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EUROPEAN COMMUNITIES – CONDITIONS FOR THE GRANTING OF TARIFF PREFERENCES TO DEVELOPING COUNTRIES

AB-2004-1

Report of the Appellate Body

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TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation Description

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- 4. India is a beneficiary of the General Arrangements but not of the Drug Arrangements, or of any of the other arrangements established by the Regulation. In its request for the establishment of a panel, India challenged the Drug Arrangements as well as the special incentive arrangements for the protection of labour rights and the environment. However, in a subsequent meeting with the Director-General regarding the composition of the Panel—and later in writing to the European Communities—India indicated its decision to limit its complaint to the Drug Arrangements, while reserving its right to bring additional complaints regarding the two "special incentive arrangements". Accordingly, this dispute concerns only the Drug Arrangements.
- 5. The Panel summarized the effect of the Drug Arrangements as follows:

The result of the Regulation is that the tariff reductions accorded under the Drug Arrangements to the 12 beneficiary countries are greater than the tariff reductions granted under the General Arrangements to other developing countries. In respect of products that are included in the Drug Arrangements but not in the General Arrangements, the 12 beneficiary countries are granted *duty free* access to the European Communities' market, while all other developing countries must pay the *full dutountriesTj* 257.2j t41.25pect

- (a) India has the burden of demonstrating that the European Communities' Drug Arrangements are inconsistent with Article I:1 of GATT 1994;
- (b) India has demonstrated that the European Communities' Drug Arrangements are inconsistent with Article I:1 of GATT 1994;
- (c) the European Communities has the burden of demonstrating that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause; [and]
- (d) the European Communities has failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause[.]¹⁶

The Panel also concluded that the European Communities had "failed to demonstrate that the Drug Arrangements are justified under Article XX(b) of GATT 1994". Finally, the Panel concluded, pursuant to Article 3.8 of the U9946600021335375c3122534 31725 Total Concluded To 1.04411 Total Concluded To 1.04411 Total Concluded Total Conclud

the Enabling Clause and Article I:1. Instead, the European Communities observes, the Panel simply "assumed" ³⁵ that the Enabling Clause is an exception to Article I:1.

- 12. Turning to the content and context of the Enabling Clause, the European Communities submits that the Enabling Clause provides a comprehensive set of rules that positively regulate the substantive content of GSP schemes, to the exclusion of the rules in Article I:1 of the GATT 1994. Specifically, the European Communities emphasizes that the words "generalized, non-reciprocal and non discriminatory" in footnote 3 of the Enabling Clause are distinct from and are intended to replace the most-favoured-nation ("MFN") obligation in Article I:1. The European Communities also argues that, according to the Panel's own reasoning, footnote 3 should be interpreted in the context of the Agreed Conclusions of the Special Committee on Preferences of the United Nations Conference on Trade and Development (the "Agreed Conclusions") and the submissions by developed countries to that committee. As such, the detailed obligations created by paragraph 2(a), footnote 3, and paragraph 3(c) of the Enabling Clause go far beyond "mere 'anti-abuse' safeguards". The European Communities contends that the Enabling Clause is unlike the chapeau of Article XX of the GATT 1994, which neither regulates the substantive content of measures adopted by Members, nor replaces the substantive rules from which Article XX derogates.
- 13. The European Communities relies in support of its argument on the position of the Enabling Clause within the GATT 1994 and the *Marrakesh Agreement Establishing the World Trade Organization* (the "WTO Agreement"). Thus, the European Communities contends that if paragraph 2(a) of the Enabling Clause were an exception to Article I:1, it would typically be found in Article I, or immediately after that Article. This is not the case, however. The Enabling Clause is a separate decision complementing Part IV of the GATT 1994, which is entitled "Trade and Development". In the view of the European Communities, Part IV of the GATT 1994 and the Enabling Clause cannot be "mere 'exception[s]'" to the GATT 1994.³⁸ Rather, the European Communities argues, they constitute a "special regime" for developing countries to address inequalities among the WTO Membership.³⁹
- 14. The European Communities submits that its understanding of the relationship between Article I:1 and the Enabling Clause is supported by the object and purpose of the Enabling Clause, in

³⁵European Communities' appellant's submission, para. 31.

³⁶Attached as Annex D-4 to the Panel Report.

³⁷European Communities' appellant's submission, para. 48.

³⁸*Ibid.*, para. 51.

 $^{^{39}}Ibid.$

accordance with the rules of treaty interpretation. The European Communities emphasizes that the

- 16. The European Communities notes the Panel's suggestion that absurd results would flow from characterizing the Enabling Clause as excluding the application of Article I:1 because it "would mean that GSP imports from different developing countries could be subject to different taxation levels in the importing country's domestic market." According to the European Communities, the Panel confuses *tariff measures* covered by paragraph 2(a) with the *imported products* to which such measures apply. Finding that the Enabling Clause excludes the application of Article I:1 would mean only that Article I:1 does not apply to a *tariff measure* falling within paragraph 2(a) of the Enabling Clause. It would not mean, as the Panel suggested, that Article I:1 does not apply with respect to *imported products* covered by such a *tariff measure*.
- 17. The European Communities submits that, as a result of the Panel's erroneous findings that the Enabling Clause is an "exception" to Article I:1 and that the Enabling Clause does not prevent the continued application of Article I:1, the Panel found that the European Communities bears the burden of justifying the Drug Arrangements under the Enabling Clause. Aonlye.125 j2 3 0 TD -0.1727 Tc 10880

"non-discriminatory" in footnote 3 of the Enabling Clause as requiring GSP schemes to provide "identical" preferences to "all" developing countries without differentiation, except with regard to *a priori* import limitations as permissible safeguard measures. The second error alleged by the European Communities concerns the Panel's interpretation of the term "developing countries" in paragraph 2(a) of the Enabling Clause as meaning *all* developing countries, except with regard to *a priori* limitations.

20. The European Communities asserts that the Panel's interpretation of the word "non-discriminatory" in footnote 3 of the Enabling Clause is erroneous because the phrase "generalized, non-reciprocal and non discriminatory" in footnote 3 merely refers to the description of the GSP in the 1971 Waiver Decision and, of itself, does not impose any legal obligation on preference-granting countries.⁵³ Even assuming such obligations existed, the European Communities maintains, the Panel failed to take into account the context of footnote 3 and the object and purpose of the Enabling Clause. Properly interpreted, the European Communities argues,

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last of these differences, the European Commu

29. The European Communities contends that, although tariff preferences may not be an "adequate" or "appropriate" response to other development problems, drug production and trafficking form major economic activities in the relevant countries, which activities cannot be eliminated without the provision of "alternative licit activities". Therefore, the European Communities claims that tariff preferences are an appropriate response to the drug problem, as recognized by the Members of the WTO—through the Preamble to the *Agreement on Agriculture* and the waiver for the United States' Andean Trade Preference Act 63—and the United Nations—through other instruments. Furthermore, the European Communities argues that the Drug Arrangements are non-discriminatory because the drug problem affects individual developing countries in different ways, and because

developing countries *ab initio* from GSP schemes.⁶⁵ The European Communities contends that several other documents that the Panel relied on contain merely "expectations" ⁶⁶ or "aim[s]" ⁶⁷ of particular parties, rather than agreed statements of "legally binding" obligations. ⁶⁸ Finally, the European Communities argues, the Agreed Conclusions do not purport to be an exhaustive regulation of GSP schemes. Therefore, in the European Communities' view, the allowance under the Agreed Conclusions for differentiation in favour of least-developed countries does not mean that the Agreed Conclusions prohibit all other forms of differentiation between developing countries.

