

APPLICATION OF WTO LAW IN TRADE REMEDY DISPUTES IN CARICOM

By Delroy S. Beckford*

The trade remedy regime under the Revised Treaty of Chaguaramas (Revised Treaty) contains provisions that are similar to their corresponding WTO Agreements, notably the WTO Antidumping Agreement (ADA), the Agreement on Subsidies and Countervailing Measures (SCM Agreement, and the Safeguards Agreement (SGA), but which contain some noteworthy differences that raise the issue of the extent of the applicability of WTO law to the resolution of disputes that may arise in that regime.

The similarities between the regimes may suggest the raising of the issue as counter-intuitive, but trade remedy provisions in some FTAs, whose practice differ from that of the WTO, do not replicate WTO provisions in all respects, nor provide for direct effect of WTO jurisprudence.

In this brief article I attempt to outline some of the differences in the CARICOM and WTO trade remedy regime and the implications for the applicable law in dispute settlement.

DIFFERENCES BETWEEN ADA AND AD PROVISIONS IN REVISED TREATY

The antidumping(AD) provisions in the Revised Treaty are for the most part consistent with the ADA. One important difference is that a domestic investigating authority's investigation may be short circuited due to the existence of a dual jurisdictional structure for the conduct of investigations.

Under the Revised Treaty, the Council for Trade and Economic Development (COTED) has jurisdiction to take over, and proceed to a definitive ruling, an investigation that began at the domestic level, if one of the parties refers the matter to it.

Second, remedies for provisional measures imposed by or pursuant to the recommendation of a domestic investigating authority, but that are inconsistent with the AD provisions as determined by COTED, include compensation for materially retarded exports of the CARICOM Member against whom the complaint was brought.¹ Compensation may, apparently, involve more than the refund of the provisional duties, bearing in mind the discretionary language of the provision to the effect that the nature and extent of the compensation is to be determined by COTED.²

DIFFERENCES BETWEEN SCM AGREEMENT AND SUBSIDY PROVISIONS IN REVISED TREATY

The subsidy provisions in the Revised Treaty generally mirror those in the SCM Agreement, but there are some noteworthy differences. For example, subsidies are regarded as being for the benefit of a product, as opposed to benefiting a legal or natural person. Thus, one of the conditions to be met for a Member to take action against subsidized products is that ‘the products have benefited from a prohibited subsidy’.³

Like the AD provisions in the Revised Treaty, compensation may also involve more than the refund of provisional duties, if the effect of the provisional measure materially retards the exports of the alleged subsidizing Member.⁴ By contrast, the remedy under the SCM Agreement is limited to the prompt withdrawal of the measure and the refund of provisional duties.

There are also differences in the conditions to be met for the availability of a definitive remedy. Consultation must take place with the alleged subsidizing Member, and there must be authorization from COTED for imposition of a definitive measure.⁵

DIFFERENCES BETWEEN SGA AND SG PROVISIONS IN REVISED TREATY

One noteworthy difference between the Revised Treaty and the SGA (read in conjunction with Article XIX of GATT 1994) is the absence of the ‘unforeseen developments

requirement for the application of a safeguard measure. There is also no general provision on the duration of a definitive measure, and, if a measure may be extended and the period for the extension of a definitive measure.⁶

IMPLICATIONS FOR DISPUTE SETTLEMENT

These differences suggest some discretionary scope in the applicable law. NAFTA, for example, does not apply the concept of ‘unforeseen development’ as a requirement for the imposition of a safeguard measure.⁷ Nor is the calculation of dumping margins necessarily done according to the provisions of the ADA to exclude practices such as zeroing.⁸ Importantly, the standard of review for reviewing domestic measures is also, not surprisingly, not influenced by WTO jurisprudence.⁹

The AD provisions in the Revised Treaty also open the possibility for inconsistent rulings between a domestic reviewing court and COTED. A judicial review application of a provisional measure may find that the domestic investigating authority acted in accordance with the applicable law, while COTED may take a different view.¹⁰ Arguably, this situation is less likely where the dispute involves CARICOM origin goods, but more likely where non-CARICOM origin goods are a part of the domestic investigation.¹¹

On the other hand, where the Revised Treaty framework becomes fully operational with a system of *directives*, *regulations* and *opinions*, as is the case in the European Union (EU), parallel litigation is less likely in trade remedy matters. Doubtless, this may arguably entail re-drafting of domestic anti-dumping legislation to exclude domestic judicial review of anti-dumping investigations involving CARICOM Members where COTED decides to exercise jurisdiction, or the inclusion of some provision in the Revised Treaty to bar domestic review proceedings in such cases once a matter has been referred to COTED.

APPLICATION OF WTO TRADE REMEDY LAW TO RTAs

RTAs are governed by Article XXIV of GATT 1994 that requires their consistency with the WTO regime. However, complete consistency is not mandatory. For example, Article XXIV provides exemptions from Articles XI, XII, XIII, XIV, XV, and XX of GATT 1994 where necessary.

