as appropriate, greater tariff reductions on such products".

Thus, the means to address the specific situation of the least-developed countries was not discriminatory tariff treatment between developing countries; rather, it was the inclusion in the GSP of products of export interest mainly to them and greater tariff reductions on such products (which had to be applied on an MFN basis between developing countries, including the least-developed countries).

It was not until the adoption of the Enabling Clause that developed countries were authorized to grant discriminatory preferential tariff treatment to the least-developed countries, to the exclusion of other developing countries.

Paragraph 3(c)

18. *What are India's views on the specific obligations in the Enabling Clause in terms of product coverage and depth of tariff cuts?*

Paragraph 3(c) provides that any special and differential treatment provided under the Enabling Clause "shall in the case of such treatment by developed [country Members] be designed and, if necessary, modified, to respond positively to the development, financial, and trade needs of developing countries". In the context of GSP schemes, this obligation is intended to ensure that the product coverage and depth of tariff cuts are responsive to the needs of developing countries as a whole. Paragraph 3(c) is the only provision within the Enabling Clause that regulates these aspects of GSP schemes.

²⁹ TD/232.

Article XX

19. *If the Drug Arrangements contribute to the protection of public health in the EC, is it then "necessary"? Or is it India's position that "necessary" means "indispensable"?*

Reply

Please see India's response to Panel Questions 53 and 54 to both parties.

20. *What is India's estimate of quantity of illicit drugs being exported from India to the EC?*

Reply

It is very difficult to estimate illicit trade due to the very nature of operations involved in such trade. However, an idea of the existence of such trade and its seriousness can be had from the results of enforcement measures against such trade.

There is significant wild growth of cannabis plant, from which hashish is obtained in India. Indian law enforcement agencies seize significant quantities of Cannabis and hashish each year. The seizures of the last four years are given below:

(all figures in kgs.)

Name of the drug	1999	2000	2001	2002
Ganja	40113	100056	86929	88137
Hashish	3391	5041	5664	3300

Europeans nationals were arrested while taking drugs to European destinations in the year 2002. In addition, several West African traffickers, who are known to be engaged in trafficking of methaqualone/mandrax, have also been arrested. Indian law enforcement agencies seized 111130 kgs of mandrax and broken apart several illicit manufacturing facilities.

Heroin and morphine hauls mainly find there way out of Afghanistan through Iran as well as Pakistan for onward transportation to Europe. Drugs transported into Pakistan transit India on their way to Europe. Historically, almost 35% of seizures of heroin in India were of heroin trafficked through Indo-Pak border. Significant quantities of this would have ultimately reached consumption centres in Europe.

There has been a continuous decline in the share of Afghan heroin in the total seizures of heroin in India over 2001 and 2002. This trend appears to be attributable to the events of September 11, 2001 and the consequent onslaught against the Taliban, as well as due to the military build up on both sides of the Indo-Pak border. Towards the end of the year, however, there were indications of resurgence in trafficking.

India is a significant manufacturer of precursor chemicals (like Ephedrine, pseudo-ephedrine, Acetic anhydride etc.), that are used for the manufacture of drugs. It is generally believed that the Indian precursor chemical industry is even more regulated than its counterpart in Europe.

21. *What specific, less-inconsistent, alternative measures are reasonably available to the EC and which would be equally effective in achieving the EC's health objectives?*

Reply

In India's view, financial and technical assistance in law enforcement and development, combined with multilateral trade negotiations in sectors of export interest of the developing countries (as foreseen in the preamble to the Agreement on Agriculture and the UN resolutions cited by the EC), would be equally – if not more – effective, WTO-consistent, and non-trade restrictive measures available to the EC.

22. *Does India think that technical and financial assistance to the drug beneficiaries would have a significant effect for taking people off the production of drugs and getting them to produce other, licit crops?*

Reply

Yes. Ultimately, tariff preferences are a form of financial assistance affecting conditions of competition as they enable beneficiaries to compete with the advantage of preference margins. Thus, direct financial assistance and preference margins virtually could have the same effect. The only difference is that direct financial assistance would have to be at the EC's expense, which is only fair, because it is the EC's problems which are being addressed. On the other hand, preference margins are borne by other developing countries which have development needs of their own, many of which have their own drug problems. Preference margins in the context of the Drug Arrangements is thus foreign aid in the reverse – from developing to developed countries.

Thus, in India's view, financial assistance, albeit in different form, along with technical assistance in the law enforcement and development, would have a significant effect for taking people off the production of drugs and getting them to produce other, licit crops, or at the very least, have the same effect as technical assistance plus financial assistance through preference margins. India also notes that such assistance combined with *binding* multilateral trade liberalization would also be equally effective.

23. *In paragraph 58 of the EC's second submission, the EC cites the U.N. General Assembly: "... within the context of shared responsibility, appropriate measures, including strengthened international cooperation in support of alternative and sustainable development activities, in the affected areas of those countries, that have as their objectives the reduction and elimination of illicit production." On the next page, the EC states that the U.N. further recommended that, "... in order to support those alternative activities, other countries should provide not only financial assistance but also greater market access", and that only a few weeks ago, the Commission on Narcotic Drugs renewed this recommendation. Could India please comment on what implications these activities of international agencies have for the EC's Article XX(b) defence?*

Reply

"Strengthened international cooperation" means the consent of those who cooperate. It is not forbearance of measures unilaterally determined by a single country or a group of countries. It is in this context that the call for "greater market access" must be construed. In the context of the WTO, the results of market access negotiations are always applied on an MFN basis. Where there are exceptions, as in the case of the GSP, the Members themselves specify the conditions under which the exceptions apply. Again, this cannot be unilaterally determined by a single Member or a group of Members.

In India's view therefore, the activities of other international agencies have no implications for the EC's Article XX(b) defence. The call for "greater market access" is a non-binding recommendation. From the strictly legal viewpoint, the decisions or recommendations of international agencies are not, as such, part of the "covered agreements" under the WTO. Furthermore, a call for "greater market access" by another international agency cannot be construed as a call for *discriminatory* market access. It would be unrealistic to presume that such a recommendation would be made without detailed discussion as to the nature of the discriminatory treatment and the criteria to be applied. It cannot be presumed that an international agency would wittingly and deliberately recommend that any country commit acts in violation of its obligations under a treaty, even if those treaties are administered by other international organizations or agencies.

24. *Is it India's view that any tariff preference programme which has a limited time horizon is not beneficial or is just minimally beneficial?*

Reply

Tariff preference programmes under the GSP are intended to provide enhanced opportunities to developing countries to compete in developed country markets vis-à-vis developed countries, at the same time preserving equal competitive opportunities as between developing countries. Tariff preferences are a significant factor in establishing conditions of competition, conditions of competition influence investment flows, the establishment or maintenance of export industries require investments, and investors need security and predictability as to conditions of competition. Thus, the longer the duration of the tariff preference programme, the more secure and predictable the conditions of competition. Accordingly, a tariff preference programme equally applicable to all developing countries (as contemplated in the GSP) which is of longer or indefinite duration is more beneficial to developing countries than one which is of limited duration.

Since tariff preference programmes under the GSP are applied by developed country Members on a voluntary basis, they may be withdrawn or reduced in scope at any time. Thus, implicit in tariff preference programmes under the GSP is that at any time, the enhanced competitive opportunities of developing countries vis-à-vis developed countries may be eroded or even eliminated at any time. The worst case scenario therefore for developing countries in a situation where tariff preferences are applied equally to all developing countries as contemplated under the GSP is that they will have equal competitive opportunities vis-à-vis developed countries and other developing countries in developed country markets. Thus, conditions of competition would still be relatively secure and predictable, at least as between developing countries.

On the other hand, discriminatory tariff preferences, like those in the Drug Arrangements, have a different effect on the security and predictability of conditions of competition. Investors would be less likely to invest in developing countries excluded from the tariff preferences because of the competitive advantage enjoyed by those which are included. But this does not mean that those investors will necessarily invest in developing countries which benefit from the discriminatory tariff arrangements. Tariff preferences are a factor in establishing conditions of competition, but they are not the only factors. As earlier stated, tariff preferences may be withdrawn at any time. Thus, an investor will not necessarily invest in a developing country benefiting from discriminatory tariff preferences – particularly long-term investments – because those preferences could be withdrawn at any time. When those preferences are withdrawn, the developing country benefiting from a discriminatory tariff preferences will find itself in the same position as other developing countries.

Preferential tariff treatment which discriminates between developing countries therefore does not contribute to the security and predictability of conditions of competition, and therefore to the security and predictability of the multilateral trading system. Hence, in this context, it is not beneficial at all.

25. *Does the initial measure imposed by the EC have to take into account the potential drug production and trafficking in other developing countries in applying the initial measure?*

Reply

The question is premised on the EC's contention that tariff preferences, as such, or discriminatory tariff preferences, as such, could be legitimately resorted to and could qualify as "necessary to protect ... human ... life or health" in the context of Article XX(b) of the GATT. India does not agree with the EC's premise.

Nevertheless, in response to the Panel's question, even assuming that tariff preferences could be legitimately resorted to and could so qualify, the initial measure imposed by the EC must take into account the potential drug production and trafficking in other countries, including the developing countries, in *applying* the initial measure. The measure as it is (as distinguished from any *future* measure that the EC may promulgate) must thus be capable of being applied without discrimination between countries where the same conditions prevail. As it presently stands, the tariff preferences under the Drug Arrangements cannot be applied to any other country where the same conditions prevail. This therefore constitutes arbitrary and unjustifiable discrimination. The possibility of amending a measure can never be invoked as a defence against the present WTO-inconsistency of such a measure.

26. *In light of U.N. recommendations that, within this overall campaign against drug production and trafficking, giving market access is a component of the overall strategy, is it India's contention that giving market access to affected countries within this overall strategy is not such to render it "necessary" within the meaning of Article XX (b)?*

Reply

In the first place, whether a measure is "necessary" in the context of Article XX(b) entails an empirical analysis. The determination of necessity cannot be based on pronouncements, regardless of source. These pronouncements do not establish an empirical connection between the Drug Arrangements and the health of EC citizens; they are political statements of desirable goals.

In the context of the present dispute, "giving market access" is pursued through discriminatory tariff preferences. Thus, the issue is the same, albeit stated in a different form: Are tariff preferences necessary to promote the life or health of the EC population? In this regard, please see India's response to Panel Questions 53 and 54 to both parties.

27. *Is it India's view that the Drug Arrangements are not "necessary" under Article XX(b) because they are tariff preferences or also because they do not apply to all WTO Members, or to all countries or to all developing countries, or to all drug-producing developing countries?*

Reply

As earlier explained (please see India's response to Panel Questions 53 and 54 to both parties), tariff preferences, as such, cannot qualify as "necessary" in the context of Article XX(b). Thus, the expansion of the coverage of the Drug Arrangements to all drug-producing developing countries would not likewise render tariff preferences similarly "necessary". The expansion of the coverage of the Drug Arrangements to all WTO Members or to all countries would render the issue of justification under Article XX(b) moot, as there would be no violation of Article I:1 of the GATT. The expansion of the coverage of the Drug Arrangements to all developing countries would render the issue of justification under Article XX(b) moot, as they would then be justified under paragraph 2(a) of the Enabling Clause.

28. *In light of the Appellate Body's pronouncements on the term "necessary" in Korea – Beef and other relevant jurisprudence, where on the continuum between "contributing to" and "indispensable" does one place "necessary" in relation to the Drug Arrangements?*

Reply

Please see India's response to Panel Question 54 to both parties. India reiterates that it considers that the EC has failed to demonstrate that its measure is "substantially closer" to the pole of "indispensable" within the meaning of the Appellate Body ruling. The EC has failed to demonstrate that tariff discrimination between the twelve beneficiaries and other countries that actually or potentially suffer from drug-related problems is necessary to protect life and health in the EC. The EC has also failed to demonstrate that financial and technical assistance, combined with multilateral trade negotiations in sectors of export interest of the developing countries, would not be an alternative, WTO-consistent and less trade-restrictive measure available to it.

29. *Could India confirm that, as regards the chapeau of Article XX, India is not raising any issue concerning a "disguised restriction on trade"?*

Reply

As the party invoking Article XX(b) as a defence, it is incumbent on the EC to establish all of the elements under that article, including the chapeau, which specifically provides that the measure (justification for which is sought) is "not applied in a manner which constitutes ... a disguised restriction on international trade ...". The EC has thus far failed to establish that the Drug Arrangements are "necessary" in the context of Article XX(b). Thus, it is not necessary for the Panel to examine the application of Drug Arrangements in the context of the chapeau. Should the Panel proceed to examine the Drug Arrangements in relation to the chapeau, India is of the view that the EC has likewise failed to establish that the measure meets all of the elements in the chapeau, including the above-quoted portion. In its Second Submission (paragraphs 159-162), India has established that the EC has not demonstrated that the Drug Arrangements are not applied in a manner which would constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" within the meaning of the chapeau of Article XX.

ANNEX B-5

Replies of the European Communities to Questions from the Panel after the Second Panel Meeting

To both parties

Question 29

What is the difference between the Enabling Clause and the 1971 Waiver Decision? What did the Enabling Clause add to the 1971 Waiver Decision?

1. The EC has referred to the differences between the legal base, the wording and the functions of the 1971 Decision and the Enabling Clause in its reply to the Panel's Question to both Parties No. 2.¹ Other significant differences include the following:

- under the Enabling Clause, donors are subject to the obligations imposed by Paragraph 3, including in particular Paragraph 3(c). The relevance of this provision for the interpretation of the term "non-discriminatory" has been discussed at length elsewhere. (See below the reply to the Panel's Question to both Parties No. 47).
- in the Enabling Clause, GSP preferences are part of a comprehensive package, which includes *inter alia* the authorization of other forms of differential and more favourable treatment involving differentiation between developing countries (Paragraphs 2(c) and 2(d)), as well as the formal recognition of the principle of "graduation" (Paragraph 7). This supports the EC's position that interpreting the term "non-discriminatory" in footnote 3 as allowing differentiation between developing countries with different development needs is fully consistent with the objectives of the Enabling Clause.

¹ Further confirmation of the EC's account of the drafting history of the Enabling Clause is provided by the Report of the Director General of GATT on the Tokyo Round of Multilateral Trade Negotiations, which recalls that:

Over a long period of time, developing countries had pressed for inclusion in the GATT of legal recognition of preferences as a means of promoting their export trade and economic development. In their view such recognition would reflect a more equitable trading relationship between developed and developing countries and remove the anomalous application of "equal rights and obligations among unequals".

The possible inclusion of a provision in the GATT to authorise the grant of preferences was the subject of some consideration when the new Part IV of the GATT on Trade and Development was under negotiation in 1964. Nothing concrete resulted from this consideration however. Later, when the Generalized System of Preferences and the preferences resulting from negotiations among developing countries were brought to the GATT, the necessary authorization took the form of waivers dated 25 June 1971 and 21 November 1971 respectively. Developing countries always took the view that this waiver approach was unwarranted and outmoded.

[...]

The Enabling Clause meets the fundamental concern of developing countries by introducing differential and more favourable treatment as an integral part of the GATT system, no longer requiring waivers from the GATT. It also provides the perspective against which the participation of developing countries in the trading system may be seen.

The Tokyo Round of Multilateral Trade Negotiations, report by the Director General GATT, Geneva, April 1979, pp. 98-99.

Question 30

Are there any options other than construing the Enabling Clause as either an autonomous right or as an exception?

2. The case law of the Appellate Body suggests that the mere fact that a provision can be characterised as an "exception" does not preclude it from being an "autonomous right" and that the relevant distinction is not between "exceptions" and "autonomous rights", but rather between "autonomous rights" and "affirmative defences" (See e.g. Appellate Body report, *EC – Hormones*, para. 104).

Question 31

In light of the fact that the Enabling Clause was part of a treaty negotiation, did the developing countries "pay" for it?

3. Yes. As explained, Paragraph 2(a) of the Enabling Clause is part of a new balance of rights and obligations agreed at the Tokyo Round, including those under the other provisions of the Enabling Clause.

Question 32

What are relevant criteria to determining whether a provision can be characterized as an affirmative defence?

4. Please see the EC's reply to the Panel's Question to both Parties No. 6. See also EC's Second Submission, paras. 10-12 and the EC's Second Oral Statement, paras. 2-25.

Question 33

The EC has stated in response to Panel Question 12 to both Parties that, for a measure under the Enabling Clause to be "non-discriminatory", the aim must be legitimate and the means used to achieve the legitimate aim must be reasonable. In this context, how should one determine whether or not a measure to achieve a legitimate aim is reasonable, both in general and specifically with respect to the Drug Arrangements?

5. In order to establish whether a measure is a "reasonable" means to achieve a legitimate objective, it is necessary to consider, first, whether the measure is objectively apt to achieve that objective and, second, whether it is proportionate.

6. The EC has shown that the countries affected by the drug problem have special development needs (EC's First Submission, paras. 86-99) and that tariff preferences are an appropriate response to such needs. (See EC's First Submission, paras. 100-115).

Question 34

Is the term "non-discriminatory" in footnote 3 a provision aimed at preventing abuse of GSP? If so, in what way does this contribute to the correct interpretation of the term "non-discriminatory"?

7. The term "non-discriminatory" is not an "anti-abuse" provision in the same sense as, for example, the chapeau of Article XX of the GATT.² Rather, it is one of the defining characteristics of the measures covered by Paragraph 2(a).

Question 35

Noting that the Enabling Clause refers to GSP in footnote 3 "[a]s described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of 'generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries'", does the wording of the footnote incorporate the 1971 Waiver Decision as a whole (other than the temporal limitation), including the Agreed Conclusions? If not, why not?

8. Footnote 3 does not incorporate by reference the whole of the 1971 Decision. It does not say, for example, "in accordance with" the 1971 Decision, or "subject to the provisions of" the 1971 Decision. Instead, footnote 3 refers to the "preferential tariff treatment" which is "described" in the 1971 Decision.³ Accordingly, it is only such "description" of the GSP which is relevant, rather than the 1971 Decision as a whole. The footnote itself, by quoting the phrase "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries", indicates what are the essential elements of that description.

9. A fortiori, footnote 3 does not incorporate into the Enabling Clause the Agreed Conclusions. Footnote 3 does not say "as described in the Agreed Conclusions", but rather "as described in [the 1971 Decision]". Accordingly, to repeat, it is only the description of the GSP which is found in the 1971 Decision itself that is relevant.

10. Contrary to what is suggested by India, the Agreed Conclusions are not part of the 1971 Decision. Letter (a) of the 1971 Decision provides that

... without prejudice to any other Article of the General Agreement, the provisions of Article I shall be waived for a period of ten years to the extent necessary to permit developed contracting parties, subject to the procedures set out hereunder, to accord *preferential tariff treatment* to products originating in developing countries and territories *with a view to extending to such countries and territories generally the preferential tariff treatment referred to in the Preamble to this Decision*, without according such treatment to like products of other contracting parties ... [emphasis added]

11. Thus, Letter (a) alludes exclusively to the "preferential treatment referred to in the Preamble", and not to the Agreed Conclusions. That "preferential treatment" is described in the Preamble with the terms "generalized", "non-reciprocal", "non discriminatory" and "beneficial to the developing countries".

