

ELSA MOOT COURT COMPETITION ON WTO LAW

THE CASE:

*DISPUTE CONCERNING PARADISE – DIFFERENTIAL TARIFF RESTRICTIONS ON
FOOD IMPORTS FROM DEVELOPING COUNTRIES*

2005

ARACHNIA

Complainant

-V-

PARADISE

Respondent

MEMORIAL FOR COMPLAINANT

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- Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries (*'the Enabling Clause'*)
- Doha Ministerial Declaration
- General Agreement on Tariffs and Trade 1947 (*'GATT 1947'*)
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LIST OF ABBREVIATIONS

AB	Appellate Body
Codex	Codex Alimentarius
EC	European Communities
ECJ	European Court of Justice
FAO	Food and Agriculture Organization
GATT	General Agreement on Tariffs and Trade 1947
GSP	Generalized System of Preferences
MFN	Most Favoured Nation
MRL	Maximum Residue Limits
SPS Agreement	Agreement on Sanitary and Phytosanitary Measures
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
WTO	World Trade Organization

STATEMENT OF THE FACTS

Paradise, a high-income developed country WTO Member renowned for its high environmental standards, has a programme that grants tariff preferences to developing countries as a GSP scheme under the terms of the Enabling Clause. Paradise has introduced an additional margin of preference beyond that generally available to developing countries under its programme for food imports that are “pesticide-free” (*GSP One*). The producer or importer must certify that no pesticides whatever have been used in the production of the imports in question. On the basis of such certification, the preferential rate of tariff drops to zero.

Where developing country food imports are not pesticide-free, they can still qualify for the general margin of preference afforded to all developing country imports under Paradise’s GSP programme, provided that the imports are shown to have less than half the Maximum Residue acceptable for consumer health under the Codex (*GSP Two*). Where food imports from developing countries are not shown to have less than half the Maximum Residue, but have precisely half the Maximum Residue, duty is imposed as the full MFN-bound rate applicable to trade with developed WTO Members. Food imports from developed countries which have precisely half the Maximum Residue are banned, as are all food imports from developing and developed countries which have more than half the Maximum Residue.

Arachnia is a small developing country WTO Member, situated in the tropics. It has failed to develop an economically viable “pesticide-free” niche in its agricultural industries. It has implemented the Codex Maximum Residue standards, but with some difficulty.

IDENTIFICATION OF OBLIGATIONS

I. Article I:1 of the GATT

Any advantage, favour, privilege or immunity granted by Paradise to any product originating in or destined for any other country should be accorded immediately and unconditionally to like products originating in or destined for the territories of all other WTO members.

II. Enabling Clause

Any exception to Article I:1 by Paradise that is intended to accord differential and more favourable treatment to developing countries must be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of other WTO members; must not impede the reduction or elimination of tariffs and other restrictions to trade on an MFN basis; and must be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

Any preferential tariff treatment for developing countries must be within a generalized, non-reciprocal and non-discriminatory GSP.

III. Article XX of the GATT

Any general exception to Article I:1 by Paradise that is "necessary to protect human, animal or plant life or health" (Article XX(b)) or "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption" (Article XX(g)) must not be applied to enable arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

IDENTIFICATION OF BREACHES

Arachnia has filed a dispute settlement complaint in the WTO against Paradise, claiming that the additional margin of preference granted to imports that are "pesticide-free" violates Article I:1 of the GATT, does not meet the conditions of the Enabling Clause, and cannot be justified under Article XX of the GATT. On the same grounds, Arachnia also challenges Paradise's denial of general GSP treatment to food imports from developing countries that are not shown to have less than half the Maximum Residue acceptable under the Codex.

SUMMARY OF ARGUMENTS

I. Article I:1 of the GATT

Both Programmes are in breach of Article I:1, in that they grant to certain products an advantage not extended immediately and unconditionally to other, like products. Tariff preferences are undeniably an 'advantage.' In granting them, the Programmes impose wholly arbitrary thresholds in respect of pesticide residue content and there is no labelling system with

respect to *GSP Two*. Furthermore, both Programmes distinguish between products which, on grounds of consumer safety, are indistinguishable in respect of their pesticide residue content.

II. Consequence of breach

Arachnia need only have established breach of Article I:1, notwithstanding any conflicting provision, for a *prima facie* case to be satisfactorily made against Paradise. The burden of proof then shifts to Paradise in respect of defending the measures complained about; and in the absence of successfully proving the applicability of those defences, Paradise will be presumed to be responsible for an impairment of benefits due to Arachnia under GATT 1994.

III. Enabling Clause

The exception afforded by the Enabling Clause does not extend to special incentive arrangements of the sort implemented by Paradise. The history and objectives of the WTO suggest that any exceptions to the general rules must be specific and narrowly interpreted. To allow special incentive arrangements under the Enabling Clause would be to interpret the exception broadly and should thus be avoided. In the alternative, it is submitted that Paradise's GSP Programmes do not satisfy the requirements of being either non-reciprocal or non-discriminatory. The Programmes are reciprocal in that they require developing countries to give something in return for the tariff preferences. They are discriminatory in that they apply only to certain countries and cannot be said to respond positively to a development, financial, or trade need.

IV. Article XX

Article XX(b) does not protect the Programmes because they are not primarily intended "...to Protect Human, Animal or Plant Life or Health", and nor are they "necessary to protect human life." Article XX(g) does not protect the Programmes because it is impossible to establish a close and genuine relationship between them and ends which would be justified under the subsection. Moreover, even if they did fall within the terms of either subsection (b) or subsection (g), the Programmes fail to satisfy the Chapeau of Article XX, on procedural as well as substantive grounds.

