

Bananas: Differentiating Tariffs According to Social, Environmental and/or Economic Criteria

By Liz Parker and James Harrison

On behalf of EUROBAN (European Banana Action Network)

**The research for this paper was kindly supported by the
International Union of Food, Agricultural, Hotel, Restaurant,
Catering, Tobacco and Allied Workers' Associations (IUF)**



January 2004

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About EUROBAN

The European Banana Action Network is a grouping of over 30 European civil society organisations in 12 countries. Since EUROBAN's founding in 1994, the network's members have cooperated in defence of workers' and environmental rights, in advocating a reform of the European banana import regime and in promoting fair trade bananas. Members include national and international trade unions, alternative trading organisations that market fair trade bananas and development and solidarity organisations.

The views expressed in this paper are those of the authors; they may or may not be shared with EUROBAN members.

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Executive Summary

The banana industry is witnessing a race to bottom in both prices and social and environmental conditions. Trade union repression is still common on banana plantations throughout Latin America. Small farmers, unable to compete with 'cheap' bananas continue to be squeezed out of the market. Expansion of banana production in West Africa, Ecuador and Brazil is putting pressure on wages and working conditions.

Preparations are under way for the transition to a single tariff regime in the European Communities (EC), the world's biggest importer of bananas. The change from the current tariff-quota system will have important consequences for the future of banana workers and small farmers. It is clear that the EC's Common Market Organisation of Bananas (COMB) has not prevented the race to the bottom, but analysts agree that the COMB has slowed down the acceleration.

A trade policy mechanism is needed in order to provide the framework for a sustainable banana industry. Taking the change to a tariff-only regime as a catalyst, this paper explores the potential of tariff differentiation to enable economic, social and environmental sustainability in the banana industry.

The European Communities is in the process of negotiating free trade areas with the ACP states to allow them to continue to benefit from free market access into the European Communities. Yet, if these states receive tariff-free treatment regardless of social, environmental and economic conditions, it will have serious consequences for a system of tariff differentiation. The question is whether bananas should be included in these free trade agreements, and if so, should the agreements include a labour rights provision.

The principle behind tariff differentiation is that bananas produced according to defined social, environmental and/or economic criteria receive tariff reductions. It is suggested that tariff differentiation is permissible under existing WTO rules, provided that the criteria fall within the objectives outlined in Article XX. Alternatively, it is suggested that lower tariffs may be applied to bananas carrying a consumer label, such as the Fairtrade label, because these bananas are not "like products" for the purposes of the non-discrimination articles of the GATT.

Tariff differentiation may take the form of a single level of tariff reduction or a multiple tier of criteria, which can provide an incremental incentive to countries to implement the criteria. A further question is raised whether individual shipments should be certifiable or whether a country must guarantee the implementation of the criteria for all its exports before it qualifies for tariff reductions.

The paper raises many more questions than it answers but it seeks to provoke a debate on what tariff differentiation on the basis of sustainability may actually look like, as well as the legal possibility and political feasibility of implementing a system of tariff differentiation.

Introduction

This paper is an attempt to put some 'flesh on the bones' on the idea of differentiating tariffs according to social, environmental and/or economic criteria to enable a sustainable banana industry - one that is socially just, economically fair and environmentally.

The paper is a consultation paper and does not claim to cover all the issues that might arise. It has been produced in order to provoke debate and discussion by raising questions, with some attempts at answers.

The authors begin this paper from the premise that during the discussions on the future of the banana industry between 2004 and 2006 - by which time the European Commission has agreed to modify its banana import regime - the workers, small farmers and the environment **must** be central to these discussions. As many governments and companies have accepted - and which the proliferation of social and environmental criteria in the industry attests to - the poverty in which banana workers and farmers are living and the daily fear of violence, of losing the jobs or being blacklisted that many face, as well as the negative environmental impact is not acceptable in a modern and efficient industry.

Trade policy can complement the existing responsibilities and rights of governments, companies and workers in relation to sustainable trade. States currently have the obligation to abide by international agreements they have ratified and to implement and/or reform national laws. States also have a right to sovereignty. Companies have a responsibility to abide by national laws and have a responsibility for the sources of their supplies. Workers have rights under national and international law, and have a right and responsibility to organise and bargain collectively to improve conditions.

The social, environmental and economic conditions in the banana industry, similar to other commodities, continue to deteriorate. A trade policy framework that supports and enables a sustainable banana industry is needed to complement and facilitate these rights and responsibilities.

Whilst one of the catalysts for this paper is the proposed changes to the EC's banana import regime by 2006, the proposal for a system of tariff differentiation is in no way limited to the EC.

This paper is structured in four sections. The first introduces the purpose of tariff differentiation. The second section raises broader contextual issues which need to be borne in mind whilst considering tariff differentiation. In part three the WTO compatibility of tariff differentiation is discussed, before looking in part four at what tariff differentiation may look like in practice, raising key questions that must be answered.

Part I - The Objectives of Tariff Differentiation?

It is widely accepted by many involved at different parts of the banana supply chain that the social, environmental and economic conditions within the banana industry need improving. This paper does not aim to describe the conditions in the industry, as these are well-documented elsewhere. (Useful starting points include Banana Link's website at www.bananalink.org.uk, the recent UK Food Group publication *Food, Inc: Corporate Concentration from Farm to Consumer* and the UNCTAD website at http://www.unctad.org/en/docs//ditccom20031&c1_en.pdf, Chiquita's Corporate Social Responsibility report, the Human Rights Watch report, *Bitter Harvest*, on obstacles to freedom of association and child labour in Ecuador available at www.hrw.org).