12. Furthermore, the subject of the waiver granted by the 1971 Decision was not the "preferential treatment referred to in the Preamble" as such. Rather, the 1971 Decision permitted developed countries to accord "preferential tariff treatment" **"with a view to"** extending generally to developing countries the "preferential treatment referred to in the Preamble".⁴ Thus, in the context of the 1971

² See e.g. Appellate Body report, US – Gasoline, p. 22, and Appellate Body report, US – Shrimps, para. 151.

³ It may be open to debate whether footnote 3 refers to the "preferential tariff treatment" or to "the Generalised System of Preferences". The question, nevertheless, is inconsequential, because the 1971 Decision describes the Generalised System of Preferences by enumerating the characteristics of the preferential tariff treatment to be provided thereunder.

⁴ See Lorand Bartels, *The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program*, Journal of International Economic Law 6 (2003), 507-532, at p. 520.

Decision, the "preferential treatment referred to in the Preamble" is an objective at which donors should aim, rather than a binding requirement. Therefore, even if the Agreed Conclusions were deemed to be covered by the reference in Letter (a), they would impose no binding obligations.⁵ While the EC has chosen not to dispute the binding nature of the "description" of the GSP contained in the Preamble to the 1971 Decision, this position does not extend to the Agreed Conclusions.

13. Moreover, as explained in the EC's Second Submission (paras. 33-37), the Agreed Conclusions are drafted in hortatory language, do not purport to be binding and indeed would be extremely difficult to enforce due to their lack of precision. It would be an illogical and unacceptable result if the reference in footnote 3 to the 1971 Decision were interpreted so as to confer upon the Agreed Conclusions legal effects which they were never meant to have either within UNCTAD or under the 1971 Decision.

Question 36

In respect of GSP, should the context of the Agreed Conclusions be used any differently in interpreting the Enabling Clause than in interpreting the 1971 Waiver Decision? If so, why? Please elaborate.

14. The Agreed Conclusion are not "context" for the interpretation of the 1971 Decision (See the replies to the Panel's Questions to both Parties Nos.35 and 44.) Even if they were, Paragraph 2(a) must be read in its own context, which includes in particular the other provisions of the Enabling Clause. As explained, the legal base, the wording and the legal function of the Enabling Clause are different from those of the 1971 Decision.

Question 37

Assuming that different treatment is not necessarily discriminatory treatment and is permitted by the term "non-discriminatory" under the Enabling Clause, what then is not permitted by this term? Where do we draw the line?

15. The term "non-discriminatory", as interpreted by the EC, does not allow all kinds of distinctions between developing countries, but only those which

- (1) pursue an objective which is legitimate in the light of the objectives of the Enabling Clause and, more generally, of Special and Differential Treatment; and
- (2) which are a reasonable means in order to achieve that objective, i.e. which are both objectively apt to achieve the objective and proportionate.

16. For example, if a developed country differentiated between developing countries according to whether they are located in a certain geographical region, or have English as their official language, or belong to a certain political or military grouping, or qualified for the final round of the last World Football Cup, such differentiation would be discriminatory because it does not pursue an objective which advances the objectives of the Enabling Clause.

17. Even where differentiation between developing countries pursues a legitimate objective, it may still be discriminatory if it is not a "reasonable" (i.e. adequate and proportionate) measure to achieve that objective. For example, as discussed below, it seems that tariff preferences would not be an appropriate response to address problems such as famine or AIDS.

18. The EC has shown that the Drug Arrangements are "non-discriminatory" because

⁵ See US First Oral Statement, para. 8.

- first, they pursue an objective which is legitimate having regard to the objectives of the Enabling Clause: responding to the special development needs of the countries affected by drug production and trafficking; and
- second, tariff preferences are an appropriate response to the drug problem because they are necessary to support sustainable alternative licit activities which replace drug production or trafficking.

Question 38

Taking account of the contents of footnote 3, please indicate what changes – if any – the Enabling Clause made to the pre-existing GSP regime

19. See the EC's replies to the Panel's Questions to both Parties Nos. 2 and 35.

Question 39

Did Centrally Planned Economies that were GATT contracting parties participate in the negotiations of GSP? Did the Enabling Clause affect their rights and obligations under GATT Article I:1? If so, how were they affected?

20. A number of socialist countries attended the meetings of the UNCTAD Special Committee on Preferences. Some of the them (Czechoslovakia and Poland) were GATT Members at the time.

21. In response to persistent requests by the developing countries, Bulgaria, Czechoslovakia, Hungary, Poland and the Soviet Union made a Joint Declaration in the Special Committee on the measures those countries intended to take to contribute to the attainment of the objectives of Resolution 21(II).

22. The Enabling Clause does not distinguish between Centrally Planned Economies and other Contracting Parties. Accordingly, their rights and obligations were affected in the same manner as those of other contracting parties.

Question 40

Please indicate any preferential tariff preference granted at any time by individual GATT contracting parties or WTO Members to limited groups of developing countries which have been notified under paragraph 4(a) of the Enabling Clause and whether they were the object of the granting a waiver under GATT Article XXV.

23. At the outset, the EC would recall that the EC authorities will include in the Drug Arrangements any beneficiary of its GSP scheme which is found to be severely affected by drug production or trafficking. Thus, potentially, all developing countries are beneficiaries of the Drug Arrangements.

24. Therefore, the issue before the Panel is not whether the Enabling Clause allows to exclude *a priori* and permanently certain countries from a GSP scheme, but rather whether it is possible to apply differentiation criteria among the GSP beneficiaries which have the consequence that, at any given point in time, not all the GSP beneficiaries receive identical preferences.

25. Like the EC's GSP, the GSP schemes of other donor countries, such as the United States and Japan, also differentiate between developing countries. For example, both the United States and Japan

"graduate" countries with respect to products or sectors where they have become competitive.⁶ This form of differentiation, like the Drug Arrangements, reflects the assumption that the term "non-discriminatory" does not require to grant identical preferences to all developing countries.

Question 41

Under the initial application of the 1971 Waiver Decision, did any contracting party granting preferences to developing countries exclude any developing country or countries from its GSP?

26. The GSP scheme introduced by the EC following the adoption of the 1971 Waiver did not exclude a priori any developing country. The EC understands that, in contrast, other donors (in particular the United States) did exclude from the outset certain developing countries.

27. It is recalled, nevertheless, that the issue in dispute is not the possibility to exclude *a priori* and permanently certain developing countries from a GSP scheme, but rather whether the term "non-discriminatory" means that all the developing countries previously designated as beneficiaries of a GSP scheme must be granted identical preferences.⁷

Question 42

What elements of Article I:1 of GATT 1994 do not apply under paragraph 2(a) GSP schemes covered by the Enabling Clause? For example, do commitments regarding charges imposed in the international transfers of payments for imports and exports, or rules and formalities in connection with importation and exportation, change in any way when trade under GSP takes place, or do they retain their validity, as set out in Article I:1?

28. The Enabling Clause excludes completely the application of Article I:1 of the GATT with respect to measures that fall within Paragraph 2(a).

⁶ See the description of the GSP schemes applied by the United States and Japan made in the Note by the WTO Secretariat entitled "The Generalised System of Preferences: A preliminary analysis of the GSP schemes of the Quad", WT/COMTD/W/93, of 5 October 2001, paras. 46 and 57-61.

⁷ The WTO Secretariat has observed that in the discussions within UNCTAD some flexibilities were discussed and these have become *de facto* part of operational schemes. For example, it was noted that "...the industrial countries could establish a quota for admitting manufactured goods from developing countries *free of duty*, but they could *exclude from these preferences* a schedule of items constituting a reasonable percentage of the total goods they import."⁷ And "*all the developing countries*, irrespective of their level of development, would be eligible to avail themselves of the *preferential system* up to the amount of the relevant quota. But there would have to be a periodic review of the flow of exports; and if the exports from one or more countries increased so much that they did not leave sufficient room for those from others, equitable solutions should be sought." "Special preferences should be granted to the less advanced developing countries." It was also accepted that, after preferences had helped the developing countries "to prevent or rectify the structural imbalance in their trade", they "will gradually have to disappear". That was the concept of "graduation": that developing countries becoming advanced would not longer benefit from the GSP. Finally, it was recognised that, while developing countries would not offer "conventional reciprocity", as a result of preferences they would be able to import more than if the preferences had not been granted. Thus, irrespective of the subsequent legal texts, the early discussion already envisaged quota limits, graduation, special preferences for LDCs and the eventual phasing out of preferences.

Note by the WTO Secretariat entitled "The Generalised System of Preferences: A preliminary analysis of the GSP schemes of the Quad", WT/COMTD/W/93, of 5 October 2001, para. 12. [footnotes omitted].

29. Paragraph 2(a) covers only "preferential tariff treatment". Accordingly, it does not cover the granting of preferences with respect to other measures such as "rules or formalities"⁸ or with respect to "charges on international transfers of payments".

30. The preferences provided under the Drug Arrangements consist exclusively of tariff preferences. India does not contest that they constitute "preferential tariff treatment" within the meaning of Paragraph 2(a).

Question 43

Please give your full interpretation of the term "non-discriminatory" in footnote 3.

31. The Panel is referred to:

- the EC's First Submission, paras. 64-85;
- the EC's reply to the Panel's Question to both parties Nos. 9, 10, 12 and 37;
- the EC's reply to the Panel's Question to the EC Nos. 2 and 18;
- the EC's Second Submission, paras. 19-44; and
- the EC's Second Oral Statement, paras. 36-63.

Question 44

Is it your understanding that the Agreed Conclusions (TD/B/330) were agreed to by consensus in UNCTAD?

32. No. The Agreed Conclusions embody the results of the consultations undertaken by certain countries within the Special Committee on Preferences. The UNCTAD Trade and Development Board limited itself to "take note" of those results. (see EC's Second Submission, para. 36.)

If so, do you consider that they are part of the context of the 1971 Waiver Decision, within the meaning of Article 31.2(a) of the Vienna Convention?

33. No. First, the Agreed Conclusions do not purport to be a binding "agreement" (see EC's Second Submission, para. 36). Second, India has not established that the Agreed Conclusions were made by all the countries that were Contracting Parties to the GATT 1947.⁹ Third, the Agreed Conclusions were not made "in connection with the conclusion of" the 1971 Decision, let alone "in connection with the conclusion of" the Enabling Clause. They were drawn up before the 1971 Decision was adopted, or even drafted, and, therefore, they cannot be an interpretation of its terms.¹⁰

Are they also part of the context of the Enabling Clause, by virtue of its footnote 3?

34. No. See the EC's Second Submission, paras. 33-37 and the EC's reply to the Panel's Question to both Parties No. 35.

⁸ See Panel report, United States – Denial of Most-Favoured-Nation Treatment as to Non-rubber Footwear from Brazil, adopted on 19 June 1998, 39S/128, paras. 6.14-6.17.

⁹ It appears that some countries that were Contracting Parties to the GATT 1947 were neither present nor represented in the Special Committee on Preferences. For example, South Africa and Zimbabwe.

¹⁰ According to Sir Ian Sinclair,

It is of course essential that the agreement ... should be related to the treaty. It must be concerned with the substance of the treaty and clarify certain concepts in the treaty or limit its field of application. It must equally be drawn up on the occasion of the conclusion of the Treaty.

Sir Ian Sinclair, *The Vienna Convention on the Law of the Treaties*, 2nd Edition, Manchester University Press, p. 129.

If not, are they part of the preparatory work of the 1971 Waiver Decision and of the Enabling Clause? Please elaborate.

35. The EC would agree that the Agreed Conclusions may be considered as "preparatory work" of the 1971 Decision.

Question 45

In light of Articles 31 and 32 of the Vienna Convention, are the Agreed Conclusions context, object and purpose, preparatory work or something else?

36. See the reply to the Panel's Question to both Parties No 44.

Question 46

Do you consider that the developing countries agreed in the Agreed Conclusions or in the 1971 Waiver Decision that GSP schemes could contain as little as a single product? If so, please provide documentary support for this contention. If not, what in the Agreed Conclusions prevent this?

37. Neither the Agreed Conclusions nor the Enabling Clause contain any express requirement concerning the product coverage of the GSP schemes.

38. In their "offers" to the Special Committee on Preferences, the prospective donor countries specified the products in respect of which they intended to grant preferences. Those "offers" are not binding and the donor countries remain free to withdraw preferential treatment with respect to all or part of those products, in accordance with the strictly voluntary nature of the GSP preferences (cf. Section IX.2(ii)(a) of the Agreed Conclusions).

39. As suggested by some of the Panel's questions, it might be arguable that the term "generalised" refers to the product scope of the preferences.¹¹ But this interpretation does not appear to be supported by the drafting history.

Question 47

Please give your full interpretation of paragraph 3(c).

40. Please see:

- the EC's First Submission, paras. 70-71;
- the EC's replies to the Panel's Questions to both Parties Nos. 12, 13, 14, 15, 16, 17 and 19;
- the EC's reply to the Panel's Question to India No. 8;
- the EC's replies to the Panel's Questions to the EC Nos. 16, 17 and 18; and
- the EC's Second Submission, paras. 48-52.

Question 48

What was your position on the meaning of GSP during the negotiation in the late 1960s? Did this position change over time, through to the Enabling Clause in 1979? Please provide documentary evidence in support of your answer.

¹¹ This interpretation is advanced also in the Note by the WTO Secretariat entitled "The Generalised System of Preferences: A preliminary analysis of the GSP schemes of the Quad", WT/COMTD/W/93, of 5 October 2001, para. 89.

41. The EC's position on the meaning of the term "non-discriminatory" has always been that this term does not prevent differentiation between developing countries according to their development needs. Thus, for example, as noted below, the EC introduced special tariff preferences for LDCs as early as 1976. Also, graduation mechanisms have been a feature of the EC's GSP scheme since its inception.

Question 49

Do you agree that a major objective of the introduction of GSP was to replace the previously existing special preferences?

42. Yes. As explained, the drafting history of the Enabling Clause suggests that the term "generalised" was used in order to distinguish the system of preferences developed in UNCTAD from the existing "special" preferences granted by some developed countries to some developing countries, mainly former colonies, on purely historical or geographical grounds. As originally envisaged, the UNCTAD system would have subsumed and replaced those existing "special" preferences for certain developing countries by "generalising" them, i.e. by making them available to all, or at least most developing countries. Hence the term "generalised".

43. As noted by one commentator, the Enabling Clause reflects the principle that

The preferences for development are to be accorded, not because of political, cultural or even geographical ties, but because of the difference that exists in the levels of economic development.¹²

If so, is it possible to set up GSP programmes addressing development problems of less than all developing countries? What is the basis for this possibility? What are the systemic consequences of such reading?

44. One thing is to give "special" preferences only to certain designated developing countries for historical or geographical reasons. Another is to include all developing countries in a GSP scheme and then differentiate among them according to criteria related to their development needs. Such differentiation among the beneficiaries of a GSP scheme is compatible with the requirement that the preferences must be "non-discriminatory" and indeed necessary in order to attain the objective stated in Paragraph 3(c).

Question 50

Does "generalized" include either product coverage or country coverage or both?

45. As mentioned, the drafting history of the Enabling Clause suggests that the term "generalised" was used to define the country scope of the preferences, rather than their product scope. (see above the EC's reply to the Panel's question to both Parties No. 46).

¹² Abdulqawi A. Yusuf, *Differential and More Favourable Treatment: The GATT Enabling Clause*, *Journal of World Trade Law*, Vol. 14, 1980, p.488-507, at p. 492.

And does "non-discriminatory" include either of these or both?

46. The term "non-discriminatory" is concerned exclusively with the country coverage. The fact of granting preferences with respect to certain products, rather than with respect to other products can never be considered as "discriminatory".

Question 51

If "generalized" does not mean to all and does not allow to one, then what does it mean? How does one determine whether a GSP scheme is "generalized" or not? Would four countries be sufficiently generalized, as was the situation in the earlier years of implementation of the Drug Arrangements? Would a scheme covering, say, 50 per cent of all developing countries be "generalized"?

47. See below the reply to the Panel's question to both Parties No. 52.

Question 52

Please give your full interpretation of paragraph 2(a).

48. Paragraph 2(a) is one of the forms of "differential and more favourable treatment to developing countries" to which Paragraph 1 "applies". Accordingly Paragraph 2(a) must be interpreted within the framework of Paragraph 1. As explained, Paragraph 1 does not require to grant the same preferences to all developing countries. Accordingly, there is no reason to read that requirement into Paragraph 2(a), unless Paragraph 2(a) so provides.

49. The interpretation of the term "preferential tariff treatment" does not seem to be disputed between the parties. Rather, it is the characteristics of such treatment which are at issue.

50. The term "tariff" makes clear that Paragraph 2(a) covers only tariff preferences, unlike Paragraph 2(d), which covers any kind of "special treatment". This is one of the reasons why the EC's interpretation of Paragraph 2(a) does not render redundant Paragraph 2(d), contrary to India's assertion.

51. In turn, the terms "accorded by developed countries" make clear that Paragraph 2(a) does not apply to preferential treatment granted by developing countries to other developing countries. As pointed out by the EC, this is another of the differences between Paragraphs 2(a) and 2(d)

52. The preferences must apply to "products originating in developing countries". By India's own logic, the absence of the term "the" before "developing countries" supports the EC's interpretation that developed countries are not required to grant the same preferences to each and every developing country.

53. Finally, "preferential tariff treatment" must be granted "in accordance with the Generalised System of Preferences". This means that the preferences must be granted as part of, and consistently with "the Generalised System of Preferences".

54. It is unclear whether Footnote 3 refers to the description of the "preferential tariff treatment" or of the "Generalised System of Preferences". The issue, nevertheless, seems inconsequential, since the 1971 Decision describes the General System of Preferences by describing the characteristics of the preferential treatment provided thereunder.

55. The scope of the cross-reference made in Footnote 3, as well as the meaning of the terms "generalised", "non-discriminatory", "non-reciprocal" and "beneficial to the developing countries" have been addressed elsewhere by the EC.

Please also give your interpretation of the term "generalized" in footnote 3.

56. The term "generalised" must be given a meaning that, while being compatible with the other requirements included in footnote 3, does not reduce those requirements to inutility.

57. The EC considers that the issue of whether developed countries are permitted to differentiate between developing countries is addressed specifically by the term "non-discriminatory". The presence of this term in footnote 3 presupposes that the term "generalised" does not exclude *a priori* any conceivable form of differentiation between developing countries. If "generalised" meant that the same preferences must be granted to all developing countries, the term "non-discriminatory" would become meaningless and redundant, because any "discriminatory" preferences would be, by definition, "non-generalised", regardless of whether the EC's or India's interpretation of "non-discriminatory" is adopted.

58. It is possible to conceive a number of different ways in which the term "generalised" could be interpreted so as to give it a meaning which is different but nevertheless compatible with that of "non-discriminatory".

