

CARIBBEAN INTEGRATION AND TRADE: HOT BUTTON ISSUES

Coherence, energy, subsidies, carbon taxes and the CSME

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Coherence conveys a sense of consistency and rationality that is not always evident in Caricom affairs; I refer to the Caribbean Community and Single Market and Economy. The Revised Treaty of Chaguaramas (hereinafter ‘Revised Treaty’) which establishes the Caricom Single Market and Economy (CSME) has not been fully implemented nor do Member States necessarily have the capacity to implement it in its present form. It is also not in harmony with certain agreements that have been negotiated on behalf of the region, such as the CARIFORUM Economic Partnership Agreement (EPA) as regards the operation of the Regional Preference clause. It does not comport with certain positions which have been articulated in the WTO Doha Development Agenda (DDA) where Caricom-WTO Members have sought and won additional policy flexibility with respect to the use of subsidy measures to promote their economic development. These are merely symptoms of an underlying detachment between the treaties that define trade integration and Caribbean reality.

The reconstitution of the Intergovernmental Task Force to revise the Revised Treaty as mandated by the Conference of Heads of Government presents the opportunity for Member States to negotiate new rules that will be supported and implemented by Caribbean peoples and Governments. Caricom is a “fledgling Community”.¹ Hopefully the region will emerge from its growing pains, stronger and with a greater sense of understandability than there is today.

A former US negotiator, Ambassador Susan Schwab, observed:

* The views presented herein are those of the author and do not necessarily represent those of the Government of Jamaica.

¹See also *Trinidad Cement Ltd (TCL) v. The Caribbean Community* [2009] CCJ 4 (OJ), para 39.

The real danger is that if we do not keep moving forward, the nations of the world could retreat from trade and actually reverse the gains we have been making in the last half century. It is like riding a bicycle. Keep moving forward or stay in place and fall over.²

The bicycle analogy has been derided by some and championed by others. In general, it has not been well received by many representatives of developing countries who suggest that the gains from the growth in international trade have not been fairly distributed, hence the need to address the outstanding “implementation concerns” from the former Uruguay Round before undertaking new WTO liberalization commitments.

There are lessons here for the Caribbean Community.

This paper reviews the treatment of certain aspects of the debate over energy subsidies and taxes of particular relevance to the CSME assessed against pertinent regional and multilateral trade rules. It presents a ‘smorgasbord’ of ideas which will hopefully stimulate an appetite for further discussion.

The debate on energy within Caricom

The differentials in the cost of energy within the CSME are a contentious issue. It may be recalled that the Conference of Heads of Government, at its Twenty-Fourth Meeting in Montego Bay, Jamaica in July 2003, decided to refer the issue of national treatment and non-discrimination in respect of access to, and pricing of natural resources as these relate to energy within the context of the CSME to the Caricom Secretary-General for an advisory legal opinion.³

² Remarks by Ambassador Susan C. Schwab, Deputy United States Trade Representative, Thunderbird University, Glendale, Arizona, March 20, 2006.

³ The request from the Conference was phrased in general terms without reference to any particular Member State, although the impetus for the reference lay in a dispute between Trinidad and Tobago and Jamaica over differentiated pricing in relation to liquefied natural gas (LNG). All Member States were invited to submit briefs. However, only Jamaica and Trinidad & Tobago made formal submissions. The

The Opinion provided by the Secretary-General includes the following observations:

Industrial competitiveness is among the most immediate concerns. Energy is a significant cost component in the production process. Access by the productive sector in Trinidad and Tobago to natural gas at lower net back prices than is available to the productive sector in other Member States, has been claimed to have had a devastating impact upon the manufacturing industry and balance of payment profile in many of Trinidad and Tobago's traditional trading partners within the Community. This impact has been said to (*sic.*) so grave as to be unsustainable.⁴

The Opinion failed to advance the discourse in so far as it concluded that insufficient evidence had been adduced for a determination to be made as to whether the operation of differential pricing practices in the Trinidad market were in breach of the basic principles of non-discrimination.

With a view to achieving the goal of market-led, internationally competitive and sustainable production of goods and services for the promotion of the Region's economic and social development, the Revised Treaty imposes an obligation on Member States to pursue, *inter alia*, the "*cross-border employment of natural resources ... for the production of goods and services on a sustainable basis*".⁵ The Revised Treaty also requires Member States to "*refrain from trade policies and practices, the object or effect of which is to distort competition, frustrate free movement of goods and services, or otherwise nullify or impair benefits to which other Member States are entitled under this Treaty.*"⁶ The Revised Treaty, as such, protects the balance of concessions made by individual Member States by providing a means to redress government actions which

Opinion was prepared by the Caricom Secretariat's General Counsel and submitted to the Community Council.

⁴ Dr. Winston Anderson, "Advisory Legal Opinion – Energy", 5 November 2003, para. 8.

⁵ Revised Treaty, Article 51.2(a)

⁶ See Revised Treaty, Article 79.2; see also Revised Treaty, Article 187 on the scope of the dispute settlement chapter including "(b) allegations of injury, serious prejudice suffered or likely to be suffered, nullification or impairment of benefits expected from the establishment and operation of the CSME".

may not otherwise be regulated by express treaty rules but which nonetheless nullify or impair a Member's legitimate expectations of the benefits to be derived from liberalization within the region.⁷ The fundamental objective of such a 'non-violation' provision is to prevent a Member State from using policy measures to negate the anticipated benefits of integration.⁸ This applies even where there is no finding of a breach of a specific liberalization obligation.

