TRADE REMEDIES WITHIN THE CARICOM SINGLE MARKET AND ECONOMY: SOME THOUGHTS ON THE CHALLENGE FOR ACHIEVING A COHERENT ADMINISTRATION

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Abstract

The creation of the CARICOM Single Market under the Revised Treaty of Chaguaramas (Revised Treaty) presents opportunities for expanding trade possibilities within CARICOM and provides the region with a stronger negotiating voice to advance a coordinated regional trade policy. The uncertain relationship between regional trade agreements and the World Trade Organization (WTO) regime, however, is likely to produce tension in the application of trade disciplines across these regimes, not least of which is that involving trade remedies.

For the most part, trade remedy provisions in the Revised Treaty mirror those in the corresponding WTO Agreements, but differences in some of the provisions are likely to produce inconsistent results in decisions within the dispute settlement systems in either regime. This possibility for tension and conflict suggest that unless there is a firm commitment to the regional integration process, forum shopping is liking to be a preferred means of resolving disputes as disputants weigh the pros and cons of either the regional or multilateral regime for the resolution of disputes. Other possible sources of tension relate to the applicable standard of review together with the applicability of

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jurisprudence from other regional trading arrangements to address issues of interpretation.

INTRODUCTION

Much attention has been focused on the CARICOM Single Market Economy as an important development for the region's trade possibilities. However, the effective functioning of this regime remains to be fully tested in the area of trade remedies, particularly with regard to the stock of jurisprudential choices that exist for the resolution of disputes from several free trade areas (FTAs)[1] and the WTO. Given the context of a relatively untested dispute settlement system, and the fact that disputes may involve more than just CARICOM members, cases involving non-members are expected to be argued from the vantage point of jurisprudential choices consistent with those countries legal tradition or FTAs of which they are members to the extent of the similarity of issues to be adjudicated. That the trade remedies regime within the CARICOM Single Market and Economy is modeled on the WTO's trade remedies regime set out in the antidumping Agreement, the Agreement on Subsidies and Countervailing Measures, and the Safeguards Agreement, may suggest that WTO jurisprudence will be controlling on the resolution of disputes. This, however, is not the end of the matter since disputes may involve products for which there is yet no dispute before the WTO with respect to a challenge of a trade remedy measure involving such a product, while there may be decisions, urged on the tribunal for consideration, from other jurisdictions that decided

[1] For convenience, I have used the term free trade areas interchangeably with customs unions.

similar issues involving a similar or identical product, but that were not subject to challenge under the WTO regime.

This paper provides a brief overview[2] of the trade remedies regime under the Revised Treaty of Chaguaramas[3] (hereafter 'Revised Treaty') and addresses some of the issues that are likely to pose a challenge for a coherent administration among varied jurisprudential options. Part I gives a very brief overview of trade remedies under the Revised Treaty and implications for disputes to be settled by the Caribbean Court of Justice. Part II discusses possible conflicts between the CARICOM trading regime and the WTO in safeguards, subsidies and antidumping provisions. Part III begins a discussion about some of the relevant issues to arise adjudication such as the applicable standard of review for determinations by investigating bodies, local courts and the Caribbean Court of Justice (CCJ), and the policy options for consideration. Part IV concludes with a brief overview of the issue of complementarity or conflict generally with respect to the trade remedies regime.

I. A. OVERVIEW OF THE ANTIDUMPING REGIME

The antidumping provisions under the Revised Treaty mirror those contained in the WTO Antidumping Agreement. The detailed provisions of the Anti-dumping agreement are,

[2] The overview is very brief because of the similarity of the provisions in both the WTO trade remedies regime and that under the Revised Treaty. A detailed exposition of these provisions would therefore involve considerable repetition if comparison is to be made between these two regimes. Consequently, only some of the salient differences are mentioned. In addition a detailed exposition of the provisions of the trade remedy regimes under both treaties is beyond the scope of this paper.

[3] Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy, available at http://www.sice.oas.org/trade/caricom/caricind.asp

however, not replicated verbatim in the Revised Treaty. One noteworthy difference is the stage at which consultations are expressly permitted under the two regimes. Under the Antidumping Agreement, consultations are permitted at any stage of an antidumping proceeding;[4]the Revised Treaty provides a bit more flexibility in permitting consultations after an affirmative finding from a preliminary investigation,[5] although consultations could arguably take place following a decision to initiate an investigation.[6]

Perhaps, the most salient of the differences between the Revised Treaty and the WTO Antidumping Agreement, is the establishment by the former of a dual structure for the conduct of anti-dumping investigations. Investigations may be initiated by national investigating bodies, but must be referred to the Council for Trade and Economic Development (COTED) after an affirmative preliminary finding. COTED determines if the affirmative preliminary finding is justifiable, and if so, continues with the investigation leading to imposition of definitive anti-dumping duties. If the domestic investigating authority's affirmative preliminary determination is not justified, compensation may be authorized to the CARICOM Member whose exports were affected by the imposition of provisional duties.[7]Here, compensation may be authorized following

[4] WTO Antidumping Agreement, Article 17.2. It provides that: "Each Member shall afford sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, representations made by another Member with respect to *any* matter affecting the operation of this Agreement. Emphasis added.
[5] Revised Treaty, Article 129(5).
[6] Article 131(6) of the Revised Treaty allows for this possibility by providing that: "Nothing in this Article shall be construed so as to prevent an injured party or a Member State from initiating and proceeding with an investigation into alleged dumping having regard to the rights of such parties under international agreements to which they are signatories". This provision, therefore, indirectly incorporates Article 17.2 of the ADA that allows consultations to take place at any stage of an antidumping proceeding if the Member concerned decides to invoke the ADA as the basis of its right to conduct an antidumping investigation. Invoking the provisions under the ADA to conduct an investigation implicates the obligation to give consideration to a request for consultations at any stage of the proceeding.
[7] Article 133(3) (f) of the Revised Treaty provides for this possibility where provisional measures have 'materially retarded' the exports of the CARICOM Member against whom the complaint was brought.

the negative determination by COTED with respect to the affirmative preliminary determination found by the domestic investigating authority.[8]

By contrast, the WTO Antidumping Agreement does not provide for a dual structure for the conduct of investigations, nor does it provide for compensation in the event that an affirmative preliminary determination is not justified. The remedy available for a negative definitive finding where provisional measures were imposed after a prior affirmative preliminary determination is the refund of the duties paid.[9]

B. OVERVIEW OF THE SAFEGUARDS REGIME

The rules governing safeguards are similar to those of the relevant WTO agreements in some respects. Articles 92 and 150 of the Revised Treaty, however, do not contain the more detailed provisions of the Safeguards Agreement together with Article XIX: 1(a) of GATT 1994, concerning some of the more important procedural and substantive issues. For example, there is no requirement that a safeguard measure be imposed consequent on a finding that the increased imports causing serious injury results from 'unforeseen developments', nor is there a specific provision regarding the duration of a definitive measure generally.[10]

[8] In this respect, the referral of the investigation to COTED following an affirmative preliminary determination is akin to a review of the domestic investigating authority's determination. However, there is no indication as to how possible conflicts are to be resolved if the preliminary investigation is subject to both a domestic review by a local court (as is provided for in some jurisdictions with WTO consistent antidumping legislation) and a COTED review.

[9] WTO Antidumping Agreement, Article 10.5.

[10] However, for a disadvantaged country, Article 150(1) of the Revised Treaty provides that safeguard measures can be maintained for up to three years, unless a longer period is authorized by COTED.

Article 150 of the Revised Treaty in some respects operates as a special and differential provision by providing that in the case of a disadvantaged country, safeguard measures are not to be applied to their products if the imports of such products do not exceed 20 per cent of the market of the importing Member concerned.[11] This import threshold apparently allows for the imposition of safeguard measures for imports that fall below it.

By contrast, Article 9 of the Safeguards Agreement mandates the non-application of safeguard measures against developing countries whose share of the imports to the importing Member does not exceed 3 per cent, unless developing countries with less than 3 per cent import share collectively account for no more than 9 per cent. The implications of these differences in the provisions are explored below.[12]

C. OVERVIEW OF THE SUBSIDIES REGIME

The provisions on subsidies under the Revised Treaty mirror, in important respects, those contained in GATT Article VI 1994 and the Agreement on Subsidies and Countervailing Measures (SCM Agreement). For example, Article 96 of the Revised Treaty on the definition of subsidies tracks closely the wording in Article 1 of the SCM Agreement, and Article 97(2) of the Revised Treaty on specificity of subsidies is almost verbatim that contained in Article 2 of the SCM Agreement as is the Revised Treaty's definition of prohibited subsidies.

[11] Revised Treaty, Article 150(3).
[12] See section II A below.

However, there is some difference between the two regimes in the process of accessing the available remedy of a countervailing duty. Article 16 of the Revised Treaty stipulates the usual conditions for imposition of provisional countervailing duties as are found in the SCM Agreement,[13] but requires as a further condition for the imposition of provisional countervailing duties that consultations with affected CARICOM Members is undertaken and that COTED be notified and requested to investigate the matter. As a practical matter, this difference may not matter much because the requirement for notification and consultation does not mean an investigating authority cannot impose the measure until the issue is resolved in the consultations. Therefore, these procedural obligations can be met even as the investigating authority is imposing the measure, although the duty to consult implies some modicum of restraint in this regard.[14]

On the other hand, for CARICOM countries without standing investigating bodies for trade remedy matters, the difference in the two regimes in accessing the remedy may be of some significance. Much depends on how soon an investigation is initiated by COTED following a request for one to be done by it. The longer the investigation takes to be initiated than if that CARICOM Member's investigating authority were conducting it, if it had one, the more likely it is that that the domestic industry concerned would suffer

[13] These include the requirement for public notice of the investigation, that interested persons have been given an adequate opportunity to submit information and make comments, the provisional measure is necessary to prevent further injury being caused during the investigation, the form that the countervailing duty measure may take, the period after which the measure is to be applied and duration of the provisional measure. These provisions are similar to Article 17 of the SCM Agreement.

