The Newsletter of the Anti-dumping and Subsidies Commission

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TRADE GATEWAY

YOUR SOURCE FOR TRADE REMEDIES & TRADE INFORMATION

Special Economic Partnership Agreement (EPA) Issue

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."

SUCCESSFULLY SECURING AND EXPANDING JAMAICAN EXPORTS IN THE INTERNATIONAL MARKET

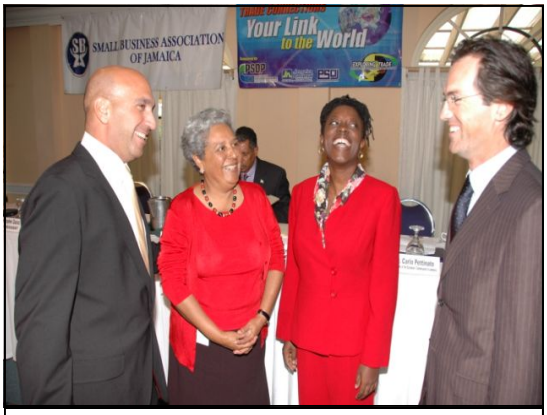
ADDRESS TO THE JAMAICAN PRIVATE SECTOR BY DR. KENNETH BAUGH, THE HONORABLE MINISTER OF FOREIGN AFFAIRS AND FOREIGN TRADE PSOJ AND SMALL BUSINESS ASSOCIATION OF JAMAICA TRADE SEMINAR ON "GLOBALISATION AND ITS IMPACT ON JAMAICAN AND CARICOM FIRMS"

Thank you to the Private Sector Organisation of Jamaica (PSOJ) and the Small Businesses Association of Jamaica (SBAJ) for inviting me to be a keynote speaker this afternoon. I commend both organisations for putting on this Seminar. It should provide our local business people, and government institutions too, with some food for thought. I look forward to meeting you all and to working closely with you to accomplish the goals this Government has set for revitalising trade and investment and ensuring job creation.

The themes for this seminar are certainly topical. I am sure everyone here knows that, Jamaica, as a part of CARIFORUM, is in the final stages of negotiating an "Economic Partnership Agreement" (EPA) with the European Community (EC). The EPA is intended to replace the trade provisions of the Cotonou Agreement, which expire at the end of this year. In fact, I recently returned from Trinidad, where I attended my first Meeting of CARIFORUM Trade Ministers to discuss the status of the EPA negotiations.

As I speak, trade officials and negotiators from Jamaica and other CARIFORUM Member States are in Barbados, engaged in another round of negotiations with the EC. These negotiations are, of course, very important for Jamaica, as they will, hopefully, result in a framework for future trade with Europe. Like our previous trading arrangements under the ACP-EU framework, the EPA will hopefully promote increased levels of Jamaican exports into Europe. What is different about the EPA, however, is that it also allows for exports from the EC to Jamaica and other CARIFORUM States. This has been one of the main concerns on the minds of our negotiators as they negotiate the EPA with the EC.

Throughout the process, we have heard repeated calls for "liberalisation" and we have had to remind many of our partners that Jamaica's is already one of the most liberalised economies in the world. Jamaican negotiators, and you, our private sector stakeholders and partners, are very conscious about how vulnerable we are in the face of strong imports from the developed world.



Participants at PSOJ/SBAJ Trade Seminar held September 27, 2007. From Left: Christopher Zacca, President of the Private Sector Organisation of Jamaica; Marjory Kennedy, President of Jamaica Exporters' Association; Andrea Marie Brown, Executive Director of the Anti-dumping and Subsidies Commission; Carlo Pettinato, 1st Secretary and Head of Section for Economics, Trade, Politics and Information - EC Delegation to Jamaica.

This brings me to an issue which causes great concern among most of us here in Jamaica, that is, the persistent imbalance in our external trade. As we have liberalised, we have watched as our volume of imports continues to outstrip exports, increasing year after year. We have to find an appropriate balance in our negotiations and with our trading partners in order to derive beneficial outcomes from our discussions. So, based upon this concern, CARIFORUM is pushing for what we call 'asymmetry' in the EPA negotiations. Bearing in mind the economic disparity between the EC and CARIFORUM States, this reality should be translated into our respective obligations in the Agreement. So far, our EC partners have appeared willing to go this route, although not to the extent that we would have liked.

We have also tried to include in the EPA, various types of 'built-in agendas' or 'transition periods'. Wherever we feel that there are fledgling or sensitive industries that we need to protect - either in perpetuity or for a specific period - we have sought to ensure that these industries are not unduly or prematurely exposed. The objective here is that these industries will use the transition period to become stronger and more efficient and more able

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EDITORS' NOTE

This current ***TRADE GATEWAY, THE NEWSLETTER OF THE ANTI-DUMPING AND SUBSIDIES COMMISSION*** *is devoted to issues surrounding the* ***European Partnership Agreements (EPAs),*** *which are in the final stages of negotiation, in particular, the CARIFORUM EPA with the European Community, intended to take effect January 1, 2008. Publication of this issue was delayed as the Staff of the Commission felt it critical to give a comprehensive picture of the status of the talks and elaborate on some issues not previously emphasised. Articles in this issue point to costs and benefits, and seek to address implications of not concluding by the end of 2007. It is hoped that the issue will help you to assess the feasibility of signing by the end of the year, or weigh in your mind the suggestion that CARIFORUM should sign an interim agreement and use the time permitted under the multilateral agreements, which suggests that it is possible to take ten (10) years to finalise aspects of an RTA. More recently, in a communication dated 23 October 2007, the EC noted the possibility that an agreement that is not a full EPA could be used as a stepping-stone towards a full EPA, but indicated that market access would need to be concluded within the previously stipulated deadline, if CARIFORUM goods are not to be subject to a Generalised System of Preferences (GSP) regime come January 2008.*

As the ***Honourable Minister of Foreign Affairs and Foreign Trade, Dr. Kenneth Baugh*** *noted in his talk to the Private Sector (page 1) "it is companies that trade." We therefore thought it useful to facilitate the dissemination of Minister Baugh's September 27 address to the Jamaican private sector who were present at the PSOJ and SBAJ Seminar on Globalisation to as many stakeholders as possible. He raised a number of important points with respect to the newly elected Government's overall foreign trade policy stance that should be noted.*

*In "****Making S&D Operational," the FTC's Dr. Delroy Beckford*** *explores this "hot topic" of "an interpretive principle." Dr. Beckford offers some recommendations on how such provisions could be included in Trade Agreements to better serve their purpose.. In* ***"Issues and Implications" Foreign Trade Officer, Richard Brown*** *offers an explanation of the origin of the EPAs, a look into some issues that emerge from it, and some developments over the course of the negotiations. The writer highlights the fact that the Caribbean region has one option, the GSP, if the EPA is not concluded on the original schedule and explores the implications of both possibilities.*

Trade agreements can have significant social as well as economic effects. These effects have become more varied, given the expansion in both the volume and scope of trade, facilitated by developments in technology. In this regard, one issue that we may not have paid enough attention to, is gender implications outlined by ***Women's Project Director, Karen Small.*** *This look at such an important aspect of the EPA with CARIFORUM, we think begs the question, are there other critical issues we may have overlooked?*

In ***Trade Remedies Corner*** *we illustrate some questions that must be addressed in deciding on the type of provisions to include in trade agreements and the dynamic interplay between them that must be contemplated. At the end of the day, all parts of the agreement must be complementary and useful. Further, we hope that there is a national and regional acknowledgement of the importance of taking a strategic approach and anticipating future developments and a taking into account of the learning hard won from the EPA process .*

In ***The Need for a Development Chapter in the EPA****, we assess whether attempts so far demonstrate sufficient commitment to development goals in the EU-CARIFORUM EPA and offer suggestions for additional elements needed to truly render it a tool of development, instrumental in the successful integration of CARIFORUM States into the Global Economy.*

In ***Trade Talk For Dummies****, as always, we attempt to simplify an important trade term. In this issue we discuss the term, Market Access, which often lies at the heart of trade negotiations, including the EPAs.*

Andrea Marie Brown and Keisha-Ann Thompson, Editors.

TRADE GATEWAY

YOUR SOURCE FOR TRADE REMEDIES & TRADE INFORMATION

The Newsletter of the Anti-dumping and Subsidies Commission

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FAST FACTS– CARICOM'S CURRENT TRADE COMMITMENTS

- CARICOM-DR FTA — The effective date was 2001 with respect to goods, negotiations on services are yet to be concluded
- CARICOM VENEZUELA Trade and Investment Agreement — A Partial Scope Agreement
- CARICOM SINGLE MARKET AND ECONOMY (CSME) - Contemplated to be a deeper Integration arrangement characterised by free movement of goods, services, investment and capital and some degree of coordination of fiscal and monetary policies. This is scheduled to be concluded in 2015
- Caribbean Basin Economy Recovery Act (CBI 2) - Expires 30 September 2008 (non-reciprocal)
- Caribbean Canada Trade Agreement (CARIBCAN) - Expires in 2011 (non-reciprocal)
- CARICOM Cuba FTA— This has not yet been enforced and is only being applied provisionally between a few members
- CARICOM Costa Rica FTA - Signed in 2001 but has not yet entered into force in all Members. It covers mainly goods trade with provisions for ongoing negotiations in other areas
- CARICOM Central America - Contemplated to be an extension of the CARICOM Costa Rica FTA with the accession of El Salvador, Guatemala, Honduras, Nicaragua, and Panama. Technical Negotiations launched in August 2007 are yet to be concluded
- Economic Partnership Agreements– Free Trade Agreements between the European Union (EU) and the African Caribbean and Pacific States (ACP) on a regional basis. The ACP are divided into six regions, CARIFORUM being one. The EPA will replace trade aspects of Cotonou. Negotiations are ongoing with a view to entry into force in 2008. Liberalisation on CARIFORUM's side will not be immediate
- World Trade Organisation— Multilateral Trading Arrangement in force since 1994, replaced the GATT; now extends to more than goods. Not all CARICOM Members are WTO Members.

