

Team: 018

ELSA MOOT COURT COMPETITION ON WTO LAW  
ON SUBMISSION TO THE PANEL OF THE WORLD TRADE ORGANIZATION

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

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2005

ARACHNIA

Complainant

- V -

PARADISE

Respondent

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MEMORIAL FOR RESPONDENT

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#### LIST OF ABBREVIATIONS

AB	Appellate Body
Codex	Codex Alimentarius
EC	European Communities
FAO	Food and Agriculture Organization
GATT	General Agreement on Tariffs and Trade 1947
GSP	Generalized System of Preferences
MFN	Most Favoured Nation
SPS Agreement	Agreement on the Application of 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 developed country WTO Member with high environmental standards, has a GSP under the terms of the Enabling Clause. Paradise has introduced an additional margin of preference beyond that generally available to developing countries under the GSP for food imports that are “pesticide-free.” The producer or importer must certify that no pesticides have been used in the production of the imports in question. On the basis of such certification, the 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 the GSP, provided that they are shown to have less than half the Maximum Residue acceptable for consumer health under the Codex. Where food imports from developing countries are not shown to have less than half the Maximum Residue, duty is imposed at the full rate applicable to trade with developed WTO Members. Arachnia is a small developing country WTO Member, situated in the tropics. Arachnia has failed to develop an economically viable “pesticide-free” niche in its agricultural industries. Arachnia has implemented the Codex Maximum Residue standards, 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 any other country should be accorded immediately and unconditionally to like products originating in the territories of all other WTO members.

### *II. Enabling Clause*

Any exception to Article I:1 by Paradise 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. Such preferential treatment must be generalized, non-reciprocal and non-discriminatory.

### *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” (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*

Paradise accepts that the granting of tariff preferences to developing countries in respect of pesticide-free imports is an “advantage” within the meaning of Article I:1 of the GATT. However, apart from this derogation from Article I:1, there has been no other violation of the Article. In particular, food imports containing 50%, less than 50% and 0% of the Codex Maximum Residue are not like products and can receive different tariffs.

#### *II. Enabling Clause*

Paradise claims that its tariff preferences for developing-country food imports are permitted under the Enabling Clause. Paradise claims that its GSP is generalized and non-reciprocal. Paradise submits that, when interpreting the phrase “non-discriminatory”, the Panel should consider (i) whether the GSP addresses the development, financial and trade needs of developing countries; and (ii) whether it responds positively to the heterogeneous needs of different developing countries. To be non-discriminatory, a GSP need not treat all developing countries alike. The term ‘development’ must, in light of the Marrakesh Preamble and Doha, be interpreted as ‘sustainable development’. Paradise claims that its GSP addresses developing countries’ development needs and that its flexibly-structured tariffs responds positively to the varied needs of developing countries.

### *III. Article XX of the GATT*

Paradise claims that the granting of tariff preferences to developing countries in respect of pesticide-free and “low-pesticide” imports also constitutes a permitted general exception to Article I:1 under Article XX of the GATT. The tariff preferences meet the requirements of the chapeau of Article XX and they are necessary for the protection of human health (and therefore fall under Article XX(b)). Additionally or alternatively, the preferences relate to the conservation of exhaustible natural resources and are therefore justified under Article XX(g).

## LEGAL ARGUMENTS

### **1. Article I:1 of the GATT**

#### *1.1. Paradise’s GSP is not entirely consistent with Article I:1 of the GATT*

Article I:1 of the GATT requires WTO members not to grant advantages to products originating from other member countries unless such advantages are given unconditionally to like products originating in the territories of all other members.

Paradise accepts that the granting of tariff preferences to developing countries in respect of pesticide-free imports is an “advantage” within the meaning of Article I:1 of the GATT, and that granting such an advantage only to developing countries is inconsistent with Article I:1.

#### *1.2. This inconsistency is compatible with WTO law*

##### **a. The inconsistency is permitted by the Enabling Clause or Article XX of the GATT**

The universal MFN requirement of Article I:1 is excluded by the Enabling Clause, to be examined in detail in Section 2 below. Alternatively, Paradise’s trade measures are justifiable under Article XX of the GATT, to be examined below in section 3.

##### **b. The GSP complies with Article I:1 in all other respects**

Paradise accepts that the Enabling Clause operates as an exception to Article I:1 and not as a self-contained provision. Paradise relies on the Enabling Clause as an affirmative defence to justify its partial non-compliance with Article I:1 in respect of its margins of preference. At this stage it should be noted that Article I and the Enabling Clause apply concurrently, with the Enabling Clause prevailing to the extent of the inconsistency between the two provisions.<sup>1</sup> Since the Enabling Clause only takes precedence over Article I:1 to this limited extent, Paradise must show that, apart from the derogation represented by the granting of tariff preferences to developing countries under a GSP authorised by the Enabling Clause,

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<sup>1</sup> *EC-Tariff Preferences*, para. 7.49, and see p.6, below



there has been no other violation of Article I. All the advantages must therefore be shown to apply (i) to “like products”; and (ii) “unconditionally”.

i. The tariff preferences do not discriminate between “like products”

Most cases concerning the interpretation of “like products” involve purported distinctions between domestic and imported products in the context of Article III of the GATT.

In *Japan–Alcoholic Beverages* the AB explained how the scope of “like products” could differ depending on provisions. To illustrate that the term “like products” will vary between different provisions of the WTO Agreement, the AB evoked the image of an accordion:

“No one approach to exercising judgement will be appropriate for all cases. The criteria in Border Tax Adjustments should be examined, but there can be no one precise and absolute definition of what is ‘like’...The accordion of ‘likeness’ stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term ‘like’ is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.”<sup>2</sup>

The AB endorsed a narrow test based on the 1970 Report of the Working Party on Border Tax Adjustments, requiring consideration of:

- (i) the product’s end-uses in a given market;
- (ii) consumers’ tastes and habits; and
- (iii) the product’s properties, nature and quality.<sup>3</sup>

Paradise submits that its tariff classifications fall within this test since (i) they are based on the “properties, nature and quality” of the products concerned; and (ii) take account of the views of Paradise’s consumers. Pesticide residue is a physical characteristic of a product, therefore products containing no pesticide residue may be distinguished from those containing up to 50% of the Maximum Residue under the Codex, which in turn are qualitatively different from those containing exactly 50%. Products that fall into these categories (or any other such categories that Paradise might have delineated) need not, indeed should not, be considered “like” products.