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B. Arguments of India – Appellee

1. <u>The Relationship Between Article I:1 of the GATT 1994 and the Enabling Clause</u>

- 35. India argues that the Panel correctly found that the Enabling Clause is an "exception" to Article I:1 of the GATT 1994 and requests the Appellate Body to uphold this finding. In addition, India submits that it made a claim against the Drug Arrangements under the Enabling Clause and that, therefore, the Appellate Body should examine the consistency of the Drug Arrangements under the Enabling Clause, even if it finds that the Enabling Clause is not an exception to Article I:1.
- 36. India contends that the Panel's test as to what is an "exception" is consistent with previous Appellate Body decisions. According to India, the Appellate Body drew an important distinction in *US Wool Shirts and Blouses* between "positive rules establishing obligations in themselves" and "exceptions" to those obligations. ⁶⁹ India states that an exception is an "affirmative defence" ⁷⁰ and, accordingly, panels examine the consistency of a challenged measure with an exception only if the Member complained against invokes the exception to justify its measure. This leaves the Member with the choice of which exceptions to invoke and prevents exceptions being turned into rules. In other words, in India's view, a Member needs to comply with a provision that is an exception only when the Member invokes that exception to justify an inconsistency with another provision.
- 37. Applying this reasoning to the present dispute, India characterizes paragraph 2(a) of the Enabling Clause as an "exception" to Article I:1, because it grants developed-country Members a "conditional right" to provide tariff preferences to developing-country Members under the conditions contained in paragraphs 2(a) and 3 of the Enabling Clause. India submits that these paragraphs impose conditions only on Members who invoke the Enabling Clause as a defence, whereas Article I:1 imposes obligations regardless of the defence invoked.
- 38. India argues, with reference to the *Vienna Convention*, that "subsequent practice" ⁷² supports its interpretation. First, India maintains that all waivers for preferential tariff treatment for products from developing countries have permitted derogations from Article I without mentioning the Enabling

⁶⁹India's appellee's submission, para. 36 (quoting Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, at 337).

⁷⁰*Ibid.*, para. 36.

⁷¹*Ibid.*, para. 39.

⁷²*Ibid.*, para. 42 (referring to *Vienna Convention*, Art. 31.3(b)).

WT/DS246/AB/R Page 18 the developing countries did not agree to relinquish their MFN rights as between themselves in agreeing to paragraph 2(a) of the Enabling Clause.

 50. India contends that paragraph

"individual" or "particular" needs of developing countries. India argues that this shows that the "needs" intended by the drafters under paragraph 3(c) are the needs of "developing countries as a whole". ¹⁰¹

- 53. India draws support for its reading of paragraph 2(a) from the object and purpose of the Enabling Clause. According to India, the purpose includes: facilitating "mutually acceptable arrangements" that were "unanimous[ly] agree[d]" 103 in UNCTAD; replacing "special preferences" 104 granted only to some developing countries with generalized preferences that do not differentiate between developing countries; and, promoting the trade of developing countries without raising barriers to or creating undue difficulties for the trade of other Members, as confirmed in paragraph 3(a). India points to several UNCTAD texts to confirm these purposes 105, arguing that the European Communities offers no such support for its contrary views. India regards differentiation between developing countries under a GSP scheme as inconsistent with paragraph 3(a) because it creates difficulties for the trade of other developing countries by "divert[ing] competitive opportunities" 106 from one country to another. In addition, India contends that linking GSP benefits to "the situation or policies" 107 of beneficiaries reduces the certainty and value of such benefits.
- 54. India contends that the European Communities' interpretation of paragraph 3(c) would mean that developed countries "would have *the obligation*" ¹⁰⁸ to differentiate between developing countries according to their individual needs. This would have the "absurd consequence" ¹⁰⁹ that a measure eliminating tariffs on products from *all* least-developed countries, without differentiating between those countries would be open to challenge under paragraph 3(c). Moreover, India argues that it would result not only in the European Communities' scheme, but in all GSP schemes being inconsistent with the Enabling Clause because they do not differentiate between developing countries based on their *individual* development needs. India also maintains that the European Communities' suggestion that its interpretation would best fulfil the objectives of paragraph 3(c) is inconsistent with

¹⁰¹India's appellee's submission, para. 124.

¹⁰²*Ibid.*, paras. 95 and 190.

¹⁰³*Ibid.*, para. 165.

¹⁰⁴*Ibid.*, paras. 147 and 190.

¹⁰⁵*Ibid.*, paras. 158-184 (referring to Agreed Conclusions; Resolution 21(II); Resolution 24(II) of the Second Session of UNCTAD; Charter of Algiers, paras. (a) and (d); and OECD Special Report, part II).

¹⁰⁶*Ibid.*, para. 192.

¹⁰⁷*Ibid.*, para. 21.

¹⁰⁸*Ibid.*, para. 14. (original italics)

¹⁰⁹*Ibid.*, para. 15.

the rule that treaty interpretation should be based on the text and not on policy considerations that are not reflected in the text.

- 55. For these reasons, India requests the Appellate Body to uphold the Panel's finding that the Drug Arrangements are not justified under the Enabling Clause.
 - C. Arguments of the Third Participants
 - 1. <u>Andean Community</u>
- 56. The governments of Bolivia, Colombia, Ecuador, Peru, and Venezuela (jointly, the "Andean

Community, under the Panel's allocation of the burden of proof, every GSP scheme would be open to challenge, with the burden falling on each preference-granting country to establish the consistency of its GSP scheme with the Enabling Clause. The Andean Community claims that the assigning of the burden of proof is "a fundamental initial decision upon which every further consideration is based", such that the Appellate Body "should reverse on this element alone". 115

- Sommunity submits, first, that the Panel did not properly interpret the historical texts serving as context and preparatory work for the Enabling Clause. The Andean Community emphasizes the "aspirational tone" 116 of these texts and argues that the Panel "mischaracterize[d]" 117 certain texts as binding or reflecting "unanimous agreement". Secondly, turning to the interpretation of the term "non-discriminatory" in the Enabling Clause, the Andean Community contends that the Panel wrongly equated this concept with MFN treatment. The Andean Community further alleges that the Panel's allowance for *a priori* limitations under he Enabling Clause is contrary to the Panel's own interpretation of "non-discriminatory".
- 60. In the view of the Andean Community, "a prohibition of discrimination is a command not to treat equal situations differently, or different situations equally" ¹¹⁹ and, accordingly, the word "non-discriminatory" in the Enabling Clause does not require that identical treatment be granted to all developing countries. The Andean Community suggests that differentiating between developing countries—taking into account their objectively different situations—does not constitute discrimination. The Andean Community argues that the "production and trafficking of illicit drugs have far-reaching, unparalleled and unquantifiable implications for the economic and social development" ¹²⁰ of affected developing countries. By providing preferential access for "alternative products" ¹²¹ and, thereby, seeking to reduce the importance of drugs as an economic activity, the European Communities responds to these countries' specific needs. The Andean Community asserts that this response is consistent with the requirements of the Enabling Clause.

