Appendix A

The Effects of the New EU Banana Regime

The share of EU banana imports not covered by Latin American exports comes almost exclusively from ACP states, Community overseas territories and to a small extent the Community itself. Under the import system which operated until 1993, certain Member States, viz France, Greece, Spain, Portugal, Italy and the United Kingdom, guaranteed markets to their traditional suppliers. These were either domestic producers (Guadeloupe and Martinique, Crete, the Canary Islands, and Madeira and the Algarve) or ex-colonies (Cameroon and Côte d'Ivoire, Jamaica, Windward Islands[19] and Belize, and Somalia) by exonerating them from the Community's common 20 per cent tariff and limiting (or excluding) the imports of dollar bananas as those from Latin America are called.

Between 1984 and 1992 Latin America's share of the Community market for bananas was relatively stable. However, that conceals a downturn in the share when the new Member states, Spain and Portugal, which have their own sources in the Canary Islands and Madeira (and to a small extent the Algarve) joined the Community and an upturn in recent years. The Latin American share in EU import volumes had risen from 56 per cent in 1988 to 68 per cent in 1992, while the share in the value of EU imports rose from 47 per cent to 57 per cent.

The establishment of the Single European Market meant that changes in the arrangements for protecting the traditional Community and ACP banana producers were required. The old regime could not survive the opening up of borders within the Community since it depended on preventing the onward sale of dollar bananas from the free-market member states to those with restricted markets. In particular, protection for the EU and ACP producers required recourse to Article 115 (which allows free trade within the Community to be temporarily suspended).

The ACP banana-producing countries continue to insist that the EC has a legal commitment to ensure that they are not put in a less favourable situation than in the past or at present as the Lomé Convention puts it. However, these words are subject to alternative interpretations.

The new regime: After years of internal argument among the Member States, the Commission eventually adopted a system based on tariff quotas. Under the proposal, specific country quotas for ACP suppliers, based on traditional imports, would enter duty-free (up to a global amount of 857,000 tonnes). Latin America, or dollar, banana producers and non-traditional ACP producers are limited to a global tariff quota of 2.1 million tonnes in 1994 (2.2 mn. from 1995) with a duty of 75 Ecu/tonne for non-ACP supplies. Imports above the quotas are subject to a duty of 850 Ecu/tonne on dollar bananas and 750 Ecu/tonne on ACP bananas. Meanwhile, bananas from Community sources are to be subsidised through deficiency payments to growers on fixed amounts of output per region, grubbing up premia to encourage diversification into new crops in the least competitive areas and structural assistance to improve competitiveness elsewhere. Supplies from traditional EU sources would not face any quotas. Similar schemes for easing the process of adjustment for ACP farmers have not been agreed, though funds from the EDF are being directed towards that goal.

The tariff quotas are managed through a system of import certificates. These are shared out among existing operators, 66.5 per cent to those who marketed dollar (or in the EU's terminology, third country) or non-traditional ACP supplies, 30 per cent to operators who agree to import ACP supplies and 3.5 per cent to operators who started marketing non-EC and non-traditional ACP supplies from 1992. In the first two cases, the distribution to operators of reference quantities will be based on imports in the three preceding years.

The lifeline for the ACP producers stems from that 30 per cent of quota reserved for importers who agree to import ACP bananas. If importers want to increase their licences for dollar bananas, they will have to commit to importing some further ACP supplies. The idea is that, with higher prices for dollar bananas than in the past, profits earned on these can cross-subsidise the more expensive ACP fruit. If insufficient ACP fruit is contracted, total licence allocations can be scaled back to encourage more importers to accept additional ACP contracts. The system is clearly an attempt at sophisticated market manipulation. It has been in operation since mid-1993. To date, the results are reckoned as encouraging by the EU Commission, though significant reductions in prices have been experienced by the Caribbean producers.

From the point of view of the Latin American suppliers, the main objection to the new regime is the very limited initial tariff quota of 2.1 million tonnes. Above that, the tariff of 850 Ecu/tonne will effectively keep out additional dollar bananas. Consumption in 1992 was in excess of 4 million tonnes – admittedly in a year when prices were unusually low and efforts were being made to secure ample quotas under the new system – but the traditional and non-traditional quotas together only come to some 2.8 million tonnes. Under the new regime, prices will settle between those which prevailed in the free and those in the restricted markets – indeed they are already doing so – but it is unlikely that demand will settle at less than 2.8 million tonnes. However, it is also unlikely that much fruit could be profitably imported with the 850 Ecu tariff, given that the unit value of Latin American imports in 1992 was only 412 Ecu/tonne and that of ACP fruit 598 Ecu/tonne. The upshot will be that the tariff-quota will effectively prohibit above-quota imports. The net receipts on Latin American bananas will gain from higher prices but suffer from lower volumes.

