

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

**ARB-2004-1/17**

*Arbitration  
under Article 21.3(c) of the  
Understanding on Rules and Procedures  
Governing the Settlement of Disputes*

Award of the Arbitrator  
John Lockhart



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Short Title	Full Title and Citation of Arbitration
<i>Argentina – Hides and Leather</i>	Award of the Arbitrator, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS155/10, 31 August 2001, DSR 2001:XII, 6013
<i>Canada – Autos</i>	Award of the Arbitrator, <i>Canada – Certain Measures Affecting the Automotive Industry – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS139/12, WT/DS142/12, 4 October 2000, DSR 2000:X, 5079
<i>Canada – Patent Term</i>	Award of the Arbitrator, <i>Canada – Term of Patent Protection – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS170/10, 28 February 2001, DSR 2001:V, 2031
<i>Canada – Pharmaceutical Patents</i>	Award of the Arbitrator, <i>Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS114/13, 18 August 2000
<i>Chile – Alcoholic Beverages</i>	Award of the Arbitrator, <i>Chile – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS87/15, WT/DS110/14, 23 May 2000, DSR 2000:V, 2583
<i>Chile – Price Band System</i>	Award of the Arbitrator, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS207/13, 17 March 2003
<i>EC – Bananas III</i>	Award of the Arbitrator, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS27/15, 7 January 1998, DSR 1998:I, 3
<i>EC – Hormones</i>	Award of the Arbitrator, <i>EC Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, 1833
<i>Indonesia – Autos</i>	Award of the Arbitrator, <i>Indonesia – Certain Measures Affecting the Automobile Industry – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 7 December 1998, DSR 1998:IX, 4029
<i>Korea – Alcoholic Beverages</i>	Award of the Arbitrator, <i>Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, 937
<i>US – 1916 Act</i>	Award of the Arbitrator, <i>United States – Anti-Dumping Act of 1916 – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS136/11, WT/DS162/14, 28 February 2001, DSR 2001:V, 2017
<i>US – Offset Act (Byrd Amendment)</i>	Award of the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000 – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS217/14, WT/DS234/22, 13 June 2003
<i>US – Section 110(5) Copyright Act</i>	Award of the Arbitrator, <i>United States – Section 110(5) of the US Copyright Act – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS160/12, 15 January 2001, DSR 2001:II, 657

WORLD TRADE ORGANIZATION  
AWARD OF THE ARBITRATOR

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

Parties:

*European Communities*  
*India*

ARB-2004-1/17

Arbitrator:

John Lockhart

**I. Introduction**

1. On 20 April 2004, the Dispute Settlement Body (the "DSB") adopted the Appellate Body Report<sup>1</sup> and the Panel Report<sup>2</sup>, as modified by the Appellate Body Report, in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* ("EC – Tariff Preferences").<sup>3</sup> At the DSB meeting of 19 May 2004, the European Communities confirmed its intention to implement the recommendations and rulings of the DSB in this dispute and stated that it would require a "reasonable period of time" in which to do so, pursuant to Article 21.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").<sup>4</sup>

2. On 16 July 2004, India informed the DSB that consultations with the European Communities had not resulted in agreement on the reasonable period of time for implementation. India therefore requested that such period be determined by binding arbitration, in accordance with Article 21.3(c) of the DSU.<sup>5</sup>

3. The European Communities and India were unable to agree on an arbitrator within 10 days of the matter being referred to arbitration. Therefore, on 26 July 2004, India requested that the Director-General appoint an arbitrator pursuant to footnote 12 to Article 21.3(c) of the DSU. The Director-

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<sup>1</sup>Appellate Body Report, WT/DS246/AB/R.

<sup>2</sup>Panel Report, WT/DS246/R.

<sup>3</sup>WT/DS246/10.

<sup>4</sup>WT/DSB/M/169, para. 34.

<sup>5</sup>WT/DS246/12.

General appointed me as arbitrator on 4 August 2004, after consulting the parties.<sup>6</sup> I informed the parties of my acceptance of the appointment by letter dated 6 August 2004.

4. The European Communities and India have agreed that this award will be deemed to be an arbitration award under Article 21.3(c) of the DSU, notwithstanding the expiry of the 90-day period stipulated in Article 21.3(c).<sup>7</sup> The parties have also agreed, pursuant to Article 21.4 of the DSU, that "exceptional circumstances" in this dispute justify the determination of the reasonable period of time more than 18 months after the establishment of the Panel.<sup>8</sup>

5. The European Communities and India provided their written submissions to me on 18 August 2004. I requested additional information from the European Communities by letter dated 24 August 2004, and the European Communities provided a written response on 1 September 2004.<sup>9</sup> An oral hearing was held on 2 September 2004.

## **II. Arguments of the Parties**

### **A. *European Communities***

6. The European Communities requests that I determine the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in this dispute to be 20 months and 10 days from the date of adoption by the DSB of the Panel and Appellate Body Reports, which it calculates as being "until 1 January 2006".<sup>10</sup>

7. The European Communities describes the "general standard" for determining the reasonable period of time under Article 21.3(c) of the DSU as that set out in the Award of the Arbitrator in *EC – Hormones*. That is, the reasonable period of time "should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB".<sup>11</sup> The European Communities submits that subsequent arbitrators have confirmed that this standard does not

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<sup>6</sup>WT/DS246/13.

<sup>7</sup>The 90-day period following adoption of the Panel and Appellate Body Reports expired on 19 July 2004.

<sup>8</sup>The Panel was established on 27 January 2003. (WT/DS246/5)

<sup>9</sup>"Responses of the European Communities to the Advance Questions of the Arbitrator", 1 September 2004.

<sup>10</sup>European Communities' submission, paras. 2 and 43. In response to questioning at the oral hearing, the European Communities indicated that it calculates the reasonable period of time in the following manner: the period begins to run on 21 April 2004 (that is, the day after the adoption of the Panel and Appellate Body Reports); 20 months and 10 days later is 31 December 2005; the period ends at "zero hours" on 1 January 2006.

<sup>11</sup>*Ibid.*, para. 5, quoting Award of the Arbitrator, *EC – Hormones*, para. 26.

require the use of "an expeditious or extraordinary legislative procedure"<sup>12</sup> and that the particular circumstances of implementation need to be considered, including: the nature of the implementing measure as legislative and/or administrative; the legislative complexity of the implementing measure; the intricacy of the lawmaking process; and "whether the measure concerned is so fundamentally integrated into the domestic system that opposition to changes reflects a serious debate".<sup>13</sup> The European Communities maintains that each of these particular circumstances is relevant to this arbitration.

8. The European Communities contends that the "legislative task" of implementing the recommendations and rulings in this dispute is "very complex" because of "the intricacy of the Appellate Body findings".<sup>14</sup> According to the European Communities, implementation will require the following two steps, in turn:

- (a) First, modification of the special arrangements to combat drug production and trafficking (the Drug Arrangements") contained in the European Communities' existing Generalized System of Preferences ("GSP") scheme, which is embodied in Council Regulation (EC) No. 2501/2001 of 10 December 2001 ("Regulation 2501").<sup>15</sup> The European Communities submits that, as the current GSP scheme is due to expire on 31 December 2005<sup>16</sup>, it is "[m]ost logical" for the modification of the Drug Arrangements to coincide with the adoption of a new GSP scheme "in order to avoid any gap for granting the additional tariff preferences to affected beneficiary developing countries".<sup>17</sup> The European Communities highlights the "practical absurdity" of modifying the Drug Arrangements and then, shortly after, adopting a new GSP scheme.<sup>18</sup>

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<sup>12</sup>European Communities' submission, para. 6.

<sup>13</sup>*Ibid.*, para. 7, referring to Award of the Arbitrator, *Chile – Price Band System*, para. 48.

<sup>14</sup>*Ibid.*, para. 10.