Clear objectives must be set for a system of tariff differentiation. This must be seen in contrast to which criteria could be used as a basis for the tariff differentiation, which is dealt with in Part IV of this paper. The working objectives for the system of tariff differentiation put forward in this paper are:

- to halt the race to the bottom in terms of social, environmental and economic conditions within the banana industry
- to enable a socially just, environmentally sound and economically fair banana industry for ALL actors, in particular to enable men and women banana workers and farmers to sustain their livelihoods in dignity and to reduce the negative environmental impact.

The following list includes some of the key issues facing banana workers, farmers, their communities and the environment, that currently need addressing.

The extent to which any trade policy mechanism addresses these issues depends on the political will of all lobbyists and decision makers to enable the men, women and children that produce bananas to live and work in decent conditions.

1. *Social issues*

- Lack of freedom of association and right to collective bargaining, and discrimination of and threats against workers' representatives and access to workplaces
- Erosion of small farmers' livelihoods (through rising costs, falling prices, 'quality' demands)
- Non-payment of a living wage
- Negative impact on workers' and farmers' health through pesticide usage
- Excessive hours of work
- Sexual harassment of women workers
- Discrimination against women and migrant workers
- Child labour
- Poor health and safety protection of workers
- Lack of maternity rights
- Lack of rights to land worked by family farmers
- Irregular employment relationships - few permanent contracts for workers and farmers
- Lack of consultation where employment / contracts may be jeopardised
- Weak labour inspectorates

2. *Environmental issues*

- Pollution of watercourses
- Soil degradation, erosion and contamination
- Poor waste management
- Deforestation (of primary and secondary forest)
- Poor environmental management
- Excessive use of pesticides and poor uptake of organic methods
- Loss of plant, animal and insect biodiversity

3. *Economic issues*

In discussions around social and environmental criteria in trade, very often economic issues are left to one side. The authors of this paper however, argue that sustainability **must** include economics - without payment of prices that cover the costs of production, other social and environmental improvements cannot be made.

- Costs of production not covered by prices paid to producers
- Oversupply of bananas on the world market
- Increased market share of countries with poor social and environmental conditions
- Excessive profit-making upstream in the banana chain
- Trading relations characterised by short-term contracts or weak contracts
- High dependence on bananas by some banana exporting countries
- Increasing concentration of buying power in the hands of a small number of importing and exporting companies and retailers

Part II - Considering the Wider Trade Policy Context

1. The Impact of Free Trade Areas

One of the most important exceptions to the rules of the General Agreement on Trade and Tariffs (GATT) is found in Article XXIV providing for the creation of free trade areas or customs unions. Article XXIV permits countries to grant tariff free treatment to “substantially all” products from countries with which it has formed a free trade area or customs union, without having to extend tariff free treatment to products from all other contracting parties.

The negotiation of an increasing number of free trade areas by the European Communities poses a threat to efforts to improve sustainability through a system of differentiated tariffs on the basis of social, environmental and/or economic criteria because products from countries included in a free trade area could receive tariff free treatment, regardless of whether they have been sustainably produced.

One such threat is posed by the negotiation of a free trade agreement between the European Communities and Central American countries. All Central American countries, with the exception of El Salvador, are banana exporting countries. Should bananas be included in the free trade area or should they be excluded?

The European Communities is also seeking to negotiate regional free trade areas or Economic Partnership Agreements (EPAs) with ACP states in order to replace the preferences granted under the Lomé/Cotonou Conventions. The first negotiations began in September 2003 between the European Communities and states belonging to the Economic Community of West African States (ECOWAS) and the Economic and Monetary Community of Central Africa (CEMAC). ECOWAS includes Ivory Coast and Ghana, whilst CEMAC includes Cameroon - all countries exporting increasing numbers of bananas to the European Communities. Working conditions on plantations in Ivory Coast and Cameroon are poor according to research by Banana Link although the sole plantation in Ghana produces Fairtrade certified bananas.

The existing WTO waiver for the EC-ACP agreement - that gives zero tariff access to the European market for ACP bananas - continues until the end of 2007. Can this exist in conjunction with a system of tariff differentiation based on social, environmental and/or economic criteria?

It is likely that the EPAs will include bananas given that ACP bananas already receive tariff free treatment into the European Communities. In addition, Article 37 of the Cotonou Agreement provides that *‘trade liberalisation should build on the acquis and shall aim at **improving current market access** for the ACP countries’* (emphasis added).

One solution to the threat to the achievement of the objectives of a system of tariff differentiation on the grounds of social, environmental and/or economic criteria, is to include some sort of tariff conditionality in the EPAs. Examples of such tariff conditionality already exist in other tariff preference schemes, for example the United States’ Generalised System of Preferences and its unilateral tariff regional preferences. Both the Caribbean Basin Initiative and Andean Trade Pact allow tariff free treatment to be withdrawn if the beneficiaries fail to implement internationally recognised workers rights¹.

Similarly, the European Communities’ GSP provides in Article 26 that *‘the preferential arrangements provided for in this Regulation may be temporarily withdrawn, in respect of all or of certain products, originating in a beneficiary country, for any of the following reasons ... (a) practice of any form of slavery or forced labour as defined in the Geneva Conventions of 25 September 1926 and 7 September 1956 and ILO Conventions No 29 and No 105; and (b) serious and systematic violations of the freedom of association, the right to collective bargaining, or the principle of non-discrimination in respect of employment and occupation, or the use of child labour, as defined in relevant ILO Conventions...’*².

The labour rights condition has been used against Burma (Myanmar) following a joint complaint in June 1995 by the International Confederation of Free Trade Unions and the European Trade Union Federation³. The Commission examined the complaint in accordance with the procedure

¹ Scherrer and Greven, *Global Rules for Trade - Codes of Conduct, Social Labeling, Workers Rights’ Clauses*, 2001, Westfälisches Dampfboot, p. 70

² Regulation 2501/2001, *Official Journal of the European Communities*, L346/1, 31 December 2001, Article 26

³ Der-Chin, ‘The Human Rights Clause in EU Agreements’, *European Law Journal*, 2003, Vol. 9

laid out in the GSP Regulation and it made a proposal in February 1997 that the European Council withdraw GSP benefits from Burma, adopted by a qualified majority in Regulation 552/97⁴.

