Anti-dumping and Subsidies Commission

TRADE GATEWAY

YOUR SOURCE FOR TRADE REMEDIES & TRADE INFORMATION

Volume 2, Issue 1

April 2006

SPECIAL CARICOM EDITION!

In This Issue

Special CARICOM Edition!

Anti-dumping and Subsidies Commission
Kingston, Jamaica

Check out our website for news and upcoming events in Trade Remedies:

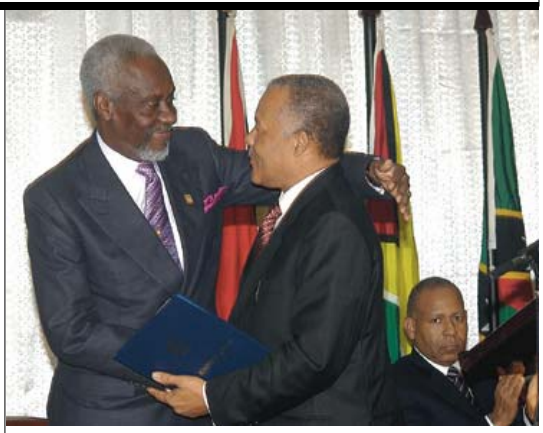
http://www.jadsc.gov.jm

REGIONALISM: SELECTED ISSUES

KEISHA-ANN THOMPSON

INTRODUCTION

In contemporary usage the terms "Regionalism" and "Regional Trade Agreements" (RTAs) have come to refer specifically to the formation of trading blocs among countries. These terms are now broadly applicable to trade arrangements among countries, not necessarily in the same geographical location[1] as may be suggested by their ordinary meaning. Essentially the arrangements foster trade between members and discriminate against non-members. They do this by applying lower, in some cases, zero tariff rates to trade between members of the bloc, while applying higher rates on trade from non-members. A description of types of trading blocks appears in Box 1.



*Former Prime Minister PJ Patterson (left) embraces Barbadian Prime Minister Owen Arthur, in January, at the Mona campus of the University of the West Indies after Arthur signed the declaration of entry that legally enforces the first phase of the CARICOM Single Market. Seated at right is Patrick Manning, the Prime Minister of Trinidad and Tobago. (*Reprinted with the permission of the Jamaica Observer Limited. Photo by Garfield Robinson.*)*

Box 1

TYPES OF TRADING BLOCS

Free Trade Areas - Countries belonging to a free trade area, trade freely amongst themselves but retain individual trade barriers with countries outside the free trade area. All members have most favoured nation status, which means that they are all treated equally. Examples include North American Free Trade Area (NAFTA) between the USA, Canada and Mexico and Asia Pacific Economic Cooperation (APEC).

Customs Unions – Member countries no longer have independent trade policy. They have a common external tariff (CET), which is applied to all countries outside the customs union. This may differ across product categories, but will be the same for all members of the union. The countries will be represented at trade negotiations with organisations such as the World Trade Organisation by supranational organisations e.g. the European Union. In the case of CARICOM, which is a union of 15 Caribbean nations, in certain fora, the Caribbean Regional Negotiating Machinery (C-RNM) negotiates for the group.

Common Market - This trading bloc is a customs union, which has in addition the free movement of factors of production such as labour and capital between the member countries. MERCOSUR is an example of a common market comprising of a number of South American nations as is the newly formed Caribbean Single Market (CSM) which comprises the CARICOM member countries.

Economic Union - This is the deepest form of regional integration. Member states may adopt common economic policies e.g. the Common Agricultural Policy (CAP) of the European Union. They may have a fixed exchange rate regime and may have integrated further and have a single common currency. This will involve common monetary policy. The ultimate act of integration is likely to be some form of political integration where the national sovereignty is replaced by some form of over-arching political authority. The best example of an economic union presently is the European Union. The Revised Treaty of Chaguaramas establishing the intention of CARICOM to move toward a Caribbean Single Market and Economy (CSME) is a move in this direction.

The character of RTAs has evolved to become more outward oriented, as opposed to the more closed, import substituting types. This is referred to as "open regionalism,"[2] and represents a commitment to promoting international trade. Interestingly, the new wave of trade agreements are not being formed between countries at the same level of economic development as was the case in former times, but between countries at varying levels of development. Estimates are that in 2002, there were approximately 162 RTAs in existence, and the WTO predicts that by 2007, there will be approximately 300 such agreements. Currently, almost every Member of the WTO is part of such an arrangement and where members are not, they are actively seeking to join or form such arrangements. RTAs have also expanded to cover not only goods, but also other areas, such as services and investment.

With the growth in regionalism has also come an expansion in the literature relating to the phenomenon and the range of issues covered in the writings. In this article we will examine two of the main issues with respect to regionalism. With specific reference to Jamaica in the context of the Caribbean Community, (CARICOM) we will look at the compatibility of regionalism with multilateralism. We will also look at is its impact on individual

Continues on page 7

TRADE AND INTELLECTUAL PROPERTY IN CARICOM

EDWARD G. BRIGHTLY, Acting Executive Director, Jamaica Intellectual Property Office

A Regional Approach to Bio-Diversity and Traditional Knowledge

"The Convention on Biological Diversity (CBD) has the objectives of *"the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources."*

The growing economic, commercial and scientific value of genetic resources, bio-diversity and associated traditional knowledge systems has highlighted the need for their protection.

Biological diversity - or biodiversity - is the term given to the variety of life on Earth and the natural patterns it forms. Biodiversity also includes genetic differences within each species - for example, between varieties of crops and breeds of livestock. Yet another aspect of biodiversity is the variety of ecosystems such as those that occur in deserts, forests, wetlands, mountains, lakes, rivers and agricultural landscapes.

Genetic resources are genetic material of actual or potential value. Genetic material can be defined as any material of plant, animal, microbial or other origin containing functional units of heredity.

Traditional knowledge (TK) generally refers to the matured long-standing traditions and practices of certain regional, indigenous or local communities. It also encompasses the wisdom, knowledge and teachings of these communities. In many instances, much of this knowledge has only been preserved orally.

Article 27 of the Trade Related Aspects of Intellectual Property (TRIPS) Agreement of the World Trade Organization (WTO) allows for the grant of patents in all areas of technology, without discrimination. Article 27.3 limits this general right to the grant of patents for all inventions by stipulating as follows:

⇒ WTO members do not have to, but may, provide protection for plant and animal inventions and for biological processes for producing plants and animals.

⇒ Members must provide patent protection for micro-organisms and non-biological and microbiological processes.

⇒ Members must also provide some form of protection for new plant varieties. This may be done by means of granting patents, by a *sui generis* system such as plant breeders' rights or by a combination of both.

Article 27.3 must also be viewed in light of the Convention on Biological Diversity (CBD).

The Convention on Biological Diversity (CBD) has the objectives of ***"the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources."*** The CBD also has important provisions concerning, "knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity."

There is a wide ranging debate about how the intellectual property (IP) system can most effectively promote the goals of the CBD: this debate concentrates on the role of IP in relation to access to genetic resources, but especially concerning equitable sharing of the benefits resulting from that access.

The debate has centered on Article 27.3[b] of the TRIPS Agreement which obliges WTO Members to provide protection for the patenting of micro-organisms, microbiological processes and non–biological processes. This has proved to be one of the most controversial provisions of the TRIPS Agreement. In fact, the provision has been so controversial that at Paragraph 19 of the Doha Ministerial Declaration, WTO Members directed the TRIPS Council as follows:

> "We instruct the TRIPS Council, in pursuing its work programme including under the review of Article 27.3 [b], the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this Declaration, to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore..."