<sup>15</sup>*Official Journal of the European Communities*, L Series, No. 346 (31 December 2001), p. 1. (Exhibit EC-1 submitted by the European Communities to the Arbitrator)

<sup>16</sup>Council Regulation (EC) No. 2211/2003 of 15 December 2003, *Official Journal of the European Union*, L Series, No. 332 (19 December 2003), p. 1. (Exhibit EC-2 submitted by the European Communities to the Arbitrator)

<sup>17</sup>"Responses of the European Communities to the Advance Questions of the Arbitrator", 1 September 2004, p. 5.

<sup>18</sup>European Communities' statement at the oral hearing.

- (b) Secondly, selection of the developing country beneficiaries under special or additional arrangements to address particular development needs within the new GSP scheme, taking into account the interests of the current beneficiaries of the Drug Arrangements in accordance with Article 21.2 of the DSU. The European Communities maintains that it can only comply with Article 21.2 and ensure "that all developing countries which have similar development needs continue to enjoy special tariff preferences" if the step of selecting beneficiaries is included in the calculation of the reasonable period of time.<sup>19</sup> The European Communities supports its argument by stating that "the Appellate Body explicitly acknowledged that developing countries with special needs might enjoy additional tariff preferences".<sup>20</sup>

9. According to the European Communities, the first step in implementation will involve the adoption by the Council of the European Union (the "Council") of a regulation to modify the Drug Arrangements and, concurrently, establish a new GSP scheme (the "Council Regulation").<sup>21</sup> This process will involve several steps, which the European Communities describes as follows:

- (a) Proposal by the Commission of the European Communities (the "Commission")

The Commission is a "political body" with "the exclusive right of legislative initiative".<sup>22</sup> The Commission began discussing the recommendations and rulings in the present dispute shortly after they were adopted, and it subsequently issued guidelines on this matter as part of a communication to the Council and other relevant institutions regarding the new GSP scheme to commence in 2006.<sup>23</sup> The next step is for the Commission services<sup>24</sup> to prepare a proposal for presentation to the Commissioners, taking into account the views expressed by "all relevant stakeholders"<sup>25</sup> on the initial communication to the Council. The cabinet of each

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<sup>19</sup>European Communities' submission, para. 14.

<sup>20</sup>*Ibid.*, para. 13.

<sup>21</sup>*Ibid.*, para. 12, as clarified by the European Communities at the oral hearing.

<sup>22</sup>*Ibid.*, para. 17.

<sup>23</sup>Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *Developing countries, international trade and sustainable development: the function of the Community's generalised system of preferences (GSP) for the ten-year period from 2006 to 2015*, COM(2004) 461 final, 7 July 2004, pp. 6, 9, and 10. (Exhibit EC-5 submitted by the European Communities to the Arbitrator)

<sup>24</sup>In response to questioning at the oral hearing, the European Communities explained that the Commission "services" are similar to ministries or agencies of the Commission.

<sup>25</sup>European Communities' statement at the oral hearing.



Commissioner<sup>26</sup> conducts a "political review"<sup>27</sup> of the proposal, and then the Commissioners adopt the proposal by majority vote. The proposal is then translated into the 20 official languages and transmitted to the Council. The European Communities estimates that the Commission could adopt a proposal regarding the Council Regulation in October 2004.

(b) Opinion of the European Parliament on the Commission's proposal

The European Parliament is the "co-legislator" of the European Communities, comprising "representatives of the peoples of Member States".<sup>28</sup> According to "established practice"<sup>29</sup> and in the light of a Framework Agreement between the European Parliament and the Commission<sup>30</sup>, the Council consults the European Parliament on "all trade matters unless they are confidential or of minimal political or economic importance".<sup>31</sup> The Council "normally"<sup>32</sup> delays consideration of a proposal by the Commission regarding such matters until the European Parliament has provided an opinion on the proposal. Previously, the European Parliament has given its opinion on "the most important ... regulations"<sup>33</sup> concerning the European Communities' GSP scheme.

The relevant committee of the European Parliament examines the proposal and hears from "representatives of the Commission or other relevant economic and political stakeholders".<sup>34</sup> The committee then adopts a report and submits it to the European Parliament, sometimes including suggested amendments to the proposal. The "full European Parliament Assembly"<sup>35</sup>, which usually meets monthly, votes on the committee's report. The report is then translated into the 20 official languages and transmitted to the Council as an opinion of the European Parliament. The European Communities estimates that the European Parliament could provide to the Council its opinion on the Commission's proposal regarding the Council Regulation in January 2005.

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<sup>26</sup>In response to questioning at the oral hearing, the European Communities explained that the cabinet of a Commissioner is similar to a "private office" of the Commissioner, comprising four to six individuals working under the Commissioner's authority.

<sup>27</sup>European Communities' submission, para. 17.

<sup>28</sup>*Ibid.*, para. 18.

<sup>29</sup>*Ibid.*, para. 20.

<sup>30</sup>*Official Journal of the European Communities*, C Series, No. 121 (24 April 2001), p. 122. (Exhibit EC-7 submitted by the European Communities to the Arbitrator)

<sup>31</sup>European Communities' submission, para. 20.

<sup>32</sup>*Ibid.*

<sup>33</sup>*Ibid.*, para. 22.

<sup>34</sup>*Ibid.*, para. 21.

<sup>35</sup>*Ibid.*

(c) Opinion of the Economic and Social Committee (the "ECOSOC") on the Commission's proposal

The ECOSOC is an "advisory body"<sup>36</sup> comprising "representatives of the various economic and social components of organised civil society".<sup>37</sup> In the light of a "Cooperation Protocol" agreed between the Commission and the ECOSOC<sup>38</sup>, the Council has always sought an opinion from the ECOSOC about proposals concerning the European Communities' GSP scheme. The European Communities estimates that the ECOSOC could provide to the Council its opinion on the Commission's proposal regarding the Council Regulation in January 2005.

(d) Adoption of the Council Regulation

The Council comprises representatives of the member States of the European Union at ministerial level, with votes weighted according to size.<sup>39</sup> Various Council working groups and the Committee of the Permanent Representatives of the Member States ("Coreper") prepare the Council's decision to adopt a regulation based on the Commission's proposal, taking into account any opinions provided by the European Parliament or the ECOSOC. The Council then votes to adopt the decision. The Council must adopt the decision unanimously if, on its own, it changes the proposal originally presented by the Commission.<sup>40</sup> This would rarely occur, however, because in practice the Council changes the proposal in consultation with the Commission. Thus, the Council would normally adopt the decision by qualified majority. As from 1 January 2005, a member State of the Council may request verification that the decision was taken by at least 62 per cent of the total population of the European Union. If not, the decision is not adopted.<sup>41</sup> The European Communities estimates that the

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<sup>36</sup>European Communities' submission, para. 23.

<sup>37</sup>Treaty Establishing the European Community, Art. 257, *Official Journal of the European Communities*, C Series, No. 325 (24 December 2002), p. 136. (Exhibit EC-10 submitted by the European Communities to the Arbitrator)

<sup>38</sup>European Communities' submission, para. 24, referring to Exhibit EC-11 submitted by the European Communities to the Arbitrator.

<sup>39</sup>*Ibid.*, para. 26, referring to the Treaty Establishing the European Community, Art. 205, *Official Journal of the European Communities*, C Series, No. 325 (24 December 2002), p. 118 (Exhibit EC-15 submitted by the European Communities to the Arbitrator), "in conjunction with" the Protocol on the Enlargement of the European Union, Art. 3, *Official Journal of the European Communities*, C Series, No. 325 (24 December 2002), p. 164. (Exhibit EC-17 submitted by the European Communities to the Arbitrator)

<sup>40</sup>Treaty Establishing the European Community, Art. 250(1), *Official Journal of the European Communities*, C Series, No. 325 (24 December 2002), p. 132. (Exhibit EC-16 submitted by the European Communities to the Arbitrator)

<sup>41</sup>Protocol on the Enlargement of the European Union, Art. 3, *Official Journal of the European Communities*, C Series, No. 325 (24 December 2002), pp. 164 and 165. (Exhibit EC-17 submitted by the European Communities to the Arbitrator)

Council Regulation could be adopted in May 2005 and that it would then enter into force after it is signed by the President of the Council and published in the *Official Journal of the European Union*.