This information was compiled from the address of Undersecretary for Trade, Ambassador Lorne McDonnough at the PSOJ and SBAJ Seminar on "Globalisation and Its Impact On Jamaican and CARICOM Firms" held on September 27, 2007, with the assistance of The Staff of the Ministry of Foreign Affairs and Foreign Trade.

Visit MFAFT Website—www.mfaft.gov.jm

RELOCATION ADVISORY

Effective June 1, 2007,
The offices of THE ANTI-DUMPING AND SUBSIDIES COMMISSION relocated to:

THE ROSWIND, 25 WINDSOR AVENUE
KINGSTON 5, JAMAICA

Our **new** telephone and facsimile numbers are as follows:
Telephone: 927-8665; 978-1800
Fax: 978-1093

Our email address is : antidump@jadsc.gov.jm

We look forward to continuing to serve and work with you from our new location.

Sincerely,

THE ANTI-DUMPING & SUBSIDIES COMMISSION

"A Portfolio Agency of Ministry of Industry, Investment and Commerce"

Working to ensure a level playing field for domestic production.

THE EPAS: SOME ISSUES AND IMPLICATIONS

Richard Brown *

Overview of the European Partnership Agreement (EPA)

Today we are at the cusp of concluding a new international trade arrangement with Europe, known as the African, Caribbean and Pacific (ACP) and European Union (EU) Economic Partnership Agreement (**EPA**). The ACP-EU EPA, which is billed as a development-oriented reciprocal trade arrangement, was created from the ashes of a series of Lome agreements, which, at the time, provided non-reciprocal preferential market access into the EU's common marketplace to the ACP countries that were mainly former European colonies.

The termination of the Lome agreement was mutually agreed to by the ACP and EU member states and a successor arrangement, called the Cotonou Agreement, signed in Cotonou, Benin in 2000. The Cotonou agreement outlines the scheduled termination and replacement of the non-reciprocal market access arrangement with a reciprocal, World Trade Organisation (WTO) compatible, but asymmetrical, trade arrangement that would assist ACP countries to achieve their economic development objectives through the provision of development financing, as well as technical and capacity building assistance. Negotiations are proceeding on the basis of Regional Economic Partnership Agreements (REPAs) between the six sub-regions of the ACP, including **CARIFORUM** which is normally comprised of **CARICOM plus the Dominican** Republic, alongside Cuba, which has opted not to participate in the negotiations. However, the CARIFORUM/EC EPA negotiations are the most advanced, with about two thirds of the draft text having been agreed to. The main outstanding issue for CARIFORUM is in the area of **market access**. It was hoped that all outstanding issues could have been resolved in time to initial the Agreement by the end of October. This has not, however, been the case and talks are continuing into November with a view to having the agreement enter into force on January 1, 2008, as originally scheduled.

Another important purpose of the EPA, is the conclusion of an agreement that conforms to Article XXIV of the GATT/WTO agreement. This WTO provision, which is a necessary condition for achieving WTO compatibility, expressly allows for the creation of preferential free trade agreements (FTAs) between WTO Members, which would otherwise be in contravention of WTO non-discrimination rules, providing that the agreement liberalises trade between the parties to a substantial degree (precisely what this means is the subject of considerable debate). The entry into force of the EPA, would therefore, insulate the parties to the agreement against any potential challenges from other WTO Member States, as was the case under the Lome arrangements, notably with respect to sugar and bananas. Ultimately, what is being contemplated under the EPAs is a restructured sugar and banana regime, as well as special arrangements for the preferential entry of rice and rum. In addition, the EPA will ensure two-way access (reciprocal) to the markets of both parties to the agreement for both goods and services, unlike the previous non-reciprocal or unilateral access that ACP countries enjoyed for the export of goods under Lome.

The Projected Benefits of the EPA

It is anticipated that the EPA will open up a wealth of opportunities for CARICOM and the DR, and is expected to generate a multiplicity of benefits for the Jamaican private sector and consumers in general. The EPA first and foremost will provide preferential access to Europe's markets for approximately 95% of all agricultural and manufactured goods produced within the ACP regions, with the sole exception of arms, while the remaining 5% representing sugar, bananas, rice and rum, will enter under separate preferential arrangements. This will create a significant margin of preference for Jamaican, as well as other ACP producers who will automatically enjoy a cost advantage relative to other competing exporters to Europe. Such access will, furthermore, provide a vent for the productive resources of Jamaica, and is expected to spur economic activity by providing access to, inter alia, emerging as well as niche markets that are of interest to Jamaican producers.

However, it is recognised that Jamaican exporters need to benefit from the requisite capacity building in order to successfully contest the European market, and it is therefore expected that under the EPA, the EC will provide, inter alia, development funding to assist in (1) the restructuring of economically viable sectors, (2) the transitioning of failing sectors into new productive activities, and (3) to strengthen and empower areas of production that show economic promise. The agreement will also be expected to stimulate investment within a range of existing and new sectors, and create opportunities for further growth in areas such as services and, in particular, tourism which remains one of the areas in which the region enjoys its greatest comparative advantage.

This is critical since analyses have shown that the greatest benefits will accrue to the intangible sectors versus the real sector. This is due to the fact that trade in goods in Jamaica, and worldwide, continues to account for a diminishing share of Gross Domestic Product (GDP), while trade in services continues to dominate world trade, and accounts for approximately 71% of Jamaica's GDP (services in most CARIFORUM economies account for well over 60% of GDP with the exception of Guyana). In addition, the provision of services requires lower levels of capitalisation relative to production based activities, and are mainly labour and knowledge intensive. This, therefore, allows for a broader cross-section of firms and, more importantly, individuals to participate in revenue generation and wealth creating activities and for the unleashing of Jamaica's comparative advantage.

Finally, the EPA will significantly contribute to the reduction of the final costs to the Jamaican consumers as foreign competition drives the cost of production downwards. In addition, consumers are likely to benefit from an influx of new and innovative products and services as well as technology, and at internationally competitive prices.

The Economic Cost of the EPA

Notwithstanding the many potential benefits that may accrue to Jamaica and its ACP partners under the EPA, there are likely economic costs associated with the liberalisation of trade, and particularly with a large, mainly developed country, partner or group.

First and foremost, Jamaica will now be required to open its markets to a conglomerate of states, which together represent the number one source of merchandise goods and commercial services exports to the world, ahead of the United States. This is likely to result in significant adjustments in existing economic activities as domestic manufacturing and services firms and businesses begin to compete directly with large European entities. Ultimately, some domestic entities may discontinue their activities due to their inability to compete, while others may become emboldened by increased investment and joint-ventureship arrangements that bring both inflows of capital and managerial capabilities. There is also a potential threat to fledgling and emerging sectors due mainly to the impact of Europe's production subsidies that provide European firms with an unfair cost and competitive advantage relative to ACP countries.

In addition, there are concerns with regard to the imminent erosion of longstanding prefer-

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(Continued from page 1) **Dr. Baugh's Address**

to compete successfully with European and other imports or as exports in their own right. Indeed, it is development that we seek to achieve in the EPA and indeed in all the trade negotiating scenarios in which we are involved: in the WTO, and our bilaterals with CARICOM Member States, among others. In this regard, the EPA is not just a trade agreement; it is also about development. This is actually central to the Agreement.

The input of the private sector, including small business, has been invaluable to us at the Ministry of Foreign Affairs and Foreign Trade and, indeed, to all our government officials involved in these negotiations. We hope that, at the end of the day, we will have an Agreement that does justice to the breadth and depth of consultation which has been held and the advice and instructions which you have given to our negotiators.

I want to just touch on some ideas and strategies which the Government has identified for securing and expanding Jamaican exports. Most are not new and many have coincided with your own suggestions. I think, though, that the issue we need to grapple with is how to carry out some of these ideas. But I will deal with that later.

First, when we think of Jamaican exports, we think of major export goods, like bauxite, alumina, sugar, bananas, rum, coffee, citrus and apparel. These have enjoyed some success over the years. However, some have fallen off in recent times, due to factors within and outside of our control.

Second, a whole new category of goods and services has emerged in recent times, representing cultural products and services, including entertainment and music. These are in addition to major growth areas such as tourism.

When we think how we can improve our export performance, we immediately recognise that many initiatives at the national level are not being addressed. There are also some relatively new ideas upon which we need to expand:

We have been speaking about "Brand Jamaica" for some time. Happily, Government has been doing some work on this and I know that Mr. Robert Gregory and his team at JTI (formerly JAMPRO) are excited about this approach. It is my understanding that recent studies have shown that Brand Jamaica is among the top ten most recognisable country brands in the world. This has been achieved through our allure as a tourist destination and, in no small part, to the exploits of our athletes, musicians and entertainers on the world stage.

The development of Brand Jamaica may very well have been a grassroots phenomenon, but it has certainly been increasingly recognised by mainstream players. We see evidence of this in the fact that the colours of the Jamaican flag have been used successfully to revamp the sports brand, PUMA, and that they continue to be used by other brands in the fashion industry. The power of Brand Jamaica is also evident in the fact that Jamaican 'Jerk' cuisine is now a staple offering at restaurants across the world, and that Jamaican music (ska, reggae, dancehall) is used regularly in television ads and jingles, as well as movie soundtracks in other countries. If Jamaica is to truly capitalise on the power of Brand Jamaica, cultural differentiation and innovation, we will need to strengthen our legislative and enforcement framework to protect "geographical indicators."

