The Newsletter of the Anti-dumping and Subsidies Commission

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TRADE GATEWAY

YOUR SOURCE FOR TRADE REMEDIES & TRADE INFORMATION

In This Issue

"ENSURING EQUITY IN INTERNATIONAL TRADE"

THE ANTI-DUMPING AND SUBSIDIES COMMISSION KINGSTON, JAMAICA

"Working to ensure a level playing field for domestic production."

LOCAL TRADE REMEDIES EXPERT GETS FIRST WTO DS PANEL APPOINTMENT

KEISHA-ANN THOMPSON

Executive Director of the Anti-dumping and Subsidies Commission, Andrea Marie Brown, has been appointed to sit on a World Trade Organisation (WTO) Dispute Settlement Panel. The Dispute Settlement process of the WTO enables any WTO Member to raise issues, with respect to trade policies or practices of other Members that may be affecting their trade with that Member or other Members. The panel on which Ms. Brown is sitting concerns a dispute raised by the European Communities ("EC") against the continued existence and application of the "zeroing" methodology by the United States ("US") in anti-dumping investigations (WT/DS350).[1]

The Dispute Settlement Understanding (DSU) is deemed to be an improvement of the WTO over its predecessor, the General Agreement on Tariffs and Trade (GATT). A Member which believes that there has been a breach of a covered Agreement[2], may, after failing to reconcile the matter in consultations, (which are required) request the establishment of a Panel. The WTO Secretariat nominates panellists from a list of experts which it keeps or prepares. Parties to the dispute should agree on panellists to be chosen. The parties should only object for compelling reasons. However, the composition of Panels has often been a highly contentious issue. Where agreement cannot be reached by the parties, the Director General of the WTO composes the Panel. Ms. Brown's appointment was unopposed by both parties several months after the panel was initially composed. She replaced a panellist who was, during the panel process, appointed to the Appellate Body at the WTO. The DSU provides that Panel members should be well-qualified government or non-governmental individuals, should have a diverse background and wide spectrum of experience, and will be independent. Article 8 of the DSU provides that Members, as a general rule, shall permit their officials to serve as panellists, though they serve in their individual capacity and not as a representative of any government or organisation.

Miss Brown's expertise in WTO law and practice has been honed at the Anti-dumping and Subsidies Commission, Kingston, Jamaica, the agency of government, set up under the Commerce portfolio in 1999, charged with administering Jamaica's trade remedies legislation. In 2002, Miss Brown took over at the helm of the Commission from Fernanne Kirkham-Chin Yee, under its Board of Commissioners.

Andrea Marie Brown, *Executive Director of the Anti-dumping and Subsidies Commission (ADSC), Kingston, Jamaica.*

Trade Remedies are policy tools that can be used under certain circumstances to mitigate some negative effects of imports on a domestic industry. Trade remedies have to be applied in a "WTO consistent" manner. However, the rules themselves may not always be clear and practice can vary from country to country. Trade remedies are, in fact, one of the most intensely disputed areas of WTO law.

The Commission has conducted five trade remedy investigations, four antidumping matters and one Safeguard case. Pursuing its goal to educate its constituents regarding its mandate, the Commission provides training for industry players, private sector associations, public sector employees and others in trade remedies disciplines. The Commission's staff has been integrally involved in providing analysis and expertise to support Jamaica's international trade negotiations. Miss Brown notes that her appointment to a WTO Dispute Settlement panel, a first for Jamaica, and for the Caribbean region, despite the Commission's small size and short history, is a testament to the high level of expert grasp of these disciplines in Jamaica.

The issue facing the panel of which Ms. Brown is a member, the issue of "zeroing" has been the subject of a contentious history. The term "zeroing" refers to

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EDITOR'S NOTE

The current issue of ***Trade Gateway***, the Newsletter of the Anti-dumping and Subsidies Commission, spans several areas we are sure will be of interest to you, our reader. They include a strong, but humourously stated opinion, "Protectionism: The Truth is on a One Dollar Bill," by Cambridge University Professor Ha-Joon Chang. Professor Chang graciously consented to our reproducing this article, which first appeared in The Independent newspaper in July 2007. Also included is an update by Washington D.C. insider, attorney-at-law, Andrea Ewart, on the status of Caribbean-U.S. trade relations in "Changing US-Caribbean Relations." We venture into a new area for us, with Dr. Delroy Beckford's analysis concerning the WTO Sanitary Phyto-Sanitary (SPS) Agreement, "Assessing the Appellate Body's Interpretation of the SPS Agreement and Implications for SPS Measures in RTAs." Keisha-Ann Thompson, in her two articles, updates us regarding anticipated bilateral negotiations in "Bilateral Update: CARICOM-CANADA" and invites us to glimpse into the future of anti-dumping jurisprudence in "Trade Remedies Corner: A Glimpse into the future of Anti-dumping Law."

We recognise that ***Trade Gateway (TG)*** has become an eagerly awaited publication for our friends. For this we are glad, of course. That was the general idea. We have had a rather longer than anticipated pause in our publication schedule this year, for which we offer our apologies. Every effort was made to put out an April issue of the newsletter. However, our internal constraints got tighter before they improved. During the several months which have elapsed since the publication of the last issue of Trade Gateway in 2007, developments included:

- **Our stalwart TG Editor, Senior Economist and Chief Technical Advisor, Miss Keisha-Ann Thompson** simply had to take a break, and the loss of her presence was keenly felt. We celebrate Keisha's return to the Commission from leave on June 24, 2008.

- **We use this opportunity to welcome to the Commission and this publication, our new Senior Legal Counsel, Miss Tara Marie Evans.** She joined the staff of the Commission on June 9, 2008, just in time to assist in the final editing and proofreading of this long-held issue of TG.

- **Administrative Staff at the Commission have been honing their skills** by engaging successfully in learning about the WTO and Agreements through the WTO's e-training initiative.

- The Commission welcomed in February, its **new Board of Commissioners, Dr. Derrick McKoy, Chairman, Dr. Velma Brown-Hamilton, Messrs. Leslie Campbell, and Peter Champagnie.**

It is our hope, as always, that you receive in this issue, valuable trade information and perspective that assists you in navigating your way through the sometimes complex world of international trade and trade remedies. We always welcome your feedback – via telephone, email or in person.

Your Contact Information

We hope that you will assist us in our efforts to keep you in the know about trade matters by updating your contact information with the Commission from time to time.

Andrea Marie Brown, Editor.