The main contention with Article 27.3[b] of TRIPS surrounds the precise definition of "micro-organism". There has been a strong lobby group advocating a restrictive definition of micro-organism to exclude naturally occurring ones.

The debate is particularly important for developing countries such as those that make up CARICOM. While the debate continues in the TRIPS Council, the United States has already negotiated bilateral and regional trade agreements which have led to the extension of intellectual property rights protection to cover plants and animals in a number of developing countries. For example, the US-Singapore Free Trade Agreement provides for the grant of patents on plants and animals.

The problems start with the inherent contradiction between Article 27.3[b] of TRIPS and the Convention on Biological Diversity (CBD) (1992). The CBD is the first international agreement that has acknowledged the role and contribution of indigenous and local communities in the conservation and sustainable use of biodiversity. It has been signed by 169 nations, including all the member states of CARICOM.

The CBD has three main objectives:

1. Conservation of biological diversity (biodiversity);
2. Sustainable use of its components; and
3. Fair and equitable sharing of benefits arising from genetic resources.

The CBD recognises the sovereign rights of States (local communities) over their biological diversity. TRIPS, by virtue of Article 27.3[b], confers monopoly rights through intellectual property rights (IPRs). It is argued that the construct of Article 27.3[b] precludes recognition of technologies, innovations and practices of local communities and their collective ownership for common social good.

Continues on page 8

TRADE REMEDIES CORNER

AUDEL CUNNINGHAM

THE CSME ANTI-DUMPING REGIME: A CONUNDRUM IN THE MAKING

The Caribbean Single Market and Economy (CSME) has been modeled on the legal structure of the European Union (EU), the nature of which does not allow for trade defense measures to be taken among member states. The underlying juridical reason for this is that the concept of trade defense measures is inimical to the proper functioning of a true internal market, which aims at removing all barriers to trade among members. For this reason, it is suggested that the proper tool for regulating commercial behaviour which undermines or has the potential to undermine the proper functioning of the internal market is competition policy and complex state aid rules, centered on core provisions of the framework treaty, the Treaty of Rome, 1957.

Given the parallels between the CSME and EU arrangements, it might appear therefore that the provision for trade defense measures in the Revised Treaty of Chaguaramas, does not quite mesh with the nature of the economic arrangement that we are trying to create. The situation appears even more perplexing when one considers that in addition to establishing trade defense regimes, the treaty also establishes a competition policy regime and mandates CARICOM member states to enact domestic legislation implementing this regime.

As in the WTO framework, the trade defense measures provided for within the Treaty are anti-dumping and safeguard measures and countervailing duties. With respect to anti-dumping, for the most part, the substantive legal rules are a duplication of those which apply in the WTO regime. For instance, the definition of dumping is the same that applies in the WTO context[1] and there is an adoption of the WTO standards relating to (i) the need for a causal connection between dumping and injury as a pre-requisite for disciplining dumping (ii) the permissible amount of an anti-dumping duty (iii) factors to be considered in an injury analysis and (iv) necessary elements for the imposition of a provisional duty.

It is with reference to the administrative structure that applies to intra-community investigations, that one notes a marked difference between the CSME and the WTO regimes. The WTO structure, envisages a fully competent investigating authority, vested with powers to conduct preliminary and final determinations, impose or recommend the imposition of provisional and final measures and conduct periodic reviews of the need for continuation or extension of an anti-dumping duty. On the other hand, the Revised Treaty vests the authority to conduct trade remedy investigations in both national investigating authorities and the Council for Trade and Economic Development (COTED).

Under this "co-competence" structure, national investigating authorities are competent to initiate and conduct investigations up to the stage of making a preliminary determination in the first instance. The investigating country must thereafter seek consultations with the "offending" member state. The hope at this stage is that the parties will be able to resolve the issue through these consultations, obviating the need for the imposition of a remedial anti-dumping duty. Where the "offending" state refuses to enter into consultations and presumably where these consultations are embarked upon but fail to produce the desired results, COTED is obliged to conduct an investigation into the issue and where it finds the complaint of dumping or subsidisation and injury to be justified, it must request the offending party to cease the practice failing which the complaining member state may be authorised to impose a definitive measure.

One concern which appears obvious here, is whether COTED will be able to avail itself of the expertise and resources, necessary for the efficient conduct of an anti-dumping investigation. Article 10(2) of the Revised Treaty provides that COTED shall be comprised of Ministers designated by the member states, but does not vest this body with an administrative secretariat. Therefore, COTED may lack the necessary technical capacity to conduct an anti-dumping investigation, unless it is given the power to appoint experts to assist it in the determinative process, as it does expressly in investigations as to the existence of a prohibited subsidy.[2]

The notion of state consultation on anti-dumping matters is both novel and potentially problematic. It implies that the acts complained of as constituting a violation of an international obligation have been facilitated or sanctioned by the government of the exporting party, and that it is therefore within the power of that state to refrain from the proscribed activity. The consultation procedure is therefore reminiscent of GATT Article III disputes, where it is alleged, for instance, that by implementing a tax on certain imports, a state has acted in violation of the national treatment principle.[3]

The fact that dumping is a commercial practice utilised by business enterprises makes it difficult to justify the utility of the Revised Treaty's consultation mechanism. It is not easy to appreciate how allegations of dumping and injury among CARICOM member states are to be resolved by consultations, unless there is a clear power in the exporting state to issue trading directives to its commercial enterprises. With the exception of governmental control over state trading enterprises, CARICOM governments neither have nor assume the power to dictate commercial behaviour to their trading enterprises, especially in the absence of some species of anti-trust violation. Indeed, such a power would prove wholly inconsistent with the concept of a free market economy. These observations could mean that the consultation obligations imposed by the Revised Treaty do not add any value to the process of resolving anti-dumping disputes in the CSME. As it stands the consultation procedure even if embarked upon, may fail to resolve the dispute. It is therefore axiomatic, that COTED's jurisdiction will always be invoked in intra-community anti-dumping investigations.

Continues on page 11

"The notion of state consultation on anti-dumping matters is both novel and potentially problematic."

Trade Terminology Search

NICHOLE SUPERVILLE-HALL

C S R K T C N S D N Y M Y
P C E T E O O I E R T U T
O O G N K N I N T Q I L I
P L I E R V T G O Y S T N
E B O M A E A L C T R I U
C G N P M N R E U I E L M
O N A O N T E M S L V A M
N I L L O I D A T I I T O
O D I E M O E R O B D E C
M A S V M N F K M A O R N
I R M E O S Y E S N I A A
C T I D C D C T U I B L E
U C A R I C O M N A T I P
N A T F I R A C I T R S O
I C O F A B S J O S I M R
O A A T F M B C N U P V U
N C S W E P A C G S S M E
F R E E T R A D E A R E A
E D A R T L A N O I G E R

FIND THE FOLLOWING WORDS:

BIODIVERSITY
CARICOM
CARIFTA
CCJ
COFAB
COMMON MARKET
CONVENTION
COTED
CSM
CSME
CUSTOMS UNION
DEVELOPMENT
ECONOMIC UNION
EPA
EUROPEAN - COMMUNITY
FEDERATION
FREE TRADE AREA
FTAA
MULTILATERALISM
REGIONAL TRADE
SINGLE MARKET
SUSTAINABILITY
TRADING BLOC
TRIPS

Find the hidden trade term that this issue is most about. Answer on page 12.