[14] This procedural obligation for consultation is also reflected in the antidumping and safeguard provisions. But the leeway for the imposition of measures by national investigating bodies before the resolution of the issue by consultation is seen in Article 92(10) of the Revised Treaty which stipulates that for safeguard measures, where a provisional measure is taken by a national investigating body and consultations do not result in the resolution of the dispute, "the matter *may* be referred to COTED for a determination". Emphasis added.

loss that it is not likely to recoup.[15] This is because provisional measures cannot be applied sooner than 60 days after the initiation of the investigation, and retroactive imposition of countervailing duties, where applicable, are limited to the period for which provisional measures were in place.

D. POTENTIAL DISPUTES

The types of disputes that may arise for consideration under the Revised Treaty framework, and which have implications for the consistency of the operation of the trade remedies regime with the WTO regime, include disputes between CARICOM Members, disputes between a CARICOM Member and a third party, disputes involving private litigants and a CARICOM Member, and disputes involving a private litigant and a third party.

E. DISPUTES BETWEEN CARICOM MEMBERS

Disputes between CARICOM Members may arise where the decision to initiate an investigation, the imposition of a provisional measure or final duty or measure is treated as being in violation of the trade remedy provisions in the Revised Treaty. This situation may arise where, for example, a CARICOM Member uses its domestic antidumping or subsidies regime (as opposed to that under the Revised Treaty where COTED is authorized to conduct such investigations resulting in provisional or definitive measures) to initiate and conclude such investigations.

[15] There is no provision stipulating a minimum period in which an investigation is to be initiated by COTED following a request for such initiation, unlike the case say in the Jamaican legislation where, pursuant to section 22 of the Customs Duties (Dumping and Subsidies) Act, 1999, the decision to initiate or not is to be made within 45 days of the receipt of a properly documented complaint.

In the case of anti-dumping disputes, CARICOM Members are permitted an express jurisdictional choice between the WTO dispute settlement system and the Revised Treaty regime to resolve antidumping disputes.[16] Use of the latter may likely reduce legal costs, particularly where a dispute is confined to the treaty but does not involve issues that may be resolved under the WTO regime.[17] An additional benefit to choosing the jurisdictional forum of the CCJ is that it narrows the room of maneouvre for subsequent litigants since its decisions are invested with *stare decisis* status in contrast to the WTO dispute settlement system where this does not exist.[18]

Of the possible disputes than can arise, those between CARICOM Members carry fewer risks of potential conflict from several jurisprudential choices. But the risks are real

[16] Jurisdictional choice between the WTO and the CARICOM regime for resolving trade remedy disputes is arguably available only in the case of anti-dumping measures, at least from the standpoint of the Revised Treaty. See, for example, Article 131(6) of the Revised Treaty that provides for a CARICOM Member to initiate and conduct investigations in accordance with international agreements to which it is a party. No similar provision exists with respect to investigations for subsidies or safeguards, but this does not mean that the WTO dispute settlement system cannot be used to resolve such disputes if a CARCOM Member so chooses, at least with respect to the provisions of the WTO Agreement.

[17]There is perhaps no clearer demonstration of the possibility of trade remedy disputes arising under the dispute settlement systems of an FTA and the WTO than the softwood lumber dispute between Canada and the US where the dispute was litigated before NAFTA Panels, WTO panels, and the WTO Appellate Body. See, for example, Opinion and Order of the Extraordinary Challenge Committee, *In the Matter of Certain Softwood Lumber Products from Canada*, Secretariat File No. ECC-2004-1904-01USA, 10 August 2005. See also, WTO Panel decision, *United States-Investigation of the International Trade Commission in Softwood Lumber from Canada, recourse to Article 21.5 of the DSU by Canada*, WT/DS277/RW,circulated November 15,2005. See also Appellate Body decision, *United States-Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada, recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW,circulated December 5, 2005.

[18]Whether or not there is any practical significance in whether decisions of international tribunals are invested with stare decisis is the subject of some debate. Adjudicative legitimacy and judicial coherence are said to be important factors accounting for de facto *stare decisis* of decisions of some international tribunals even where the text of their terms of reference and competence indicate that *stare decisis* is inapplicable to their decisions. The Appellate Body's practice of meeting *en banc* to discuss each case to ensure consistency in decisions even though a decision is usually made by a three member division of the Appellate Body. See, for example, Raj Bhala, "The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy), *American University International Law Review*, vol. 14. p. 845, 1999; Raj Bhala, "The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy), *George Washington International Law Review*, vol. 33, p.873, 2001.

nonetheless. Consider, for example, a case brought before the CCJ on a particular issue where the jurisprudential stock includes a pre WTO panel decision, a conflicting WTO panel decision, and an ongoing appellate process where the WTO panel decision is subject to appeal. If the issue arises before the CCJ for the first time, it may, in reliance on WTO jurisprudence that accords no precedential value to pre WTO decisions, disregard the pre WTO panel decision, but does it wait until the appeal settles the question before ruling on the issue before it, lest it gives legitimacy to a WTO panel decision that may be overturned? This difficulty may give rise to forum shopping, although this would admittedly be less likely where the CCJ is already seized of the matter.

If the issue has already been decided by the CCJ then there is no hard question to resolve on the approach to take since its decisions are a source of precedent, but this approach may serve to delimit jurisprudential development in accordance with developing WTO jurisprudence that may, by extension, alter the WTO rights and obligations of CARICOM Members with respect to each other, at least to the extent that CARICOM Members choose to settle such disputes before the CCJ and not before the WTO. It may be said that there can be no altering of rights and obligations in this sense since CARICOM Members are free to choose the forum more satisfactory for the resolution of their disputes, but it is unlikely that the WTO would consider an issue that specifically arises under a regional trade agreement (RTA), unless that issue directly implicates WTO issues.[19]

[19] The mandate of the Dispute Settlement Body is to clarify the meanings of the covered WTO Agreements. Despite this express rule contained in Article 3.2 of the DSU, it would not be unusual for the WTO to consider issues arising under RTAs that may include issues such as whether the conditions for an RTA's formation have been met pursuant to Article XXIV of the WTO Agreement.

The foregoing argument on possible restriction on jurisprudential development presumes that the CCJ may not revise its judgment consistent with changes in WTO law that are independent of changes to the text of the Agreements arising from future trade rounds.[20] Article IX (l) of the Agreement Establishing the Caribbean Court of Justice (CCJ Agreement) accords to judgments of the CCJ the role of binding precedents unless such judgments have been revised in accordance with Article IX (j). However, Article IX (j) limits revision to certain specified circumstances, particularly to the discovery of a decisive fact that was unknown to the court or party claiming revision at the time the judgment was given. Whether discovery in this sense relates to a pre-existing fact later discovered or a later decisive fact, or both, is unclear, although discovery in either case (to the extent that an issue of interpretation before another tribunal may be treated as a factual issue)[21] should not exclude revision to apply a later WTO Appellate Body decision that overruled a panel decision on which the CCJ judgment is based.

[20]This presumption is not unreasonable given the that countries interpret Article XVI.4 of the WTO Agreement (i.e. respecting the legal obligation of a WTO Member to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the Annexed Agreements") as permitting them to decide whether to apply WTO law directly in their legal system or indirectly by additional incorporating legislation. This freedom to determine the method of implementation is also supported by WTO jurisprudence. See, for example, *United States-Offset Act/Byrd Amendment Arbitration*, WT/DS217/14, WT/DS234/22, para. 52.

[21] That an issue of textual interpretation may indeed be categorized as a factual issue can be seen from the decision of the panel in *United States-Sections 301-310 of the Trade Act of 1974* (*'US-Sections 301-310'*), WT/DS152/R(adopted 27 January 2000), paras. 7.18-19. The panel held:

'We do not, as noted by the Appellate Body in *India-Patents(US*), interpret US law 'as such', the way we would, say, interpret provisions of the covered agreements. We are, instead, called upon to establish the meaning of Sections 301-310 as factual elements and to check whether these factual elements constitute conduct by the US contrary to its WTO obligations. The rules on burden of proof for the establishment of facts referred to above also apply in this respect. It follows that in making factual findings concerning the meaning of Sections 301-310 we are not bound to accept the interpretation presented by the US. That said, any Member can reasonably expect deference to be given to its views on the meaning of its own law.'

F. DISPUTES BETWEEN A CARICOM MEMBER AND A THIRD PARTY

Disputes involving third parties and CARICOM Members on trade remedy issues are likely to be based more on alleged violation of WTO rules than on the FTA rules in particular. The invocation of the Revised Treaty rules may be used as a defence in those proceedings to justify the imposition of a CARICOM measure where a conflict exists between those rules and WTO provisions as may appear, for example, from the substantive provisions governing safeguards under both regimes. Or, the question may be whether the imposition of the measure can meet the MFN requirement by expressly giving effect to the special and differential provision in the Revised Treaty with respect to the imposition of such measures on less developed or disadvantaged countries.[22]

G. DISPUTES INVOLVING PRIVATE LITIGANT AND A THIRD PARTY

These disputes are more likely to arise in the context of investigations done by national investigating bodies that are being reviewed in domestic courts since private litigants generally do not have any standing before the CCJ. They may, however, arise before

[22] Article 4 of Revised Treaty distinguishes between more and less developed countries, and Chapter Seven of the Revised Treaty addresses the concept of disadvantaged countries. Unlike some RTAs that provide for a one-off transitional period, with the possibility of further extensions, for lesser developed or disadvantaged countries to comply eventually with the substantive provisions of the FTA, the Revised Treaty allows disadvantaged countries a seemingly indefinite period of transition as the need arises on the recommendation of the Community Council. This is because the Chapter Seven can be invoked by such countries for the implementation of measures to make them more economically viable and competitive, albeit on a temporary basis, as often as the Community Council recommends where such adjustments are deemed necessary. One example of the requirement for the special and differential operation of trade remedies is seen in Article 150 of the Revised Treaty that bars the imposition of safeguard measures 'against the products of Community origin of a disadvantaged country where such products do not exceed 20 per cent of the market of the importing Member State". This provision, doubtless, will run into conflict with the Article 2 MFN requirement under the Safeguards Agreement where a WTO safeguard measure is maintained against non-Community goods, and the safeguard measure is not to be applied to the disadvantaged country because the 20 per cent threshold is not met.