COMMENTS INVITED: ***Manufacturers, importers, exporters, and other members of the public are invited to comment on the*** **Rules Negotiating Group Chairman's Draft Text on Anti-dumping and Countervailing (November 2007) at** http://www.wto.org/english/news_e/news07_e/rules_draft_text_nov07_e.htm **Also view the reactions of other Members at** http://www.wto.org/english/news_e/news08_erules_28may08_e.htm

Opinions expressed in **TRADE GATEWAY** *are those of the writers, and not necessarily those of The Anti-dumping and Subsidies Commission, The Government of Jamaica, or organisations with which the writers may be affiliated.*

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a methodology that is used to arrive at final or overall dumping margins—which usually determines an anti-dumping duty that a country might apply to the imported product being investigated. Without going into the nuances of the term here, essentially, it is the practice of disregarding or setting at zero, hence the term "zeroing," negative dumping margins in the comparisons used to arrive at the final dumping margin for the product being considered in an investigation. Proposals regarding zeroing were introduced for inclusion in the ADA in the Rules Negotiating Group,[3] and have generated a significant amount of interest. Proposals for amendment in this area are extremely contentious. Critics of the methodology oppose it because its application inevitably leads to a higher dumping margin than would otherwise be the case. Members' opinions differ widely on the legitimacy of this approach and its consistency with the Anti-dumping Agreement. At the heart of the debate about zeroing is whether the practice is consistent with the Agreement.

The issue of zeroing has been the subject of several Dispute Settlement panels and has been repeatedly appealed, with divergent results from panels and the Appellate Body. The importance of the dispute is reflected in the high level of interest by other Members, with more than ten joining or reserving third party status. It is also reflected in the call for the panel meetings with the parties and third parties to be open (video linked); and portions were opened to the public.

Jamaica does not practice zeroing. Jamaica commented during the negotiations, reserving for further review on the issue of its legitimacy under the Agreement language. Ms. Brown mused that this clearly middle road articulated by Jamaica on the question must have accounted for her being acceptable to the parties on both sides of this dispute.

This dispute may be regarded as unique. It comes at a point in time when the practice of Members and the rules about a fundamental question in antidumping practice are arguably, being remade, in the negotiations or with input from interpretation brought to bear through the WTO dispute settlement regime, rendering Jamaica's ability to observe the workings of the process and participate from the front seat, of greater than ordinary significance. ◘

[1] For more information on the United States - Continued Existence and Application of Zeroing Methodology (DS350), visit the WTO website at www.wto.org.

[2] "Covered agreement" includes certain WTO multilateral (between all Members) trade agreements and certain plurilateral (between some WTO Members) trade agreements included under the application of the DSU.

[3] Trade Remedies are deemed Rules. The Rules Negotiating Group (RNG) are Members convened to negotiate to clarify and improve the rules under the ADA and the Subsidies Agreements.

TRADE GATEWAY

YOUR SOURCE FOR TRADE REMEDIES & TRADE INFORMATION

The Newsletter of the Anti-dumping and Subsidies Commission

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PROTECTIONISM... THE TRUTH IS ON A $10 BILL

*Professor Ha-Joon Chang**

I have a six-year-old son. His name is Jin-Gyu. He lives off me, yet he is quite capable of making a living. After all, millions of children of his age already have jobs in poor countries.

Jin-Gyu needs to be exposed to competition if he is to become a more productive person. Thinking about it, the more competition he is exposed to and the sooner this is done, the better it is for his future development. I should make him quit school and get a job.

I can hear you say I must be mad. Myopic. Cruel. If I drive Jin-Gyu into the labour market now, you point out, he may become a savvy shoeshine boy or a prosperous street hawker, but he will never become a brain surgeon or a nuclear physicist. You argue that, even from a purely materialistic viewpoint, I would be wiser to invest in his education and share the returns later than gloat over the money I save by not sending him to school.

Yet this absurd line of argument is in essence how free-trade economists justify rapid, large-scale trade liberalisation in developing countries. They claim that developing country producers need to be exposed to maximum competition, so that they have maximum incentive to raise productivity. The earlier the exposure, the argument goes, the better it is for economic development.

However, just as children need to be nurtured before they can compete in high-productivity jobs, industries in developing countries should be sheltered from superior foreign producers before they "grow up". They need to be given protection, subsidies, and other help while they master advanced technologies and build effective organisations. This argument is known as the infant industry argument. What is little known is that it was first theorised by none other than the first finance minister (treasury secretary) of the United States - Alexander Hamilton, whose portrait adorns the $10 bill.

Initially few Americans were convinced by Hamilton's argument. After all, Adam Smith, the father of economics, had already advised Americans against artificially developing manufacturing industries. However, over time people saw sense in Hamilton's argument, and the US shifted to protectionism after the Anglo-American War of 1812. By the 1830s, its industrial tariff rate, at 40-50 per cent, was the highest in the world, and remained so until the Second World War.

The US may have invented the theory of infant industry protection, but the practice had existed long before. The first big success story was, surprisingly, Britain - the supposed birthplace of free trade. In fact, Hamilton's programme was in many ways a copy of Robert Walpole's enormously successful 1721 industrial development programme, based on high (among world's highest) tariffs and subsidies, which had propelled Britain into its economic supremacy.

Britain and the US may have been the most ardent - and most successful - users of tariffs, but most of today's rich countries deployed tariff protection for extended periods in order to promote their infant industries. Many of them also actively used government subsidies and public enterprises to promote new industries. Japan and many European countries have given numerous subsidies to strategic industries. The US has publicly financed the highest share of research and development in the world. Singapore, despite its free-market image, has one of the largest public enterprise sectors in the world, producing around 30 per cent of the national income. Public enterprises were also crucial in France, Finland, Austria, Norway, and Taiwan.

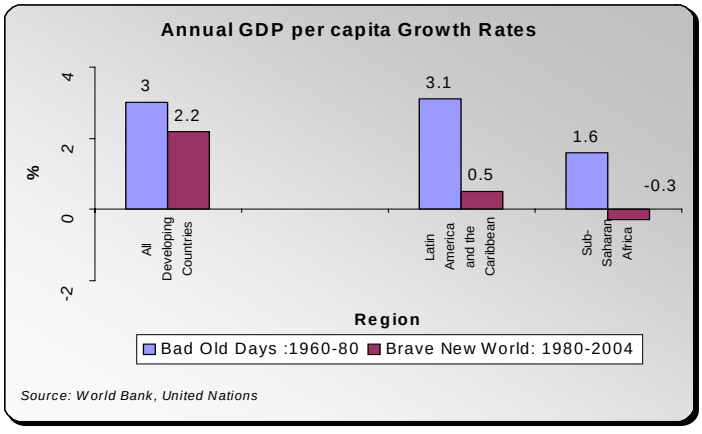
When they needed to protect their nascent producers, most of today's rich countries restricted foreign investment. In the 19th century, the US strictly regulated foreign investment in banking, shipping, mining, and logging. Japan and Korea severely restricted foreign investment in manufacturing. Between the 1930s and the 1980s, Finland officially classified all firms with more than 20 per cent foreign ownership as "dangerous enterprises".