The CARICOM Standard

We're on the web!
http://www.jadsc.gov.jm

CARICOM CORNER

Contributors: ALTHEA WOOLCOCK, KHALILE NELSON, ERMINE LEWIS and PAMELA MORGAN

THE CARICOM SINGLE MARKET AND ECONOMY (CSME) AND THE CARICOM SINGLE MARKET (CSM) EXPLAINED

In 1989, the Heads of Government of the Caribbean Community (CARICOM) at the 10th Meeting of the Conference in Grand Anse, Grenada, declared their intention to deepen the integration process and strengthen the Caribbean Community in all its dimensions. The Heads, at that time, determined that the Region would work towards the establishment of a single market and economy as one aspect of its response to the challenges and opportunities presented by the changes in the global economy. Three years later the leaders embraced this new initiative with formal endorsement at the 13th Meeting of the Conference in 1992.

Although the vision is of a CARICOM Single Market and Economy the CARICOM leaders have in the first instance embarked upon the **CARICOM Single Market** which came into effect on January 1, 2006 and had its formal launch on Monday, January 30, 2006 in Kingston, Jamaica. At that launch two declarations were signed by the Heads of Government of six of CARICOM's Member States – Barbados, Belize, Guyana, Jamaica, Suriname and Trinidad and Tobago. Heads of Government of six other Member States, Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines signed a document entitled "Draft Declaration of Intent by Heads of Government of the Caribbean Community on the Participation of their Countries in the CARICOM Market." These countries are expected to join the Single Market at a later date. Bahamas and Haiti, the three remaining Member States of CARICOM, have not signified their intention to participate in the CSME process and Montserrat, a British Dependency, is awaiting the necessary instrument of entrustment from the United Kingdom Government to enable their participation in the CSME.

The Single Market will allow for the unrestricted movement of goods, services, people and capital throughout the Region. It will also provide for the harmonisation of economic and trade policies for all CARICOM States, thereby creating a single economic space.

The Single Economy is not yet in place as there are many legislative and other arrangements that will need to take place before the harmonisation of foreign exchange and interest rate policies, tax regimes, laws and economic, monetary, fiscal and trade policies of all participating Member States can be realised. The Single Economy is expected to come on stream by December 2008 and when this is done the leaders will have realised their vision of a CARICOM Single Market and Economy.

JAMAICA ON TARGET WITH CSME COMPLIANCE

Robert Miller, head of the CSME unit in the Ministry of Foreign Affairs and Foreign Trade reported that Jamaica is on its way to being Single Market compliant as it has completed work in 14 key areas in an attempt to ensure compliance with the CSME mandates. He further noted that although Jamaica has taken significant steps towards compliance, it still has quite a long way to go in enacting all the required legislative changes. The number of ensuing legislative changes has been estimated at 371. Significant achievements made by Jamaica thus far are:

1. The enactment of The Foreign Nationals and Commonwealth Citizens (Amendments) Act which has the effect of removing the requirement for work permits for Commonwealth Nationals;
2. Becoming a party to the agreements establishing the CARICOM Regional Organisation for Standards and Quality (CROSQ) and the agreements regulating the Transference of Social Security Benefits and Intra-Regional Double Taxation;
3. The Removal of legal and Administrative restrictions in respect of establishment rights for businesses, the provision of services and the movement of capital; and
4. The implementation of mechanisms ensuring hassle free intra-regional travel.

CSME SKILLS CERTIFICATES TO BE WAIVED BY DECEMBER 2008

At a recent forum on the Caribbean Single Market and Economy (CSME) held in Kingston, Jamaica, Ivor Carryl, Programme Manager for the CSME noted that in December 2008, when the CSME is fully implemented, there will be no need for CARICOM nationals to have work permits or skills certificates to work in member states as by then all categories of the work force will be eligible to move freely.

Continues on page 11

Trade Talk For "Dummies"

AUDEL CUNNINGHAM

One of the features of the workplace of International Trade, is the tendency of everyone involved to use words, abbreviations and acronyms and assume that the audience knows precisely what is being referred to. Those who hear them often formulate an understanding of what is being referred to without a full working definition or explanation. If you don't do it yet, you will soon find yourself doing it. In this corner, we will enlighten our readers about words, abbreviations and acronyms used in "trade speak" which you often hear and of which you want to know the precise meaning.

WHAT ARE EUROPEAN PARTNERSHIP AGREEMENTS (EPAs)?

At present, CARICOM member states are involved in intensive negotiations with the European Union (EU) regarding the conclusion of European Partnership Agreements called EPAs. EPAs are intended to be successor agreements to the Cotonou Agreement concluded between the European Union and member states of the African Caribbean and Pacific (ACP) group of countries in 2000. Cotonou itself, is the successor to the Lomé Agreements, which formed the cornerstone of a preferential trading relationship between European Union member states and their current and former colonies in Africa, the Caribbean and the Pacific. Because of its maintenance of a non-reciprocal preferential trade regime characterised by trade discrimination in favour of ACP countries, the Cotonou Agreement has been adjudged inconsistent with World Trade Organisation (WTO) principles. The continued operation of Cotonou has only been facilitated by a waiver granted to the European Community by the WTO General Council which expires in 2007. ACP countries therefore have a vital interest in ensuring that successor EPAs have been concluded and have received the WTO stamp of approval by this date.

The early Lomé Agreements, were limited to a trade development dimension and provided merely for the establishment of a general system of non-reciprocal trade preferences for ACP products in European markets. With Lomé IV however, the "European Community" moved away from merely providing trade developmental assistance to the ACP region and towards establishing a requirement that ACP states had to abide by good governance principles. The clear thinking here was that there could be no true economic and social development in disadvantaged countries unless their governments abide by the principles of transparency and the rule of law. The tying of developmental assistance to the adherence to these "core international values" was also a marked feature of the Cotonou Agreement and is also to be one of the cornerstones of EPAs.

As identified by the EU, the strategic objectives to be pursued by EPAs should be:

1. Sustainable development and the eradication of poverty;
2. Facilitating sustained economic growth, increasing employment and enhancing welfare indicators;
3. Enhancing the capacity of ACP states to attract foreign investment and deepening their trade and investment policies;
4. Fostering the structural transformation of ACP economies into knowledge based competitive economies;
5. Addressing the non-tariff barriers to entry of ACP products in European markets;
6. Creating a financial facility funded by the EU to underwrite ACP costs associated with the implementation of EPAs;
7. Establishing a mechanism which will contribute a solution to the problem of external indebtedness of ACP countries.

Further, the EU has also indicated its intention for the following principles to inform EPA negotiations:

1. Sustainable Development – The principle identified here is that development must be at the core of EPA negotiations, given the structure of many ACP states, with large percentages of their populations living below the poverty line and the overall vulnerability of ACP economies.
2. ACP Unity and Solidarity – This refers to the need for ACP countries to negotiate collectively on issues of common interest in order to strengthen their bargaining positions with the EU.
3. Preservation and improvement of the Lomé Acquis – This refers to the need to continue economic and trade cooperation on a comprehensive basis, building on the strengths and achievements of previous ACP-EC conventions.
4. WTO Compatibility – This requires that EPAs must be compatible with overarching WTO rules. Ensuring this compliance will require the parties to, among other things, clarify and improve upon current WTO rules regarding the conclusion of regional trade agreements between developed and developing countries and improve upon existing WTO special and differential treatment provisions while crafting new ones.
5. Special and Differential Treatment – This implicates a recognition of the differing levels of development of EU and ACP member states. The principle requires that the EU make firm and enforceable commitments to offer special and differential treatment to the least developed members of the ACP group as well as to those members with small and vulnerable economies.
6. Flexibility – This principle has two dimensions:
    a. EU commitment to demonstrate flexibility to the ACP, during the negotiations in recognition of the level of development of these states and their economic needs; and
    b. Injecting some measure of flexibility in WTO rules to make the future EPAs WTO compatible.