The recently negotiated free trade agreements between United States on one hand and Jordan and Chile on the other hand are the first to include in the body of the agreement key provisions on the protection of labour rights⁵, although the North American Free Trade Agreement contained a similar provisions in a side agreement - the North American Agreement on Labour Cooperation. However, it is important to note that these agreements do not provide for the enforcement of international labour rights, rather, they provide that *'a party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties'*⁶ and a party may request consultations if it considers the other party is not enforcing its labour laws in such a manner.

Since 1992 the European Communities has included a human rights clause in all its agreements with third countries⁷. Thus Article 9 of the Cotonou Agreement provides that *'Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the parties and constitute the essential elements of this Agreement'*. Article 96 permits, as a last resort, suspension of the Agreement if a party fails to fulfill an obligation stemming from respect for human rights, democratic principles and the rule of law⁸.

Article 50 of the Cotonou Agreement also reaffirms the Parties' commitment to the internationally recognised core labour standards, as defined by relevant ILO Conventions and the Parties agree to co-operate in this area whilst maintaining that labour standards should not be used for protectionist purposes.

Would it therefore be possible and politically feasible to include a conditionality provision in the EPAs, allowing the suspension of tariff free treatment if a party fails to respect human rights, including core labour rights as outlined by ILO Conventions?

2. Impact of International Negotiations on Agriculture on Deficiency Payments to EC Producers

The WTO negotiations on agriculture are incredibly complex and at the current time it is unclear what the outcome will be. Of particular significance for the international banana industry is what the impact will be on the European Communities' deficiency payments for banana producers and how this will effect negotiations for the new EC banana import regime?

3. Quotas and Commodity Agreements

Can the race to the bottom in social, environmental and economic conditions in the banana trade be tackled solely by a system of tariff differentiation? This paper does not discuss other options but it is worthwhile noting that, in relation to supply and demand, production quotas have been set in the past by international commodity organisations in order to control prices on the international market, with varying degrees of success.

One important consideration for this paper is the implications of having quotas alongside a differentiated tariff on the basis of sustainability.

4. The ILO and Labour Rights

One of the primary reasons that this paper focuses on the potential for tariff differentiation is the failure of existing mechanisms to protect workers, small farmers or the environment, and indeed many companies, consumers or the EC.

⁴ Der-Chin, op cit

⁵ United States Trade Representative, The US - Jordan Free Trade Agreement: Fact Sheet, 2003, available at www.ustr.gov, checked 20/12/2003

⁶ US - Chile Free Trade Agreement, Article 18(2)(1)(a)

⁷ Der-Chin Horng, op cit

⁸ Der-Chin Horng, op cit

One of the weaknesses in the existing system is the enforcement mechanisms of the International Labour Organisation. Between 1960 and 1995 only twenty complaints of labour rights violations were raised through the constitutional complaints procedure⁹ and of these, only 9 were referred by the Governing Body to a Commission of Inquiry¹⁰. It was not until 2000 that the possibility of sanctions under Article 33¹¹ of the ILO Constitution was first utilised by the International Labour Conference against Burma (Myanmar) for its failure to comply with the recommendations of the Commission of Inquiry into violations of the Forced Labour Convention. The ILO Conference called upon governments and employers to reconsider their relationships with Burma (Myanmar) and the Director General requested other international organisations to reconsider their co-operation with the country¹².

An additional limitation of the ILO procedure is that states must have ratified ILO Conventions before the inter-state complaints procedure can be invoked.

The question is whether a strengthened ILO carry out the any of the objectives that this paper set in the introduction?

5. Labour Rights Incentive in the Generalised System of Preferences (GSP)

The Generalised System of Preferences (GSP) is a scheme of tariff preferences in favour of developing countries, a consequence of lobbying by developing countries in the 1960s which led to the agreement of the 1971 GATT Waiver, later incorporated into the 1979 Enabling Clause. These instruments provide an exception from the Most Favoured Nation principle in Article I:1 of the GATT, permitting countries to differentiate between developing countries and developed countries in their tariff treatment.

Most developed countries¹³ operate a GSP scheme, although product coverage and margins of preference vary from scheme to scheme. Developed countries are under no obligation to provide tariff preferences to developing countries¹⁴, but if they do, they must be 'generalised, non-reciprocal and non-discriminatory'¹⁵.

The European Communities GSP differentiates between non-sensitive products which receive duty-free treatment and sensitive products which receive tariff reductions of 3.5 percentage points on ad valorem (on value) duties or 30% on specific (quantity) duties, although there are exceptions which receive a lower reduction, currently including clothing and textiles and ethyl alcohol. Currently, bananas are totally excluded from the GSP scheme.

As noted above, under the United States' and European Communities' GSP, tariff preferences may be withdrawn for failure to implement internationally recognised workers rights.

The European Communities' GSP scheme also contains some Special Incentive Arrangements whereby eligible developing countries can claim **additional** tariff preferences of up to ten percentage points on ad valorem tariffs and up to 60% reduction on specific tariffs, if they meet certain conditions relating to labour rights and/or the environment¹⁶ - in effect, tariff differentiation on the basis of social, environmental and/or economic criteria. If bananas were included in the European Communities' GSP, developing countries may be able to qualify for an additional tariff reduction under the Special Incentive Arrangement to Protect Labour Rights¹⁷.