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<sup>2</sup>*Japan–Alcoholic Beverages*, Report of the Appellate Body, p.20

<sup>3</sup> Report of the Working Party on Border Tax Adjustment, BISD 18S/97, para. 18

The additional margin of preference granted to pesticide-free products is further justified by the fact that products that are and are not pesticide-free are likely to be treated differently by Paradise's health-conscious and environmentally aware consumers.<sup>4</sup>

The AB in *Japan-Alcoholic Beverages* moreover held that tariff classification itself "can be relevant in determining what are 'like products'."<sup>5</sup> Whether or not products are "like" is therefore not necessarily a logically prior question that requires a negative answer before those products may be accorded differing tariff classifications. This conclusion may appear to deprive the test in Article I:1 of much of its force, yet it is nevertheless inherent in WTO jurisprudence. It is suggested that the best way to resolve this apparent contradiction is to apply a broad and not overly technical test of 'likeness' that affords Members considerable latitude. On this view, Paradise's tariff classifications do not afford differential treatment to 'like products'.

ii. The tariff preferences are applied "unconditionally"

The two margins of preference that Paradise grants to food exports from developing countries, both of which depend upon the exports containing specified pesticide levels, are both applied "unconditionally" within the proper meaning of that term. The requirement to accord margins of preference to all contracting parties "unconditionally" means only that the granting of the margin of preference must not depend on any reciprocal guarantees. This was confirmed by the Panel in *Canada-Autos*, when it held that "unconditional" in this context means independent of the situation or conduct of the exporting country:

"An advantage can be given subject to conditions without necessarily implying that it cannot be accorded 'unconditionally' to the like product of all other members."<sup>6</sup>

Paradise does not impose any conditions of this nature on other contracting parties in respect of any of its import tariffs. Moreover, the Panel in *Canada-Autos* held that prohibited conditions would be those that discriminated between like goods according to their origin, not those relating to the nature of the imported goods themselves.<sup>7</sup> Legal classifications that distinguish among goods based on inherent characteristics – such as the level of contamination by pesticides – are not "conditions", since they do not inhibit the

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<sup>4</sup> Clarifications to the case in response to Questions 51 and 52

<sup>5</sup> *Japan-Alcoholic Beverages*, Report of the Appellate Body p. 22

<sup>6</sup> *Canada-Autos*, Report of the Panel, para. 10.23

<sup>7</sup> *Canada-Autos*, Report of the Panel, para. 10.29

purpose of Article I:1, which is undiscriminating MFN treatment. In the above case the Panel in fact expanded the scope of permitted “conditions” from the more restricted view of the Panel in *Indonesia–Autos*, which declared that an advantage within the meaning of Article I:1 cannot be made conditional on any “criteria not related to the imports themselves itself”<sup>8</sup>. The imposition of tariffs on products containing pesticides exports is contingent solely on the intrinsic properties of the products themselves and is thus permitted under Article I:1. So Paradise’s import tariffs cannot be challenged on the ground that they are not applied to developing countries “unconditionally”.

iii. Conclusion

It follows from the above that, other than the limited derogation from the MFN obligation authorised by the Enabling Clause and to be examined below, no violation of Article I:1 of the GATT has been established.

## 2. The Enabling Clause

The Enabling Clause confers a right on members to grant “differential and more favourable treatment” to developing countries “notwithstanding Article I:1 of the GATT”. The Enabling Clause (more specifically, Paragraph 2(a)) authorises WTO members’ GSPs, which were formulated by UNCTAD. Footnote 3 to Paragraph 2(a) of the Clause characterises GSPs “generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries”. Paragraph 3 outlines further criteria with which GSPs must comply.

### 2.1. What Paradise must prove with respect to the Enabling Clause

#### a. The relationship between the Enabling Clause and Article I:1 of the GATT

In *EC–Tariff Preferences*, the AB upheld the Panel’s findings that the Enabling Clause was an “exception” to Article I:1 of the GATT<sup>9</sup> and that the Clause does not “exclude the applicability” of Article I:1.<sup>10</sup> Paradise accepts this reasoning. However, Paradise emphasises that “the characterization of the Enabling Clause as an exception in no way diminishes the right of Members to provide or to receive “differential and more favorable treatment”.”<sup>11</sup> Paradise also notes that, “although a responding party must defend the consistency of its

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<sup>8</sup> *Indonesia–Autos*, Report of the Panel, para. 14.147

<sup>9</sup> *EC–Tariff Preferences*, Report of the Appellate Body, para. 99

<sup>10</sup> *ibid.*, para. 103

<sup>11</sup> *ibid.*, para. 98

preference scheme with the conditions of the Enabling Clause...a *complaining* party has to define the parameters within which the *responding* party must make that defence."<sup>12</sup>

**b. The burden of proof**

Paradise accepts the consequences of the AB's view in *EC-Tariff Preferences* of the relationship between the Enabling Clause and Article I:1 of the GATT. Because the Enabling Clause is an "exception" to Article I:1, the body raising the Enabling Clause as an "affirmative defence" of a trade measure must prove that the challenged trade measure meets the requirements of the defence provision. Paradise therefore accepts that by using the Enabling Clause to justify a derogation from Article I:1, it must establish that defence.

**c. What Paradise must prove**

Paradise therefore submits that it must prove the following:

- (i) Except for the preferential treatment granted to developing countries, its GSP does not in any other way violate Article I. Paradise submits that this burden of proof has been discharged by section 1 of Paradise's legal arguments.
- (ii) Its GSP programme is, in fact, valid under the terms of the Enabling Clause.

**2.2. The nature of a GSP and the standards to which it should conform**

**a. The origins of GSPs**

Paradise notes that the Enabling Clause, of 1979, essentially re-enacted an earlier UNCTAD 'Decision of the Contracting Parties of 25 June 1971' (the "1971 GSP Decision").<sup>13</sup> Footnote 3 to Paragraph 2(a) of the Enabling Clause refers explicitly to the 1971 GSP Decision for the definition of a GSP. Paradise therefore submits that the text of the 1971 GSP Decision is essential to understanding the nature and purpose of GSP schemes.

**b. A GSP must be "mutually acceptable"**

i. Textual analysis of the 1971 GSP Decision

Footnote 3 to Paragraph 2(a) of the Enabling Clause quotes the following description of a GSP from the Preamble to the 1971 GSP Decision: "generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries". The full paragraph from which these words are excerpted reads as follows:

*"Recalling that at the Second UNCTAD, unanimous agreement was reached in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing*

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<sup>12</sup> *ibid.*, para. 114

<sup>13</sup> Waiver, Generalized System of Preferences, BISD 18S/24

countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries;”<sup>14</sup>

Paradise submits that the words “mutually acceptable” are critically important. They show that the object of GSPs was to move towards a system of preferences acceptable to both developing and developed countries.<sup>15</sup> Notwithstanding the fact that the Enabling Clause converted them from an aspiration into a permanent part of the GATT, GSPs remain “mutually acceptable” schemes. Insofar as members assume binding obligations in respect of their GSPs, they do so within the context of tariff preferences that they find acceptable.

ii. Political-economic constraints

Even if the 1971 GSP Decision had not indicated that GSPs must be mutually acceptable, Paradise claims that there are other compelling reasons for viewing them as such. Mutual acceptability is the necessary counterpart of voluntary GSPs: if a developed country cannot offer an acceptable GSP, it will offer none. Furthermore, a developed country WTO member, when participating in trade negotiations and designing its GSP, is bound by its domestic political processes and the need to respond to the policy concerns of its electorate. A GSP must be “mutually acceptable” to a sufficient proportion of that country’s electorate.