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2. <u>Costa Rica</u>

- 61. Costa Rica submits that the Panel erred in finding that the Drug Arrangements are not justified under the Enabling Clause. Costa Rica asserts that the Panel based this finding on erroneous interpretations of the terms "non-discriminatory" and "developing countries" contained in footnote 3 and paragraph 2(a), respectively, of the Enabling Clause. Accordingly, Costa Rica supports the European Communities' request that the Appellate Body reverse this finding.
- 62. Costa Rica contends that, instead of relying on the ordinary meaning of these terms of the Enabling Clause in context, the Panel relied on other instruments that "cannot be properly considered context for the interpretation of the Enabling Clause". Costa Rica maintains that this led to the Panel's incorrect finding that "non-discriminatory" treatment under footnote 3 of the Enabling Clause is synonymous with identical or unconditional treatment. Costa Rica asserts that had the Panel interpreted the Enabling Clause in accordance with Article 31 of the *Vienna Convention*—in the light of the object and purpose of the Enabling Clause and the 1971 Waiver Decision—it would have found that "the 'non-discriminatory' standard prohibits developed countries from according tariff preferences that make an unjust or prejudicial distinction between different categories of developing countries." 123
- In addition, according to Costa Rica, the Panel erred in concluding that the term "developing countries" in paragraph 2(a) of the Enabling Class means *all* developing countries. In Costa Rica's view, in interpreting this term, the Panel relied on its incorrect interpretation of the term "non-discriminatory" and failed to examine paragraph 1 of the Enabling Clause as relevant context.

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4. Paraguay

- 68. Paraguay contends that the Panel was correct in finding that the Enabling Clause is an "exception" to Article I:1 of the GATT 1994. In addition, Paraguay agrees with the Panel's interpretation of paragraph 2(a) of the Enabling Clause and the Panel's consequent finding that the Drug Arrangements are not justified by the Enabling Clause. Accordingly, Paraguay supports India's request that the Appellate Body uphold these findings.
- 69. According to Paraguay, where a Member's measure differentiates between other Members in a manner inconsistent with Article I:1 and does not fall within any specific exceptions such as the P r29.2542Paraguay contends that th75 0.75 r.8103e Panel'sTD -0.149ma 0 a Enabling Clause or Article XX of the GATT 1994, the only way for that Member to impose its

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to all such countries. Therefore, Paraguay submits that tariff preferences pursuant to the Enabling Clause must apply to all developing countries.

5. <u>United States</u>

The United States contends that the Panel misconceived the relationship between the Enabling Clause and Article I:1 of the GATT 1994. The United States also submits that the Panel erred in concluding that the term "non-discriminatory" in footnote 3 of the Enabling Clause requires preference-granting countries to accord "identical" treatment to all beneficiaries and that, consequently, paragraph 2(a) covers only identical preferences extended to *all* developing countries. Accordingly, the United States supports the European Communities' request that the Appellate Body reverse the Panel's legal interpretation of the terms "non-discriminatory" in footnote 3 and "developing countries" in paragraph 2(a)

refers only to "developing countries" or "the developing countries", and not to "all developing countries".

III. Issues Raised in This Appeal

- 78. The following issues are raised in this appeal:
 - (a) Whether the Panel erred in concluding that the "special arrangements to combat 0.0495 dWT/D

objectives" that may be pursued by Members.¹⁶⁴ The Panel reasoned that, because a complaining party may not be able to discern the objectives of a given measure, particularly as they may not be apparent from the text of the measure itself, it is "sufficient" for a complaining party to demonstrate an inconsistency with Article I:1, without also establishing "violations" of any of the possible exception provisions.¹⁶⁵

82. With respect to the present dispute, the Panel found that India could make its case against the European Communities solely by establishing the inconsistency of the Drug Arrangements with Article I:1. Having done so, according to the Panel, it would then be incumbent upon the European Communities to invoke the Enabling Clause as a defence and to demonstrate the consistency of the Drug Arrangements with the requirements contained in that Clause. 167

Range 2. The Panel also examined whether Article I:1 applies to a measure covered by the Enabling Clause. It looked first to the ordinary meaning of the term "notwithstanding", as used in paragraph 1 of the Enabling Clause, and concluded on that basis that the Enabling Clause takes precedence over Article I "to the extent of conflict between the two provisions". Revertheless, the Panel declined to assume the exclusion of the applicability of a "basic GATT obligation" such as Article I:1 in the absence of a textual indication of Members' intent to that effect. Thus, it also referred to World Trade Organization ("WTO") jurisprudence relating to other exception provisions, and concluded that the relationship between these exceptions and the obligations from which derogation is permitted is "one where both categories of provisions apply concurrently to the same measure, but where, in the case of conflict between these two categories of provisions, [the exception] prevails ". Accordingly, the Panel concluded, on the basis of both the ordinary meaning of the text of the provision and WTO case law, that Article I:1 applies to measures covered by the Enabling Clause and that the Enabling Clause prevails over Article I:1 "to the extent of the conflict between [them]".

¹⁶⁴Panel Report, para. 7.40.

¹⁶⁵*Ibid*.

 $^{^{166}}Ibid.$

¹⁶⁷*Ibid.*, para. 7.42.

¹⁶⁸*Ibid.*, para. 7.44. Paragraph 1 of the Enabling Clause provides:

Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties. (footnote omitted)

¹⁶⁹Panel Report, para. 7.44.

¹⁷⁰*Ibid.*, para. 7.45.

¹⁷¹*Ibid*.

- 84. Finally, the Panel referred to the European Communities' reliance on the Appellate Body's decisions in *Brazil Aircraft* and *EC Hormones* and distinguished those cases from the present dispute. The Panel stated that the relationship between the provisions at issue in those cases was "different" from the relationship it had found between Article I:1 and the Enabling Clause. In particular, the Panel determined that, in the two earlier disputes, one provision "clearly exclude[d]" the application of the other. In contrast, the Panel had already found that the Enabling Clause does not exclude the applicability of Article I:1. In these circumstances, the Panel suggested that the Enabling Clause constitutes an "affirmative defence", in relation to which the responding party bears the burden of proof if that party invokes the Enabling Clause to justify its challenged measure.
- 85. On appeal, the European Communities challenges the Panel's finding that the Enabling Clause is an "exception" ¹⁷⁵ to Article I:1 of the GATT 1994 and that, therefore, the European Communities must invoke the Enabling Clause as an "affirmative defence" ¹⁷⁶ to India's claim that the Drug Arrangements are inconsistent with 25 -5.25 TD e3 0 TD -0.2175 Tc 1.between the provisions at issue

allegedly acknowledged by India before the Panel, India did not bring a claim under the Enabling Clause.¹⁸¹

86. India, by contrast, supports the Panel's understanding of the relationship between Article I:1 and the Enabling Clause. India argues that paragraph 2(a) of the Enabling Clause qualifies as an "exception" because the conditions therein must be complied with only by Members adopting a measure pursuant to the authorization granted by that provision. This differs from the most-favoured nation ("MFN") obligation in Article I:1. Moreover, according to India, we are not precluded t to 7Am192357.75 -

It is thus for the *complaining* party to raise a claim with respect to a particular obligation and to *prove* that the responding party is acting inconsistently with that obligation. It is for the *responding* party, if it so chooses, to raise a defence in response to an allegation of inconsistency and to *prove* that its challenged measure satisfies the conditions of that defence. Therefore, the question before us is whether India must raise a "claim" and prove that the Drug Arrangements are inconsistent with the Enabling Clause, or whether the European Communities must raise and prove, in "defence", that the Drug Arrangements are consistent with the Enabling Clause, in order to justify the alleged inconsistency of the Drug Arrangements with Article I:1.