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TRADE REMEDIES CORNER

Keisha-Ann Thompson

TRADE DEFENCE AND COMPETITION POLICY: DO BOTH HAVE A PLACE IN A FTA?

Introduction

The Economic Partnership Agreement between CARIFORUM (CARICOM and the Dominican Republic) was scheduled to be concluded by the end of October this year, however, indications are that talks will continue into early November. This development is not surprising given the import of many of the outstanding issues.

Further, the discussions in CARIFORUM, unlike the other regional groupings, include "new generation" issues (also referred to as Trade Related Issues—TRIs). These new generation issues include services, intellectual property, investment, competition, government procurement, labor, and environment as well as Trade Defence. CARIFORUM has included most of these issues on the negotiating agenda and formal texts have been developed dealing with these areas. Resistance of other regions, particularly the African groups, to including them on the negotiating agenda stems from a lack of institutional and negotiating capacity to treat effectively with these issues, as well as the potential impact of concluding these rules in an EPA context on regional integration efforts.

Some of these concerns are relevant to CARIFORUM. However, a number of factors have led to the inclusion of these issues on the negotiating agenda, not least of which is the strategic advantage of having some of these issues included in an EPA and indeed, in any Free Trade Agreement (FTA). Notably, liberalisation can have its benefits, and also costs. Some of these costs can be mitigated if the necessary regulatory frameworks are put in place. In fact, some studies have shown that developing countries will stand to gain little from the EPAs and even less if the necessary regulatory frameworks are not put in place to harness and "safeguard" whatever gains follow.

It is against this background that one has to view the scope and the pace of negotiations in CARIFORUM. As a result, CARIFORUM and the EC have reached consensus on the inclusion of both Trade Remedies (referred to as Trade Defence Instruments — TDIs) and Competition Policy (CP) in the EPA, two important regulatory tools that can be used to help to achieve a level playing field for industry. TDI and CP are not strangers in Trade Agreements, particularly Free Trade Agreements (FTAs), especially those concluded by the EC. The interesting thing about these two policy instruments is the questions which they prompt in the context of an EPA, which this article seeks to highlight and discuss.

TDIs and CP Defined

TDIs or Trade Remedies refer to instruments of contingent protection, such as anti-dumping (AD) duties, countervailing (CV) duties and safeguards (SG) that are used to discipline imports in specific circumstances. In the case of AD and CV, duties are imposed where imports are unfairly priced due to dumping or subsidies, respectively, and they cause injury to a domestic producer of a like product.

A Safeguard may be triggered when imports enter in such volumes and under such conditions that the domestic producer is also harmed. It is important to note that it is presumed that the imports causing the injury are not unfairly priced; there is no need to analyse

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SITUATING GENDER IN AN EPA

*Karen Small**

Gender vs. Women

Gender is often mistakenly used as synonymous with 'sex' or used to refer to 'woman or man' or 'female or male'. This misuse fuels a lot of the scepticism that exists around a gender and development approach to achieving gender equality, even in the area of trade and investment. In explaining gender inequality by linking it to differences between women and men, there is often confusion between biological and social factors. This often leads to the assumption that any issue analyzed from a gender perspective (how men and women are differently affected by economic, political, social, legal, cultural and environmental processes) must be biased in favour of women. However, the term 'sex' refers to the biological and physical features that differentiate males from females. The term 'gender,' on the other hand, refers to socially assigned roles, attitudes, values, and behaviour that society uses to impose on women and men as a result of the biological differences between them to define what is considered appropriate male and female behaviour or appropriate male and female work. Gender is about women and men and social and cultural expectations. Therefore gender inequality is socially constructed and not biologically determined and can thus be ended.

Why Gender Analysis is Often Women-Focused

However, when a gender-based analysis is done, a process that assesses the differential impact of a proposed or existing policy on women and men, the measure of disparity and inequality is more skewed against women than men based on past (historical) unequal socio-economic arrangements and continuing inequalities between women and men. In filling this gender gap, the process takes account of the necessity to continue to redress particular instances of past (historical) discrimination or long-term systemic discrimination that continue to work against women, bearing in mind that the world of work was never initially set up for women to participate - the productive sector was and still is considered the male domain while the reproductive 'care' sector is still considered the female domain.

Further, inequalities persist, in the context of the labour market and the productive sector - women work for less remuneration than men; women constitute a higher proportion of the poor[1]; women receive a low share of credits and inputs[2];women continue to be discriminated against in the labour market; women still have inferior status in many societies; unequal participation in economic decision–making processes, including trade policy-making, monitoring and negotiating, which are still largely male dominated.

Why is a Gender Analysis of Trade Significant?

It is often simply assumed that trade policies are gender neutral in their outcomes and impacts and that there will be harmless and positive outcome for women on equal par with men. As a result trade negotiations are approached and national priorities are set without a gender analysis. A Gender analysis looks at the unequal socio-economic arrangements between women and men that put women at a disadvantage based on their unequal access to land, credit and technology. It reveals that macroeconomic policies will have different effects on men and women.

In reality, the effects of trade are experienced by individual women, individual men, and by extension, households, families and communities. This is true of any policy that has implications for the availability and affordability of goods and services.

In the context of trade liberalisation a Gender analysis means taking into consideration the nature and terms of the participation of women and men and the effects of current trade arrangements on their different social and economic groupings and realities. This is crucial to understanding the likely impact of any trade arrangement, such as Economic Partnership Agreement (EPA), on CARIFORUM economies and peoples. Markets are gendered with different locations for women and men who are differently affected by market forces and economic changes. A gender analysis will provide insight on the likely impact of EPA on poor marginalised women and men as producers and consumers, since a key part of the analysis will focus on the micro-level of communities and households. Therefore, the conventional assumption that trade policy and trade liberalisation are gender neutral in their formulation and impact must be rejected in favour of much more in-depth examination of their gendered impact.

Key Findings of a Gender Analysis

Gender analysis shows that "free market" policies assume that the benefits of 'free trade" will trickle down to all economic actors alike: women, men, rich and poor, small producers and trans-national companies (TNCs), exporters and consumers. However, various studies on the gendered impact of trade liberalisation, confirms that trade liberalisation processes have not taken place on a level playing field and have involved unequal competitors in local, national and international markets, the gains therefore will not be distributed evenly. Such gains often focus on income and the dimensions of poverty beyond this – risk and insecurity, access to services, and empowerment - are almost completely ignored.

This implies that there is a critical disconnect and conflict between trade policy reforms, like those required by EPA, at the national and regional level, and with the goals of poverty eradication and social equity, as well as gender equality commitments and gender mainstreaming objectives. This disconnect therefore implies that EPA are likely to hinder the capacity of CARIFORUM states to fulfil their mandate by CEDAW[3], notably under Article 11 on women's social rights and Article 14 on their economic rights.

The current divergence of views on development issues between ACP countries and the EU is a critical area of concern from a gender perspective, as it will have implications for addressing the structural gender inequalities disempowering women in the globalised economy. Such, inequalities make women a large, exploitative source of cheap labour which is implicitly considered a "comparative advantage" in international trade. However they are often situated in the informal economy, which is characterised by low levels of resources and education, and as a consequence low wages, and is often the most affected by economic restructuring.

Further, access to education, health care and other basic services is often severely reduced through trade liberalisation. As such the role of social reproduction in terms of providing care is brought upon women and girls. Women in this sense become double losers. The lack of sex-disaggregated data severely hampers analysis to accurately determine the sectors that women predominate vis-à-vis men. However, some indication is provided by the figures from a Women's Edge Coalition Trade Impact Review study on Jamaica in 2002 which estimated that the largest categories for women's service employment are trade, hotels, restaurants, community, social and personal services (84%).

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MAKING SPECIAL AND DIFFERENTIAL PROVISIONS OPERATIONAL: IN SEARCH OF AN EFFECTIVE INTERPRETIVE PRINCIPLE—THE WTO AND RTAS

Delroy S. Beckford *

Special and differential (S&D) provisions are an integral part of the World Trade Organisation (WTO) Agreement, and have assumed prominence in Regional Trade Agreements (RTAs), whether in the form of provisions for technical assistance, privileged access to markets or some limited suspension of obligations that applies to other trading partners, in order to permit smooth integration within a context of further liberalisation. One concern with respect to these provisions is that they are not being made operational within the WTO. Some provisions are drafted in hortatory language that makes enforcement difficult and, in other cases in which the language is drafted with more precision; no primacy is given to these provisions by WTO panels.

The following discussion highlights some of the issues raised with respect to making S&D provisions operational and the extent to which the proposals suggested can be met within the WTO's current interpretive framework.

The discourse on the significance of S&D provisions has not only centred on their original justification but also on the question of the extent to which the current development agenda can be met if these provisions are not made effective, and what proposals may be warranted if the current interpretive framework at the WTO does not make it feasible to attain this objective.

S&D provisions are not only of significance to developing countries within the WTO's multilateral framework, but also within RTAs whereby bargains are often struck on the understanding that there be some flexibility in the obligations to be assumed or a grace period for the assumption of obligations. That RTA regimes must be consistent with the WTO means that the WTO's signal regarding the resolution of the interpretive conundrum for S&D provisions will have implications for how such provisions are to be interpreted in RTA regimes.