Efforts have been made within the Region to address the issue. In February 2003, Caricom Heads of Government agreed to establish a Task Force, comprised of Barbados, Grenada, Guyana, Jamaica, Suriname and Trinidad & Tobago to develop recommendations for a Regional Energy Policy, which would address issues such as-

- (i) security of energy supplies;
- (ii) energy pricing policy and the impact on relative competitiveness in the CARICOM Single Market and Economy; and
- (iii) purchasing and transportation arrangements

The Caricom Draft Energy Policy, "The Way Forward",⁹ was presented in 2007. Although it has not been adopted, it is questionable whether it is sufficiently far reaching as to provide a solution to the fundamental concerns of many Caricom Member States.

⁷ See also *Japan-Film*, WT/DS44/R, para 1050.

⁸ The concept of a 'non-violation' complaint originated in bilateral trade agreements and is rooted in the General Agreement on Trade and Tariffs (GATT) 1947. It is intended to protect reciprocal tariff concessions among the parties to an agreement. In the absence of substantive legal rules in many areas relating to international trade, the 'non-violation' provision is aimed at preventing a party from using non-tariff barriers (NTBs) and other policy measures to negate the benefits of the agreement. The provision therefore allows a party to bring a 'non-violation' complaint when the negotiated balance of concessions between Members is upset by the application of a measure whether or not this measure is inconsistent with the provisions of the covered agreement; see *India-Patents*, WT/DS50/AB/R, para 41.

⁹ The Draft Energy Policy encourages Member States to explore opportunities for import, export and cross-border trade in electricity. With respect to natural gas it provides that,

"Member States will:

a) Identify and implement alternative methods and measures aimed at:

(i) creating more efficient means to transport natural gas; and

(ii) expanding the transportation and trade network for natural gas within the CARICOM region;

b) Co-ordinate shipping arrangements to minimize transportation costs."

The Draft Energy Policy provides that developments in technology should impact pricing and allow for the commercial distribution of energy among Member States in an efficient manner. It further supports the promotion of competition in power generation to encourage non-utility or independent power producers.

The Multilateral Approach

The Doha Development Round, should it be successfully concluded, might provide the region with a possible way forward on treating with dual pricing practices in the energy sector. The question of subsidies in the form of low-priced energy products, especially natural gas, has recurrently stirred heated debates among WTO Members. The subject is being addressed as part of the on-going negotiations.¹⁰

The United States submitted a proposal in the Rules Group in the WTO negotiations under the heading “Natural Resource and Energy Pricing”. The US proposal states:

While the principle that trade flows should be determined by comparative advantage is broadly accepted, it must also be accepted that preferential natural resource pricing has been and, if not addressed, will continue to be a source of considerable trade distortion and friction. Simply put, there is no difference between the government provision of a natural resource at less than fair market value and the government provision of a cash grant allowing the purchase of a natural resource at less than fair market value.

Government intervention in the natural resource and energy sectors can take a variety of forms. One such practice is dual pricing: one price for exports, and another controlled price for domestic consumption, benefiting domestic producers and exporters, especially those who use the resources intensively in their own manufacturing processes. The advantage provided to domestic producers in this situation unfairly magnifies the comparative advantage that would otherwise be determined by market forces and production efficiencies. While Members made progress in addressing these issues during the Uruguay Round, further

¹⁰ See also WTO Director-General Pascal Lamy, Speech to the Twentieth World Energy Congress in Rome, 16 November 2007.

clarification and improvement of the rules and remedies in this area are warranted.¹¹

The European Union has also thrown its support behind amending the WTO Agreement on Subsidies and Countervailing Measures (ASCM) so as to strengthen current rules in order to proscribe dual pricing practices in the energy sector.¹² The Chairman of the Rules Group has introduced text for the consideration of Members (though this does not prejudice the outcome of the negotiations).

Key ‘clarifications’ of the existing WTO rules relate to the concept of ‘specificity’¹³ and the method for calculating the amount of a subsidy where a Member proposes to impose trade remedies, such as countervailing duty measures, against ‘unfair trade’.¹⁴ The proposed new language provides that:

Where the price level of goods or services provided by a government is regulated, the adequacy of remuneration shall be determined in relation to prevailing market conditions for the goods or services in the country of provision when sold at unregulated prices, adjusting for quality, availability, marketability, transportation and other conditions of sale; provided that, when there is no unregulated price, or such unregulated price is distorted because of the predominant role of the government in the market as a provider of the same or similar goods or services, the adequacy of remuneration may be determined by reference to the export price

¹¹TN/RL/W/78, “Subsidy disciplines requiring clarification and improvement”, communication from the United States, p.3; see also TN/RL/W/94, “Expanding the Prohibited ‘Red Light’ Subsidy Category”, Paper by the United States. But see TN/RL/W/107, “Observations and comments by Venezuela on Document TN/RL/W/78 submitted by the United States concerning prohibited subsidies and other subjects under the WTO Agreement on Subsidies and Countervailing Measures”. Note also that in the Services negotiations the US and Norway initially proposed that a Reference Paper should be developed similar to the Reference Paper to the GATS Agreement on Basic Telecommunications Services. This, however, did not garner sufficient support and has not been developed in the course of the negotiations.