LEGAL ARGUMENTS

I. Breach of Article I:1***1. Both GSP Programmes are in breach of Article I:1***

Article I:1 of GATT 1994 states, in relevant part, that: “With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation...any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.” Arachnia submits that Paradise’s *GSP One* and *GSP Two* Programmes are in breach of the Article, in that, within its proper meaning: first, they grant an *advantage* to some products but not to others; second, they do so in respect of *like products*; and third, such advantage is granted only *conditionally*, and not unconditionally, to other, like products.

a. Granting to certain products an advantage not accorded to others

Under both Programmes, reduced or zero tariff rates are accorded to some products but not to others in respect of food imports from developing countries. Arachnia contends that such reduced tariff rates plainly confer an ‘advantage’ within the meaning of Article I:1 on those products to which they apply, compared with those to which they do not apply and which therefore remain subject to higher tariff rates.

b. Differential treatment of ‘like’ products**i. Physical characteristics and arbitrary thresholds**

Factors which may be considered in determining the likeness of products for purposes of Article I:1 are the physical characteristics of the products, their end use, and their substitutability in the marketplace.¹ It may be that there is, in general, some physical difference between a product that contains more rather than less pesticide. However, the wholly arbitrary thresholds imposed by the GSP Programmes negate the validity of any such distinction in this case. Under the Programmes, products whose respective residue contents are, for example, 50% and 49.99% of the Codex MRL are treated as ‘unlike’, whereas those whose respective residue contents are 49.99% and 0.01% are treated as ‘like’. Arachnia contends that, for the purposes of Article I:1, such products cannot reasonably be said to be ‘unlike’ in respect of their physical characteristics.

¹ *Spain – Unroasted Coffee*, para 4.8

ii. Lack of labelling

Arachnia accepts that, in consequence of the fact that Paradise's distributors routinely label food "pesticide-free" when they can legitimately do so, it may frequently be possible for consumers to distinguish between products which qualify for *GSP One* and those that do not. There is additionally some basis for thinking that such labelling may have a significant effect on consumer demand. However, there is no mechanism whatever for alerting consumers to whether products have qualified for *GSP Two* by virtue of their pesticide content. Such products *must* be perfectly substitutable in the marketplace for those developing country imports whose residue content is precisely 50%, because the two 'categories' of product cannot be distinguished by consumers. Equally, one must suppose that their end-use is identical on the same ground.

iii. Likeness and safety

Furthermore, in *EC-Asbestos*, where the likeness of chrysotile asbestos fibres to other fibres at issue in the case had to be considered, the AB emphasised that it was the undoubted health risks associated with the former, and the consequent impact on consumer behaviour in respect of choosing between otherwise similar fibres, which exerted particular influence to persuade it that the relevant products were not, in fact, 'like'.² Thus a product which is unsafe for human consumption, or which poses an environmental hazard on account of its pesticide residue content, is rightly to be distinguished as 'unlike' one which poses no such danger, not least because one would expect informed consumers to distinguish between the products on those grounds.³ By contrast, both GSP Programmes seek to differentiate products which may contain different levels of pesticide residue, but which are equally fit for human consumption, since they all fall within the Codex MRL.⁴ In this respect, Arachnia draws attention to the fact that, although previous panel and Appellate Body rulings have not applied a rigid interpretation of the phrase 'like products' in the context of the GATT Agreements, and have held that the phrase should be considered in the light of the circumstances of each given case,⁵ such rulings have

² *EC-Asbestos* AB Report, para. 122

³ *EC-Asbestos* AB Report, para. 122

⁴ c.f. *EC-Asbestos*, *passim*.

⁵ *Japan – Alcoholic Beverages*, AB report, para. 64

nevertheless taken a consistently sceptical attitude towards forms of discriminatory categorisation which are not widely recognised or employed.⁶ The stated purpose of the Codex, indeed, is to co-ordinate an internationally accepted basis for distinguishing between products which are safe for human consumption, and those which are not, in respect, *inter alia*, of their pesticide residue content.⁷ Arachnia therefore contends that, for purposes of determining whether products are 'like' within the meaning of Article I:1, and insofar as a safe product is 'unlike' one that is not safe, the Codex MRL is the appropriate standard on which to rely in distinguishing safe from unsafe products. Products which meet this standard and are granted advantages under the GSP Programmes cannot reasonably be held, on grounds of safety and any consequent influence on consumer behaviour, to be 'unlike' those which also meet the standard and are not granted such advantages.

c. The advantages available under the Programmes are not extended unconditionally to like products

i. Conditions unrelated to the imported product itself

The panel in *Indonesia – Automobiles* stated that: "The GATT case law is clear to the effect that any...advantage [within the meaning of Article I:1]...cannot be made conditional on any criteria that is not related to the imported product itself."⁸ In practice the relevant question, once again, is whether a condition involves "discrimination between *like products* of different countries [emphasis added],"⁹ since a legitimate condition pertaining to the product itself is one which has the effect of making the product *unlike* one which has not fulfilled the condition. Thus if the panel accepts the above contention, that Paradise discriminates between like products in granting advantages under the GSP Programmes, it follows that Paradise also fails in its obligation to grant the advantages "unconditionally" to all member countries.

ii. De facto discrimination on the basis of national origin

In *Canada - Automobiles*, the panel took a somewhat different view from that taken in *Indonesia – Automobiles*, in that it found that attaching conditions to the granting of an advantage will not