10. According to the European Communities, the second step in implementation will involve the adoption by the Commission of a regulation identifying the beneficiaries of special or additional arrangements to address particular development needs under the new GSP scheme (the "Commission Regulation"). The Commission Regulation will implement the Council Regulation by providing instructions to customs authorities indicating which countries are to benefit from the special or additional arrangements under the new GSP scheme. The Commission Regulation will be adopted in accordance with a specific regulatory procedure<sup>42</sup>, which the European Communities describes as follows:

(a) Proposal by the Commission

The Commission submits a proposal for the Commission Regulation to a regulatory committee comprising member States' representatives. The European Communities estimates that the Commission could submit such a proposal in September 2005.

(b) Adoption of the Commission Regulation

If the regulatory committee votes in favour of the proposal, the Commission adopts by simple majority the Commission Regulation proposed. The European Communities estimates that the committee could complete deliberations on the proposal in October 2005 and that, if the committee approves, the Commission could adopt the Commission Regulation in November 2005.

If the regulatory committee votes against the proposal or does not provide an opinion, the Commission submits the proposal to the Council and informs the European Parliament. The Council may adopt a regulation based on the proposal by qualified majority within three months. If the Council neither adopts the proposal nor indicates its opposition to the proposal within this three-month period, the Commission adopts the proposed Commission Regulation. If the Commission submits the proposal to the Council, the European Communities estimates that the selection of beneficiaries will be delayed by approximately six or seven months.

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<sup>42</sup>Council Decision of 28 June 1999, Art. 5, *Official Journal of the European Communities*, L Series, No. 184 (17 July 1999), p. 25. (Exhibit EC-18 submitted by the European Communities to the Arbitrator)

(c) Publication of the Commission Regulation

The Commission Regulation is published in the *Official Journal of the European Union*. According to "established practice", regulations that must be implemented by the customs authorities, such as the Commission Regulation, "should normally" be published at least six weeks before they enter into force.<sup>43</sup>

(d) Entry into force of the Commission Regulation

Regulations to be implemented by the customs authorities, such as the Commission Regulation, enter into force on 1 January in any year, or "exceptionally" on 1 July.<sup>44</sup>

11. The European Communities points to several additional factors that it argues may delay the completion of the steps for implementation described above. First, the decision-making process "has become more cumbersome and time consuming since the enlargement of the European Union from 15 to 25 Member States on 1 May 2004".<sup>45</sup> Secondly, the European Communities indicates that the current Commission will present a legislative proposal "as soon as possible"<sup>46</sup>, but that a new Commission will take over from 1 November 2004. The new Commission will have to discuss the proposal with the European Parliament and the Council. Thirdly, the European Communities explains that a new European Parliament was elected in June 2004.

12. Finally, the European Communities states that "the Drug Arrangements are an integral and essential part of its development policy".<sup>47</sup> According to the European Communities, preferences of the kind provided under the Drug Arrangements were first granted to four countries in 1990 and have subsequently been extended to other countries. The European Communities submits that the Drug Arrangements reflect its consistent approach of supporting "alternative trade possibilities ... to break the vicious circle of drug [addiction] and development problems".<sup>48</sup> According to the European Communities, changes to the Drug Arrangements will be politically sensitive and subject to "very close scrutiny by the relevant stakeholders"<sup>49</sup>, particularly because of the implications for several developing countries. The European Communities suggests that this could increase the time taken to

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<sup>43</sup>European Communities' submission, para. 36, referring to Council Resolution of 27 June 1974, *Official Journal of the European Communities*, C Series, No. 79 (8 July 1974), p.1. (Exhibit EC-19 submitted by the European Communities to the Arbitrator)

<sup>44</sup>*Ibid.*

<sup>45</sup>*Ibid.*, para. 29.

<sup>46</sup>*Ibid.*, para. 30.

<sup>47</sup>*Ibid.*, para. 39. See also European Communities' submission, para. 41.

<sup>48</sup>European Communities' submission, para. 41.

<sup>49</sup>*Ibid.*, para. 42.

reach a solution because, for example, further discussions with the member States of the European Union and among various bodies of the European Communities will be required. The European Communities refers to the Award of the Arbitrator in *Chile – Price Band System*<sup>50</sup> to support its contention that I should take this circumstance into account in determining the reasonable period of time for implementation.

B. *India*

13. India requests that I determine the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in this dispute to be no more than six months and two weeks from the date of adoption by the DSB of the Panel and Appellate Body Reports, so that the period would expire no later than 3 November 2004.<sup>51</sup>

14. India submits that the implementation period in this dispute should be the shortest period possible within the legal system of the European Communities.<sup>52</sup> India argues that the European Communities has the burden of proving that immediate implementation is impracticable and that the period of time proposed by the European Communities is reasonable in view of the particular circumstances of this case; also, the European Communities must prove that the period proposed is the shortest period possible within the legal system of the European Communities. India argues that this burden is increased if the period proposed is longer than 15 months.

15. India recognizes that it is not the Arbitrator's task to determine the means by which the European Communities implements the relevant recommendations and rulings. Nevertheless, India submits that "the European Communities is not faced with the problem of choosing between various implementing measures".<sup>53</sup> Furthermore, India argues that the "intricacy of the Appellate Body's findings" is not relevant to the determination of the reasonable period of time.<sup>54</sup> India refers to Articles 3.7 and 21.1 of the DSU to demonstrate that the European Communities must comply promptly with the recommendations and rulings of the DSB, either by withdrawing the measure found to be inconsistent with the covered agreements, or by amending that measure to remove the inconsistency.

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<sup>50</sup>Award of the Arbitrator, *Chile – Price Band System*, para. 48.

<sup>51</sup>India's submission, para. 66.

<sup>52</sup>*Ibid.*, paras. 2 and 43-44, referring to Award of the Arbitrator, *EC – Hormones*, para. 26 and Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 44.

<sup>53</sup>*Ibid.*, para. 3.

<sup>54</sup>India's statement at the oral hearing.

16. India emphasizes that the measure that the European Communities must bring into conformity, in implementing the recommendations and rulings of the DSB in this dispute, is the measure that the Panel and Appellate Body found to be inconsistent with the European Communities' obligations under the covered agreements. India notes that the European Communities is working on a new GSP scheme for the years 2006 to 2015 and that the Commission has referred to the Appellate Body Report in *EC – Tariff Preferences* in relation to this new scheme.<sup>55</sup> However, India maintains that the present arbitration relates to only one component of the European Communities' GSP scheme, namely the Drug Arrangements. India argues that a "wholesale review"<sup>56</sup> of the European Communities' GSP scheme is not necessary to implement the relevant recommendations and rulings, and therefore it is not relevant to the determination of the reasonable period of time for implementation that the European Communities may wish to "work on the larger task of revising its general GSP Scheme".<sup>57</sup> India also contends that the availability of various options for implementation is not a "particular circumstance" relevant to the determination of the reasonable period of time for implementation.<sup>58</sup>

17. According to India, in order to implement the recommendations and rulings of the DSB, the European Communities needs to bring the Drug Arrangements into conformity with Article I:1 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). Thus, India states, the reasonable period of time does not encompass the time required for the European Communities to demonstrate that the Drug Arrangements are justified under the Enabling Clause or any other exception.