With respect to the conclusion of an EPA between the EU and the Caribbean region, both sides agreed that the negotiations are to be conducted in three phases. Phase I (April – September 2004) involved distilling agreement on formal matters such as the nature, purpose and objectives of EPAs. The objectives of Phase II (September 2004 – September 2005) were, to develop an understanding of the nature of the respective economic spaces that would assume commitments once the EPA is operationalised and identifying priority areas where Caribbean regional integration priorities can be supported by an EPA.

Arguably, the most significant achievement of this phase of the negotiations, is that agreement has been reached that the regional space with which the EU negotiates for the region, will not be CARICOM but rather CARIFORUM. This latter entity comprises the member states of CARICOM and the Dominican Republic.

Continues on page 9

A Regional Approach to Bio-Diversity... continued from page 2

It is argued that the construct of Article 27.3[b] precludes recognition of technologies, innovations and practices of local communities and their collective ownership for common social good.

Two major concerns then arise from the suggestion that countries may patent plants and animals without giving recognition to the technologies, innovations and practices of local communities, which fall under the concept of Traditional Knowledge. The first is bio-piracy and the second is the related issue of access and benefit sharing.

BIO-PIRACY

In many countries, such as several on the continent of Africa, there has been a maintenance, conservation and nurturing of biological resources through generations of local and indigenous communities, particularly through the activities of farmers, hunters, fishermen, women and local healers, whose livelihood depends almost exclusively on these resources. The Caribbean is very similar to these countries. Every Caribbean national is aware of some form of herbal "bush" medicine practice that is used to treat or cure ailments. Bio-piracy refers to the privatisation and unauthorised use of biological resources by entities outside a country which has pre-existing knowledge and use of the resources concerned. Research centres of Universities and private pharmaceutical companies often engage in Bio-piracy.

India has undertaken a project of digitising its centuries-old traditional knowledge, preserved and orally passed down through generations of households. This was precipitated by costly legal battles that India had to wage in the last decade to seek the revocation of patents. The impetus for the project came in 1997 after India successfully managed to get a US patent on the wound healing properties of turmeric revoked. The patent claimed the wound healing properties of turmeric as novel, whereas every Indian housewife knows and uses it to heal wounds.

Ajay Dua, a beauracrat in the Department of Policy and Planning, which oversees Intellectual Property in India, stated,

> *"We do not want anyone selling our own knowledge to us....also, we would like anyone using our traditional knowledge to acknowledge that it is from India."*

ACCESS AND BENEFIT SHARING

The problem of the treatment of TK and IPRs is further compounded by the question of access and benefit sharing. The obligations under TRIPS can have adverse impact on the use of biological and genetic resources and the distribution of benefits arising therefrom. IP protection in the current TRIPS regime may well deprive the countries providing the biological and genetic resources and the individual or community providers of traditional knowledge of the use of such resources and their fair share of the benefits.

The fair and equitable sharing of benefits is one of the objectives of the Convention on Biological Diversity (CBD). Article 16(5) of the CBD provides that the implementation of intellectual property right obligations has to be consistent with the objectives of the CBD. The example of India mentioned above provides proof that the concerns are well founded.

As the technological divide between developed and developing countries continues to widen, there is need to ensure that companies that invest in Research and Development in respect of genetic resources,

traditional knowledge and biological resources in regions such as the Caribbean, not only acknowledge the source of the materials used in their patents, but also provide for financial benefits to be reaped by the indigenous peoples of the respective regions. Disclosure of the source of material is therefore of extreme importance as States and local communities will only be able to trace the use of their local TK, GR and biological resources in patented drugs and other inventions if there is disclosure.

THE WAY FORWARD FOR DEVELOPING COUNTRIES

Both the WTO and the World Intellectual Property Organization (WIPO) continue to look at the issues highlighted in the controversy raised by Article 27.3[b] and its impact on the CBD. They are also considering a possible system for the protection of Traditional Knowledge.

In the WTO, the discussions in the TRIPS Council continue to centre on the question of Disclosure. Three distinct proposals on the disclosure requirement have arisen from those discussions. They are from:

Brazil, India and others:

⇒ TRIPS should be amended so that Members shall require patent applicants to disclose:
- ◊ The source and country of origin of any biological resources or traditional knowledge used in inventions;
- ◊ Evidence of prior informed consent from the competent authority in the country of origin; and
- ◊ Evidence of fair and equitable appropriate benefit-sharing arrangements or have followed national law.

Switzerland:

⇒ The Patent Cooperation Treaty of WIPO (PCT) should be amended so as to allow countries the option of asking applicants for patents to disclose the source of genetic resources or traditional knowledge used in inventions.

European Community:

⇒ Make it mandatory to disclose on all national, regional and international patent applications, information on the country of origin or source of genetic resources or traditional knowledge used in the invention.

In 2000, WIPO established an Inter-governmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC) to work on the critical issue of an international protection regime for Traditional Knowledge. The IGC is supposed to discuss IP issues that arise in the context of (i) access to genetic resources and benefit-sharing; (ii) protection of traditional knowledge, whether or not associated with those resources; and (iii) the protection of expressions of folklore.

Two positions for protection of TKs have been advocated in the IGC:

⇒ Defensive protection of TK, or measures which ensure that IP

Continues on page 9

Regionalism: Selected Issues, continued from page 1

members' trade. The examination of these two issues will provide some preliminary insight into whether deeper economic integration is in fact the way forward for Jamaica.

REGIONALISM VS. MULTILATERALISM

At present regionalism has taken centre stage; as multilateral negotiations have slowed or been able to fulfil only in a limited way the hope for lowering of barriers to trade, there has been a push, largely by the more developed countries, to form regional groupings. Many commentators describe this as a kind of "backdoor liberalisation" of trade - compartmentalised multilateralism, characterised by bilateral agreements, new regional arrangements and expansions of existing regional arrangements. Multilateralism is a term used to refer to liberal trade among all nations, as opposed to a select group of countries, as is the case with regionalism. These differing characteristics of RTAs when compared to multilateral free trade have led many to wonder, as Jagdish Bhagwati framed the question, "Are RTA's "building blocks or stumbling blocks?"

Some trade analysts believe that multilateralism and regionalism are incompatible. They believe that regionalism essentially hinders the progress of universal liberalisation. It has been suggested that the process of formation of RTAs can drain the negotiating capacity of countries and actually slow down progress in multilateral negotiations. It is also believed that once countries have acceded to particular regional groupings, they have less urgency to conclude multilateral negotiations, especially if they perceive that their needs are already being met by the RTA. Further, some studies indicate that under certain conditions, such as where there is significant trade diversion[3] benefiting the producer within the RTA, the RTA will be preferred to multilateral liberalisation, because of the utility so derived.

On the other hand, some view regionalism as furthering liberalisation. In fact, some authors posit that regionalism is a direct result of multilateral liberalisation, as the arrangements are seen as pockets of free trade that gradually expand to more countries. Some of the literature suggests that unless there are significant economic costs associated with entry into an RTA, countries will desire to join. This expansion, the analysts suggest, can continue until there is global free trade. In the current global trading environment, there seems to be some support for this hypothesis in the experience of expansion of existing regional arrangements. Examples of this are the European Community (EC) and the pursuit of new regional arrangements as well as bilateral agreements in conjunction with increased WTO membership. Further, there is a prevalent view that if the world were divided into a few trade blocs, this would make negotiations easier and global liberalisation could be achieved much faster.