While (exceptionally) practising free trade, the Netherlands and Switzerland refused to protect patents until the early 20th century. In the 19th century, most countries, including Britain, France, and the US, explicitly allowed patenting of imported inventions. The US refused to protect foreigners' copyrights until 1891. Germany mass-produced counterfeit "made in England" goods in the 19th century.

Despite this history, since the 1980s the "Bad Samaritan" rich countries have imposed upon developing countries policies that are almost the exact opposite of what they used in the past. But these countries condemning tariffs, subsidies, public enterprises, regulation of foreign investment, and permissive intellectual property rights is like them "kicking away the ladder" with which they climbed to the top - often against the advice of the then richer countries.

But, the reader may wonder, didn't the developing countries already try protectionism and miserably fail? That is a common myth, but the truth of the matter is that these countries have grown significantly more slowly in the "brave new world" of neo-liberal policies, compared with the "bad old days" of protectionism and regulation in the 1960s and the 1970s (see chart). And that's despite the dramatic growth acceleration in the two giants, China and India, which have partially liberalised their economies but refuse to fully embrace neo-liberalism.

Growth has failed particularly badly in Latin America and sub-Saharan Africa, where neo-liberal reforms have been implemented most thoroughly. In the "bad old days", per capita income in Latin America grew at an impressive 3.1 per cent per year. In the "brave new world", it has been growing at a paltry 0.5 per cent. In sub-Saharan Africa, per capita income grew at 1.6 per cent a year during 1960-80, but since then the region has seen a fall in living standards (by 0.3 per cent a year).



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TRADE REMEDIES CORNER:
A GLIMPSE INTO THE FUTURE OF ANTI-DUMPING LAW

Keisha-Ann Thompson

The World Trade Organisation (WTO) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement, or "ADA"), in its current form is largely the product of the Uruguay Round. The Round ran from 1986 to 1994, and produced some of the most significant changes to WTO law, since the establishment of the General Agreement on Tariffs and Trade (GATT).

The Anti-dumping Agreement represents the most comprehensive form of the rules to date, essentially adding meat to the bones of Article VI of GATT and previous anti-dumping codes. Article VI of GATT contained provisions that permitted Members to take action against dumping, but did not elaborate on the findings necessary, nor the procedures to be followed in order to invoke the remedies afforded. Anti-dumping duties are the remedies used to address instances where a domestic industry may be suffering injury as a result of dumping. Dumping is defined in the Agreement, as the practice of selling a product at a price that is lower than the price charged for the same product, under the same circumstances of sale, in the domestic market of the exporter. Anti-dumping duties are exporter, product and country specific.

It is important to note that the ADA can be looked at as a document that prescribes the way that Members can respond to dumping and does not condemn or outlaw the practice. Dumping, as defined in the Agreement amounts to price discrimination between international markets, and is considered to be a legitimate business strategy in some situations, for example, trying to break into a new market or to simply maximise profits.

An investigation is required under the ADA for a WTO Member to determine if in fact an anti-dumping measure is warranted in a given situation. The provisions in the ADA can be placed in two broad categories. Those that cover the *substantive conditions* that must be met for a measure to be imposed and *procedural requirements* for the conduct of a WTO compliant investigation.

Notwithstanding, the level of detail resulting from the Uruguay Round, there still continues to be ambiguity in the Agreement language. This has led to considerable variation in practice across Members. Some believe that these ambiguities lead to the abuse of the law, with the consequence that anti-dumping has become the trade policy instrument of choice among protectionists. This has led some to question its legitimacy and to call for a so-called "dumping" of anti-dumping laws.

The frequent use of the instrument has led some Members, in particular major developing country exporters, such as India and China, (the repeated subjects of anti-dumping measures), to ask that the rules be tightened. Other Members, such as the US, have resisted changing the rules. A compromise was arrived at in Doha in 2001, where a part of the mandate given to the Rules Negotiating Group (RNG) was to identify those provisions of the ADA that needed to be clarified and improved, while preserving the basic concepts and principles, and taking into account the needs of developing countries.

At the end of November last year, RNG Chair, Uruguayan Ambassador Guillermo Valles Galmes circulated the first draft text since the start of the negotiations in 2001. The draft text met with considerable criticism from many quarters as reflected in the most recent set of documents circulated by the Chair. The ADA is one of the most technical and complicated of the WTO Agreements; so, considering the number of proposals and dissent, the production of a consolidated text is significant. The ADA has the distinction of being the most frequently disputed of all the WTO Agreements. Hence, there is a significant amount of jurisprudence to be considered in the clarification and improvement exercise. This further adds to the controversy, as Members views differ on the extent to which the reports of the DSU should be codified. Panel and Appellate Body reports are not binding except on the parties to the particular dispute and do not form a part of Members' substantive obligations, not having resulted from the decision of Members. The decisions from these disputes, however, have acted as persuasive precedent over the years, influencing many jurisdictions' practice. They have, most often, *de facto* become an integral part of the disciplines. This can be seen in the fact that some terms of art used by practitioners, such as for example, "non-attribution" and "parallelism", have their origins, not in the language of the ADA, but in that of Dispute Settlement decisions.

Some of the less contentious changes can be seen as simply attempting to codify good practice, resolve uncertainty in practice where the Agreement has been silent, eliminate bias and promote transparency. However, even here, care is needed, since Members' capacities differ, affecting their ability to institute any proposed changes, however well intentioned. In fact, the African, Caribbean and Pacific (ACP) group has repeatedly pointed to the fact that the majority of developing countries have had difficulty in using the rules. Government resources to successfully implement them are limited and industries are similarly handicapped. This has led to underutilisation of the disciplines in some Members, and as a consequence, continued exposure of industries to the ravages caused by unfairly traded imports. Even in light of these realities, however, there has been and continues to be strong opposition to the introduction of less stringent requirements for developing countries, both in their conduct of investigations and as subjects of application of measures.

Suffice it to say, there appears to be very little common ground on the more substantive changes proposed in the Chair's text. Some Members believe that the proposed changes did not go far enough, while others feel that they go too far. A few fundamental ones are worth highlighting. One of the most noticeable features of the Chair's November text was the absence of any amendment to Article 15. Article 15 is the only provision in the ADA where it is a recognised that developing countries may be accorded special treatment. However, it is extremely limited in scope and lacks teeth. The Chair's text did not reflect any of the suggestions on how to improve Article 15. The ACP have however put forward a proposal which the Chair has inserted in the draft text subsequent to Members' reactions.