18. India refers to conclusions by previous arbitrators that the steps that the implementing Member takes towards implementation in the period between adoption of the relevant reports and an arbitration under Article 21.3(c) of the DSU are relevant in determining the reasonable period of time for implementation.<sup>59</sup> India argues that the European Communities has had "ample time to *initiate* and *complete* the preliminary phase of adopting implementing legislation".<sup>60</sup>

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<sup>55</sup>Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *Developing countries, international trade and sustainable development: the function of the Community's generalised system of preferences (GSP) for the ten-year period from 2006 to 2015*, 7 July 2004, p. 5. (Exhibit India-3 submitted by India to the Arbitrator)

<sup>56</sup>India's submission, para. 31.

<sup>57</sup>*Ibid.*, para. 32, referring to Award of the Arbitrator, *Argentina – Hides and Leather* and Award of the Arbitrator, *Canada – Autos*, para. 55. See also India's submission, para. 35.

<sup>58</sup>*Ibid.*, para. 34, referring to Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 59.

<sup>59</sup>India's submission, paras. 37 and 38, referring to Award of the Arbitrator, *Chile – Price Band System*, para. 43 and Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 46.

<sup>60</sup>*Ibid.*, para. 36. (original emphasis)

19. India states that, in order to implement the recommendations and rulings of the DSB, the European Communities will have to withdraw the Drug Arrangements or amend Regulation 2501 according to the procedure set out in Article 133 of the Treaty Establishing the European Community. According to India, the bodies involved in this procedure are the Commission and the Council, and "there is no requirement for other institutions of the European Communities to be consulted".<sup>61</sup> India also maintains that the European Communities is able to implement measures expeditiously because of the flexibility in its legislative system and the absence of "specified timeframes" for completion of each step.<sup>62</sup>

20. India describes the specific steps required for the European Communities to implement the recommendations and rulings of the DSB in this dispute as follows:

(a) Adoption of proposal by the Commission

India contends that the Commission is able to adopt a proposal as soon as it is drafted and to transmit the proposal to the Council on the day of adoption. India states that the European Communities indicated before the Panel that criteria for the selection of beneficiaries under the Drug Arrangements already existed, even though they were not published. Therefore, the Commission does not need time to develop such criteria. According to India, the Commission has indicated in a press statement that it will transmit its proposal regarding the European Communities' GSP scheme to the relevant institutions by October 2004.<sup>63</sup> India infers from this that the Commission has already drafted a proposal to implement the recommendations and rulings of the DSB. Moreover, India argues that the European Communities would require no more than one further month in which to refine and adopt a proposal and present it to the Council. This would make a total of five months from the date on which the DSB adopted the Panel and Appellate Body Reports in this dispute.

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<sup>61</sup>India's submission, para. 47.

<sup>62</sup>*Ibid.*, para. 48.

<sup>63</sup>*Ibid.*, para. 29, referring to "Developing countries: Commission unveils system of trade preferences for next ten years – simple, transparent and objective", IP/04/860, 7 July 2004, p. 2 (Exhibit India-4 submitted by India to the Arbitrator)

(b) Adoption of Commission's proposal as a Council regulation

India states that, in the Council, the Commission's proposal will be considered by Coreper, the committee established under Article 207 of the Treaty Establishing the European Community. India reiterates that the Council is "not legally obliged" to consult either the European Parliament or the ECOSOC and that, if it does choose to seek opinions from those institutions, these opinions are "not binding on the Council".<sup>64</sup> India also argues that the Council is able to consult the European Parliament and the ECOSOC at the same time as the Council is discussing the Commission's proposal and, therefore, no additional time is needed for such consultation. Following Coreper's discussion of the Commission's proposal, the relevant "measure"<sup>65</sup> is placed on the agenda of the next monthly Council meeting for adoption by qualified majority. After adoption, according to India, the President of the Council signs the measure and the measure is published in the *Official Journal of the European Communities*. India submits, with reference to the time taken to adopt previous Council regulations amending Regulation 2501, that the Council is able to consider a proposal by the Commission and to enact it within one month and two weeks, whether or not the Council consults the European Parliament and the ECOSOC.

21. India contests the European Communities' suggestion that the selection of beneficiaries should be considered in determining the reasonable period of time in this dispute. Rather, India maintains that only the "framework regulation"<sup>66</sup> of the Council, modifying or withdrawing the Drug Arrangements, is required to implement the recommendations and rulings of the DSB. Any subsequent selection of countries would simply be part of the implementation of the Council's framework regulation.

22. India rejects the European Communities' contention that translation delays and changes in the composition of the European Parliament and the Commission are relevant to the reasonable period of time for implementation. Moreover, according to India, arbitrators under Article 21.3(c) of the DSU have repeatedly held that mere contentiousness of implementation measures is not relevant to the determination of the reasonable period of time. India challenges the European Communities' reliance on the Award of the Arbitrator in *Chile – Price Band System*. India argues that *Chile – Price Band System* involved the removal of "trade advantages enjoyed by [the] broader domestic constituency" of

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<sup>64</sup>India's submission, para. 57.

<sup>65</sup>*Ibid.*, paras. 58 and 59.

<sup>66</sup>India's comments at the hearing on the "Responses of the European Communities to the Advance Questions of the Arbitrator", 1 September 2004.



the implementing Member, which gave rise to "domestic opposition" and "serious debate"<sup>67</sup>; the situation in the present dispute is quite different.

23. Finally, India argues that the Drug Arrangements "affect the interests of many developing country Members, including India".<sup>68</sup> Therefore, according to India, Article 21.2 of the DSU requires the European Communities to "accord the highest priority to bringing the Drug Arrangements ... into conformity with its obligations under the GATT 1994".<sup>69</sup> India indicates that the developing country Members whose interests are to be taken into account under Article 21.2, when read in context, are the parties to the dispute, and not third parties or any other Members. Moreover, even if Article 21.2 referred to all developing country Members, India maintains that the interests of India and all other developing country Members that are not beneficiaries of the Drug Arrangements would prevail to the extent that they conflict with the interests of the 12 beneficiaries.

### **III. Reasonable Period of Time**

#### *A. General Principles*

24. Article 21.3 of the DSU provides that an implementing Member shall have a "reasonable period of time" in which to comply with the recommendations and rulings of the DSB in a given dispute "[i]f it is impracticable to comply immediately". Pursuant to Articles 21.3(a) and 21.3(b), the reasonable period of time may be a period proposed by the implementing Member and approved by the DSB or, in the absence of such approval, a period of time mutually agreed by the parties to the dispute within a specified time period. In the present dispute, no approval was obtained under Article 21.3(a) and no agreement was reached under Article 21.3(b). Accordingly, pursuant to Article 21.3(c) of the DSU and the agreement of the parties, it is my task as Arbitrator to determine the "reasonable period of time" for the European Communities to implement the recommendations and rulings of the DSB in *EC – Tariff Preferences*.

25. In determining the reasonable period of time for implementation, I am guided by several provisions of the DSU, including Article 21 in particular. To begin with, Article 21.1 provides that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure

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<sup>67</sup>India's statement at the oral hearing.

<sup>68</sup>India's submission, para. 65.

<sup>69</sup>*Ibid.*

effective resolution of disputes to the benefit of all Members".<sup>70</sup> This is consistent with the expectation in Article 21.3, as mentioned above, that compliance will be immediate, unless this is impracticable. In addition, Article 21.3(c) provides a specific "guideline for the arbitrator", which is that the reasonable period of time "should not exceed 15 months from the date of adoption of a panel or Appellate Body report", although this period "may be shorter or longer, depending upon the particular circumstances".