¹² This is one of three EU priorities in the Rules Negotiations on the ASCM, see WT/TPR/G/177, EU Trade Policy Review, para 39; see also TN/RL/GEN/135, ‘Subsidies’, Submission by the European Communities.

¹³ See TN/RL/W/236 - an amendment is proposed to the definition of ‘specificity’ in the context of Article 2.1(c) of the ASCM which would address subsidies conferred through the provision of goods or services at regulated prices to take into account the exclusion of firms within the country in question from access to the goods or services at such regulated prices.

¹⁴ See also TN/RL/W/232 Annex B, “Subsidies and Countervailing Measures”.

for these goods or services, or to a market-determined price outside the country of provision, adjusting for quality, availability, marketability, transportation, and other conditions of sale.¹⁵

The notion of ‘specificity’ is a critical hurdle in the imposition of countervailing measures against subsidized products; *viz.* under WTO rules, subsidies are only ‘actionable’ if they are ‘specific’. The provisions of the ASCM are essentially duplicated in the Revised Treaty where it is stated that a subsidy is ‘specific’ when it is limited “to an enterprise or industry or group of enterprises or industries *within the jurisdiction of the granting Member State.*”¹⁶ It is not ‘specific’ where the subsidy is granted automatically to enterprises based on “objective criteria or conditions”¹⁷ governing eligibility which are strictly adhered to, and capable of verification (as for example, set out in law).

In the WTO, the dual pricing of energy products has been characterized as a *de facto* subsidy (a reference to the fact that dual pricing schemes are generally not ‘specific’, though some are and others may be). The practice is also referred to as a non-tariff trade barrier (NTB), akin to an export duty, or alternatively as ‘reverse dumping’.

Fossil fuels and natural gas are scarce, non-renewable and among the most geographically concentrated energy products. This makes for less direct competition in products and the presence of significant economic rents. It significantly affects

¹⁵ TN/RL/W/236, note also the proposed new language in Article 14.2: – “For the purpose of Part V, where a subsidy is granted in respect of an input used to produce the product under consideration, and the producer of the product under consideration is unrelated to the producer of the input, no benefit from the subsidy in respect of the input shall be attributed to the product under consideration unless a determination has been made that the producer of the product under consideration obtained the input on terms more favourable than otherwise would have been commercially available to that producer in the market.” The text includes a footnote which provides: “Where, however, it has been established that the effect of the subsidy is so substantial that other relevant prices available to the producer of the product under consideration are distorted and do not reasonably reflect commercial prices that would prevail in the absence of the subsidization, other sources, such as world market prices, can be used as the basis for the determination in question.”

¹⁶ Revised Treaty, Article 97(1) (added emphasis); see also Article 2.1 of the ASCM.

¹⁷ Objective criteria or conditions should be neutral (i.e. not favour certain enterprises over others), economic in nature and horizontal in application (such as number of employees or size of enterprise); see ASCM footnote 2.

production patterns, and threatens to redefine traditional notions of ‘comparative advantage’.¹⁸

Energy is the number one commodity in global trade, accounting for almost 15% of total trade in 2006.¹⁹ The notion of a ‘commodity’ is generally indicative of trade in goods as opposed to services. Classification issues arise with respect to trade in energy which may relate to goods (subject to the General Agreement on Tariffs and Trade (GATT) as well as services (subject to the General Agreement on Trade in Services (GATS)).²⁰ The distinction is not always obvious: so for example, how should one classify natural gas? Are liquefied natural gas (LNG) and natural gas ‘like products’? In trade law the notion of ‘like products’ provides for a comparison of, *inter alia*, physical characteristics, end-uses of products, consumers’ tastes, preferences and the tariff classification of products. Within Caricom the focus has largely been on access to and pricing of LNG and related concerns relevant to the cost of electricity. As regards the latter, it is perhaps worth nothing that the World Custom Organization (WCO) Harmonized Commodity Description and Coding System (HS) contains an optional heading for electrical energy as some treat it as a service and others as a commodity.²¹

The energy sector has traditionally been dominated by state-owned vertically integrated utilities as is typical of the region. Where the entity that owns the raw materials also

¹⁸ See also Speech by WTO Director-General Pascal Lamy at a conference on “Energy, Trade and Global Governance”, 22 October 2009.

¹⁹ See also Katrin Elborgh-Woytek & Azim Sadikov, “Energy Issues on the Trade Liberalization Agenda” Trade Policy Division, Policy Development and Review Department, IMF, April 2008.

²⁰ Note that the WTO ‘Services Sectoral Classification List’, MTN/GNS/W/120, does not include a separate comprehensive entry for energy services. Important energy services (transport, distribution, construction, consulting, engineering, etc) are covered by the respective horizontal categories, while some energy related services are listed as separate subsectors. The UN Provisional Central Product Classification (UNCPC) also does not list energy services as a separate category. However, both lists contain separate entries for ‘services relating to energy distribution’ and ‘pipeline transportation’. Note that the revised UNCPC has been updated to take into account the more modern structure of the energy industry which has allowed for the emergence of new independent service segments. See also S/C/W/52, “Energy Services”, Background Note by the WTO Secretariat.