With respect to Paradise’s GSP, the fact that Paradise is renowned for its high environmental standards bespeaks an electorate to whom environmental issues are of concern.<sup>16</sup> By challenging Paradise’s denial of preferential tariff treatment to all food imports from developing countries that achieve the Codex Maximum Residue, Arachnia is implying that unconditional preferential tariff treatment is, in fact, available – that Paradise could change the GSP unilaterally, regardless of its electorate. This implication is false. Indeed, the real choice for developing countries may be between a conditional preference and none at all.

c. **The implications of mutual acceptability: the need for flexible interpretation**

i. The disincentive effects of rigid interpretation

Paradise submits that if GSPs must be mutually acceptable, then developed countries must have as much flexibility as possible when designing them. A prescriptive list of permitted tariff preferences and/or a rigid interpretation of “generalized, non-reciprocal and non-discriminatory” would discourage developed countries from offering GSPs. If WTO

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<sup>14</sup>*ibid.*

<sup>15</sup> See Howse, R. “Back to Court After *Shrimp/Turtle*” at p.9

<sup>16</sup> Clarification to the case in response to Question 52

members fear that individual elements of their schemes will be scrutinised strictly by the WTO dispute settlement organs, this will make GSPs less attractive. Paradise endorses the Panel's remarks in *EC–Tariff Preferences*:

"The Panel recognizes that the Enabling Clause is one of the most important instruments in the GATT and the WTO providing special and more favourable treatment for the developing countries. The Panel has no doubt that WTO developing country Members often draw significant benefits from the operation of GSP schemes of developed country Members. The Panel is well aware that the setting up of the GSP was greeted very positively by the GATT contracting parties as a whole. With the above in mind, the Panel considers that it is important to be particularly cautious in the interpretation of its provisions."<sup>17</sup>

ii. The international law principle of *in dubio mitius*

Paradise submits that the fact that GSPs must be “mutually acceptable” makes it difficult to know exactly how extensive a legal obligation a developed country assumes when setting up a GSP. Some countries may be enthusiastic about being held to strict interpretations of “generalized, non-reciprocal and non-discriminatory”; others may be less so.

In light of such ambiguity, the general international law principle of *in dubio mitius* requires the interpreter of a treaty to adopt the reading that imposes the lightest restrictions on the sovereignty of the state that is bound. The AB endorsed this principle in *EC–Hormones*.<sup>18</sup> Paradise accepts that the Panel can judge whether its (Paradise’s) GSP is “generalized, non-reciprocal and non-discriminatory”. However, Paradise claims that, when interpreting the criteria, the Panel should err on the side of flexibility and lighter restrictions.

**d. The reasoning of the Panel and AB in *EC–Tariff Preferences***

*EC–Tariff Preferences* changed dramatically the degree of flexibility permitted by the WTO’s dispute settlement organs in interpreting “generalized, non-reciprocal and non-discriminatory”. The Panel in *US–Brazil Footwear* had already established that the scope and coverage of the Enabling Clause were justiciable.<sup>19</sup> However, the fact that both the WTO and UNCTAD had, until the EC case, tolerated a variety of different GSPs, many of which

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<sup>17</sup> *EC–Tariff Preferences*, Report of the Panel, para. 7.31

<sup>18</sup> *EC–Hormones*, Report of the Appellate Body, para. 165

<sup>19</sup> *US–Brazil Footwear*, Report of the Panel, para. 6.15

contained elements of selectivity and conditionality, suggested that the criteria were to be interpreted flexibly<sup>20</sup> – an approach that Paradise has commended *supra*.

In *EC–Tariff Preferences*, the Panel and AB analysed the meaning of “generalized, non-reciprocal and non-discriminatory” in unprecedented detail and with unprecedented strictness. However, Paradise observes that the Panel and AB in *EC–Tariff Preferences* failed to consider the words “mutually acceptable” when deciding how closely to police the criteria. This failure was noted by the Deputy US Trade Representative at a meeting of the WTO Dispute Settlement Body.<sup>21</sup> Paradise encourages the Panel to remedy this oversight and return to interpreting the criteria flexibly.

### 2.3. Paradise’s GSP is “generalized”

Having explained Paradise’s view of how strictly the ‘Footnote 3 criteria’ should be interpreted, Paradise proceeds to show that its GSP does, in fact, comply with the criteria.

The AB in *EC–Tariff Preferences* stated that, “the term “generalized” requires that the GSPs of preference-granting countries remain generally applicable.”<sup>22</sup> Paradise submits that, given that the very function of a GSP is to benefit developing countries, by “generally applicable” the AB must have meant “applicable to all developing countries”.

Paradise’s GSP is applicable to all developing countries, in that (i) any developing country with food imports containing <50% of the Codex Maximum Residue receives the preferential tariff rate; and (ii) any developing country with “pesticide-free” imports receives a zero rate. There is no list of intended beneficiaries (as was the case in the EC’s Drug Arrangements in *EC–Tariff Preferences*). The GSP is therefore “generalized”.

### 2.4. Paradise’s GSP is “non-reciprocal”

Article 31 of the Vienna Convention requires that expressions be interpreted to give effect to their ordinary meaning. The ordinary dictionary definition of “reciprocal” is “given, felt, or done in return”<sup>23</sup> – so a non-reciprocal tariff *preference* is one that does not require a *preference* to be offered in return. Paradise’s GSP programme does not require developing countries to

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<sup>20</sup> See, for example, *Trade Preferences for LDCs: An Early Assessment of Benefits and Possible Improvements*, UNCTAD, 2003, for an illustration of the range of GSPs

<sup>21</sup> The meeting was on April 20<sup>th</sup>, 2004. See <http://geneva.usmission.gov/press2004/0421DSB.htm> for details of the US’s response to the AB’s report

<sup>22</sup> *EC–Tariff Preferences*, AB Report, para. 156

<sup>23</sup> *Compact Oxford English Dictionary*, online edition

grant differential treatment to imports originating from Paradise. Nor does it require any concessions. The GSP programme is therefore “non-reciprocal”.