26. Reading Article 21.3(c) together with Article 21.1, and referring for guidance to the Awards issued in previous arbitrations under Article 21.3(c), it is clear that the reasonable period of time should be "the shortest period possible within the legal system of the Member to implement the relevant recommendations and rulings of the DSB", in the light of the "particular circumstances" of the dispute.<sup>71</sup> Both parties to this arbitration concur with this general approach.<sup>72</sup>

27. India has argued that the implementing Member—in this case, the European Communities—bears the burden of demonstrating that the period it proposes is reasonable and that "the already great burden becomes even greater" if this period is more than 15 months.<sup>73</sup> In my view, the European Communities must demonstrate that the period it proposes is reasonable; but I do not find it necessary in this arbitration to determine whether the burden of proof becomes greater if the period proposed is more than 15 months. I have found the evidence and arguments presented by both the European Communities and India very helpful in determining whether, in the particular circumstances of this case, the period of time for implementation should be 15 months or a shorter or longer period.

28. Against this background, I now turn to a discussion of the measure to be brought into conformity.

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<sup>70</sup>See also Article 3.3 of the DSU, which provides:

The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

<sup>71</sup>Award of the Arbitrator, *Chile – Price Band System*, para. 34, citing Award of the Arbitrator, *US – 1916 Act*, para. 32. See also Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 42.

<sup>72</sup>European Communities' submission, paras. 5 and 6; India's submission, paras. 19 and 20.

<sup>73</sup>India's statement at the oral hearing.

B. *The Measure to be Brought into Conformity*

29. The parties agree<sup>74</sup> that the subject of the original dispute in *EC – Tariff Preferences*, and the specific measure that the Panel and Appellate Body found inconsistent with the GATT 1994<sup>75</sup>, was the Drug Arrangements.<sup>76</sup> Accordingly, in implementing the recommendations and rulings of the DSB in this dispute, the European Communities is required to bring the Drug Arrangements into conformity with its WTO obligations. Nevertheless, the European Communities argues that it would be "impracticable" to dissociate the Drug Arrangements from the European Communities' overall GSP scheme by modifying the Drug Arrangements alone, given that the current GSP scheme (including the Drug Arrangements) will be replaced by a new GSP scheme from 1 January 2006. Accordingly, the European Communities proposes to bring the Drug Arrangements into conformity as part of its reform of the GSP scheme as a whole.<sup>77</sup>

30. It is, of course, beyond the scope of my mandate to determine *how* the European Communities should implement the recommendations and rulings of the DSB. It is for the European Communities to choose the method of implementation, provided that the method chosen is consistent with the relevant recommendations and rulings and with the provisions of the covered agreements.<sup>78</sup> Within these limitations, the European Communities is thus entitled to bring the Drug Arrangements into conformity through whatever method it deems appropriate, be it at the same time and within the same instrument as its GSP scheme, or otherwise.

31. However, as the European Communities itself acknowledges, the relevant recommendations and rulings of the DSB require the European Communities to bring into conformity solely the Drug Arrangements, and not any other part of the European Communities' GSP scheme. Therefore, my determination as to the reasonable period of time for implementation in this arbitration must have regard only to the shortest period possible within the legal system of the European Communities to bring the Drug Arrangements into conformity with its WTO obligations. The mere fact that the European Communities has decided to incorporate the task of implementation within the larger

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<sup>74</sup>European Communities' submission, para. 10, as clarified at the oral hearing; India's submission, para. 31, as clarified at the oral hearing.

<sup>75</sup>Panel Report, *EC – Tariff Preferences*, paras. 3.1 and 8.1(f); Appellate Body Report, *EC – Tariff Preferences*, paras. 4 and 190(g).

<sup>76</sup>*Supra*, para. 8(a).

<sup>77</sup>European Communities' statement and response to questioning at the oral hearing.

<sup>78</sup>See, for example, Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 45; Award of the Arbitrator, *Chile – Price Band System*, para. 32; and Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 48. In addition, "[t]he choice and the timing of the detailed operating steps in enacting a new law are properly left to the Member concerned". (Award of the Arbitrator, *Chile – Alcoholic Beverages*, para. 42)

objective of reforming its overall GSP scheme cannot lead to a determination of a shorter, or longer, period of time. In other words, my task is not to determine the reasonable period of time for reforming the overall GSP scheme. Rather, my determination must be confined to the reasonable period of time for implementing the recommendations and rulings of the DSB with respect to the Drug Arrangements.

32. India has pointed out<sup>79</sup> that the Arbitrator in *Canada – Autos* declined to take into account the fact that "it might be more convenient for Canada to implement the DSB's recommendations in this case on the same timeline as it has planned for the reform of its customs administration regime".<sup>80</sup> I have reached a similar conclusion here with respect to the European Communities' argument as to the practicability of associating the modification of the Drug Arrangements with the replacement of the overall GSP scheme.

33. Turning to a different but related matter, India contends that the European Communities is simply required to bring the Drug Arrangements into conformity with "Article I:1 of the GATT".<sup>81</sup> I note that the Appellate Body in *EC – Tariff Preferences* recommended that the DSB request the European Communities to bring its inconsistent measure "into conformity with its obligations under the GATT 1994".<sup>82</sup> The Panel made a similar recommendation.<sup>83</sup> These recommendations are consistent with Article 19.1 of the DSU, which provides for panels and the Appellate Body to recommend that Members bring measures that are found "inconsistent with a covered agreement ... into conformity with that agreement". Similarly, Article 22.1 of the DSU refers to implementation of a recommendation to bring a measure "into conformity with the covered agreements". These provisions, and the recommendations and rulings of the DSB in this dispute, are contrary to India's argument that the European Communities is simply required to bring the Drug Arrangements into conformity with Article I:1 of the GATT 1994. Accordingly, in determining the reasonable period of time, I do not take this into account.

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<sup>79</sup>India's submission, para. 32.

<sup>80</sup>Award of the Arbitrator, *Canada – Autos*, para. 55.

<sup>81</sup>India's statement at the oral hearing.

<sup>82</sup>Appellate Body Report, *EC – Tariff Preferences*, para. 191.

<sup>83</sup>"The Panel recommends that the Dispute Settlement Body request the European Communities to bring its measure into conformity with its obligations under GATT 1994". (Panel Report, *EC – Tariff Preferences*, para. 8.2)

C. *Implementation Process*

34. I now address the specific process through which the European Communities states that it will comply with the recommendations and rulings of the DSB in this dispute, beginning with some general observations about that process.

1. Overall Process

35. The European Communities asks me to determine that the reasonable period of time for implementation lasts until 1 January 2006, which is the same day that the European Communities expects its new GSP scheme to enter into force.

36. As several previous arbitrators have noted<sup>84</sup>, flexibility in a Member's legislative system may enable the Member to effect a legislative amendment in a shorter period of time than might otherwise be possible. In the present case, India submits that the European Communities' legislative system "is characterised by considerable flexibility".<sup>85</sup> I agree, in the sense that no mandatory minimum time periods are imposed for any particular step in the implementation process as outlined by the European Communities. The European Communities has used this flexibility to modify Regulation 2501 (modifying or extending the GSP scheme) promptly in the past.<sup>86</sup> I take into account, as a relevant matter, the flexibility in the European Communities' legislative system; but it does not, of itself, determine the question of the reasonable period of time for implementation.

37. In this arbitration, the European Communities referred to the "intricacy" of the Appellate Body's findings in *EC – Tariff Preferences*, arguing that they lead to complexity in the "legislative task for implementation".<sup>87</sup> I would not describe the Appellate Body's findings as "intricate"; nor am I persuaded that they necessarily impose a complex implementation process or a complex

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<sup>84</sup>Award of the Arbitrator, *US – 1916 Act*, para. 39; Award of the Arbitrator, *Canada – Patent Term*, paras. 63 and 64.

<sup>85</sup>India's submission, para. 48.