Perhaps the most controversial inclusion in the text was the adoption of the zeroing methodology in some contexts. Zeroing is a practice, whereby negative dumping margins are replaced with zeros. According to critics, the practice unfairly inflates dumping margins and hence the antidumping duties payable. The amendment proposed in the Chair's text would preclude the practice of zeroing where weighted average is compared to weighted average, but allow zeroing where a transaction-to-transaction analysis is utilised. The issue of zeroing has been the subject of several dispute settlement panels and has been repeatedly appealed. The zeroing methodology has been found to be inconsistent with the ADA in some circumstances by panels and by the Appellate Body.

Another controversial inclusion in the text is mandatory termination of antidumping measures after ten years. Currently, the ADA permits measures to remain in place initially, for five years. However, it also permits reviews,

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CHANGING US - CARIBBEAN TRADE RELATIONS

*Andrea Ewart, Esq.**

Anticipating the expiration later this year of key provisions of the Caribbean Basin Initiative (CBI) programme, which has shaped United States-Caribbean trade relations for the past twenty-five (25) years, the U.S. Congress has begun to think about how to re-direct U.S. trade policy in the Caribbean. Discussions of what to do about the expiring CBI provisions will also be shaped by the desire of many Congressional representatives to revisit all of the U.S. trade preference programs that unilaterally grant duty-free access to the U.S. market. Also expiring this year, in addition to CBI provisions, is the Generalised System of Preferences (GSP) program for 132 developing countries including the Caribbean, and the Andean Trade Preference program (ATPA). Rather than simply renewing these, Congress has expressed its intent to debate the role of unilateral preference programs in general. What is their overall goal; and are there better ways to contribute to the countries' development? Should these unilateral programs be replaced by agreements that place the countries' trade relations with the U.S. on a reciprocal footing?

History & Prospects for U.S.-Caribbean Trade Relations

The CBI was launched in 1983 through the Caribbean Basin Economic Recovery Act (CBERA) for twenty-four (24) countries in the Caribbean and Central America. The stated goal was to promote the region's economic revitalization and growth. CBERA was later modified in 1990 when the range of products allowed duty-free entry into the United States was expanded and the program made permanent. In 2000, the Caribbean Basin Trade Partnership Act (CBTPA) further expanded the program to allow duty-free entry into the United States of some textiles and apparel as well as other previously excluded products. It is these CBTPA provisions that expire in September, 2008, requiring the U.S. Congress to either:

i. Allow CBTPA to expire;
ii. Renew CBERA; or
iii. Revamp and revise CBERA.

Let us explore these options.

Allow CBTPA to Expire

Congress may choose to take no action prior to the legislation's expiration date, thereby allowing the CBTPA program to also expire. Expiration of CBTPA would nevertheless leave in place the CBERA provisions which already allow a wide range of products duty-free entry into the U.S. market on a permanent basis. However, CBTPA was enacted because of the realisation that CBERA was insufficient to meet the development goals of the region and its desire for increased access to the U.S. market. It is widely recognised that these goals have not yet been fully realised. In 2006, for example, goods valued at US $10 billion were imported into the United States under the CBI program. However, the majority of these products came from three countries – Trinidad & Tobago (36%), the Dominican Republic (25%), and Costa Rica (14%). The other program participants each provided no more than up to 7% of total imports into the United States; Jamaica provided 2%. Fuel and methanol products from Trinidad & Tobago alone typically account for over 50% of U.S. imports from CARICOM countries. These figures starkly indicate that the goal of increased access to the U.S. market under CBI has not yet been attained.

Renew CBTPA

Enacting legislation to merely renew CBTPA should be relatively easy to accomplish, but given the context outlined above is not the desired outcome. At the request of Representative Charlie Rangel (Democrat-New York), the U.S. International Trade Commission (USITC), investigative arm of the U.S. government on trade matters, has been tasked with investigating and providing recommendations on future U.S. trade policy in the Caribbean. Rep. Rangel is the Chair of the Ways and Means Committee of the U.S. House of Representatives which has primary jurisdiction over U.S. trade policy. Additionally, Mr. Rangel has a long acquaintance with and interest in the Caribbean. He has asked that the USITC study: (1) provide an in-depth description of current levels of economic development in the Caribbean; and (2) identify possible future development strategies. The questions to be answered by the USITC report include the following:

Has CBI contributed to the region's economic development? If so how? Two CBI beneficiaries -- Costa Rica and Panama – have signed free trade agreements with the United States; should the CARICOM beneficiaries of CBI also pursue a free trade agreement with the United States? If not, what is an appropriate alternative framework on which to build the future of U.S.-Caribbean trade relations?

Revamp CBTPA

As the request to the USITC suggests, it is most likely that CBTPA will not just be renewed but also revised. This was also the consensus of those who presented at the hearing held by the USITC on January 29, 2008 to solicit input from interested parties. Furthermore, because the remaining CBI beneficiaries are all Caribbean countries, the program may now be re-shaped to focus on the needs of the Caribbean region.

Two panels comprising representatives of regional governments, CARICOM and the Organisation of American States, as well as trade experts provided oral testimony at the USITC hearing. Among the varying viewpoints presented, the following recommendations appeared consistently in the submissions and presentations:

- Expand the program to allow the export into the United States of Caribbean-based tourism, financial sector, and other professional services
- Expand the goods eligible for duty-free entry and simplify the rules that determine which products are eligible for duty-free entry
- Incorporate capacity-building assistance; and
- Recognise that the region is not ready for a free trade agreement with the United States, although the concrete suggestions about how to move trade relations forward differed.

The USITC report is due before Congress in April, 2008. Its findings and recommendations will provide a good indicator of the direction that Congress will take to shape future US-Caribbean trade relations.

Moving U.S.-Caribbean Trade Relations to a Reciprocal Basis

While this writer believes that the U.S. Congress will most likely extend and expand the CBI program, this can only be a short-term measure. Unilateral preferential programs, such as CBI, violate the Most Favored Nation (MFN) commitment that each Member makes to provide the same level of market access to all WTO Members. Consequently, they require a waiver to be legal under WTO rules. The current waiver has been held hostage to ongoing dissatisfaction with the European Union banana regime. While there may be sufficient support among WTO members to allow these programs to continue in the short term, their days are numbered. Consequently, any discus-

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GLOBAL HEALTH GOVERNANCE IN THE WTO: ASSESSING THE APPELLATE BODY'S INTERPRETATION OF THE SPS AGREEMENT AND IMPLICATIONS FOR SPS MEASURES IN RTAs

*Dr. Delroy S. Beckford**

TRADE GATEWAY NOTE:

Sanitary and Phyto-Sanitary measures are border measures to protect human health, animal or plant life or health. Popularly called quarantine measures. They are used to prevent the spread of pests and diseases.