⁶ *Spain – Unroasted Coffee*, para 4.8

⁷ General Principles of the Codex Alimentarius

⁸ *Indonesia – Automobiles*, para 14.143

⁹ *Canada-Automobiles*, AB report, para 10.22

necessarily offend Article I:1, but will do so only if such conditions are discriminatory with respect to the origin of products.¹⁰ Even if the panel accords with this view, however, Arachnia submits that the GSP Programmes plainly do impose conditions which “amount to discrimination between like products of different origins.”¹¹ In the *Canada - Automobiles* case, the panel emphasised that, in assessing whether the effect of a condition is to discriminate between like products on the basis of their origin, the possibility of *de facto* discrimination must be considered. Legitimate conditions are only those which are *de facto*, as well as *de jure*, origin-neutral. In this case, the climatic conditions in the tropics, where Arachnia is situated, have the effect of making it considerably more difficult, and therefore more costly, to meet the conditions imposed by Paradise’s GSP Programmes than it would be for certain other, differently-situated, developing countries. Such conditions are therefore not *de facto* origin-neutral. Arachnia would draw the panel’s attention in this respect to Article 6:1 of the SPS Agreement, which states that: “Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area...from which the product originated...In assessing the sanitary or phytosanitary characteristics of a region, Members shall take into account, *inter alia*, the level or prevalence of specific diseases or pests...”

2. Establishing breach of Article I:1 is sufficient also to establish the prima facie case that there has been an impairment of benefits due to Arachnia under the GATT Agreements

It is a matter of settled law that, first, Arachnia need only have established breach of Article I:1, notwithstanding any conflicting provision, for a *prima facie* case to be satisfactorily made against Paradise; second, the burden of proof then shifts to Paradise in respect of defending the measures complained about; and, third, in the absence of successfully proving the applicability of those defences, Paradise will be presumed to be responsible for an impairment of benefits due to Arachnia under GATT 1994, in breach of its international treaty obligations.

a. The *prima facie* case is made out

It is well-established that countervailing provisions of the GATT which may purport to justify actions in breach of Article I:1 operate by way of *exception* to the general rule constituted by that

¹⁰ *Canada – Automobiles*, AB report, para 10.29

¹¹ *ibid.*, para.10.30

Article.¹² As exceptions, these provisions *cannot* be invoked as though they were “self-contained” provisions, with regard to which the inconsistency of the conduct of the party complained against would first have to be proved by the complainant. Rather, 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.¹³ Previous panel and AB decisions have upheld this logic with respect to, for example, the Enabling Clause¹⁴ and Article XX(g).¹⁵

b. The burden of proof therefore shifts to the respondent

As a general matter of procedure, it falls to the complainant to establish a *prima facie* case that a breach of a binding obligation has occurred. However, once that case is made, the burden of proving that a legitimate exception applies by way of defence falls to the party complained against.¹⁶ The AB in *EC – Tariff Preferences* states the position thus: “It is...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.”¹⁷

c. Impairment of benefits due is presumed to follow from the breach

Where a *prima facie* case of breach by the other party or parties *has* been established by the complainant, this will be taken as a sufficient basis to presume that nullification or impairment of benefits within the meaning of Art.XXIII GATT 1994 has resulted. Article 3(8) of the DSU states that: “In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Member parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.”

¹² See, for example, *US – Shrimps*, AB report, *passim*.

¹³ *EC – Tariff Preferences*, AB report, para 7.40.

¹⁴ *ibid*.

¹⁵ *US - Shrimps*

¹⁶ *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses*

¹⁷ *EC –Tariff Preferences* para 88

III. Inapplicability of the Enabling Clause Exception

The AB held in *EC – Tariff Preferences* that the Enabling Clause operates by way of exception to Article I:1.¹⁸ It further held that the burden of proof lies with the responding party to adduce sufficient evidence to demonstrate the consistency of its preference scheme with the conditions of the Enabling Clause, but that it falls to the complaining party to define the parameters within which the responding party's defence must be made.¹⁹ Paradise cannot rely on the exception afforded by the Enabling Clause to justify either GSP Programme. Arachnia contends, first, that GSP Programmes designed to offer special incentive arrangements which encourage developing countries to adopt certain policies or practices cannot claim an exemption under the Enabling Clause; and, second, in the alternative, that Paradise's GSP Programmes are both reciprocal and discriminatory, and thus fail to meet the general requirements necessary to benefit from the said exception.

1. General inapplicability to special incentive arrangements

a. History and purpose of the Enabling Clause

The Enabling Clause makes no mention of special incentive arrangements, and their legal status has never received Panel consideration. However, interpretation of the clause is aided by reference to its policy predecessors and to the broad objectives of the GATT, in accordance with the supplementary means of interpretation allowed by Article 32 of the Vienna Convention. The GSP originated from the First Conference of the UNCTAD in 1964, which was heavily driven by a desire to move away from the complex and discriminatory patchwork of preferences that characterised a world then still shedding its colonial past. UNCTAD resolved that any concessions should be granted to all developing countries and that existing special preferences enjoyed by certain developing countries should be eliminated, "as and when effective international measures guaranteeing at least equivalent advantages to the countries concerned come into operation."²⁰ This general philosophy remains central to the functioning

¹⁸ *EC-Preferences*, para. 99.

¹⁹ *Ibid*, para. 114.

²⁰ In Principle 8, Recommendation A.I.1 in Final Act of the First United Nations Conference on Trade and Development (Geneva: UNCTAD, Doc E/CONF.46/141, 1964).

of the GSP: indeed, the fact that the Enabling Clause operates by way of *exception* confirms that it was intended to be used only in specific and limited circumstances.

b. Economic objectives of the WTO

The WTO exists to promote trade liberalisation through a process of multilateral negotiations, making unfair and unpredictable trade rules a thing of the past. Arachnia contends that any form of tariff preference necessarily violates these objectives. It increases the unpredictability of the world trade system by enabling individual countries to write their own rules. The added complexity increases transaction costs for those seeking to comply with the rules. It is likely to create negative externalities for countries which do not benefit, by displacing their exports with those from the beneficiary countries.²¹ Preferential tariffs may also retard trade liberalisation in beneficiary countries by reducing the need for domestic producers to lobby for liberalisation.²² It has also been suggested that the uncertainty introduced by preferential tariffs reduces countries' willingness to liberalise trade through multilateral negotiations.²³ It is precisely because of the general inconsistency of preferential tariffs with the economic vision of the WTO that they are permitted only in certain specific situations. To allow each developed country to introduce its own special incentive arrangements would be to open the floodgates to a new patchwork of discounts and advantages which was manifestly not the intention of the UNCTAD negotiators and cannot have been willed by the Tokyo Round framers of the Enabling Clause. Arachnia thus submits that the Enabling Clause's silence on the question of special incentive arrangements must be read conservatively, to imply that they do not fall within its reach.