The second main concern for the Latin American producers derives from the increased bargaining power of the TNCs. Originally it was proposed that they be allotted all the import licences, in which case they would be in a strong position to cream off the quota rents. Since the second appeal to GATT the supplying countries are able to allocate 70 per cent of their national quotas.

Involvement by the GATT: Five Latin American producers, Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela, had already taken the EU to a GATT tribunal on the earlier regime and in June, 1993 they obtained a clear decision to the effect that the discriminatory banana import regimes operated by France, Italy, Spain and the United Kingdom were contrary to several GATT articles. These countries had a number of grounds for taking the new regime to a GATT tribunal. They claimed that (i) the initial tariff quota was below recent levels of imports; (ii) the existing ad hoc quotas in the restricted markets could not, under GATT, be replaced by a tariff quota covering the whole EC; (iii) the average tariff on the original two million tonnes quota would be higher than previous average tariffs because of the German derogation from the EU 20 per cent CET; and (iv) a number of additional details were clearly trade-restrictive and worked against the interests of the Latin Americans. In particular, the system whereby the tariff quota is administered will further weigh market power in favour of importing companies at the expense of the actual producers on the ground.

They were also encouraged by the GATT tribunal decision on the previous banana regime which not only condemned it as discriminatory, but in fact declared that the whole Lomé

Convention's structure of trade preferences was GATT-inconsistent on the grounds that it did not represent a comprehensive (agricultural trade is largely excluded) or reciprocal free-trade area customs union (under the meaning of GATT Article XXIV).

After the various attempts at reconciliation failed, the Commission withdrew its offer. The tribunal decision was published on 11 February, 1994. The new banana regime was condemned as discriminatory and inconsistent with GATT. Reports of GATT tribunals were not legally binding until adopted by the full Council and that could be blocked by the EU under the old rules, though that is no longer possible in the WTO.

Whether there will be another appeal to GATT is not clear. The EU has bought off four of the last five appellants with increased quotas and other concessions. As regards the issue of whether the whole Lomé trade system of non-reciprocal preferences is GATT-illegal, the EU requested and has been granted a waiver for the present Convention.

Meanwhile, the traditional suppliers are none too happy with the present regime. The single market in bananas in the EU means that prices are considerably below those they received under the earlier regime, though they are still higher than those on the world market. This is already causing severe economic and social problems for the very high cost producers in the Caribbean – in particular the Windward Islands.

The EU Commission did propose a scheme to supplement STABEX, specifically for banana producers. It would work on the basis of deficiency payments for marketed fruit – unlike STABEX which is compensation for total earnings shortfalls. It would cover countries, like Jamaica, where the share of banana exports in merchandise exports was insufficient to qualify for STABEX payments. It would be sufficiently funded so that payments would not have to be scaled down to meet prior limits. The scheme has not yet been accepted by the EU member states.

The importance of bananas to the Commonwealth Caribbean is shown in Appendix Table 9. The major economic and social dislocation that will be caused by a serious loss in export markets is clear from the share of banana exports in GDP and in merchandise exports. The real problems lie in the Windward Islands – where according to unofficial estimates banana production, transport and other related activities probably account for 50 per cent of total employment.

The Windward Islands quotas are set on an annual basis – Dominica 71,000 tonnes, Grenada 14,000 tonnes, St. Lucia 127,000 tonnes and St. Vincent and the Grenadines 82,000 tonnes. There has been no allowance for any transfer of quotas so the producers will tend to overproduce to allow for any loss from weather or unforeseen events, with little hope of selling any excess profitably on non-EU markets (though the Commission has recently proposed some limited transferability of quotas). Failure to reach quota can, under present rules, result in a reduced quota in subsequent years.

Production in the Windward Islands is based on smallholdings on hilly terrain. Apart from topographical disadvantages there are adverse soil conditions relative those in Latin America. There is a significant occurrence of hurricanes. Wage rates are higher than in Latin American plantations. Since the land is unsuitable for plantation-type production, the Windward Islands producers cannot obtain the same economies of scale as their Latin American competitors. This means their input costs are higher, as are the transport and handling costs.

Various estimates have been made of how much the price of ACP fruit will fall from average levels under the previous regime once the new regime has settled down and the market has become genuinely integrated. The World Bank has recently estimated 30 per cent, though industry sources generally consider this too high a figure (World Bank, 1994a). A price decline of this magnitude would have serious implications for the export earnings of many Commonwealth Caribbean countries. On the basis of average 1991-92 trade, it would imply falls in export earnings of Belize of 4.3 per cent, of Dominica 23.7 per cent, of Grenada 7.6 per cent, of Jamaica 1.5 per cent, of St. Lucia 21.9 per cent and of St. Vincent and the Grenadines 17.4 per cent.