COTED or the CCJ where, a measure already imposed before the full operation of the CARICOM Single Market and Economy, and whose duration survives the operation of the Single Market, has to be extended for a further period either because, in the case of a safeguard, the adjustment for the subject domestic industry has not occurred, or because, in the case of an antidumping or countervailing duty, the offending trade practice subsists or there is a threat of material injury.

In these cases, it may be practical for the private litigant to be granted access to the CCJ especially where the RTA contracting party of the private litigant is unwilling to espouse the claim for extension of the measure.[23]

H. DISPUTES INVOLVING PRIVATE LITIGANT AND A CARICOM MEMBER

In disputes between a private litigant and a CARICOM Member, the former may or may not be a national of CARICOM. In the former case, the provisions governing *locus standi* apply, but should not apply as between a non-CARICOM private litigant and a CARICOM Member challenging say a determination by COTED where that private litigant's government has declined to espouse or defend the litigant's claim, especially in cases involving the application of WTO law.

[23]An additional hurdle to meet for *locus standi* to be granted to a private litigant in these circumstances is that the Revised Treaty intended that a right conferred thereunder to a contracting party is to inure to the benefit of the private litigant directly, that such a person has been prejudiced in the enjoyment of such rights and the CCJ is of the view that the interests of justice requires that the private litigant be allowed to espouse the claim. See Article IX(n) of the Agreement Establishing the Caribbean Court of Justice.

As shown preliminarily above, the various types of disputes that may arise under the Revised Treaty together with differences in substantive provisions of the trade remedies regime under the Revised Treaty and the corresponding WTO agreements suggest the likelihood of some conflict in the application of these rules. The sections that follow elaborate on this tension between the two regimes with respect to some of the provisions on safeguards, dumping, and subsidies.

II. POSSIBLE CONFLICT WITH TRADE REMEDIES REGIME

A. POSSIBLE CONFLICT WITH SAFEGUARDS

One potential source of conflict is between domestic law (especially domestic law incorporating WTO law) and CCJ law.[24] This is more likely the case between CARICOM Members with existing trade remedies legislation as opposed to other Members that have yet to put such legislation in place. As applied in Jamaica, for example, the maintenance of a safeguard measure requires a finding that an increase in imports that causes or threatens serious injury to a domestic industry is the result of unforeseen developments.[25] Neither Articles 92 nor 150 of the Revised Treaty, that addresses the issue of safeguards, requires the demonstration of unforeseen developments for the application of safeguard measures for products of CARICOM origin.[26] There is also no specific reference in either

[24] Although WTO Members have pledged to implement WTO law in their domestic systems this has not occurred across the board. On domestic implementation of WTO Agreements by WTO Members, see John H. Jackson and Alan Sykes (eds.), *Implementing the Uruguay Round*, Oxford, Clarendon Press, 1997.

[25] The application of the requirement of 'unforeseen developments' is based on a pragmatic adoption of the prevailing jurisprudence of the WTO since the Jamaica Safeguards Act of 2001 does not require a demonstration of that requirement for the imposition of a safeguard measure.

[26] This does not mean, of course, that this requirement is not intended to be met as the case with the WTO Agreement on Safeguards demonstrates. Like the safeguard provisions in the Revised Treaty, the WTO Agreement on Safeguards contains no requirement for the demonstration of unforeseen developments, but the Appellate Body in a series of rulings has clarified that that requirement must be met to comport with

of these provisions to the WTO Agreement as a source of law for interpretation of the requirements for imposition of a safeguard measure, although the CCJ is enjoined to have recourse to relevant principles of international law when interpreting the Revised Treaty.[27] Presumably, this means that the CCJ in an appropriate case may consult WTO jurisprudence since the trade remedies provisions under the Revised Treaty are roughly similar to those in the WTO Agreement. In the case of an RTA, it is arguable that the absence of this requirement was intended for the specific arrangement designed by the CARICOM trade partners and that developing CCJ jurisprudence should not necessarily track those in the WTO on these issues, since the Revised Treaty is not designed as a WTO clone. Indeed, Article XXIV of the WTO Agreement permits the establishment of RTAs as an exception to the neo-liberal principles embodied in GATT 1994.[28]

However, it is unclear whether the exception would permit the exclusion of any of the requirements to be met for the imposition of a safeguard measure. In *Turkey-Restrictions on Imports of Textile and Clothing Products*[29], the Appellate Body stipulated two conditions to be met for the invocation of Article XXIV to warrant the violation of GATT 1994, namely that the party claiming the benefit of the defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that meets the requirement for formation of customs unions, and that the formation of the customs union

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GATT Article XIX:(1) (a). See, for example, *Argentina-Safeguards Measures on Imports of Footwear*, WT/DS121/AB/R, adopted January 12, 2000; Korea-*Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted January 12, 2000.

[27] Article IX(g) of Agreement Establishing the Caribbean Court of Justice.

[28] This statement is correct in the sense that RTAs may deviate from the MFN principle with respect to measures adopted by RTA members for their mutual benefit that would be, more likely than not, a further liberalization of trade in relation to those members of the RTA. But, the obligation of RTA members to substantially eliminate all restrictions to trade as contained in Article XXIV of the WTO Agreement means that there is, on the whole, no absolute deviation from the WTO principles encouraging freer trade.

[29] WT/DS34/AB/R, adopted November 19, 1999.

would be prevented if it were not allowed to impose the measure at issue.[30] Neither of these two conditions would likely be met under the Revised Treaty because it is expected that the imposition of the safeguard measure would be subsequent to the formation of the CARICOM Single Market and Economy and the ability to impose safeguard measures is not a precondition for the establishment of FTAs. This would, therefore, suggest that the CCJ should in an appropriate case read in the GATT Article XIX 'unforeseen development requirement', although as discussed below, this would be in the context of the obligations incurred under the Revised Treaty.

Yet, where this is done, a safeguard remedy may be difficult to impose because a surge in imports in the individual countries comprising an FTA is what is to be expected especially since one of the conditions for the formation of a GATT consistent RTA is that there should be the elimination of restrictions with respect to substantially all trade.

There is also the view, as expressed by Joost Pauwelyn[31], that the GATT Article XIX 'unforeseen development' requirement cannot, and should not, be met within the context of an RTA since the surge in imports would be the result of further liberalization of trade from the RTA and not from any 'unforeseen development' arising from GATT obligations. However, this view is less than convincing. Trade liberalization within an RTA is an obligation to be met under Article XXIV: 5 and Article XXIV: 8 of GATT 1994, requiring substantially all trade to be liberalized. Therefore, the surge in imports

[30] Ibid. para. 48.
[31] Joost Pauwelyn, "The Puzzle of WTO Safeguards and Regional Trade Agreements", *Journal of International Economic Law*, vol. 7, no. 1, p. 109-142, 2004.

connected to the obligation to liberalize within the RTA would be the result of a GATT obligation.

That said, a surge in imports occurring within the framework of a trade liberalization goal is no less demonstrable as being attributable to unforeseen developments within a RTA regime as under the WTO regime, where the goal of trade liberalization is juxtaposed against contingency safeguard measures.

The reference to 'obligations incurred' in Article XIX of GATT 1994 may also potentially refer to the obligation in Article XXIV of GATT 1994 for the substantial liberalization of all trade with respect to RTA Members. This obligation is understood not as a requirement for GATT or WTO Members to establish FTAs; rather the obligations to be met if they choose to enter into such arrangements.

Moreover, distinguishing an Article XIX requirement as an essentially GATT obligation that cannot be employed in a RTA regime presumes that the 'unforeseen developments requirement' contained therein cannot be severed from the rest of GATT Article XIX and be transferred to a safeguard provision in a RTA as a precondition for safeguard measures, but is somehow tied to, or must be tied to, the GATT obligations implicated in Article XIX. Viewed in this way, the transferred unforeseen developments requirement would be tied to the RTA obligations incurred by the RTA partners and not GATT obligations.

In practice, however, other RTAs, such as NAFTA, have generally excluded the 'unforeseen development' requirement for maintenance of a safeguard measure, although in the case of NAFTA the safeguard measures are designed to cover a transitional period.[32] Unlike the Revised Treaty, however, NAFTA has expressly reserved for its members the right to pursue a WTO safeguard measure even against NAFTA Members. The absence of this express right for CARICOM Members under the Revised Treaty, as opposed to what obtains under the antidumping provisions where the right to a WTO antidumping measure is maintained[33], may suggest that the Revised Treaty intended the exclusion of a WTO safeguard measure by one CARICOM Member against another.

However, this would be very difficult to achieve in practice, especially where a WTO safeguard measure is maintained against a non-member of CARICOM because such measures must be applied on an MFN basis to be consistent with Article 2 of the Agreement on Safeguards. This is also true of a safeguard measure designed to be maintained only against CARICOM Members, particularly where the source of injury to a domestic industry results from both intra-regional and extra-regional trade of the targeted good.

But, for safeguards there is the additional conundrum of whether a CARICOM safeguard measure[34]that results in the imposition of a safeguard duty above the CARICOM

[32] See, for example, Article 801 of NAFTA (Bilateral Actions).
[33] Revised Treaty, Article 131(6).
[34] Here for the purposes of the argument I make a distinction between such a safeguard measure and one in accordance with the WTO Agreement in the sense that safeguard measures under the Revised Treaty do not expressly require the conditions set out in Article IX: 1(a) of GATT 1994.

Member's applied rate but below its WTO bound rate[35] is maintainable given the provision of Article XXIV that the restrictions on trade upon the formation of a customs union must be no more than what obtained in the period before the formation of the customs union. This provision governs tariffs as well as other restrictions to trade that would also include trade remedy provisions. As discussed below,[36] this is an issue for which there is no easy resolution. On the one hand, there is no clear restriction on the maintenance of trade remedies within an FTA generally, but if used in a manner that is trade restricting, as may be the case where several RTA partners simultaneously have such measures in existence against each other and third parties, a threshold may be reached where it is deemed to be in violation of Article XXIV of GATT 1994.