Paradise is aware of India's submission to the AB in *EC-Tariff Preferences* that the term “non-reciprocal” was intended by the UNCTAD to cover both concessions and conditions.<sup>24</sup> Paradise rejects this view. First, India itself admits that the First Conference of the UNCTAD resolved, “...developed countries should grant concessions to all developing countries and to extend to developing countries all concessions they grant to one another and should not, in granting these or other concessions, require any concessions in return from developing countries”<sup>25</sup> (underlining added). The resolution did not mention conditions. Second, had the Contracting Parties to the 1971 GSP Decision or the Enabling Clause wished to prevent developed countries from attaching conditions to preferential tariffs, presumably they could have added an unambiguous word such as “unconditional”.

### 2.5. Paradise's GSP is “non-discriminatory”

#### a. The meaning of “non-discriminatory”

##### i. De facto and de jure non-discrimination

Arachnia's argument that Paradise's GSP does not meet the conditions of the Enabling Clause is presumably based in part on the view that the GSP is discriminatory. This, in turn, presumably depends on a *de facto* understanding of what constitutes 'discrimination'. Paradise will now consider the flaws in, and alternatives to, such an understanding.

A ‘pure’ *de facto* understanding of “discrimination” would be based entirely on the *effects* of a country's GSP. Even if a developed country had made the same tariff available to every developing country, if one developing country's situation made that country unable to avail itself of the preferential rate, the result would be discriminatory. Note that the logical implication is *not* that a GSP offering identical, unconditional tariff preferences to all developing countries would be non-discriminatory; a uniform scheme would probably have *unequal* effects across developing countries, as some would be better placed than others to benefit from the preferential tariff. Rather, the object under the “unequal effects equals discrimination” logic is to produce the *same effect* in every developing country.

By contrast, a ‘pure’ *de jure* view would be that whether or not a GSP is discriminatory depends solely on how it is applied. Assuming that any conditions for preferential treatment did not explicitly exclude any countries, so long as the conditions applied equally to all

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<sup>24</sup> *EC-Tariff Preferences*, Report of the Panel, p.B-26

<sup>25</sup> *ibid.*, p.B-25



developing countries, a GSP would be non-discriminatory, although some countries might encounter greater practical difficulties in meeting the conditions than others.

Paradise submits that the *de facto* view has several unattractive features. First, by requiring a developed country to take account of every potentially relevant feature of every developing country, the *de facto* view places a huge burden on developed countries. It is impossible to have a completely non-discriminatory GSP. Second, the burden on the WTO's dispute settlement organs is no less heavy, as they have to decide whether or not a GSP takes account of every relevant feature of every developing country. Third, the very object of attaching conditions to preferential rates is to offer developing countries an *incentive* to improve their environmental care, labour rights, etc. A GSP guaranteed to produce identical effects from the outset would negate that incentive. Finally, the very idea of preventing unequal effects across developing countries is incoherent with respect to schemes such as Paradise's that reward *individual producers and importers*, not whole countries. If all of the farmers in Country A achieve 50% of the Codex Maximum Residue and in Country B one-third achieve 0% and two-thirds, 100%, one cannot say meaningfully that the GSP has been better or worse for A than for B. One can only compare the outcomes for different farmers.

ii. The AB's interpretation in *EC-Tariff Preferences*

In this case, both the Panel and the AB considered the meaning of "non-discriminatory" in great detail, as was mentioned *supra*. India and the EC differed sharply in their interpretations of the term. India submitted that *any* distinction between GSP beneficiaries was discriminatory; the EC maintained that only an *unjust or prejudicial* one was.<sup>26</sup> The Panel held, "the term "non-discriminatory" in Footnote 3 requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori limitations."<sup>27</sup> The AB overturned this conclusion,<sup>28</sup> holding, "Whether the drawing of distinctions is *per se* discriminatory, or whether it is discriminatory only if done on an improper basis, the ordinary meanings of "discriminate" converge in one important respect: they both suggest that distinguishing among similarly-situated beneficiaries is discriminatory."<sup>29</sup> (underlining added)

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<sup>26</sup> *EC-Tariff Preferences*, Report of the Appellate Body, para. 151

<sup>27</sup> *EC-Tariff Preferences*, Report of the Panel, para. 7.161

<sup>28</sup> *EC-Tariff Preferences*, Report of the Appellate Body, para. 156

<sup>29</sup> *ibid.*, para. 153

This does not make a *de facto* view of “discrimination” preferable to a *de jure* one. The AB held that the meaning of “similarly-situated” depended on the situation: “identical treatment [should be] available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the “development, financial and trade needs” to which the treatment in question is intended to respond”.<sup>30</sup> So “non-discriminatory” was interpreted in light of Paragraph 3(c) of the Enabling Clause, which requires differential treatments to be “designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries” (underlining added). The AB held that Paragraph 3(c) does *not* require a GSP respond to the needs of *all* developing countries. Nor must a GSP respond to the needs of *each and every* developing country. Indeed, the requirements to “respond positively” and, if necessary, to “modify” GSPs reflect the fact that developing countries have different needs and priorities that change with time. Beneficiaries of a GSP can be treated differently so long as the treatment addresses a development, financial or trade need that can be assessed by an *objective* standard.<sup>31</sup>

iii. Paradise's conclusions on the appropriate interpretation of “non-discriminatory”

Paradise accepts the AB's finding in *EC-Tariff Preferences* that even on a *de jure* interpretation of “non-discriminatory” that allows GSPs to offer conditional preferences, developed countries cannot set arbitrary conditions and apply them equally; conditions must be a means to an aim. Paradise also accepts that Footnote 3 of the Enabling Clause must be interpreted in light of Paragraph 3. Thus, the aim of a GSP must advance a development, financial or trade need. However, Paradise argues that the ‘objective standard’ part of the AB's findings means only that there must be evidence from a suitable source suggesting that (i) the aim *does* advance a development, financial or trade need, and (ii) the conditions are consistent with (ie, likely to advance) the aim. To go beyond this and require a quantified causal relationship between the aim and the needs, or between the conditions GSP and the aim, would be impossible to police and would effectively prevent developed countries from offering conditional preferences. Paradise also urges the Panel to interpret the words “similarly-situated” flexibly, for the reasons discussed *supra*.