59. First, the term "generalised" could be interpreted as referring to the question of whether developed countries may exclude *a priori* certain developing countries from a GSP scheme (e.g., because they provide "reverse preferences"), while the term "non-discriminatory" would address the different and subsequent question of whether each and every developing country previously recognised as a beneficiary of a GSP scheme must be given the same preferences. This appears to be India's interpretation:

India's understanding of the drafting history is that the term "generalised" was meant to refer to the range of countries that would accord and receive preferences but not to the degree of differentiation between the countries that the donor countries select as beneficiaries. In view of the fact that the countries that are denied the benefits accorded under the Drug Arrangements are not excluded from the EC's GSP scheme, the question of whether the EC's GSP scheme is sufficiently "generalised" does not arise in the case before the Panel.¹³

60. Another possible interpretation of the term "generalised", based on its ordinary meaning rather than on the drafting history, would be that, while not prohibiting all forms of differentiation between developing countries, an issue which is addressed by the term "non-discriminatory", the term "generalised" nonetheless requires that preferences be granted to a subcategory of developing countries and thus prohibit individual preferences. The obvious difficulty with this interpretation, as suggested by some of the Panel's questions, is where to draw the line.

61. Finally, the term "generalised" could also be interpreted as meaning that preferences must be granted with respect to all or at a least a sufficiently wide range of products. However, as discussed above, the drafting history does not appear to support this interpretation.

62. The above three interpretations are not necessarily mutually exclusive.

63. It should be noted that none of the above interpretations requires to interpret the term "non-discriminatory" as prohibiting differentiation between developing countries.

64. It should also be noted that the Drug Arrangements are consistent with all the above interpretations. Indeed, India has not claimed in this dispute that the Drug Arrangements are not "generalised".

¹³ India's Question to the EC No. 30

Question 53

What in your view should be the test for "necessary" under Article XX(b)?

65. Please see the EC's First Submission, paras. 176-182. See also the EC's reply to the Panel's Question to both Parties No. 54.

Question 54

In light of the Appellate Body's interpretation and description of the term "necessary" as being somewhere along a continuum between "contributing to" and "indispensable", please provide your views on how and where along this continuum the Drug Arrangements qualify as "necessary" according to the interpretation enunciated by the Appellate Body.

66. From the analysis made by the Appellate Body in *Korea – Beef* it is possible to draw the following guidance:

- first, a measure does not have to be "indispensable", i.e. a measure may be deemed "necessary" even if it is possible to achieve the same objective by other means;¹⁴
- second, the measure must be "closer to the pole of indispensable than to the opposite pole of simply 'making a contribution to'".¹⁵ However, contrary to what is stated sometimes by India, this is not the same as saying that the measure must be "close" to the "pole of indispensable";
- third, the Appellate Body has noted that the more vital or important the value, the easier it would be to accept as "necessary" a measure.¹⁶ Accordingly, measures to protect human life or health need to be "less closer" to the "pole of indispensable" than other types of measures in order to be considered "necessary".

67. The EC considers that the Drug Arrangements are "necessary" to protect human life and health for the following reasons:

- First, the United Nations has recognised that, in order to fight effectively against drug abuse, it is necessary to reduce both illicit demand and illicit supply. For example, the 1988 Action Plan states that:

... in order to achieve a maximum effectiveness in the fight against drug abuse it is necessary to maintain a balanced approach by allocating appropriate resources to initiatives that include the reduction of both illicit demand and illicit supply.¹⁷
- Second, the United Nations has recognised that, in order to reduce illicit supply, it is necessary to adopt a balanced approach which combines law enforcement and initiatives to promote alternative economic activities. For example, the 1988 Action Plan states that:

¹⁴ Appellate Body report, *Korea – Beef*, para. 161.

¹⁵ Ibid.

¹⁶ Ibid., para. 162.

¹⁷ 1998 Action Plan, preamble, para. 5 (Exhibit EC – 9). See also the Declaration on the Guiding principles of Drug Demand Reduction, included in the same resolution, which provides (at II.8 a)) that "there shall be a balanced approach between demand reduction and supply reduction, each reinforcing the other, in an integrated approach to solving the drug problem". (Exhibit EC -10).

History has shown that there is no single response to reducing and eliminating the cultivation and production of illicit drugs. Balanced approaches are likely to result in more efficient strategies and successful outcomes.¹⁸

National drug crop reduction and elimination strategies should include comprehensive measures such as programmes in alternative development, law enforcement and eradication.¹⁹

Alternative development ... is one of the key components of the policy and programmes for reducing illicit drug production that have been adopted within the comprehensive framework of the global strategy of the United Nations.^{20 21}

- Third, the United Nations has recommended that, in order to support sustainable alternative activities, other countries should provide greater market access. For example, only a few weeks ago the UN Commission on Narcotic Drugs resolved that

In accordance with the principle of shared responsibility, States are urged to provide greater access to their market for products of alternative development programmes, which are necessary for the creation of employment and the eradication of poverty.²²

- Finally, the EC considers that, in order to provide "greater market access" to the products of the beneficiaries it is necessary to provide tariff preferences to those countries. Extending the same preferences to all developing countries, as suggested by India, would fail to provide effective "greater market access" to the countries affected by the drug problem, because other developing countries which are not handicapped by the drug problem would capture the new market opportunities created by the Drug Arrangements, as it is already the case under the GSP General Arrangements.

Question 55

The EC has stated at the Second Meeting with the Parties that the existence of the Drug Arrangements tariff preference margins will not prevent it from fully contributing to the Doha tariff reduction negotiations. If the EC is ready to reduce the Drug Arrangement margins of preference, how can these preferences be considered "necessary" to protect human life and health in the EC?

68. To be precise, the EC noted that, when negotiating tariff reductions, the EC takes into account *inter alia* of the need to preserve the margins of preference under the Drug Arrangements. Whether or not the Doha negotiations will lead to a reduction of the margins of preference for the products

¹⁸ 1988 Action Plan, para. 1.

¹⁹ Ibid., para. 4.

²⁰ Ibid., para. 8.

²¹ See also the Joint Ministerial Statement adopted at the 46th Session of the Commission on Narcotic Drugs, E/CN.7/2003/L.23/Rev.1, p.7, para. 8. (Exhibit EC - 18):

[Action to counter the drug problem] requires a comprehensive strategy that combines alternative development, including, as appropriate, preventive alternative development, eradication, interdiction, law enforcement, prevention, treatment and rehabilitation as well as education.

²² Ibid., para. 21. (Exhibit EC - 18).

covered by the Drug Arrangements which would render ineffective the Drug Arrangements is at this point in time mere speculation.

Question 56

Please briefly state the criteria under Article XX(b) of GATT 1994 for determining whether a measure is: (i) necessary; (ii) necessary to protect human life or health; (iii) necessary because there is no less trade-restrictive measure available; or (iv) there is no consistent or less inconsistent measure available.

69. As regards the meaning of "necessary" and "necessary to protect human life or health", the Panel is referred to the EC's First Submission, paras. 176-182 and the reply to the Panel's Question to both Parties No. 54.

70. On the issue of whether the measure should be the "least trade restrictive" or the "least inconsistent", the EC would like to make two observations.

71. First, in *Korea – Beef*, the Appellate Body held that one of the factors to be weighed in establishing whether a measure was necessary, is "the extent to which the compliance measures produces restrictive effects on international commerce"²³ or, according to another formulation, "the accompanying impact of the law or regulation on imports or exports".²⁴

72. At the same time, nevertheless, the Appellate Body endorsed the standard established by the Panel in *US – Section 337*, according to which it must be determined whether a WTO-consistent measure, or a less-inconsistent WTO measure is reasonably available.²⁵

73. Contrary to what has been suggested by the United States, the two approaches are not incompatible, but rather complementary. Thus, in *Korea – Beef*, the Appellate Body upheld the panel's findings by noting that there existed alternative measures that were "consistent with the WTO Agreement, and thus less trade restrictive and less market intrusive".²⁶ On the other hand, where two measures are equally WTO-inconsistent, it may be necessary to consider their respective trade restrictive effects.

74. Second, a measure cannot be considered as a true "alternative" to the measure for which justification is being sought unless it is equally effective in achieving the objective of life and health protection pursued by the Member concerned.²⁷

75. The EC's position in this dispute is that there is no true "alternative" WTO-consistent measure, or less WTO-inconsistent measure, because there is no measure that would be as effective as the Drug Arrangements in providing greater market access for the products of the beneficiaries.

76. In particular, extending the Drug Arrangements to other developing countries which are not handicapped by the drug problem would have the consequence that those countries would capture most of the additional market opportunities created by the Drug Arrangements, just like under the GSP general arrangements. As a result, the Drug Arrangements would be much less effective in reducing the drug supply from the beneficiaries.

²³ Appellate Body report, *Korea – Beef*, para. 163

²⁴ *Ibid.*, para. 164.

²⁵ *Ibid.*, paras. 165-166.

²⁶ *Ibid.*, para. 172.

²⁷ Appellate Body report, *EC – Asbestos*, para. 174.

Question 57

What in your view should be the test under the chapeau?

77. Please see the EC's First Submission, paras. 197- 216 and the EC's Second Oral Statement, paras. 79-80.

Question 58

In terms of the chapeau of Article XX of GATT 1994, can it be said that the same conditions prevail in all 12 beneficiaries of the Drug Arrangements, or are there differences among them?.

78. Obviously the situation of the 12 beneficiaries is not identical. However, the prevailing conditions are sufficiently similar to consider that, for the purposes of the chapeau, the same conditions prevail in all of them.

Assuming the conditions within the 12 countries differ, are the differences between the conditions in these 12 countries and in other drug-affected developing countries greater than those between the 12? Please provide justification and evidence for your response.

79. Yes. The Panel is referred to the argument and evidence provided in:

- the EC's First Submission, paras. 116-140; and
- the EC's replies to the Panel's Questions to the EC Nos. 14, 15, 57 and 62.

Question 59

Would human life and health in the EC be better protected if the Drug Arrangements were extended to all the developing countries involved with drug production and traffic which appear in the 2002 report of the International Narcotics Control Board?

80. The EC considers that the Drug Arrangements include all the developing countries which are seriously affected by drug production or trafficking (with the exception of those that benefit already from more favourable tariff arrangements) and which, therefore, pose a threat to the human life and health in the EC.

81. The mere fact that a developing country is mentioned in the 2002 INCB Report does not mean that it is as seriously affected by drug production or trafficking as the beneficiaries. The EC has already explained why the developing countries mentioned by India and by the Panel (India, Paraguay, Indonesia, Thailand, the Philippines, South Africa) are not included in the Drug Arrangements. The EC stands ready to explain why any other countries specifically identified by the Panel have not been included either.

82. As explained above, extending the Drug Arrangements to other developing countries which are not as severely affected by drug production or trafficking as the beneficiaries would render the Drug Arrangements much less effective in reducing the supply of drugs from the beneficiaries.

To the European Communities

Question 23

Are developed countries free to decide upon the development needs of developing countries in setting up a GSP scheme?

83. See below the answer to the Panel's Question to the EC No. 33.

Are they also free to choose the countries and the products covered by the GSP scheme? If yes, where is the textual basis for such authorization? If not, what is the legal basis limiting or qualifying such measures.

84. As regards products, see above the reply to the Panel's question to both Parties No. 46.

Question 24

If different treatment is allowed under the concept of "non-discriminatory", then what is not allowed?

85. As explained, the term "non-discriminatory" does not allow to make all kinds of distinctions between developing countries. See the responses to the Panel's Questions to both Parties Nos. 32 and 37.

Question 25

Originally the Drug Arrangements covered four countries. There certainly was a drug problem in other countries at that time, including in Pakistan. Under what criteria at that time did the EC incorporate those four South American countries and not Pakistan?

86. The EC applied the same criteria as in the current GSP Regulation. Obviously, the EC does not agree with the suggestion that, at the time were the Drug Arrangements were introduced, there were "certainly" other countries as affected by the drug problem as the beneficiaries. No evidence to that effect has been provided by India. In any event, the issue before the Panel is whether the *current* GSP Regulation is discriminatory.

87. The reasons for including Pakistan in the Drug Arrangements in the current GSP Regulation are explained in the reply to the Panel's Question to the EC No. 62.

Question 26

Please provide the list of those developing countries which are referred to in the Board's 2002 report and which are not included in the Drug Arrangements and are however the beneficiaries of similar preferential treatment by the EC under other schemes.

88. The EC assumes that the Panel refers to Part III of the INCB report, which provides a general overview of the drug situation in the different world regions.

89. The following developing countries mentioned in the INCB Report are covered by other preferential arrangements:

- **GSP Special Arrangements for Least Developed Countries:** Cap Verde, Senegal, Mozambique, Tanzania, Haiti, Laos, Myanmar, Afghanistan, Cambodia, Bhutan, Nepal, Bangladesh and the Maldives.

- **ACP-EC Partnership Agreement:** Cape Verde, Senegal, Nigeria, Kenya, Mozambique, Tanzania, Namibia, Zimbabwe, Belize, Saint Vincent and the Grenadines, Haiti, St. Lucia, Saint Kitts and Nevis, Grenada, the Bahamas, Jamaica, Trinidad and Tobago and the Dominican Republic.
- **Bilateral Free Trade Agreements:** Morocco, Tunisia, Egypt, Algeria, South Africa and Chile

Question 27

Has it not been the practice to either grant GSP to all developing countries or to obtain a waiver for the purpose of differentiation?

90. See the replies to the Panel's questions to both Parties Nos. 40 and 41.

Question 28

Under the Agreed Conclusions, would it have been possible to give special preferential treatment to the LDCs prior to the Enabling Clause?

91. The Agreed Conclusions do not prevent developed countries from granting special tariff treatment to the LDCs. See the EC's Second Oral Statement at para. 58.

92. The EC considers that the 1971 Decision allowed developed countries to give special tariff preferences to the LDCs as part of a GSP scheme. Indeed, the EC has granted special tariff preferences to the LDCs since 1976.

And prior to the 1971 Waiver?

93. No.

Question 29

Is there any requirement that product coverage must be broad enough, according to the 1971 Waiver? Or is a GSP scheme that only contains one product legally permitted under the 1971 Waiver? Why or why not?

94. See the reply to the Panel's Question to both Parties No. 46.

Question 30

Can the EC conceive of unique needs justifying special preferences other than drug-caused needs or the needs of least-developed countries? Leaving aside least-developed countries, what about AIDS-related needs or famine?

95. The EC considers that the special arrangements for LDCs and countries affected by drug production and trafficking, together with the graduation mechanisms provided in the EC's GSP Regulation, capture the most significant differences between the needs of developing countries. The EC does not wish to rule out, however, that in the future it may become necessary to modify or complement those arrangements in the light of the evolving needs of development countries.

96. The EC recalls that the UN definition of LDCs already take into account *inter alia* the levels of nutrition and health, as well as the instability of agricultural production which is often the cause of

famines.²⁸ In contrast, the UN definition of LDCs does not address the drug problem, which may affect developing countries with different levels of development. Hence the need to provide special preferences for the countries affected by that problem.

97. Moreover, as explained above, in order to be "non-discriminatory", the differences in treatment must be objectively apt and proportionate to achieve the objective of responding to the needs of the developing countries.

98. The Drug Arrangements are an appropriate response to the drug problem because in order to reduce drug production and trafficking it is necessary to replace them with licit alternative economic activities and, in turn, this requires to provide greater market access for the products of such activities.

99. On the other hand, tariff preferences would be an inappropriate response to famines. The most direct and effective response to a famine is emergency food aid. Similarly, the most direct and effective response to the AIDS problem is providing financial and technical assistance, in the form of medicines, doctors, funds to build hospitals, etc.

100. Both the UN and the WTO have recognised that providing greater market access for the products of countries affected by the drug problem is an appropriate response to the that problem. No similar international recognition exists with respect to famines or AIDS.

Question 31

When was the last time the EC conducted a review of all countries to determine which countries are the principle drug producers or drug traffickers?

101. The EC authorities monitor regularly the situation of the drug problem in all developing countries.

102. Each GSP Regulation has a limited duration (as a rule 4 years). Prior to the enactment of a new GSP Regulation, the EC Commission conducts an assessment of those countries which are susceptible to benefit from the Drug Arrangements (i.e. those which do not benefit already from more favourable tariff treatment as LDCs or under bilateral agreements) in order to decide which of them should be covered by the Drug Arrangements.

103. The current GSP Regulation was adopted in December 2001 on the basis of a proposal submitted by the EC Commission in September of the same year. The latest assessment of the drug situation in those countries which could potentially qualify for the Drug Arrangements was conducted by the EC Commission as part of the preparation of that proposal. The next GSP Regulation will apply from 1 January 2005. The EC Commission will submit a proposal for that regulation during 2004.

Question 32

The EC states, in response to Panel Question 11 to Both Parties, that "generalized" in footnote 3 means that GSP is to be provided to all developing countries with similar development needs. Based on this analysis, how does one determine whether these needs are in fact "similar"?

104. See the EC's replies to the Panel's Questions to Both Parties Nos. 12 and 17.

105. The EC has explained why the countries affected by drug production and trafficking have special development needs in its First Submission, paras. 87-99. India has nowhere addressed the EC's

²⁸ Exhibit EC-18.

arguments and evidence. Both the UN and the WTO have recognised that the countries affected by the drug problem have special development needs.

Question 33

Is it EC's position that the determination of legitimate objectives and special needs is something to be determined by the country granting those preferences?

106. No.

107. Developed countries have some discretion in designing their GSP schemes. Otherwise, the provision contained in Paragraph 3(c) to the effect that preferences shall be designed, and if necessary, modified to respond to the needs of developing countries would be superfluous

108. However, this discretion must be exercised within the limits of the requirements imposed by the Enabling Clause, including in particular the requirement that preferences must be "non-discriminatory".

109. Under the EC's interpretation of the term "non-discriminatory", WTO panels can review whether (1) tariff differentiation between developing countries pursues an objective which is legitimate in light of the object and purpose of the Enabling Clause; and (2) whether tariff differentiation is an adequate and proportionate means to achieve that objective.

110. Thus, India's allegations that, under the EC's interpretation, the needs of developing countries would be determined "solely"²⁹ by the developed countries are thoroughly misguided.

Question 34

Can you point to any of the initial "primitive" schemes in which there is a differentiation among developing countries?

111. As mentioned, the EC's GSP scheme has differentiated between LDCs and other developing countries since 1976. Also, the EC's GSP scheme has included from its inception mechanisms to limit imports from the most competitive developing countries.³⁰

Question 35

One would suppose that when the developed countries introduced their GSP schemes and did so uniformly, there must have been some common understanding that all developing countries would be included. Has there been any GSP scheme to selected developing countries which was not covered by a GATT/WTO waiver? If so, please point to any such schemes.

112. See the EC's replies to the Panel's questions to both Parties Nos. 40 and 41.

Question 36

India states in response to Panel Question 11 to Both Parties that "generalized" in footnote 3 means that GSP is to be provided to all developing countries. Could the EC please give a detailed explanation as to why it disagree with India's interpretation of this term?

²⁹ India's Second Submission, para. 4.

³⁰ This possibility was mentioned expressly in the "offer" submitted by the EC to UNCTAD. (TD/B/AC.5/34/Add.1). Similar mechanisms are mentioned in Austria's submission. (TD/B/AC.5/34/Add.3).