<sup>86</sup>See, for example, Council Regulation (EC) No. 2211/2003 of 15 December 2003, *Official Journal of the European Union*, L Series, No. 332 (19 December 2003), p. 1. (Exhibit EC-2 submitted by the European Communities to the Arbitrator) This regulation extended the GSP scheme to 31 December 2005 and amended, among other things, the special incentive arrangements for the protection of labour rights. India relies on this regulation in arguing that the Council is able to adopt a proposal by the Commission within one month and two weeks. (India's submission, paras. 60 and 61) According to the European Communities, the Commission adopted the proposal leading to this regulation on 29 October 2003; the European Parliament completed its opinion on the Commission's proposal on 4 December 2003; the ECOSOC completed its opinion on the Commission's proposal on 10 December 2003; the Council adopted the regulation based on the Commission's proposal on 15 December 2003. ("Responses of the European Communities to the Advance Questions of the Arbitrator", 1 September 2004, para. 7)

<sup>87</sup>European Communities' submission, para. 10.

implementing measure. Therefore, I do not consider it necessary to take into account what the European Communities describes as the "intricacy" of the findings of the Appellate Body in this case.

## 2. Individual Steps in Implementation

### (a) Adoption of a Regulation by the Council

38. The parties agree that the Council needs to adopt a regulation in order to modify the Drug Arrangements, and that this regulation would be based on a proposal to be adopted by the Commission.<sup>88</sup> However, subject to certain reservations, the European Communities estimates that the necessary Council regulation could be adopted in May 2005<sup>89</sup>, whereas India maintains that it could be adopted by 3 November 2004.<sup>90</sup>

39. An initial reason for this discrepancy in the parties' submissions relates to the date on which the Commission is expected to adopt a proposal. The European Communities estimates that the Commission could do so in October 2004<sup>91</sup>, which corresponds with the estimate contained in a "press statement" by the Commission that India provides as an exhibit in this arbitration.<sup>92</sup> However, based on this press statement, India states that it would be "reasonable to assume that the Commission has already drafted a proposal to amend or repeal" Regulation 2501, and thus little additional time is required to adopt it. In any case, according to India, the Commission would need no more than 5 months from the adoption of the Panel and Appellate Body Reports on 20 April 2004 to present a proposal to the Council<sup>93</sup> (that is, according to my calculation, until 20 September 2004).

40. In assessing this early stage of the implementation process, I take note, first, of the steps that the European Communities has already taken since the adoption of the Panel and Appellate Body Reports in *EC – Tariff Preferences*. The European Communities confirmed, in response to questioning at the oral hearing, that the Commission began discussions regarding implementation in early May 2004 and that the Commission decided in the course of those discussions to "embed" the

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<sup>88</sup>European Communities' submission, paras. 12 and 17; India's submission, paras. 49 and 60. The parties differ as to whether a regulation by the Council is the only instrument required for implementation, as described further below in paras. 44 and 45.

<sup>89</sup>"Responses of the European Communities to the Advance Questions of the Arbitrator", 1 September 2004, p. 3.

<sup>90</sup>India's submission, paras. 54, 60, and 66.

<sup>91</sup>"Responses of the European Communities to the Advance Questions of the Arbitrator", 1 September 2004, p. 3.

<sup>92</sup>India's submission, para. 29; "Developing countries: Commission unveils system of trade preferences for next ten years – simple, transparent and objective", IP/04/860, 7 July 2004, p. 2. (Exhibit India-4 submitted by India to the Arbitrator)

<sup>93</sup>*Ibid.*, paras. 53 and 54.

implementation process into the process of establishing a new GSP scheme from 1 January 2006. In addition, the European Communities and India have both presented to me a communication from the Commission to the Council (and other institutions), outlining the new GSP scheme, including modifications to the Drug Arrangements.<sup>94</sup> This communication, which the European Communities describes as containing "guidelines" for discussion by relevant institutions in advance of the adoption by the Commission of a formal legislative proposal<sup>95</sup>, is dated 7 July 2004. I am prepared to accept, in all the circumstances, that the Commission could reasonably be expected to adopt a proposal to modify the Drug Arrangements in October 2004.

41. Another reason for the discrepancy in the parties' submissions is their assessment of the necessity for participation of the European Parliament and the ECOSOC in the process leading to adoption of the Council regulation. First, India submits that the Council is not legally bound by Article 133 of the Treaty Establishing the European Community<sup>96</sup> to seek an opinion from the European Parliament and the ECOSOC, and India therefore excludes this step from the implementation process.<sup>97</sup> In contrast, the European Communities contends that, although this is not an express requirement in Article 133, it is an "established practice" and effectively a requirement within the European Communities' system and should therefore be included in the implementation process.<sup>98</sup> Secondly, India submits that, even if the Council were to seek an opinion from the European Parliament and the ECOSOC, these institutions and the Council could examine the Commission's proposal at the same time, rather than sequentially.<sup>99</sup> The European Communities responds that, even if the three institutions examine the proposal at the same time, the Council will nevertheless require additional time subsequent to this examination to discuss the proposal further, because it needs to make a decision on the proposal in the light of opinions provided by the European Parliament and the ECOSOC.<sup>100</sup> Accordingly, the European Communities estimates that the European Parliament and the ECOSOC could provide their opinions in January 2005 and the Council

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<sup>94</sup>Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *Developing countries, international trade and sustainable development: the function of the Community's generalised system of preferences (GSP) for the ten-year period from 2006 to 2015*, COM(2004) 461 final, 7 July 2004. (Exhibit EC-5 submitted by the European Communities to the Arbitrator; see also Exhibit India-3 submitted by India to the Arbitrator)

<sup>95</sup>European Communities' response to questioning at the oral hearing.

<sup>96</sup>*Official Journal of the European Communities*, C Series, No. 325 (24 December 2002), pp. 90 and 91.

<sup>97</sup>India's submission, paras. 47 and 57.

<sup>98</sup>European Communities' submission, paras. 18-20 and 24, as clarified at the oral hearing. The European Communities also refers to certain agreements between the Commission and the European Parliament, and the Commission and the ECOSOC. (Exhibits EC-7 and EC-11 submitted by the European Communities to the Arbitrator)

<sup>99</sup>India's submission, para. 57.

<sup>100</sup>European Communities' response to questioning at the oral hearing.

could adopt a regulation based on the Commission's proposal, taking into account those opinions, in May 2005.<sup>101</sup>

42. It is not unusual for domestic or other legal systems to follow procedural conventions that are not explicitly mandated by legal instruments. Moreover, I find relevant that the Council has sought an opinion from the European Parliament and the ECOSOC before adopting the great majority of regulations related to the European Communities' GSP scheme over the years.<sup>102</sup> The European Communities has also suggested that the consequences of failing to seek such opinions in the present implementation process would be a matter to be determined by the Court of Justice of the European Communities. It appears, therefore, that adoption of the regulation in question without seeking opinions from the European Parliament and the ECOSOC would be an "extraordinary" procedure. I agree with previous arbitrators that implementing Members are not required to adopt "extraordinary legislative procedures" in every case.<sup>103</sup> In my view, seeking the opinions of the European Parliament and the ECOSOC should be included in determining the reasonable period of time for implementation.

43. On the question of the time required for taking this step, I also accept the European Communities' assertion that the Council needs time to consider the opinions of the European Parliament and the ECOSOC before it makes its own decision on the Commission's proposal. If no such time were provided for this, it would defeat the purpose of seeking the opinions. However, I agree with India that the Council could begin its examination of the Commission's proposal before it receives the opinions of the European Parliament and the ECOSOC. The European Communities does not appear to dispute this, and it indicates that these institutions have sometimes conducted their examinations "in parallel" in the past.<sup>104</sup> With this in mind, the European Communities has not demonstrated why the Council would need to examine the proposal from October 2004 until January 2005 and then, after receiving the opinions of the European Parliament and the ECOSOC, to continue its examination until May 2005. In my view, based on the evidence before me, the Council could reasonably be expected to make a decision on the Commission's proposal by adopting a regulation, taking into account the opinions of the European Parliament and the ECOSOC, before May 2005.<sup>105</sup>

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<sup>101</sup>"Responses of the European Communities to the Advance Questions of the Arbitrator", 1 September 2004, p. 3.