The WTO is the main protagonist in the movement towards universal free trade grounded on the principle of non-discrimination. In the GATT, Article XXIV, RTAs are recognised as "increasing the freedom of trade by the development through voluntary agreements, of closer integration between the economies of …parties to such agreements." The WTO requires that such arrangements do not make trade more restrictive against WTO Members which are not members of the regional arrangements than prior to the formation of the arrangement and there is the elimination of all barriers on substantially all trade of the parties to the RTA or bilateral arrangement.

One might wonder then - If RTAs are sanctioned by the WTO, what is the debate about? Interestingly, WTO sanction does not guarantee an appropriate result. For instance, the view that RTAs would make negotiations easier fuelled their popularity during the Uruguay Round negotiations. However, once the talks concluded this notion lost its acceptance as the results did not appear to bear out the theory. With the current difficulties in the Doha round of WTO negotiations, even as RTAs proliferate, we can only hope that this chapter in history will not be repeated.

On the other hand, the multilateral system and RTAs are not necessarily incompatible. The strongest assurance of the compatibility of regionalism and multilateralism comes from the principle of open regionalism or outward-looking trade blocs, which seems to be a principle that underlies most of the RTAs being formed currently. Wider integration efforts can however be stalled as is the case of Free Trade Area of the Americas (FTAA). Given the diversity of countries economic needs and political views one can only wait and see what type of global landscape will eventually emerge.

GAINS BEYOND TRADE?

The study of the impact of RTAs on trade and ultimately, on welfare and economic growth has been the focus of economic analysis of RTAs. Traditionally, trade was thought to be the main benefit of belonging to an RTA. However, there are benefits other than trade from RTA membership. (See Box 2 below).

Box 2

Potential Gains and Losses Associated with RTAs

GAINS

- ⇒ Motivate members to undertake economic, political and social reform.
- ⇒ Access to larger markets and technology.
- ⇒ Open markets may lead to economic growth and improvements in standards of living.
- ⇒ Encourage more rapid progress towards trade liberalisation.
- ⇒ Counters economic and political power in other parts of the world.
- ⇒ Greater leverage is wielded by countries acting together.
- ⇒ Help developing countries to integrate into the international trading system.
- ⇒ Forced efficiency from exposure to competition.
- ⇒ Increased Investment.

LOSSES

- ⇒ Loss of revenues - Government and taxpayers bear the cost of any gains.
- ⇒ May hinder a country's ability to effectively negotiate multilateral agreements
- ⇒ Stretch a country's negotiating capacity and resources.
- ⇒ Do not necessarily do away with contingent protection.

The tendency is to assume that because RTAs result in lower trade barriers, the overall effect is generally welfare enhancing, and that this would be true both in the short and long term. However, the evidence has been that increased trade may result from economic integration, but that this does not necessarily result in economic growth. In the context of RTAs, positive short term economic gains are deemed to be derived if trade creation outweighs trade diversion.[4] It is important to note the difference between the two effects and an increase in the overall level of trade within the affected grouping of territories. Trade creation occurs when the domestic production of one member nation is replaced with lower cost imports from another member nation.

Trade diversion occurs when lower cost imports from a non-member nation are prevented from entering the RTA by tariff and non-tariff barriers, and are replaced with the higher cost imports of members; there are economic loses (less efficient allocation of resources and negative income distribution effects) when this occurs. It should be noted that in both instances, the overall volume of trade within the grouping can increase. From an economic standpoint, RTAs have a positive impact if trade creation outweighs trade diversion.

Continues on page 10

A Regional Approach to Bio-Diversity... continued from page 2

Two major concerns then arise from the suggestion that countries may patent plants and animals without giving recognition to the technologies, innovations and practices of local communities, which fall under the concept of Traditional Knowledge. The first is bio-piracy and the second is the related issue of access and benefit sharing.

Bio-Piracy

In many countries, such as several on the continent of Africa, there has been a maintenance, conservation and nurturing of biological resources through generations of local and indigenous communities, particularly through the activities of farmers, hunters, fishermen, women and local healers, whose livelihood depends almost exclusively on these resources. The Caribbean is very similar to these countries. Every Caribbean national is aware of some form of herbal "bush" medicine practice that is used to treat or cure ailments. Bio-piracy refers to the privatisation and unauthorised use of biological resources by entities outside a country which has pre-existing knowledge and use of the resources concerned. Research centres of Universities and private pharmaceutical companies often engage in Bio-piracy.

India has undertaken a project of digitising its centuries-old traditional knowledge, preserved and orally passed down through generations of households. This was precipitated by costly legal battles that India had to wage in the last decade to seek the revocation of patents. The impetus for the project came in 1997 after India successfully managed to get a US patent on the wound healing properties of turmeric revoked. The patent claimed the wound healing properties of turmeric as novel, whereas every Indian housewife knows and uses it to heal wounds.

Ajay Dua, a beauracrat in the Department of Policy and Planning, which oversees Intellectual Property in India, stated,

> *"We do not want anyone selling our own knowledge to us....also, we would like anyone using our traditional knowledge to acknowledge that it is from India."*

Access and Benefit Sharing

The problem of the treatment of TK and IPRs is further compounded by the question of access and benefit sharing. The obligations under TRIPS can have adverse impact on the use of biological and genetic resources and the distribution of benefits arising therefrom. IP protection in the current TRIPS regime may well deprive the countries providing the biological and genetic resources and the individual or community providers of traditional knowledge of the use of such resources and their fair share of the benefits.

The fair and equitable sharing of benefits is one of the objectives of the Convention on Biological Diversity (CBD). Article 16(5) of the CBD provides that the implementation of intellectual property right obligations has to be consistent with the objectives of the CBD. The example of India mentioned above provides proof that the concerns are well founded.

As the technological divide between developed and developing countries continues to widen, there is need to ensure that companies that invest in Research and Development in respect of genetic resources, traditional knowledge and biological resources in regions such as the Caribbean, not only acknowledge the source of the materials used in their patents, but also provide for financial benefits to be reaped by the indigenous peoples of the respective regions. Disclosure of the source of material is therefore of extreme importance as States and local communities will only be able to trace the use of their local TK, GR and biological resources in patented drugs and other inventions if there is disclosure.

The Way Forward For Developing Countries

Both the WTO and the World Intellectual Property Organization (WIPO) continue to look at the issues highlighted in the controversy raised by Article 27.3[b] and its impact on the CBD. They are also considering a possible system for the protection of Traditional Knowledge.

In the WTO, the discussions in the TRIPS Council continue to centre on the question of Disclosure. Three distinct proposals on the disclosure requirement have arisen from those discussions. They are from:

Brazil, India and others:

⇒ TRIPS should be amended so that Members shall require patent applicants to disclose:
- ◊ The source and country of origin of any biological resources or traditional knowledge used in inventions;
- ◊ Evidence of prior informed consent from the competent authority in the country of origin; and
- ◊ Evidence of fair and equitable appropriate benefit-sharing arrangements or have followed national law.

Switzerland:

⇒ The Patent Cooperation Treaty of WIPO (PCT) should be amended so as to allow countries the option of asking applicants for patents to disclose the source of genetic resources or traditional knowledge used in inventions.

European Community:

⇒ Make it mandatory to disclose on all national, regional and international patent applications, information on the country of origin or source of genetic resources or traditional knowledge used in the invention.

In 2000, WIPO established an Inter-governmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC) to work on the critical issue of an international protection regime for Traditional Knowledge. The IGC is supposed to discuss IP issues that arise in the context of (i) access to genetic resources and benefit-sharing; (ii) protection of traditional knowledge, whether or not associated with those resources; and (iii) the protection of expressions of folklore.

Two positions for protection of TKs have been advocated in the IGC:

⇒ Defensive protection of TK, or measures which ensure that IP rights over TK are not given to parties other than the customary TK holders. These measures have included the amendment of WIPO-administered patent systems (the International Patent Classification system and the Patent Cooperation Treaty Minimum Documentation).