113. The EC understands that India's position is that that the term "generalised" means that, in principle, no developing country should be excluded *a priori* from a GSP scheme, but does not address the different issue of whether the same preferences must be granted to each and every recognised GSP beneficiary. According to India, that issue is addressed by the term "non-discriminatory". Thus, India has explained that

India's understanding of the drafting history is that the term "generalised" was meant to refer to the range of countries that would accord and receive preferences but not to the degree of differentiation between the countries that the donor countries select as beneficiaries. In view of the fact that the countries that are denied the benefits accorded under the Drug Arrangements are not excluded from the EC's GSP scheme, the question of whether the EC's GSP scheme is sufficiently "generalised" does not arise in the case before the Panel.³¹

114. The above is consistent with the EC's own understanding of the drafting history of the term "generalised".³² The EC, nevertheless, has pointed out that, in addition, the ordinary meaning of "generalised" could support another interpretation:

At the same time, and in accordance with its ordinary meaning, the term "generalised" appears to presuppose the existence of a given class or category of beneficiaries to which the preferences must be "generalised". Accordingly, it seems that a preference granted exclusively to one country could not be considered as "generalised" even if it could qualify as "non-discriminatory".³³

115. The two interpretations are not necessarily mutually exclusive. In any event, neither of them has the implication that the term "non-discriminatory" requires to provide the same preferences to *all* the developing countries included in a GSP scheme.

Question 37

If "generalized" means all and "non-discrimination" allows differentiation as to different needs, how do you reconcile the contradiction in these two terms?

116. As explained, it is neither the EC's nor India's position that the term "generalized" prohibits differentiation between the developing countries included in a GSP scheme. If "generalized" meant that identical preferences must be provided to all the beneficiaries of GSP scheme, the term "non-discriminatory" would become redundant and meaningless. The EC submits that, if only for that reason, that interpretation of "generalized" cannot be correct.

117. As explained above in the EC's reply to Panel's Question to both Parties No. 52, there are number of different ways in which the term "generalised" could be interpreted as having a meaning which is different, yet compatible, with that of "non-discriminatory". None of those interpretations of "generalised" requires to interpret "non-discriminatory" as prohibiting all kinds of differentiation between developing countries.

³¹ India's Question to the EC No. 30. By using the terms "sufficiently generalised" India appears to admit that donors are not required to include all developing countries in their GSP schemes. This would be consistent with the Agreed Conclusions, which stated the objective that "*in principle* all developing countries should participate as beneficiaries from the outset", but left open the issue of the countries granting "reverse preferences" (Section II.1) and noted the statement by the donors that "in general" they would base themselves in the principle of self-election (Section IV.1).

³² EC's Reply to the Panel's Question to both Parties No. 11, at para. 41.

³³ Ibid., at para. 46. [Footnotes omitted].

Question 38

Under the Enabling Clause the EC originally selected four countries under this Drug Arrangements. Therefore, is it the EC's view that if similar development needs only cover four countries, then it is legally adequate and proper to apply such a system to just those four countries?

118. The EC considers that the mere fact that, at a certain point in time, certain preferences apply to four of the beneficiaries of a GSP scheme is not a sufficient reason to consider that such preferences are inconsistent with the requirements of footnote 3. More specifically, it would not be a sufficient reason to consider that the preferences are "discriminatory", which is the only issue before this Panel.

Question 39

In Korea – Beef, the Appellate Body stated that: "For a measure ... to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be designed to secure compliance" with laws and regulations that are not themselves inconsistent with some provisions of the GATT 1994. Second, the measure must be necessary to secure such compliance". In Japan – Alcoholic Beverages, the Appellate Body said that "the aim of a measure may not be easily ascertained, nevertheless, its protective application can most often be discerned from the design, the architecture and the revealing structure of a measure". Similarly, the first step in this case is for the EC to demonstrate that the measure is designed to achieve/for the purpose of achieving a legitimate objective. The EC must then demonstrate that the measure is "necessary" to achieve that legitimate objective. With this in mind, what specific evidence can the EC provide in support of its claim that its preferential tariff measure is for the purpose of the protection of human life or health in the EC, while we note the Drug Arrangements are aimed at promoting sustainable development in 12 developing countries? Please provide your analysis as to the design, architecture and structure of the Drug Arrangements.

119. The Appellate Body has warned repeatedly against applying "tests", rather than the actual wording of the WTO Agreement.³⁴ The only requirement stated in Article XX(b) of the GATT is that the measure must be "necessary" for the protection of human life or health. The EC sees no basis whatsoever in the text of Article XX(b) for the proposition that, in addition to showing that a measure is "necessary" for the protection of human life and health, it must be shown that it has been specifically "designed" for that purpose.

120. The EC considers that the examination of the "design, architecture and structure" of a measure may be pertinent as part of the examination of whether a measure is "necessary", but not as a separate requirement. The EC believes that the passage of the Appellate Body report in *Korea – Beef* quoted in the question should be understood in this way. (Moreover, the EC would note that there are important differences between the structure of Article XX(b) and that of Article XX(d), which could explain the two-step approach applied by the Panel, and endorsed by the Appellate Body in *Korea – Beef*.)

121. At any rate, the EC rejects the suggestion that a measure cannot be justified under Article XX(b) unless it can be shown that it has as its sole and exclusive purpose the protection of human life and health. To repeat, the only requirement provided in Article XX(b) is that the measure must be "necessary" to protect human life or health. Yet, it is evident that a measure may be "necessary" to protect human life or health and, at the same time, achieve another, compatible objective.

³⁴ See e.g. Appellate Body Report, *US – FSC*, para. 91.

122. The immediate objective of the Drug Arrangements is to promote exports from the countries affected by the drug problem with a view to support licit alternative activities that replace drug production and trafficking. Reducing drug production and trafficking in the beneficiary countries promotes the economic development of those countries, which is impaired by those activities. At the same time, reducing drug production and trafficking in those countries has the necessary effect of reducing the supply of drugs to the EC, which in turn has the necessary effect of reducing drug consumption within the EC.

123. In sum, the development problems of the beneficiaries and the problem of drug abuse within the EC have a common cause: the extent of drug production and trafficking in the beneficiary countries. Reducing drug production and trafficking in those countries addresses simultaneously both problems.

Question 40

What evidence can the EC provide as to the effect of the Drug Arrangements on the protection of the health of EC citizens?

124. The EC monitors the levels of production and trafficking in the beneficiary countries. The EC also monitors the effects of the Drug Arrangements in promoting exports from the beneficiaries and, therefore, in supporting alternative activities to drug production and trafficking (See below, the reply to the Panel's Question to the EC No. 49).

125. The EC considers that it is a self-evident proposition that reducing the supply of drugs from the beneficiaries to the EC reduces the consumption of drugs in the EC and, therefore, protects the health and life of the EC citizens.

126. However, it would be an impossible task to separate and quantify the effects on drug consumption within the EC which are attributable to the Drug Arrangements from those which are attributable to other actions undertaken by the beneficiaries in order to reduce production and trafficking of drugs or to others actions that are part of the EC's comprehensive strategy against drug abuse, including in particular those aimed at reducing the demand for drugs.

127. The UN recommendations relied upon by the EC in this dispute reflect the basic assumption that promoting alternative licit activities will reduce (or at least prevent the increase of) the production and trafficking of drugs and, hence, their supply to, and their consumption in other countries. India has provided no evidence that calls into question this premise, which underlies well-established international anti-drug policies to which all WTO Members, including India, have agreed within the United Nations.

Question 41

Does the EC have any mechanism that in one way or other monitors the effect of the DA on the health of the EC's citizens?

128. See above the EC's reply to the Panel's Question to the EC No. 40.

Question 42

Was there any report prepared by the EC before the Drug Arrangements were enacted that described the link between production in the drug-producing and trafficking countries and consumption by the EC's citizens?

129. As mentioned above, the EC considers that there is a self-evident link between the production and trafficking of drugs in other countries and their consumption in the EC. There is no production of coca or opium products in the EC. If those drugs were not produced and trafficked in other countries, they would not be consumed in the EC.

Question 43

Is there any documentary material that the EC can point to from any of its member states, in terms of referring to the health benefits ascertained from the Drug Arrangements, rather than in terms of quantification?

130. See above the EC's reply to the Panel's Question to the EC No. 40.

Question 44

The EC mentions a comprehensive strategy for combating drug problems, including improved market access for developing countries, called for by various UN conventions, resolutions and other reports. Is this comprehensive strategy aimed at supporting sustainable development of drug-affected developing countries or at protecting human health in the importing country, or both?

131. Both. The UN strategy is aimed to counter the "world drug problem", which the United Nations has described as

a challenge of a global dimension which constitutes a *serious threat to the health, safety and well being of all mankind, in particular young people, in all countries, undermines development, including efforts to reduce poverty, socio-economic and political stability and democratic institutions*, entails an increasing economic cost for Government, also threatens the national security and sovereignty of States, as well as the dignity and hope of millions of people and their families, and causes irreparable loss of human lives.³⁵

Please identify the specific wording of the strategy in any UN conventions, resolutions or related reports which links improved market access to the protection of human health in the importing country.

132. Please see above the EC's Reply to the Panel's Question to both Parties No. 54. See also EC's First Submission, paras. 100-115, EC's Second Submission, paras. 57-61, and the reply to the Panel's Question to both Parties No. 25.

Question 45

Is improved market access suggested as one alternative component or as a necessary component of this strategy?

133. It is a necessary component of the UN strategy. The texts cited by the EC contain no suggestion to the effect that providing greater market access is merely one among various options. As explained, alternative activities would not be sustainable in the absence of markets for the products of such activities.

³⁵ U.N General Assembly Resolution 56/124 of 19 December 2001 (International Cooperation against the World Drug Problem), Fourth recital (Emphasis added) (Exhibit EC-4).

Question 46

The EC argues that the objective criteria for designating beneficiaries under the Drug Arrangements are based solely on the seriousness of the drug production and trafficking problems in each of the developing countries. It seems that there is nothing in the criteria focusing on whether or not the drugs are supplied into the EC market. How does providing tariff preferences to non-suppliers serve to protect the health of EC citizens?

134. The EC is, by far, the largest market for narcotic drugs, together with the United States. All the countries included in the Drug Arrangements are, as a matter of fact, "suppliers" to the EC.

135. See also the EC's reply to the Panel's Question to both Parties No. 24.

Question 47

In light of the pronouncements of relevant UN and other international bodies regarding the fight against drugs, contained in UN documentation mentioning promotion of market access for drug-producing and trafficking countries, there is no reference to the consequences for protecting life and health in importing countries. Could the EC comment on this fact.

136. The EC does not agree with the statement made in the question. The relevant UN recommendations make clear that providing greater market access is necessary in order to support alternative development, which in turn is one of the necessary components of the strategy to reduce illicit production and trafficking, which in turn is one of the actions, together with the reduction of demand, required to counter the "drug problem". One of the main aspects of the "drug problem" which the UN strategy aims to resolve are the negative health consequences of drug abuse, including in the importing countries.

137. Please see

- the EC's First Submission, paras. 100-115;
- the EC's Second Submission, paras. 57-61;
- the EC's Reply to the Panel's Question to both Parties Nos. 25 and 54; and
- the EC's reply to the Panel's Question to the EC No. 44.

Question 48

Is the EC saying that the tariff preferences under the Drug Arrangements are reducing the drug supply into the EC and can you supply evidence of this? Or are you saying that the effects of the Drug Arrangements cannot be known?

138. See above the EC's reply to the Panel's Question to the EC No. 40.

Question 49

In light of the preamble of the EC's Regulation enacting the Drug Arrangements, which states "that special arrangements must be closely monitored under the Drug Arrangements", how does the EC monitor the Drug Arrangements in the 12 beneficiaries? Please provide the most recent report on the monitoring of the Drug Arrangements.

139. The most recent report on the effects of the Drug Arrangements was drawn up under Regulation (EC) No 2820/98 for the period 1 July 1999 to 31 December 2001. This report analyses the effects of the Drug Arrangements on the trade from the beneficiaries.³⁶

140. In addition, the EC would like to draw the Panel's attention to an evaluation of the impact of the Drug Arrangements conducted by the General Secretariat of the Andean Community.³⁷

Question 50

Does the EC monitor the effects of the Drug Arrangements on the protection of human life and health in the EC? If yes, please describe this monitoring mechanism and provide relevant evidence thereof. If no, how can the EC determine whether the Drug Arrangements continue to be "necessary" to protect human life and health in the EC?

141. See above the reply to the Panel's Question to the EC No. 40.

Question 51

Do the UN reports suggest alternative measures to reduce production in drug-producing developing countries?

142. No. Rather, the UN texts recommend a series of complementary measures, all of which are necessary in order to fight against the drug problem.

143. See also the reply to the Panel's Questions to the EC No. 56.

Question 52

Prior to adopting the most recent version of the EC's Drug Arrangements, did the EC consider other possible, less trade-restrictive alternatives? If so, please indicate what these were and provide documentary support for your answer. If not, why not?

144. The EC is not aware of the existence of other less-trade restrictive alternatives.

145. As explained, giving the same preferences to all developing countries is not a true alternative, because it would be much less effective, as other developing countries which are not affected by the drug problem would capture most of the additional market opportunities created by the Drug Arrangements.

146. The provision of financial assistance is also not a true alternative. The relevant UN recommendations make clear that it is necessary to provide both financial assistance and greater market access. Without the latter, alternative development would not be sustainable. Suggesting, as India did during the second hearing, that financial assistance is a sufficient, and indeed more effective way than trade preferences to promote sustainable development calls into question the justification for any GSP preferences, and not just for the Drug Arrangements.

³⁶ Exhibit EC-22.

³⁷ Exhibit EC-23.

Question 53

Does the EC consider that improved market access under the Drug Arrangements is more necessary to promote sustainable development or more necessary to protect human health in the EC?

147. The question draws a false alternative. The Drug Arrangements are equally necessary to achieve both objectives. They are designed to reduce drug production and trafficking in the beneficiary countries. By doing so, they achieve simultaneously the objectives of promoting the development of those countries and the objective of protecting the health and life of the EC population.

148. See also the EC's reply to the Panel's Question to both Parties No. 21.

Question 54

Does the EC consider that it has met its burden of demonstrating to the Panel that its tariff preference measure is "necessary" under Article XX(b)? Why does the EC consider that it has met this burden?

149. Yes.

150. Please see the following sections of the EC's submissions, as well as the evidence cited therein:

- the EC's First Submission, paras. 185-193 and 100-115;
- the EC's replies to the Panel's questions to both Parties Nos. 24 and 25; and
- the EC's Second Submission, paras. 54-76.

Question 55

The 2002 Annual Report on the state of the drugs problem in the European Union and Norway does not appear to refer at all to the Drug Arrangements. Given this circumstance, can the Drug Arrangements be considered as a measure under Article XX(b) and, moreover, can it be deemed as "necessary" to protect human life and health in the EC?

151. The 2002 EMCDDA report focuses on the drug situation in the European Union and does not provide an exhaustive overview of all the EU policies. In particular, the section concerning the reduction of drug supply refers only to the actions taken in order to reduce drug production and trafficking *within* the European Union, and does not address the action taken to reduce drug production and trafficking in other countries with a view to limit the supply of drugs to the EC. Thus, for example, the report does not mention either the financial assistance for alternative development provided by the EC and its Member States.

152. A more comprehensive description of the EU anti-drug strategy is found in documents such as the EC Commission's "European Union Action Plan to Combat Drugs 2000 - 2004"³⁸. The Plan covers three main areas: "action on demand reduction"; "action on reduction of illicit trafficking"; and "action at international level", which refers specifically to the GSP Regulation as one of the instruments of the EC's anti-drug policy.

³⁸ COM(1999) 239 final of 26 May 1999.

Question 56

How does giving special preferences to 12 beneficiaries have the desired effect if the same, equivalent or better preferences are given to many other developing countries under other programmes, for example, "Everything but Arms", LDC schemes, the Cotonou Agreement, regional free trade agreements?

153. Obviously, the Drug Arrangements would provide even greater market access to the beneficiary countries, if they were the only tariff preference accorded by the EC. Nonetheless, there is clear evidence that the Drug Arrangements are effective in promoting the exports from the countries concerned and, therefore, in promoting alternative activities. (See the reports mentioned in the reply to the Panel's Question to the EC No. 49).

Are you giving the equivalent preferential treatment to such other countries under other programmes?

154. The developing countries seriously affected by drug production or trafficking that are covered by the arrangements mentioned in the question, and which for that reason have not been included in the Drug Arrangement, enjoy equivalent or greater market access under those arrangements than if they were included in the Drug Arrangements. Accordingly, it is not necessary (or indeed possible) to provide them with additional trade preferences in order to support their fight against the drug problem.

Question 57

The EC has a free-trade agreement with South Africa. A recent report of the Narcotics Board mentions the problem of drug production and trafficking in South Africa. Would you say that the problem in South Africa is comparable to that in the 12 beneficiary countries? Is there any distinction between the preferences given to South Africa under that agreement and the 12 beneficiaries? If so, can you say that those differences are not discriminatory?

155. The EC assumes that the Panel refers to the INCB report of 2002 and in particular para. 222, which states that "over 20 per cent of all cocaine seizures in Africa took place in South Africa (...)".

156. This statement must be read in light of the fact that Africa's overall production and trafficking is very low. The EC would invite the Panel to consult the latest report of the United Nations Office on Drugs and Crime (UNODC) on "Global Illicit Drug Trends 2003". According to the most recent statistics there is no significant opium or coca production in South Africa. Indeed, South Africa is not even mentioned as a producing country.³⁹ With regard to trafficking, UNODC does not report any seizures of opiates in Southern Africa (including South Africa) for the years 2000 and 2001.

157. As to seizures of heroin, the figures for South Africa compared to Pakistan are minimal (in kg)⁴⁰:

	1995	1996	1997	1998	1999	2000	2001
Pakistan	10760.1	5872.1	6156	3363.7	4973.7	9492	6931.5
South Africa	5.9	0.8	1.5	5.4	7.4	15.4	8.5

³⁹ Global Illicit Drug Trends 2003, p. 165, 190.

⁴⁰ Ibid., p. 226.

158. Regarding seizures of cocaine, South Africa only plays a minor role compared to South America, and in particular Colombia. The figures in kg are as follows:

	1995	1996	1997	1998	1999	2000	2001
Colombia	59 030	45 779	42 044	107 480	63 945	110 428	73 863.5
South Africa	187.8	106.6	151.5	635.9	345.5	91.2	155.3

159. The EC therefore considers that on the basis of these figures the situation of the drug problem in South Africa is indeed very different from that in the beneficiary countries.

Does the EC consider that in extending the Drug Arrangements to the 12 designated beneficiaries, it is extending these preferences to all developing countries where the same conditions prevail?

160. Yes, except that some countries that are seriously affected by drug production and trafficking are not included in the Drug Arrangement because they benefit already from equivalent or more favourable treatment under other trade arrangements. As shown above, South Africa is not one of such countries. It would not have qualified for inclusion in the Drug Arrangements, even if it were not a party to a Free Trade Agreement with the EC.

Question 58

The 2002 INCB Report provides information on drug problems in various developing countries where, apparently, largely the same or equivalent conditions prevail as in the 12 beneficiary countries under the Drug Arrangements. Can the EC demonstrate to the Panel that, in fact, the same or equivalent conditions do not prevail as between the two sets of countries? Please provide any such evidence.

161. The EC does not agree with the statement that, according to the INCB Report, the drug problems in other developing countries not included in the Drug Arrangements are "largely the same".

