

EC – TARIFF PREFERENCES¹

(DS246)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	India	GATT Art. I:1 Enabling Clause para. 2(a)	Establishment of Panel	27 January 2003
			Circulation of Panel Report	1 December 2003
Respondent	European Communities		Circulation of AB Report	7 April 2004
			Adoption	20 April 2004

1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** European Communities' generalized tariff preferences (GSP) scheme for developing countries and economies in transition. In particular, special arrangement under the scheme to combat drug production and trafficking (the "Drug Arrangements"), the benefits of which apply only to the listed 12 countries experiencing a certain gravity of drug problems.²
- **Product at issue:** Products imported from India vs products imported from the 12 countries benefiting from the Drug Arrangements under the EC GSP scheme.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- **GATT Art. I:1 (most-favoured-nation treatment):** The Panel found that the tariff advantages under the Drug Arrangements were inconsistent with Art. I:1, as the tariff advantages were accorded only to the products originating in the 12 beneficiary countries, and not to the like products originating in all other Members, including those originating in India.
- **Enabling Clause, para. 2(a):** The Appellate Body agreed with the Panel that the Enabling Clause is an "exception" to GATT Art. I:1, and concluded that the Drug Arrangements were not justified under para. 2(a) of the Enabling Clause, as the measure, *inter alia*, did not set out any objective criteria, that, if met, would allow for other developing countries "that are similarly affected by the drug problem" to be included as beneficiaries under the measure. In this regard, although upholding the Panel's conclusion, the Appellate Body disagreed with the Panel's reasoning and found that not every difference in tariff treatment of GSP beneficiaries necessarily constituted discriminatory treatment. Granting different tariff preferences to products originating in different GSP beneficiaries is allowed under the term 'non-discriminatory' in footnote 3 to para. 2, provided that the relevant tariff preferences respond positively to a particular "development, financial or trade need" and are made available on the basis of an objective standard to "all beneficiaries that share that need".

3. OTHER ISSUES³

- **Burden of proof (Enabling Clause):** The Appellate Body noted that, as a general rule, the burden of proof for an "exception" falls on the respondent. Given "the vital role played by the Enabling Clause in the WTO system as means of stimulating economic growth and development", however, when a measure taken pursuant to the Enabling Clause is challenged, a complaining party must allege more than mere inconsistency with Art. I:1 and must identify specific provisions of the Enabling Clause with which the scheme is allegedly inconsistent so as to define the parameters within which the responding party must make its defence under the requirements of the Enabling Clause. The Appellate Body found that India in this case sufficiently raised para. 2(a) of the Enabling Clause in making its claim of inconsistency with GATT Art. I:1.

¹ *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*

² The 12 countries benefiting from the Drug Arrangements are the following: Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru and Venezuela.

³ Other issues addressed: nature of Enabling Clause; dissenting panellist. Art. XX(b) defence; enhanced third party rights (DSU Art. 10); joint representation of India and Paraguay by private counsel.