88. We recall that the Appellate Body has addressed the allocation of the burden of proof in similar situations. In cases where one provision permits, in certain circumstances, behaviour that would otherwise be inconsistent with an obligation in another provision, and one of the two provisions refers to the other provision, the Appellate Body has found that the complaining party bears the burden of establishing that a challenged measure is inconsistent with the provision permitting particular behaviour *only* where one of the provisions suggests that the obligation is not applicable to the said measure.¹⁸⁹ Otherwise, the permissive provision has been characterized as an exception, or defence, and the onus of invoking it and proving the consistency of the measure with its requirements has been placed on the responding party.¹⁹⁰ However, this distinction may not always be evident or readily applicable.

C. Characterization of the Enabling Clause

1. Text of Article I:1 and the Enabling Clause

89. In considering whether the Enabling Clause is an exception to Article I:1 of the GATT 1994, we look, first, to the text of the provisions at issue. Article I:1, which embodies the MFN principle, provides:

¹⁸⁸We are not concerned here with the situation where a complaining party brings a challenge solely under the provisions of the Enabling Clause, that is, without also claiming an inconsistency with Article I of the GATT 1994.

¹⁸⁹See Appellate Body Report, *EC – Hormones*, para. 104; Appellate Body Report, *Brazil – Aircraft*, paras. 139-141; and Appellate Body Report, *EC – Sardines*, para. 275.

¹⁹⁰See Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 131-133; and Appellate Body Report, *US – Wool Shirts and Blouses*, p.16, DSR 1997:I, at 337.

Article I

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Clause permits Members to provide "differential and more favourable treatment" to developing countries "in spite of" the MFN obligation of Article I:1. Such treatment would otherwise be inconsistent with Article I:1 because that treatment is not extended to all Members of the WTO "immediately and unconditionally". Paragraph 1 thus excepts Members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause. As such, the Enabling Clause operates as an "exception" to Article I:1.

- 2. <u>Object and Purpose of the WTO Agreement and the Enabling Clause</u>
- 91. The European Communities' contention that the Enabling Clause is

... 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;

[and recognized] further that individual and joint action is essential to further the development of the economies of developing countries[.]¹⁹⁹

We understand, therefore, that the Enabling Clause is among the "positive efforts" called for in the Preamble to the *WTO Agreement* to be taken by developed-country Members to enhance the "economic development" of developing-country Members.²⁰⁰

93. According to the European Communities, the Enabling Clause, as the "most concrete, comprehensive and important application of the principle of Special and Differential Treatment", serves "to achieve one of the fundamental objectives of the WTO Agreement". In the view of the European Communities, provisions that are exceptions permit Members to adopt measures to pursue objectives that are "not ... among the WTO Agreement's own objectives" the Enabling Clause thus does not fall under the category of exceptions. Pointing to this alleged difference between the role of measures falling under the Enabling Clause and that of measures falling under exception provisions such as Article XX, the European Communities contends that the WTO Agreement does not "merely tolerate" measures under the Enabling Clause, but rather "encourages" developed-country Members to adopt such measures. According to the European Communities, to require preference-granting countries to invoke the Enabling Clause in order to justify or defend their GSP schemes cannot be reconciled with the intention of WTO Members to encourage these schemes.

94. We note, however, as did the Panel²⁰⁴, that WTO objectives may well be pursued through measures taken under provisions characterized as exceptions. The Preamble to the *WTO Agreement* identifies certain objectives that may be pursued by Members through measures that would have to be

¹⁹⁹First and second recitals. Similarly, Article XXXVI:1(d) of the GATT 1994 provides:

[[]I]ndividual and joint action is essential to further the development of the economies of less-developed contracting parties and to bring about a rapid advance in the standards of living in these countries[.]

 $^{^{200}}$ We discuss further the role of the Enabling Clause in the context of the covered agreements, *infra*, paras. 106-109.

²⁰¹European Communities' appellant's submission, para. 20.

²⁰²*Ibid.*, para. 52.

²⁰³*Ibid.*, para. 53.

²⁰⁴See Panel Report, para. 7.52.

justified under the "General Exceptions" of Article XX. For instance, one such objective is reflected in the recognition by Members that the expansion of trade must be accompanied by:

... the optimal use of the world's resources in accordance with the objective of sustainable development, [with Members] seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development[.]²⁰⁵

95. As the Appellate Body observed in US - Shrimp, WTO Members retained Article XX(g) from the General Agreement on Tariffs and Trade 1947 (the "GATT 1947") without alteration after the conclusion of the Uruguay Round, being "fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy". 206 Article XX(g) of the GATT 1994 permits Members, subject to certain conditions, to take measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption". It is well-established that Article XX(g) is an exception in relation to which the responding party bears the burden of proof.²⁰⁷ Thus, by authorizing in Article XX(g) measures for environmental conservation, an important objective referred to in the Preamble to the WTO Agreement, Members implicitly recognized that the implementation of such measures would not be discouraged simply because Article XX(g) constitutes a defence to otherwise WTO-inconsistent measures. Likewise, characterizing the Enabling Clause as an exception, in our view, does not undermine the importance of the Enabling Clause within the overall framework of the covered agreements and as a "positive effort" to enhance economic development of developingcountry Members. Nor does it "discourag[e]" 208 developed countries from adopting measures in favour of developing countries under the Enabling Clause.

96. The European Communities acknowledges that requiring Members to pursue environmental measures through Article XX(g), an exception provision, may be logical because "the WTO Agreement is not an environmental agreement and ... it contains no positive regulation of environmental matters." Because the WTO Agreement "regulate[s] positively the use of trade

²⁰⁵WTO Agreement, Preamble, first recital.

²⁰⁶Appellate Body Report, *US – Shrimp*, para. 129.

²⁰⁷*Ibid.*, para. 157; Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 15-16, DSR 1997:I, at 337 (referring to GATT Panel Report, *Canada – FIRA*, para. 5.20; GATT Panel Report, *US – Section 337*, para. 5.27; GATT Panel Report, *US – Malt Beverages*, paras. 5.43 and 5.52; and Panel Report, *US – Gasoline*, para. 6.20S12762 Tw (, Preamble, first recital.)2s to pularas.

measures"²¹⁰, however, and the Enabling Clause "promotes" the use of trade measures to further the development of developing countries, the European Communities argues that Members should not be required to prove the consistency of their measures with the Enabling Clause.