**b. The aims and conditions of Paradise's GSP**

i. Environmental protection advances a legitimate development need

The Preamble to the WTO Agreement contains the following words:

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<sup>30</sup> *ibid.*, para. 173

<sup>31</sup> *ibid.*, para. 163

"[The contracting parties' relations]...should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development," (underlining added)

This Preamble states clearly that sustainable development is an objective of the WTO, and that protecting and preserving the environment is necessary to that objective. The AB in *US-Shrimp* stated that the language of the Preamble "must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement".<sup>32</sup> This suggests that the phrase "development need" in Paragraph 3(c) of the Enabling Clause should, in light of the Preamble, be interpreted as "sustainable development need". A GSP programme that encourages measures that protect the environment, and therefore improve the sustainability of economic development, meets an appropriately construed definition of a "development need". The recent Doha Declaration strengthens the argument for this reinterpretation of Paragraph 3(c), stating:

"We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive."<sup>33</sup>

Paradise has therefore demonstrated that the aim of its GSP does advance a suitable need.

ii. The "positive conditionality" of Paradise's GSP promotes environmental protection

The practice of offering developing countries preferential tariff rates if they meet certain conditions is known as "positive conditionality". Paradise's GSP uses positive conditionality to reward developing countries for reducing their use of pesticides in agriculture. Furthermore, the *tiered* structure of the GSP (ie, the reduced rate for achieving <50% of the Codex Maximum Residue and the zero rate for achieving "pesticide-free" food) gives

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<sup>32</sup> *US-Shrimp*, AB Report, para. 153

<sup>33</sup> Doha Declaration, para. 6

developing countries an incentive to *continue* to reduce their use of pesticides. Paradise submits that this reward-based scheme clearly encourages developing countries to reduce their use of pesticides in agriculture, and therefore improve environmental protection.<sup>34</sup>

iii. Paradise's GSP fulfils Paragraph 3 of the Enabling Clause

Paradise accepted, *supra*, the need to interpret Footnote 3 of the Enabling Clause, which reiterates the 1971 GSP Decision definition of a GSP, in light of Paragraph 3. The paragraph has two sections of relevance to Arachnia's complaint. Paragraph 3(a) requires GSPs to be "designed to facilitate and promote the trade of developing countries", while Paragraph 3(c), mentioned *supra*, requires them to be "designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries".

With respect to Paragraph 3(a), Paradise argues that its GSP obviously facilitates and promotes the trade of developing countries; this is inherent to its design. Paradise endorses Howse's comment on the EC's labour standards preferences:

"If the preferences were not designed to facilitate and promote trade, it is difficult to see how they could operate as an incentive to developing countries to comply with core labour standards; if a developing country's trade were not promoted or facilitated by a scheme of this design, it is very difficult to imagine why that country would bother electing to participate in it."<sup>35</sup>

Turning to Paragraph 3(c), Paradise argues that by offering different tariff rates to different developing countries, its GSP gives each developing country the flexibility and autonomy to select the appropriate trade-off between the costs and advantages of environmental protection for its own stage of development.

### 3. Article XX of the GATT

Article XX provides for general exceptions from international trade obligations for unilateral trade measures for specified purposes. Paradise relies in the present dispute on clauses which permit the adoption of measures "necessary to protect human, animal or plant life or health" (Article XX(b)) and (additionally or alternatively) measures "relating to the conservation of exhaustible natural resources if those measures..." (Article XX(g)).

It was held in *US-Shrimp* that Article XX could be used to justify measures that condition market access on the policies adopted by exporting Members. Indeed, the AB declared that

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<sup>34</sup> See the clarifications to the case provided in response to Questions 23 and 24

<sup>35</sup> Howse, "Back to Court After *Shrimp/Turtle*", pp.13-14

many of the heads of justification would otherwise be deprived of their purpose<sup>36</sup>. Therefore, even if Paradise's tariff preferences violate Article I of the GATT, they may nevertheless be justified under Article XX, and thus legal under the GATT.

### 3.1. *The extent of Paradise's obligations with respect to Article XX*

Article XX does not impose free-standing obligations on Members but may be invoked by way of an affirmative defence if it is established that there has been a breach of another of the provisions of the GATT. If the Panel accepts Arachnia's *prima facie* case, then Paradise must prove that (i) its tariff preferences qualify under one of the subheadings of Article XX; and (ii) they comply with the requirements of the introductory clause ("the chapeau").

The AB stated in *US-Gasoline* that the task of proving that the preferences conform to the conditions of the chapeau is "heavier...than that involved in showing that an exception...encompasses the measure at issue."<sup>37</sup> The AB also emphasised that the chapeau must be examined only after it has been established that the challenged measures fall within a subheading of Article XX.

### 3.2. *Paradise's GSP is permitted under Article XX(b) of the GATT*

Considering first the question of whether Paradise's trade measures fall within the scope of Article XX(b), it is necessary to establish, first, that the measures are intended to protect human health, and second, that they are necessary to attaining that objective.

#### a. **The GSP is intended to "protect human health"**

##### i. The risk of pesticides damaging the health of Paradise's citizens

There is conclusive evidence that pesticides have a deleterious effect on human health and that human health benefits from their elimination from the food chain.<sup>38</sup> Agricultural pesticides have been shown in numerous studies to be linked to various forms of cancer, liver dysfunction, and abnormalities in the reproductive system.<sup>39</sup> By favouring imports of goods uncontaminated by pesticides, Paradise aims to protect the health of its own citizens. That the reduction of the risks posed by pesticide residues to Paradise's citizens is a legitimate aim within the scope of Article XX(b) may be ascertained from comparable cases involving known health risks. For example, in *Thailand-Cigarettes* the Panel held that,

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<sup>36</sup> *US-Shrimp*, Report of the Appellate Body, para. 121

<sup>37</sup> *US-Gasoline*, Report of the Appellate Body, p.23

<sup>38</sup> See the clarifications to the case provided in response to Questions 36 and 47

<sup>39</sup> See for example Dich, Zahm, Hanberg, and Adami, "Pesticides and cancer", *Cancer Causes and Control* 8 (1997): 420-43.

“Smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b).”<sup>40</sup>

The Panel noted that this provision clearly allowed contracting parties to give priority to human health over trade liberalisation.<sup>41</sup> Similarly, in *US–Gasoline*, the Panel agreed that the policy of reducing air pollution resulting from the consumption of gasoline was a policy capable of coming within Article XX(b). In the subsequent *EC–Asbestos* case, where there was a dispute as to the gravity of the risks posed by chrysotile cement, the Panel held that the EC succeeded in showing that “the policy of prohibiting chrysotile asbestos...falls within the range of policies designed to protect human life or health.”<sup>42</sup>

ii. The risk of pesticides damaging the health of others

As stated above, the primary aim of Paradise’s trade policy is to restrict its own population’s exposure to harmful pesticide residues. Nevertheless, Paradise acknowledges that the policy may have additional beneficial effects: if developing countries act on the incentive to reduce their reliance on agricultural pesticides, this will also benefit the health of consumers in those countries and in other countries to which agricultural products are exported. Paradise’s submissions regarding the aims of its policies insofar as they relate to their local impact in developing countries will be made principally in connection with Article XX(g). However, since the issue of human health is only relevant to Article XX(b), it falls in this section to examine the legitimacy of these aspects of Arachnia’s policy and whether such aims are also within the scope of Article XX(b).

iii. Whether such health risks are within the jurisdictional limit of Article XX(b)

No clear pattern emerges from past disputes as to the matters covered by Article XX(b); the issue of whether there is an implied jurisdictional limit on the exceptions covered by the subheading remains an open question.<sup>43</sup> In *Tuna/Dolphin I* the Panel ruled that Article XX(b) was inapplicable to measures necessary to protect human, animal or plant life or health outside the jurisdiction of the party taking the measure.<sup>44</sup> In *Tuna/Dolphin II*, a differently constituted panel employed a different analysis and held that neither paragraph

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<sup>40</sup> *Thailand–Cigarettes*, Report of the Panel, p.20

<sup>41</sup> Secretariat Paper, WT/CTE/W/203

<sup>42</sup> *EC–Asbestos*, Report of the Appellate Body, p.56

<sup>43</sup> Condon, “GATT Article XX and Proximity of Interest”, p. 4

<sup>44</sup> *Tuna/Dolphin I*, Report of the Panel, para. 5.27

(b) nor paragraph (g) specifically limited the location of the resource or animal (or, presumably, people) in question.<sup>45</sup> Neither ruling, however, was adopted.

In *EC–Tariff Preferences*, the Panel found that “the policy reflected in the Drug Arrangements is not one designed for the purpose of protecting human life or health in the European Communities and, therefore, the Drug Arrangements are not a measure for the purpose of protecting human life or health under Article XX(b)”.<sup>46</sup>

This reasoning, it is submitted must be purely a matter of interpretation, for on a literal construction there is nothing in the text of Article XX that requires it to be correct. Paradise invites the Panel to make a ruling on this question.

**b. The GSP is necessary to “protect human health”**

i. Paradise must demonstrate the necessity of its means, not its aims

Paradise need not demonstrate that its public health or environmental policy objectives themselves are “necessary”, merely that the measures adopted in pursuit of its policies are “necessary” for achieving their respective aims. No AB or Panel Report has ever questioned the environmental or health policy choices made by a government. In *US–Gasoline* the AB emphasised that “WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement.”<sup>47</sup>

Granting an additional margin of preference to exports which are pesticide-free cannot be challenged on this ground since it represents an unambiguous advantage offered to any developing country meeting its requirements and not a restriction on trade as that term is properly understood. Paradise assumes, therefore, that it is the granting of GSP treatment to exports containing 50% or less of the Codex Maximum Residue level of pesticides, rather than some higher amount, that is challenged as being in some way unnecessary. It should be remembered, however, that Paradise has not imposed any additional tariff burden on any country: Paradise bans all imports containing more than 50% of the Codex level, while imports from developing countries containing 50% are charged at the ordinary MFN-bound rate. There is a clear distinction between the raising of trade barriers, which is unlawful, and the refusal to extend GSP treatment, to which no country has an automatic right, to countries

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<sup>45</sup> *Tuna/Dolphin II*, Report of the Panel, para. 5.20

<sup>46</sup> *EC–Tariff Preferences*, Report of the Panel, para. 7.210

<sup>47</sup> *US–Gasoline*, Report of the Appellate Body, p.30

that do not meet the same environmental standards as those to whom preferential treatment is accorded.

ii. The meaning of "necessary" in previous WTO and GATT jurisprudence

If it does fall to Paradise, notwithstanding the above remarks, to demonstrate the necessity of its tariff preferences, then assistance as to the meaning of 'necessary' in this context may be found in previous disputes. The test in respect of Article XX(b) was said in *Thailand-Cigarettes* to be one of "least-trade-restrictiveness", defined by the Panel in these terms:

"[T]he import restrictions imposed by Thailand could be considered to be 'necessary' in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives."<sup>48</sup>

This test was developed in *Korea-Beef*, in which the AB acknowledged that a measure would in some situations be justified as "necessary" within the meaning of Article XX even if others measures were available.<sup>49</sup> That dispute was concerned with the scope of Article XX(d) but in *Thailand-Cigarettes* the Panel considered that the word "necessary" should bear the same meaning in paragraph (b) as in paragraph (d).<sup>50</sup> Paradise, however, submits that a distinction can be drawn between the uses of the word in the respective paragraphs, since paragraph (d) applies to measures "necessary to secure compliance with laws or regulations" whereas paragraph (b) applies not to measures "necessary to secure compliance with health regulations" but to measures "necessary to protect health". Paradise therefore considers that the Panel would be justified in taking an even broader view of the notion of necessity than previous panels have done in the context of Article XX(d).

iii. Paradise's GSP fulfils the required definition of "necessary"

In *Thailand-Cigarettes*, Thailand imposed a virtual ban on imported cigarettes without restricting domestic cigarette production. It is therefore difficult to draw a meaningful analogy with the present dispute, in which the challenged trade restrictions are more modest and, most significantly, Paradise employs no pesticides in its agriculture<sup>51</sup>. Paradise could, of course, allow imports containing higher levels of pesticides to qualify for GSP

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<sup>48</sup> *Thailand-Cigarettes*, Report of the Panel, para. 75

<sup>49</sup> *Korea-Beef*, Report of the Appellate Body, paras. 159-167

<sup>50</sup> *Thailand-Cigarettes*, Report of the Panel, p. 20

<sup>51</sup> Clarifications to the case in response to Questions 6 and 7



treatment, but that would inhibit its ability to achieve its stated objectives relating to the levels of pesticides to be admitted into its territory for consumption by its citizens. These prescribed levels have been determined by a process involving extensive scientific analysis and lie outside the jurisdiction of the Panel. The tariff preferences which Arachnia seeks to challenge have been established by balancing many complicated factors, and their overriding purpose is to reduce the levels of pesticides imported into Paradise to the degree necessary in the manner least restrictive of developing countries' ability to trade. Paradise asks the Panel to note that (i) several developing countries already benefit from the GSPs that Paradise has established, including some tropical ones<sup>52</sup>; and (ii) a significant quantity of the products that Arachnia exports to Paradise are pesticide-free, so Arachnia is able to take advantage of the tariff preference granted to those products.<sup>53</sup>

The most effective means of eliminating pesticides altogether within Paradise would be to ban all food imports contaminated with them or, failing that, to impose prohibitive tariffs on such imports. However, Paradise has not adopted such a policy since to do so might be unreasonably restrictive of developing countries' ability to trade. The GSPs that have been implemented represent a fairer and more flexible approach balancing concern for the health of Paradise's citizens with the development needs of exporting countries.