Would it be possible and politically feasible to include bananas in the European Communities' GSP, possibly as a special product with a lower tariff reduction as are clothing and textiles? There is no need to worry that desensitising bananas would give those Latin American states qualifying

⁹ ILO Constitution, Articles 26-33

¹⁰ Reeve, *Policing International Trade in Endangered Species*, 2002, The Royal Institute for International Affairs, p.294

¹¹ Article 33 provides that '*in the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry ... the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith*'.

¹² The Governing Body established a Commission of Inquiry against Belarus in November 2003

¹³ Including United States, Canada, the European Communities, Switzerland, Norway, Australia, Japan, New Zealand, Belarus, Bulgaria, the Czech Republic, the Slovak Republic, Poland, and Hungary

¹⁴ 1971 Decision explicitly states the grant of tariff preferences 'does not constitute a binding commitment' and 'it does not in any way prevent their subsequent withdrawal in whole or in part'.

¹⁵ 1979 Enabling Clause, paragraph 2(a)

¹⁶ See the UNCTAD guide available at <http://www.unctad.org/en/docs/itcdtsbmisc25rev2en.pdf>, checked 20/12/2003

¹⁷ Dickson, *Towards an International Banana Agreement*, May 2003, EUROBAN, p. 10

for duty free treatment under the Special Drugs Arrangement tariff free entry for their bananas because only those products marked with a D in Annex IV of the GSP Regulation are actually included in this scheme and there is no need to include bananas.

Two recent developments should be noted:

1. The current European Communities' GSP scheme is due to expire at the end of 2004 and proposals for its continuation are already under consideration. One proposal from the European Commission is to make it easier to use the Special Incentive Arrangements to Protect Labour Rights, allowing developing countries to qualify if they have '*engaged in significant ongoing efforts to incorporate and apply the substance of these standards*'¹⁸.

2. It is also worth considering the consequences of the WTO Panel decision in the Case Concerning the Conditions for the Granting of Tariff Preferences to Developing Countries brought by India. One of the main questions the Panel faced was whether the Special Drugs Arrangement, providing additional benefits to those countries which the European Commission believe face an acute drug problem, is consistent with the non-discriminatory requirement in the Enabling Clause.

In its decision of the Panel held that '*if the Panel were to uphold the European Communities' interpretation the way would be open for the setting up of an unlimited number of special preferences favouring different selected developing countries... the end result would be the collapse of the whole GSP system and a return back to special preferences favouring selected developing countries, precisely the situation that negotiations aimed to eliminate in the late 1960s*'¹⁹ and therefore it concluded that '*the term non-discriminatory in footnote 3 requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation*'²⁰.

What are the implications of this decision for the Special Incentive Arrangements to Protect Labour Rights and the Environment? It is suggested that there is an important difference between the Labour Rights Incentive and the Drugs Arrangement, because the latter differentiates between developing countries on the basis of their **characteristics** whilst the former does so on the basis of their **conduct**²¹. In other words, some countries cannot by definition qualify for the tariff reduction under the Special Drugs Arrangement, whereas all countries can comply with core labour rights²².

¹⁸ European Commission, Proposal for a Council Regulation amending Regulation (EC) No 2501/2001, 2003/0259 (ACC), 29 October 2003, Article 1(4)

¹⁹ Panel Report, EC - Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/R, 1 December 2003, para. 7.102

²⁰ Panel Report, EC - Conditions for the Granting of Tariff Preferences to Developing Countries, op cit, para. 7.161

²¹ Harrison, 'GSP Conditionality and Non-Discrimination', *International Trade Law and Regulation*, 2003, Vol. 9, p. 164

²² Bartels argues that '*when the relevant conditions require countries to undertake to comply with standards which they have already recognised as binding standards, or which are binding on them under customary international law ... it may be argued that the respective Members are deemed to be in a situation equal to that of Members benefiting from special preferences under a GSP program*', in 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program', *Journal of International Economic Law*, Vol. 6, 2003, p. 525

Part III - WTO Compatibility of Tariff Differentiation?

1. Conditionality in the WTO

The proposal to differentiate banana tariffs on the basis of social, environmental and/or economic criteria envisages that bananas that meet the criteria would be subject to lower tariffs.

To comply with WTO rules, a system of tariff differentiation must either treat all like products identically in accordance with the non-discrimination provisions of the GATT, such as Article III, otherwise it must fall within the exceptions outlined in Article XX.

It is suggested in this section that the WTO rules do permit certain types of trade conditionality, and that therefore a system to differentiate tariffs on the basis of social, environmental and/or economic criteria is compatible with WTO rules. In *US - Shrimp* the WTO Appellate Body held that '*conditioning market access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX*²³. This case involved the imposition of an import prohibition by the United States on shrimp that had been caught using fishing techniques that were harmful to sea turtles.

The proposal for tariff differentiation put forward in this document is less trade restrictive than the import prohibition applied in *US - Shrimp*. All states would be able to import bananas into the European Communities, although those bananas produced in accordance with minimum social, environmental and/or economic criteria would be subject to a lower tariff.

2. Like products

Under the rules of the GATT, principally Article I and III, products that are "like" must be treated identically. One purpose of this rule is to prevent discrimination on a geographical basis. However, in many cases it also prevents products being treated differently because of the way they have been produced.

The most important indicator of "likeness" identified by WTO panels is whether two products are in a competitive relationship²⁴. It follows that the concept of likeness is relative and two products that are "like" in one market are not necessarily "like" in markets in other countries.

In decisions applying Article III, it has been held that three factors should be taken into account: '*the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the products' properties, nature and quality*²⁵.

It is important to note that there is no formal distinction in the text of the GATT between the harm caused by a product's consumption and the harm caused by its production. It is true that the way that a product is produced is often irrelevant to the determination of "likeness", but this is simply a reflection of that fact that many consumers do not consider the production conditions when they purchase products. In *Spain - Coffee*, the GATT Panel stated that differences resulting from geographical factors, cultivation methods, the processing of coffee beans, and genetics were not a sufficient reason to allow differential tariff treatment of 'Colombian Mild and Other Mild' coffee from 'Unwashed Arabica, Robusta and Other' coffee - in other words coffee in its end-use was universally regarded as a single product intended for drinking²⁶.