WTO Dictionary of Trade Policy Terms

Health protection has loomed large as a value so worthy of deference by the WTO that this has prompted the suggestion that it has assumed the status of an interpretive principle in the interpretation of trade agreements. By this is meant that protection for health, as an interpretive principle, is given substantial weight to allow WTO Members significant discretion in the application of measures for health governance. However, the interpretation of the Agreement on Sanitary and Phyto-Sanitary Measures (SPSA) and Article XX (b) of GATT 1994 by the Appellate Body (AB) provides little support for this position. The different criteria to be met under the necessity tests under both provisions, and under GATT Article XXIV with respect to free trade agreements demonstrate the challenge that will accompany the design and application of SPS measures in order for them to pass muster under GATT and under Regional Trade Agreement (RTA) provisions, which must be consistent with GATT.

Measures to be necessary in relation to the objects pursued

Once a WTO Member has chosen its level of protection for the application of SPS measures, such measures are required to be no more than necessary for the attainment of that object. Thus Article 2.2 of the SPSA states:

Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

This provision does not indicate what is meant by "necessary", but Article 5.6 of the SPSA sheds some light on the meaning to be accorded to the term. Both Article 5.6 of the SPSA and GATT Article XX bear a close relationship in terms of the requirement of a balancing between the health measure and its likely effect on trade. Also, both provisions stipulate similar conditions for the balancing of the competing norms of health governance and trade liberalization implicated, although interpretation by the AB of Article XX (in particular Article XX(b)) provides a more nuanced approach to the balancing of these competing norms.

Article 5.6 of the SPSA requires that a Member's SPS measure be no more trade restrictive than necessary in order to achieve its appropriate level of protection. In *Australia-Salmon*, the AB set out three conditions to be met for there to be a breach of this provision. These are (1) there is an SPS measure that is reasonably available taking into account technical and economic feasibility (2) achieves the Member's appropriate level of sanitary or phytosanitary protection and (3) is significantly less restrictive to trade than the SPS measure contested. The AB indicated that these conditions are cumulative so that if any one of these conditions is not met, the measure in dispute would not be in breach of Article 5.6[1].

By contrast, GATT Article XX provides that:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

.(b) necessary to protect human, animal or plant life or health;

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

A comparison of both provisions requires the meeting of a necessity test for the health measure implemented. Article 5.6 requires that there is no alternative measure in place that is significantly less trade restrictive than the contested measure, and Article XX of GATT requires that the measure be necessary in the sense that there is no less trade restrictive measure in place.

The AB's interpretation of Article XX (b) has benefited from some measure of refinement that has not been extended to its interpretation of Article 5.6 of the SPSA. It has held in *Korea –Beef* that "necessary" does not necessarily mean indispensable, thereby allowing for a measure that is not the *only* measure that could have addressed the risk posed. Where the measure is not indispensable the AB balances a number of factors to achieve the appropriate balance between the competing norms of health governance and trade liberalization. These are (1) the contribution made by the compliance measure to the enforcement of the law or regulation at issue (2) the importance of the common interests or values protected by that law or regulation, and (3) the accompanying impact of the law or regulation on imports or exports[2].

Despite the similar requirement for necessity under Article 5.6 of SPSA and Article XX (b) of GATT 1994, there is some notable difference in the application of the standard under both agreements. Conceivably, Article 5.6 includes measures that are not indispensable by virtue of the fact that a measure may be justified if it is not significantly more trade restrictive than a reasonably available alternative. Consequently, if the alternative measure is merely less trade restrictive the challenged measure may still meet the requirements of Article 5.6, but without the balancing requirement for the necessity standard under Article XX (b) of GATT 1994.

The disconnect in the jurisprudence on the necessity standard under both agreements may be justified on the basis that the SPSA is a more specific agreement to address measures to protect health and that the SPSA is designed to provide a less onerous route for the justification of health measures in the form of an SPS measure. The difference in the requirements for justification of measures under Article XX (b) and Article 5.6 of the SPSA seems to support this argument. The Chapeau to Article XX of GATT 1994 requires, as the AB clarified in *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, that a Member imposing a measure pursuant to Article XX discharges its duty to negotiate a bilateral or multilateral outcome to resolve the dispute prior to an embargo against another Member's exports. Although the decision relates to the interpretation of Article XX (g) and not Article XX (b) of GATT 1994, it has general application for the interpretation of other Article XX exceptions to GATT for as the AB further clarified 'any appraisal of justifiable or unjustifiable discrimination' requires an examination of whether the Member imposing the measure in the form of an embargo has engaged Members who may be affected in concluding a bilateral or multilateral solution.

The 'justifiable or unjustifiable discrimination' standard is contained in the *Chapeau* that the AB has clarified to require interpretation for GATT consistency of any exception measure taken under Article XX even if they initially meet the necessity or other test under that provision[3]. Similarly, Article 2.3 of the SPSA contains the same standard to guard against arbitrary and unjustifiable discrimination, although it is un-

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BILATERAL UPDATE: CARICOM-CANADA

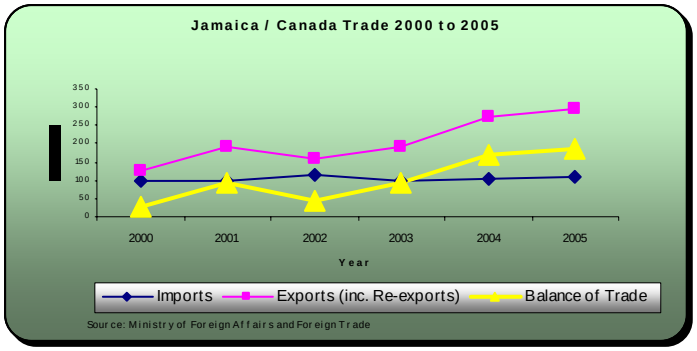
Keisha-Ann Thompson

Jamaica currently trades with Canada under the CARIBCAN Agreement. CARIBCAN was established in 1986 and provides duty free access into the Canadian market for most products from eighteen Commonwealth Caribbean Countries. Such non-reciprocal arrangements contravene World Trade Organisation (WTO) rules and require a waiver to operate. Canada secured a waiver for ten 10 years, and then on December 15, 2006 secured a further five-year extension of the waiver, which will expire in 2011. The scenario is similar to that which necessitated negotiation of the Economic Partnership Agreement (EPA), recently concluded with the European Communities (EC).

CARICOM is to shortly start negotiations with Canada towards concluding a reciprocal trade agreement. Expectations are that another WTO waiver will not be secured by Canada. In fact, the current extension was sought and granted with the understanding that it would facilitate the launch of free trade negotiations between CARICOM and Canada. Varying interests and resource constraints among the members of the fifteen nation CARICOM bloc delayed the first round of negotiations, which should have started in early February.