The margins of preference offered by Paradise are "necessary" to protect its citizens' health, since (a) there is no adequate method for eliminating harmful pesticide residues from food imports and (b) the harm caused by pesticides is a serious one, hence the strict regulations governing their use in most developed countries. Nevertheless, Paradise takes extremely seriously its obligation to be fair and sensitive to the needs of developing countries. It is therefore unreasonable to criticise Paradise on the basis that it should have imposed even harsher restrictions on agricultural exports to demonstrate the necessity of its policy aims. To suggest that a more draconian policy would pass the necessity test whereas the measures in fact introduced do not would be simply illogical. Paradise's tariff classifications may therefore be described as "necessary for the protection of human health" and are within the scope of the exception from general trading obligations provided by Article XX(b).

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<sup>52</sup> Clarification to the case in response to Questions 19 and 32

<sup>53</sup> Clarification to the case in response to Question 16

### 3.3. Paradise's GSP is also permitted under Article XX(g) of the GATT

For Paradise's trade measures to conform to the terms of clause (g) of Article XX, it is necessary to establish that they relate to the conservation of exhaustible natural resources and that they are in conjunction with restrictions on domestic production or consumption.

#### a. The GSP concerns "the conservation of exhaustible natural resources"

##### i. Agricultural pesticides endanger aquatic life and reduce supplies of clean water.

The harmful effects produced by agricultural pesticides are not limited to the damage caused to human and animal health by the ingestion of chemical residues. Pesticides persist as pollutants that are particularly dangerous to aquatic life and reduce the availability of fresh water.<sup>54</sup>

##### ii. Both of these dangers fall within the definition of "exhaustible natural resources"

In *US-Gasoline*, the Panel held that clean air constituted an exhaustible natural resource for the purposes of Article XX(g)<sup>55</sup>; Paradise submits that clean water should be treated similarly. Furthermore, the jurisprudence of other tribunals (the Panel in *Canada-Herring*<sup>56</sup> and the AB in *US-Shrimp*<sup>57</sup>) has established that animal life subsisting in water may be considered a natural resource within the meaning of the subheading, notwithstanding the fact that living resources are capable of replenishing themselves, or that measures introduced for the protection of animal life may also qualify as legitimate under Article XX(b). Paradise argues that protection of animal life in exporting countries falls within the scope of Article XX(g) even if it is not a permitted aim under Article XX(b).

#### b. The GSP is sufficiently relevant to the conservation aims to be "related" to them

Measures adopted pursuant to policies aimed at the conservation of exhaustible natural resources under Article XX(g) need not be "necessary", according to the text of the clause, but must merely 'relate' to the stated policy aims. Thus Article XX(g) exempts a broader range of measures from the strict application of the general trade rules than does Article XX(b). This was confirmed by the AB in *US-Gasoline*. It is true that in *Canada-Herring* the Panel held that a measure has to be "primarily aimed at" the conservation of an exhaustible natural resource to be deemed to be "relating to" it in the context of Article XX(g). However, this interpretation seems to deny the expression "relating to" its ordinary meaning, contrary

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<sup>54</sup> See Marc Pallemarts, *Toxics and Transnational Law*, Hart, June 2003

<sup>55</sup> *US-Gasoline*, Report of the Appellate Body, para. 6.37

<sup>56</sup> *Canada-Herring*, Report of the Panel, para. 4.4

<sup>57</sup> *US-Shrimp*, Report of the Appellate Body, paras. 128-129

to Article 31 of the Vienna Convention, and has not always been followed in practice. In *US–Gasoline*, the disputed measure was upheld because without it the object of the policy, namely the reduction of air pollution, would have been “substantially frustrated”<sup>58</sup>. The policy of reducing the currently extensive use of pesticides in developing countries would, it is submitted, be similarly frustrated if such moderate trade measures as those under examination were found to be illegitimate.

In *US–Shrimp* the AB stated that the correct test to be applied in this context consists of two parts. First, are the objects and purposes of the measures genuine? Second, is there a “close and real” correlation between the measures and the ends pursued?<sup>59</sup> Paradise submits that both limbs of this test are satisfied. Measures which are provisionally authorised by Article XX(g) must of course also meet the more stringent requirements of the chapeau, to be examined below; however, the test applicable to paragraph (g) itself has been shown to be a relatively deferential one which establishes a basic threshold for conservation policies.

#### ***3.4. Paradise’s GSP is compatible with the chapeau of Article XX of the GATT***

Paradise acknowledges that any measures adopted pursuant to aims that conform to Article XX(b) and (g) must also satisfy the requirement in the chapeau to Article XX: they must not be 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”.

##### **a. The GSP does not constitute “unjustifiable discrimination”**

The AB defined the scope of the chapeau in *US–Shrimp*. It found that certain factors should be regarded as unjustifiable discrimination “in their cumulative effect”<sup>60</sup>. These were:

- (i) that the US’s regulations required other countries to adopt essentially the same programme requiring the use of turtle excluder devices;
- (ii) that the US embargo was applied to all imports from non-registered countries rather than to those caught using turtle-safe technology;
- (iii) that the US had not negotiated sufficiently before enforcing its laws; and
- (iv) that the US did not afford equal treatment to other countries in its application and enforcement of the law.

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<sup>58</sup> *US–Gasoline*, Report of the Appellate Body, p. 19

<sup>59</sup> *US–Shrimp*, Report of the Appellate Body, para. 141

<sup>60</sup> *US–Shrimp*, Report of the Appellate Body, para. 176

These findings accord with the Panel's remarks in *US–Spring Assemblies*, that it is the application of the measure and not the measure itself that needs to be examined for conformity with the chapeau.<sup>61</sup> This view received further support in *US–Gasoline*, where the AB stated that the chapeau addresses “not so much the questioned measure or its specific contents as such, but rather the manner in which the measure is actually applied”<sup>62</sup>, and in *EC–Asbestos* where the Panel confirmed that its task was to examine “whether the application of the Decree constitutes a means of arbitrary or unjustifiable discrimination”<sup>63</sup> (underlining added). Paradise submits that no unlawful factors comparable with those listed above may be discerned in Paradise's application of its policies, primarily because it does not concern any mandatory regime prohibiting imports but rather a system of preferences under which developing countries may benefit from lower or non-existent tariffs. In particular, Paradise has taken care to avoid criticism based on factor (ii) above by applying its tariffs to individual exports of products rather than to all products emanating from particular countries. This allows flexibility to producers in developing countries who are able to reduce their dependence on pesticides for any particular crop at any time.<sup>64</sup> Moreover, the economic effect on Arachnia's industry of Paradise's policies should not be especially severe, since Arachnia is not highly dependent on its exports to Paradise.<sup>65</sup>