<sup>102</sup>European Communities' submission, paras. 22 and 25, as clarified at the oral hearing.

<sup>103</sup>See, for example, Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 32 and Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 74.

<sup>104</sup>European Communities' response to questioning at the oral hearing.

<sup>105</sup>See *supra*, para. 36.



(b) Adoption of a Regulation by the Commission

44. According to the European Communities, the regulation adopted by the Council will establish a new GSP scheme, including criteria to govern the selection of beneficiaries of special or additional arrangements to address particular development needs within that scheme. The European Communities submits that, after the Council establishes these criteria, a further important step must occur, namely, the Commission will need to select the beneficiaries under those additional arrangements and then adopt another regulation identifying these beneficiaries. The European Communities describes this regulation of the Commission as an administrative act that will implement the regulation of the Council, by providing specific instructions to customs authorities.<sup>106</sup> The European Communities estimates that, assuming the Council adopts the overarching regulation in May 2005, the Commission will be able to adopt an implementing regulation in November 2005.<sup>107</sup>

45. India submits that the European Communities can and should implement the recommendations and rulings in this dispute purely through the adoption of a regulation by the Council, without the need for an additional regulation by the Commission identifying the relevant beneficiaries. India states that the selection of beneficiaries is not necessary to implement the recommendations and rulings.<sup>108</sup>

46. As I understand the European Communities' argument<sup>109</sup>, as elaborated at the oral hearing, after the Council adopts a regulation in May 2005, the Commission will need time to assess which developing countries meet the new criteria established by the Council. The European Communities has not explained which countries it will examine or how it will identify those countries. However, it seems clear from the European Communities' submissions that the current 12 beneficiaries of the Drug Arrangements will be among the countries examined. Indeed, it appears that the European Communities is keen to ensure that any current beneficiary of the Drug Arrangements that remains eligible for benefits under special or additional arrangements within the new GSP scheme suffers no interruption of tariff preferences? that is, such a country would continue to receive benefits under the Drug Arrangements until 31 December 2005, and then it would receive benefits under the new GSP scheme from 1 January 2006.

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<sup>106</sup>European Communities' submission, para. 13, as clarified at the oral hearing.

<sup>107</sup>"Responses of the European Communities to the Advance Questions of the Arbitrator", 1 September 2004, p. 3.

<sup>108</sup>India's comments at the hearing on the "Responses of the European Communities to the Advance Questions of the Arbitrator", 1 September 2004.

<sup>109</sup>*Supra*, para. 10.

47. Although the European Communities indicated at the oral hearing that it does not have the objective of ensuring that all 12 current beneficiaries of the Drug Arrangements continue to benefit from special or additional arrangements under the new GSP scheme, India argues that the European Communities has a certain "preoccupation"<sup>110</sup> with those 12 beneficiaries. I note that the European Communities contends, in connection with Article 21.2 of the DSU<sup>111</sup>, that "[a]s all current beneficiary countries of the Drug Arrangements are developing countries the EC implementing measure must pay particular attention to their situation".<sup>112</sup> The European Communities also states that the modification of the Drug Arrangements should coincide with the adoption of the new GSP scheme "in order to avoid any *gap* for granting the additional tariff preferences to affected beneficiary developing countries".<sup>113</sup> The European Communities submits that India's proposal of modifying the Drug Arrangements before the new GSP scheme comes into force could mean, "[i]n the worst of all scenarios, ... that additional preferences would be *interrupted* for beneficiary developing countries for a certain time".<sup>114</sup> Finally, the European Communities suggested at the oral hearing that, in determining how to implement the recommendations and rulings in this dispute, the European Communities "should ensure there is no *interruption* for legitimately granted additional preferences".<sup>115</sup>

48. As I have said, it is for the European Communities to decide how it should implement the recommendations and rulings of the DSB, subject to certain restrictions.<sup>116</sup> However, as I have also stated, my task is not to determine the reasonable period of time for reforming the overall GSP scheme; rather, it is to determine the reasonable period of time for implementing the recommendations and rulings of the DSB with respect to the Drug Arrangements.<sup>117</sup>

49. I am not satisfied that the period of time for implementation should be determined having regard to the desirability of ensuring that certain Members, to the exclusion of others, can continue to benefit from tariff preferences that have been found to be inconsistent with the covered agreements. As the European Communities itself points out, many more developing countries exist than the

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<sup>110</sup>India's response to questioning at the oral hearing.

<sup>111</sup>The implications of this provision are discussed further *infra*, paras. 57-59.

<sup>112</sup>European Communities' submission, para. 14.

<sup>113</sup>"Responses of the European Communities to the Advance Questions of the Arbitrator", 1 September 2004, p. 5. (emphasis added)

<sup>114</sup>European Communities' statement at the oral hearing. (emphasis added)

<sup>115</sup>European Communities' response to questioning at the oral hearing. (emphasis added)

<sup>116</sup>*Supra*, para. 30.

<sup>117</sup>*Supra*, para. 31.

current 12 beneficiaries of the Drug Arrangements.<sup>118</sup> If I were to include within the period required for implementation the process of assessing all of those countries against the new criteria to be established by the Council, this could potentially add many months, indeed several more years, to the reasonable period of time. The process of assessing countries could even extend indefinitely, if the European Communities implemented a mechanism whereby developing countries could apply on an *ad hoc* basis to become a beneficiary under the special or additional arrangements.<sup>119</sup>

50. According to the European Communities, the final step in the implementation process involves the publication of the regulation adopted by the Commission and its entry into force. The European Communities submits that, pursuant to "established practice under the [European Communities'] internal legislative procedure" as reflected in a Council Resolution of 1974, the regulation should enter into force on 1 January or "exceptionally" on 1 July, and publication should normally take place at least six weeks before entry into force.<sup>120</sup> Although the European Communities makes this submission in the context of the proposed regulation to be adopted by the Commission identifying certain beneficiaries under a new GSP scheme<sup>121</sup>, I understand that the requirements of advance publication and entry into force on 1 January or 1 July apply more generally, to "measures which must be implemented by the customs authorities", including "tariff changes".<sup>122</sup> In other words, these requirements would apply to any tariff changes necessary to bring the Drug Arrangements into conformity with the GATT 1994, whether these changes are made effective solely through a regulation adopted by the Council, or through a regulation adopted by the Council followed by a regulation adopted by the Commission.

51. I note that the Arbitrator in *Korea – Alcoholic Beverages* determined that it was reasonable to include in the reasonable period of time the "thirty-day grace period for enforcement of certain ... instruments" provided in a Korean statute.<sup>123</sup> The Arbitrator in *EC – Bananas III* also appears to have taken into account the European Communities' statement that "any change in legislation which directly affects the customs treatment of products in connection with importation or exportation,

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<sup>118</sup>European Communities' response to questioning at the oral hearing.

<sup>119</sup>Such a mechanism appears to exist in connection with tariff preferences provided under the "special incentive arrangements for the protection of labour rights" and the "special incentive arrangements for the protection of the environment" within the current GSP scheme. See Appellate Body Report, *EC – Tariff Preferences*, para. 182.

<sup>120</sup>European Communities' submission, para. 36, referring to Council Resolution of 27 June 1974, *Official Journal of the European Communities*, C Series, No. 79 (8 July 1974), p.1. (Exhibit EC-19 submitted by the European Communities to the Arbitrator)

<sup>121</sup>European Communities' response to questioning at the oral hearing.

<sup>122</sup>European Communities' submission, paras. 36 and 37.