At first sight, this decision poses an obstacle to the argument bananas produced in different ways are unlike. Like the coffee in the above case, all bananas share similar physical characteristics and they are all intended for eating. However, there is an increasing awareness amongst consumers about where food comes from, especially following such incidents as the BSE and Foot and Mouth epidemics.

Is it true to say that all bananas are physically identical? In *EC - Asbestos*, the WTO Appellate Body considered the "likeness" of asbestos and PCG fibres. Although they fulfilled similar

²³ Appellate Body Report, *US - Shrimp*, WT/DS58/AB/R, 12 October 1998, para. 121

²⁴ In *Japan - Taxes on Alcoholic Beverages*, the Appellate Body held that it is appropriate to consider 'elasticity of substitution as one means of examining [the] relevant markets'.

²⁵ Report of the Working Party on Border Tax Adjustments, BISD 18S/97, para. 18

²⁶ Spain - Tariff Treatment of Unroasted Coffee, *Handbook of GATT*, p. 240

functions, *'in the case of chrysotile asbestos fibres, their molecular structure, chemical composition, and fibrillation capacity are important because the microscopic particles and filaments of chrysotile asbestos are carcinogenic in humans'*²⁷. An argument exists, although it would depend on some scientific corroboration, that organic foods are unlike other foods which contain significant pesticide residues.

Nor does the conclusion that physical similarity denotes likeness appreciate the sophistication of the "like product" test. Whilst all bananas may be yellow and bendy, the physical characteristics of a product is only one of the criteria specified by past GATT panels. The Appellate Body stressed in *EC - Asbestos* that it is vital that evidence relating to each - *'the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the products' properties, nature and quality'* - of the criteria is considered in order to make an overall determination of whether the products at issue can be characterised as "like"²⁸.

It follows that an analysis of consumers' tastes and habits provides a very important aspect of whether all bananas are like. In this regard, Fauchald comments *'one issue that is particularly interesting in the context of environmental protection is whether the fact that certain products are marketed as environmentally friendly, and thus are aimed at certain segments of the market, can represent a strong argument in favour of considering such products "unlike" products that are not to the same extent environmentally friendly'*²⁹.

One important question is whether bananas labeled Fairtrade and organic are "like" other bananas? It is possible to argue that consumers who buy Fairtrade or organic bananas do so because they consider that they possess characteristics that other bananas do not share, i.e. they meet minimum ethical standards. In other words, Fairtrade or organic consumers do not treat other bananas as competitive or "like".

Are consumer tastes and habits sufficient to distinguish Fairtrade and organic bananas from other bananas, given the otherwise identical physical properties and end-uses of all bananas? Definitive answers are not possible, but it **may** be possible for a system of tariff differentiation to apply a lower tariff to bananas conforming to an ethical labeling system.

3. Article XX

3.1 Compatibility

Article XX provides a list of ten public policy exceptions to the positive rules of the GATT 1994. As the United Nations Secretary General said in a 2000 Report to the UN General Assembly *'the exceptions referred to [in Article XX] call to mind the protection of the right to life, the right to a clean environment, the right to food and to health, the right to self-determination over the use of natural resources, the right to development and freedom from slavery, to mention but a few'*³⁰.

Two of the public policy exceptions under Article XX are particularly relevant for this paper:

- (a) measures necessary to protect public morals
- (g) measures relating to the conservation of exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption.

This paper does not discuss in detail measures falling under paragraph (b) *'measures to protect human, animal and plant, life or health'* of Article XX because it primarily relates to sanitary and phytosanitary measures to protect human, animal, and plant life or health within the territory of the regulating state.

(a) measures necessary to protect public morals

It has been convincingly argued by several commentators that the public morals exception under Article XX(a) applies to violations of international human rights, although it has never been the subject of adjudication in the GATT/WTO³¹.

²⁷ Appellate Body Report, *EC - Asbestos*, para. 114

²⁸ Appellate Body Report, *EC - Asbestos*, para. 109

²⁹ Fauchald, 'Flexibility and Predictability Under the World Trade Organization's Non-Discrimination Clauses', *Journal of World Trade*, Vol. 37, 2003, p. 460

³⁰ UN doc A/55/342 31 Aug 2000, quoted in Bartels, *Journal of World Trade*, 2002, p. 353

³¹ Howse, 'Back To Court After Shrimp/Turtle', 2003; Charnowitz, 'The Moral Exception in Trade Policy', *Virginia Journal of International Law*, Vol. 38, 1998, p. 689

The term international human rights includes some, but not all, labour rights. The most obvious examples are the so-called “core” or “fundamental” labour rights, as outlined by the 1999 ILO Declaration on Fundamental Principles and Rights at Work, which are:

- freedom of association and the effective recognition of the right to collective bargaining;
- the elimination of all forms of forced or compulsory labour;
- the effective abolition of child labour; and
- the elimination of discrimination in respect of employment and occupation.

The majority of the ILO Conventions embodying these core labour rights³² have achieved the status of universally accepted human rights³³ and many of them are also contained in other human rights instruments such as the 1948 Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights.

How far the protection of public morals includes other social objectives such as the payment of a living wage, maternity rights, or health and safety issues is questionable in terms of WTO law.

(g) measures relating to the conservation of exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption

Paragraph (g) has been widely interpreted to cover measures to protect the natural resources, both living and non-living, including sea turtles, clean air, tuna, herring and salmon³⁴.

Can it be presumed that the term natural resources would also cover measures to prevent deforestation, pollution of watercourses, prevention of soil depletion and reduction in the use of pesticides with a harmful effect on the natural environment?