2. The GSP Programmes fail to meet the Enabling Clause requirements

²¹ Grossman, G.M. and Sykes, A.O., 2004 "A Preference for Development: The Law and Economics of GSP", p. 26, posted at the eScholarship Repository, http://repositories.clib.org/berkeley_ilw/fall2004/6

²² Ozden, C. and Reinhardt, E., 2003 "The Perversity of Preferences: GSP and Developing Country Trade Policies, 1976-2000", World Bank Working Paper 2955, The World Bank.

²³ Schwartz, W.F. and Sykes, A.O., 1997 "The Economics of the Most Favored Nation Clause", in J.S. Bhandani and A.O. Sykes (eds.) *Economic Dimensions of International Law: Comparative and Empirical Perspectives*, Cambridge: Cambridge University Press, pp 34-79; also Bagwell, K. and Staiger, R.W., 1999 "An Economic Theory of GATT", *American Economic Review*, 89, pp 215-248.

Arachnia submits that in the event that the Enabling Clause is found to allow special incentive arrangements, Paradise's specific GSP Programmes nevertheless fail to meet the requirements necessary to benefit from the exception. Paragraph 2(a) of the Enabling Clause, which establishes that differential and more favourable treatment may be accorded to developing countries in accordance with the GSP, only allows preferential tariff treatment that is "generalized, non-reciprocal and non-discriminatory", as described in footnote 3 to the paragraph.²⁴ Neither GSP Programme is non-reciprocal or non-discriminatory.

a. They are not 'non-reciprocal'

i. Reciprocity of the Programmes

Arachnia contends that Paradise's GSP Programmes are structured as a bargain: in return for cutting pesticide usage, Paradise grants a tariff preference. It is Paradise, not Arachnia, which desires that the lower pesticide levels be achieved. This exchange is reciprocal according to the ordinary meaning of the term: Arachnia does something desired by Paradise, in return for which Paradise grants something desired by Arachnia.

ii. Reciprocity includes the giving of both tariff and non-tariff concessions

It is submitted that in the context of the GSP, reciprocity has always been taken to include the giving of non-tariff concessions of this sort. The first UNCTAD Conference resolved that in granting concessions, developed countries should not "require any concessions in return from developing countries." The next sentence stated that: "[N]ew preferential concessions, both tariff and non-tariff, should be made to developing countries as a whole and such preferences should not be extended to developed countries."²⁵ The fact that UNCTAD stressed that developed countries should not require *any* concessions, and that the Conference understood concessions to cover both tariff and non-tariff measures, implies that a requirement of any concession - whether tariff or non-tariff - breaches the non-reciprocity requirement. This analysis is confirmed by the UNCTAD Secretariat's 1979 Comprehensive Review of the Generalized System of Preferences, which stated that, "certain preference-giving countries specify conditions for eligibility for preferences which indirectly imply a certain degree of reciprocity of concessions or a certain pattern of behaviour. These conditions would thus seem

²⁴ Also confirmed in *EC-Tariff Preferences*, para. 147.

²⁵ In Principle 8, Recommendation A.I.1 in Final Act of the First United Nations Conference on Trade and Development (Geneva: UNCTAD, Doc E/CONF.46/141, 1964).

to be incompatible with the principle of non-reciprocity embodied in the GSP.”²⁶ Arachnia submits that neither GSP Programme is non-reciprocal, and that therefore neither can benefit from the exception granted by paragraph 2(a) of the Enabling Clause.

b. The Programmes are not ‘non-discriminatory’

i. Distinction between ‘discrimination’ and ‘differentiation’

The meaning of ‘discriminatory’ was considered at length by the AB in *EC-Preferences*. The Body there rejected the view, promoted by India, that any differentiation between GSP beneficiaries was by definition discriminatory, preferring to confine the term to differentiation between similarly-situated beneficiary countries.²⁷ To describe a scheme as discriminatory is thus to reach a legal conclusion. A scheme must in practice differentiate between countries before it can be said to be discriminatory; on the other hand, not all forms of differentiation will be considered discriminatory. In *EC - Tariff Preferences* the AB considered a policy which clearly differentiated between developing countries, granting an additional margin of preference to those countries which appeared on the relevant list. The question for the Board was whether the differentiation was of such a nature as to be discriminatory. Paradise’s GSP Programmes, in contrast, raise the important preliminary question of whether they can accurately be said to *differentiate* between developing countries at all, and if so on what basis. Arachnia submits that in considering this question, regard must be had to whether the schemes differentiate between countries on a *de facto* basis.

ii. A programme extending preferences to one group of countries ‘differentiates’

A GSP programme can be said to *differentiate* between countries if it extends tariff preferences to one group of countries only. This was the case in *EC – Tariff Preferences*, where the benefits granted by the drug arrangements extended only to listed countries. The important question is whether the tariff preferences are extended to all countries or not. In asking whether a scheme differentiates between countries, it is not relevant whether certain countries stand to benefit more from those tariff preferences than do others. It is irrelevant, for example, that a scheme which reduces tariffs on sugar imports would be heavily to the advantage of those countries most reliant on sugar exports. Nature may smile more on some countries than on others: this