Noteworthy, also, is the absence in the Revised Treaty of the special and differential treatment provision in Article 9 of the Safeguards Agreement regarding the application of safeguard measures against developing countries. This exclusion suggests that, unless there is a strong commitment to the regional process, safeguard measures may, in some instances, be easier to apply against a CARICOM Member that chooses to use the WTO dispute settlement system. Under Article 9 of the Safeguards Agreement, these instances would include those where the share of imports of a CARICOM Member into the market of the importing CARICOM Member is less than 3 per cent (though not more than 9 per

[35]Unlike Article XIX:1(a) of GATT 1994, there is no provision in either Articles 92 or 150 of the Revised Treaty requiring the relevant level of increase in imports that may warrant a safeguard measure to be the result of obligations incurred pursuant to the Revised Treaty. It is of-course arguable that this must be the meaning that was intended, but it is possible for an increase in imports to arise not from the reduction of tariffs within the RTA, but from the maintenance of existing tariff levels at the preexisting applied rates. This is likely the case where there is no comprehensive revision of the tariff structure prior to the formation of the RTA and revision of the tariff structure to increase applied rates, after the formation of the RTA becomes a non-option pursuant to Article XXIV of the WTO Agreement.

[36] See section IV below on complementarities and conflict between FTAs and the WTO.

cent collectively with the imports of other CARICOM Members and non-CARICOM developing countries). Since there is no provision in the Safeguards Agreement for the non-application of safeguards measures against developing countries generally, except for the Article 9 exemption, the MFN provisions in GATT 1994, and also in Article 2 of the Safeguards Agreement, requires the non-discriminatory application of these measures for developing countries where their import share exceeds 3 per cent.

On the other hand, Article 150 (3) of the Revised Treaty contemplates a permissible bar against safeguard measures for a 'disadvantaged' CARICOM Member whose share of imports in the importing CARICOM Member does not exceed 20 per cent. Given that this figure is above the 3 per cent threshold that triggers the MFN application of a safeguard measure against a developing country, the provisions of the Safeguards Agreement would require the application of the safeguard measure even against a 'disadvantaged' CARICOM Member with the less than 20 per cent share of imports in the importing CARICOM Member.[37]

[37]This obligation is of particular importance where the safeguard investigation includes imports of both CARICOM and non-CARICOM Members, and the increase in imports justifying the application of the measure is attributable to both sources of imports. This is to ensure compliance with the principle of parallelism, according to which the scope of a safeguard measure should correspond to the scope of the imports that were investigated and for which the requirements for the imposition of a safeguard measure were met. On the principle of parallelism and the implications for its operation in FTAs with respect to safeguard measures, see for example, *Argentina-Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted January 12, 2000, para. 8.102.; *United States-Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted January 19, 2001, para. 96.

B. POSSIBLE CONFLICT WITH SUBSIDY PROVISIONS

As outlined above, the provisions on subsidies in the Revised Treaty are generally similar to those in the SCM Agreement, for example, provisions on the definition of a subsidy[38] and types of subsidies[39]. There are, however, a few noteworthy provisions that may give rise to conflict with the WTO regime. Article 98 of the Revised Treaty permits a cause of action with respect to a prohibited subsidy where a particular *product* has benefited from the subsidy. For the purposes of the SCM Agreement, however, the term *benefit* has been construed to mean *benefit* to a legal or natural person and not to the product per se.[40]This interpretation permits the conclusion that a subsidy no longer exists (in the case of a one-off non-recurring subsidy) where the entity that received the benefit has transferred ownership to a new entity on an arms-length basis.[41] If, on the other hand, *benefit* is to the *product*, a change in ownership would be irrelevant to maintaining the cause of action where the one-off non-recurring subsidy is apportioned for the product over some period (perhaps annually) until the subsidy is deemed extinguished.

Interestingly, Article 98 limits the availability of a remedy for subsidization by providing that definitive countervailing duties or other countermeasures shall not be taken unless there is provision for same in the domestic legislation of the Member seeking to put such measures into effect.[42] There is also the requirement that there be prior consultations with

[38]Revised Treaty, Article 96.
[39]Revised Treaty, Article 97.
[40] *United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted June 7, 2000.
[41] Ibid.
[42] Revised Treaty, Article 98 (2) (a).

the Member maintaining the subsidies[43], notification to COTED[44], and prior authorization from COTED for imposition of countervailing duties or other countermeasures.[45] In addition, the subsidy provisions in the Revised Treaty do not apply to agricultural commodities produced in the Community.[46]

Some of these provisions do not square with the provisions in the corresponding WTO agreements, and their application may be problematic particularly against parties external to the CARICOM regime. Under the SCM Agreement, for example, there is no requirement for prior consultations before imposition of a countervailing duties, nor prior authorization from the Subsidies Committee for imposition of such duties. While it is possible for harmony to be achieved between the two regimes where CARICOM Members undertake subsidy investigations, investigations that simultaneously or separately involve products from CARICOM Members and products from countries external to CARICOM may, in certain circumstances, flout WTO rules. This may be the case, for example, if a decision is taken, after consultations or on the directive of COTED, that definitive countervailing duties not be imposed against the CARICOM origin product, and a COTED authorized compensation to extinguish the effects of the provisional measure is not extended to other countries.

Article 104 of the Revised Treaty, for example, contemplates this possibility. Pursuant to Article 104(2) of the Revised Treaty, COTED is mandated to determine the nature and

[43] Revised Treaty, Article 98 (2) (b).
[44] Revised Treaty, Article 98 (2) (c).
[45] Revised Treaty, Article 98 (2) (d).
[46] Revised Treaty, Article 99 (3).

amount of compensation to be given for provisional measures that materially retard the exports of a Member State where COTED decides that the provisional measure should be withdrawn. There is no requirement that the benefit of this provision be extended to countries external to the CARICOM regime.[47]

Given that the MFN obligation applies to any 'advantage, favour , privilege or immunity' granted, providing compensation to CARICOM Members to extinguish the effects of provisional measures without extending that benefit to non-CARICOM Members may result in a breach of Article 1.1 of GATT 1994, the non-application against the CARICOM Member being deemed an advantage provided.

That the application of the SCM Agreement is subject to GATT provisions is observed from the *US-MFN Footwear* panel decision.[48] Here, the GATT panel found an Article 1.1 violation on Brazil's claim against the U.S. that the operation of its domestic countervailing duty laws in backdating the effects of a negative injury determination to the date of the request for injury determination and not to the time that the U.S.'s obligation took effect resulted in treatment less favourable than that accorded to other contracting parties.[49]

[47]This provision amounts to a benefit since the SCM Agreement has no provision that requires compensation where provisional measures are withdrawn.

[48]Panel Report, *United States-Denial of Most-Favoured Nation Treatment as to Non-Rubber Footwear from Brazil*, adopted June 19, 1992, BISD 39S/128. 'The panel considers that the rules and formalities applicable to countervailing duties, including those applicable to the revocation of countervailing duty orders, are rules and formalities imposed in connection with importation, within the meaning of Article 1:1'. Ibid. para. 6.8.

[49]The decision is not, strictly speaking, binding on WTO Members, though the reasoning therein on the applicability of the MFN obligation to the application of countervailing duties may be used by future panels or the Appellate Body as part of the GATT *aquis* to ensure the predictability and the legitimate expectations among WTO Members. For the Appellate Body's view on the status of adopted GATT reports

Although this Article 1.1 violation occurred in the context of an obligation under Article VI of GATT 1947 that was applied discriminately, similar claims have been made in subsidy disputes for state practices not required under the SCM Agreement.[50] Therefore, an argument to the effect that compensation for withdrawal of provisional measures is not required under the SCM Agreement, and should not amount to an Article 1.1 violation where the compensation is limited to particular countries may not be tenable.

C. POSSIBLE CONFLICT WITH ANTIDUMPING PROVISIONS

The antidumping provisions in the Revised Treaty are for the most part similar to those contained in the WTO Antidumping Agreement, although the provisions are not similarly detailed. Compared to the safeguard and subsidy provisions, the antidumping provisions in the Revised Treaty pose fewer possibilities for conflict with the WTO regime. One notable area of conflict is that relating to domestic administrative reviews. Under the WTO Antidumping Agreement administrative reviews are required to be undertaken upon the request of an exporter whose goods are subject to antidumping duties. The Revised Treaty provides for the satisfaction of this obligation[51], but does not set out in sufficient detail how this is to be achieved. The Revised Treaty does not specifically confer jurisdiction on COTED to conduct such reviews, although COTED is to function as a body having competence to conduct antidumping investigations. For instance,

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see, for example, *Japan-Taxes on Alcoholic Beverages*, WT/DS10/AB/R, adopted November 1, 1996, p. 15.

[50] See, for example, *Canada- Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, DS/142/AB/R, adopted August 4, 2000.

[51] Revised Treaty, Article 133(3) (c).

Article 133(3) (d) of the Revised Treaty provides that an applicant for review may refer the request for review to COTED if the Member to whom the request is made has not given adequate consideration of the request for review. In this case, COTED's terms of reference is apparently limited to making a recommendation to the particular Member if it is satisfied that the circumstances for review are justified, that is, a recommendation that the review be conducted.

This would be impractical where COTED conducted the investigation leading to the imposition of the antidumping duty for which review is sought and the Member concerned has no fully operative antidumping legislation in place, as is apparently contemplated by the overarching jurisdiction of COTED permitting it to conduct anti-dumping investigations on behalf of CARICOM Members against non-regional imports.