In many of the agreements interpreted by the Appellate Body, for example, no primacy is given to S&D provisions over other core provisions such as national treatment, MFN, or the prohibition against import restrictions embodied in Article XIII of GATT 1994. In addition, S&D provisions often compete with procedural and substantive obligations that are not in any sense core provisions, but which are treated as no less important than other provisions in the Appellate Body's interpretation of Members rights and obligations. For example, the invocation of S&D provisions with respect to the applicable burden of proof in dispute settlement has not met with any success. Thus, in the case of **Indonesia—Certain Measures Affecting the Automobile Industry**[1], Indonesia argued, unsuccessfully, that the burden of proof on complainants is higher in this case because Indonesia is a developing country', and the term 'like product' should be interpreted differently based on Indonesia's developing country status.

There are, however, examples of some leeway being given to developing countries in procedural matters. Article 12.11 of the DSU, for example, requires that Panels "explicitly indicate the form in which account has been taken of relevant S&D provisions that…have been raised by' a developing country Member that is a party to the dispute." The Panel in **US—Offset Act (Byrd Amendment)**, by relying on this provision, interpreted an S&D provision in the Antidumping Agreement despite the failure of the parties to the dispute to raise the S&D argument in their request for the establishment of a Panel.[2]

With regard to substantive provisions, the record is also mixed, although there is a jurisprudential preference that subordinates S&D provisions. The Appellate Body has repeatedly stated, for example, consistent with its position in **Japan - Taxes on Alcoholic Beverages**,[3] that all provisions in the WTO Agreement must be given effect. Although this means that in an appropriate case S&D provisions must be given effect, it also means that other provisions are to be given effect ,without any clear guidance as to when and under what conditions S&D provisions trump other provisions in dispute settlement.

What is meant by making S&D provisions operational?

This brings to the fore the important issue of what is meant by making special and differential provisions effective or operational. It may mean, for example, that where an S&D provision is raised in a dispute, it should be considered and must take precedence over other provisions. It may also mean that Panels should exercise an inherent jurisdiction to consider S&D provisions in disputes pursuant to Article 12.11 of the DSU. Another suggested approach is to interpret such provisions consistent with the Doha Development Agenda.

Although the exploratory definitions above are not exhaustive of the meaning of operational, each one includes challenges that are not easily surmountable within the WTO's current interpretive framework. For S&D provisions to take precedence to other provisions, core principles such as MFN and national treatment must be classified as exceptions to S&D provisions thereby subordinating them to S&D provisions within the hierarchy of norms governing dispute settlement within the WTO Framework. The current structure of the WTO Agreement suggests that this position is untenable. For example, provisions for technical assistance are often drafted in hortatory language[4]. Where they are drafted in terms of an enforceable obligation, enforcement of the general obligations for which the technical assistance is designed to ensure developing country compliance are not made conditional or subject to the obligation for technical assistance[5]. Moreover, S&D provisions permitting assumption of obligations at a later time indicate the primacy of the obligation for which some leeway has been given.

Alternatively, S&D provisions may be seen as mere exceptions to the general core principles such as MFN and national treatment, in which case they would not necessarily take precedence unless the impugned state conduct falls squarely within the exception. But even where an exception applies, the issue of the legality of the impugned state conduct is usually referenced or made subject to core principles of non-discrimination. Thus, for GATT Article XX exceptions, state conduct falling within any of the exceptions must pass the Chapeau test, that is, the measure to be justifiable must not be applied in an arbitrary or discriminatory fashion.

The Appellate Body's interpretation of the Enabling Clause allowing for a Generalised System of Preferences (GSP) also confirms that S&D provisions are subordinated to core provisions even when the challenged state conduct falls within the permissible exception. For example, in **EC-Tariff Preferences**,[6] the Appellate Body, upholding the Panel's findings, treated the Enabling Clause (which is undoubtedly an S&D provision) as involving a binding legal obligation on donor countries to apply preferences in a non-discriminatory fashion. Although this holding is apparently counter-intuitive in its formulation, the Appellate Body applied the principle of non-discrimination in GSP cases to mean that similarly situated countries must not be treated differently by donor countries.

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(Continued from page 5) *Situating Gender in an EPA*

SUMMARY OF ISSUES

The Negotiation Process

The under-representation of voices (usually women) raising gender specific concerns in the negotiating structures and processes is a major issue that raises fundamental questions about the governance and necessary democratisation of international trade institutions and processes. The specific needs of poor women and men should be articulated in relation to the structure of negotiations, as gender blindness due to reliance on market based criteria in the assessment of trade impacts often leads to their exclusion. To ensure that they are included, the EPA requires a human rights framework. Further, the input of civil society and women's organisations should not only be relevant at the consultation stage but also in decision making.

A number of international and regional bodies, human rights and civil society groups have demanded gender and/or social impact assessment of trade agreements. Also, there is a UN Inter-Agency Task Force on Gender and Trade in operation since 2003, mandated to mainstream Gender in international trade policies and processes. The activities of the Task Force also involve assessing the adjustment costs of trade liberalisation and implementation of trade agreements, from the gender perspective, and drawing implications for trade negotiations. So far gender has not been integrated into the trade policy arena as part of the EPA negotiations. Gender, therefore is still seen as 'legally irrelevant' primarily because gender issues are usually not considered as 'legally relevant.'

Reciprocity and Market Access

The differential impact of moves towards free trade with the EU on women as producers, and women as consumers who might benefit form such moves should be acknowledged. The specific needs of women as producers and consumers should also be acknowledged. This means being able to identify the sectors and areas of production of importance to women especially where there will be increased competition with EU exports on local and regional markets as well as where it will be necessary to: (i) evaluate the likely impact of the Common Agricultural Policy (CAP) reform on the income earned by women involved in the different stages of agricultural production, processing, marketing and distribution (ii) introduce simple and effective safeguard measures (iii) introduce special arrangements to accommodate different regional interests.

The starting point for a gender analysis of market access is the definition of women's location in the different sectors and markets, so as to identify those which are important to them and require protection. Currently the free trade rules on market access (tariffs and subsidies) are biased against women's needs and interests, and undermine their livelihoods in a context where they constitute the majority of the poor. To that end the type of sectors serving both domestic and regional markets should be examined, along with their level of tariff protection and the nature of competitive threat posed by free trade with the EU, especially the likely CAP reform on these sectors.

The specific trade issues related to Sanitary and Phytosanitary measures and rules of origin in sectors of greatest importance to women in the different countries should be clearly identified, with a view that they will benefit from any assistance programme that is negotiated for addressing these issues.

Labour Standards

An amended Occupational Safety and Health Act is due to be tabled after consultations with relevant stakeholders where recommendation was strongly suggested for the Act to be drafted within the context of the 1998 ILO Declaration on Fundamental Principles and Rights at Work which sets out a floor of rights that all states must comply with "regardless of their level of development or location in the international economy". As such states are not free to change priorities since "once a human right, always a human right". Therefore in the EPA due attention will have to be paid to:

- Sectors and occupations employing large numbers of women
- Application of relevant measures to all enterprises covered
- Extending the scope of measures so that working conditions in sectors otherwise excluded, such as export-processing, free trade zones, wholesales, and factories, maybe appropriately regulated
- National legislation to ensure that part-time, temporary, seasonal, casual workers, home-based workers, contractual workers, and domestic workers suffer no discrimination as regards terms and conditions of employment

Fiscal Dimension

In the EPA, gender analysis of the fiscal issues should focus not only on the specific trade issues (tariffs etc.) but also on the different contextual factors that enable or disable women and small producers to take advantage of opportunities afforded. Among such contextual factors are the existing macroeconomic policies, notably fiscal policies and national budgets. Within the budget, social services (including education, health, housing and water) and economic services (including agriculture, infrastructure, feeder roads, financial policies, and land policies), both vital to women and small producers, should be protected from further cuts.

The analysis should focus on how expenditures in these areas compare to the likely level of revenue losses arising from moves towards free trade with the EU. An accurate evaluation of the actual impact of tariff reduction and elimination must be done, including losses that will result from a gradual reduction of ODCs, against the domestic macroeconomic framework.

Development Dimension

The gender analysis of the development issues raised by the EPA should aim at identifying the areas in which women face particular disadvantages in accessing productive resources on equal par with men; along with the steps that should be taken to improve women's access to productive resources also on equal par with men, so that they are better placed to respond to the challenges of free trade with the EU.

Another essential component of the analysis is the extent to which women are already benefiting from the EU and governments' programmes to improve their access to resources on equal par with men. This will also allow defining the types of assistance needed as a matter of priority in order to better equip women alongside men in CARIFORUM to cope with adjustments resulting from liberalisation.

Conclusion

EPAs and trade liberalisation will undoubtedly affect individuals,

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(Continued from page 4) **Dr. Baugh's Address**

Linked to Brand Jamaica is the notion of trading in culture. Jamaica's cultural vibrancy is portrayed in a number of different products, ranging from fashion and clothing to cuisine and lifestyle products. Culturally inspired innovation and creativity will be used to differentiate Jamaican products in the global marketplace. We all know that, because Jamaican culture is so popular throughout the world, producers in other Caribbean countries, in Africa and Asia have tried to mimic the Jamaican identity in their product ranges. These imitators have used Jamaican flag colours or renowned Jamaican brand concepts such as 'Blue Mountain' for coffee, 'Jerk' for cuisine or 'Scotch Bonnet' for spices.

Jamaica has recognised that due to globalisation and our own domestic constraints, our competitive advantage will increasingly have to be based upon the quality, rather than on the quantity, of our goods and services as well as cultural differentiation. We have long had success in exporting Jamaica Blue Mountain Coffee; a very good example of how a low volume, high value product can perform well. Jamaica will, therefore, be seeking to secure more of these kinds of niche markets for our products. What is interesting about these so-called new ideas ('Brand Jamaica', cultural differentiation, innovation and creativity), is that we can and must apply them not only to marketing of newer exports like fashion and music, but also to more traditional exports like sugar, bananas and citrus. Some of the producers in the traditional industries, in particular, the rum industry, have already begun to embrace these ideas. We can apply these new ways of marketing, even as we continue to negotiate with international partners, including those in Europe, to defend the markets for our traditional exports, particularly sugar and bananas, which as you all know, have suffered from erosion of preferences in recent years.