²⁶ UNCTAD, 1981 Operation and Effects of the Generalized System of Preferences, UN Doc No TD/b/C.5/71 New York

²⁷ *EC – Tariff Preferences*, para. 153

form of differentiation, however, cannot be said to be the result of any GSP scheme. Similarly, it matters not that certain countries do not or cannot produce the product benefiting from the tariff preference. This, again, would be an example of nature differentiating between countries; not of any differentiation caused by the scheme itself.

iii. Distinction between *de facto* and *de jure* differentiation

The drug arrangements discussed by the AB in *EC – Tariff Preferences* limited tariff preferences to those countries appearing on a pre-determined list. This exemplifies a *de jure* differentiation between countries. *De facto* differentiation arises where the tariff preference *in practice* extends only to a certain country or set of countries. This may occur, for example, where the tariff preference only comes into existence once a specific hurdle has been overcome. If only certain countries are able to overcome the hurdle, the tariff preference may be accurately described as differentiating between countries on a *de facto* basis.

iv. The WTO should look to *de facto* differentiation

The importance of *de facto* differentiation has been recognised in other international legal contexts. The ECJ has found that Article 90 of the Treaty Establishing the European Community, which makes illegal any taxation on imports that is not applied to domestic products, was breached by France's tax on all cars above 16CV in power. No French car was that powerful. The Court held that: "Although the system embodies no formal differentiation based on the origin of the products it manifestly exhibits discriminatory or protective features."²⁸ Similarly, the court has found national rules imposing language²⁹ or residency³⁰ requirements to breach the rules against less favourable treatment on the grounds of nationality. The advantage of focusing on *de facto* differentiation is to ensure that no tariff preference can be designed in such a way as to differentiate between countries in practice whilst avoiding the legal consequences of that differentiation. This approach is the only way of respecting the underlying policy objections against differentiations between countries, which rest on the *effects* of that differentiation, not on the label attached to it by legislators. Arachnia urges that it be adopted in this case.

²⁸ Case 112/84, *Humblot v Directeur des Services Fiscaux* [1985] ECR 1367 at para. 14

²⁹ Case 379/87 *Groener v Minister for Education* [1989] 3967

³⁰ Case C-350/96 *Clean Car Autoservice GmbH v Landeshauptmann von Wien* [1998] ECR I-2521

c. The Programmes differentiate *de facto* between developing countries**i. Only those countries whose products meet the relevant standards stand to benefit**

At any given time, Paradise's tariff preferences only apply to certain countries - those whose products meet the relevant standards. The preferences do not extend to other countries. Developed countries have sometimes suggested that this does not amount to a differentiation among countries because every developing country has the *option* of choosing to comply with the relevant condition.³¹ Arachnia disputes this suggestion. It does not logically follow that simply because a measure *would* not differentiate between countries *if* they all performed a certain task, it therefore *does* not differentiate between them at all. Indeed, the fundamental basis of any incentive system - from tariffs to examinations - is that those who perform to a certain standard are differentially rewarded as against those who do not.

ii. Not every country is equally able to meet the relevant standards

Furthermore, Arachnia disputes the claim that every country is free to choose whether or not to comply with Paradise's policy hurdles. Developing countries are not equally positioned in their ability to satisfy the necessary pesticide criteria. As has been argued above, potential beneficiaries vary in their climatic, environmental, financial and technical endowments. It will certainly be easier for some countries to qualify for the tariff preference than for others; it may even be impossible for some countries to benefit at all. Arachnia's tropical soils are so quickly eroded and its financial and technical resources so thin that it is unlikely to be able to fulfil the requirements. Arachnia does not complain that its natural endowments prevent it from producing the relevant product. Indeed, as is argued above, food products with 50% of the Codex MRL are in all significant respects 'like' those with under 50% of the MRL, and Arachnia has worked hard to produce food within the MRL limits. The complaint, rather, is that Arachnia's natural endowments prevent it from falling within the group of countries to which the tariff preference applies. Paradise has imposed a hurdle which only certain countries can overcome. Arachnia *does* produce the products to which the tariff preferences apply; it simply *cannot* satisfy the requisite hurdles to qualify for that preference. This, in Arachnia's submission, must constitute a *de facto* differentiation.

d. The differentiation inherent in Paradise's GSP Programmes is discriminatory

³¹ Bartels, L. 2003 "The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program", Journal of International Economic Law 6(507)

Arachnia accepts that not every form of differentiation is necessarily discriminatory. The AB in *EC – Tariff Preferences* confirmed that the non-discriminatory requirement must be read in light of Paragraph 3(c) of the Enabling Clause. The Board said:

“In sum, we read paragraph 3(c) as authorizing preference-granting countries to “respond positively” to “needs” that are *not* necessarily common or shared by all developing countries. Responding to the “needs of developing countries” may thus entail treating different developing-country beneficiaries differently.”³²

Differentiation between developing countries will thus be non-discriminatory when differences respond positively to the needs of developing countries. Paradise’s GSP Programmes are not non-discriminatory according to this definition: first, because there is no ‘need’ to cut pesticide use below the CODEX maxima; second, because the Programmes anyway do not ‘respond positively’ to any such alleged need; and third, because the beneficiary countries do not share a need which differentiates them from non-preferred countries.

i. No ‘need’ to cut pesticide usage below the Codex MRL

The AB in *EC – Tariff Preferences* said that:

“...the existence of a “development, financial [or] trade need” must be assessed according to an *objective* standard. Broad-based recognition of a particular need, set out in the *WTO Agreement* or in multilateral instruments adopted by international organizations, could serve as such a standard.”³³

No such objective standard exists for justifying a claim that developing countries have a need to use less pesticide such that their crops have less than half of the Codex MRL, or for the claim that they have a need to use no pesticide at all. The Codex MRLs have been set by a painstaking process of balancing various considerations. The broad-based picture which emerges is of a world increasingly united in its desire to manage its agriculture according to uniform standards as expressed by the Codex MRLs. There is no indication of any broad-based recognition of a lower set of standards. Arachnia also submits that Paradise must not only show a benefit from a general reduction of pesticide usage; it must show that there is a need to reduce the use of every single pesticide to below 50% or to 0% of the MRL, as required by the tariff preferences.