- 97. We do not consider it relevant, for the purposes of determining whether a provision is or is not in the nature of an exception, that the provision governs "trade measures" rather than measures of a primarily "non-trade" nature. Indeed, in a previous appeal, the Appellate Body found that the proviso to Article XVIII:11 of the GATT 1994—a provision authorizing quantitative restrictions when taken in response to balance-of-payments difficulties—is a defence to be invoked by the responding party.²¹¹ The fact that a provision regulates the use of "trade measures", therefore, does not compel a finding that it is for the complaining party to establish inconsistency with that provision, rather than for the defending party to rely on it as a defence.
- 98. In sum, in our view, the characterization of the Enabling Clause as an exception in no way diminishes the right of Members to provide or to receive "differential and more favourable treatment". The status and relative importance of a given provision does not depend on whether it is characterized, for the purpose of allocating the burden of proof, as a claim to be proven by the complaining party, or as a defence to be established by the responding party. Whatever its characterization, a provision of the covered agreements must be interpreted in accordance with the "customary rules of interpretation of public international law", as required by Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").²¹² Members' rights under the Enabling Clause are not curtailed by requiring preference-granting countries to establish in dispute settlement the consistency of their preferential measures with the conditions of the Enabling Clause. Nor does characterizing the Enabling Clause as an exception

(Appellate Body Report, para. 104)

²¹⁰European Communities' appellant's submission, para. 54.

²¹¹Appellate Body Report, *India – Quantitative Restrictions*, paras. 134-136. We also note that GATT panels determined Article XI:2(c) of the GATT 1947 to constitute an "exception", even though that provision addresses "trade measures", namely quantitative restrictions. (See GATT Panel Report, *Japan – Agricultural Products I*, para. 5.1.3.7; GATT Panel Report, *EEC – Dessert Apples*, para. 12.3; and GATT Panel Report, *Canada – Ice Cream and Yoghurt*, para. 59)

 $^{^{212}}$ In this regard, we recall the Appellate Body's statement in EC-Hormones that:

^{...} 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 the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.

detract from its critical role in encouraging the granting of special and differential treatment to developing-country Members of the WTO.

- 99. In the light of the above, we *uphold* the Panel's finding, in paragraph 7.53 of the Panel Report, that the Enabling Clause is an "exception" to Article I:1 of the GATT 1994.
- 100. We examine now the European Communities' appeal regarding the Panel's finding that the Enabling Clause "does not exclude the applicability" of Article I:1 of the GATT 1994. The European Communities argues that the Enabling Clause exists "side-by-side and on an equal level" with Article I:1, and thus applies to the exclusion of that provision. In our view, the European Communities misconstrues the relationship between the two provisions.
- 101. It is well settled that the MFN principle embodied in Article I:1 is a "cornerstone of the GATT" and "one of the pillars of the WTO trading system" ²¹⁵, which has consistently served as a key basis and impetus for concessions in trade negotiations. However, we recognize that Members are entitled to adopt measures provi

adequate market access for developing countries so as to stimulate their economic development.

Overcoming this required recognition by the multilateral trading system that certain obligations, applied to all Contracting Parties, could impede rather than facilitate the objective of ensuring that applie143

The problems which Pakistan is facing today, are similar. The *GSP drug regime* is therefore likely to stabilise its economic and social structures and thus consolidate the institutions that uphold the rule of law.²⁴⁵ (emphasis added)

- 117. It is therefore clear, on the face of the Regulation and from official, publicly-available explanatory documentation, that the Drug Arrangements challenged by India in this dispute are part of a preferential tariff scheme implemented by the European Communities pursuant to the authorization in paragraph 2(a) of the Enabling Clause. As such, India would have been well aware that the Drug Arrangements must comply with the requirements of the Enabling Clause, and that the European Communities was likely to invoke the Enabling Clause in response to a challenge of inconsistency with Article I:1. Indeed, India admitted as much before the Panel. India also must have believed that at least certain of those requirements were not being met and that, as a consequence, the inconsistency of the Drug Arrangements with Article I could not be justified. Accordingly, India, as the complaining party, should reasonably have articulated its claims of inconsistency with specific provisions of the Enabling Clause at the outset of this dispute as part of its responsibility to "engage in [dispute settlement] procedures in good faith in an effort to resolve the dispute". India also must have believed that a least certain of those requirements were not being met and that, as a consequence, the inconsistency of the Drug Arrangements with Article I could not be justified. Accordingly, India, as
- 118. In sum, although the burden of *justifying* the Drug Arrangements under the Enabling Clause falls on the European Communities, India was required to do more than simply allege inconsistency with Article I. India's claim of inconsistency with Article I with respect to the measure challenged here is inextricably linked with its argument that the Drug Arrangements do not satisfy the conditions

120. In its written submissions before the Panel, India clearly invoked paragraph 2(a) of the Enabling Clause as the basis for its allegation that the Drug Arrangements are not "justified" by the Enabling Clause.²⁵² For example, in its first written submission before the Panel, India stated:

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.²⁵³

121. India's second written submission before the Panel included a sub-heading entitled, "The EC has failed to demonstrate that under the Drug Arrangements it accords tariff treatment that is 'non-discriminatory' within the meaning of paragraph 2(a) of the Enabling Clause". Under this subheading, India argued:

[P]aragraph 2(a) of the Enabling Clause was meant to ensure that benefits under the GSP are extended to *all* developing countries, as opposed to some developing countries. Paragraph 2(a) of the Enabling Clause does not envisage selectivity. Instead, it requires that preferential tariff treatment is accorded to all developing countries.²⁵⁵ (original italics)

India further argued that, even if the European Communities' interpretation of paragraph 2(a) were correct, the Drug Arrangements would not be "non-discriminatory", as required by footnote 3 to paragraph 2(a).²⁵⁶

122. We find that India acted in good faith, in its written submissions before the Panel, explaining why, in its view, the Drug Arrangements fail to meet certain requirements of the Enabling Clause, namely, those present in paragraph 2(a). Such an explanation, in our view, was sufficient to place the European Communities on notice as to the reasons underlying India's allegation that the Drug Arrangements are not justified by the relevant provision of the Enabling Clause. With such notice,

²⁵²India's first written submission to the Panel, heading IV.C. and para. 67; India's second written submission to the Panel, heading III.B. and para. 164. By the time of its first written submission to the Panel, India had indicated to the European Communities and to the Panel that this dispute was limited to the WTO-consistency of the Drug Arrangements, but that India reserved its right to challenge the special incentives for the protection of labour rights and the environment in a future dispute settlement proceeding. (See *supra*, para. 4; and Panel Report, para. 1.5) Both participants confirmed, in response to questioning at the oral hearing, that the measure at issue in this dispute was limited to the Drug Arrangements.

²⁵³India's first written submission to the Panel, para. 62.

²⁵⁴India's second written submission to the Panel, heading III.B.3.

²⁵⁵*Ibid.*, para. 95.

²⁵⁶*Ibid.*, paras. 119-128.

the European Communities could be expected to defend its challenged measure under the Enabling Clause, in relation to which the European Communities ultimately bears the burden of justification.