III. A. CONFLICT IN THE STANDARD OF REVIEW

Judicial review of domestic trade remedy measures is nested in a standard of review that is at odds with the standard of review in the WTO.[52] Substantial deference is usually accorded the determinations of a specialized tribunal, unlike the situation at the WTO where their review of trade remedy measures have tended to address not only whether the legal conditions for a measure has been met, but also whether the reasoning supporting a

[52] For some treatment of the issue of standard of review in WTO dispute settlement proceedings, see, John H. Jackson, *The World Trade Organization: Constitution and Jurisprudence*, London, Royal Institute of International Affairs, 1998, at p. 90; John H. Jackson, William J. Davey, and Allan O. Sykes, Legal *Problems of International Economic Relations: Cases, Materials and Text on the National and International Regulation of Transnational Economic Relations*, 3rd edn, St. Paul: West Publishing Company, 1995, at p. 364-366; Matthias Oesch, " Standards of Review in WTO Dispute Resolution", in *Journal of International Economic Law*, vol. 6, no.3, 2003, p.635-659.

measure is adequate, irrespective of whether the result reached would in any event have been considered correct.[53] The Appellate Body's interpretation of Article 17.6 of the WTO Antidumping is further added as support for this claim of an open-ended standard of review.[54] This provision expressly contemplates some leeway being given to national investigating authorities by directing WTO panels to defer to their interpretation where a provision of the Antidumping Agreement is ambiguous and the investigating authority chooses one of the permissible interpretations of the ambiguous provision. But, at writing, domestic authority interpretations are rarely upheld by the Appellate Body as permissible interpretations.[55]

There is, however, no automatic application of this open ended standard into the domestic context since WTO decisions do not have direct effect.[56] But it is doubtful whether such a standard may, or should, not eventually be accepted within domestic judicial review proceedings of such matters as the procedures set out in the standard become, in effect,

[53] Holger Spamann, " Standard of Review for World Trade Organization Panels in Trade Remedy Cases: A Critical Analysis" in *Journal of World Trade*, vol. 38, no. 3, 2004, p. 509-555, esp. 543.

[54] Article 17.6 (ii) states: 'The panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations'.

[55] Daniel Tarullo, "The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Antidumping Decisions" in *Law and Policy in International Business*, vol. 34, no. 109, Fall 2002. Tarullo argues that the 17.6 standard has been effectively neutralized in the WTO. But, for a contrary view, on the inherent difficulties of giving effect to the express wording of Article 17.6, in the context of the rules of treaty interpretation within the Vienna Convention on the Law of Treaties see, Steven P. Croley and John Jackson, " WTO Dispute Settlement, Standard of Review, and Deference to National Governments", in *The American Journal of International Law*, vol. 90. no.2, April, 1996, p. 193-213. Croley and Jackson argue that Article 17.6 reflects customary international law, but that the instruction to panels to interpret antidumping provisions in accordance with the Vienna Convention on the Law of Treaties presumes the resolution of the ambiguity, and therefore, no need to resort to a permissible interpretation.

[56] John H. Jackson, "The WTO Dispute Settlement System Understanding-Misunderstandings on the Nature of Legal Obligation" in *The American Journal of International Law*, vol. 91, no.1, January 1997,p.60-64. See also, Natalie Mc Nelis, "What Obligations are Created By World Trade Organization Dispute Settlement Reports?, in *Journal of World Trade*, vol. 37, no.3, 2003, p.647-672.

legal conditions that must be satisfied before a measure can be imposed consistent with any of the agreements.

B. REVIEW OF FACTUAL DETERMINATIONS

Judicial review of factual determinations is usually reserved for the more egregious of defects on the Wednesbury reasonableness principles, that is, the factual finding amounts to an impugnable error because there is clearly no evidence to support the finding, insufficient evidence to support the finding, or the existence of evidence on which no reasonable tribunal properly considering the matter would rely for the finding made. In practice tribunals are more likely to be faced with those situations where the existing 'facts' or material from which to make the factual determination are such that there can be reasonable disagreement as to the particular factual finding made. A reviewing court in these circumstances is less likely to disturb the factual findings. This approach also comports with reviewing courts in other jurisdictions with respect to trade remedies.[57]

However, under the WTO Agreement, it would seem that the satisfaction of this threshold to avoid review of a factual finding is not enough. For example, in the establishment of the facts for a particular criterion to be met (say in the case of whether

[57] The flexibility of the Wednesbury principles in permitting investigating authorities an appreciable margin of deference comports with the margin of deference employed by United States courts (the United States Court of International Trade, in particular) for trade remedy matters as articulated in the controlling United States Supreme Court decision in *Chevron, U.S.A. v. National Resources Defense Council*, 467 U.S. 837, 842-43 (1984), where the court stated:
"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter…If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute".

particular facts amount to serious injury)[58], it is not enough to merely examine the stipulated 'all relevant factors' in the agreement to the exclusion of 'other factors' that might be relevant, where the investigating authority considers the relevance of other factors, or ought to, or they are clearly relevant based on the submissions of the interested parties to an investigation.[59]

Second, factual determinations must be supported by a 'reasoned and adequate explanation'.[60] This requires the investigating authority to do more than respond to the alternative explanations of the data submitted by interested parties, but to also refute all alternative explanations,[61]and this must be clearly set out in the investigating authority's

[58] This example is arguably a mixed issue of fact and law.

[59] See for example, *United States-Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, (*US-Wheat Gluten*) WT/DS166/AB/R, adopted January 19, 2001. At paragraph 55, the Appellate Body specified the duty of national investigating authorities as not to "…limit their evaluation of 'all relevant factors'…to the factors to the factors which the interested parties have raised as relevant…If the competent authorities consider that a particular 'other factor' may be relevant…their duties of investigation and evaluation preclude them from remaining passive in the face of possible shortcomings in the evidence submitted, and views expressed, by the interested parties. …The competent authorities must undertake additional investigative steps, when the circumstances so require, in order to fulfill their obligation to evaluate all relevant factors.

However, as is clear from the preceding paragraph of this Report, we also reject the…argument that the competent authorities have an open ended and unlimited duty to investigate all available facts that might possibly be relevant".

[60] See, for example, *Argentina-Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted January 12, 2000, para. 121. A fuller articulation of the standard of review appeared in *US-Lamb* (note 26 below) in which the Appellate Body stated at para. 106:

"…Although Panels are not entitled to conduct a *de novo* review of the evidence or to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that Panels must simply accept the conclusions of the competent authorities. To the contrary, in our view, in examining a claim under Article 4.2(a), a Panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate *only* if the Panel critically examines that explanation in depth, and in the light of the facts before the Panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and especially the complexities of the data, and responds to other plausible interpretations of that data. A Panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation". (Italics included in original; underline is my emphasis).

[61] *United States-Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R and WT/DS178/AB/R, adopted May 16, 2001, paras 110-114, 148-149.

published statement of reasons as opposed to internal reports that form part of the investigating record, but are not made public.[62]

C. REVIEW OF LEGAL DETERMINATIONS

Review of legal determinations in domestic systems is subject to a *de novo* review, that is, the decision is reviewable if there is an error of law of the type where the applicable law is not applied or is misapplied. It may be difficult, however, to demonstrate the need for review of an investigating authority's interpretation of the applicable law in trade remedies where the interpretation is, for example, based on the jurisprudence from other jurisdictions, even if that jurisprudence is inconsistent with WTO law. Again, the point is that the latter has no direct effect, and would not, therefore, be available to private parties for review, unless the investigating authority relies on WTO law to justify its interpretation of the applicable local law.[63]

I. Arguments in favour of harmonizing standard of review

Harmonizing standard of review between the WTO and the local context may reduce transaction costs involved in multiple proceedings. Differences in standards of review, on the other hand, increase the risks that an aggrieved party may petition its government to bring the dispute before the WTO, and the attendant implications of cost, particularly for developing countries challenged by countries with greater resources. Harmonizing

[62] *US-Wheat Gluten*, in note 59 above, paras. 156-163.
[63] This view is premised on the dualist theory of international law discussed at note 72 below.

standards also ensures a certain degree of predictability in the applicable law for judicial review of trade remedy cases. On the other hand, the reputation of a reviewing court for undue deference to determinations of an investigating authority will likely lead to the avoidance of the local court system for resolution of disputes arising from such determinations. This may likely be the case since there is no exhaustion of local remedies rule before a trade remedies dispute can be brought before a WTO panel.[64]

II. Arguments against harmonizing standard of review

Harmonization of standards of review in the absence of other WTO Members doing the same puts less powerful countries at a disadvantage in relation to those countries with

[64] The local remedies rule, according to which local remedies are to be exhausted before a dispute is brought to the international forum, is recognized as a principle of customary international law. The question of whether the exhaustion of national administrative and judicial remedies is a precondition for resort to dispute settlement under GATT 1947 arose in *United States-Antidumping Duties on Grey Portland Cement and Cement Clinker from Mexico*(ADP/82, 7 September 1992) concerning an interpretation of Article 15.5 of the Tokyo Antidumping Code. The panel held that the Tokyo Antidumping Code "did not require the exhaustion of administrative remedies, but provided that the matter examined by the panel would have to be based on facts raised in the first instance…in the administrative proceedings in the importing country". This issue is not specifically addressed in the WTO Antidumping Agreement or in the Dispute Settlement Understanding (DSU), and there is considerable debate as to whether this panel ruling has survived the creation of the WTO. On one view, the exhaustion of local remedies rule exists pursuant to Article 13 of the WTO Antidumping Agreement which obliges Members to maintain judicial, arbitral, ands administrative procedures for review of administrative actions relating to reviews of determinations, and that Article 17.6 of the WTO Antidumping Agreement requires that panels interpret the provisions of the agreement in accordance with customary rules of international law. See, P.J. Kuijper, "The New WTO Dispute Settlement System: The Impact on the Community" in J.H.J. Bourgeois, F. Berrod, E.Gippini (eds), The Uruguay Round: A European Lawyers Perspective (EUP: Brussels, 1996), at p. 107. On the other hand, Petersmann argues that the local remedies rule only applies to cases of diplomatic protection of nationals as opposed to cases involving direct injury to states, and that the possibility of a panel hearing a dispute with respect to a provisional measure rules out the application of the rule in antidumping cases. See, E. U. Petersmann, "International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction", in E.U. Petersmann (ed.) International Trade Law and the GATT/WTO Dispute Settlement System (Kluwer: London, Hague, Boston, 1997). However, where the local administrative or judicial tribunal is not directly applying WTO law in its determinations or review of the national agencies determinations, it is arguably that exhaustion of local remedies would be futile and therefore inapplicable. The WTO Appellate Body has yet to address the issue directly, though it would seem on the balance that the rule is inapplicable given the Appellate Body's view that pre-WTO jurisprudence forms part of the GATT *acquis* and is to be consulted for guidance on the interpretation of the covered agreements. See, for example, *Japan-Taxes on Alcoholic Beverages*, WT/DS1/AB/R,WT/DS10/AB/R,WTDS22/AB/R, at p. 15.