In order for Jamaica to be able to take full advantage of all of the opportunities for the expansion of our exports, we will all have to recast our vision and imagination with a view to re-inventing some of our more traditional exports, even as we pursue new frontiers. Again, many of these ideas have come from you; others will require you, our private sector partners, including small business, to be at the forefront of collaboration in their execution.

We have to re-examine the economic fundamentals and ensure that our trade policy becomes integral to our economic policy-making. For example:

Interest Rates. I am told that during the extensive national consultations held for the EPA negotiations, virtually every representative from nearly every productive sector complained about the high interest rates. This was universally identified as the single, greatest obstacle to small business becoming competitive. This has to be balanced against exchange rate stability but clearly is a constraint that has to be addressed. This new administration has made some suggestions as to how to address this problem; however, I would like to exchange ideas on how you think we can effectively tackle this concern.

Inefficiencies in Production. These are diverse and range from a lack of capacity in certain sections of our work-force to the need for the physical re-structuring of certain industries. What comes readily to mind in the latter case is the Sugar Industry, where we have this strange dichotomy of two of the more efficient factories in the world operating alongside some of the most inefficient. With input from Government, civil society and industry, and with assistance from the European Union, Jamaica had developed a ten-year strategy to transform the Industry, which includes the privatisation of a number of the State-owned sugar factories. We have made some progress on this,

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THE NEED FOR A DEVELOPMENT CHAPTER IN THE EU-CARIFORUM EPA

Andrea Marie Brown

The process of negotiation of the several Economic Partnership Agreements (EPAs), trade agreements which will replace the terms of the trade facets of the Cotonou Agreement is well advanced and is much in current news of international trade. The agreements are being negotiated by the European Union (EU) regionally throughout the world. The negotiations for the Caribbean region has proceeded since the official launch in 2004. Jamaica is a party to these negotiations as part of the Caribbean Community (CARICOM), which, along with the Dominican Republic form CARIFORUM. Meetings being held October 29 to November 6, 2007are expected to produce agreement on a final text for initialing and an Agreement that will enter into force on January 1, 2008. Although the EC has made what it deems to be a generous market access offer, important elements of the agreement, which may critically affect whether CARIFORUM can make this offer operational remain to be agreed upon. CARIFORUM producers have been hindered from making better use of market access offers in the past because of limited capacity. The development dimension of the EPAs was hailed as an avenue by which the developing country partners to the EPAs could seek to remedy these deficiencies. To that end, the question of whether there is a need for a discrete development chapter in the final EPA text arises.

The Argument Against the Need for A Discrete Development Chapter

The thrust of the argument that the text does not require a discrete development chapter appears to be that there have been attempts made to "infuse the text of the agreement" throughout with development provisions, thus making a development chapter superfluous, repetitious or meaningless. For the most part, CARIFORUM does not appear to be satisfied with that view; in particular, Jamaica's trade officials and others of our CARICOM sister territories have noted the dangers inherent in signing an EPA that relies on loose, uncoordinated terms purported to include development provisions—dangers of failing to comprehensively address the aspirations of the region in this regard.

The Need for The Development Chapter

Others take the view that a specific chapter on development is needed. Advocates of this position note that the diffusion throughout the text of the EPA, intended to add the development dimension to the Agreement is useful and may even be desirable, but is not sufficient and cannot adequately replace the focus of a separate development chapter in the trade agreement being negotiated. The Anti-dumping and Subsidies Commission adheres to the opinion that the Development Chapter is required to add the appropriate focus and clarity to the provisions for development cooperation under the EPA. Indeed a separate chapter should be required for consummation of the agreement. We hold the view that a piecemeal approach of "diffusion" of the development cooperation provisions throughout the text will fail to provide a comprehensive and sufficient framework for the development agenda to be met adequately by the EPA.

Afforded a view of an early draft of the proposed text of a chapter in the EU-CARIFORUM EPA addressing CARIFORUM's development concerns, we found much to take issue with in that draft. The language used in the draft was circular and appeared to lack focus. It failed to articulate a rationale or clear goals for development help under the EPA. It failed to delineate a set of legitimate development priorities. Instead, "buzz" words such as "sustainable development" littered the

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(Continued from page 3) *EPAs: Some Issues and Implications*

ences due to the reorganisation of the regimes governing the export of bananas and sugar into Europe. Under the new regimes there will be a marked reduction in the price of sugar, and the application of a new and significantly high import tariff on imports of bananas. These will negatively impact on the economic feasibility and continued longevity of both sectors in Jamaica and the rest of CARIFORUM, as they currently produce their output at costs greater than other more efficient sources in Latin America and even Africa. Furthermore, there remains a nascent threat from Europe's Overseas Countries and Territories (OCT) within the Caribbean in particular, which produce and export similar products, but which may not be bound by some of the rules that will be imposed bilaterally on mainland Europe and the ACP countries.

Most critical at this juncture, however, is the overwhelming impact that the liberalisation of trade with Europe will have on Government's fiscal revenues due to the removal of tariff revenues from EU imports, as well as trade diversion. In the first instance, Jamaica and its CARIFORUM partners will face a reduction in their revenue captured from border taxes, over time. The exact fiscal impact will depend on the pace and scope of liberalisation. Notwithstanding, this will put a significant dent in the Government's revenue base, which relies on border taxes for approximately 30% of it fiscal revenues.

In addition, the benefit to consumers has to be weighed against the general welfare loss that could accrue as Jamaican consumers switch from lower cost import sources to European goods, which may cost more to produce. If however, European goods are cheaper this will create a direct cost to CARIFORUM Governments, due to trade diversion as consumers readjust demand patterns and switch to European sources. In both instances, therefore, the result will be a further reduction of Government's revenues that would have normally accrued from border taxes on third party import substitutes.

The Progress and Main Issues

At the time of this writing, there had been eleven Technical Negotiating Group (TNG) meetings and eight meetings of the Principal Negotiators, with more on the way. In addition, ACP and EU Heads of State met on a number of occasions, most recently in Montego Bay from October 4-5, 2007, in order to thrash out difficult, but critical issues to allow for the timely completion of the arrangement.

The negotiations are still inconclusive as there are outstanding issues related to market access, trade in services, and other trade related issues. However, the main overarching issues remain; (a) the timely completion of the agreement; (b)the threat of GSP market access; (c) WTO challenges and dispute settlement risks resulting from failure to complete the EPA; (d) concerns over the legal text and (e) **effective market access**.

The first three points are directly linked, as it has been argued that any failure to achieve the completion of the EPA agreement by the parties will expose them and the EPA regime, to a WTO challenge and possible dispute settlement if the agreement fails to acquire the legal cover of the WTO. Furthermore, the worst case scenario appears to be the likelihood of reverting to some level of GSP access to European markets in the interregnum between the expiration of the WTO waiver, which allowed the existence of the Cotonou Agreement, and the implementation of the new EPA agreement.

The potential failure of the parties to achieve the timely completion of the agreement partly stems from the fact that the CARIFORUM Member States are unable to reach an agreement on a market access offer as well as a more ambitious services offer. There are also serious *sine qua non* issues regarding the legal text that are contributing to the lack of progress in the negotiations between CARIFORUM and the EC, and which may yet prove to be the undoing of the agreement if both parties are unable to find a comfortable compromise.

If CARIFORUM and the EC are unable to sign an agreement in October, and the agreement is provisionally applied, then both parties could be the likely subject of a dispute settlement challenge from other WTO members, and face the possibility of paying damages to affected third countries or be required to offer compensation in the form of market access. It must be noted, however, that if the EPA agreement, which will enshrine new banana and sugar regimes, in particular, is provisionally applied, then the likelihood of a challenge is significantly diminished, as the formerly contentious regimes would now be technically WTO compatible.

It should be noted that the other ACP sub-regions do not face the same constraints as CARIFORUM as it relates to the failure to complete an agreement on schedule, as the African countries, with the exception of South Africa, are mainly LDCs and will continue to benefit from Everything But Arms (EBA) (duty-free quota-free) access to Europe's markets (the same level of access the EPA would provide to CARIFORUM). South Africa, for its part, has already signed a free trade agreement with Europe and, irrespective of the outcome of the EPA negotiations, will continue to benefit under this arrangement. The Pacific countries have little or no trade with Europe and will not be disadvantaged by not signing an agreement on time.

Ultimately, therefore, if no interim arrangement is possible and CARIFORUM is forced to accept a GSP scheme until an agreement is reached, CARIFORUM will temporarily face a significantly lower level of market access into Europe than is currently the case, or would obtain under the EPA. There have been arguments to the contrary, however, as analysts claim that the CARIFORUM region, and Jamaica in particular, have failed to take advantage of the market access provided under similar arrangements, most notably the CARICOM Single Market (CSM) arrangement, and the soon to be defunct Cotonou Agreement. As a result, it is not anticipated that CARIFORUM will face any serious dislocation under a GSP scheme with Europe.