<sup>123</sup>Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 47.

enters into force either on 1 January or 1 July of the relevant year"<sup>124</sup> in determining the reasonable period of time in that dispute.<sup>125</sup> In the present case, I regard the administrative practice of the European Communities, as it pertains to advance publication of tariff changes and the date on which such changes take effect, as a relevant factor in determining the reasonable period of time for implementation.

### 3. Institutional Changes

52. The European Communities argues that the reasonable period of time for implementation in this dispute should be extended because of changes occurring in certain institutions of the European Communities that play a role in the implementation process. Specifically, the European Communities states that the European Union itself grew from 15 to 25 member States on 1 May 2004, a new European Parliament was elected in June 2004, and a new Commission will take charge from 1 November 2004.<sup>126</sup>

53. To start with the European enlargement, the European Communities argues that considerable time will be needed to translate into the 20 official languages certain instruments connected with implementation.<sup>127</sup> I agree that this circumstance is likely to increase the period of time reasonably required to complete certain steps in the implementation process. Therefore, I have taken this into account in my determination. I also agree with the European Communities that, if a member State of the European Union requested verification that the Council adopted the implementing regulation by a qualified majority representing at least 62% of the population of the European Union, this could add to the time required for implementation.<sup>128</sup>

54. I turn to the election of a new European Parliament in June 2004 and the commencement of a new Commission on 1 November 2004. According to the European Communities' estimates, the Commission will complete its proposal on a Council regulation modifying the Drug Arrangements, and that proposal will be transmitted to the European Parliament, in October 2004.<sup>129</sup> The fact that a new Commission takes charge on 1 November 2004 would not appear to increase the time required to

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<sup>124</sup>Award of the Arbitrator, *EC – Bananas III*, para. 9.

<sup>125</sup>*Ibid.*, para. 19. The Arbitrator concluded, in paragraph 20, that the reasonable period of time should be "from 25 September 1997 to 1 January 1999".

<sup>126</sup>European Communities' submission, paras. 29 and 30.

<sup>127</sup>*Ibid.*, paras. 17 and 29.

<sup>128</sup>*Ibid.*, para. 27, referring to the Protocol on the Enlargement of the European Union, Art. 3, *Official Journal of the European Communities*, C Series, No. 325 (24 December 2002), pp. 164 and 165. (Exhibit EC-17 submitted by the European Communities to the Arbitrator)

<sup>129</sup>"Responses of the European Communities to the Advance Questions of the Arbitrator", 1 September 2004, p. 3, as clarified at the oral hearing.

complete that proposal. Similarly, if the Commission's proposal is transmitted to the European Parliament in October 2004, this should allow sufficient time for the European Parliament to become "operational"<sup>130</sup> before it examines the proposal.

D. *Nature of the Drug Arrangements*

55. The European Communities suggests that the "political sensitivities" of the Drug Arrangements and the GSP scheme will increase the time required to implement the recommendations and rulings in this dispute.<sup>131</sup> The European Communities acknowledges<sup>132</sup> that previous arbitrators have typically refused to treat mere contentiousness or political sensitivity as a factor warranting a longer period of time for implementation.<sup>133</sup> However, the European Communities maintains that the Drug Arrangements are analogous to the measure that needed to be brought into conformity in *Chile – Price Band System* because the Drug Arrangements are "an integral and essential part of its development policy".<sup>134</sup>

56. I am not persuaded by the statements of the European Communities that the particular nature of the Drug Arrangements within the GSP scheme and the development policy of the European Communities warrants any increase in the reasonable period of time for implementation. Although a modification to the Drug Arrangements may well be described as "politically sensitive", this factor does not distinguish the Drug Arrangements from any other measure that is likely to be the subject of a WTO dispute. The measure examined in *Chile – Price Band System* was quite different. That measure had a "unique ... impact on Chilean society" (that is, the society of the *implementing* Member); "domestic opposition" to its repeal or modification reflected "serious debate, within and outside the legislature of Chile, over the means of devising an implementation measure" and "not simply opposition by interest groups to the loss of protection".<sup>135</sup>

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<sup>130</sup>European Communities' response to questioning at the oral hearing.

<sup>131</sup>European Communities' submission, paras. 31 and 42.

<sup>132</sup>European Communities' response to questioning at the oral hearing.

<sup>133</sup>See, for example, Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 60; Award of the Arbitrator, *Canada – Patent Term*, para. 58; and Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 61.

<sup>134</sup>European Communities' submission, paras. 38 and 39, referring to Award of the Arbitrator, *Chile – Price Band System*, para. 48. See also European Communities' submission, para. 41.

<sup>135</sup>Award of the Arbitrator, *Chile – Price Band System*, para. 48.

E. *Article 21.2 of the DSU*

57. In their submissions, both parties rely on Article 21.2 of the DSU, which provides:

Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

58. India appears to suggest that, in order to comply with this provision in connection with the interests of India (among other countries), the European Communities should take less time to implement the recommendations and rulings of the DSB in this dispute.<sup>136</sup> Conversely, the European Communities suggests that, in order to comply with this provision in connection with the interests of the current beneficiaries of the Drug Arrangements, the European Communities will need more time for implementation.<sup>137</sup> India rejects the European Communities' approach, arguing that, in relation to an Article 21.3(c) arbitration, the obligation in Article 21.2 relates only to developing country Members that are party to the arbitration.<sup>138</sup> The European Communities, however, responds that Article 21.2 refers to "developing country Members" and not only to the parties to any particular dispute.<sup>139</sup>

59. Previous arbitrators have not found it necessary to determine the precise boundaries of Article 21.2 of the DSU. Some arbitrators have taken this provision into account in assessing the difficulties faced by an *implementing* Member that is a developing country<sup>140</sup>, or where both parties were developing countries.<sup>141</sup> No arbitrator has determined whether the reference to "developing country Members" in Article 21.2 should be interpreted to include, in the context of an Article 21.3(c) arbitration, Members that are not party to the arbitration. It is unnecessary for me to decide this issue

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<sup>136</sup>India's submission, para. 65.

<sup>137</sup>European Communities' submission, para. 14.

<sup>138</sup>India's statement at the oral hearing.

<sup>139</sup>European Communities' response to questioning at the oral hearing.

<sup>140</sup>See, for example, Award of the Arbitrator, *Indonesia – Autos*, para. 24; Award of the Arbitrator, *Chile – Alcoholic Beverages*, para. 45; and Award of the Arbitrator, *Argentina – Hides and Leather*, para. 51.

<sup>141</sup>Award of the Arbitrator, *Chile – Price Band System*, paras. 55 and 56. See also Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 81.

in the present dispute. Although India has identified itself as a developing country<sup>142</sup>, and the European Communities has identified the current beneficiaries of the Drug Arrangements as developing countries<sup>143</sup>, neither party has provided a satisfactory explanation or evidence of the precise manner in which these countries are particularly affected, as developing country Members, by the European Communities' implementation of the recommendations and rulings in this dispute, nor how this should affect the reasonable period of time for implementation.

#### **IV. The Award**

60. For the reasons set out above, I determine that the "reasonable period of time" for the European Communities to implement the recommendations and rulings of the DSB in this dispute is 14 months and 11 days from 20 April 2004, being the date of adoption of the Panel and Appellate Body Reports by the DSB. The "reasonable period of time" will therefore expire on 1 July 2005, such that implementation must be completed on or before that date.<sup>144</sup>

Signed in the original at Geneva this 10th day of September 2004 by:

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John Lockhart  
Arbitrator

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<sup>142</sup>India's submission, para. 65.

<sup>143</sup>European Communities' submission, para. 14.

<sup>144</sup>I have calculated the reasonable period of time in the following manner. 14 calendar months from 20 April 2004 is 20 June 2005, plus 11 additional days brings us to 1 July 2005. Thus, the last day of the reasonable period of time is 1 July 2005.