²¹ The drafters of the GATT seemed to have assumed that electricity should not be classified as a commodity. This suggestion is based on the discussions of the New York Drafting Committee Report on Article XX(g) of the GATT where the view was expressed that there was no need to expressly refer to electrical power; see GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6th Edition (1995), see also *supra*, note 20, S/C/W/52, p.2.

engages in the transport, transmission and distribution of energy the line between goods and services trade becomes blurred.²² Classification is important as different rules generally govern trade in goods (agriculture versus industrial products) and services.

Setting aside the debate over electricity, it is generally accepted that the production of energy, whether raw or refined (primary and secondary), is goods trade and subject to the GATT 1994. The very first dispute in the WTO to go to a panel, indeed, concerned energy, i.e. *US – Standards for Reformulated and Conventional Gasoline*.²³ Formerly certain practices in the energy sector which did not conform to GATT disciplines were deemed to be acceptable under the general exceptions and national security clauses (Articles XX²⁴ and XXI of the GATT). Increasingly, however, the discourse has shifted and concerns about ‘fair trade’ in the energy market have come to the forefront.

Privatization and liberalization are promoting greater competition in the energy sector. Competition policy is an important part of the architecture of the CSME.²⁵ This affords yet another heading under which dual pricing practices may be scrutinized.²⁶ However, competition rules are not highly developed in the WTO context.²⁷ There are, nevertheless, general rules on monopolies and exclusive services suppliers²⁸ and recognition of the negative impact of restrictive business practices²⁹ in the GATS. The GATT, Article XVII, addresses State Trading Enterprises (STEs) and imposes the general obligation that STEs must act in a manner consistent with general principles of non-discrimination. STEs must conduct business on the basis of commercial

²² This could be addressed through the adoption of a ‘source-neutral’ classification.

²³ WT/DS2/R and WT/DS4/R – complaints by Venezuela and Brazil, respectively, concerning exports of gasoline to the US.

²⁴ E.g. GATT, Article XX(g) relating to the conservation of exhaustible natural resources.

²⁵ See Revised Treaty, Chapter 8 on “Competition Policy and Consumer Protection”. Note that the objectives of Community Competition Policy are to ensure that the benefits expected from the establishment of the CSME are not frustrated through, *inter alia*, anticompetitive business conduct that prevents, restricts or distorts competition; see Revised Treaty, Article 169.

²⁶ See also, “Advisory Legal Opinion – Energy”, *supra* note 4 at para 79.

²⁷ Various provisions of the WTO Agreements address competition policy issues. However, although initially part of the Doha Round, the WTO General Council subsequently agreed that the issue of competition policy would not form part of the work programme and no work towards negotiations on this topic would be undertaken during the Doha Round; see WT/L/579, 2 August 2004.

²⁸ See GATS, Article VIII.

²⁹ See GATS, Article IX.

considerations³⁰ and afford enterprises of other Members an adequate opportunity to compete for participation in their sales and purchases.

Interest in dual-pricing and other ‘suspect’ practices in the energy trade have peaked in the WTO with the accession of important oil producing states, such as Ukraine, Saudi Arabia and other Gulf States. There are also several other important oil producing states in the process of negotiating their accession, including Russia,³¹ Kazakhstan, Azerbaijan, Algeria, Libya, Iran, Iraq, and Sudan. This is not to suggest that hitherto there was a lack of interest in the topic. Indeed, the issue was raised in the GATT 1982 Ministerial Meeting. Additionally, in the course of the Uruguay Round several delegations proposed that the negotiations on goods, specifically the Negotiating Group on Natural Resource-Based Products address such problems or issues as “dual-pricing practices and resulting subsidies, and/or reverse dumping”.³² The US further pressed the matter in the Negotiating Group on Subsidies and Countervailing Measures, but this met with limited success.³³

³⁰ Note that the phrase ‘commercial considerations’ has not been given an expansive interpretation in WTO jurisprudence, e.g. *Canada – Wheat Exports and Grain Imports*, WT/DS276/AB/R at 144 -149: “the term “commercial considerations” necessarily implies that the determination of whether or not a particular STE’s conduct is consistent with the requirements of the first clause of subparagraph (b) of Article XVII:1 must be undertaken on a case-by-case basis, and must involve a careful analysis of the relevant market(s). ... [T]he United States appears to construe Article XVII:1(b) as requiring STEs to act not only as commercial actors in the marketplace, but as *virtuous* commercial actors, by tying their own hands. We do not see how such an interpretation can be reconciled with an analysis of ‘commercial considerations’ based on market forces.”

³¹ The issue is particularly significant in Russia’s accession (as it was with Saudi Arabia and the Ukraine); see also Keith Bush, ‘Russia’s Accession to the World Trade Organization’, June 2008, noting that the US Department of Commerce cited dual pricing practices in proposing protective import duties of 138% and 233% on the import of carbamide-ammoniac mix from Russia. Russia contends, *inter alia*, that there is no world price for natural gas and, moreover, that the differential tariffs between Russia and its neighbours are in large measure reflective of the high costs of transportation.