- 123. In allocating the burden of proof, therefore, we conclude that India was required to raise the Enabling Clause in making its claim of inconsistency with Article I:1. Once India had identified, in its panel request and through argumentation in its written submissions, the relevant obligations of the Enabling Clause that it claims were not satisfied by the Drug Arrangements, the European Communities was then required to prove that the Drug Arrangements met those obligations, having chosen to rely on the Enabling Clause as a defence.
- 124. Finally, we observe that the European Communities' appeal of the Panel's conclusion that the Drug Arrangements are inconsistent with Article I:1 of the GATT 1994 is "based on" the European Communities' claim that the Panel erroneously found that (i) the Enabling Clause is an "exception" to Article I:1; (ii) the Enabling Clause "does not exclude the applicability" of Article I:1; and (iii) the European Communities had the burden of proving the consistency of the Drug Arrangements with that Clause. As we have not reversed any of these findings of the Panel Arrangements are inconsistent with Article I:1 of the GATT 1994.
- 125. For these reasons, we *modify* the Panel's finding, in paragraph 7.53 of the Panel Report, that "the European Communities bears the burden of invoking the Enabling Clause and justifying its Drug Arrangements under that provision." We *find* that it was incumbent upon India to *raise* the Enabling Clause in making its claim of inconsistency with Article I:1 of the GATT 1994, but that the

(Notification of an appeal by the European Communities, WT/DS246/7, 8 January 2004, p.1 (attached as Annex 1 to this Report))

 $^{^{257}}$ In its Notice of Appeal, the European Communities' reference to Article I:1 was limited to its decision to:

^{...} seek[] review of the Panel's legal conclusion that [the Drug Arrangements] are inconsistent with Article I:1 ... This conclusion is based on the following erroneous legal findings:

that the Enabling Clause is an "exception" to Article I:1 of the GATT;

that the Enabling Clause does not exclude the applicability of Article I:1 of the GATT;

⁻ that the EC had the burden of proving that the Drug Arrangements were consistent with the Enabling Clause.

²⁵⁸Supra, paras. 99, 103, and 123.

²⁵⁹Panel Report, paras. 7.60 and 8.1(b). The European Communities confirmed, in response to questioning at the oral hearing, that it is not appealing the Panel's conclusion, in paragraph 7.60 of the Panel Report, that the tariff advantages under the Drug Arrangements are inconsistent with Article I:1 because they are not accorded "unconditionally" to the like products originating in all

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130. We note, moreover, that the European Communities has *not* appealed the Panel's interpretation of paragraph 3(c) of the Enabling Clause.²⁷¹ Instead, the European Communities has invoked that provision solely as "contextual support" for its interpretation of "non-

WT/DS246/AB/R Page 56 in paragraph 2(d) of the Enabling Clause and for the implementation of a priori limitations, as set out in the Agreed Conclusions." ²⁸⁶

- 138. Turning to the "object and purpose" of the Enabling Clause, the Panel considered that "the objective of promoting the trade of developing countries and that of promoting trade liberalization generally" are relevant for the interpretation of the term "non-discriminatory". The Panel determined, however, that the latter "contributes more to guiding the interpretation of 'non-discriminatory', given its function of preventing abuse in providing GSP." 288
- 139. The Panel found further support for its interpretation in an examination of the "overall practice" of preference-granting countries ²⁸⁹, which, according to the Panel, "suggests that there was a common understanding of 'equal' treatment to all developing countries except for a priori measures, and that it was on this basis that the 1971 Waiver Decision was adopted." ²⁹⁰
- 140. Based on its analysis described above, the Panel found that:

... the term "non-discriminatory" in footnote 3 requires that *identical* tariff preferences under GSP schemes be provided to *all* developing countries without differentiation, except for the implementation of a priori limitations. ²⁹¹ (emphasis added)

141. Regarding the measure at issue in this dispute, the Panel found that:

... the European Communities' Drug Arrangements, as a GSP scheme, do not provide identical tariff preferences to *all* developing countries and that the differentiation is neither for the purpose of special treatment to the least-developed countries, nor in the context of the implementation of a priori measures. Such differentiation is inconsistent with paragraph 2(a), particularly the term "non-discriminatory" in footnote 3[.]²⁹² (original italics)

Consequently, the Panel also found that "the European Communities has failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause". 293

²⁸⁶Panel Report, para. 7.151.

²⁸⁷*Ibid.*, para. 7.158.

 $^{^{288}}Ibid.$

²⁸⁹*Ibid.*, para. 7.159.

 $^{^{290}}Ibid.$

²⁹¹*Ibid.*, para. 7.161.

²⁹²*Ibid.*, para. 7.177.

²⁹³*Ibid.*, para. 8.1(d).

- B. Interpretation of the Term "Non-Discriminatory" in Footnote 3 to Paragraph 2(a) of the Enabling Clause
- 142. We proceed to interpret the term "non-discriminatory" as it appears in footnote 3 to paragraph 2(a) of the Enabling Clause.
- 143. We recall first that the Enabling Clause has become a part of the GATT 1994.²⁹⁴ Paragraph 1 of the Enabling Clause authorizes WTO Members to provide "differential and more favourable treatment to developing countries, without according such treatment to other WTO Members". As explained above, such differential treatment is permitted "notwithstanding" the provisions of Article I of the GATT 1994. Paragraph 2(a) and footnote 3 thereto clarify that paragraph 1 applies to "[p]referential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences" [295], "[a]s described in the [1971 Waiver Decision], relating to the establishment of 'generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries'". [296]
- 144. The Preamble to the 1971 Waiver Decision in turn refers to "preferential tariff treatment" in the following terms:

Recalling that at the Second UNCTAD, unanimous agreement was

"conformity" ²⁹⁸, only preferential tariff treatment that is in conformity with the description "generalized, non-reciprocal and non-discriminatory" treatment can be justified under paragraph 2(a).

146. In the light of the above, we do not agree with European Communities' assertion ²⁹⁹ that the Panel's interpretation of the word "non-discriminatory" in footnote 3 of the Enabling Clause is erroneous because the phrase "generalized, non-reciprocal and non discriminatory" in footnote 3 merely refers to the description of the GSP in the 1971 Waiver Decision and, of itself, does not impose any legal obligation on preference-granting countries. Nor do we agree with the United States that the Panel erred in "assum[ing]" that the term "non-discriminatory" in footnote 3 imposes obligations on preference-granting countries, and that, instead, footnote 3 "is simply a cross-reference to where the Generalized System of Preferences is described." ³⁰⁰⁹⁵⁹Or1875:46(n) The 3Werfic Ostupportness TD -Countries and the support of the Countries of Preferences is described.

"relinquish[] their MFN rights [under Article I of the GATT 1994] as between themselves, thus permitting developed countries to discriminate between them." ³¹¹

- 151. We examine now the ordinary meaning of the term "non-discriminatory" in footnote 3 to paragraph 2(a) of the Enabling Clause. As we observed, footnote 3 requires that GSP schemes under the Enabling Clause be "generalized, non-reciprocal and non discriminatory". Before the Panel, the participants offered competing definitions of the word "discriminate". India suggested that this word means "'to make or constitute a difference in or between; distinguish' and 'to make a distinction in the treatment of different categories of peoples or things'." The European Communities, however, understood this word to mean "'to make a distinction in the treatment of different categories of people or things, esp. *unjustly* or *prejudicially* against people on grounds of race, colour, sex, social status, age, etc.'" ³¹³
- 152. Both definitions can be considered as reflecting ordinary meanings of the term "discriminate" and essentially exhaust the relevant ordinary meanings. The principal distinction between these definitions, as the Panel noted, is that India's conveys a "neutral meaning of making a distinction", whereas the European Communities' conveys a "negative meaning carrying the connotation of a distinction that is unjust or prejudicial." Accordingly, the ordinary meanings of "discriminate" point in conflicting directions with respect to the propriety of according differential treatment. Under India's reading, any differential treatment of GSP beneficiaries would be prohibited, because such treatment necessarily makes a distinction between beneficiaries. In contrast, under the European Communities' reading, differential treatment of GSP beneficiaries would not be prohibited per se. Rather, distinctions would be impermissible only where the basis for such distinctions was improper. Given these divergent meanings, we do not regard the term "non-discriminatory", on its own, as determinative of the permissibility of a preference-granting country according different tariff preferences to different beneficiaries of its GSP scheme.
- 153. Nevertheless, at this stage of our analysis, we are able to discern some of the content of the "non-discrimination" obligation based on the ordinary meanings of that term. Whether the drawing of

³¹¹India's appellee's submission, para. 104.