³² *EC-Preferences*, para. 162.

³³ *Ibid*, para. 163.

Arachnia further suggests that such incentives not only fail to meet any known need: they also risk impacting negatively on a country's development. It is significantly more costly to produce crops using less pesticides. The remaining control options are more expensive, and more crops are lost to pest and disease infestation. It is also possible that the existence of an incentive encourages developing countries to allocate resources to agricultural production which would be better directed elsewhere³⁴, and that the tariff preference in fact discourages producers from cutting costs to a level that would be competitive with non-preferred countries in the long-term.³⁵ In the absence of any contrary evidence of a broad-based recognition that Paradise's tough standards on pesticide use would meet a development, financial or trade need, it is not open to Paradise unilaterally to use its own environmental standards as markers for tariff brackets.

ii. The Programmes do not 'respond positively' to the alleged need

The AB in *EC – Tariff Preferences* further held that, "a sufficient nexus should exist between, on the one hand, the preferential treatment provided under the respective measure authorized by paragraph 2, and on the other hand, the likelihood of alleviating the particular 'development, financial [or] trade need'."³⁶ Arachnia submits that Paradise's GSP Programmes are an inappropriate method of reducing pesticide usage in developing countries. Technical measures like tariff preferences are particularly inaccessible to small countries like Arachnia; and even more so to the smallest producers. Conversely, Arachnia lacks knowledge of alternative pest management systems, and the resources needed to train small farmers in alternative methods. Pesticide-free production requires complex land and ecosystem management: Arachnia submits that a positive response to the alleged need to cut pesticide use would be to educate and empower small farmers to use these techniques, instead of offering incentives which will not reach them and from which they lack the knowledge or skills to benefit.

iii. Beneficiary countries do not share a need

It is clear from *EC – Tariff Preferences* that the beneficiaries of any form of tariff differentiation between developing countries must *share a common need* which differentiates them from the

³⁴ Grossman, G.M. and Sykes, A.O., 2004 p. 27

³⁵ *Ibid*, p. 28.

³⁶ *EC – Tariff Preferences*, para. 164.

other, excluded, developing countries. The AB stressed 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.”³⁷ It was argued above that the GSP Programmes differentiate between countries on one of two grounds: either between those countries which at any given time are producing products which meet the necessary criteria as against those which are not; or alternatively between those countries with the capacity (be it climatic, geographic or financial) to produce those products and those which lack that capacity. Neither of these alternative ways of conceptualising the differentiation inherent in Paradise’s GSP Programmes satisfies the requirement that beneficiary countries must share a common need. A grouping of countries which uses very little or no pesticides cannot be said to share a need which is both common and exclusive to them. All they share is a policy decision of which Paradise approves. Similarly, a grouping of countries which have the capacity to cut their pesticide use to a certain level do not share a need as such; on the contrary, they simply share an ability.

IV. Inapplicability of defences under Article XX

To be successful, a defence under Article XX requires proof of conformity, first, to the particular terms of a subsection *and*, second, to the general provisions of the *chapeau*.³⁸ The panel need only find failure to conform with *either* for the defence to fail in its entirety.

1. Article XX(b) GATT 1994 does not protect the Programmes

Arachnia submits that neither GSP Programme can be held to fall within the ambit of Article XX(b), because, first, neither is primarily intended “to protect human, animal or plant life or health”; and, second, even if either were primarily *intended* for that purpose, neither would be “necessary” to achieve it.

a. They are not primarily intended “...to Protect Human, Animal or Plant Life or Health”

Applying their ordinary meaning, as is required by Article 31(1) of the Vienna Convention, the words “necessary...to protect” imply that the primary *purpose* of any measures which purport to fall within the terms of the subsection must be the protection of “human, animal or plant life.”

³⁷ *Ibid*, para. 18

³⁸ *US – Gasoline*

In this regard, it is notable that the panel in *US – Gasoline* interpreted the words “relating to” in the context of Article XX(g) as meaning “primarily aimed at” and therefore held that any measure seeking to be justified under that provision must be “primarily aimed at” the purposes stated in the relevant subsection.³⁹

i. Competing justifications exclude the legitimacy of that required under the subsection

Arachnia submits that if Paradise’s intention in respect of either GSP Programme *had* in fact been primarily to “protect human, animal or plant life”, it would have been irrational and contrary to that intention for Paradise to limit the scope of Programmes designed to achieve it to developing countries. In fact, its only stated intentions refer to generalities around “sustainable development.” As far as protecting life and health are concerned, there could be no logical connection between differentiating imports on the basis of their pesticide content *and* differentiating them on the basis of whether they originated from a developing country. Since both Programmes in fact do both, it is clear that some substantial further motive or motives must have impelled Paradise’s actions. The existence of any substantial further motives nullifies the claim on the part of Paradise to possess a legitimate primary intention, in the sense required under the terms of the subsection.

ii. GSP One is specifically aimed at effecting measures outside the jurisdiction of the respondent state