³² See MTN.GNG/NG3/W/8, Multilateral Trade Negotiations, the Uruguay Round Special Distribution, Group of Negotiations on Goods (GATT), Negotiating Group on natural Resource-Based Products, 13 November 1987.

³³ In 1983, the US Congress attempted to amend US legislation on countervailing duty measures to essentially remove the ‘specificity’ requirement in relation to subsidies provided through natural resource inputs in imported products. These efforts were directed at curbing the sale of natural resources by foreign governments at prices substantially lower than export prices of “fair value”. The proposal would have expanded the definition of a countervailable domestic subsidy in 19 USC section 1677(5) to include the domestic sale of a natural resource based product by entities regulated by foreign governments, if the resource was subject to a government price control system. If the price of the resource was less than (1) its export price, (2) its “fair market value,” or (3) the price generally available to US producers, goods produced using that resource would be countervailable if the resource accounted for a significant portion of the cost of producing the merchandise under investigation. Where these basic conditions were met, the

As with other concerns (for example, agriculture subsidies), it has taken time for the multilateral rules-based system to show signs of ‘progress’. It should be noted, however, that even without additional clarity in the WTO rules the possibility exists for more aggressive action against dual-pricing practices through the use of trade remedies, including antidumping measures.³⁴ The imposition of antidumping duties on energy intensive products which have benefited from dual pricing schemes is facilitated through the use of constructed values when sales of the product on the domestic market account for less than five percent (5%) of exports of the product to the country concerned.³⁵

Under the Revised Treaty Caricom Member States retain the right to use WTO compatible trade remedies against intra-regional imports. Article 131.6 of the Revised Treaty expressly provides that the agreement “shall not be construed so as to prevent an injured party or a Member State from initiating and proceeding with an investigation into

amount of the countervailing duty on imports would be the difference between the resource’s domestic price and export price, or between its domestic price and “fair market value” when there are no exports or the export price is distorted by government manipulation. The ‘natural resources provision’ (as it was commonly referred to) in a House-approved miscellaneous tariff bill was dropped in conference – and therefore did not appear in the Trade and Tariff Act of 1984. The Trade Agreements Act of 1979 implemented the Tokyo Round of Multilateral Trade Negotiations including the Subsidies Code which was largely incorporated in the WTO ASCM. See J.H. Bello & A.F. Holmer, “Subsidies and Natural Resources: Congress Rejects a Lateral Attack on the Specificity Test” 1984 Geo. Wash. J. Int’l L. & Econ. 297; see also A.F. Holmer & J. H. Bello, “Current Developments - The Trade and Tariff Act of 1984: the Road to Enactment”, 1984 International Lawyer 287.

³⁴ See also Global Europe – 521, “Europe’s Trade Defence Instruments in a changing global economy’, A Green Paper for public consultation, submission by Kemira GrowHow, a leading European provider of fertilizer products and related chemicals, listed on the Helsinki Stock Exchange, Finland - calling for ‘creative remedies’, including a dedicated dual-pricing trade defence mechanism.

³⁵ Article 2.2 of the Agreement on Implementation of Article 6 of the General Agreement on Tariffs and Trade 1994 (hereinafter ‘Antidumping Agreement’) provides that “When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country(2), such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.” (*footnote in original*) “2 Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.”

alleged dumping having regard to the rights of such parties under international agreements to which they are signatories.”

The WTO debate is interesting and possibly provides a launching pad for more serious discussion within Caricom. But that is premised on a sense of coherence in trade policy that is not always evident. It may be questioned whether any notice has been taken of the Geneva-based WTO discussions? History is informative.

The Doha Decision on Article 27.4 of the ASCM

One of the Caribbean’s implementation concerns which was addressed at the WTO Doha Ministerial in 2001 concerned an extension of the transitional provisions for the use of export subsidies under the ASCM. The extension was granted in favour of certain ‘small economies’, those whose share of world merchandise export trade was not greater than 0.10 per cent (which includes the Dominican Republic)³⁶ and those whose total Gross National Income (‘GNI’) for the year 2000 as published by the World Bank was at or below US\$20 billion (which essentially places the cut off mark at Sri Lanka with a per capita income of just below US\$1000 and population of 20 million).³⁷

The Doha extension covers export subsidy programmes in the form of full or partial exemptions from import duties and internal taxes, which were in existence not later than 1 September 2001. Various conditions such as a standstill and graduation on the basis of export competitiveness apply. The Doha Decision covered the period up to the end of the calendar year 2007.³⁸

³⁶ According to the calculations performed by the WTO Secretariat as reflected in Appendix 3 to the Report of the Chairman (G/SCM/38).

³⁷ See G/SCM/39, “Procedures for extensions under Article 27.4 for certain developing countries members”.

³⁸ See *ibid.*, G/SCM/39, para 1(f): “During the last year of the period referred to in 1(e), a Member that has received an extension under these procedures shall have the possibility to seek a continuation of the extension pursuant to SCM Article 27.4, for the programmes in question. The Committee shall consider any such requests at that year’s annual review, on the basis of the provisions of SCM Article 27.4, i.e., outside the framework of these procedures.”