³¹²Panel Report, para. 7.126 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 689).

³¹³*Ibid.* (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 689). (italics added by the Panel)

distinctions is *per se* discriminatory, or whether it is discriminatory only if done on an improper basis, the ordinary meanings of "discriminate" converge in one important respect: they both suggest that distinguishing among similarly-situated beneficiaries is discriminatory. For example, India suggests that all beneficiaries of a particular Member's GSP scheme are similarly-situated, implicitly arguing that any differential treatment of such beneficiaries constitutes discrimination. The European Communities, however, appears to regard GSP beneficiaries as similarly-situated when they have "similar development needs". Although the European Communities acknowledges that differentiating between similarly-situated GSP beneficiaries would be inconsistent with footnote 3 of the Enabling :336.25 0 though 5 0 mf.0421 Tc 0. TD -0.1726 Tc 1.1101 Tw (differentiating 5 0

of the Enabling Clause impose specific conditions on the granting of different tariff preferences among GSP beneficiaries.

157. As further context for the term "non-discriminatory" in footnote 3, we turn next to paragraph 3(c) of the Enabling Clause, which specifies that "differential and more favourable treatment" provided under the Enabling Clause:

... shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

158. At the outset, we note that the use of the word "shall" in paragraph 3(c) suggests that paragraph 3(c) sets out an obligation for developed-country Members in providing preferential treatment under a GSP scheme to "respond positively" to the "needs of developing countries". Having said this, we turn to consider whether the "development, financial and trade needs of developing countries" to which preference-granting countries are required to respond when granting preferences must be understood to cover the "needs" of developing countries *collectively*.

159. The Panel found that "the only appropriate way [under paragraph 3(c) of the Enabling Clause] of responding to the differing development needs of developing countries is for preference-giving countries to ensure that their [GSP] schemes have sufficient breadth of product coverage and depth of tariff cuts to respond positively to those differing needs." In reaching this conclusion, the Panel appears to have placed a great deal of significance on the fact that paragraph 3(c) does not refer to needs of "*individual*" developing countries. The Panel thus understood that paragraph 3(c) does not permit the granting of preferential tariff treatment exclusively to a sub-category of developing countries on the basis of needs that are common to or shared by only those developing countries. We see no basis for such a conclusion in the text of paragraph 3(c). Paragraph 3(c) refers generally to "the development, financial and trade needs of developing countries". The absence of an explicit requirement in the text of paragraph 3(c) respond to the needs of "all" developing countries, or to

³²⁵We note that the European Communities agreed before the Panel that paragraph 3(c) of the Enabling Clause sets forth a "requirement". (European Communities' first written submission to the Panel, paras.71 and 149)

³²⁶Panel Report, para. 7.149. (See also, *ibid.*, paras. 7.95-7.97 and 7.105)

³²⁷*Ibid.*, para. 7.78.

³²⁸The United States refers to Article 3.2 of the DSU to support its argument that "panels are barred from reading legal obligations into the Enabling Clause that are not found in the text." (United States' third participanr?otÜeRA ly to those differing needs

the needs of "each and every" ³²⁹ developing country, suggests to us that, in fact, that provision imposes no such obligation. ³³⁰

160. Furthermore, as we understand it, the participants in this case agree that developing countries may have "development, financial and trade needs" that are subject to change and that certain development needs may be common to only a certain number of developing countries.³³¹ We see no reason to disagree. Indeed, paragraph 3(c) contemplates that "differential and more favourable treatment" accorded by developed to developing countries may need to be "modified" in order to "respond positively" to the needs of developing countries. Paragraph

widely-recognized "development, financial [or] trade need", can such action satisfy the requirements of paragraph 3(c).

- 165. Accordingly, we are of the view that, by requiring developed countries to "respond positively" to the "needs of developing countries", which are varied and not homogeneous, paragraph 3(c) indicates that a GSP scheme may be "non-discriminatory" even if "identical" tariff treatment is not accorded to "all" GSP beneficiaries. Moreover, paragraph 3(c) suggests that tariff preferences under GSP schemes may be "non-discriminatory" when the relevant tariff preferences are addressed to a particular "development, financial [or] trade need" and are made available to all beneficiaries that share that need.
- 166. India submits that developing countries should not be presumed to have waived their MFN rights under Article I:1 of the GATT 1994 *vis-à-vis* other developing countries ³³⁷, and we make no such presumption. In fact, we note that the Enabling Clause *specifically* allows developed countries to provide differential and more favourable treatment to developing countries "notwithstanding" the provisions of Article I. ³³⁸ With this in mind, and given that paragraph 3(c) of the Enabling Clause contemplates, in certain circumstances, differentiation among GSP beneficiaries, we cannot agree with India that the right to MFN treatment can be invoked by a GSP beneficiary *vis-à-vis* other GSP beneficiaries in the context of GSP schemes that meet the conditions set out in the Enabling Clause.
- 167. Finally, we note that, pursuant to paragraph 3(a) of the Enabling Clause, any "differential and more favourable treatment ... shall be designed to facilitate and promote the trade of developing countries and not to raise barTw . 1 6 2 3 4 2 Tthe En8518.75 TD 0 0 3 3 1 FN

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- 168. Having examined the context of paragraph 2(a), we turn next to examine the object and purpose of the *WTO Agreement*. We note first that paragraph 7 of the Enabling Clause provides that "[t]he concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the [GATT 1994] should promote the basic objectives of the [GATT 1994], including those embodied in the Preamble". As we have observed, the Preamble to the *WTO Agreement* 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". Similarly, the Preamble to the 1971 Waiver Decision provides 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". These objectives are also reflected in paragraph 3(c) of the Enabling Clause, which states that the treatment provided under the Enabling Clause "shall ... be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries".
- 169. Although enhanced market access will contribute to responding to the needs of developing countries *collectively 199Gj 2dcu.5 -78.75 T90 0 TD.countric4*

to guiding the interpretation of 'non-discriminatory' " ³⁴⁶ than does the objective of ensuring that developing countries "secure ... a share in the growth in international trade commensurate with their development needs." ³⁴⁷ We fail to see on what basis the Panel drew this conclusion.

171.

least-developed countries distinct from the preferences granted to other developing countries under paragraph 2(a). Thus, pursuant to paragraph 2(d), preference-granting countries need not establish that differentiating between developing and least-developed countries is "non-discriminatory". This demonstrates that paragraph 2(d) does have an effect that is different and independent from that of paragraph 2(a), even if the term "non-discriminatory" does not require the granting of "identical tariff preferences" to all GSP beneficiaries.