Continues on page 9

A Regional Approach to Bio-Diversity... continued from page 8

Some countries and communities are also developing TK databases that may be used as evidence of prior art to defeat a claim to a patent on such TK; and

⇒ Positive protection of TK, or the creation of positive rights in TK that empower TK holders to protect and promote their TK. In some countries, *sui generis* legislation has been developed specifically to address the positive protection of TK. Providers and users may also enter into contractual agreements and/or use existing IP systems of protection.

The IGC Meetings are held in Geneva, Switzerland. From CARICOM, only Jamaica and Trinidad and Tobago have Permanent Missions in Geneva. Perhaps more importantly, it is unclear whether a regional position has been formulated regarding which of the two foregoing positions might be the best for the region.

There is a great deal of relevance for this region in the several discussions and negotiations taking place both in the TRIPS Council of the WTO and the IGC of WIPO. At stake is the misappropriation of indigenous knowledge, innovations, technologies and practices of local communities associated with their biodiversity as well as disregard for equity in the sharing of benefits. As a matter of urgency, an appropriate system is needed to legally secure the rights of local communities and peoples, especially those of farmers and traditional medicine practitioners' over their biological resources. This will secure ownership of the physical resource and the traditional knowledge associated with the resource.

It is of critical importance that the region remains engaged in these discussions. It is equally urgent that the member states of CARICOM formulate a regional position in keeping with the needs of the region's indigenous communities in order to safeguard our resources from commercial exploitation. There is much to be lost, and potentially much also to be gained in these discussions.◘

THE CARIBBEAN COURT OF JUSTICE

The Caribbean Court of Justice (CCJ) is the regional judicial tribunal established on 14 February 2001 by the Agreement Establishing the Caribbean Court of Justice. Along with the intention of becoming a court of last resort for member states of the Caribbean Community replacing the Judicial Committee of the Privy Council, the CCJ is vested with an original jurisdiction in respect of the interpretation and application of the Treaty Establishing the Caribbean Community. In effect, the CCJ is designed to exercise both an appellate and an original jurisdiction. The Vision of the court is:

The Seal of the Caribbean Court of Justice

For more information about the CCJ please visit the Court's website at http://www.ccj.org

"To provide for the Caribbean Community an accessible, fair, efficient, innovative and impartial justice system built on a jurisprudence reflective of our history, values and traditions while maintaining an inspirational, independent institution worthy of emulation by the courts of the region and the trust and confidence of its people."◘

Trade Talk for Dummies, continued from page 5

Two of the identified objectives for the current phase of the negotiations (Phase III – Launched in September 2005) are:

1. Forging an agreement on the structure of the Agreement; and
2. Agreeing upon an approach to trade liberalisation.

Given the region's need to have a much greater presence in European markets, it is in our best interest to push for liberal market access commitments on the part of the EU with respect to both agricultural and industrial products. Our interest in capitalising on the economic opportunities presented by trade in services, means that we should be also be quite aggressive in seeking liberal access and permissive rights of establishment in European services markets. This does not however imply that with respect to market access for both services and goods, reciprocity has to be the order of the day. Rather, the recognition of the differing levels of development of the EU *vis a vis* the CARIFORUM member countries should be used as a plank to forge asymmetrical market access commitments.

The expectation of both sides, is that through a structured series of negotiations held in Europe and the Caribbean during 2006, a draft legal text can be prepared in time for the Third CARIFORUM-EU Ministerial Meeting on EPA Negotiations in December 2006. This legal text is expected to adequately reflect the "development dimension" that both sides have agreed must permeate the structure and provisions of the EPA.[1]

The greatest test for the CARIFORUM region will undoubtedly be whether it is able to adjust to the marked change in the relationship between Europe and the Caribbean, which has moved from one of non-reciprocity to one demanding a reciprocal trading arrangement. As if the process of adjusting to this new relationship is not already riddled with complications, CARIFOUM is saddled with the obligation of having to iron out core internal issues, which if left unaddressed, may undermine the level of benefits afforded by the EPA.

Some of these core issues are the finalising of the CARICOM/Dominican Republic Free Trade Agreement and the full implementation of the CARICOM Single Market and Economy. With respect to the former of these arrangements, much work is yet to be done in order to clarify the precise scope and coverage of the trading arrangement and determine whether the Dominican Republic can be incorporated into the single market. With respect to the latter, there is a pressing need for all member states to take all necessary legislative and policy steps required to facilitate full single market integration. This process is already far behind established schedules, and success in establishing the regional economic space is critical to our realising the full benefits of an EPA.◘

Endnotes

[1]The development dimension acknowledges that "development is a multi-dimensional undertaking, that seeks to capture the benefits accruing from trade and integration, but also requires accompanying adjustment measures and institutional capacity building" See Joint CARIFORUM–EU Press Release, September 30, 2005. Available at: http://www.acpsec.org/en/epa/cariforum-eu-press_release_30-9-05_e.htm

See also Joint Statement of the Fifth Meeting of CARIFORUM – EU Principal Negotiators, March 28, 2006, available at http://www.crnm.org.

Regionalism: Selected Issues, continued from page 7

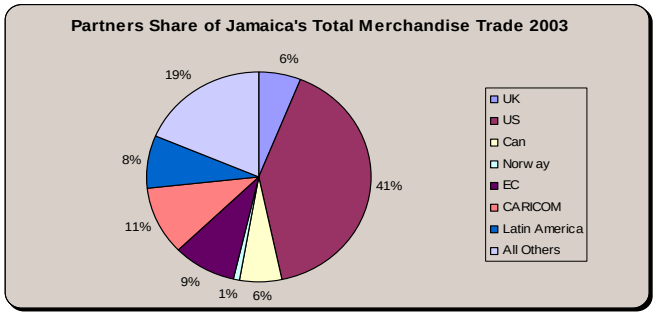
Outside of these economic gains in trade, RTAs can produce benefits that are regarded as long-term or dynamic, which may be more important than the static effects pointed to above. For instance, by virtue of belonging to an RTA, a larger market space is produced which allows greater economies of scale. Additionally, non-member countries may increase investment to member countries to take advantage of the preferential access to markets within the RTA. Exposure to increased competition among firms within the region will enable firms to be better able to compete with international competition. Such economic integration can also promote the development and use of new technology. More efficient use of resources will also likely ensue. (It has been noted in the literature that these gains will be more pronounced for RTAs between large and small countries). Further, RTAs have been seen as a vehicle through which political and economic reforms are instituted. The actual net benefit of RTAs as well as the benefit to individual member countries is largely an empirical question that must be examined on a case-by-case basis. Both the short term and long-term effects must be considered to judge the overall desirability of such arrangements. Trade theory will not leave us with any definitive conclusions.

Jamaica and CARICOM: Some Empirical Considerations

The best way to empirically assess the impact of membership in a trade bloc would be to utilise the gravity model.[5] This is outside the scope of this article. Instead, we will examine some statistical trends to see what insights can be gained.