Finally, concerns abound regarding the effectiveness of the market access provided by Europe in both goods and services and, specifically, how economically feasible would having unfettered access to that market be. The questions arise from the clear advantage in size, capital endowment and access to subsidies and investment incentives that European firms enjoy relative to CARIFORUM firms, as well as concerns over standards and other regulations that have to be complied with in order to operate in that market. This has generated some doubt that Jamaican and CARIFORUM firms can out-compete European firms in areas of non-traditional productive activities, while concerns still remain as to CARIFORUM's ability to compete with Latin American sources in the production of traditional goods. Therefore, emphasis is being placed on extracting improved access to Europe's markets for the provision of services and, in particular, the temporary entry of services professionals. This is understood to be an area which holds the greatest comparative advantages for the region and provides opportunities for all levels of skill and training, particularly within the Cultural and Creative industries.

The Way Forward

As a region, Jamaica and its CARIFORUM partners have come a long way from the days of non-reciprocal preferential access to Europe's markets, and mainly for the regulated export of goods and manufactures that were not necessarily of export interest to our producers and manufacturers. With the completion and signature of the EPA,

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(Continued from page 7) ***Situating Gender in an EPA***

families, and communities through impact on prices, employment, capital flows, investment conditions, and production structures. The structural changes will have differential impact on women and men, the wealthy and the least wealthy, due to their incongruent locations in the economic system, compounded by nuanced social and cultural factors such as gender, ethnicity, class and race.

This underscores the importance of development in the EPA, and the development chapter has to be drafted in a broader, gendered context that is mindful of the non-neutrality of the market economy, acknowledging that all human community interests must be considered in order for the CARIFORUM region to progress under trade liberalisation.

The cost of trade liberalisation on women compared to men in terms of physical resources, human resources and social capital needed to transfer resources and skills to effectively manage liberalisation equally with men must be taken into consideration. Ignoring these could exacerbate the inequalities and incongruence already present which will have wider social and economic impact. ◘

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[1] Female headed households comprise 46.3 % of all households; more children present in female headed households comprise 46.3% of all households (66.3%); 72.5% of male headed households has a partner, versus 26.6% (Source– Gender and Trade Task Force)

[2] Women are better at loan repayment, in comparison to their male counterparts but remain in micro-business for too long (Source—Article in the Jamaica Gleaner, July 18, 2007 on Women Business)

[3] Convention for the Elimination of Discrimination Against Women

(Continued from page 9) ***EPAs : Some Issues and Implications***

however, we would be afforded an opportunity to transform those arrangements into a more dynamic and economically meaningful level of market penetration that provides access to the EU markets for both goods and services, and provides opportunities for serious investment and economic development.

Such an arrangement is not without its share of costs, but holds significant promise and indeed benefits that, if utilised to their fullest extent, will deliver on the twin objectives of economic growth and development. Though impediments may remain regarding elements of the legal text that are unsuitable to both parties, or where issues affecting the completion of the agreement may expose CARIFORUM to exogenous factors, there continues to be a strong commitment to solidifying this arrangement so as to extract the best possible benefits that it can provide.

Failure to achieve an agreement on schedule may not, however, unravel the progress that has been made, and may not needlessly expose Jamaica to unwelcome effects. Therefore, it is appropriate that the Government of Jamaica err on the side of caution as they seek to extract a suitable and meaningful arrangement that continues to give effect to the progress that is ongoing in Jamaica, and avoid rushing to complete a potentially impotent agreement. ◘

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(Continued from page 8) ***Need for a Development Chapter in the EPAs***

text, without any precise statement of what the region requires or specific objectives which member states desire to reach through the development cooperation mechanisms attached to the EPA.

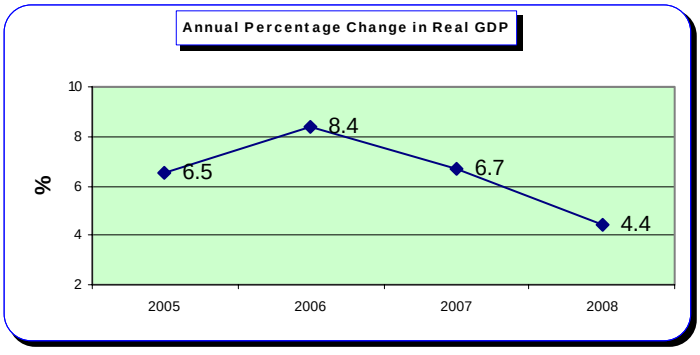
Additionally, the draft text appears to omit to spell out requirements such as the transfer of skills, technology and institutional knowledge transfer, (as opposed to trading goods and services and receiving financial assistance); giving token acknowledgement only to these critical matters by the repetition of the word "sustainable," in a manner that could be construed to devalue the legitimate expectation of CARIFORUM regarding development assistance from the EPA.

There is a possibility that there has been progress in this regard, as some time has elapsed since the review of the early draft chapter. Otherwise, it appears that at this critical juncture in the negotiations, a coherent and effective development chapter is still needed. The development chapter in the EPA should enunciate clear goals, priorities and mutual ambitions in language that is forthright and specific. Missing from the draft text we examined, which we hope to see in a later iteration of the text, is an expression of the undeniable fact that greater development in the CARIFORUM States will make the regional market more lucrative and attractive to international suppliers, including those from the EU, as a reason for the EU to support significant development assistance to CARIFORUM States.

Given the EC's expressed intention to ensure optimal interaction between the EPAs and development cooperation, CARIFORUM should retain the force of this particular demand. The final word on development in the EPA, even if it must follow the closing of the market access deal, should be a discrete chapter that comprehensively states the most appropriate guiding principles for fulfilling the development cooperation agenda of the CARIFORUM States. It should fully engage and account for stakeholders' requests for development assistance in configuring the framework to be used and include an assessment of whether the avenues for funding proposed will be adequate to fulfill the development goals of the EPA for the region. ◘

Fast Facts — Caribbean Growth Forecast

The IMF World Economic Outlook 2007 reports a downturn in economic performance for the region. The forecast covers the 14 independent nations of CARICOM and the Dominican Republic. The determining factors of performance were a sharper than expected downturn in the US economy and tighter global credit conditions. The fund forecasts that the better performers are likely to be Trinidad and Tobago, St. Kitts and Nevis and the Dominican Republic. The report highlights the importance of tourism for the region's long-term growth prospects, underscoring the importance of making the EPAs work for this sector.



(Continued from page 6) *Making S&D Provisions Operational*

Not all S&D provisions are directed at developed country Members. Those directed at WTO Members in general include Article 9.1 of the WTO Agreement on Safeguards which stipulates that the interests of developing countries are to be taken into account in the application of safeguard measures. This is to ensure that safeguard measures do not target developing country imports where the volume of imports is less than three per cent of total imports for the WTO Member imposing the safeguard measure. Where the S&D provision may be interpreted as being directed at the general membership of the WTO it may become meaningless in disputes between developing countries, if the perceived underlying rationale for such provisions is to ensure a certain threshold level of market access to developed country markets where safeguard measures are to be imposed.

If parties did not raise S&D provisions in their claims with respect to the request for establishment of a Panel, exercising an inherent jurisdiction under Article 12.11 of the DSU to make S&D provisions effective may lead to jurisdictional challenges on appeal, on the basis that the parties have not made S&D claims part of the Panel's terms of reference under Article 7.1 of the DSU. Additionally, to interpret S&D provisions to be consistent with a 'development' agenda in accordance with Ministerial Declarations, such as Doha, raises questions about the legal effect of Ministerial Declarations. To be given legal effect a Ministerial Declaration may either be an authoritative interpretation in accordance with Article IX (2) of the WTO Agreement or an amendment to the agreement under Article X. By its terms, however, Article IX (2) suggests that the authoritative interpretation function is not to be used to circumvent Article X amendment provision.

Although the authoritative interpretation may be case specific, as in the case when the Appellate Body's interpretation of a covered agreement is deemed to be in breach of Article 3(2) of the DSU, it is conceivable that an authoritative interpretation may arise in a general sense. The difficulty with the latter approach is that WTO Members may disagree as to whether what purports to be an authoritative interpretation is in fact an attempt at amendment that requires a different procedure and acceptance by a greater number of WTO Members.[7] In any event, under Article X:3 of the WTO Agreement, an amendment of WTO provisions, or an authoritative interpretation that has a similar effect, can only bind those WTO Members accepting the amendment.

In fact if the development agenda is to be seen as requiring that in specified instances development should trump principles like MFN and national treatment (NT), this would mean that all WTO Members would have to accept the Declaration as a *de facto* amendment to MFN and NT obligations under the covered agreements.

The difficulty in practice of securing the acceptance of all WTO Members on key Ministerial Declarations such as Doha's, suggest that the current structure of the WTO is not amenable to interpreting S&D provisions in terms of a development agenda. Moreover, development goals that incorporate sustainable development, such as Article 34.1 of the Cotonou Partnership Agreement that sets out one of the key goals of the European Partnership Agreements, may not be readily achievable within the WTO framework even though the WTO Agreement notes sustainable development as a significant objective.

S&D and RTAs

Given the limitations of the WTO's governing interpretive framework for S&D provisions the question arises as to what effect, if any, RTAs may have in their enforcement. Within some RTA arrangements, LDCs are permitted some flexibility in the assumption of obligations and the bargains struck for some obligations are based on a development agenda. To be sure, Article XXIV of GATT 1994 allows, or may even require, RTA Members to liberalise trade at much greater levels than exists within the WTO[8]. Alternatively, liberalisation within an RTA may be less than what is required for RTAs to justifiably fall within Article XXIV of GATT, albeit their existence can be sanctioned by a waiver. Such waivers however have been increasingly difficult to obtain leading to tensions between developed and developing country members entering into such arrangements under the auspices of Article XXIV. Another approach is to have liberalisation commitments in the RTA roughly equivalent to what its Members have undertaken in the WTO.