162. The mere fact that a country is mentioned in the INCB report, regardless of what it is said about that country, is clearly not evidence that such country is as affected by drug problem as those included in the Drug Arrangements.

163. The designation of beneficiaries is a complex process involving the examination of all relevant statistical data on drug production and trafficking, as well as a comprehensive analysis of the effects of the drug problem in each country. For that purpose, the EC uses a variety of sources, including not only the ICBN reports, but also other UN publications such as for instance the "World Drug Report" or the annual "Global Illicit Drug Trends", as well as the reports from its delegations in the countries concerned.

164. The EC recalls that it has already explained why India, Paraguay, Thailand, Indonesia, the Philippines and South Africa (all the countries identified by the Panel and India) have not been included in the Drug Arrangements. The EC would like to put on record, once again, its willingness to explain the reasons why any other developing countries have been excluded, provided that those countries are sufficiently identified by the Panel.

Question 59

In your view, how should the Panel proceed to assess whether the application of the EC's measure is not "arbitrary or unjustifiable discrimination", given the fact there are no explicit criteria for the application of the Drug Arrangements? How does the EC ensure the non-arbitrariness of the application of its Drug Arrangements?

165. From the fact that the criteria for the selection of the beneficiaries are not stated in the GSP Regulation it does not follow that such criteria lead to "arbitrary or unjustifiable discrimination". The EC has explained why the publication of the selection criteria is not necessary. (See EC's reply to the Panel's Question to the EC No. 10).

166. The EC has explained what are the criteria used in the designation of the beneficiaries (EC's First Submission, paras. 116-118 and 86-99, EC's Reply to the Panel's Question to the EC No.13) and has shown, first, that all the countries included in the Drug Arrangements meet those criteria (EC's First Submission, paras. 119-139) and, second, that all the non-included countries identified by the Panel and by India do not meet those criteria (EC's replies to the Panel's Questions to the EC Nos. 14, 15 and 57). The EC has offered to do the same with respect to any other developing country specifically identified by the Panel. All this confirms that the EC is not applying the selection criteria in a discriminatory manner.

Question 60

What are the objective criteria applicable to determining whether or not the Drug Arrangements are in compliance with the chapeau of Article XX? Does the EC consider that it has met its burden of demonstrating to the Panel that its tariff preference measure meet the requirements of the chapeau? Why does the EC consider that it has met this burden?

167. Please see:

- The EC's First Submission, paras. 197-216;
- The EC's reply to the Panel's Questions to both Parties No. 24;
- The EC's reply to the Panel's Question to the EC No. 19;
- The EC's Second Oral Statement, paras. 79-80.

Question 61

Assuming that the Drug Arrangements are not consistent with the Enabling Clause, would not making sufficient effort to obtain a waiver on terms and conditions acceptable to WTO Members be a less inconsistent, reasonably available alternative to achieve the EC's health objectives?

168. A waiver is required only to the extent that a measure is inconsistent with a Member's WTO obligations. A measure justified under Article XX(b) is not inconsistent with a Member's WTO obligations and does not require a waiver.

169. Since a measure which is justified under Article XX(b) does not require a waiver, whether or not a Member has made sufficient efforts in order to obtain a waiver cannot be a relevant consideration in establishing whether a measure is "necessary" for the purposes of Article XX(b).

170. The EC would recall that in *EC – Asbestos*, the only dispute so far where a measure has been found to be justified under Article XX(b), there was no suggestion that the EC should have asked for a waiver. Yet, that possibility existed also in that case. Indeed, by the logic of the Panel's question, no measure could ever be justified under Article XX, as it may always be possible for a Member to request a waiver rather than invoking Article XX(b).

Question 62

What documentary evidence can the EC provide to the Panel in support of its argument that the seriousness of the drug problem in Pakistan changed dramatically along with the "regime change" in Afghanistan?

171. The situation in Pakistan is closely related to the events in Afghanistan, the most important opium producer in the world. In its report "Global Illicit Drug Trends 2003" UNODC has noted:⁴¹

An abrupt decline of illicit opium poppy cultivation was recorded in Afghanistan in 2001, following the ban imposed by the Taliban regime in its last year of power. Despite the existence of significant stocks of opiates accumulated during previous years of bumper harvests, the beginning of a heroine shortage became apparent on some European markets by the end of 2001. Furthermore, the absence of the usual harvest in Afghanistan in spring 2001 and the subsequent depletion of stocks pushed opium prices upwards to unprecedented levels in the country (prices increased by a factor of 10), creating a powerful incentive for farmers to plant the 2002 crop. The power vacuum in Kabul caused by the aftermath of 11 September 2001 enabled farmers to replant opium poppy (starting in October/November 2001). By the time the Afghan Interim Administration was established and issued a strong ban on opium poppy cultivation, processing, trafficking and consumption (17 January 2002), most opium poppy fields had already started to sprout.

172. Thus, before the events of 11 September 2001, the expectation prevailed that, due to the ban on opium poppy cultivation imposed by the Taliban, the supply of drugs from Afghanistan would eventually run out. Indeed, the production figures of 2001 clearly demonstrate that the ban was very successful, reducing opium production in 2001 to a mere 185 tons compared to an average of 2657 tons in the years 1994 to 2000. This represents a decrease of 94% in 2001 when directly compared with the figures of 2000.⁴²

173. In the context of the imminent invasion of Afghanistan, it was considered that there was a great risk that, following the fall of the Taliban, opium production Afghanistan would resume once again, as the new authorities would be initially very weak. This is exactly what happened in 2002, despite the newly imposed ban on opium cultivation, trafficking and consumption by the new government.⁴³

174. Against this background, the EC considered that the events in Afghanistan would have a considerable negative impact on Pakistan. Indeed, the facts show that this risk eventually materialised and that the inclusion of Pakistan in the Drug Arrangements was fully justified.

⁴¹ Ibid., p. 166.

⁴² United Nations Office on Drugs and Crime, *The Opium Economy in Afghanistan*, 2003, p. 31 *et seq.*

⁴³ The central government's powers are geographically very limited and do not extend to the main opium producing areas in the south of Afghanistan around Kandahar, the former stronghold of the Taliban.

ANNEX B-6

Comments of India to the Replies of the European Communities to Questions from the Panel after the Second Panel Meeting

To both Parties

Question 29

1. India reiterates that paragraph 3(c) of the Enabling Clause does not support the EC's interpretation of the term "non-discriminatory". The inclusion of paragraph 3(c) cannot have the consequences that the EC seeks to attach to it. There is no basis to conclude that the drafters of the Enabling Clause altered the meaning of the term "non-discriminatory" by introducing paragraph 3(c). Had they intended to do so, they could have done so more directly in paragraph 2(a) or in wording specifically directed at preferential tariff treatment, as opposed to all measures taken under the Enabling Clause. The inclusion of paragraph 3(c) in the Enabling Clause does not therefore alter the meaning of the term "non-discriminatory", as the term was used in the 1971 Waiver Decision.

2. Contrary to the EC's assertion, paragraph 7 of the Enabling Clause does not formally recognize the principle of "graduation" *in the context of preferential tariff treatment* under paragraph 2(a) of the Enabling Clause. Indeed, the term "graduation" does not appear in paragraph 7. Paragraph 7 refers to an improvement of the capacity of less developed contracting parties to "make contributions or negotiated concessions or take *other* mutually agreed action under the provisions and procedures of the General Agreement" (emphasis added). Paragraph 7 is concerned with mutually agreed action taken under the provisions and procedures of the GATT. It applies to the process of negotiations and obligations assumed by developing countries as a consequence of negotiations. The use of the term "other" prior to the phrase "mutually agreed action" means that contributions or (negotiated) concessions of the less developed contracting parties must be "mutually agreed"; meaning with the consent of contracting parties, including the less developed contracting party making the contribution or concession. In this context, paragraph 7 has no bearing on the GSP.

Question 30

3. Contrary to what the EC asserts, the Appellate Body has clearly stated, with regard to GATT "exceptions", such as those found under Article XX or XI:(2)(c)(i), that "[t]hey are in the nature of affirmative defences".¹ The EC's reply to this question shows the difficulties that the EC itself finds

¹ In Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("US – Wool Shirts and Blouses"), WT/DS33/AB/R and Corr.1, adopted 23 May 1997, p. 15, the Appellate Body stated:

"We acknowledge that several GATT 1947 and WTO panels have required such proof [that the party invoking a provision which is identified as an exception must offer proof that the conditions set out in that provision are met] of a party invoking a defence, such as those found in Article XX or Article XI:(2)(c)(i), to a claim of violation of a GATT obligation, such as those found in Articles I:1, II:1, III or XI:1. 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. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it."²³

²³ Furthermore, there are a few cases that are similar in that the defending party invoked, as a defence, certain provisions and the panel explicitly required the defending party to demonstrate the applicability of the provision it was asserting. See, for example, *United States - Customs User Fee*, adopted 2 February 1988, BISD 35S/245, para. 98, concerning Article II:2 of the GATT 1947; *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, adopted 22 March 1988, BISD 35S/37, para. 4.34, concerning Article XXIV:12 of the GATT 1947; and *United States - Measures Affecting Alcoholic and Malt*

in trying to make sense of the distinctions between "autonomous right", "exception" and "affirmative defence" with a view to demonstrating that it does not bear the burden of proof. As stated in India's reply to the same question from the Panel, the defence of the EC could be resolved by relying on the same undisputed facts upon which India relies for India's claim under Article I:1 of the GATT without the need of characterizing paragraph 2(a) of the Enabling Clause as an "exception", an "autonomous right", or an "affirmative defence" for purposes of the allocation of burden of proof.

Question 31

4. India does not disagree with the EC. As a matter of fact, that the developing countries "paid" for the Enabling Clause confirms that, in agreeing to the Enabling Clause, the developing countries did not waive their MFN rights as between themselves and that the term "non-discriminatory" is to be construed to mean that developed countries cannot differentiate between developing countries in the context of the GSP. Otherwise, if the EC's interpretation of the term "non-discriminatory" were to be upheld, the conclusion would be that the developing countries "paid" to relinquish their unqualified MFN rights under Article I:1 and to be discriminated against in exchange for tariff preferences, which developed countries are not obliged to grant in the first place, and which, if granted, are granted only in respect of products chosen by developed countries, are granted only to products originating in developing countries chosen by developed countries and when granted, could be removed when developed countries choose to do so.

Question 33

5. The EC's elaboration on its "reasonableness" requirement is devoid of content. The Panel is left without any further criteria to determine whether a measure is "apt" or "proportionate". India also notes that there are implied variations in the EC's formulation of its test of "non-discriminatory". In its First Submission, it contended that tariff preferences are an appropriate response to the development needs of countries affected by drug production or trafficking. There was no explicit analysis whether the tariff preferences under the Drug Arrangements are "apt" or "proportionate". Neither was there any analysis of the "legitimacy" of the objective pursued by the Drug Arrangements.

Question 35

6. The EC's argument seeks to distinguish between the binding nature of the "description of the GSP contained in the preamble to the 1971 Decision" and the "Agreed Conclusions". No such distinction can be made; the Agreed Conclusions describe the GSP. Without reference to the Agreed Conclusions, there can be no understanding of the GSP; this is evident from the preamble of the 1971 Waiver Decision.

7. The phrase "with a view to" cannot support the distinction which the EC makes between the "Agreed Conclusions" and the "description of the GSP". Either the description of the GSP is binding, or it is not. The EC has conceded that it is binding. Thus, if the Agreed Conclusions are the description of the GSP then the Agreed Conclusions are likewise binding. The EC may argue that the Agreed Conclusions are *not* the description of the GSP in the 1971 Waiver but the use of the term "with a view to" is irrelevant to this argument.

8. In any case, the phrase "with a view to" does not mean that preferential tariff treatment of any kind was sanctioned by the 1971 Decision. On the contrary, it indicates that the purpose of the preferential tariff treatment under the 1971 Waiver Decision must be to implement the GSP. Further,

even if such an interpretation *may be possible* under the 1971 Waiver, the Enabling Clause removes all doubt. Under the Enabling Clause, the "description of the GSP" is clearly a binding condition.²

Question 36

9. The EC does not give any plausible reason as to why the Agreed Conclusions are not context of the 1971 Waiver Decision. Without providing any reason, the EC contends that even if the Agreed Conclusions are context of the 1971 Waiver Decision, "paragraph 2(a) must be read in its own context". This is clearly wrong. There is a specific reference in the Enabling Clause to "non-discriminatory" GSP schemes as described in the 1971 Waiver Decision, which, in turn, refers to the mutually acceptable arrangements drawn up at the UNCTAD.

Question 37

10. India notes that the EC's test of "non-discriminatory" is limited to the issue of what types of differentiation between developing countries are permitted. However, the EC must also explain the test to be applied in determining when identical treatment of developing countries is not permitted. Under its own interpretation this is also "prohibited" by the term "non-discriminatory".

11. India also notes that terms "legitimate" and "reasonable" do not appear in the Enabling Clause; neither do those terms provide adequate guidance as to where to draw the line in order to establish that different treatment of developing countries is permissible.

Question 40

12. The EC has not addressed the Panel's question squarely.

13. India notes that the issue of "sector graduation" is not before the Panel. "Sector graduation" raises distinct issues, such as the appropriate scope and effect of the safeguard provisions under the Agreed Conclusions, all of which are not at issue in this dispute.

Question 42

14. The EC merely confirms that the application of Article I:1 of the GATT is not totally excluded by the Enabling Clause. Therefore, the EC has now qualified its blanket assertion in paragraph 22 of its First Written Submission that the phrase "notwithstanding the provisions of Article I of the General Agreement" excludes the application of Article I:1 of the GATT. This is precisely the position that India has taken in this dispute – that paragraph 2(a) of the Enabling Clause only permits developed country Members to grant preferential tariff treatment to products originating in developing countries but does not permit them to disregard other aspects of Article I:1, including the MFN rights of developing countries as between themselves.

Question 44

15. The EC attempts to downplay the value of the Agreed Conclusions. The EC denies the obvious:

- (i) that the Agreed Conclusions are called "agreed" precisely because of its consensual nature,

² See 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. 520.

- (ii) that Paragraph 2(a) of the Enabling Clause refers to "preferential tariff treatment accorded by developed [country Members] to products originating in developing countries in accordance with the Generalized System of Preferences"; footnote 3 to paragraph 2(a) refers to the GSP as that which is "... described in the [1971 Waiver Decision] relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries"; paragraph (a) of the 1971 Waiver Decision refers to "the preferential tariff treatment referred to in the Preamble to this Decision ..." and; the relevant provision of the Preamble of the 1971 Waiver Decision refers 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..."
- (iii) regardless of the formal status of those mutually acceptable arrangements under the law of the UN, it is sufficient to note that the Enabling Clause refers to the GSP referred to in the 1971 Waiver and that the 1971 Waiver in turn refers to the "mutually acceptable arrangements" that "have been drawn up in the UNCTAD". Those arrangements define the legal scope of the Enabling Clause;
- (iv) whether the Agreed Conclusions were accepted by all Contracting Parties to the GATT 1947 at the time (unanimity as opposed to consensus of Contracting Parties) is completely irrelevant for ascertaining the legal value of this document. That it was incorporated into the 1971 Waiver Decision and the 1979 Enabling Clause, both legally binding instruments, is sufficient.

The EC concedes that Agreed Conclusions may be considered at the very least, as "preparatory work" of the 1971 Decision. India notes that even as "preparatory work", the Agreed Conclusions support India's interpretation of the term "non-discriminatory".

Question 48

16. To establish that it had always been of the position that the term "non-discriminatory" does not prevent differentiation between developing countries according to their development needs, the sole evidence of the EC is that as early as 1976, it had granted special tariff preferences to least-developed countries. The grant of such special tariff preferences prior to the Enabling Clause, wherein special preferences in favour of least developed countries was authorized for the first time, was thus in violation of the terms of the 1971 Waiver Decision. What is more credible evidence in respect of the EC's position is that it requested a waiver of the provisions of Article I of the GATT in order that it may implement the Drug Arrangements. This is conclusively indicative of its position *then* that differentiation between developing countries according to their development needs is not permitted by the Enabling Clause, contrary to the position which it takes today.

17. Incidentally, apart from the EC and Norway, all other major GSP donors only differentiated in favour of LDCs after the adoption of paragraph 2(d) of the Enabling Clause. As of 1982, in addition to the EC and Norway, only Austria (1982), Canada (1982) Finland (1980) and Switzerland (1982) had granted special preferences to least developed countries.

18. India also notes that a present Member State of the EC had taken a different position on the meaning of the GSP in the 1960s. The so-called "Brasseur Plan" was presented to the GATT, to the OECD Council, and to the First UNCTAD. The Brasseur plan proposed a selective preferential system (in contrast to the developing countries' demand for the introduction of a generalized uniform system of preferences to apply to all imports of manufactures and semi-manufactures from developing to developed countries). In rejecting the Brasseur plan, the delegation of the United Kingdom said:

It seems reasonably plain that all developing countries need to export more and to earn more foreign exchange and that any reduction in tariff barriers, whether preferential or not, will help them do it ... We believe, therefore, that any principle of selection of countries on the basis of need for preferences should be rejected. We think it would be invidious to put developing countries in the position of applicants, as it were, for piecemeal preferential tariff concessions.³

Question 49

19. As India had earlier cited, the GSP had its beginnings at the First Conference of the UNCTAD in 1964, which resolved:

... Special preferences at present enjoyed by certain developing countries in certain developed countries should be regarded as transitional and subject to progressive reduction. They should be eliminated as and when effective international measures guaranteeing at least equivalent advantages to the countries concerned come into operation."⁴

20. According to the EC, the special preferences were granted then for "historical or geographical reasons", and that what the GSP was intended to accomplish was to eliminate special preferences for these reasons. Regardless of the reasons – whether historical, geographical or any other reason – the relevant fact is that the distinctions between developing countries under the special preferences were unilaterally determined by the developed countries granting those preferences. This is precisely the aspect which the GSP was supposed to eliminate – the unilateral determination by developed countries, regardless of the reason invoked, including differentiation between developing countries on the basis of needs *unilaterally* determined by developed countries. Thus, the UNCTAD resolution did not delve into the *reasons* for the special preferences then existing. On the contrary, it referred to all special preferences, regardless of the reasons for their grant. Hence, as distinguished from "special" (applicable only to *some* and not to all developing countries) "generalized" should be interpreted as having a special meaning – that tariff preferences under the GSP shall be made available to all developing countries.

21. This interpretation is confirmed by the report entitled "Review and evaluation of the generalized system of preferences" dated 9 January 1979⁵ issued by the UNCTAD, which states:

"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 ...**" (emphasis added)

22. Even the EC concedes this, albeit in a slightly qualified way, when it states in its reply:

³ TD/B/C.2/1. Add. 1. Annex B, p.26 quoted from Peter Tulloch, *The Politics of Preferences: EEC policy making and the generalised system of preferences* (Croom Helm, London, 1975) p. 44. See also R. Krishnamruthi "Tariff Preferences in favour of the developing countries" *Journal of World Trade Law*, Vol. 1, No. 6 (1967) 643, p.648-50.

⁴ 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.

⁵ TD/232.

As originally envisaged, the UNCTAD system would have subsumed and replaced those existing "special" preferences for certain developing countries by "generalising" them, i.e. by making them available to all, or at least most developing countries.