3.2 Questions of Sovereignty and Extra-Territoriality

A controversial question is whether Article XX allows states to take measures to regulate activities taking place outside their territorial jurisdiction.

One objection that is often raised against measures based upon process and production methods (PPM) is that they have extra-territorial effect. Yet, Article XX does not expressly exclude measures with extra-territorial effect³⁵ nor has it been interpreted to relate exclusively to activities taking place within the territory of the regulating state. Clearly, many of the measures envisaged by Article XX will to some extent impinge upon activities taking place in the territory of another state.

However, it is unclear whether there is an implied limit on the extra-territorial effects of a measure³⁶. In *US - Shrimp*, the Appellate Body found that a ‘sufficient nexus’ existed between the United States and the sea turtles it was seeking to protect. The Appellate Body noted that sea turtles were highly migratory and some species passed through US waters³⁷. Moreover, they were an endangered species whose protection relies upon co-operation of the international community.

Does a sufficient nexus exist between a state importing bananas and the environmental conditions on banana plantations?

In this regard, Bartels suggests that the relevant question is whether a state has a legitimate interest in enforcing the measure to justify or make it reasonable for a state to take extra-territorial measures³⁸. One example he gives of a legitimate extra-territorial state interest is the protection of human rights which have been classified by the International Court of Justice as erga omnes obligations, meaning any state has an interest in enforcing them. Therefore a system of tariff

³² Including Conventions No. 98, 87, 29, 105, 111, 100, 138, 182

³³ Scherrer and Greven, op cit, p. 19

³⁴ Appellate Body Report, *US - Shrimp*, para. 131

³⁵ c.f. WTO Agreement on Sanitary and Phyto-Sanitary Measures, Annex A

³⁷ Appellate Body Report, *US - Shrimp*, para 133

³⁸ Bartels, ‘Article XX of GATT and the Problem of Extraterritorial Jurisdiction’, *Journal of World Trade*, 2002, Vol. 36, p. 374

differentiation based upon the protection of fundamental labour rights is likely to fall within the ambit of Article XX.

The question of environmental standards is more controversial. Bartels suggests that *'the field of human rights is only the most obvious example currently of States' legal interests - and, to some extent legal rights - in what would otherwise be the purely domestic concern of another State. The protection of the global commons, or biodiversity, or space, represents another set of purely extraterritorial concerns that should not automatically be excluded from a States' field of jurisdiction'*³⁹. Thus he suggests that some environmental measures - those relating to biodiversity - may be permissible under Article XX even though the environmental impact takes place exclusively within the exporting state.

The question is how does the protection of biodiversity relate to bananas and which environmental issues would measures to protect biodiversity address?

3.3 Discrimination

Once a measure is judged to fall within one of the objectives of Article XX, it must also meet the requirements of the introductory paragraph or chapeau which requires that measures *'are not applied in a manner which would constitute unjustifiable or arbitrary discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'*.

The Appellate Body has stressed that regulatory conditions must not discriminate de facto between countries where the same conditions prevail. In other words, the standards should be sufficiently flexible to take into account the different levels of development of all contracting parties. The Appellate Body explained in *US - Shrimp* that *'we believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measures at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries'*⁴⁰. The Appellate Body found that the *'rigid and unbending'* measure enacted by the United States to protect sea turtle population had unequal effects on countries and it therefore constituted unjustifiable discrimination.

As well as the substantive content of the standards, it is important that the application of the standards is also non-discriminatory. In its analysis of arbitrary discrimination, the Appellate Body in *US - Shrimp* took into account the lack of formal opportunity for an applicant country to be heard or to respond to any arguments that were made against it, the lack of a formal decision to grant or deny certification, the failure of the administering authorities to give notice of a denial or the reasons for the denial, and the absence of a review or appeal procedure⁴¹.

In determining which countries shall be designated beneficiaries of the United States' GSP, the United States Trade Representative (USTR) has the discretion to accept or reject petitions or whether to initiate a review on its own. As noted by the UNCTAD Secretariat, *'the United States has increasingly employed the GSP and other preferential trade programs as substitute form of enforcement authority. This is true both for cases involving established trade issues such as intellectual property rights, as well as new issues such as labour rights'*⁴². For example, the United States withdrew half of the GSP benefits from Argentina in 1997 as a result of an intellectual property rights dispute under the Special 301 law⁴³. The element of discretion in deciding whether to withdraw preferences provides the potential for discriminatory decisions on the application of the conditions. It has been suggested that during the 1980's, the labour rights conditionality of the GSP program were generally applied by the United States government in accordance with its foreign policy⁴⁴. Two commentators conclude that *'the [Reagan] administration refused to review several petitions ..., found several countries were "taking steps" to afford internationally recognised workers' rights, and suspended or excluded only those countries that were to pressured for unrelated foreign policy reasons: Nicaragua, Romania, and Paraguay in 1987 and Chile in 1988'*⁴⁵.

³⁹ Bartels, op cit, p. 366

⁴⁰ Appellate Body Report, *US - Shrimp*, para. 165

⁴¹ Appellate Body Report, *US - Shrimp*, para. 180

⁴² UNCTAD Secretariat, *Generalised System of Preferences: Handbook on the Scheme of the United States of America*, 2003, p. 19

⁴³ UNCTAD Secretariat, *Generalised System of Preferences: Handbook on the Scheme of the United States of America*, 2003, p. 20

⁴⁴ See US-LEAP website - <http://www.usleap.org/trade/SITRABITrial/GSPGuateFactSheet.html>, checked 10/06/03

⁴⁵ Scherrer and Greven, op cit, p. 72

Part IV - What Tariff Differentiation May Look Like?

1. Number of tariffs and ways of applying them

There are two main options:

1.1 Single tariff level

A single tariff level could be based on adherence to one standard or one set of standards. If this is the option to be pursued it will need to be agreed what objectives this single level of standards seeks to achieve.