With respect to trade remedies, no such exemptions are stipulated. The absence of Article VI of GATT 1994 (governing both dumping and subsidies) and Article XIX of GATT 1994 (regarding the unforeseen developments requirement for application of safeguard measures) may suggest that these provisions were meant to be observed where RTAs choose to implement a trade remedy regime.

Disputes brought before the WTO also indicate that the substantive provisions of the trade remedy agreements are to be observed irrespective of whether an FTA excludes the provision from application within the FTA. Arguing that its safeguard measure against non-MERCOSUR countries could not be applied against MERCOSUR Members because of the provisions of MERCOSUR, Argentina in *Argentina-Footwear*¹² maintained in its defence the consistency of its measure under Article 2 of the SGA, and that the selective application of the measure can be done where it is carried out by a customs union.

The Appellate Body rejected the argument, clarifying that if the finding of an increase in imports is based on imports from MERCOSUR Members, the measure must be applied against them as well. This left open the question of whether the measure would still have to be applied against MERCOSUR Members if their imports were excluded from the finding regarding an increase in imports. This issue did not arise in the dispute, and no clarification was sought or given on it.

The Appellate Body, however, did not treat the selective application issue as arising under footnote 1 of Article 2 of the SGA (relating to measures adopted by a customs

union) because the measure in issue was not applied on behalf of the customs union as a whole, but by a member of the union for its own benefit.

Selective application may also arise with respect to subsidy provisions. For example, the Revised Treaty exempts agricultural subsidies from its general provisions on subsidies. Doubtless, this provision was meant to mirror the perceived relationship between the SCM Agreement and the Agreement on Agriculture. However, the law on the relationship between the two agreements is a moving target, or so it seemed. Prior to the *US-Subsidies on Upland Cotton*¹³ decision, the SCM Agreement was treated as subject to the Agreement on Agriculture. Thus, export subsidies, generally proscribed under the SCM Agreement, were considered shielded from challenge for agricultural products to the extent that those export subsidies were included in the subsidizing WTO Member's schedule. Two developments question this reading of the relationship: first, the expiry of the 'peace clause' (Article 13 of the Agreement on Agriculture) on January 1, 2004, and, second, the Appellate Body's decisions in *EC-Bananas III*¹⁴, and *Chile Price Band System*, that signaled the interpretive approach it would adopt in the *Upland Cotton* decision.

In *EC-Bananas III*, and *Chile Price Band System*¹⁵, the Appellate Body had occasion to interpret Article 21 of the Agreement on Agriculture, specifically the relationship between Article 21 and the Annex IA Multilateral Agreements of GATT 1994. Article 21 of the Agreement on Agriculture provides for the application of the GATT 1994 Annex 1A Multilateral Agreements "subject to the provisions of this Agreement". This provision was interpreted to mean "except to the extent that the Agreement on Agriculture contains specific provisions dealing specifically with the same subject matter".

The term 'same subject matter' was then applied in the context of the relationship between the Agreement on Agriculture and the SCM Agreement to mean that, as regards prohibited subsidies, the specific provision invoked in the Agreement on Agriculture as an exception to the SCM Agreement must specifically refer to prohibited subsidies. In the *US-Subsidies on Upland Cotton* decision, none of the provisions of the Agreement on

Agriculture advanced by the United States, to justify their subsidies, mentioned prohibited subsidies specifically.

The current position, as the Appellate Body clarified in *US-Subsidies on Upland Cotton*, is that prohibited subsidies under SCM Agreement Article 3.1(a) and 3.1 (b) are not shielded from challenge, despite the introductory language of Article 3.1 of the SCM Agreement “except as provided in the Agreement on Agriculture.” That the expiry of the ‘peace clause’ did not influence this holding suggests that prohibited subsidies are now inconsistent with the Agreement on Agriculture. In short, prohibited subsidies on agricultural products are subject to the discipline of the SCM Agreement.

A duty exemption or duty concession regime regarding CARICOM origin goods may also give rise to disputes with non-CARICOM Members under both Article 1 of GATT 1994, and the SCM Agreement. A duty exemption or remission that is less than the bound rate inscribed in a CARICOM Members Schedule of Concessions, and accorded to other CARICOM Members by that Member, may be treated as a subsidy, despite provisions requiring the application of that duty rate to CARICOM origin goods.

As the Appellate Body noted in *Canada-Certain Measures Affecting the Automotive Industry*¹⁶, the relevant benchmark for purposes of determining whether revenue otherwise due is foregone, under Article 1 of the SCM Agreement, is not the provisions requiring the duty exemption or duty remission regime, but rather the Schedule of Concessions of the WTO Member with respect to the goods benefiting from the duty exemption or remission. The relevance of this holding was in response to Canada’s argument that duty otherwise due is not foregone unless the duty waived is more than the duty accrued. Using the duty exemption regime as the benchmark meant there was no duty foregone.

Is this ruling relevant for the CARICOM regime, given that the dispute with Canada concerned an FTA and not a customs union with a common external tariff? Yes and no.