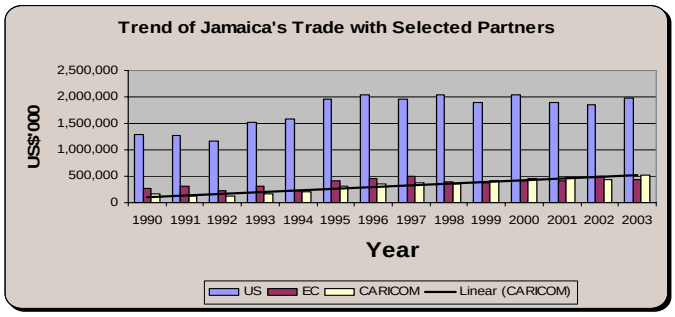
Steps towards the deepening of trading relationships within CARICOM were taken with the adoption of the Common External Tariff (CET) in 1991 and its subsequent implementation, and more recently, with the adoption of the Caribbean Single Market (CSM). Between 1991 and 2003, Jamaica's total merchandise trade (imports and exports) with CARICOM has grown on average by 11% as compared to a 3% growth in its extra-regional trade. Specifically, growth in total trade with the EC, Latin America, US and Canada, its main trading partners was 8%, 5%, 4% and 2%, respectively. Jamaica's total trade in 2003 stood at US$520M as compared to US$131M in 1991 an increase of almost 300%, and even more significant, considering the gradual phasing in of the CET starting in 1993.

Figure 1



Today, CARICOM is an important market for Jamaica. As Figure 1 above shows, in 2003, next to the US (41%) and the EC (9%) CARICOM (11%) is Jamaica's third largest trading partner. This compares with average shares over the period 1990 to 2003, of 44%, 9% and 8%, for the US, EC and CARICOM, respectively. Even though its trade with CARICOM is well below that with its main trading partner, the US, it is important to note that CARICOM's share of Jamaica's trade has grown more than that of any other trading partner, since 1991, growing at an annual average rate of 6% compared to approximately -0.03 % and 3% for the US and the EC respectively. As Figure 2 shows, Jamaica's trade with CARICOM has increased steadily since 1990.

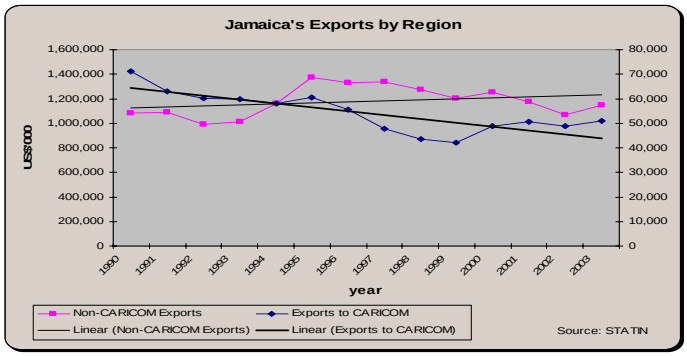
Figure 2



While Jamaica's trade has increased with CARICOM, one has to look at the structure of its trade to get a better view of the relationship. The trade balance in this respect is particularly important, (that is whether the country is a net importer or exporter). In Jamaica's case it has been a net importer from CARICOM. Over the period, exports have declined on average by 2% as compared to a 17% increase in imports. The decline in exports to its CARICOM partners compares with a 1% and an 8% increase in exports to the US and EC, respectively. In fact, in 2003 the value of Jamaican exports to CARICOM were 28 per cent below their 1990 levels.

Given the trend in its intra-regional exports versus that of its extra-regional exports, coupled with the fact that Jamaica is the region's second largest exporter, it is tempting to think that Jamaica's trade policy and in particular its export strategy should have less of a regional focus and therefore, should not support the movement towards integration. However, factors such as type of export commodity, similarity of comparative advantages within the region, as well as the size of export markets are all factors that contribute to this trend. More importantly the productive capacity of Jamaica's export sector also has a part to play.

Figure 3



The data also suggests that Jamaica's reliance on CARICOM imports has increased at the expense of non-CARICOM imports. Using the US as an example of a country whose cost-structures are generally lower, the displacement of their imports could be seen as evidence of trade diversion. If one considers that in a context where, as one commentator, Panagariya (1998) points out, when members are small in relation to the outside world, little trade creation is likely this would seem a reasonable conclusion. However, a more precise analysis is required to determine if the increased trade with CARICOM is trade diverting or trade creating. Further given the limited ability to capture statistics on trade in services the picture could be quite different.

Continues on page 11

Regionalism: Selected Issues, continued from page 10

Conclusion

While trade within CARICOM has increased and in particular Jamaica's trade flows within the region has increased in recent years, one has to look behind this bare fact to get a clearer view of the picture and hence the prospects. In particular, membership in CARICOM has not resulted in significant intra-regional export growth for Jamaica. However, it is not unreasonable to postulate that in the absence of CARICOM membership, Jamaica's total export performance would likely have been lower, given the advantage of Jamaican exports in the regional context, as distinct from the extra-regional market place. Further, trade in goods is only one part of the picture given the opening up of services markets.

While the impact on Jamaica's export flows has not been an unqualified success and there may be the possibility of trade diversion, there are other important considerations outside of trade in goods that make membership in CARICOM very important, and one might argue, even critical. In particular, membership improves Jamaica's chance to individually gain entry into larger regional groupings, as well as to form alliances at the WTO, and reap the consequent gains from these. Jamaica, along with many other CARICOM countries, has in the past benefited from non-reciprocal trading arrangements with its former colonial masters. However, with the pending expiry of the Enabling Clause of the GATT 1947, such one way (non-reciprocal) preferential arrangements will be a thing of the past, and former colonies will be forced into greater reciprocity in the international trading environment. Because of the relatively small size of the former colonies' individual country markets, the most obvious way to do this is through negotiations at a regional level, rather than at the individual country level. Individually, the countries in the Caribbean region do not have a sufficiently large market to negotiate advantageously with their more developed former colonial masters. On the contrary, a 15-member trade bloc which collectively boasts a market of approximately 14 million people and an average of 16 % of World Trade (WTO estimates 1990 to 2004) will be better able to negotiate trading terms.

These considerations make Jamaica's membership in CARICOM and the deeper integration arrangements, Caribbean Single Market (CSM) and Economy (CSME) more critical now than at any time in the past.◘

Endnotes

[1] It is important to note that some studies have found that transportation costs play no special role in establishment of RTAs. In fact, they point out that economic theory does not say that countries far apart will gain less from trade; empirical evidence has shown instances where countries in the same geographical location have in fact gained less from RTAs than those that are far apart.

[2] The council of economic advisors of the President of the United States defined it as referring to plurilateral agreements that are non-exclusive and open to new members to join. Alternatively, it can be defined as RTAs with low trade barriers on non-member countries. This contrasts with the closed import substituting regionalism of the 1950s and 1960s.

[3] See the next section for an explanation of this term.

[4] Viner, Jacob (1950): The Customs Union Issue (Carnegie Endowment for International Peace, New York).

[5] For a good description of the gravity model in trade, see wikipedia (http://en.wikipedia.org), and for an assessment of its applicability, see Trade Frictions and Welfare in the Gravity Model (Presentation): (http://info.worldbank.org/etools/bspan/PresentationView.asp?PID=416&EID=217).

Need More Information About The Commission?

Read The Customs Duties (Dumping and Subsidies) Act, 1999, and visit our website at http://www.jadsc.gov.jm .

You may call 920-1493 or 920-7006 to speak to a member of the Commission's technical staff, either by telephone or in person at our office, by appointment. Application and information packages are available from the Commission's office at 24 Trafalgar Road, Kingston 10. The WTO website at http://www.wto.org is also helpful.

CARICOM Corner, continued from page 4

Ambassador Ransford Smith Appointed Commonwealth Deputy Secretary-General

Ambassador Ransford Smith, Jamaica's permanent representative to the Office of the United Nations and its Specialised Agencies in Geneva, has been recently appointed Deputy Secretary General of the Commonwealth (Economic). Ambassador Smith is expected to take up his appointment in July of this year.