Arachnia would, in addition, draw attention to the fact that, whereas *GSP Two* is concerned with the pesticide residue content of food imports, *GSP One* is explicitly concerned with their production process, which by definition occurs outside Paradise’s borders. If it were necessary to stipulate requirements as to the production process itself in order to secure the consumer health goals as to the nature of food imports, which Paradise may allege to justify its GSP Programmes (and whose legitimacy, in these circumstances, Arachnia nevertheless disputes), it must be asked why it is that this was not also necessary in respect of *GSP Two*. Arachnia contends that, in reality, *GSP One* can only be understood as an attempt to intrude on the sovereignty of other states in respect of their environmental policy-making, while the same motivation is also an integral aspect of *GSP Two*. Previous decisions have cast doubt on the capability of Article XX(b) to legitimise such an objective. In *Tuna One*, it was made plain that

³⁹ *US – Gasoline*, para 19

the subsection could not apply to life *outside* the jurisdiction of the state complained against.⁴⁰ Arachnia acknowledges that the terms of that statement were somewhat modified in *US – Shrimps*, but they were not dispensed with. Arachnia contends, furthermore, that it must be contrary to the fundamental tenets of the WTO that it be permissible for some member states to exert their economic power through trade policy, in pursuit of effecting political changes within the jurisdictions of other member states, whose economies may be highly vulnerable to such pressure. It is submitted that the position must remain that Paradise has to demonstrate a primary intention to protect the health of its *domestic* consumers in order to meet the preconditions of a defence under Article XX(b).

iii. The SPS Agreement provides no endorsement for extraterritorial measures

This contention is further supported by the terms of the SPS Agreement. Although Arachnia bases its complaint on breach of the GATT and not the SPS Agreement, the latter is nevertheless relevant in seeking to interpret the provisions of Article XX(b), its preamble stating that its purpose is to “elaborate rules for the *application* of...Article XX(b).” Among its primary purposes is to provide for the legitimate use of certain trade restrictions based on internationally recognised standards, including the Codex. It is therefore highly significant that it extends such legitimisation only to measures applied by a member state for various purposes *within the territory* of that member state.⁴¹

b. The Programmes are not “...necessary to protect human life.”

As well as being intended for the purpose contained in Article XX(b), measures must also be “necessary” to be capable of being justified by the subsection. Arachnia wishes to emphasise at the outset that previous decisions have set a high threshold for necessity in the context of Article XX. In *Korea – Beef*, the Appellate Body noted that, in accordance with Article 31(1) of the Vienna Convention, the word should be given its “ordinary meaning”, but went on to state that this ordinary meaning conveys a continuum of different usages and that: “We consider that a “necessary” measure is, in this continuum, located significantly closer to the pole of “indispensable” than to the opposite pole of simply “making a contribution to.””⁴² Previous

⁴⁰ *Tuna One, passim*.

⁴¹ SPS Agreement, Annex A, paragraph 1

⁴² *Korea – Beef*, AB report, para 161

rulings have laid down two requirements that must be fulfilled in order for a measure to satisfy the necessity requirement within the meaning of Article XX. First, the measure must be “necessary” in the sense that alternative means to achieve the required purpose which conform with GATT obligations were not available. Second, the measure must be “necessary” in the sense that it averts a significant and likely harm.

i. Alternative measures are available

In *US – Section 337*, it was stated that: “It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as “necessary” in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it.”⁴³ The case of *Korea – Beef* affirmed that XX(d) will not apply where “alternative WTO-consistent measures” are “reasonably available.”⁴⁴ Arachnia submits that approaches based on negotiation towards bipartisan or multilateral agreement are plainly available as an alternative means of seeking to protect human health and life in this context, to the extent that such measures can anyway be considered “necessary”, given Arachnia’s general compliance with the Codex MRL. Instead of pursuing such negotiations, Paradise has adopted a measure unilaterally and peremptorily.

ii. They are not based on the required assessment of risk and level of harm

Food exports from Arachnia are in compliance with the standards set out in the Codex and it does not seek to dispute the appropriateness of recourse to *these* standards. Rather, it disputes the substantially higher standards set by the terms of *GSP One* and *GSP Two*. Article 3.1 of the SPS states that: “To harmonise sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist...” Arachnia acknowledges that, in the *EC – Hormones* case, the AB held that the obligation that standards be “based on” international standards was not tantamount to a requirement that they “conform to” those standards. There is room, therefore, for reasonable discretion. However, Arachnia submits that the interpretation of “based on” in Article 3.1 must also be considered in the light of the stated intention of that Article, which is: “To harmonize sanitary and phytosanitary measures on as wide a basis as possible...” It therefore submits that limits set at 0% of the international

⁴³ Panel report, *US – Section 337*, para 5.26

⁴⁴ *Korea-Beef*, AB report, para 182

standard in *GSP One*, and 49.999% of that standard in *GSP Two*, cannot conceivably be said to be “based on” those standards within the meaning of Article 3.1. Furthermore, it was held in the *EU-Hormones* case that national health and safety standards higher than internationally recognised standards purporting to be justified by the SPS Agreement must be subjected to the disciplines contained in the Agreement, that is to say they must be based on a “risk assessment”, which in turn must be based on “scientific principles” and “sufficient scientific evidence.”⁴⁵ Paradise has failed to provide such justification to Arachnia. Arachnia asserts its entitlement under Article 11 of the DSU to an objective assessment by the panel of whether these requirements have been met. Whilst some room for discretion has been admitted in *EU-Asbestos*, the Appeals Board in the *EU-Hormones* case emphasised that: “total deference to the findings of the national authorities could not ensure an ‘objective assessment’ as foreseen by Article 11 of the DSU.”⁴⁶

iii. The Programmes are anyway inadequate in respect of the purposes legitimated under the exemption