The EPA experience, the final text of which is slated to come into force in April 2008, will certainly inform these negotiations. An important fact to keep in mind is that the EPA contains a Most Favoured Nation (MFN) provision, that calls for the extension, to the EC, of any more favourable treatment given to another trading partner in future trade deals. This means, for example, that if Canadian goods are given better tariff treatment than currently exists for the EC, then under the EPA, such treatment must also be extended to the EC, making the EPA a very dynamic creature. Also important is the fact that the EPA covers both goods and services. A Free Trade Agreement with Canada is also likely to cover goods and services, as distinct from current arrangements under CARIBCAN which cover only goods.

Under the current non-reciprocal arrangements, with Canada, the



volume of Jamaica's goods imports from Canada has grown by approximately 11% while exports have grown by over twelve times this number in 2005 over their 2000 levels. Consequently, preliminary estimates are that Jamaica's positive trade balance with Canada has moved from US$25 million in 2000 to US$185 million in 2005, fueled largely by the growth in exports. As with any market opening exercise, there are always fears that the trade balance can shift unfavourably. This is a legitimate fear that developing countries will no longer benefit from preferential arrangements, as will be the case with the proposed reciprocal trade deal with Canada It is hoped however, that the Caribbean's proximity to the Canadian market, cultural and historical ties as well as migration patterns will help to maintain the current favourable trade balance, as well as future product developments.

(Continued from page 6) ***Global Health Governance in the WTO***

clear whether this means that, like the duty to negotiate in Article XX (b) jurisprudence, the requirements of Article 4.2 of the SPSA (regarding the duty to consult with a view to concluding Mutual Recognition Agreements or MRAs) must be met to satisfy the standard in Article 2.3 of the SPSA. The duty referred to in the interpretation of Article XX (b) is a duty to negotiate and not necessarily to conclude a bilateral or multilateral agreement. Further, this duty arises in the context of discrimination in the design or application of the measure between countries where the same conditions prevail.

It is interesting to note, however, that an SPS measure may pass muster under the necessity test of the SPSA and fail that test under Article XX of GATT 1994. That is, in the one case, there is no balancing of factors for the measure to be justified if it is not indispensable while in the other a balancing is required for the justification of the measure as necessary where the measure is not indispensable. There is no apparent justification in principle for the difference in the AB's approach on the necessity standard under both provisions. It may be argued that there is no need to harmonize the jurisprudence on both provisions (with respect to the necessity standard) because both provisions focus on different issues, one (Article XX of GATT 1994) addressing general exceptions under GATT and the other (Article 5.6 of SPSA) addressing specific measures under a specific agreement.

This position is less than convincing because the AB has opined that the WTO Agreement must be read and interpreted as a whole. Indeed, claimants often plead a breach of several agreements in a dispute. It would not be unusual therefore for a Member to claim that an SPS measure is in breach of the SPSA and of another provision of GATT 1994 that would require the respondent Member to plead Article XX (b) as a defence. In this regard, the AB has stated that no one agreement takes precedence over the other. This means that where Article XX is claimed as a defence to an SPS measure the SPS measure would ultimately have to be justified under the more stringent of the two separate criteria for justification of such measures.

Relationship between SPSA and SPS measures under RTAs

Article XXIV of GATT 1994 governs the formation of RTAs. SPS measures are usually an important component of the rules within an RTA, but their inclusion present several interpretive issues. An SPS measure implemented within an RTA may be the result of an MRA as between the members of the RTA, or there could also be mutual recognition agreements between the RTA members collectively and some countries external to the RTA. GATT inconsistent SPS measures have to meet a necessity test under Article XXIV to be justified. This requires that the measure be put in place on the formation of the customs union (CU) or free trade area (FTA) and the measure is necessary for the formation of the CU or FTA, that is the CU or FTA could not have been formed but for the SPS measure. It is unclear whether the SPS provision in an RTA if stated to require consistency with GATT obligations would therefore mean that the FTA never intended a GATT inconsistent SPS measure to be a necessary condition for the formation of the CU or FTA. That means that the discriminatory application of an SPS measure, whether *de facto* or *de jure*, would not meet the necessity test under Article XXIV .

The necessity test under Article XXIV, like that under Article XX (b) and Article 2.2 and 5.6 of the SPSA are designed to balance trade liberalization against legitimate domestic regulatory policy goals of health protection. However, the criteria to be met for each when compared to the other are substantially different thereby resulting in uncertainty

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Trade Talk For "Dummies"

Althea Woolcock

Policy Space in International Trade

The term "policy space" in its current meaning formally appeared in the Sao Paulo Consensus which was adopted at the 11th Session of the United Nations Conference on Trade and Development. In that declaration, it was defined as, "the scope for domestic policies, especially in the areas of trade, investment and industrial development which might be framed by international disciplines, commitments and global market considerations."

Professor Alan Winters of the University of Sussex at a WTO Forum defined policy space as "the argument that countries should have fewer constraints, fewer rules on the policies that they can pursue."

Policy Space is sought for both broad economic strategy and specific policies. Some countries see it as a general freedom from external constraints. The constraints directly relevant to the WTO, from which freedom is sought are primarily legal ones, both those stemming from WTO commitments and those interacting with them, such as regional or financial agreements. Policy space in relation to specific Doha commitments is an issue in six areas – tariffs, agricultural policy, services, Investment and Trade Related Intellectual Property.

The principal argument for allowing developing countries more policy space, than others, is that they are more likely to need to take policies which may be constrained. This is clearest in relation to interventions that may be needed to execute a country's industrial strategy. The small and vulnerable economies, for example, have argued that their characteristics give them a particularly strong need to use subsidies, however WTO rules on subsidies make this more difficult and in some instances illegal. There is also the possibility that developing countries are more likely to want to change their policies in the future, but will be constrained from doing so because of an erosion of their policy space.◘

Sources: Overseas Development Institute (ODI) Briefing Paper – January 2007 and WTO Forum 5, WTO website, www.wto.org.

(Continued from page 3) ***Protectionism***

Both the history of rich countries and the recent records of developing countries point to the same conclusion. Economic development requires tariffs, regulation of foreign investment, permissive intellectual property laws, and other policies that help their producers accumulate productive capabilities. Given this, the international economic playing field should be tilted in favour of the poorer countries by giving them greater freedom to use these policies.

Tilting the playing field is not just a matter of fairness. It is about helping the developing countries to grow faster. Because faster growth in developing countries means more trade and investment opportunities, it is also in the self-interest of the rich countries. ◘

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(Continued from page 5) ***US—Caribbean Trade Relations***

sion of the long-term future for U.S.-Caribbean trade relations needs to include prospects for moving the relationship towards reciprocity.

At the same time, US-CARICOM trade relations have not matured to the point where a free trade agreement can effectively replace CBTPA. The U.S. approach to negotiating free trade agreements is a one-size-fits-all approach that minimises differences in economic development of the negotiating party. Nor does it include the development phase-ins that have been included in the Economic Partnership Agreement (EPA) recently negotiated with the European Union.