The regime is due to last until 2002. But the alarming prospect is that most of these countries will be unable to reduce costs adequately to compete profitably in the EU market. The regime could in principle be extended or something similar implemented. But the general view is that the ACP producing countries will by then have had long enough to diversify, and that, anyway, the momentum towards trade liberalisation would make a similar operation unfeasible.

There are major problems of diversification for the highly dependent islands. One justifiable criticism of the new regime is that it does nothing to support diversification, though there are EDF development assistance funds for that purpose. But the regime itself actually encourages continued dependency on bananas by ensuring their sale – albeit at lower prices than in the past.

Appendix B

A maritime services agreement: *the Caribbean contribution*

The negotiations on Maritime Transport Services were not completed by the time the UR Agreement was signed in Marrakesh in early 1995. The difficulties of reaching an agreement had been underestimated. In an attempt to rescue the negotiations, Norway and Sweden proposed the submission of commitments to a minimum level of open competition in three areas – international shipping, access to ports and port services (such as pilotage, repair, bunkering) and auxiliary services (such as cargo handling, warehousing and stevedoring) – by a number of countries in the hope that others would participate later.

In the event, time was insufficient and particular problems arose with the US insistence that US food aid and military supplies be carried on US vessels. It was agreed that the 32 countries that had submitted offers could withdraw them and negotiations would be restarted under an NGMTS – Negotiating Group on Maritime Transport Services. Neither the EU nor the US had submitted a liberalisation commitment. By 13 July 1994, a total of 30 countries had joined the negotiations. As of May 1995, some 60 countries were participating. Provisions were made for observer status.

The maritime services sector is subject to a particularly high degree of protection, of restrictive practices and of regulation. The NGTMS has limited goals, in particular the elimination of restrictions on trade in shipping, port and other services. It does not seek an agreement on the dismantling of the liner conferences, the cartels which control freight prices on the most important routes or on restrictions on cabotage, the rules which prevent foreign carriers competing in within-country trade. It does seek to encourage the elimination of nationalistic practices, such as cargo reservation schemes which restrict the use of foreign carriers, crew monopolies, port monopolies and so on. As with other services sectors, countries are encouraged to submit schedules of offers and to list any restrictions on MFN treatment.

The first paragraph of the Annex on Negotiations on Maritime Transport Services that neither Article II of the GATS nor the Annex to that article (which require MFN treatment unless a measure is specifically listed and meets certain conditions) would come into force for maritime services until an implementation date was agreed, or in the event of failure of the NGTMS, the date of the final report.

Several meetings of the NGMTS have taken place to date, but relatively little progress has been achieved. A model schedule of offers has been agreed since many of the original offers, some of which remain on the table, did not deal with many important issues. The danger of this approach is that where a restrictive stance is practised it becomes enshrined in the agreement and, to some extent, legitimised. Also the system could actually encourage protectionism since countries may opt to protect their future discretion by declaring exemptions that had not hitherto been in effect.

In the most recent meetings, an effort has been made to establish the extent of restrictive practices in the maritime services sector through asking all delegations to complete a questionnaire on regulatory structures, freedom of access to facilities and so on. A goal for starting serious negotiations on liberalisation in September 1995 has been set, and the most important participants have been asked to put forward some ideas on how this might proceed before the summer recess. The general idea is still that the major players will commit themselves to a minimum degree of openness and, thereby, generate a sufficient momentum to carry the other participants along to a meaningful degree of irrevocable liberalisation across the board.

Out of the ten Commonwealth Caribbean countries to make services offers in the UR, six included offers in maritime transport services. Most of these appear to have confirmed that there are no restrictions on the import of these services by the countries in question, nor any regulations which would prevent these services competing in the world market.

As in so many of the UR negotiations, where a country does not have a major direct interest in the subject, the importance of participation lies in contributing to the pressure for a liberal outcome. Open markets in maritime services, with the very minimum of barriers, are in every country's long-term interest. The GATS, and with it any agreement on maritime services, is only the first stage in a process which will ultimately lead to the free, international trade in services. Official restrictive practices will be abandoned, and in time, private non-competitive practices such as the liner codes may well be proscribed. If the Commonwealth Caribbean countries are to enter the market for port and ancillary services, including transshipment, warehousing, regional freight transport and so on, it is imperative that the world markets be open, and this justifies an active participation by these countries in the NGTMS.

Appendix C

The use of anti-dumping (AD) procedures and countervailing (CV) procedures to prevent dumping of agricultural products

Uruguay Round and Anti-dumping: Until the 1980s, anti-dumping actions were used largely by the DMEs to protect industries threatened by highly competitive imports from Japan and the NIEs. Then they became what is now widely seen as a quick and relatively costless (at least when the consumer interest is ignored) alternative to safeguards actions for protection over a broad range of sectors by an increasing number of countries, including the developing countries. The GATT code was undemanding about the procedures or evidence required to find exporters guilty of selling below normal cost. Provisional duties – or export constraint agreements – could be imposed immediately, and, even if these were not upheld in the final determination, at worst the duties had to be refunded. Often, the threat of AD actions was sufficient to deter exporters from competing on price.