One benefit of this system is its simplicity in implementation. However, there would be no incentive - through tariff levels - to improve standards to an even greater extent.

1.2 More than one tariff level

It is possible to have a number of different levels of tariff graduation. Examples are given below. Any of the systems described below can be based on specific tariff (quantity, e.g. 100 Euros per tonne) or ad valorem tariff (value, e.g. 10% of value).

This section has been broken down into two main subheadings - Cumulative and Progressive tariffs.

Please note the figures used below are completely arbitrary and are there simply to illustrate the system.

1.2.1 Progressive tariff levels

The simplest scenario is a multiple tier (the number of tiers shown below are simply for illustration of the system) progression of tariffs, whereby bananas qualify for lower tariffs, the higher the criteria they meet.

Example:

MFN tariff level bananas - 450 Euros/tonne or 75% of import value
Bananas meeting level 1 standard - 300 Euros/tonne or 50% of import value
Bananas meeting level 2 standard - 150 Euros/tonne or 25% of import value
Bananas meeting level 3 standard - 0 Euros/tonne or 0% of import value

1.2.2 Cumulative Tariffs

In a manner similar to the Labour Rights and Environment Incentives in the European Communities' GSP system, the tariff reductions could be applied cumulatively as different criteria are met. Therefore bananas could simply meet one standard, or any combination of the different criteria, increasing the tariff reduction for each additional standard that they meet.

Example:

Bananas meeting standard A (e.g. on labour standards) could qualify for a 100 Euros/tonne reduction in tariff or 5 percentage point reduction

Bananas meeting standard B (e.g. on environmental standards) could qualify for a 100 Euros/tonne reduction in tariff or 5 percentage point reduction.

Bananas meeting standard C (e.g. on organic standards) could qualify for a 100 Euros/tonne reduction in tariff or 5 percentage point reduction.

Bananas meeting any combination of standards would qualify for the sum of all the tariff reductions for those standards. For example banana meeting standards A **and** C would qualify for a 200 Euros/tonne reduction in tariff or 10 percentage point reduction.

2. Which criteria? Existing, new, unilateral and/or multilateral?

There are a number of existing codes, guidelines and conventions that may be useful to consider in a scheme of tariff differentiation, including:

- International Labour Organisation Conventions
- Fairtrade Labeling Organisations International standard
- OECD Guidelines on Multinational Enterprises
- ETI base code
- Social Accountability 8000 standard
- International Confederation of Free Trade Unions base code of conduct
- Chiquita/COLSIBA/IUF Framework Agreement
- WHO classification of pesticides
- US Model Business Principles
- UN Convention on the Rights of the Child
- Rainforest Alliance guidelines
- Agenda 21 principles and guidelines
- ILO Tripartite Declaration of Principles Concerning Multinational Enterprises
- Forestry Stewardship Council

Another option to utilising existing standards is to develop an entirely new set of guidelines at the international level, for example under the auspices of the Food and Agriculture Organisation or a new International Banana Organisation, which could involve producer and consumer country governments, inter-governmental organisations, trade unions and other civil society actors.

It does not matter whether the criteria upon which the tariff differentiation is based are binding or non-binding for them to be used as a basis for tariff differentiation. For example, for its Special Incentive to Protect the Environment in its GSP scheme, the European Communities uses the voluntary guidelines agreed by the International Tropical Timber Organisation.

One question is whether it is important that standards are unilaterally imposed? Although there is no explicit prohibition on unilateral standards, in *US - Shrimp* the Appellate Body emphasised that *'[one] aspect of the application of [the measure] that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members'*⁴⁶. This decision suggests at least that multilateral standards are less likely to be discriminatory. However, it does not prohibit unilateral standards provided that they do not discriminate de facto or de jure against a WTO Member in any way.

The European Communities already incorporates organic standards into its legislation in order to regulate any private person using the term. A definition of, for example 'ethical trade', 'fair trade', 'worker friendly' or 'environmentally sound banana' could be incorporated into the importing country law as a basis for the tariff differentiation.

3. Who Pays?

Whilst there are many standards covering social and environmental conditions, very few address economic issues (for example Fairtrade standards explicitly ensure fair economic conditions, ETI base code covers payment of a living wage) and therefore there may be a need to develop new guidelines to cover these. This is to ensure that the cost of any tariffs is not borne by the workers and the farmers at the end of the chain. It may be that if freedom of association and right to collective bargaining are amongst the criteria that have to be met in order for the tariff preference to be granted, then the workers should hopefully be able to negotiate living wages. But safety nets should be put in place to ensure the most vulnerable do not lose out because of this system.

⁴⁶ Appellate Body Report, *US - Shrimp*, para 166

It may be possible to ensure that national legislation in the exporting country in relation to wages and/or minimum prices for the product is implemented, or is considered as a condition of the preferential tariff. However, this raises the further question about whether the minimum wage constitutes a 'living wage', or whether the minimum price for the product actually covers the cost of production.

Another form of safety net may be to introduce a consumer label so that consumers are aware which bananas meet which criteria and can choose not just on price, facilitating a market in which the cheapest price is not the only competitive concern.

The tariff preference would have to be sufficient so that even if companies not meeting the criteria were to lower labour costs, they would not be able to realistically drop prices below those of the bananas that meet the social, environmental and/or economic criteria.

4. Level of tariffs and Implications of the WTO Cotonou Waiver

It goes without saying that the level of the most-favoured nation tariff (in other words the tariff level for all states prior to any preferential treatment permissible under World Trade Organisation rules) will have an effect on the effectiveness of tariff differentiation. In order to provide a sufficient incentive to states to implement the social, environmental and/or economic criteria, there must be an adequate margin between the MFN tariff and the differentiated tariff. In addition, the MFN tariff level must be set at a high enough level so any benefits of tariff differentiation on the basis of social, environmental and/or economic criteria are not negated through a low MFN tariff.