No, if the common external tariff (CET) satisfies Article XXIV: 5, that is, it is, on the whole, no higher than what existed before the formation of the customs union with respect to trade with non-CARICOM Members. Additionally, there should be satisfaction of other conditions for the establishment of a customs union, notably the internal liberalisation requirement.

There is no bar to raising Article XXIV as a defence to a claim for breach of any of the core provisions of GATT 1994, but this would doubtless open the door for arguments about the consistency of a purported customs union with GATT 1994. Yes, then, with respect to an Article XXIV defence for breach of GATT 1994.

APPLICATION OF WTO LAW WHERE DIFFERENCES EXIST IN PROVISIONS BETWEEN WTO AGREEMENTS AND THE FTA REGIME

Differences in the regimes permit some margin of appreciation in the applicable law for disputes. This situation is more likely to be the case with disputes among CARICOM Members, but less likely where the dispute involves non-CARICOM Members. A dual regime is doubtless permissible, as exists in the case of MERCOSUR or NAFTA: for MERCOSUR non-application of trade remedies for its Members, but the right to apply them against non-Members; for NAFTA, selective application among its Members, together with a regime that retains the rights of Members to apply the remedy against non-Members.

For CARICOM, a dual regime is, however, less permissible or practicable where the trade remedy measure involves non-CARICOM goods. It would be problematic for safeguard investigations involving CARICOM and non-CARICOM origin goods to be subject both to CARICOM safeguard provisions, with respect to CARICOM origin goods, and the WTO Safeguards Agreement, with respect to non-CARICOM origin goods because of the likelihood of a violation of Article 1 of GATT 1994.

Moreover, special and differential provisions that ensured the involvement of some CARICOM Members may be a source of conflict with the WTO regime, if the benefits for those countries under the relevant provisions are not extended on an MFN basis.

It would seem, therefore, that the growing integration of CARICOM in the international economic system, its relationship with other FTAs and the proposed European Partnership Agreements (EPA) indicate a need to appreciate the broader trade policy context for the application of trade remedies that factor WTO disciplines into account in order to avoid challenges to determinations.

*Research Fellow (International Economic Law), Division of Global Affairs, Center for Law and Justice, Rutgers University, Newark, New Jersey, U.S.A. The author previously worked as Senior Legal Counsel to the Antidumping and Subsidies Commission, Jamaica, and is currently a Fulbright Scholar and Global Affairs Fellow at the Division of Global Affairs, Rutgers University, specializing in international economic law. The views expressed herein are not attributable to any organization with which the author is associated. Email: beckford@pegasus.rutgers.edu.

¹ Revised Treaty, Article 133(3) (f). As a practical matter, this provision does not accurately reflect the nature of antidumping complaints which are usually against a particular firm and not a country *per se*. The drafting language incorrectly implies that the act of dumping is attributable to state action.

² Revised Treaty, Article 133(3) (f).

³ Revised Treaty, Article 98 (1) (a).

⁴ Revised Treaty, Article 104(2), with respect to prohibited subsidies, and Revised Treaty, Article 115(2) with respect to subsidies alleged to be causing serious adverse effects.

⁵ Revised Treaty, Article 98(2).

⁶ One exception exists in the case of disadvantaged countries. These are allowed a three year safeguard measure in the first instance. See, Article 150 of Revised Treaty.

⁷ NAFTA, Article 801 does not mention Article XIX of GATT 1994 with respect to bilateral safeguard actions involving NAFTA parties, although NAFTA, Article 802 includes obligations under Article XIX of GATT 1994 regarding safeguard measures to be applied against non-NAFTA parties.

⁸ But see, NAFTA Bi-national Panel Report, *In re Certain Softwood Lumber Products from Canada*, Final Affirmative Antidumping Investigation, USA-CDA-2002-1904-02, Third Remand, June 9, 2005, where the panel directed Department of Commerce (DOC) to apply a non-zeroing methodology to calculate dumping margins to comply with Appellate Body Report in *Softwood Lumber IV*.

⁹ NAFTA panels apply a domestic standard of review.

¹⁰ For example, there is no provision in the Revised Treaty that forecloses the exercise of a domestic court's jurisdiction to review an antidumping investigation once COTED becomes seized of the matter following a preliminary determination.

¹¹ Revised Treaty, Article 131(5) and 131(6), read in conjunction, contemplate this possibility by vesting COTED with jurisdiction to investigate cases of alleged dumping by third states, but also reiterating the right of Members to conduct investigations consistent with international agreements to which they are signatories. This would include the WTO Agreement, and by extension, the provisions in the ADA for domestic legislation with respect to review of anti-dumping proceedings.

¹² WT/DS98/AB/R, adopted January 12, 2000.

¹³ WT/DS267/AB/R, adopted March 21, 2005.

¹⁴ WT/DS27/AB/R, adopted September 25, 1997, para. 155.

¹⁵ WT/DS207/AB/R, adopted October 23, 2002, para. 186.

¹⁶ WT/DS/139/AB/R, adopted June 19, 2000.