Prior to the deadline established in Doha a number of Caricom countries joined with other WTO Members to seek a further extension of the deadline to phase out the covered programmes given that they “*have been of great importance to the economic and financial needs of these economies and continue to be important components of their development strategies.*”³⁹

On 27 July 2007 the WTO General Council adopted a decision to extend the transitional period through to the end of the calendar year 2015.⁴⁰ This is worthy of note, particularly as the Revised Treaty of Chaguaramas essentially copies the original provisions of many of the 1994 Uruguay Round Agreements, including the ASCM. As such, Article 99 of the Revised Treaty on ‘Prohibited Subsidies’ largely mirrors Article 3 of the ASCM in proscribing the measures which Caricom countries have been granted permission to continue to use for an extended transitional period under WTO rules.⁴¹ Much ‘diplomatic’ energy was expended in securing the WTO extension⁴² at the same time as measures were being taken to provisionally apply the Revised Treaty.

³⁹ See G/SCM/W/535, submitted by the Delegations of Antigua and Barbuda; Belize; Barbados; Dominica; Dominican Republic; El Salvador; Fiji; Guatemala; Grenada; Jamaica; Mauritius; Papua New Guinea; St. Kitts and Nevis; St. Lucia; and St. Vincent and the Grenadines

⁴⁰ The decision provides that the “last authorized period” referred to in the last sentence of ASCM Article 27.4 shall not extend beyond 31 December 2013, and the final two-year phase-out period provided for in the last sentence of ASCM Article 27.4 shall end not later than 31 December 2015; see WT/GC/M109, Minutes of the Meeting of the General Council, see also G/SCM/120, para 1(d).

⁴¹ Article 99 of the Revised Treaty provides:

“1. Subject to this Treaty, a Member State shall neither grant nor maintain subsidies referred to in paragraph 2.

2. The following subsidies within the meaning of Article 96 shall be prohibited: (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those listed in Schedule V”.

⁴² This was the case both before and during the Doha Ministerial Conference as well as more recently in 2007 in securing the further extension; see also WT/GM/M109, *supra* note 40, at para 54. “The representative of Barbados, also on behalf of the Dominican Republic, El Salvador, Guatemala, Jamaica, Mauritius, Antigua and Barbuda, Belize, Dominica, Fiji, Grenada, Papua New Guinea, St. Lucia, St. Kitts and Nevis, and St. Vincent and the Grenadines, expressed great satisfaction at the expected adoption at the present meeting of the recommendation from the SCM Committee to extend the transition period for the use of certain export subsidies until 2015. ... The adoption of this recommendation would have a positive effect on all of these countries, from both an economic and social perspective. The programmes concerned were currently an integral component of their countries' investment regimes and also helped to employ, in some cases, millions of people, particularly women. These countries hoped to use the period between the present and 2015 to adjust their economies adequately so that the loss of these programmes as policy instruments could be managed with minimal dislocation. This decision was not just an achievement for the proponents, but rather another illustration that the WTO system could indeed work for its smallest and most vulnerable members. ...”

Most Caricom Member States continue to take advantage of this additional policy flexibility irrespective of the proscriptions in the Revised Treaty. It appears to be assumed that no one within the Community would challenge their use. The traditional assumption is perhaps that within the region we adhere to a flexible ‘common sense’ interpretation (as opposed to a ‘rules-based approach’) of how we move forward with integration. The establishment of the Caribbean Court of Justice (CCJ) may suggest the need for further reflection.

Energy and Climate Change

The realities of Climate Change have added a new dimension to the debate on energy. Those most disturbed with dual pricing schemes on fossil fuels have found new friends with environmentalists. The International Institute for Sustainable Development, for example, has created a Global Subsidies Initiative which spotlights the effect of fossil fuel subsidies in encouraging wasteful spending and harmful emissions.⁴³ The WTO is becoming increasingly relevant in relation to the possible use of trade measures to manage leakage and/or competitiveness concerns arising from the costs of carbon constraints on production. Incentives and other financial support which promote the use of renewable energy are reviewable in the context of WTO subsidy rules.⁴⁴ Recent WTO discussions have explored the possibility of a carbon tax on imports and/or the levying of countervailing duty measures on carbon/fossil fuel energy-intensive products.⁴⁵

The Climate Change debate, however, threatens to shed more ‘heat than light’ when it ventures into the realm of ‘saving the planet’ by taxing air miles. The newly implemented

⁴³ See <http://www.globalsubsidies.org/en>

⁴⁴ Note the proposal in the current Chairman’s Text of the Doha Negotiations to reintroduce a category of non-actionable subsidies, including ‘green subsidies’; see TN/RL/W/236. The provisions of Article 8 of the ASCM which deemed certain government subsidy programmes as ‘non-actionable’, including measures to promote adaptation of existing facilities to new environmental requirements, expired at the end of 1999, short of a consensus of Members to extend them; see ASCM, Article 31. But note that the Revised Treaty of Chaguaramas, Article 111, largely duplicated the expired WTO provision. It is unclear whether this was intentional or inadvertent.

⁴⁵ *E.g.* WT/GC/M/120, Minutes of the Meeting of the General Council held on 26-27 May 2009, para 94, remarks of the Representative of India.

UK Air Passenger Duty (APD) varies according to the distance and class of travel. The APD is an interesting measure to examine from the perspective of WTO rules. It is also the sort of measure that likely merits some discussion in the context of the CARIFORUM EPA.