However, the European Communities does not have total discretion in setting its tariff level. According to the Decision of the WTO Ministerial Conference on the WTO Waiver for the ACP-EC Partnership Agreement⁴⁷ '*any re-binding of the EC tariff on bananas under the relevant GATT Article XXVIII procedures should result in at least maintaining total market access for MFN banana suppliers*'. The Annex to the Decision requires the European Communities to initiate consultations with Members exporting to them on a MFN basis (interested parties) with a view to reaching a mutually satisfactory solution. If no agreement can be reached, the European Communities is free to modify its tariff schedule, although interested parties may withdraw substantially equivalent concessions initially negotiated with the European Communities⁴⁸. The Waiver Annex also allows those interested parties to request arbitration if they are dissatisfied with the level of the tariff. An arbitrator will decide whether the proposed rebinding would result in maintaining total market access for MFN banana suppliers and if the European Communities fails to rectify the matter in accordance with the decision of the arbitrator, the waiver protecting preferential tariff levels for ACP banana imports shall cease to apply from the date of entry into force of the single tariff regime.

5. Shipment vs. State Certification

Two proposals are put forward on the subject of whether states or individual shipments should be certified according to the social, environmental and/or economic criteria in order to qualify for tariff reductions.

5.1 State Certification

If states are 'certified' to benefit from tariff reductions, all banana exports from that state will be eligible for tariff reductions. In contrast, no imports from a non-certified state will receive tariff reductions. One potential consequence is that Fairtrade producers in 'non-certified' countries will be unable to claim the tariff reductions despite the fact that they would meet, and may even exceed, the social, environmental and/or economic criteria.

Another consideration is the impact on a country such as Ecuador which would not be able to meet standards straight-away. Ecuadorian imports could therefore become less competitive. However, the proposed tariff differentiation would not completely exclude imports that did not meet standards, but rather they would be subject to a higher tariff. What would be the impact on the Ecuadorian economy and the workers on banana plantations? Ecuadorians are already suffering - and the poorest are worst hit - because of a struggling economy.

⁴⁷ Decision of 14 November 2001, WT/L/436, 7 December 2001, available at www.wto.org (visited 15/12/03)

⁴⁸ See Article XXVIII of the GATT

The fact that tariff differentiation does not prohibit imports has important implications for the so-called necessity test in Article XX of the GATT. In order to fall within the ambit of, *inter alia*, paragraph (a) of Article XX, measures must be necessary, a term that has been interpreted to mean that measures should be 'least-trade restrictive'. Whilst it is true that early GATT panels set a very high threshold for the necessity test, in two recent Appellate Body decisions, a more lenient approach is adopted. In *Korea - Beef*, the Appellate Body undertook 'a process of weighing and balancing a series of factors', including, the importance of the non-trade objective pursued by the measure and the impact of the measure on trade⁴⁹. In *EC - Asbestos*, the Appellate Body held that the objective of the measure, the protection of human life and health, was 'vital and important in the highest degree'⁵⁰ and therefore the measure was justified under the necessity test although it did restrict trade.

Not only are the social, environmental and economic issues facing the banana industry discussed in this paper, in the opinion of the authors, vital and important, but the proposed system of tariff differentiation does not excessively restrict trade of banana exporting countries.

5.2 Shipment Certification

Another option is for the tariffs to apply to individual shipments. Under such a system, individual shipments of bananas could apply for tariff reductions even though the country itself does not meet the criteria as a whole. Therefore, it would be possible for Fairtrade bananas from non-certified states to qualify for tariff reductions.

6. Monitoring and Verification

It is important to consider the burden of proof. In other words, is it the banana exporting country that must prove it meets the criteria or should the importing country assume that the criteria are met until it has evidence to show otherwise?

There are a number of ways that ensuring compliance or investigating violations could be implemented:

- a) Responsibility could be placed with the exporting state to prove upholding of standards and that systems (such as labour inspectorates) are in place to ensure the standards are upheld. Under the Special Incentives Arrangements to Protect Labour Rights in the European Communities' GSP, states wishing to receive tariff reductions must submit an application to the European Commission, demonstrating that they meet the requisite criteria.
- b) The importing country could be responsible for investigating violations. For example, the US Trade Representative has responsibility to investigate alleged violations of labour rights under the GSP.
- c) Private companies could monitor/verify the criteria are being complied with. There could be an accreditation system like with organics where there are internationally agreed guidelines under the IFOAM where private companies have to be accredited to monitor and verify these criteria.
- d) The ILO system could be utilised as a reference to determine whether violations of labour rights have taken place. ILO Member States are required to report annually on the implementation of the ILO Conventions that they have ratified⁵¹ and these reports are subject to the scrutiny of the quasi-judicial Committee of Experts and the tri-partite political Committee on the Application of Conventions and Recommendations.
- e) A new multilateral body, an International Banana Organisation, could be established to set, monitor and verify the criteria. This process could involve all or any combination of the following: NGOs, trade unions, companies and governments.

The advantages of d) and e) are that they use multilateral mechanisms and they are therefore more difficult to abuse for protectionist purposes.

An important consideration is the implications in terms of bureaucracy and verification of these different systems.

⁴⁹ Appellate Body Report, *Korea - Beef*, para. 162

⁵⁰ Appellate Body Report, *EC - Asbestos*, para. 172

⁵¹ Article 22 of the ILO Constitution

7. Enabling compliance

A mechanism for dealing with violations of the criteria would need to be developed.

- Financial assistance could be made available to enable compliance with the criteria.
- Would non-compliance result in immediate expulsion from the system or suspension?
- What time-frame would be introduced for compliance with the criteria?

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