**b. The GSP does not constitute “arbitrary discrimination”**

The AB in *US–Shrimp* found that the measure at issue amounted to arbitrary discrimination because, through the application of the measure, “a single, rigid and unbending requirement” was imposed on the exporting countries.<sup>66</sup> As noted above, Paradise's policies do not impose any mandatory requirements on any exporting country other than by banning exports from any country containing more than 50% of the maximum Codex pesticide level, which of course is not discriminatory. Neither do they discriminate between countries where the same conditions prevail, since the same tariff preferences are offered to all developing countries. To hold otherwise would be to require developed countries such as

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<sup>61</sup> *US–Spring Assemblies*, Report of the Panel, para. 56

<sup>62</sup> *US–Gasoline*, Report of the Appellate Body, p. 22

<sup>63</sup> *EC–Asbestos*, Report of the Panel, para. 8.226

<sup>64</sup> Clarification to the case in response to Question 58

<sup>65</sup> Clarification to the case in response to Question 54

<sup>66</sup> *US– Shrimp*, Report of the Appellate Body, para. 177

Paradise to tailor their import tariffs to each individual country or region, which would be almost impossible to undertake lawfully within the GATT.

**c. The GSP is not a “disguised restriction on international trade”**

In *EC–Asbestos* the Panel examined the scope of this requirement and concluded that, since any measure falling within Article XX is likely to represent some form of restriction on trade, the key to the provision lies in the word “disguised”. Paradise interprets these findings to mean that to constitute a “disguised” restriction, its trade measures would have to have been adopted to restrict trade, under the guise of environmental protection. Paradise emphasises that: (i) it is heavily dependent on exporting countries for its food supply<sup>67</sup> and has no wish to restrict trade except insofar as to give effect to overriding health and environmental policies; (ii) those policies are solely health-oriented and environmental in nature; and (iii) its policies have been designed in a manner sensitive to the trading needs of developing countries.

In *EC–Asbestos*, the Panel examined the “design, architecture and revealing structure” of the measure at issue to determine whether it had protectionist objectives.<sup>68</sup> Clearly, the abolition of import tariffs in respect of pesticide-free products cannot be characterised as a protectionist measure.

Paradise therefore submits that its GSPs do not infringe the chapeau of Article XX.

**3.5. The relationship between Article XX, the SPS Agreement and the Codex**

**a. The SPS Agreement effectively clarifies what is permissible under Article XX**

The SPS Agreement allows countries to adopt measures to protect human health with the same provisos as Article XX of the GATT. Article 2(4) of the Agreement provides, “sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).” The Agreement considers at greater length than Article XX the type of provisions that are acceptable. If Paradise demonstrates that its measures are allowed under the Agreement, then they will also be permitted under Article XX(b). Otherwise, Paradise will rely solely on its defence under Article XX(g).

**b. Paradise’s GSP is compatible with the SPS Agreement**

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<sup>67</sup> Clarification to the case in response to Question 4

<sup>68</sup> *ibid.*, para. 8.236

Paradise submits that the additional margin of preference granted to pesticide-free imports cannot be challenged under the SPS Agreement, and that any substantive challenge must be levelled at Paradise's decision to extend GSP treatment to products containing less than 50% of the Codex Maximum Residue. The measures introduced by Paradise are, *prima facie*, within the terms of paragraph (1)(b) of Annex A of the SPS Agreement, since they are applied "to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods..."

i. Paradise's GSP is not discriminatory

A central principle of the SPS Agreement is that of non-discrimination, articulated in Article 5(5) of the Agreement. It was discussed in *EC-Hormones* by the AB, which based its ruling on the intent behind the measure in question and not on the effects of the measure. The intent of Paradise's tariff measures is not to discriminate unjustifiably or arbitrarily between exporting countries but to protect the health of its citizens and influence environmental policy in exporting developing countries.

ii. Paradise's GSP meets the required standard of scientific justification

All three cases brought before the AB concerning the Agreement have revealed its strict science-based requirements. The relationship between the standards imposed by importing countries and recognised international standards such as the Codex is central to this requirement. According to Article 3(1), SPS measures "shall be based on" international standards. The AB in *EC-Hormones* overruled the Panel's finding that "based on" should be read as "conforming to": members *can* use SPS measures offering different levels of protection than international standards.

If, as the AB held, the standards established by international organisations are not binding norms, the standard required by Paradise's GSP is clearly "based on" the Codex within the sense of Article 3(1). Paradise submits that the importance of basing SPS measures on international standards lies less in ensuring uniform levels of protection than in making the standards in different countries easily comprehensible. A standard that is in a simple and direct mathematical relationship with the Codex standard ought to be entirely acceptable.

Under Article 3(3) of the SPS Agreement, "Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of...protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of...protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5." According to footnote (2) to this

paragraph, there is a scientific justification if, “on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.” Paradise submits that even if its standards are not found to be “based on” international standards they are in any case justified by Article 3(3).

While internationally recognised, the Codex standards are not universally accepted as establishing safe levels of pesticides for human consumption. For example, the Codex permits about 40 pesticides for which the US permits no residues on perishable goods. Of those, the Environmental Protection Agency classifies six as carcinogens. Scientific evidence may justify individual countries adopting more stringent standards than those of the Codex to safeguard human health, under Article 3(3). In taking decisions of this nature, footnote (2) to the SPS Agreement makes clear that, provided they make proper use of scientific findings, members are to enjoy considerable autonomy in deciding what measures are necessary to protect human health. This is confirmed by paragraph 5 of Annex A, where an “appropriate level of sanitary protection” is defined as “the level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.” There follows a note: “Many Members otherwise refer to this concept as the “acceptable level of risk”.”

Paradise therefore argues that its tariffs conform to the SPS Agreement. The wording of Article 2(4) suggests that, if this is the case, there will have been no violation of Article XX(b) of the GATT, since the obligations imposed by the SPS Agreement, according to the Panel in *EC-Hormones*, “go significantly beyond and are additional requirements for invocation of Article XX(b).”<sup>69</sup>

#### PRAYER FOR RELIEF

Paradise therefore asks the Panel to endorse its tariff preferences for developing countries as being permissible under either or both of Article XX of the GATT and the Enabling Clause. Paradise asks the Panel to confirm that its GSP scheme is fully compliant with WTO law.

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<sup>69</sup> *EC-Hormones*, Report of the Panel, para. 8.41