Question 50

23. Please India's comments on the EC's reply to Question 52 to both parties.

Question 51

24. Please see India's comments to Question 52 to both parties.

Question 52

25. According to the EC, paragraph 2(a) of the Enabling Clause must be interpreted within the framework of paragraph 1, paragraph 1 does not require to grant the same preferences to all developing countries. As India has stated before to grant "preferential tariff treatment ... to products originating in developing countries in accordance with the [GSP]" in the context of "differential and more favourable treatment to developing countries", it is not necessary for developed countries to derogate from their MFN obligations under Article I:1 of the GATT.⁶

26. In its reply to Question 50 to both parties, the EC states that the drafting history of the Enabling Clause suggests that the term "generalised" was used to define the *country scope* of the preferences. In its reply to Question 49, the EC states, "as originally envisaged, the UNCTAD system [referring to the GSP] would have subsumed and replaced [the] existing 'special' preferences for certain developing countries by 'generalising' them, i.e. by making them available to all, or at least most developing countries . Hence the term 'generalised'."

27. In paragraph 42 of its reply to Panel Question 11 to both parties, the EC confirms the foregoing, by saying that "unlike the 'special' preferences traditionally granted to certain countries or groups of countries merely for historical or geographical reasons, the preferences should be 'generalised' to all the developing countries", and then adds "with similar development needs". The addition of the phrase "with similar development needs" merely re-establishes what the GSP sought to eliminate by making preferences available to all developing countries ("generalised") – the differentiation between developing countries on a basis unilaterally determined by developed countries under the "special preferences".

28. In this dispute, the EC has always contended that the term "non-discriminatory" permits developed countries to differentiate between developing countries on the basis of development needs. Now, the EC states that "generalised" means that benefits under the GSP shall be made available to all developing countries "with the same development needs". Thus, the EC invokes "development needs" to justify differentiation in treatment between developing countries under both "non-discriminatory" and "generalised". This renders one of those terms redundant. Thus, back to the era of "special preferences".

29. The EC's position is that the term "non-discriminatory" permits the classification of, and differentiation among, developing country Members based on development needs chosen by a developed country Member, such as the EC. The EC then argues that the term "generalized" does not require a GSP programme to extend to all developing country Members but rather may be restricted to all developing country Members that fall within a sub-set of developing country Members selected by the EC based on its choice of development criteria.

⁶ See eg, India, *Second Written Submission*, para. 68.

30. The EC's interpretation contemplates the possibility of GSP programmes that, in their entirety, do not extend to all developing country Members. Moreover, it also contemplates the possibility of multiple GSP programmes that are available in each case to some but not all developing country Members with overlapping product coverage and different tariff levels depending on the choice of the developed country donor.

31. The possibility of such multiple GSP programmes was never expressly envisaged in the Agreed Conclusions, in the 1971 Waiver, in the "Review and evaluation of the Generalized System of Preferences" dated 9 January 1979 by UNCTAD or in the Enabling Clause. Moreover, the EC's interpretation clearly departs from the meaning of the term "generalized" as contemplated in Footnote 3 of the Enabling Clause, the 1971 Waiver and the Agreed Conclusions. Footnote 3 makes it clear that the preferential treatment contemplated by paragraph 2(a) of the Enabling Clause in accordance with the Generalized System of Preferences must be as described in the 1971 Waiver relating to the establishment of "generalized, non reciprocal and non discriminatory preferences beneficial to the developing countries".

32. The reference in Paragraph (a) of the 1971 Waiver Decision to "the preferential treatment referred to in the Preamble to this Decision" is clearly intended to take in the Agreed Conclusions. The fourth paragraph of the Preamble to the 1971 Waiver specifically refers to "mutually acceptable arrangements [that] have been drawn up in the UNCTAD ...". The preambular portion of the Agreed Conclusions also "recognizes that these preferential arrangements are mutually acceptable ...".⁷ The scope of developing country coverage of a GSP programme envisaged by the term "generalized" in turn is clear from the Agreed Conclusions. The Special Committee noted that:

[C]onsistent with the Conference Resolution 21(II), there is agreement with the objective that in principle all developing countries should participate as beneficiaries from the outset⁸

The Special Committee also noted that the developed countries agreed that GSP programmes must extend to all developing countries based on the principle of self-election.⁹ The next paragraph records the statement of the spokesman of the Group of 77 on the question of beneficiaries and makes a reference to Annex I. Further, the note at the end of Annex I entitled "Statement on behalf of the Group of 77" states that the Group of 77 "hold[s] the view that no developing country member of this Group should be excluded from the generalized system of preferences at the outset or during the period of the system"

33. There is little doubt, therefore, that it was agreed among all participating countries that GSP programmes must extend to all developing countries. Therefore, the requirement that a GSP programme be "generalized" clearly prohibits a GSP donor from carving out from its GSP programme special sub-programmes for sub-sets of developing countries. Accordingly, in India's view, the Drug Arrangements are not "generalized" because the benefits thereunder are not made available to all developing countries.

Question 54

34. In paragraphs 146-148 of its Second Submission, India pointed out that (i) the EC had manifested that the Drug Arrangements "contribute to" the objective of preserving the life and health of the EC population and that "the reach of the word 'necessary' is not limited to that which is

⁷ Agreed Conclusions, Part One, Section I, paragraph 9.

⁸ Agreed Conclusions, Part One, Section II, paragraph 1.

⁹ Agreed Conclusions, Part One, Section IV, paragraph 1.

'indispensable' or of 'absolute necessity' or 'inevitable'" (ii) in support of the latter proposition, the EC had cited paragraph 161 of the Appellate Body Report in *Korea - Beef* in the following manner:

"In *Korea - Beef* the Appellate Body observed that, as used in the context of Article XX(d), "necessary" does not mean "indispensable":

The reach of the word "necessary" is not limited to that which is "indispensable" or "of absolute necessity" or "inevitable". Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception."¹⁰

35. As India had pointed out, in citing paragraph 161 of the Appellate Body report in *Korea - Beef*, the EC made a material omission, as the full quote reads as follows:

We believe that, as used in the context of Article XX(d), the reach of the word "necessary" is not limited to that which is "indispensable" or "of absolute necessity" or "inevitable". Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." **We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".** (emphasis added)

36. In its reply, the EC again cites paragraph 161 of the Appellate Body report in *Korea - Beef*, in the following manner:

second, the measure must be "closer to the pole of indispensable than to the opposite pole of simply 'making a contribution to'". However, contrary to what is stated sometimes by India, this is not the same as saying that the measure must be "close" to the "pole of indispensable";

37. Having manifested in categorical terms that the Drug Arrangements "contribute to", the EC again makes a material omission in citing paragraph 161 of the Appellate Body report in *Korea - Beef*. It omits the word "significantly" prior to the phrase "closer to the pole of 'indispensable'" and, in so omitting, concludes that that in order to qualify as "necessary" under Article XX(b), the Drug Arrangements need not be "'close' to the 'pole of indispensable'". This is contrary to the test applied by the Appellate Body. Not only must the Drug Arrangements be close to "indispensable"; rather, they must be "significantly" closer. Thus, by the EC's own admission that the Drug Arrangements merely "contribute to", the Drug Arrangements are in the opposite pole of "making a contribution to" and cannot be deemed to be "significantly closer" to the pole of "indispensable". Hence, the Drug Arrangements do not qualify as "necessary".

Question 55

38. Even if the Doha tariff reduction negotiations were to result in bound tariffs at nominal or even zero levels for all products for all Members, if the EC's defence on Article XX(b) were to be upheld, by the EC's theory, it would be exempt from the provisions of both Articles I and II of the GATT. Thus, under the EC's defence, in such event, it could maintain discriminatory tariff

¹⁰ EC, First Submission, para. 176, citing Appellate Body Report, *Korea - Beef*, para. 161.

preferences (even by imposing *discriminatory* tariffs beyond the nominal or zero bound levels). In this context, while the EC may agree to tariff reductions, the EC's agreement would not be meaningful, as other Members would not have the assurance that the EC will apply tariffs on an MFN basis or, in the context of the Enabling Clause, as developing countries would not have the assurance that tariffs shall be applied on an MFN basis as between them. Therein lies the moral danger of presently legitimizing resort to discriminatory tariff preferences as a measure permissible under Article XX(b). This would render the WTO inutile as a forum for the mutual reduction of tariffs (implicit in which is the application of tariffs on an MFN basis).

Question 56

39. Please see India's comments on the EC's replies to Question 54 to both parties. The EC further argues that "there is no true 'alternative' WTO-consistent measure, or less WTO-inconsistent measure, because there is no measure that would be as effective as the Drug Arrangements in providing greater market access for the products of the beneficiaries". In order to assess the effectiveness of the alternative measures, the EC switches the goal pursued from "reducing the drug supply from the beneficiaries" to "greater market access for the products of the beneficiaries". However, in terms of "reducing the drug supply from the beneficiaries", the EC has failed to establish that other alternative, WTO-consistent, non-trade restrictive measures, such as (i) improved enforcement both in the beneficiary countries and in the EC's borders, and (ii) financial assistance to substitute licit crops for illicit crops in the beneficiaries, which are measures equally available, are less effective in reducing drug supply from the beneficiaries..

Question 57

40. Please see India's comments on the EC's reply to Panel Question 59 to the EC.

Question 58

41. Please see India's comments on the EC's reply to Panel Question 59 to the EC.

To the European Communities

Question 25

42. The EC refers to "the same criteria as in the current GSP Regulation". There are no criteria under the Drug Arrangements. The EC likewise refers to certain criteria which it has "explained" to the Panel. Thus, far, the Panel has not been satisfied that those criteria indeed do exist. (Please see India's comments on the EC's reply to Panel Question 59 to the EC). In the absence of criteria, the question cannot be properly responded to.

Question 28

43. The terminology used in UNCTAD in the course of adopting the GSP to refer to "least-developed countries" was "least developed among the developing countries". In terms of preferential tariff treatment under the GSP, least-developed countries were not singled out as such in the sense that no discriminatory tariff treatment for their benefit (to the exclusion of other developing countries) was authorized. Since they were included in the category of "developing countries", and the tariff preferences under the GSP were intended to be "non-discriminatory" between developing countries, there was no need for an express prohibition against discriminatory tariff treatment for the benefit of the least-developed countries (to the exclusion of other developing countries).

44. However, "special measures" for the benefit of the least-developed countries were contemplated under the Agreed Conclusions. Paragraph 2 of Part One V of the Agreed Conclusions provides:

"The preference-giving countries will consider, as far as possible, on a case-by-case basis, the inclusion in the generalized system of preferences of products of export interest mainly to the least developed among the developing countries, and as appropriate, greater tariff reductions on such products".

45. Thus, the means to address the specific situation of the least-developed countries was not discriminatory tariff treatment between developing countries; rather, it was the inclusion in the GSP of products of export interest mainly to them and greater tariff reductions on such products (which had to be applied on an MFN basis between developing countries, including the least-developed countries).

46. It was not until the adoption of the Enabling Clause that developed countries were authorized to grant discriminatory preferential tariff treatment to the least-developed countries, to the exclusion of other developing countries.

Question 30

47. Enhanced market access for developing countries addresses the development needs of developing countries in general. In this light, the distinction the EC maintains between developing countries which require market access for their development and developing countries that do not require such market access simply cannot be sustained. Market access helps all developing countries. Indeed this is a fundamental premise underlying the GSP. The EC provides no further explanation of why preferential tariff treatment is not a "direct" or "effective" enough response to underdevelopment in general. The EC's test of non-discrimination thus allows it not only to determine the development needs of developing countries (without considering income etc) but also allows it to determine when market access is an "appropriate response" to the problems of developing countries. That the EC can assert that a low-income country suffering from famine could be provided lesser preferences than a higher income country through which drugs are trafficked (in effect making the low-income country suffering from famine paying for efforts to combat drug production and trafficking) is yet another illustration of the dangers involved in accepting the EC's interpretation of "non-discriminatory".

48. India notes that it could just as easily be stated that the "most direct and effective response" to drug problems are financial assistance to affected countries in order to enforce anti-drug policies.

Question 32

49. In its replies to questions 12 and 17 from the Panel, the EC sets out no test for determining whether development needs are similar. The EC states that it cannot be prevented from considering the most "important" or "significant" differences between developing countries without providing any criteria to determine what makes a difference "significant" or "important".

Question 33

50. In practical terms, the open-endedness of the test of "non-discriminatory" posited by the EC will have the effect of allowing developed countries to unilaterally determine legitimate objectives and special needs.

Question 36

51. India reiterates that the term "generalized" means that preferences should be given to all developing countries. The EC's understanding of the term "generalized" is *not* that preferences must be given to *all* developing countries. It is that preferences must be given to *subsets* of developing countries with similar development needs. The EC presents no basis for this limitation on the scope of the term "generalized". India has set out in detail how the term "generalized", properly understood, supports the neutral meaning of the term "non-discriminatory".

52. The EC also states that India's understanding of the application of the term "generalized" is consistent with its own understanding. However in response to the question from India that it quotes, the EC had previously stated:

India has argued that the term "generalised" alludes to the "range of countries that would accord and receive preferences", while the term "non-discriminatory" refers to the "degree of differentiation between the countries that the donor countries selected as beneficiaries". **But this interpretation is not supported by the text of Footnote 3.** The terms "generalised" and "non-discriminatory" both qualify the term "preferences". Therefore, it is the preferences themselves, rather than the system as a whole, which must be both "generalised" and "non-discriminatory". (emphasis added) (see para. 44 of the EC's reply to question 11 from the Panel to both Parties read with para. 57 of the EC's reply to question 30 from India)

53. It must be emphasized that EC's original interpretation of the term "generalized" is distinct and in contradiction to the interpretation it now endorses.

Question 37

54. India's position is that the term "generalized" supports the neutral meaning of "non-discriminatory". As the EC has explained:

The drafting history of the Enabling Clause suggests that the term "generalised" was used in order to distinguish the system of preferences developed in UNCTAD from the existing "special" preferences granted by some developed countries to some developing countries, mainly former colonies. As originally envisaged, the UNCTAD system would have subsumed and replaced those existing "special" preferences by "generalising" them, i.e. by making them available to all, or at least most developing countries. Hence the term "generalised". (EC response to Question 11 from the Panel to both parties, para. 41)

55. Thus the objective of the GSP was not only to ensure preferential access to developed country markets; it was also to ensure that such preferential access was granted equally to all developing countries. This is achieved by ensuring that all developing countries participate in GSP schemes (by disciplining the use of "compelling reasons" to exclude developing countries from beneficiary status altogether) and by ensuring there is no differentiation between beneficiary countries in terms of the tariffs applied on like products (the neutral meaning of non-discriminatory). The EC's response does not explain away the tension between the goal of ensuring equal preferential access for developing countries and an interpretation of "non-discriminatory" which permits differentiation between developing countries.

Question 39

56. The EC presents inconsistent views with respect of the value of the Appellate Body Report in *Korea – Beef* to support its defence under Article XX(b). It relies on *Korea- Beef*, drawing an

analogy between the meaning of "necessary" under Article XX(d) and Article XX(b) in order to assert that a measure to be provisionally justified under Article XX(b) must not necessarily be "indispensable" to be deemed as "necessary". However, it fails to accord the same treatment to the methodology used by the Appellate Body to determine the provisional justification under Article XX(d), without any logical reason; namely first, to analyse whether the measure is designed to secure compliance with laws and regulations that are not themselves inconsistent with some provisions of the GATT 1994, and second, whether the measure must be necessary to secure such compliance. Indeed, the EC overlooks that in order to assess the "necessity" of a measure along the continuum between "indispensable" and "making a contribution", it is necessary to determine whether the measure has been indeed designed to achieve the objective proposed. Otherwise, there is no point to determine the "necessity" of a measure for which the policy goal intended is totally different from the goals that could be pursued under the subparagraphs of Article XX.

57. Even if a measure under Article XX(b) could pursue not only a "sole and exclusive purpose", this is clearly not the case of the Drug Arrangements. The EC has not provided evidence to rebut what the design, structure and architecture of the Drug Arrangements shows: that the Drug Arrangements are a mere preferential tariff arrangement designed to further market access of certain developing countries. The stated objectives of the legislation do not support the health objectives alleged by the EC either.

Question 40

58. The EC relies on mere assertions that do not amount to proof. The EC states that "it would be an impossible task to separate and quantify the effects on drug consumption within the EC which are attributable to the Drug Arrangements from those which are attributable to other actions undertaken by the beneficiaries in order to reduce production and trafficking of drugs or to others actions that are part of the EC's comprehensive strategy against drug abuse, including in particular those aimed at reducing the demand for drugs." However, if it is *impossible* to determine the real effects of the Drug Arrangements on drug consumption within the EC, that means that these effects could possibly range from 0% to 100%. Under this complete uncertainty as to whether or not the Drug Arrangements have effects on the EC's domestic drug consumption and the magnitude of those effects, the Panel would have to find that the EC has not established that the Drug Arrangements have effects on drug consumption within the EC.

59. Even the so-called "self-evident proposition" is only an assertion that would require evidence to be corroborated. In effect, the EC states that reducing the supply of drugs from the beneficiaries to the EC (e.g. cocaine-based drugs from Latin-American and heroine from Pakistan) reduces the consumption of drugs in the EC, and therefore, protects the health and life of the EC citizens. In other words, according to the EC, if those drugs were not produced and trafficked in other countries, they would not be consumed in the EC. However, this proposition is not necessarily true in all circumstances. To be true and self-evident the EC would have to have shown that the supply of drugs from the beneficiaries cannot be substituted for by the supply of drugs from countries other than the beneficiaries. However, the EC has failed to provide evidence that

- countries other than the beneficiaries but equally or more affected by drug trafficking and production, such as Myanmar, Mexico, Thailand, the Philippines cannot replace the supply of drugs to the EC that comes from the beneficiary countries, and
- there is no substitutability between cocaine-based, opium-based and synthetic drugs, and therefore, that the eradication of the supply of one of them would not entail substitution by any other. As a matter of fact, the Global Illicit Drug Trends 2003 (http://www.unodc.org/pdf/report_2003-06-26_1.pdf) shows, among others, that:

"[c]landestine manufacture of amphetamine is mainly concentrated in Europe. The region accounts for close to 60% of all amphetamine laboratories seized over the 1991-2001 period." (p. 41)

"[p]recursor seizures suggest that ecstasy (MDMA) production is still largely concentrated in Europe, even though it has spread to other regions in recent years. Overall, 87% of all ecstasy precursors – sufficient for the production of 4.7 tons p.a. of MDMA – were seized in Europe over the 1991-2001 period."

However, the EC has failed to show that supply of its domestic production would not substitute drugs coming from the beneficiaries.

Question 42

60. India considers that it could be inferred from the answer given by the EC that there were no reports prepared by the EC before the Drug Arrangements were enacted that described the link between production in the drug-producing and trafficking countries and consumption by the EC's population. The enactment of the Drug Arrangements was therefore based on a so-called "self-evident" proposition, which, as shown in India's comments to Question 40 to the EC, is not "self-evident".