Having examined the text and context of footnote 3 to paragraph 2(a) of the Enabling Clause, and the object and purpose of the WTO Agreement and the Enabling Clause, we conclude that the term "non-discriminatory" in footnote 3 does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause Ingranting such differential tariff treatment

separate and distinct from those of paragraph 2(a). We have already concluded that, where a developed-country Member provides additional tariff preferences under its GSP scheme to respond positively to widely-recognized "development, financial and trade needs" of developing countries within the meaning of paragraph 3(c) of the Enabling Clause, this "positive response" would not, as such, fail to comply with the "non-discriminatory" requirement in footnote 3 of the Enabling Clause ³⁶³, even if such needs were not common or shared by all developing countries. We have also observed that paragraph 3(a) requires that any positive response of a preference-granting country to the varying needs of developing countries not impose unjustifiable burdens on other Members. With these considerations in mind, and recalling that the Panel made no finding in this case as to whether the Drug Arrangements are inconsistent with paragraphs 3(a) and 3(c) of the Enabling Clause ³⁶⁵, we limit our analysis here to paragraph 2(a) and do not examine *per se* whether the Drug Arrangements are consistent with the obligation contained in paragraph 3(c) to "respond positively to the development, financial and trade needs of developing countries" or with the obligation contained in paragraph 3(a) not to "raise barriers" or "create undue difficulties" for the trade of other Members.

180. We found above that the term "non-discriminatory" in footnote 3 to paragraph 2(a) of the Enabling Clause does not prohibit the granting of different tariffs to products originating in different sub-categories of GSP beneficiaries, but that identical tariff treatment must be available to all GSP beneficiaries with the "development, financial [or] trade need" to which the differential treatment is intended to respond. The need alleged to be addressed by the European Communities' differential tariff treatment is the problem of illicit drug production and trafficking in certain GSP beneficiaries. In the context of this case, therefore, the Drug Arrangements may be found consistent with the "non-discriminatory" requirement in footnote 3 only if the European Communities proves, at a minimum, that the preferences granted under the Drug Arrangements are available to all GSP beneficiaries that are similarly affected by the drug problem. We do not believe this to be the case.

³⁶³*Supra*, para. 165.

³⁶⁴*Supra*, para. 167.

³⁶⁵See *supra*, para. 134.

³⁶⁶Supra, para. 165.

³⁶⁷According to the European Communities, "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". (European Communities' appellant's submission, para. 186 (original italics))

181. By their very terms, the Drug Arrangements are limited to the 12 developing countries designated as beneficiaries in Annex I to the Regulation.³⁶⁸ Specifically, Article 10.1 of the Regulation states:

Common Customs Tariff *ad valorem* duties on [covered products] which originate in a country that according to Column I of Annex I benefits from [the Drug Arrangements] shall be entirely suspended.

182. Articles 10 and 25 of the Regulation, which relate specifically to the Drug Arrangements,

Such a "closed list" of beneficiaries cannot ensure that the preferences under the Drug Arrangements are available to all GSP beneficiaries suffering from illic it drug production and trafficking.

- 188. Secondly, the Regulation contains no criteria or standards to provide a basis for distinguishing beneficiaries under the Drug Arrangements from other GSP beneficiaries. Nor did the European Communities point to any such criteria or standards anywhere else, despite the Panel's request to do so. 384 As such, the European Communities cannot justify the Regulation under paragraph 2(a), because it does not provide a basis for establishing whether or not a developing country qualifies for preferences under the Drug Arrangements. Thus, although the European Communities claims that the Drug Arrangements are available to all developing countries that are "similarly affected by the drug problem" 385, because the Regulation does not define the criteria or standards that a developing country must meet to qualify for preferences under the Drug Arrangements, there is no basis to determine whether those criteria or standards are discriminatory or not.
- 189. For all these reasons, we find that the European Communities has failed to prove that the Drug Arrangements meet the requirement in footnote 3 that they be "non-discriminatory". Accordingly, we *uphold*, for different reasons, the Panel's conclusion, in paragraph 8.1(d) of the Panel Report, that the European Communities "failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause".

VI. Findings and Conclusions

- 190. For the reasons set out in this Report, the Appellate Body:
 - (a) <u>upholds</u> the Panel's finding, in paragraph 7.53 of the Panel Report, that the Enabling Clause is an "exception" to Article I:1 of the GATT 1994;
 - (b) <u>upholds</u> the Panel's finding, in paragraph 7.53 of the Panel Report, that the Enabling Clause "does not exclude the applicability" of Article 46.5 0 TD -0.21 foPanel's 4 Tc 0.35w () T1w32

Signed in the original at Geneva this 18th day of March 2004 by:							
-							
	Georges Abi-Saa						
	Presiding Member	er					
Luiz Olavo Bapti	sta	Giorgio Sacerdoti					
Member		Member					

ANNEX 1

WORLD TRADE ORGANIZATION

WT/DS246/7 8 January 2004

(04-0070)

Original: English

EUROPEAN COMMUNITIES – CONDITIONS FOR THE GRANTING OF TARIFF PREFERENCES TO DEVELOPING COUNTRIES

Notification of an Appeal by the European Communities under paragraph 4 of Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU")

The following notification, dated 8 January 2004, from the Permanent Delegation of the European Commission, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the European Communities hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the report of the panel established in response to the request from India in the dispute *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (WT/DS246R).

The European Communities seeks review of the Panel's legal conclusion that the Special Arrangements to Combat Drug Production and Trafficking provided in Council Regulation (EC) No. 2501/2001 (the "Drug Arrangements") are inconsistent with Article I:1 of the *General Agreement on Tariff and Trade 1994* (the "GATT"). This conclusion is based on the following erroneous legal findings:

- that the Enabling Clause is an "exception" to Article I:1 of the GATT;
- that the Enabling Clause does not exclude the applicability of Article I:1 of the GATT;
- that the EC had the burden of proving that the Drug Arrangements were consistent with the Enabling Clause.

The above legal conclusion, and the related legal findings and interpretations are set out in paragraphs 7.31 to 7.60 and 8.1 (b) and (c) of the Panel report.

India did not make any claims under the Enabling Clause and, therefore, the Appellate Body should refrain from examining the consistency of the Drug Arrangements with the Enabling Clause. However, if the Appellate Body were to uphold the Panel's conclusion that the Drug Arrangements are inconsistent with Article I:1 of the GATT, or if the Appellate Body were to decide that India made a valid claim under the Enabling Clause, the European Communities appeals subsidiarily the Panel's

legal conclusion that the European Communities? "failed top legal for the European Communities?" (as top legal find the European Communities) are justified under paragraph 2(a) of the Enabling Clause". That conclusion is based on the following erroneous legal findings:

- that "the term "non-discriminatory" in footnote 3 to Paragraph 2(a) requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori limitations"; and
- that the term "develop

- (c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.
- 4. 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:⁴
 - (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.
- 5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latters' development, financial and trade needs.
- 6. Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.
- 7. The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.
- 8. Particular a6 TDxercisr of their economies and improvement in \$\text{\$\text{\$\text{VC}(0e3/171d} a0ccondingly}\$48 Tc 2.4ly 8a45\text{\$\tex{