huge markets that are against the harmonization of standards of review. Absent the applicability or observance of the principle of reciprocity, it becomes easier for the latter to apply trade remedy rules in a protectionist manner where the approach is one that says the measure is to be maintained until challenged before the WTO.[65] Maintaining a measure until there is a specific challenge, even if there is a definitive ruling on the same issue before the WTO, albeit involving different parties, is perceived as a palatable approach to assuage domestic protectionist interests, particularly because it does not raise the prospect of WTO sanctioned compensation or retaliation from non-parties to the original dispute since only parties that have invoked the dispute settlement procedures of the WTO have the right to compensation or retaliation in the event of non-compliance of adopted panel or Appellate Body reports.[66] CARICOM countries, it may be argued, may be better off adopting the same approach to counterbalance any advantage that powerful countries may have obtained by adopting this wait and see approach to potential litigation from an aggrieved exporting country. After all, to do otherwise would be tantamount to converting this advantage into a form of non-tariff barrier itself, where goods from developing countries are subject to reduced or no market access because of WTO

[65] This is the approach taken by the United States, for example, in its calculation of dumping margins based on the zeroing methodology. The zeroing methodology by which negative dumping margins in a series of transactions involving positive dumping margins is assigned a zero value inflates dumping margins and this methodology has been clarified by the Appellate Body to be in breach of Article 2.4.2 of the Antidumping Agreement in *European Communities-Antidumping Duties on Imports of Cotton-Type Bed Linen From India*, WT/DS141'AB/R, adopted 12 March 2001. See also, *Inside US Trade*, April 6, 2001 ("Commerce Nominee Says WTO Bed Linen Case Will Not Change US law"). The US' approach seems to be based on the presumption that WTO panel or Appellate Body reports have little or no precedential value or direct effect with respect to US trade law jurisprudence. This is consistent with the rulings of the US Court of International Trade to the effect that a WTO panel's interpretation of trade remedy agreements does not constitute an international obligation to which the US is bound. For an examination of US jurisprudence on this point see, Lester, " WTO Panel and Appellate Body Interpretations of the WTO Agreement in US Law", in *Journal of World Trade*, vol. 35, no. 3, p. 521-543. This view of non-direct effect is also supported by prominent US scholars. See, for example, John H. Jackson, "The WTO Dispute Settlement System Understanding-Misunderstandings on the Nature of Legal Obligation", in *American Journal of International Law*, vol.91, no. 1, January 1997, p. 60-64.

[66] Dispute Settlement Understanding (DSU), Article 22.2.

inconsistent applied trade remedy rules in developed countries, while developing countries, and especially those in CARICOM with meager resources that they would rather not want to spend in trade litigation, maintain genuine market access to the products from developed countries because of the endeavour to ensure as far as possible that trade remedy rules are applied in a WTO consistent manner to avoid the prospect of litigation.[67]

Harmonization also presumes that local courts have the required expertise in WTO law or that WTO law is necessarily clear on how particular issues are to be resolved.[68] An argument raised in judicial review proceedings to the effect that an investigating authority did not provide a reasoned and adequate determination of the issues may be difficult to determine outside of the experience of past cases. In addition, local courts may reasonably be said to possess little expertise in WTO law than the panel and Appellate

[67] The classic case of the wait and see approach is adopted by the United States in its failure to review the 'zeroing' methodology employed for dumping where the Appellate Body has clarified in *EC-Bed Linen* that the use of this methodology is WTO inconsistent. To be sure, the United States was not the respondent party in this case, and by virtue of the case by case approach to WTO obligations, may have doubtless taken the position that the decision created specific obligations for the EC, the particular respondent party in the litigation, and not for itself. This approach by the United States has meant, however, that it continues to maintain antidumping measures based on the application of the 'zeroing' methodology in sunset reviews, largely in cases where the original dumping determination and sunset review pre-dated *EC-Bed Linen*, but also in cases where the sunset review is post *EC-Bed Linen*. For the Appellate Body's clarification of United States obligations regarding sunset review determinations pre-*EC-Bed Linen* see, in particular, *United States-Sunset Review of Antidumping Duties on Corrosion Resistant Carbon Steel Flat Products From Japan*, WT/DS244/AB/R, adopted January 9, 2004. Here, Japan argues that the United States is in breach of its WTO obligations, and the Anti-dumping Agreement because, *inter alia*, the United States authorities employed the 'zeroing' methodology in the 1993 investigation and sunset review. For a post-*EC-Bed Linen* dispute regarding a consultation request, see, *United States-Anti-Dumping on Silicon Metal from Brazil*, WT/DS239/1Rev.1.

[68] This situation is compounded by the absence of a system of *stare decisis* in the WTO. Although the Appellate Body, as a standing judicial body, plays an arguably more persuasive role than panels in the clarification of WTO Agreements, panels are bound not automatically bound by an Appellate Body decision. The collegiality of the Appellate Body, however, suggests some concerted effort to apply a coherent jurisprudence to ensure predictability. See, for example, Claus-Dieter Ehlermann, "Reflections on the Appellate Body of the WTO", in *Journal of International Economic Law*, vol. 6, no. 3, p. 695-708. Ehlermann reflects on his role as member of the WTO Appellate Body.

Body operating within the WTO dispute settlement system, thereby justifying resolution of such issues within the latter bodies exclusively. Indeed, as has been argued elsewhere, permitting local courts to pronounce on WTO law carries the risk of inconsistent rulings across jurisdictions (possibly contributing to what Palmeter and Spak have called the 'Tower of Legal Babel')[69] and the multiplication of legal uncertainty that drives up transaction costs for businesses. There is also the perceived risk that the court may be usurping the executive by not allowing it to determine if and how it may comply with an alleged breach of its WTO obligation.

III. Some tentative observations on the contending arguments and their implications in CARICOM

There is no gainsaying that developing countries within CARICOM are clearly at a disadvantage as they seek to observe the trade remedy laws to be applied to its members and those to be applied to non-members, to the extent of any inconsistency. This is largely because it is expected that with fewer resources to contest charges of WTO inconsistency, investigating authorities are likely to be even more circumspect in the application of trade remedy laws than more powerful countries with sufficient resources and significant experience with the WTO dispute settlement system. This observation suggests that there may be but few options available than the faithful observance of WTO obligations even in judicial review cases. Assuming, then, that the trade remedy rules

[69] David Palmeter and Gregory J. Spak, " Resolving Anti-dumping and Countervailing Disputes: Defining GATT's Role in an era of Increasing Conflict", in *Law and Policy in International Business*, vol. 24, 1993, p. 1145, at p. 1158.

included within the Revised Treaty are WTO based,[70] there should be no sound reason in principle for local review courts to avoid pronouncement on the issue of the soundness of a national investigating authority's determination on the basis of WTO jurisprudence. The trade remedy agreements in the WTO all provide for the establishment of review courts to review the determinations of national investigating bodies without any limitation as to the law that may be applied in the review process.[71]

Disputes may of-course arise in judicial review proceedings, or under the CCJ, as to whether WTO law should take precedence over national law or those portions of the trade remedy *acquis* of other jurisdictions that are adapted to and incorporated in national law for the conduct of investigations. There is no clear answer to this question. The dualist view of international law requires specific implementing legislation clearly intending the treaty to be effective. It would also presumably require that there be specific reference in the domestic implementing legislation to the interpretations of the treaty as directly enforceable at the instance of private parties, since in the dualist tradition, treaties are directed at or create rights and obligations for states and not for private individuals.[72] Whatever may be the conclusive answer to this issue (which is beyond the scope of this article) it is arguable that the absence of direct effect of WTO

[70] As I have argued in section I above, there is a strong basis for this assumption.

[71]The absence on limitation as to applicable law for judicial reviews may mean, *arguendo*, that the application of trade remedy laws in other jurisdictions may be relied on to the extent of the similarity of the issues being reviewed. This, however, does not mean that recourse to such laws and their interpretation from those jurisdictional contexts may eventually bar a finding of WTO inconsistency.

[72] On this view, it would seem that only the state, or its agent in the form of the national investigating authority, could specifically invoke WTO law as a basis for determining whether or not its investigations is consistent with WTO obligations, that is using WTO jurisprudence as a shield and not as a sword. However, as a practical matter, invoking WTO law in this way opens the door for an applicant for review in its rebuttal to demonstrate the inconsistency. The contrasting monist view regards the state as a mere abstraction and reduces it to a mere collectivity of individuals so that there is no difference in the subjects governed by international law as opposed to domestic law as the dualist theory assumes.

law should not prevent its observance any more than the permissible use of the jurisprudence from other jurisdictions should be controlling in resolving such disputes.

Secondly, the 'Tower of Legal Babel' that Palmeter and Spak warn against is already in existence. Trade remedy laws across jurisdictions are applied differently, even when the domestic implementing legislation presumptively mirrors the WTO obligations assumed under these agreements.[73] In addition, domestic courts interpreting WTO law should not necessarily increase confusion particularly where, as in the case of CARICOM countries, there is little local jurisprudence in existence.

Thirdly, the view that local courts are ill-equipped to interpret WTO law (a position less applicable to the CCJ since it is enjoined to interpret the Revised Treaty provisions in accordance with international law, which includes international trade law)[74] is no less true of the presumed inability or unsuitability of international tribunals like the WTO to

[73] A good example of this is the EC's internal regulation that tracks the language of the Antidumping Agreement, although the practice of their antidumping authorities endorsed the use of the 'zeroing' methodology.