The Uruguay Round has done little to tighten up the rules, in particular no stronger evidence of predatory pricing, the original justification for AD actions, is required. The EU and the US, each in different ways, sought even greater discretion for their arbitrary use of the AD instrument. Eventually, they agreed not to disagree in the negotiations with the result that some of the most biased of the EU rules were effectively generalised. A five-year review can extend the duties, grounds for contesting AD actions are further circumscribed, clothing and textiles even where controlled by MFA quotas are now covered and the concept of cumulative damage allows injury to be established more easily.

The complaints, in excess of 100, brought by the exporting countries, largely Japan and the NIEs, were mostly dismissed. Some improvements making the determination of the normal value more transparent and predictable were adopted, as was the sunset clause which requires that a duty is automatically reviewed after five years.

The developing countries as users of AD and countervailing (CV) actions: The developing countries are still mainly to be found among the defendants in AD and CV actions. Over the period 1985 to 1992, 473 out of 1148 investigations referred to developing country exporters. Only 111 of those investigations were undertaken by developing country governments, of which Mexico was responsible for 84, Brazil 13, Korea 9 and India five. 93 of the 180 CV investigations referred to developing countries exporters. Only 26 were initiated by the developing countries, Chile accounting for 18 and Brazil eight.

Clearly, however, the developing countries are learning by example of the DMEs. Most of the AD and CV investigations they have undertaken have come in the latter half of the period. But in initiating AD or CV actions, firms in a developing country may be at a disadvantage relative to firms in a developed country. With often only a nascent industry in the developing country, the government may not be prepared to sacrifice the cheaper imports in order to preserve a limited number of jobs, particularly if the imports are themselves inputs into local industries. Moreover in developing countries, the business lobby is often relatively weak. For the government, there are major institutional difficulties in bringing AD or CV actions. Unless the investigations follow the rules precisely, they may be successfully challenged through the WTO (or in the past GATT) which can imply lengthy or costly legal processes.

However, the attitude of the WTO to AD and CV actions seems to have undergone a subtle change. Instead of generally disapproving of these forms of safeguards, the WTO is keen to offer advice and training to developing countries in this area.

The subsidising and/or dumping of food by the EU: The nature of the Common Agricultural Policy is such that, at first sight, it appears that either an AD or a CV action could be successfully taken against EU exports of a wide range of temperate agricultural products. The EU has itself calculated the amounts of export subsidies for each product for its offer in the Agricultural Negotiations. This could make a CV action more straightforward, though the adverse impact on domestic producers of the products in question has still to be established. In an AD action, selling abroad below normal value has to be established, with the normal value equal to the price of the product for consumption in the exporting country, or in the absence of a domestic price, the export price to a third country or the cost of production plus a reasonable addition for the selling cost and profit.

The procedures in either action have to follow scrupulously those laid down in the GATT Agreement and the UR Final Act. Provisional duties must be based on sufficient evidence of subsidies and injury. Appropriate notices to the complainants, and publicity, are required. The subsequent investigation must consider both evidence for the subsidy and for injury. Opportunities for consultation with the complainants must be made available. In the case of an AD action, similar requirements exist.

In 1992, Brazil imposed countervailing duties on imports of milk powder and other milk products from the EU. The EEC (as it was then) complained to the GATT and a panel was established. The panel decided that Brazil had not properly followed the procedural obligations laid down in Articles 5 and 6 of the Agreement, though without making any judgment as to whether CV duties could have been validly imposed. In particular, there had been no adequate preliminary investigation and sufficient evidence of a subsidy or injury had not been put forward, so that the provisional CV duties were not consistent with the Agreement. Morevoer, the EEC had not been properly notified of the initiation of an investigation. And thirdly, the imposition of definitive CV duties was inconsistent with the analysis of the volume of imports of milk powder, in particular the requirement in Article 6.2 that the authorities consider whether there had been a significant increase in subsidised imports and the failure of Brazil to analyse the impact on domestic producers.

Assistance from the WTO: The Brazilian case emphasises the importance of following the procedural requirements to the letter. In this respect, the WTO is willing to help countries who are considering taking AD or CV actions. First by looking at the internal legislation under which the actions would be taken and advising on whether that is consistent with the Agreement and the UR Final Act. Secondly, the WTO will advise on procedural issues and, where necessary, on the use of consultants. Thirdly, the WTO does run regular training programmes for civil servants from the developing countries on these matters.