The most appropriate framework for moving U.S.-Caribbean trade relations onto a reciprocal footing is the Trade and Investment Framework Agreement (TIFA). A TIFA would provide for the establishment of a consultative mechanism to address such issues as the need to find workable solutions to the technical barriers that continue to exclude Caribbean products that affect US-Caribbean trade relations. A TIFA can also lay the groundwork for negotiating, first sector-specific trade and investment agreements, and eventually a free trade agreement between the region and the United States.◘

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[1] The ATPA, which expires in February, 2008, is in the process of being renewed, most likely for a short period of time, to allow the program to continue for Colombia which has an FTA pending with the United States, and Bolivia and Ecuador, while the long-term discussions continue. Peru, a former beneficiary, recently concluded an FTA. The other U.S. trade preferential programs are the African Growth and Opportunity Act (AGOA) and Haitian Hemispheric Opportunity through Partnership Encouragement (HOPE).

[2] U.S. Government Accountability Office (GAO), "U.S. Trade Preference Programs: An Overview of Use by Beneficiaries and U.S. Administrative Reviews," Sept. 2007, p36.

[3] Six of the original 24 CBI beneficiaries are now signatories to the U.S.-CAFTA-Dominican Republic FTA; Costa Rica and Panama have signed or pending FTAs with the United States. The remaining CBI beneficiaries are Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Netherlands Antilles, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago.

To Administrative Staff Members of the Commission

The Anti-dumping and Subsidies Commission believes that in order to reach its goal and sustain the role of being a Centre of Trade Excellence in Jamaica and the region, it must build the capacity of all its staff. As a result, ALL members of staff are encouraged to acquire competence in the basics and pursue further training in the highly technical area of trade remedies disciplines.

The WTO offers **training courses via the internet** to introduce participants, mostly regulatory (public sector) employees, to basic WTO disciplines. The **online training** is sometimes a pre-requisite for more advanced courses offered, typically on a regional basis, by the WTO. This year, for the first time, three of the Commission's administrative staff members were encouraged to register for online courses. They each completed one course out of Introduction to the WTO or Introduction to Trade Remedies. All did extremely well and have gone on to register for additional WTO E-Online training. We commend staff members, **Khalile Nelson**, **Pamela Morgan** and **Ermine Lewis** for the enthusiasm with which they approached this new learning and for their excellent results.

PUBLIC SECTOR EMPLOYEES MAY CONTACT US FOR INFORMATION ABOUT WTO-ONLINE TRAINING COURSES.

(Continued from page 4) *Trade Remedies Corner*

which are investigations that look at the continued need for the measures. Subsequent to these reviews, countries can reapply measures, with the result that antidumping duties can remain in place indefinitely. There are instances where measures have been in place for over fifteen years. The proposed language would limit all AD measures to a finite period.

"Standing" relates to a test that must be met for a domestic industry to bring an application for the imposition of anti-dumping duties. The test requires that the portion of the production of the industry filing the application, account for 50 per cent of the aggregate production of those supporting and those opposing the application, and at least 25 per cent of the total industry (those supporting and opposing and those that have remained silent). The ADA currently permits those firms which are related to exporters and those that are themselves importers of the product to be excluded from the industry. It does not, however, specify the basis on which such exclusion would take place. The amendments reflected in the Chair's text specify those situations where exclusion would take place. This makes it less likely that producers can be arbitrarily excluded. However, a point to consider is whether or not the situations listed are sufficient.

Another development concerning the standing requirement, is that the proposed changes would now require this threshold determination to be made in reviews. Reviews, unlike the original investigation were automatic, in that standing did not need to be established before a review could be initiated. The main implication of this, aside from the need for additional analysis, is that, in trying to maintain the relief provided by anti-dumping duties, companies that produce will need to gain the support of those who import, unless sufficient justification can be found to exclude them.

Probably, the most far reaching impact of WTO jurisprudence can be seen in the changes that are reflected in the text to the so called "causation" requirement. An anti-dumping duty cannot be applied unless three main criteria are met. There must be **dumping, injury** and **causation.** "Causation", refers to the link that must be established between the dumping and the injury, hence the phrase "causal link". This requirement was actually relaxed during the Uruguay round, from a requirement for the dumping to be the **principal cause** of injury, in previous anti-dumping codes, to a requirement that it need only be a cause of injury. This means, practically, that even where there are other factors at the same time causing injury to the domestic industry, including its own actions, action against dumped imports is not precluded. WTO jurisprudence however, has established that while the dumping need not be the sole or even principal cause of injury, there should be a separation and distinction between the various factors that may at the same time be affecting the domestic industry, so that the injury caused by these "other" factors are not attributed to the dumping. The result is that investigating authorities have to prove more than a mere coincidence in time between the dumping and the injury to establish a causal link.

However, it has never been clear precisely what needs to be done to "non-attribute" the injury in this way. The jurisprudence has stated that quantification is not required. However, some believe that quantification, though admittedly difficult in practice, is the only way to give effect to this requirement. The Chair's text codifies this "non-attribution" principle, a sore point for many who see it as making it more difficult for a domestic industry to prove its case for relief, and also clarifies that what is needed is a qualitative analysis. There are however, quantitative methods that can be used to conduct a non-attribution analysis, and some practitioners feel that this is far superior to a solely qualitative analysis. However, given that either method would be acceptable, it may be better to leave the choice of methodology to the Member.

Another significant addition to the text, is the inclusion of provisions on "circumvention". "Circumvention" is a term used to describe the situation where an exporter attempts to avoid an anti-dumping duty through various means. Some of the more common methods are to modify the product slightly, tranship through a third country, or export components only, instead of the finished product. Currently there are no provisions in the ADA to address this. Countries have therefore been faced with the dilemma of figuring out how to handle an exporter who is attempting to circumvent the duty. Given the lack of anti-circumvention provisions in the ADA, it seemed that the only way to address such imports might be to initiate a new investigation. This would require more resources from an industry which was already weakened by dumping and which had just fought its battle and won. In practice some countries have established expedited investigations to address circumvention. However, the legal basis for this is heavily debated. The inclusion of explicit provisions on circumvention is a definite plus for the users of the instrument, though some critics feel that the ones proposed do not go far enough.

The proposed changes to the ADA are numerous and we have only discussed a few. In evaluating these it should always be remembered that trade remedies are a double edged sword. In one sense they can be used to defend industry, but they can also be used against exporters. The appropriate balance therefore needs to be reflected in the text. Additionally, while too much ambiguity is problematic, some ambiguity especially where it confers some amount of flexibility can be beneficial. In terms of the timeline, Doha is fast approaching the standard set by Uruguay, but it remains to be seen if it will also match the record in terms of substantive changes. In particular, those that reflect the development orientation of the Round. Agreement on a final text will depend on many factors, including what happens in other areas of the negotiations.◘

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in the appropriate design of domestic policy instruments to demarcate the margin of appreciation for domestic regulatory autonomy.