In the case of the proposed European Partnership Agreements (EPAs), for example, there may be provisions that require liberalisation at a level that is 'without prejudice' to the Members' WTO rights and obligations. This latter formulation, while seemingly intuitively comprehensible, requires some explanation. For example, are the rights and obligations those that are represented in the covered agreements exclusive of adopted interpretations by panels or the Appellate Body? This is perhaps the interpretation that may be embraced given that decisions of these bodies are not considered binding other than on the parties to the particular disputes.

This notwithstanding, WTO Members rely largely on previous adopted decisions that clarify rights and obligations under the covered agreements to argue their claims or defences. It is to be expected then that claims or defences based on S&D provisions in RTAs may have to pass WTO muster under Article XXIV of GATT 1994.

The foregoing suggests the difficulty of giving effect to S&D provisions, or rather the difficulty in interpreting S&D provisions to trump core principles such as MFN and national treatment. This presents a challenge for meeting trade liberalisation and development objectives within the WTO and RTAs.

Interpreting S&D provisions consistent with a development agenda seems to require subordination of the principle of non-discrimination. Non discrimination is, however, the sine qua non for trade liberalisation. Trade liberalisation, therefore, is not seen as necessarily development friendly although development is acknowledged to be somewhat dependent on trade liberalisation, even if it may not be a necessary or sufficient condition for achieving that objective.[9]

Where the development agenda includes sustainable development as a worthy policy goal, this too may be affected by the uncertain relationship between the WTO principles and Article XXIV governing RTAs. Principles governing sustainable development may have to be drawn from other international agreements, but these are not cognisable within the WTO unless the rules contained therein are binding on all the parties to the dispute.[10]

If WTO decisions are seen as clarifying rights and obligations, the non-cognizable nature of some sustainable development principles within the WTO's interpretive framework may result in these goals being thwarted at the regional level if these principles cannot achieve more prominence in the settlement of disputes in RTAs than is currently accorded them in the WTO.[11]

Concluding remarks

The foregoing is not to suggest that S&D should be discarded or that a development objective should not be pursued. Indeed, that would

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(Continued from page 4) *Trade Remedies Corner*

whether the price is fair or unfair to use a SG measure. TDI's therefore address practices by exporters that affect domestic producers' ability to compete and remain viable in the domestic market.

Undoubtedly, all the talk about price setting and competing hints at some aspects of the more familiar discipline of CP. However, CP refers to a broad set of different measures, including ones that prohibit price fixing, abuse of dominant position, collusion between firms, efforts to privatise state-owned firms and others that may be pursued by governments to enhance the contestability of markets. As with dumping, subsidies and significant volumes, anti-competitive behaviour can have cross border effects. For example if domestic competition rules have not dealt effectively with Cartels or monopolies this anti-competitive behaviour can be transferred through trade in the product or service or the establishment of a firm in the market of another country.

The important point to note about TDIs and CP is that the disciplines both seek to address the behaviour of private firms and that to some extent, that of governments. In the case of TDI's, AD and SG's are meant to discipline the behaviour of private companies, since it is private companies that set their prices for each market or determine what volume to supply. In CV it is the government that decides to provide specific financial assistance (subsidies) that benefits companies and their products, which may be subsequently exported.

TDI and CP in RTAs

Regional Trade Agreements (RTAs) refer to groupings of countries that have sought to deepen their trading relationships. There are different forms of RTAs depending on the degree of integration that countries have sought to pursue. The most common form is the Free Trade Agreement. In an FTA, countries lower all the barriers to trade for members, but keep their respective barriers against third countries; in essence maintaining an independent trade policy.

In the context of RTAs, TDIs have long been a feature of International Agreements and an important strategic tool in many countries' trade policy arsenal. For CP, however, there has been much reluctance to develop multilateral disciplines. Notwithstanding the fact that CP issues have been on the agenda for decades at the WTO, there is still no consensus. This may be one of the underlying reasons for the trend of their increasing inclusion in RTAs.

The question that often emerges is precisely what form these disciplines are to take in RTAs, particularly FTAs, which present a different set of circumstances than a Customs Union (CU). With respect to TDIs, two questions emerge - the first is whether they should be included or not, especially if the agreement contains CP disciplines, and secondly, if they are included, should standards and procedures differ from prevailing multilateral disciplines and should there be harmonisation of regimes? With CP, the question arises as to how they will operate, i.e. what model should be incorporated into the agreement? There are generally two models in RTAs, one that is characterised by harmonisation of rules between RTA partners and supra-nationality, as is the case in CARICOM, or one that seeks to pursue cooperation between the national agencies of partners.

It is important to note that both CP and TDI are standard features of the majority of EC FTAs. In fact TDIs are seen in EC trade policy as complementary with CP. However, the most significant debate has centred around abolishing TDIs rather than having both in an FTA. This is the most fundamental of the questions posed. So let us explore the reasons for this.

One of the most contentious points has to do with the fact that TDIs may be trade restrictive and therefore have no place in an FTA, which is all about trade opening. The debate finds some legal rationale in Article XXIV of the General Agreement on Tariffs and Trade (GATT), points of which there has been little clarification from the WTO. According to Article XXIV, a free trade area is one where "the duties and other restrictive regulations of commerce … are eliminated". There are some listed exceptions, which can be maintained in an FTA, however, Article VI (anti-dumping and Countervail), Article XIX (SG) are not listed among them. The proponents for abolishing TDIs suggest that this list is exhaustive, in which case this provides the legal basis for the abolition of TDIs from FTAs. Others however, indicate that the list is merely indicative and so leaves open the possibility for trade remedy measures to be maintained. To further support this view is the argument that TDIs, being insurance against liberalisation, are even more relevant in a situation of more liberalised trade, as is the case in an FTA.

This notion of the necessity of having some sort of insurance or safety valve underscores the next argument, which posits that TDIs can be eliminated if there are disciplines on competition policy included in the RTA. This argument sees TDIs and CP as substitutable. The complementarities between TDI and CP disciplines, however, often focuses on Anti-dumping. This stems from the historical motivation for anti-dumping, which had it roots in predation for which there was the strong sentiment that, the practice at the international level amounted to unfair trade and had to be checked, hence the development of disciplines. The term dumping came to be used to describe certain types of pricing behaviour between international markets that were deemed unfair. The problem is that the particular type of pricing behaviour that came to be captured in international treaties establishing rules on how to deal with dumping, was not predation, but simply price discrimination. It is commonly understood that this type of price setting **could** be anti-competitive (predatory) but can also take place for **pro-competitive** reasons, such as to break into a new market as well as maximise profits. So while both CP and AD may have stemmed from the desire to discipline the same practice (predation) today they are quite distinct since the type of pricing behaviour addressed by anti-dumping disciplines may be outside the ambit of competition rules. Dumped imports are said to be unfair trade, though they may not be anti-competitive.

It is interesting however, that this argument against substitutability gives rise to an additional rationale for abolition of TDIs. The criticism is that since TDIs have no antitrust or economic basis, the potential costs that they impose on consumers (higher prices resulting from duties or limited imports) and the economy generally (trade diversion) to benefit domestic producers (sometimes uncompetitive) cannot be justified. Further, as a potential form of administrative protection, they may work to limit competition and consumer choice. There may be some legitimacy in these arguments, however, since the purpose of TDIs such as AD and CV is to achieve a **fair price,** it is not always true that prices have to increase, rather the increase may be effected by importers to preserve profit margins, through collusion or otherwise. The behaviour of firms after the use of TDIs may actually create a role for CP to complement TDIs. To further complicate matters TDIs have become important policy tools that serve as **insurance** against liberalisation, and as such are important to **defend** domestic industry in cases where they would simply have to suffer the ravages of "free" trade. So with TDIs, such as AD there may be an inherent trade off in the short-term but there may also be significant long-term dynamic gains, which could lead to competitive outcomes. This prompts some authors to ask, should we throw the baby out with the bathwater?

So even if one were to replace AD with CP, what of the other TDIs?

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(Continued from page 12) **Trade Remedies Corner**

There is no rationale under competition rules to limit fairly traded imports into a market, as is the case with safeguards. Further, competition rules also have limited applicability in respect of subsidies and government operations generally. This would imply that for an FTA which abolished TDI's there would need to be a corresponding tightening of the disciplines on subsidies. The experience of other FTAs, shows that their formation alone is not a sufficient basis on which to abolish TDIs. In fact, even when AD has been abolished countries have maintained the ability to deal with subsidies and apply safeguards.

TDIs and CP in the EPA

With regard to TDI's, the question for some, of non-inclusion seemed to have almost been a foregone conclusion since it was first posited that CARIFORUM import volumes would not be significant enough even if sold at unfair prices to trigger a TDI. This was a bit shortsighted, however, since CARIFORUM markets are so small relative to the capacity of EC producers that EC volumes could have a significant effect on CARIFORUM producers, more so if they are dumped or subsidised.

The issue of what disciplines were to be incorporated was answered by the EC, since notwithstanding the fact that CARIFORUM called for WTO plus disciplines, they have historically adopted WTO disciplines for TDI's in all its FTAs, with minor deviation only for bilateral SG's, which are a creature if the agreement itself and in instances of countries where they contemplated deeper economic integration. On the question of harmonisation, given the differing degrees of implementation, WTO membership, among other issues, practical and legal, harmonisation and supranationality for CARIFORUM was not an option. With respect to CP, the question of harmonisation and supranationality within CARIFORUM was considered to be impractical given the complication of the Dominican Republic. So what is contemplated for CP the EPA is a regime that features cooperation in enforcement and information sharing between national or regional bodies.