Question 43

61. It can be inferred from the EC's reply that there is no such documentary material.

Question 44

62. India re-iterates that UN pronouncements or recommendations are wholly irrelevant to the empirical question of whether there is an appropriate relationship between the Drug Arrangements and the protection of the life or health of the EC population or the special development needs of certain developing countries. If the UN were to revoke all these resolutions, surely the EC would not concede that action *ipso facto* makes the Drug Arrangements "unnecessary" for purposes of Article XX(b) or "discriminatory" for the purposes of the EC's interpretation of paragraph 2(a) of the Enabling Clause. As regards the relevant empirical issue, the EC has not presented any pertinent evidence to the Panel. Indeed, it has expressed its inability to discharge its burden of proof:

However, it would be an impossible task to separate and quantify the effects on drug consumption within the EC which are attributable to the Drug Arrangements from those which are attributable to other actions undertaken by the beneficiaries in order to reduce production and trafficking of drugs or to others actions that are part of the EC's comprehensive strategy against drug abuse, including in particular those aimed at reducing the demand for drugs.¹¹

63. Even the UN pronouncements cited by the EC do not support its claims:

- i. Article 14.3(a) of the *1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* is unresponsive.¹² It is not a mandatory provision (in contrast to sub-clauses (b) and (c) of Article 14.3) hence cannot support any inference that the provision of market access is a "necessary component of any UN strategy". In any case, this provision refers to market access as one of the factors that must be considered before rural development

¹¹ Answer to Question 40 from the Panel to the EC, para. 126.

¹² Cited in EC, *FWS*, para 101.

programmes are implemented. This does not support the claim that discriminatory preferential tariff treatment for a wide range of products (including products having no connection with crop substitution programmes) is *required* in order to combat drug production and trafficking.

- ii. The guidelines adopted by the *International Conference on Drug Abuse and Illicit Trafficking* held in Vienna in 1987¹³ state that "Governments... might consider favourably" the grant of preferential tariff treatment. This does not support the inference that discriminatory preferential tariff treatment is a necessary measure to safeguard the health of EC citizens. In any case this exhortation is limited to substitute crops; the Drug Arrangements have much wider product coverage. The EC has not led any evidence that all (or any) substitute crops are covered under the Drug Arrangements.
- iii. The EC cites a political declaration adopted by the UN General Assembly on 23 February 1990.¹⁴ However, there is no indication that the General Assembly stated that preferential tariff treatment was necessary; it merely "urges" measures that would facilitate trade flows. This should be presumed to refer to binding multilateral trade liberalization in contrast to discriminatory preferential tariff treatment.
- iv. The EC cites as particularly important the *Action Plan on International Co-operation on the Eradication of Illicit Drug Crops and on Alternative Development* adopted by the UN General Assembly in 1998 (the "1998 Action Plan")¹⁵. Paragraph 15 of the 1998 Action Plan cited by the EC merely states that the international community "should attempt" to provide greater market access this does not indicate that market access is a "necessary complement". Further this market access is for "alternative development products". Alternative development is defined in the 1998 Action Plan as " a process to prevent and eliminate the illicit cultivation of plants containing narcotic drugs and psychotropic substances through *specifically designed rural development* measures....". There is no limitation within in the Drug Arrangements to such products. Indeed the EC has not presented any evidence that substitute agricultural crops are covered under the Drug Arrangements. Further market access should be presumed to refer to multilateral secure trade liberalization and not to discriminatory preferential tariff treatment. It should also be noted that paragraph 15 appears in the context of actions to be taken to redress difficulties resulting from insufficient funding for alternative development programmes.
- v. The EC cites a UN General Assembly resolution of 19 December 2001.¹⁶ This resolution merely "encourages" markets access. There is no reference to discriminatory preferential tariff treatment and it is limited to products of alternative development activities.
- vi. The resolution of the UN Commission on Narcotic Drugs of 15 March 2002¹⁷ likewise merely "encourages" access to international markets. This is limited

¹³ Cited in EC, *FWS*, para. 103.

¹⁴ Cited in EC, *FWS*, para. 104.

¹⁵ Cited in EC, *FWS*, para. 105-110. See in particular para. 109.

¹⁶ Cited in EC, *FWS*, para. 110.

¹⁷ Cited in EC, *FWS*, para. 111.

to products of alternative development activities and cannot be construed to encourage discriminatory preferential tariff treatment.

- vii. The statement from the 46th session of the Commission on Narcotic Drugs held in Vienna¹⁸ uses language identical to UN General Assembly resolution of 19 December 2001 discussed in (5) above.

64. In summary, the texts cited by the EC (i) refer to market access (meaning multilateral binding liberalization) as opposed to discriminatory preferential tariff treatment, (ii) are expressed in non-obligatory language and contain no suggestion that market access is a necessary component of the UN strategy or (iii) are limited in scope to market access for agricultural crops which substitute for narcotics cultivation as opposed to market access for employment generation in general.¹⁹

Question 45

65. The texts cited by the EC do not contain any suggestion that improved market access is a "necessary component" of the UN strategy. The call for market access in the texts cited by the EC is invariably expressed in a non-obligatory and discretionary manner (see India's comments on the EC's reply to question 44 from the Panel to the EC). Further, the texts cited by the EC can only yield a partial and selective understanding of the UN strategy for combating drug problems. It is just as likely that there are a plethora of *UN* conventions, resolutions and other reports which simply do not mention market access (much less discriminatory preferential tariff treatment) as part of the UN strategy.

Question 46

66. Again, in the first place, the EC has not presented any objective criteria. In any event, the EC has not presented any evidence to substantiate its assertion that "[a]ll the countries included in the Drug Arrangements are, *as a matter of fact*, "suppliers" to the EC."

Question 48

67. The EC's replies to the Panel Question 40 to the EC relate to the effects of the reduction of supply on the consumption of drugs within the EC (para. 125) or to the effects of the Drug Arrangements on the consumption of drugs within the EC (para. 126). None of those replies are related to the Drug Arrangements and the reduction of supply to the EC as a consequence of the Drug Arrangements. The EC has therefore failed to respond to the Panel's question. The EC has likewise failed to provide any evidence to show the link between the Drug Arrangements and the reduction of supply in the EC.

Question 50

68. Again, the EC does not respond to the question of the Panel. It only provides assertions and a "self-evident" proposition which have been discussed by India in prior comments.

Question 51

69. Please see India's comments on the replies to Panel Questions 44 and 45 to the EC.

¹⁸ Cited in EC, Second Written Submission, para. 59.

¹⁹ See Oral Statement of the European Communities at the Second Meeting with the Panel, para. 76.

Question 52

70. India notes that the EC has not provided the Panel with clear indication as to whether it considered other possible, less trade-restrictive alternatives. Whether or not there are other less trade restrictive alternatives is an issue of fact. That there are other alternatives is not in dispute, as there have been substantial efforts under the auspices of domestic authorities, U.N. agencies, and other organizations to combat drug production and trafficking prior to the Drug Arrangements. Thus, the EC cannot be unaware of the existence of other less trade-restrictive alternatives.

Question 56

71. By its response, the EC concedes that the Drug Arrangements engender less of the "desired effect" because equivalent preferences are granted to many other developing countries under other programmes, for example, "Everything but Arms", LDC schemes, the Cotonou Agreement and regional free trade agreements. Even assuming that tariff preferences fall within the continuum of necessity, that equivalent preferences are granted to other developing countries where the same conditions do not prevail (assuming the existence of criteria as to what those conditions are) as those prevailing in the twelve beneficiary countries renders the Drug Arrangements not "significantly closer" to the pole of "indispensable", but rather significantly farther from that pole.

Question 57

72. The EC has not replied to the Panel's question regarding the distinction between preferences granted to South Africa and all the 12 beneficiaries. The conclusions that can be drawn from the comparative statistics cited by the EC as to heroin or cocaine seizures can only be rendered relevant if there were explicit criteria as to the specific conditions that the Drug Arrangements seek to address. There are no such criteria.

Question 58

73. The absence of explicit criteria for the inclusion of countries as beneficiaries under the Drug Arrangements and the arbitrariness of the Drug Arrangements are highlighted by the EC's reply that it is willing "to explain the reasons why any other developing countries have been excluded, provided that those countries are sufficiently identified by the Panel". If indeed there were explicit criteria and those explicit criteria were applied in a non-arbitrary manner, it would not have been difficult for the EC to respond to the Panel's question. Instead, the EC expects the Panel to identify which countries are not included in accordance with criteria not disclosed to the Panel.

Question 59

74. The factual premise of the Panel's question is that the EC has not established the existence of explicit criteria. In response to the Panel's question, the EC merely cites paragraphs 116-118 of its First Submission and paragraphs 86-99 of its reply to Question 10 of the Panel to the EC and reiterates that those paragraphs explain what those criteria are. But the factual premise of the Panel's question – that there are no explicit criteria – was arrived at by the Panel after it had (i) read all of the submissions of the EC and the replies of the EC to the questions of the Panel and those of India and (ii) heard all of the oral arguments of the EC. India agrees with the Panel's factual premise because there are no explicit criteria under Regulations establishing the Drug Arrangements, the paragraphs cited by the EC in its First Submission and responses to the Panel's question do not qualify as explicit criteria, and the EC has thus far failed to provide the Panel with those criteria, notwithstanding several requests by the Panel and by India. In the absence of those criteria, the EC is therefore not in a position to establish that the Drug Arrangements are not applied in an arbitrary manner.

Question 60

75. Please see India's comments on the EC's reply to Panel Question 59 to the EC.

Question 61

76. The fact is that the EC did seek a waiver but had failed to obtain a waiver. This tends to establish that the defence of justification under Article XX(b) of the GATT was conceived only after the initiation of this dispute, and at the time when the Drug Arrangements were formulated, the EC did not even take Article XX(b) into consideration.

Question 62

77. The EC explains that the inclusion of Pakistan in the Drug Arrangements was based on the anticipation of the great risk that, following the fall of the Taliban regime, opium production in Afghanistan would resume once again, and that this would have a considerable impact on Pakistan. This is an explanation made today, in the context of this dispute. However, EC pronouncements at or about the time the inclusion of Pakistan in the Drug Arrangements was being contemplated points to certain reasons other than the possible effects of the fall of the Taliban regime on Pakistan and the consequent effects thereof on the life or health of the EC population. As the EC explained *then*,:

- i. The circumstances of the inclusion of Pakistan in the Drug Arrangements make it particularly clear that the arrangements are designed to respond to policy objectives of the EC rather than the needs of developing countries. These circumstances have been described by the EC as follows:

*In recognition of Pakistan's changed position on the Taliban regime ... the Commission has stepped up the EU's assistance to Pakistan ... A new Cooperation Agreement was signed at the occasion of the visit of President Prodi and PM Verhofstadt to Pakistan on the 24 November 2001, where they also met with President Musharraf. On 16 October, the Commission presented a package of trade measures designed to significantly improve access for Pakistani exports to the EU... The proposed package has been specifically tailored to target clothing and textiles accounting for three-quarters of Pakistan's exports to the EU. It removes all tariffs on clothing and increases quotas for Pakistan textiles and clothing by 15%. In return, Pakistan will improve access to its market for EU clothing and textile exporters. The package gives Pakistan the best possible access to the EU short of a Free Trade Agreement by making it eligible for the new Special Generalised System of Preferences Scheme for countries combating drugs. This package was approved by the General Affairs Council on 10 December 2001.*²⁰ (emphasis added)

²⁰ "EU Response to 11 September - Latest update on European Commission Action- Briefing on 12 March 2002" <http://europa.eu.int/comm/110901/memo120302_en.htm> (last accessed 6 March 2003) (EXHIBIT INDIA-5).

78. Thus, the reasons given then were the following:

- "Pakistan's changed position on the Taliban regime", and
- The reciprocal commitment by Pakistan to "improve access to its market for EU clothing and textile imports".

ANNEX B-7

Comments of the European Communities to Replies of India to Questions from the Panel after the Second Panel Meeting

Questions to both Parties

Question 30

1. Contrary to India's assertion, the EC does not argue "that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause". The term "justified" implies that the Drug Arrangements are inconsistent with Article I:1 of the GATT. Yet, the EC's position is that Article I:1 of the GATT does not apply at all to measures falling within the scope of the Enabling Clause. It is part of India's claim that Article I:1 of the GATT, rather than the Enabling Clause, apply to the Drug Arrangements and, accordingly, it is for India to prove that part of its claim.

2. It is not correct to say that the facts upon which India relies in support of its claim under Article I:1 of the GATT are not in dispute. India claims in the alternative that, even under the EC's interpretation of "non-discriminatory", the Drug Arrangements would be discriminatory and inconsistent with the Enabling Clause. This claim involves factual allegations which are disputed by the EC. India bears of proving those factual allegations.

3. Finally, the EC notes that India now concedes that Paragraph 2(a) should not be interpreted differently simply because, according to India, it is an "exception" to Article I:1 of the GATT.

Question 31

4. India concedes that the developing countries had to make concessions in return for the Enabling Clause and that, in determining the level of these concessions, their individual development needs were taken into account, in accordance with "the principle of individually graduated non-reciprocity" set out in Article XXXVI:8 of the GATT (the same principle that is restated in paragraph 5 of the Enabling Clause).

5. This amounts to an admission by India that each developing country paid a different "price" for the Enabling Clause, according to its individual development needs. This supports the EC's interpretation of "non-discriminatory" in footnote 3, which implies that some developing countries paid a "higher price" for the Enabling Clause by "renouncing" their MFN rights vis-à-vis other developing countries with special development needs.

Question 32

6. India puts forward yet another interpretation of the notion of "affirmative defence" based on a definition found in the Black's Law Dictionary. Like India's previous interpretations of this term, this new interpretation is at odds with the guidance provided by the Appellate Body and well established practice. Indeed, according to the criteria outlined by India, Article 27.4 of the SCM Agreement would also be an "affirmative defence" if invoked by the defending party, just like Article 3.3 of the SPS Agreement, Article 6 of the ATC, or even Articles VI or XIX of the GATT.

7. For example, assume that India claimed that an import duty applied by another Member violates Article I:1 of the GATT and that, in response, the defending party argued that the duty is an anti-dumping measure imposed consistently with Article VI of the GATT. According to India, this would amount to an "affirmative defence" because

- it is an "assertion by the defendant";
- it raises "new facts and arguments"; and
- should the Panel find the defendant's assertion to be true, India's claim based on Article I:1 of the GATT would fail.

Question 33

8. India's contention that the EC's interpretation of "non-discriminatory" should be rejected because it would lead to a "normative void" is groundless. As shown by the EC, its interpretation of "non-discriminatory" is in line with the interpretation of that term made by numerous municipal and international tribunals in a variety of different legal areas. The EC's interpretation is also in line with the interpretation made by the panel in *Canada – Pharmaceutical Patents*¹.

9. Clearly, the mere possibility of requesting a waiver does not justify an otherwise unwarranted interpretation of Paragraph 2(a).

Question 35

10. It is incorrect to say that "the 1971 Decision does not itself describe the GSP". The 1971 Decision describes the GSP as providing preferential tariff treatment which is "generalised", "non-discriminatory" "non-reciprocal" and "beneficial to the developing countries".

Question 37

11. The mere fact that an interpretation is easier to apply is not a sufficient reason to conclude that it is the correct interpretation. From the fact that the Enabling Clause does not establish precise criteria for the application of the term "non-discriminatory" it does not follow that the Panel should ignore this standard and apply instead the MFN standard of Article I:1 of the GATT, which the drafters of the Enabling Clause clearly intended to exclude. Rather, the absence of precise criteria suggests that the drafters considered that whether or not differentiation between developing countries is "discriminatory" is something to be ascertained by panels on a case-by-case basis.

12. In order to resolve this dispute, it is not necessary to draw a bright line between all conceivable instances of differentiation between developing countries. Rather, the Panel should follow the same approach as the panel in *Canada – Pharmaceutical Patents* when applying the term "discrimination" in the context of Article 27 of the TRIPS Agreement:

In considering how to address these conflicting claims of discrimination, the Panel recalled that various claims of discrimination, de jure and de facto, have been the subject of legal rulings under GATT or the WTO. These rulings have addressed the question whether measures were in conflict with various GATT or WTO provisions prohibiting variously defined forms of discrimination. As the Appellate Body has repeatedly made clear, each of these rulings has necessarily been based on the precise legal text in issue, so that it is not possible to treat them as applications of a general concept of discrimination. Given the very broad range of issues that might be involved in defining the word "discrimination" in Article 27.1 of the TRIPS Agreement, the Panel decided that it would be better to defer attempting to define that term at the outset, but instead to determine which issues were raised by the record

¹ Panel report, *Canada – Pharmaceutical Patents*, para. 7.94.

before the Panel, and to define the concept of discrimination to the extent necessary to resolve those issues.²

Question 40

13. There is a fundamental difference between the preferential schemes cited by India and the Drug Arrangements. The five waivers mentioned by India cover preferences that were confined ab initio and permanently to a limited number of developing countries located in a certain geographical region. While some of the waivers refer to the development needs of the beneficiary countries, the donor countries did not claim that no other developing country in the world had similar development needs. For example, with regard to the APTA, the United States has never claimed that Ecuador, Colombia, Peru and Bolivia are the only countries in the world affected by the drug problem.

14. In contrast, the Drug Arrangements are "non-discriminatory" because the designation of the beneficiary countries is based only and exclusively on their development needs. All the developing countries that are similarly affected by the drug problem have been included in the Drug Arrangements, regardless of their geographical location.

Question 43

15. India notes that the "elimination of discriminatory treatment in international trade relations" is one of the objectives stated in the Preamble of the WTO Agreement and that this objective "is implemented through, among others, the MFN principle under Article I:1 of the GATT". From this India concludes that the term "non-discriminatory" in footnote 3 "must therefore be construed in accordance with the standard established under [Article I:1]". This reasoning involves a number of manifest non-sequiturs.

16. First, the elimination of discrimination in international trade relations is certainly one of the objectives of the WTO Agreement. But it is not the only one. Another objective stated in the Preamble to the WTO Agreement is to ensure that developing countries "secure a share in the growth in international trade commensurate with the needs of their economic development". The Enabling Clause, like the other provisions on Special and Differential Treatment, is an instrument to achieve this objective. India, however, continues to gloss over the fact that the Enabling Clause is the main form of Special and Differential Treatment and about its specific objectives.

17. Second, while the Preamble of the WTO Agreement alludes to the elimination of "discrimination" it does not define that term. There is no reason to assume that the term "discrimination" must be given identical meaning throughout the WTO Agreement, let alone the meaning asserted by India in this dispute.³ As noted by India, the objective to eliminate discrimination "is implemented through, among others, the MFN principle under Article I:1 of the GATT". As conceded by India, Article I:1 of the GATT is not the only provision which pursues that objective. Hence, there is no basis for India's assertion that "non-discriminatory must, therefore, be construed in accordance with the standard established under Article I:1". The Enabling Clause excludes expressly the application of Article I:1 of the GATT. Had the drafters of the Enabling Clause intended to maintain the MFN standard as between developing countries, they would have referred expressed to such standard, instead of using the term "non-discriminatory". Contrary to India's contention, the fact that the Enabling Clause reproduces language from the UNCTAD texts cannot explain the use of the term "non-discriminatory". As evidenced by the discussions within UNCTAD, its members were well aware of the specific meaning of the MFN standard in Article I:1 of the GATT.