Under Article XXIV, the balancing between the two objectives of liberalization and health protection requires that the SPS measure, if regarded as 'other regulations of commerce' pursuant to Article XXIV: 5, be no higher or more restrictive 'than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free trade area…'4 Internal MRAs that, on the whole, raise the level of, or require more stringent criteria than, what existed before the formation of the RTA may conflict with this requirement. By contrast, MRAs, that provide overall qualitatively lower SPS measures to accommodate integration efforts within the RTA, meet the requirements of Article XXIV: 5. However, they may run afoul of the MFN requirement under Article XXIV: 5 with respect to MRAs between the RTA and Members external to the RTA, if there is no consistency in the qualitative level of the SPS measure applied to Members external to the RTA. In other words, qualitatively lower SPS measures would also have to be extended to non-RTA Members, even though the RTA Members may be handicapped in their entry into markets with higher SPS standards. Negotiation of MRAs with provisions requiring qualitatively higher SPS measures than exists within the RTA, to ensure that the RTA Members are not any more disadvantaged in market access to non-RTA Member markets than those non-RTA Members would be with respect to the market of the RTA, would also run counter to the national treatment obligation in Article XXIV:5. It could then be argued that the application of a qualitatively higher

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SPS measure for imports into the RTA than for intra-RTA trade is not necessary under Article 2.2 of the SPSA because of the existence of a less trade restrictive alternative. Here, a violation of the national treatment obligation under Article XXIV: 5's necessity test merges with the necessity requirement under Article 2.2 of the SPSA. Similarly, concluding MRAs with Members external to the RTA that provide for qualitatively different levels of SPS measures among these Members would also be potentially inconsistent with the MFN requirement and would pose a challenge to meeting the necessity test under Article XXIV: 5 (because the RTA does not require these to be in existence), and possibly that under Article 2.2 and 5.6 of the SPSA (because of the availability of a less trade restrictive alternative).

Implications for SPS provisions in the EPA

The SPS provisions in EPA mirror those in the WTO Agreements and the jurisprudence developed in the WTO is therefore relevant for how SPS measures are to be applied. Critical concerns for CARIFORUM in the application of SPS measures against their exports to the European Union will be the conclusion of MRAs and the utilization of Special and Differential (S&D) provisions in the SPSA. But the conclusion of MRAs will require technical assistance to meet SPS standards as a precondition for acceptance of SPS measures in CARIFORUM as equivalent to standards in the EU.

Given the requirement for MRAs to be extended on an MFN basis to avoid a challenge to the EPA as not WTO consistent (i.e. would not meet the necessity test under Article XXIV of GATT 1994), it is unlikely that MRAs will be concluded without equivalence in standards that is consistent with the EU's appropriate level of protection. This is so because conclusion of MRAs without equivalence in standards with the EU means that the application of EU SPS measures to non-CARIFORUM parties would invite a challenge for breach of SPSA on the basis that a less restrictive trade alternative is available to meet the EU's appropriate level of protection. As discussed above, this would possibly arise where the SPS measure is not indispensable and some balancing of factors is required for justification of the measure, assuming the jurisprudence on Article XX (b) of GATT 1994 may be invoked for the determination of this issue.

The application of S&D provisions pursuant to the SPSA (which is incorporated in the EPA) would also not be shielded from the necessity test stipulated under the SPSA, despite drafting language that suggests the contrary. For example, Article 10 of the SPSA provides:

> *1. In the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members.*
>
> *2. Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.*
>
> *3. With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee is enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs.*
>
> *4. Members should encourage and facilitate the active participation of developing country Members in the relevant international organizations.*

Article 10.2 of the SPSA suggests that CARIFORUM may benefit from the phased introduction of new SPS measures. There is no obligation however to accord this treatment bearing in mind the use of the word 'should' that indicates a best efforts approach similar to the AB's interpretation of Article 3 of the SPSA as to whether there is an obligation to base SPS measures on international standards[5].

In any event, if an obligation were to be deduced from this provision this would not trump a Member's right to set its SPS measure to be consistent with its appropriate level of protection. In this respect any substantial difference in SPS measures to be applicable to WTO Members would have to be justified under the necessity test. A phased introduction of new SPS measures to accord with the S&D provision in the SPSA suggests that a less restrictive trade alternative is available, and, arguably, would have to be extended on an MFN basis to other WTO Members. In other words, Article 10 of the SPSA is not in any sense a true S&D provision because it privileges appropriate level of protection above differential treatment. That being so, the EU would be under no less obligation to other WTO Members than it would be for CARIFORUM with respect to obligations under the SPSA. In this respect, the existence of the S&D provision in SPSA does not foreclose meeting the necessity tests under SPSA and Article XXIV.

Concluding remarks

Health governance is of central concern in the interplay between trade liberalization and appropriate standards for traded goods. The SPSA is designed to play an important role in achieving a balance between these competing norms. However, the AB's interpretation of this agreement raises unresolved questions regarding the circumstances under which liberalization will trump standards. SPS measures must be necessary under SPSA, GATT Article XX (b), and Article XXIV with respect to RTAs where the SPS measure is inconsistent with GATT. That the necessity test under these provisions is not identical has implications not only for appropriate design of domestic policy instruments to demarcate the margin of appreciation for domestic regulatory autonomy, but for SPS measures under RTAs and for CARIFORUM, the EPA, in particular. The requirement to satisfy the necessity test in the case of GATT inconsistent measures means that Article 10 of the SPSA, regarding special and differential treatment for developing countries, will have to pass muster under that test if SPS measures are to be introduced that either (a) do not satisfy the appropriate level of protection of the WTO Member imposing the measure, and this treatment is not extended on an MFN basis or (b) provide for differential treatment in favour of developing countries that is not extended on an MFN basis (the claim would be that a less trade restrictive alternative is available to be applied with respect to other WTO Members).

This may very well mean that if SPS measures are used as non-tariff barriers and not as legitimate trade policy instruments for health governance it may very well mean that the S&D provision will not be given effect for the benefit of CARIFORUM.◘

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[1] *Australia-Measures Affecting the Importation of Salmon*, WT/DS18/AB/R, para. 194.

[2] *Korea-Measures Affecting Imports of Fresh ,Chilled and Frozen Beef*, WT/DS161/AB/R, para. 161.

[3] *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 147.

[4] Article XXIV: 5 of GATT 1994.

[5] *EC- Measures Concerning Meat and Meat Products(Hormones)*,WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998. Here, the AB clarified that the goal to harmonize SPS measures in Article 3 of the SPSA coupled with the obligation to base SPS measures on international standards is aspirational in character, despite the use of the word 'shall' in referring to WTO Members' obligation to base SPS measures on international standards.