Conclusion

As we have shown there is room for the inclusion of both policy instruments in an FTA and justification for having both in the EPA. Most fundamentally, is that, from a trade policy perspective they offer different mechanisms for countries to prevent certain undesirable effects of liberalisation, whether it be the transference of anti-competitive practices or the undesirable effect of unfair import competition and large volume in the domestic market. The substitution of one for the other will necessarily mean a curtailment in the scope of what and how countries can treat with the effects of liberalisation which are many and varied.

This suggests that both have their place. There are legitimate concerns however, over what effect the inclusion of both will have in an FTA, since both together could work to be more trade restrictive. In the context of the EPA therefore special care has to be paid to how these provisions are crafted and how they operate in practice. Notwithstanding this, TDIs and CP are a necessary part of the EPA framework especially in light of the small and vulnerable nature of CARIFORUM economies. ◘

(Continued from page 11) **Making S&D Provisions Operational**

be politically infeasible for developing countries, even if in a practical sense S&D provisions are largely unenforceable or superfluous because, for example, they represent soft 'obligations' that would be met in any event by an appeal to moral suasion.

Some of these provisions are, in any event, firmly established within the multilateral trading system, such as the Enabling Clause that constitutes a continuing legal basis for S&D treatment in favour of developing countries with respect to GSP schemes. Again, such S&D schemes do not necessarily trump core principles such as non-discrimination in their application[12] or result in development because industries benefiting may need more time to develop than allowed under the graduation principle or preferences may cover tariff lines where MFN tariffs are low.

Rather, S&D provisions should be drafted in terms that guarantee reciprocity in their observance as well as of the core provisions against which they are usually meant to provide some relief. Conditioning observance of core provisions on the satisfaction of S&D provisions would be an initial step in the process. For example, if no technical assistance is provided to allow developing country firms to be fully equipped to address sanitary and phytosanitary concerns in developed country markets, developing country members should be permitted to avoid the core obligations under the agreement with respect to goods imported from these regions. This suggestion may be too bold to accommodate in the context of current negotiation ethos. It remains to be seen, however, whether any other approach will achieve a position other than the continuation of asymmetrical outcomes that ultimately militate against the development that is being sought. ◘

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[1] WT/DS54/R, July 1998.
[2] Panel Report, para. 7.87. Arguably, this was a bold move by the Panel because the S&D argument not having been raised for the establishment of the Panel may well have been without the Panel's terms of reference. This means that it is incumbent on developing countries to raise S&D arguments within the context of consultations before the request for setting up a Panel that should also include such arguments in order to foreclose jurisdictional challenges at the Panel stage or on appeal before the Appellate Body.
[3] WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.
[4] See, for example, Article 9 of the Agreement on the Application of Sanitary and Phytosanitary Measures.
[5] Compare, for example, Article 11 and Article 5 of the Agreement on Technical Barriers to Trade. Satisfaction of Article 5 obligations, for example, is not made conditional on the technical assistance obligation in Article 11.
[6] *European Communities- Conditions for the Granting of Preferences for Developing Countries*, WT/DS246/R.
[7] See, for example, WT/GC/W/144, February 5, 1999, p. 2. Here the US objected to the EC's request for an authoritative interpretation of Article 22 of the DSU because it would amount to an altering of rights and obligations.
[8] This would be the position with the RTA Members. See for example, Article XXIV: 8 of GATT 1994 specifying that duties and other restrictive regulations of commerce are to be eliminated on substantially all trade within an RTA.
[9] See, for example, Dani Rodrik and Francisco Rodriquez, 'Trade Policy and Economic Growth: A skeptic's Guide to the Cross-Country Evidence, Centre for Economic Policy Research, Discussion Paper Series 2143 (1999). Demonstrates that there is little correlation between trade liberalisation, economic growth, poverty reduction and economic development.
[10] See, for example, *European Communities-Measures Affecting the Approval and Marketing of Biotech Products*,WT/DS291/R, WT/DS292/R, WT/DS293/R, at para. 7.75. The Panel rejected the application of the precautionary principle in the Cartegena Protocol on Biosafety because not all parties to the dispute are signatories to the Protocol.
[11] This position is on the assumption that WTO decisions in clarifying rights and obligations of WTO Members may influence decisional outcomes in RTAs whose consistency with the WTO Agreement are required under Article XXIV of GATT 1994.
[12] That is to say these schemes albeit discriminatory by definition must be applied in a non-discriminatory fashion with respect to the category of beneficiary countries that may be eligible for those benefits in accordance with the objective criteria required to demonstrate transparency for eligibility.

(Continued from page 8) ***Dr. Baugh's Address***

but slowly. We hope to make better progress on this front, with the recent establishment of the 'Sugar Transformation Unit' in the Ministry of Agriculture, again made possible with EU funds.

Improvement in Presentation of Trade Data. One of the fundamental questions we, in the Foreign Ministry, often find ourselves asking is, "What, exactly, do we trade?" A strange question, you might think. But the truth is, despite the many advances Jamaica has made in the collection and presentation of trade data (and we are leaders in the Caribbean), there is room for more improvement. As it stands, our method of reflecting trade data often conceals certain realities. We have found, for example, that, in a category of exports that included a particular longstanding product, Jamaica had actually ceased exporting that particular good for a number of years. Yet because the data heading was inclusive of other similar goods, this simple fact was overlooked by researchers. We need, therefore, to look at the question of categorisation or how we define headings to see where improvements can be made. However, I believe that the private sector umbrella organisations should also assist, in this regard.

Importantly, perhaps the greatest aspect in which the private sector can play a significant part is in fostering in Jamaicans more of an entrepreneurial spirit. Without this, Jamaica will never be able to take full advantage of the many opportunities for trade that are or will be present – whether in the form of trade agreements negotiated by Government or otherwise. There is a saying: "Governments do not trade, rather, companies do."

Conversely, our job is to explore and negotiate new markets for our products and to create the local environment for production. I think we all know that there are many situations where opportunities abound, but members of our business community are simply not as motivated as they should be in taking up these challenges. We assure you that we will continue to do everything in our power to create the local opportunities and environment for efficient production and to open new opportunities for our exporters.

In this vein, I want to touch on the role of the Foreign Ministry including its overseas Missions in Jamaica's export promotion.

We have worked, from the very beginning, with the Jamaica Trade Commission, later JAMPRO, now Jamaica Trade and Invest, through its overseas offices and through our network of overseas Missions. Resource constraints and budget cuts aside, this has been a very successful relationship. This new administration has pledged to rejuvenate and expand this collaboration as part of Jamaica's ambitious export promotion activities. Some of the initiatives we are exploring include the furnishing of all our overseas Missions and Honorary Consuls with comprehensive and continually-updated catalogues of Jamaican export with directories of exporters. Specialised training would also be given to Foreign Service Officers and JAMPRO officers – based both at home and overseas - to ensure that they are versed in the dynamics of Jamaican exports and exporters. We also intend to make greater use of our existing relationship with the Jamaican Diaspora, particularly in those countries in which we have Missions.

Ladies and Gentlemen, these are just some of the ideas which I wanted to share with you today. I certainly hope that these can be expanded upon during the discussions later on and that perhaps we can even come up with new strategies or improve upon the existing ones, during our discussions.

I thank you. ◘

Trade Talk For "Dummies"

Pamela Morgan

Market Access

Market Access relates to the ability of persons or firms from one country to export, either goods or services, to another country. This ability is curtailed or enhanced through a country's trade policy guidelines. Trade policy can be looked at as any measure that affects international trade, such as tariffs (import duties) and other regulatory measures such as standards or anti-dumping suits, which are referred to as non-tariff barriers. Market access can therefore be looked at as an umbrella term that refers to the ease with which a foreign producer can export to and sell in another country's market, competing with locally made and other foreign products, i.e. a foreign producer's ability to contest an overseas market.

Market Access can operate at different levels, depending on the nature of the country's trading relationship with its partners. For example, market access can be given on a multilateral level, to all trading partners or at the bilateral or regional level, with only a subset of trading partners. The specific scope of market access will vary depending on the specific type of and terms of the arrangement. Further, it can be limited to only a specific range of goods or sectors. For example, market access can be secured in relation to agriculture, non-agricultural goods, information technology or textiles.

The level of market access gained is often dependent on the cumulative outcome of negotiations in many different areas. For example, parties to a negotiation could agree to duty free access to its markets for the other's goods. However, the operation of rules such as import licensing, rules of origin, Customs valuation of goods could actually work to hinder trade, if negotiations do not produce complementary results. In the EPA negotiations, the European Community (EC) has offered duty free and quota free entry to all CARIFORUM products, with special arrangements for sugar and rice. CARIFORUM has reportedly made a market access offer that would liberalise trade with respect to 80% of EC exports. While both offers on the face of it will permit a particular level of access to goods. The actual ability of each partner's producers to the other's market will also depend on factors such as Rules of Origin (RoO), which have yet to be finalised and agreed.

Agreement on market access can be important not only for trade and economic reasons but for political reasons as well. For example, in the context of the EPAs, as with most FTAs, its scope will determine if the Agreement is in fact compatible with World Trade Organisation rules. The focus in trade agreements, therefore, is less on the actual offer and more towards what it will amount to in reality, a thorough assessment of which needs to include rules and regulations that could affect market access, as well as on the ability of firms to take advantage of the opportunities presented. This brings to the fore concerns about capacity and hence, the needed assistance to address any deficiencies, to make market access effective. Market access has therefore taken on more depth in practical application. ◘

Brain Tease — Between a Rock and a Hard Place ?

Is it really necessary to conclude negotiations on market access in order to meet the criteria set out in Article XXIV of the GATT for Interim Agreements — plan and schedule for implementation?

Further, if such an agreement is not arrived at is it really necessary to revert to GSP?

Send feedback to : antidump@jadsc.gov.jm