² Panel report, *Canada – Pharmaceutical Patents*, para. 7.98.

³ See Panel report, *Canada – Pharmaceutical Patents*, para. 7.98.

18. Third, the different objectives stated in the Preamble to the WTO Agreement must be presumed to be compatible with each other and should, therefore, be interpreted harmoniously. Yet, India's interpretation of "non-discriminatory" presupposes that the objective to eliminate discrimination would be in direct conflict with, and prevail over the objective to ensure that developing countries must secure a share of international trade commensurate with their development needs. On India's interpretation, not only the Drug Arrangements, but any preferences provided under the Enabling Clause, and indeed any provisions granting Special and Differential Treatment to developing countries, would have to be considered as "discriminatory". It is more reasonable to consider that the drafters of the WTO Agreement regarded the different objectives stated in the Preamble as compatible and, therefore, that, as used in the Preamble, the term "discrimination" does not encompass the different treatment of countries with different development needs.

Question 46

19. The phrase "beneficial to the developing countries" is found also in footnote 3. Yet, India has at no point argued that, in the context of footnote 3, this phrase alludes to the product coverage of the GSP schemes. In any event, it is evident that a GSP scheme limited to a few products could still be "beneficial", rather than "detrimental" to the developing countries.

20. Obviously, a GSP scheme with a wide product coverage would promote the attainment of the objectives cited by India. But from this it does not follow that the Enabling Clause imposes any binding requirements with respect to the product coverage.

Question 47

21. India continues to argue that preferences must respond to the developing countries "as a whole and not individually or in terms of subgroups".

22. Yet, India still has to explain whether this means that, for example, granting preferences with respect to textile products is not compatible with Paragraph 3(c) because not all developing countries have a textiles industry. (During the second meeting with the Panel, India's representative declined to answer this question on the grounds that it was irrelevant). India's position appears to be that all developing countries may have a potential interest in exporting textiles. But, by the same token, it could be argued that all developing countries have a potential interest in the Drug Arrangements because all of them may be potentially affected by the drug problem.

23. Furthermore, India's interpretation leads to a manifestly absurd result in conjunction with subparagraph 2(d), as it would imply that, in designing special treatment for LDCs, donor countries should respond to the interests of developing countries "as a whole", rather than to the interests of the LDCs as a "subgroup". India has nowhere addressed this argument.

24. India also argues that "the primary function of Paragraph 3(c) is to ensure that the product range and depth of tariff cuts schemes are of a nature and magnitude that respond to the development, financial and trade needs of developing countries as a whole."

25. This interpretation has no support in the text of Paragraph 3(c) or anywhere else in the Enabling Clause. Surely, if the drafters of the Enabling Clause had aimed at imposing upon the donor countries the kind of obligations suggested by India with respect to the depth of the tariff cuts or the product coverage they would have used more specific language to that effect.

26. Furthermore, India has not explained yet on the basis of which criteria panels should decide whether a tariff cut is sufficiently deep to be "responsive" or whether a given product should be included in a GSP scheme. (Again, during the second meeting with the Panel, India's representative

argued that this issue was irrelevant for this dispute). This contrasts with India's concern about the uncertainty that would supposedly arise from the EC's interpretation of "non-discriminatory".

Question 48

27. Elsewhere, India has emphasised that the issue of whether developing countries may be excluded ab initio from a GSP scheme is distinct from the issue of whether differentiation in treatment between developing countries recognised as beneficiaries of a GSP scheme is permissible. (See below the comments to India's reply to the Panel's question to India No. 16) The statement by the Group of 77 quoted by India is concerned with the first of these issues and, therefore, does not support India's interpretation of the term "non-discriminatory", which addresses the second issue.

Question 49

28. Principle 8 does not support India's interpretation of "non-discriminatory".

29. The "special" preferences mentioned in Principle 8 were objectionable because they were based on the historical or geographical ties between the beneficiaries and the donors, rather than on any special development needs of the beneficiaries. Principle 8 envisaged that those preferences should be made equally available to all developing countries, regardless of geographical or historical considerations. But this is not the same as saying that identical preferences should be granted to all developing countries and that no differentiation was to be permitted between developing countries in order to take account of differences between their development needs.

30. India's reply contradicts its own interpretation of "generalised" under other replies. (See EC comments to India's reply to the Panel's Question to India No. 16.)

Question 54

31. There is simply no basis in the text of Article XX for the proposition that tariff preferences can never be justified under Article XX(b). Article XX provides an exception from all the obligations contained in the GATT, including those relating to tariffs ("Nothing in this agreement...").

32. Likewise, India's contention that Article XX(b) only permits to "burden" the trade from the country that is the source of the risk to human health or life has no basis in the text of that provision or elsewhere in the GATT. The measures adopted under Article XX(b) are not penalties. They are not applied in order to sanction the conduct of other countries. The focus of Article XX(b) is on the needs of the country applying the measure. What matters is exclusively whether a measure is "necessary" to protect human health or life.

33. In most cases, restricting the importation and/or sale of substances that pose a threat to human life or health will be sufficient to protect adequately human life and health. Clearly, however, this is not so in the case of narcotic drugs. The EC already bans the importation and sale of drugs from all sources. This measure, nevertheless, is manifestly insufficient to protect adequately the life and health of the EC citizens, because drugs continue to be imported illicitly in large volumes. There is agreement among the international community, as reflected in the relevant UN resolutions cited by the EC, that trade restrictions are not enough to fight effectively against drug abuse. More specifically, there is agreement that, in order to counter the drug problem, it is necessary to reduce the production of drugs in the supplying countries. Not even India appears to dispute this at this stage of the proceedings. The only issue before the Panel, therefore, is what measures are "necessary" in order to achieve this objective.

34. India argues that the UN texts relied by the EC "cannot establish any empirical link". This amounts to saying that the UN recommendations themselves have no "empirical basis" or, in other

words, that they are groundless. The EC wonders why, if so, all WTO Members, including India, have agreed to those recommendations. At the very least, the UN resolutions cited by the EC constitute prima facie evidence that the Drug Arrangements are "necessary" to reduce the supply of drugs to the EC. India has provided no evidence to rebut that evidence.

35. The EC would caution against second-guessing the UN resolutions and, more generally, the well established international anti-drug policies which have been codified in those resolutions. In particular, since India has provided no "empirical basis" whatsoever for its own assertions, which in fact do not even reflect India's positions in the competent international fora.

36. There is no basis for India's assertion that the UN recommendations "refer" to "multilateral" trade liberalisation, let alone to "binding" liberalisation. India's contention that "non-binding" market access measures cannot contribute to sustainable alternative activities would deprive of their justification any GSP preferences, since they are also "non-binding". The EC doubts that this type of arguments is in the interest of India, as one of the main beneficiaries of the GSP schemes.

Question 55

37. The EC has already explained why the violation of a negotiated tariff binding can never be "necessary" for the purposes of Article XX(b). (See EC's reply to the India's Question to the EC No. 32, at para. 62). Characteristically, India ignores the EC's response.

Question 57

38. The conditions prevailing in a country which is "actually" affected by the drug problem are not the same as those prevailing in a country which is only "potentially" affected by such problem.

39. By India's logic, a Member could not take any action against the imports from a country which is "actually" affected by a disease or pest unless it imposed the same measures against the imports from any other country which may be "potentially" affected by the same risk. While, depending on the circumstances, it may be justified to take precautionary action against a "potential" risk to human health or life, it seems obvious that an "actual" risk is not the same as a "potential" risk and that differentiating between countries on that basis is not necessarily discriminatory.

Question 58

40. It is simply not true that the EC has not explained the criteria used to identify the beneficiaries of the Drug Arrangements. Rather, India has deliberately chosen to ignore the EC's repeated explanations, as well as the supporting evidence provided by the EC.

41. For some unexplained reason, the figures now adduced by India have been drawn from the Global Illicit Drug Report for 1998, although in the meantime UNODC has published four reports. This has some implications. For instance, the cultivation area has decreased drastically in Mexico. Also, the figures for Vietnam have not been listed separately since 2000, because, as explained in a footnote, "due to small production, Vietnam cultivation and production were included in the category 'Other Asian countries' ..."⁴.

42. Again, for some unexplained reason, India provides figures on the "cultivation area", whereas the data provided by the EC relate to "production". The difference may become important because of the climate conditions for the growth of poppy in each year.

⁴ United Nations Office on Drugs and Crime, "Global Illicit Drug Trends 2003", p. 165.

43. Also for unexplained reasons, India does not refer to coca products, which are the most relevant in Latin America.

44. In any event, the figures now provided by India do not contradict the EC's explanations and, therefore, it is difficult to understand what point, if any, India is trying to make:

- as explained repeatedly, Myanmar is not included in the Drug Arrangements because it is included in the Special Arrangements for LDCs, which provide greater benefits.⁵ The comparison with Colombia is inapposite, because the main reason to include Colombia in the Drug Arrangements is that it is the world largest producer of coca products, not of opiates⁶;
- Laos is also a LDC;⁷
- the EC has already explained in detail why Thailand has not been included in the Drug Arrangements;⁸
- Mexico is a party to a FTA with the EC. Again, the comparison with Colombia is flawed for the above mentioned reason;
- Vietnam's production of opium is negligible and, as just explained, is no longer reported separately by UNODC. In any event, the comparison with Pakistan is irrelevant. Pakistan has been included in the Drug Arrangements as a transit country and not because it is a production country.⁹ The following tables compare the seizure volumes for opium and heroine in Vietnam and Pakistan¹⁰:

Opium seizures (kgs)

	1996	1997	1998	1999	2000	2001
Vietnam	839.9	No report	No report	495.4	460	583
Pakistan	7422.8	7300	5021.7	16319.9	8867.4	5175

Heroin seizures (kgs)

	1996	1997	1998	1999	2000	2001
Vietnam	54.8	24.3	60	66.6	49.3	40.3
Pakistan	5872.1	6156	3363.7	4973.7	9492	6931.5

Questions to India

Question 16

45. At several points in its replies to the Panel's questions India has emphasised that the issue of whether all developing countries should be recognised as beneficiaries of a GSP scheme is "distinct" from "the issue of whether differentiation in treatment between developing countries recognised as

⁵ EC's First Submission, para. 140.

⁶ Ibid., paras. 126-127.

⁷ Ibid., para. 140.

⁸ EC's reply to the Panel's question to the EC No. 14.

⁹ EC's First Submission, paras. 136-139.

¹⁰ UNODC, Global Illicit Drug Trends 2003, p. 214, 229 *et seq.*

beneficiaries is permissible".¹¹ The first issue is addressed by the term "generalised". The second by the term "non-discriminatory".

46. Yet, in its reply to this question, India conveniently forgets this distinction and cites passages from the Agreed Conclusions which relate to the first of the above two issues in support of its interpretation of the term "non-discriminatory":

- the provision of Section II(1) of the Agreed Conclusions that, "... there is agreement with the objective in principle that all developing countries should participate as beneficiaries" is clearly concerned with the issue of whether donor countries should be allowed to exclude ab initio developing countries from their GSP schemes, and not with the issue of whether differentiation is permitted among the recognised beneficiaries of a GSP scheme;¹²
- likewise, the provision of Section IV:12 noting the position of the donor countries that "as for beneficiaries, donor countries would in general base themselves on the principle of self-election" is, by its own terms, concerned with the issue of what countries should be recognised as beneficiaries of a GSP scheme, and not with the "distinct" issue of whether identical preferences should be granted to all the recognised beneficiaries.

47. The indisputable fact is that there is no provision in the Agreed Conclusions which addresses the meaning of the term "non-discriminatory".

48. In reply to this question, India also cites section IX(1) of the Agreed Conclusions, which provides that

The Special Committee recognizes that no country intends to invoke its rights to most-favoured-nation treatment with a view to obtaining in whole or in part the preferential treatment granted to developing countries.

49. However, the above passage undermines, rather than supports India's position:

- first, it says that "no country" intends to invoke its MFN rights, rather than "no developed country". The term "no country" includes also "no developing country". If only developed countries had renounced to their MFN rights under the Agreed Conclusions, it would have been unnecessary to refer to "no country", rather than "no developed country";
- second, it alludes to "the preferential treatment granted to developing countries", without the definite article the before "developing countries". This, by India's well-known own interpretation, would confirm that the "preferential treatment" envisaged by the Agreed Conclusion does not have to be granted to all developing countries.

Question 17

50. The EC notes that India concedes that the Agreed Conclusions do not prohibit expressly to grant special preferences to the LDCs. According to India, no such express prohibition was necessary because "the preferences under the GSP were intended to be non-discriminatory".

¹¹ India's reply to the Panel's Question to both Parties No. 51. See also India's replies to the Panel's Questions to both Parties Nos. 41 and 50.

¹² EC's Second Oral Statement, para. 59.

51. It seems hardly necessary to point out that this amounts to purely circular reasoning. India has invoked the Agreed Conclusions as contextual support for its interpretation of "non-discriminatory". But then it is forced to rely on its own interpretation of "non-discriminatory" in order to read the Agreed Conclusions in a manner which suits that interpretation.

Question 20

52. The EC notes that India does not contest the figures concerning the seizures of coca and opium products in India provided by the EC. (See EC's reply to the Panel's Question to the EC No. 15). Those data show that the trafficking of coca products in India is negligible, while the trafficking of opium products is relatively small, as compared to Pakistan, in particular when considered in the light of the size of their respective population and economy.

Question 21

53. The UN texts cited by the EC do not foresee "multilateral trade negotiations in sectors of export interest of the developing countries". Rather, they urge to provide "greater market access" specifically for the products of the countries affected by the drug problem. There is no suggestion in the UN texts that this should be done pursuant to "multilateral trade negotiations" or with respect to products of export interest to all developing countries in general.

54. As explained, providing the same access to all developing countries would not be effective in achieving the objective of providing "greater market access" for the developing countries affected by the drug problem. India has nowhere addressed this argument. In fact, India's claims of trade diversion amount to a recognition that providing the same preferences to all developing countries would be less effective in supporting alternative activities in the beneficiary countries.

55. It is also incorrect to say that the Preamble of the Agreement on Agriculture "foresees" "multilateral trade negotiations in sectors of export interests of the developing countries". Rather, the Agreement on Agriculture provides that "in implementing their commitment on market access" developed country Members will provide "greater improvements and terms of access... for products of particular importance to the diversification of production from the growing of illicit narcotic crops". This involves an express recognition by the WTO that the countries affected by the drug problem have particular needs, different from those of other developing countries.

Question 22

56. India cites no evidence ("empirical basis") or authority in support of its proposition that financial assistance alone would be sufficient to support sustainable alternative economic activities in the drug affected countries.

57. India's position that financial assistance is a "sufficient" response to the drug problem is at odds with well established international anti-drug policies, as reflected in the UN resolutions cited by the EC, which urge to provide greater market access to the products of the countries affected by the drug problem. Those resolutions refer to financial assistance and greater market access as complementary, rather than alternative measures to counter the drug problem.

58. Moreover, India's position that financial assistance is as effective as trade preferences is also at odds with the traditional views of developing countries, which since the 1960s have consistently demanded "trade not aid". If accepted, it would deprive of its justification the Enabling Clause and, more generally, all Special and Differential Treatment provisions in the WTO Agreement. If India were correct, there would be no reason why developed countries should go on providing tariff preferences to developing countries. They could scrap their GSP schemes altogether and replace them with targeted financial assistance. This would have the additional advantage of allowing the

developed countries to respond more specifically to the needs of each developing country and to avoid the problems which result from the monopolisation of trade preferences by a few competitive developing countries. The EC doubts very much that the position expressed in this dispute reflects the considered views of India, which is both one of the main beneficiaries of all GSP schemes and the chief proponent of strengthening Special and Differential Treatment.

59. Moreover, if financial assistance were as effective in promoting exports as trade preferences (which India describes as "indirect financial assistance") it would follow that it would be also as trade restrictive. As such, it could be inconsistent with the provisions of Part IV of the SCM Agreement. Also, it seems that, in order to be as effective as trade preferences in promoting exports, financial assistance would need to be, *de iure* or *de facto*, export contingent, which would be prohibited in principle by Article 3 of the SCM Agreement.¹³ Thus, it is far from clear whether India's suggestion that the EC should provide financial assistance, rather than trade preferences, would ultimately be less trade restrictive and less WTO consistent than the Drug Arrangements.

60. Finally, it is simply not true that the Drug Arrangements are "at no expense" to the EC. See the EC's reply to the Panel's Question No. 16 to the EC.

Question 23

61. The obvious fact that the UN recommendations cited by the EC are not "legally binding" or that they are not part of the "covered agreements" is irrelevant. The EC does not contend that, as a matter of law, the UN recommendations derogate from, or take precedence over its WTO obligations.

62. Rather, the EC's position is that the fact that the United Nations has "urged" its members to provide greater market access in order to respond to the drug problem is evidence that, as a matter of fact, such action is "necessary" for the purposes of Article XX(b).

63. WTO Panels cannot assume lightly that the UN resolutions, and in particular the resolutions of the UN General Assembly, are, to use India's words, devoid of "empirical basis". India has provided no evidence of its own in order to substantiate its assertion that the UN resolutions are "empirically" groundless. The Panel, therefore, should accept the unquestionably well informed views of the United Nations that providing greater market access is indeed a necessary response to the drug problem.

64. India further contends that the United Nations could not have recommended a measure that it prohibited by the WTO Agreement. However, once again, this is purely circular reasoning. India's contention anticipates the conclusion to be reached by the Panel in this dispute. The issue before the Panel is precisely whether the action recommended by the United Nation is "prohibited" by the WTO Agreement at all.

Question 24

65. India makes the astonishing assertion that preferential treatment which is discriminatory between developing countries "is not beneficial at all". The EC wonders how this can be reconciled with India's claim that

¹³ Clearly, it would be unfeasible for the EC authorities to administer by themselves a programme that provided subsidies to any individuals in the drug affected countries wishing to engage in export activities to the EC. Rather, the EC would have to make the funds available to the authorities of the drug affected country, which would then provide the subsidies. Thus, the controversial question of whether the *SCM Agreement* may apply to foreign subsidies would not arise in practice.

The tariff preferences under the Drug Arrangements are beneficial to some developing countries and detrimental to others and consequently do not comply with paragraph 2(a) of the Enabling Clause.¹⁴

66. More fundamentally, why should the WTO Agreement be concerned about differentiation between developing countries which does not provide any benefit? Even if such differentiation were prohibited, it would have to be concluded that it causes no nullification or impairment.

67. The EC also notes the manifest contradiction between India's assertions that

An investor will not necessarily invest in a developing country benefiting from discriminatory tariff preferences ... because those preferences could be withdrawn at any time.

and Paraguay's repeated (but unsupported) claims to the effect that

As a result of the discriminatory tariff preferences under the Drug Arrangements, there has also been an "investment diversion". The proximity between Paraguay and some of the beneficiary countries creates the incentive to shift investments away from Paraguay and those countries. Moreover, international investment flows in sectors benefiting from the Drug Arrangements are diverted away from Paraguay.¹⁵

68. Once again, the EC wonders whether the interests of Paraguay and India are in fact the same in this dispute.

¹⁴ India's First Submission, para. 62.

¹⁵ Paraguay's Third Party Submission, para. 25.