The UK APD was introduced as a ‘green tax’ designed to account for aviation’s impact on the environment. There are four (4) bands and two (2) rates.⁴⁶ The rates which came into effect at the beginning of November 2009 are programmed to increase next year.⁴⁷ The implication for the Caribbean is that a family of four travelling from London to vacation in the Caribbean will have to pay an additional two hundred to four hundred pounds (£200-£400) to the UK Government in ‘green taxes’ this year, increasing to three hundred to six hundred pounds (£300-£600) following the scheduled increase next year.

A key difficulty with the measure is that it appears discriminatory. The APD arguably undermines the EU’s commitments to liberalize cross border services in the tourism sector in serving as an inducement for Europeans to vacation at home (where if they choose to fly the tax imposed is marginal). It also unfairly discriminates between the EU’s WTO partners, for example, in imposing lower charges on travel to certain ‘favoured destinations’ such as Hawaii or California, and indeed, all of the US, than charged for travel on shorter distances to tourist destinations in the Caribbean.

The UK APD may be described as a measure affecting trade in services under Article I:1 of the GATS and Article 61(a) of the CARIFORUM EPA. Article 75(2) of the EPA defines “cross border supply of a service” as covering Modes 1 and 2 as described in Article I.2 of the GATS, i.e. including the supply of a service “in the territory of a Party to the service consumer of the other Party”. Although both the GATS and the EPA

⁴⁶ Bands are mostly based on the distance between London and the capital city of the destination country/territory. Standard rates: Band A (0 - 2,000 miles) £22; Band B (2,001 - 4,000 miles) £90; Band C (4,001 - 6,000 miles) £100; Band D (over 6,000 miles) £110; Reduced rates: Band A (0 - 2,000 miles) £11; Band B (2,001 - 4,000 miles) £45; Band C (4,001 - 6,000 miles) £50; Band D (over 6,000 miles) £55.

⁴⁷ The corresponding rates for 2010-2011 are as follows: Standard rates - Band A £24; Band B £120; Band C £150; Band D £170; Reduced rates: Band A £12; Band B £60; Band C £75; Band D £85.

exclude in large measure air transport services,⁴⁸ this is as it relates to traffic rights, and the UK APD is arguably not such an exempted measure.⁴⁹ This is an important preliminary issue as an initial hurdle in pursuing the dispute in the WTO is establishing that the APD is not a measure affecting traffic rights, as herein contended. This position has support in UK case law.⁵⁰

Essentially, once a measure impinges on the supply of a service that is covered by the GATS, its legality should be assessed in the light of all relevant obligations and commitments.⁵¹ The GATS covers both *de facto* as well as *de jure* discrimination.⁵² It provides for most favoured nation (MFN) treatment for all sectors (save where specific Article II exemptions have been listed) and National Treatment where commitments have been made in the relevant sector. The EC's schedules of commitments to the EPA⁵³ and

⁴⁸ See GATS Annex on Air Transportation Services; paragraph 1 of the Annex states that, "This Annex applies to measures affecting trade in air transport services, whether scheduled or non-scheduled, and ancillary services." Paragraph 2 provides for the following exclusion from GATS rules: "The Agreement, including its dispute settlement procedures, shall not apply to measures affecting: (a) traffic rights, however granted, or (b) services directly related to the exercise of traffic rights, except as provided in paragraph 3 of this Annex." Paragraph 4 specifies that "[t]he dispute settlement procedures of the Agreement may be invoked only where obligations or specific commitments have been assumed by the concerned Members and where dispute settlement procedures in bilateral and other multilateral agreements or arrangements have been exhausted." An initial hurdle in pursuing the dispute in the WTO is establishing that the APD is not a measure affecting traffic rights, as herein contended. See also EPA, Article 75(1) which provides that "This Chapter applies to measures by the Parties or by the Signatory CARIFORUM States affecting the cross border supply of all services with the exception of: ... (c) national and international air transport services, whether scheduled or non-scheduled, and services directly related to the exercise of traffic rights, other than:

- (i) aircraft repair and maintenance services during which an aircraft is withdrawn from service;
- (ii) the selling and marketing of air transport services;
- (iii) computer reservation system (CRS) services; and
- (iv) other ancillary services that facilitate the operation of air carriers, such as ground handling services, rental services of aircraft with crew, and airport management services."

⁴⁹ WTO jurisprudence has accorded a very broad interpretation to the sort of measures covered by the GATS. "The scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services", see *EC – Bananas III*, WT/DS27/R, para. 7.285; affirmed in *EC – Bananas III*, WT/DS27/AB/R, para 217.

⁵⁰ See *Federation of Tour Operators v. HM Treasury* [2007] EWHC 2062, paras 3 & 84, where the UK Treasury argued that 'Article 15 of the Chicago Convention has no application to APD' and was upheld by the Court. See also Dr. Lorand Bartels, "The WTO compatibility of ticket taxes", 30 Sept. 2009.

⁵¹ See also R Adlung, "Public Services and the GATS" (2009) Vol. 9, No. 2, J.I.E.L. 455 at 458.

⁵² E.g. *EC- Bananas III* WT/DS27/AB/R, para. 220; *Canada –Autos*, WT/DS139/AB/R, para 234.