Arachnia would emphasise the fact that the ruling in *EC - Asbestos*, a rare case in which the “necessity” test was held to be satisfied, concerned an outright ban on imports of the relevant goods. In respect of the present case, Paradise has adopted measures which in practice allow it a very imperfect degree of control over covered imports. Movements in world market conditions entirely beyond its control, for instance, may overpower the efficacy of its tariff Programmes to alter consumer incentives through the price mechanism in respect of products’ pesticide residue content. Conceivably, depending on market dynamics, *GSP One* could act to *increase* the quantum of pesticide residue imported to Paradise compared to a situation in which all food imports that were not “pesticide-free” were subject to the MFN tariff, if the price sensitivity of demand were such that price reductions made possible by the Programme were to stimulate a substantial increase in demand for food imports, whose residue content may lie just below the 50% threshold. If Paradise considered there to be a sufficient risk presented by the pesticide residue content of food imports, it is submitted that this is not the policy lever it would adopt.

⁴⁵ *EU – Beef*, AB report, paras 179-80

⁴⁶ *EC – Asbestos*, panel report, para 117

2. Article XX(g) GATT 1994 does not protect the Programmes

Arachnia submits that neither can the GSP Programmes be held to fall within the ambit of Article XX(g). Arachnia accepts that, in the light of previous panel decisions, the terms of Article XX(g) may, unlike those of Article XX(b), admit the possibility of measures aimed at the conservation of scarce natural resources outside the territory of the member state which enacts those measures.⁴⁷ It also accepts the broad definition of scarce natural resources proposed by the AB in *US – Gasoline* and *US – Shrimp*.

a. Meaning of “relating to...”

However, it contends that the measures complained about in this case cannot be said to “relate to” an end which is legitimated by the subsection. As previously noted, it has been held that measures which purport to be justified under the terms of the subsection must be “primarily aimed at” such an end.⁴⁸ Subsequent AB decisions have emphasised the requirement for there to be a “close and genuine relationship of ends and means” in respect of the offending measure.

b. Absence of close relationship between means and ends

Beyond the generalities of “sustainable development”, it is not clear what the true ends pursued by Paradise through its GSP Programmes are. Certainly, Paradise makes no attempt to restrict the application of the Programmes to source countries where a threat to natural resources, arising from pesticide usage, does in fact exist. Indeed, the relevant issue in this respect is not the pesticide residue content of a particular food export, or even whether pesticides were used in connection with the production of a particular food export, the measures which the Programmes employ. Rather, the relevant issue is the overall quantum of pesticide usage in a particular state or geographical area within it. Certain products may contain relatively high levels of pesticide residue, but the density of production in the state from which they originate, and the overall levels of agricultural production in that state, might nevertheless be very low, so that this pesticide usage cannot be said to give rise to any conservation threat. Yet Paradise’s GSP Programmes are blanket programmes, applied to all developing countries irrespective of whether, in the light of the conditions prevailing in a particular developing country, a relevant conservation threat exists.

⁴⁷ In particular, *US – Shrimp*, AB report, *passim*.

⁴⁸ *US – Reformulated Gasoline*, AB Report, para 19.

3. The Programmes also fail to satisfy the Chapeau of Article XX

The exceptions in paragraphs (b) and (g) of Article XX are subject to the chapeau, stating that they apply only: “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade...” In the *US-Shrimp* case, it was emphasised that the chapeau had the effect of making the provisions of Article XX “limited and conditional”.⁴⁹ Arachnia contends that the Programmes plainly contravene the provisions of the chapeau, first, on procedural grounds; and, second, on substantive grounds. Therefore the chapeau excludes the applicability of the exceptions under paragraphs (b) and (g) to the facts of this case, even if they could, on their own terms, apply.

a. Procedural provisions

In the *US – Shrimp* case, an embargo on importation of shrimp caught by ships registered in nations which did not meet US standards was held not to be justifiable under the terms of the chapeau. In reaching this finding, the AB emphasised the failure of the US to consider alternative measures or to conduct negotiations and stated: “[I]t is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure and which effectively results in a suspension *pro hac vice* of the treaty rights of other Members.”⁵⁰ Arachnia submits that precisely the same applies in this case. No prior consultations whatever have been made at the Committee on SPS.

b. Substantive provisions

Furthermore, Arachnia contends that the substantive contents of the Programmes constitute “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” In *US – Reformulated Gasoline*, the AB held that the terms “arbitrary discrimination”, “unjustifiable discrimination” and “disguised restriction on international trade” may import meaning to one another.⁵¹ Arachnia would

⁴⁹ *US – Shrimp*, AB report, Para. 157

⁵⁰ *US – Shrimps*, AB report, para. 182

⁵¹ *US – Reformulated Gasoline*, AB report, Pt. IV

emphasise in this case the arbitrary nature of the Programmes, which in light of the foregoing is reason to imply that they are also “unjustifiable” and “disguised restrictions” on trade. The arbitrariness of the thresholds imposed by the Programmes has already been highlighted with respect to the breach of Article I:1. Additionally, the Programmes’ failure to respond flexibly to the needs of different countries imputes them with arbitrariness within the proper meaning of the chapeau. In *US – Shrimps*, the AB emphasised that the Programme complained against imposed a “single, rigid and unbending requirement...without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries”, and therefore did discriminate arbitrarily.⁵² The same applies in this case.

CONCLUSION

Arachnia concludes that Paradise’s GSP Programmes are in breach of Article I:1 of GATT 1994, and cannot be legitimized by reference either to the Enabling Clause or to Article XX.

PRAYER FOR RELIEF

Arachnia therefore asks the panel to recommend that the DSB request Paradise to bring such Programmes immediately into conformity with its obligations under GATT 1994.

⁵² *US – Shrimps*, AB report, para. 177