

**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 CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR2000:I, 515
<i>Brazil – Aircraft</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999, DSR1999:III, 1161
<i>Brazil – Desiccated Coconut</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997, DSR1997:I, 167
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR2000:VI, 2995
<i>Canada – FIRA</i>	GATT Panel Report, <i>Canada – Administration of the Foreign Investment Review Act</i> , L/5504, adopted 7 February 1984, BISD30S/140
<i>Canada – Ice Cream and Yoghurt</i>	GATT Panel Report, <i>Canada – Import Restrictions on Ice Cream and Yoghurt</i> , L/6568, adopted 5 December 1989, BISD36S/68
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures</i> , WT/DS207/AB/R, adopted 23 October 2002
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR1997:II, 591
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 16 February 1998, DSR1998:I, 135
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002
<i>EC – Tariff Preferences</i>	Panel Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , WT/DS246/R, circulated to Members 1 December 2003
<i>EEC – Dessert Apples</i>	GATT Panel Report, <i>European Economic Community – Restrictions on Imports of Dessert Apples – Complaint by Chile</i> , L/6491, adopted 22 June 1989, BISD36S/93
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR1998:IX, 3767
<i>India – Quantitative Restrictions</i>	Appellate Body Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/AB/R, adopted 22 September 1999, DSR1999:IV, 1763

TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
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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".⁶² 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 Act⁶³—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. The Relationship Between Article I:1 of the GATT 1994 and the Enabling Clause

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"⁷¹ 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)).

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