Ambassador Smith is a career diplomat who has held numerous governmental positions including, Permanent Secretary in both the Ministry of Commerce and Technology and the Ministry of Industry and Investment, Ambassador to the United States of America and Ambassador to the United Nations in New York. Ambassador Smith's appointment to the Jamaican Mission in Geneva began in 1999 and during his tenure there he has had the distinction of being appointed Chairman of the WTO Committee on Trade and Development, Chairman of the Commonwealth group of Developing Countries and Chief negotiator and spokesperson for the Group of 77 and China at the 11th Session of UNCTAD in June 2004. Most recently in 2005,[1] Ambassador Smith was appointed President of the Governing Body of the United Nations Conference on Trade and Development (UNCTAD).

Upon assuming his appointment to the Commonwealth, Ambassador Smith will be responsible for policy development, trade and economic issues, and development cooperation. In this regard, Commonwealth Secretary-General Don McKinnon has welcomed Ambassador Smith's appointment in light of the mandate given to the Commonwealth by its member states last year to strengthen intra-Commonwealth trade and economic linkages in order to influence the Doha Round of world trade negotiations. Ambassador Smith, who will replace Mr. Winston Cox of Barbados, will be the first Jamaican to serve as a Commonwealth Deputy Secretary-General.

Former Prime Minister Percival J. Patterson Concerned About the Region

Prime Minister Percival J. Patterson in his speech at an event held in his honour in Washington DC in March 2006, in recognition of his work and extended contribution to the Organization of American States (OAS), shared his views in respect of global realities and commitments and his concern for the Caribbean and its neighbours. He reiterated the important connection between the developments in the regional integration process of CARICOM and the developments taking place in other parts of the world, emphasising the need for Caribbean countries to focus their energy more on globalisation and trade liberalisation, in order for CARICOM countries to move forward.◘

Endnotes

[1]Reported in the December 2005 issue of Trade Gateway.

Trade Remedies Corner, continued from page 3

In cases of dumping from non-CARICOM member states, Article 131 (5) of the Revised Treaty provides that COTED has sole competence to act. This pronouncement notwithstanding, Article 131 (6) goes on to provide that member states are not deprived of the ability to take action in accordance with multilateral agreements to which they are a party. This clearly refers to the continued ability of CARICOM member states to take unilateral steps to discipline dumping in accordance with the provisions of the WTO Anti-dumping Agreement, irrespective of the competence of the COTED on this issue. There is certainly conflict between the two dictates and the burning question is how this is to be resolved.

Continues on page 12

Trade Remedies Corner, continued from page 11

From a resource perspective, given the concerns expressed above about COTED's capacity to conduct an anti-dumping investigation, the ability of member states to take unilateral action against non-community imports in defense of their domestic industries is to be welcomed. However, it is obvious that the thinking behind Article 131 (5) is that in light of the free movement of goods provisions, non-community dumping has the potential to greatly undermine the viability of the "community industry" producing like goods. The impact of such dumping may therefore not just be felt within national borders but, to borrow a phrase from the EU philosophy, might have a true "community dimension". This recognition speaks in favour of action being taken at the community level as occurs in the EU.

Failure to establish clear jurisdictional rules on the issue of non-community dumping might well lead to both a member state and COTED exercising jurisdiction over the same complaint, given that there is no express dictate in the Revised Treaty for one to yield to the other in such a case. In crafting the necessary jurisdictional rules, valuable guidance can be gleaned from EU law and practice on this matter. The principle of subsidiarity provides in effect that the community institutions such as the European Commission and the European Council, should defer to the member states with reference to any matter than can be more effectively disposed of at the member state level. This being the case and notwithstanding the recent move towards the decentralisation of some market regulatory activities within the EC, anti-dumping investigations remain within the exclusive province of the "community" undoubtedly because of the existence of seamless internal markets and the need to assess injury from dumped imports on a community- wide basis.

As a model for the CSME, short of further amending the Treaty of Chaguaramas to vest competence under Article 131 solely in COTED, a possible solution to the brewing jurisdictional conflict, is to develop rules of interpretation to the effect that in the event of a conflict, the relevant community institution (COTED) has sole jurisdiction where the issue at hand meets the threshold for community involvement. This would mean that with reference to non-community dumping, national investigating authorities would only have unquestionable competence in cases where COTED has decided not to act or to yield to the member state for reasons of administrative efficiency or otherwise or where the market for the imported product is truly "local" hence no pattern of free circulation of the dumped imports from that member state to the rest of the community (no community wide impact).

Another troubling feature of the Revised Treaty, is the Article 133(5) obligation for all member states to co-operate in establishing harmonised anti-dumping legislation. At present, although all CARICOM member states with the exception of the Bahamas are WTO members, only two (Jamaica and Trinidad and Tobago) have enacted some form of trade remedies legislation. The low degree of implementation has been triggered by the perception of smaller states that the costs associated with enacting WTO compliant legislation and implementing the requisite administrative structures, are not justifiable when compared with the actual need for such legislation given their economic realities. It is somewhat curious therefore, that the treaty mandates CARICOM states to take the very action that they have been unable or unwilling to take in a WTO context, without providing any cost-compensation or cost-offsetting mechanism.

Given the aforementioned Article 133 (5) treaty obligation, the legitimate concerns of member states as to the costs associated with the anti-dumping investigatory process must lend itself to some form of "extra – treaty" solution. One such is the follow through by each member state on the obligation to establish "harmonised anti-dumping legislation" but with the common use of existing regional investigating authorities. The model contemplated is that member state legislation would confer jurisdiction on an existing regional body and that each state would contribute to the operating costs of this body. Given the movement towards the establishment of regional institutions there is nothing outlandish in this idea. Such a move would not only make for more efficient allocation of scarce regional resources but would allow for the development of a standard regional "best" practice applicable to anti-dumping investigations. Clearly however, due to the built-in conflict, such a model can not be completely implemented as long as member states can initiate anti-dumping investigations against each other.

For CARICOM to be able to establish a coherent and workable anti-dumping regime the obvious starting point is therefore to re-cast the existing legal framework that allows for one member state to take anti-dumping action against another. If we are truly moving towards a seamless internal market, the very existence of trade defense measures is inimical to this process. Instead, as in the EU, harmful and anti-competitive commercial behaviour of enterprises located within the community is best addressed by a strong anti-trust regime.◘

Endnotes

[1]The definition of dumping as in the WTO Anti-dumping Agreement is "the introduction of a product into the commerce of another country at less than its normal value if the export price of the product exported from one member state to another member state is less than the comparable price in the ordinary course of trade for the like product when destined for consumption in the exporting member state."

[2] Article 103 of the Revised Treaty of Chaguaramas.

[3] See for instance, the Japan : Taxes on Alcoholic Beverages dispute where the relevant issue was whether Japan's maintenance of a differential tax regime on domestically produced alcoholic drink as apposed to imported alcoholic beverages, constituted a violation of its GATT Article III, national treatment obligation.

TRADE GATEWAY

YOUR SOURCE FOR TRADE REMEDIES & TRADE INFORMATION

The Newsletter of the Anti-dumping and Subsidies Commission

Editor: Nichole Superville-Hall

Cover Photograph: A Garfield Robinson photo reprinted with the permission of the Jamaica Observer Limited.

The Anti-dumping and Subsidies Commission
24 Trafalgar Road
Kingston 10
Jamaica

Phone: 1-876-920-1493
Fax: 1-876-926-4622
E-mail: antidump@jadsc.gov.jm
antidump@cwjamaica.com

To receive a free copy of our Newsletter, by e-mail, visit our website at http://www.jadsc.gov.jm and enter your e-mail address under "Newsletter". You'll be added to our mailing list and future issues of the Newsletter will be sent to you.

Answer for Trade Terminology Search: REGIONALISM