⁵³ The EPA, Annex IV.b, "List of commitments in conformity with Article 78 (cross-border supply of services)" demonstrates full commitments on Mode 2 as regards Tourism and Travel related services, though generally unbound commitments for Recreational, Cultural and Sporting Services but not for the UK market where bound commitments have been made in Mode 2 for almost all sub-sectors. Commitments

the GATS highlight that the EC has undertaken extensive commitments in Mode 2 cross-border services in the tourism and recreational services sectors.

Article 77 of the EPA on ‘National treatment’ mirrors GATS, Article XVII. It provides that in sectors where market access commitments have been undertaken (subject to any conditions and qualifications set out in Annex IV), the Parties shall grant to services and service suppliers of the other Party, in respect of all measures affecting the cross-border supply of services, treatment no less favourable than accorded to their own like services and services suppliers. This treatment may be either formally identical treatment or formally different treatment to that which is accorded to their own like services and service suppliers. Article 77(3) further clarifies that:

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the EC Party or of the Signatory CARIFORUM States compared to like services or service suppliers of the other Party.⁵⁴

The effect of the UK air passenger duty is essentially to raise the cost of travel for potential EU tourists coming to the Caribbean. It acts as a disincentive to travelers, and encourages vacationers to stay closer to home. The tax varies according to the destination – i.e. the origin of the service or service provider and therefore appears to be *de facto* discriminatory not only with regards to national treatment but also as regards the basic most favoured nation obligation.⁵⁵ The arbitrary nature of its application – for example, charging less to travel from the UK to Hawaii than Jamaica – further demonstrates that the measure is not justifiable.

for the UK remain unbound with respect to libraries, archives museums and other cultural services (CPC 963).

⁵⁴ Note that specific commitments assumed under this Article are not to be construed to require either Party to compensate for inherent competitive disadvantages which result from the foreign character of the relevant services or services suppliers; see EPA, Article 77(4).

⁵⁵ See also EPA, Article 79.

The General Exceptions clauses of the GATS and the EPA permit certain measures which do *not* constitute a means of arbitrary or unjustifiable discrimination to be adopted and enforced even where these may appear contradictory to the obligations of the Agreement. The General Exceptions provision under the GATS is arguably narrower than under the EPA. Article 224 of the EPA provides for general exceptions with respect to trade in goods and services and includes measures which:

(f) relate to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption of goods, domestic supply or consumption of services and on domestic investors

The EPA provision is largely based on Article XX(g) of the GATT which is not reproduced in the GATS, Article XIV.⁵⁶ Article XIV (b) of the GATS is limited to measures *necessary* to protect human, animal or plant life or health. While the reduction of carbon emissions may be designed for the protection of general health, it is questionable whether it is a necessary measure. The word '*necessary*'⁵⁷ suggests a significantly higher standard than the word '*relate*' which appears in Article 224(f) of the EPA – a provision which also directly addresses the conservation of exhaustible natural resources and, as such, is more directly relevant to the discussion on Climate Change (than the GATS exception clause). In any event, as above-noted, the application of the UK APD appears to be arbitrary and unjustifiably discriminatory and therefore would not fall within the chapeau of Article 224 of the EPA or Article XIV of the GATS.

⁵⁶ The following note is found in the Analytical Index: (b) Trade in services and the environment
64. On 1 March 1995, the Council for Trade in Services, pursuant to the Ministerial Decision on Trade in Services and the Environment, adopted the Decision on Trade in Services and the Environment. The Decision stipulates, *inter alia*:

“In order to determine whether any modification of Article XIV of the Agreement is required to take account of such measures, [Ministers] request the Committee on Trade and Environment to examine and report, with recommendations if any, on the relationship between services trade and the environment including the issue of sustainable development. The Committee shall also examine the relevance of inter-governmental agreements on the environment and their relationship to the Agreement.”

⁵⁷ See also *Brazil – Retreaded Tyres*, WT/DS332/AB/R, para 151 where the Appellate Body appeared to lower the bar on the ‘necessity test’ in observing that a measure need not be indispensable to be *necessary* but need only make a ‘material contribution’ to the achievement of the objective.

Concluding thought

The *Bananas III* case⁵⁸ which is well known within the region underscores the need for coherence in trade policy. It makes little sense to secure concessions in one agreement (there the Lome IV Convention) which are taken away by another (in that instance the WTO Agreements). Coherence begins at the national level and is promoted through an effective, meaningful consultative process which should inform and buttress negotiations between Member States, with the support of the Caricom Secretariat.

Caricom's unresolved disputes are beginning to take a toll on the people of the region and their commitment to the integration process. There is a musical entitled '*Stop the World, I Want to Get Off*'.⁵⁹ Dissatisfaction with the uneven distribution of the gains which have been realized from trade liberalization whether in Caricom or on a global scale should not be a spring board for an 'exit strategy' but rather a call for renewed efforts to address the imbalances in the multilateral trading system as well as the CSME.

⁵⁸ WT/DS27

⁵⁹ '*Stop the World - I Want to Get Off*' is a musical production by Leslie Bricusse and Anthony Newley, which was later adapted for the television. It focuses on a man who marries his love but with growing dissatisfaction with his existence and in the quest for something better is drawn into the arms of various other women. Finally in end he realizes that what he always had - the love of his wife - was whom he really needed all along.