[74] Whether or not international trade law is a distinct branch of international law or is part of or to be treated as incorporated into the corpus of international law is a matter of some debate. That it is a distinct branch of international law is supported by Joel Trachtman arguing that only WTO law is to be applied in the resolution of disputes. See, for example, Joel P.Trachtman, "The Domain of WTO Dispute Resolution", *Harvard International Law Journal*, vol. 40, no.2, Spring 1999, p.333-77, esp. p. 341. For a contrary view see, for example, Palmeter and Mavroidis, "The WTO Legal System: Sources of Law", 92 *American Journal of International Law*, 398, 399 (1998), argue that non-WTO international law is incorporated in the WTO system because of Article 3.2 and 7 of the DSU regarding the interpretation of the covered agreements in accordance with the principles of international law. On this view the sources of law available to the International Court of Justice (ICJ) in Article 38(1)(d) of the Statute of the ICJ are also sources for the interpretation of the covered WTO Agreements and may permissibly include the consideration of non-WTO agreements in the settlement of disputes. As a practical matter, the casting of the debate in these polar terms overlooks the nuances of the interpretive function exercised by the Appellate Body. True enough, the Appellate Body has not allowed other international law to trump the 'preeminence' of WTO law, but it has also applied non-WTO law in the settlement of disputes. See, for example, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted November 6, 1998. Here, the Appellate Body, in examining Article XX (g) of GATT 1994 (referring to 'exhaustible natural resources') sought guidance from the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) for evidence of the endangered situation of sea turtles.

interpret domestic laws with respect to their consistency with particular WTO Agreements, but which they do nonetheless.[75]

Finally, although the majority of trade remedy measures maintained by countries are not challenged before the WTO, the view that WTO standard of review should not be adopted in domestic judicial review cases to avoid the incidence of the presumptive non-tariff barrier effect discussed above, overlooks the fact that any counterbalancing effect to be achieved by non-application of the WTO standard of review can be promptly neutralized in a case of sufficient importance for the exporting country concerned. This the exporting country may achieve by insisting on its right to request consultations (and the prospect of the establishment of a panel that might be entailed) from the time the investigating authority takes a decision to initiate an investigation, or at the provisional measures stage, thereby virtually wiping out whatever benefits a domestic industry would otherwise obtain if a wait and see approach discussed above were to be adopted.

[75] See, for example, *United States-Antidumping Act of 1916*, WT/DS136/AB/R; WT/DS162/AB/R, adopted September 26, 2000. See also, *United States-Continued Dumping and Offset Act 2000*, WT/DS217/AB/R; WT/DS234/AB/R, adopted January 27, 2003. Here, it may argued that the Appellate Body is not called upon to substitute its interpretation for that of domestic tribunals (and would, therefore, be engaging in a different exercise than a domestic court adjudicating on WTO consistency of local law) as to the meaning of a particular domestic legislation, but that it is merely comparing it with WTO law to determine consistency with the benchmark of comparison, WTO law, within its zone of competence. This, of-course, is not altogether correct since in determining whether the subject domestic legislation is mandatory or discretionary, that is, whether the particular legislation requires non-observance of WTO rules as opposed to one merely permitting non-observance, the Appellate Body must have recourse to the nuances of the domestic interpretive field to determine what the legislation actually does or is designed to do based on agency and/or court interpretation.

D. HAS THE WTO STANDARD OF REVIEW IN TRADE REMEDY CASES BEEN TRANSFORMED INTO SUBSTANTIVE OBLIGATIONS UNDER THE TRADE REMEDY AGREEMENTS?

The above question is relevant not only for disputes between CARICOM Members and third parties, but also disputes between CARICOM Members as well to the extent that they may choose to avail the WTO dispute settlement system to resolve disputes under the Revised Treaty, and for disputes to be settled under the Revised Treaty where the provisions contained therein are similar to WTO trade remedy provisions. Transformation of the standard of review into substantive obligations would indicate that the Revised Treaty provisions, to the extent similar to the WTO provisions, are to be interpreted consistent with these 'added' substantive obligations to avoid a WTO challenge against a COTED determination against third parties.

The question of course presumes that the rules for standard of review must in large measure be seen as procedural as currently crafted. This is at least the view maintained by some, in effect distinguishing between those rules directed at the panel or Appellate Body (categorized as procedural) and those directed at national authorities (categorized as substantive).[76] The distinction is presumably to demarcate those rules that specify the rights and obligations of WTO Members regarding the administration of trade remedies and those directed at the judicial organ of the WTO with the objective of maintaining the negotiated institutional balance between the political and judicial organs of the WTO.

[76] Holger Spamann, *supra*, note 53.

However, the distinction is, at best, arbitrary since rules directed at national authorities also comprise both procedural and substantive elements.[77]

Under the trade remedy agreements included in the Revised Treaty no specific standard of review is articulated to govern whether a national investigating authority's determinations, made under those provisions, are to be applied to products from a CARICOM Member is consistent with the terms of the treaty. Similarly, no such guidance is provided for the review of determinations by COTED. By contrast, the WTO Agreement sets out a general standard of review for trade remedy matters and a more specific standard for antidumping cases. The general standard of review is that set out in Article 11 of the DSU that states:

"The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and under the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution".

[77] The requirement for a finding of material injury under Article 3 of the Antidumping Agreement and the minimum time period for exporters and foreign producers to respond to questionnaires under Article 6 of the Antidumping Agreement are examples of substantive and procedural rules respectively.

On the other hand the specific standard articulated for antidumping matters is set out in Article 17.6 of the Antidumping Agreement, which states:

(i) in its assessment of the facts of the matter, the Panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the Panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

The distinction between these two standards of review suggests a specific standard for review for antidumping cases as opposed to those involving subsidies and safeguards.[78]

[78] Two Ministerial Decisions taken at the final Ministerial Conference of the Uruguay Round at Marakkesh, Morocco, in April 1994 (made part of the text of the Uruguay Round Final Act) support this interpretation. The first is in the following terms:

DECISION ON REVIEW OF ARTICLE 17.6 OF THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Ministers decide as follows:
The standard of review in paragraph 6 of Article 17 of the Agreement on Implementation of Article VI of GATT 1994 shall be reviewed after a period of three years with a view to considering whether it is capable of general application.

The Appellate Body's clarification of these standards does not, however, suggest any appreciable difference between the two and in practice the two standards are combined into an overarching standard that suggests their elevation to substantive obligations under the respective provisions being interpreted. In the *Japan Steel*[79] case the Appellate Body treated both standards as complementary, in effect clarifying the Article 17.6 standard as consistent with the 'objective assessment' criterion in Article 11 of the DSU, and that Article 17.6 merely adds to Article 11 of the DSU the proviso that a national authorities determination should be upheld if it is based on a permissible interpretation of the Antidumping Agreement. In short, the two standards, as applied to antidumping measures at any rate, are clarified by the Appellate Body as directing Panels to make an objective assessment of the matter before it and to only uphold a national authorities measure if it is based upon a permissible interpretation of the provisions of the agreement.

In making this 'objective assessment of the matter before it', the Panel is to look at whether an investigating authority has examined 'all relevant factors' and provided an 'adequate and reasoned explanation' of its determination. This it is enjoined to do for subsidies and safeguard measures as well and not just with antidumping measures. In fact, the Appellate Body's elaboration on this requirement was with respect to a

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The second is in the following terms:

DECLARATION ON DISPUTE SETTLEMENT PURSUANT TO THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 OR PART V OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Ministers recognize, with respect to dispute settlement pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, the need for the consistent resolution of disputes arising from antidumping and countervailing duty measures.

[79] *United States-Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted August 23, 2001.

safeguard measure, in the case of *US-Wheat Gluten*,[80] and a subsequent fulsome clarification on another safeguard measure in *US-Lamb*.[81] In this latter case, the Appellate Body has held that "By examining whether the explanation given by the competent authorities in their published report is reasoned and adequate, Panels can determine whether those authorities have acted consistently with the obligations imposed by Article 4.2 of the Agreement on Safeguards".[82] Satisfying an Article 4.2 obligation under the Agreement on Safeguards, therefore, requires that there is a published report with a reasoned and adequate explanation justifying the findings made with respect to the factors to be examined under Article 4.2(a), the demonstration of causation between the increased imports and injury, and the non-attribution of injury to other factors where relevant under Article 4.2 (b), in addition to a demonstration of the relevance of the factors considered under Article 4.2(c).[83]

On closer examination then the standard of review rules are not merely directed at Panels and the Appellate Body, but represent substantive obligations for national authorities as interpreted by the Appellate Body.

E. USING THE LAW AND PRACTICE FROM OTHER JURISDICTIONS

Under what circumstances should an investigating authority rely on another jurisdiction's law to resolve interpretive issues raised under any of the trade remedy agreements? This

[80] *US-Wheat Gluten*, *supra*, note 59.
[81] *US-Lamb*, *supra*, note 61.
[82] Ibid. para.150.
[83] The reading of this as an added substantive obligation with respect to Article 4.2 arises because Article 4.2(b) does not use the word 'adequate' to specify how an investigating authority's demonstration of its findings under 4.2(a) or 4.2 (b) should be conducted. No adjective qualifies the word 'demonstrate' in 4.2(b) and were one to turn to 4.2(c) for guidance it is clear that its text merely requires detailed analysis as opposed to 'adequate' analysis or detailed and adequate analysis.

situation may arise, for example, in antidumping cases where a domestic industry petitioner seeks the imposition of retroactive anti-dumping duties on the basis that the importer of the targeted product knew or ought to have known that the particular exporter is practicing dumping, and that actual or presumed knowledge is to be found on the basis of a decision from an investigating authority from another jurisdiction that has found said exporter to be dumping. If that decision is itself the subject of review in local courts or is the subject of consultations between the disputing states, as a preliminary step for the establishment of a panel, may an investigating authority consider that affirmative ruling as a basis for the imposition of retroactive antidumping duties on a domestic importer who purchased from the exporter accused of dumping in the other jurisdiction? Or what if the affirmative ruling on dumping from the jurisdiction on which a finding on actual or presumed knowledge may be based is inconsistent with WTO case law, though consistent with that jurisdiction's domestic law?

These issues suggest that care should be taken in seeking guidance from the jurisprudence of other jurisdictions to resolve such issues. But there is no bright line for how this is to be done. Anti-dumping measures challenged before the WTO are usually found to be in violation of some provision of the WTO Antidumping Agreement, even if the Member whose measure is challenged succeeds on defenses raised against the claims brought. In other words, the nature of WTO dispute settlement proceedings in anti-dumping proceedings cases is such that several claims are likely to be made by the party challenging a measure and this usually results in one or more of the claims succeeding

and a corresponding recommendation for the withdrawal of the measure.[84] In this respect, it is noteworthy that the claimant need only succeed on one of the several claims brought, whether the claim relates to a breach of a procedural or substantive obligation, for a panel to find the measure in violation of the agreement and recommend its withdrawal.[85]

No less important is the reliance to be placed on other jurisdiction's findings in safeguard and subsidy cases. Definitions of what is a 'like' or 'directly competitive' product are likely to vary across jurisdictions, according to particular practices developed by national investigating authorities, even if the legislation on which such determinations are based are identical to the relevant WTO provisions governing such issues.

This is also the case with terms such as 'critical circumstances' that seek to found the basis on which antidumping and countervailing duties can be levied retroactively. There is no bar to borrowing from the jurisprudence from other jurisdictions,[86] although it is

[84] This position assumes that the dispute is properly before the panel in the first place. See, for example, *Guatemala-Antidumping Investigation Regarding Portland Cement from Mexico*, (*Guatemala-Cement I*), WT/DS60/AB/R, adopted November 25, 1998. Here the Appellate Body overturned the panel's ruling regarding the consistency of Guatemala's measure with the ADA on the basis that the dispute was not properly before the panel since Mexico had not complied with Article 6.2 of the DSU in identifying the measure complained against in its request for the establishment of the panel.

[85] The nature of the breach (i.e. whether the breach is a minor or major one) is irrelevant for the purposes of determining whether a measure should be withdrawn since the doctrine of 'harmless error' is apparently not cognizable within WTO jurisprudence as an effective defense. See, for example, *Guatemala-Definitive Antidumping Measure on Portland Cement from Mexico*, (*Guatemala-Cement II*) WT/DS/ 156/R, adopted November, 17, 2000. Here, the panel stated that: 'The concept of 'harmless error' as presented by Guatemala has not attained the status of a general principle of public international law. In any event the first task in this dispute is to determine whether Guatemala has acted consistently with its obligations under the relevant provisions of the ADA…Thus, while arguments regarding the existence and extent of the possible harm suffered by Mexico may be relevant to the issue of nullification and impairment, an argument of harmless error does not present a defence in itself to an alleged infringement of a provision of the WTO Agreement'. Para. 8.22.

[86] Except of course in those circumstances where such jurisprudence is WTO inconsistent.

important, in the interest of transparency, what precise standard is being used for the determination of these issues.

What is true of anti-dumping measures in the WTO dispute settlement system (that is, that a dispute that reaches the panel stage will most likely result in a ruling requiring the withdrawal of the measure) also applies to other trade remedy disputes, such as subsidies and safeguards. That the rulings have no direct effect in domestic jurisdictions suggests some leeway for using the jurisprudence and practices of other jurisdictions until the particular practice adopted is also subject to challenge.

IV. COMPLEMENTARITIES AND CONFLICT BETWEEN THE WTO REGIME AND THE CARICOM SINGLE MARKET AND ECONOMY

Generally, an FTA is presumptively in harmony with WTO rules by virtue of the provisions of Article XXIV of GATT 1994 that permits them. Notwithstanding this observation, an important question is whether the application of trade remedies within an FTA is in conflict with the Article XXIV because of the requirement that substantially all trade must be liberalized within an FTA. At the time of writing there is no definitive answer to this question from any WTO panel or the Appellate Body.

Under Article XXIV:8 of GATT 1994, tariffs and trade restrictions are to be liberalized except for measures under Articles XI, XII, XIII, XIV, XV and XX of GATT 1994. The exclusion of Article XIX, the Safeguards Agreement, and Article VI regarding antidumping and countervailing measures from the list of exempted Articles from the

general obligation of liberalization within an FTA may suggest that trade remedies are not to be applied within an FTA. However, this interpretation is perhaps too stringent because it presumes the exempt Articles to be an exhaustive list. This is hardly justifiable when one considers that other important Articles, such as the security exception in Article XXI and the balance of payments restrictions for developing countries in Article XVIII.B, are not specifically exempted, even though it is doubtful that is intended. As a matter of interpretation then, it may be more accurate to suggest that trade remedy measures are not excluded from the exempt list since they have not been specifically barred from this seemingly non-exhaustive list. This interpretation is supportable by the *Lotus* principle to the effect that sovereignty requires that that which is not strictly prohibited to states is permitted to them,[87] but also by such supplementary principles of interpretation as *in dubio mitius,* according to which a tribunal interpreting an ambiguous provision is directed to choose the meaning that is less onerous on the party assuming the obligation.

Assuming this conclusion to be correct, can trade remedies be applied in a manner that violates Article XXIV of GATT 1994? May the application of trade remedies by several RTA members simultaneously, and the trade restricting effect entailed, result in the requirement for the liberalization of substantially all trade not being met? Or is this term merely limited to tariff reductions and does not apply to the operation of trade remedies?

Article XXIV: 5 states that tariffs and other trade restrictions imposed by an FTA shall not be more restrictive than those in existence before the formation of the FTA. On a

[87] *S.S. Lotus (France v. Turkey*), 1927, P.C.I.J. Reports, Series A, No. 10, at p. 18-19.

literal reading of the term 'other regulations of commerce' under Article XXIV: 5 or 'other restrictive regulations of commerce' under Article XXIV: 8, trade remedy measures are included. This means that while trade remedies are not excluded within an FTA they cannot be so applied as to derogate from the substantially all trade liberalization requirement. The obvious difficulty, of course, is to determine when this threshold has been met after the application of a trade remedy measure. The application of safeguard measures within an FTA arguably carries a greater risk for breach of this obligation, even if the measure is applied on a product specific basis, since such measures are to be applied on an MFN basis within the FTA. By contrast, antidumping and countervailing duty measures would be less trade restricting because they would be applied on a product specific non-MFN basis. However, the likelihood of breach of the substantially all trade liberalization requirement arises where several RTA partners simultaneously maintain trade remedy measures, a situation all the more likely where any one of the RTA partners decides to use such remedies as a trade policy to assuage domestic interests and others follow suit.

There is no easy solution to this question, but one may suggest tentatively that, at the very least, the rules governing the imposition of trade remedies should be no less restrictive than those employed within the WTO framework, thereby reducing the incidence of trade remedies that may veer closer towards a breach of the liberalization requirement. For CARICOM, this would mean greater competition among businesses within this 'Single Market and Economy'. This is because the greater the degree of convergence of economic and other policies within this community, the less likely it would be for a

safeguard measure, for example, to be applied against any CARICOM originating product (assuming the application of the unforeseen developments criterion of GATT Article XIX)[88] because the general trend toward further liberalization at the formation of the single market and the greater incidence of liberalization consequent on policy convergence militate against a finding that possible injury to domestic interests within individual CARICOM countries was not foreseen or foreseeable.[89]

CONCLUSION

The creation of the CARICOM Single Market under the Revised Treaty presents tremendous promise for advancing the region's trade possibilities and to promote the coordination of trade policy. However, like other regional trading arrangements, it is subject to tension and possible conflict with the WTO regime with respect to various trade disciplines, not least of which is that relating to trade remedies. This is unsurprising since the WTO has not yet resolved issues of potential conflict between itself and FTAs.

Conflict may arise in terms of the applicable substantive law where an issue has received treatment in an FTA but not yet litigated before the WTO, but also in respect of procedural obligations, and the applicable standard of review with respect to domestic judicial review proceedings of trade remedy measures.

[88]The application of Article XIX: 1(a) of GATT 1994(the 'unforeseen developments' requirement) regarding safeguard measures for CARICOM under the Revised Treaty is supported by the exclusion of Article XIX from the list of exempt provisions under Article XXIV of GATT 1994.

[89]Whether or not the test for meeting the 'unforeseen developments' criterion for the application of a safeguard measure is more objective than subjective is not thoroughly settled in WTO jurisprudence. See, for example, Delroy S. Beckford, "Critical Issues in WTO Safeguard Jurisprudence for the Conduct of Safeguard Investigations in Jamaica" in *West Indian Law Journal*, vol. 29, no. May 2004.

This means that the use of jurisprudence from other FTAs to resolve trade remedies disputes within the CARICOM Single Market may spill over into the WTO domain due to differences in substantive and procedural provisions in those trading arrangements that are inconsistent with WTO provisions, and, also, given the fact that the Revised Treaty allows CARICOM Members to pursue their rights under the WTO regime. The continuing WTO obligations of CARICOM Members suggest that care should be taken in striking a balance between those obligations and those under the Revised Treaty.

The major challenge for this objective of meeting both sets of obligations is the lack of a coherent jurisprudence across jurisdictions with respect to trade remedies. It will not necessarily be altogether clear before a matter is subject to the WTO dispute settlement system whether the interpretation offered by an investigating authority in one jurisdiction, of domestic legislation implementing WTO provisions, is in fact consistent with the meaning to be ascribed to those WTO provisions. Some jurisdictions continue practices that are regarded as WTO consistent on the basis that they were not the respondents in proceedings in which those practices were challenged and found wanting and are, therefore, not specifically bound by those rulings. In other cases, some jurisdictions implement legislation that are considered consistent with their WTO obligations, albeit the provisions of the legislation are based on a 'permissible' interpretation by domestic legislatures of what those provisions can be in the light of the WTO obligations assumed, but that are not in fact consistent with those obligations. Special care must be taken in avoiding such domestic rulings and practices, particularly for the small developing

countries in CARICOM that are better off avoiding unnecessary challenges to their determinations.

One way of minimizing this difficulty-arguably a rather cautious approach- is for the adoption of a harmonized standard of review consistent with WTO law. This is obviously a policy question for WTO jurisprudence does not mandate direct effect of its rulings. On the other hand, the policy choice may suggest preference for an aggressive and robust approach to promoting trade policy where legislative provisions or administrative guidelines are designed or adjusted to take advantage of ambiguities in the current rules as is done in several developed countries.