

This issue of The WTO Monitor focuses on issues of specific interest to small developing countries such as those in CARICOM.

## Would There Be War After Nine Years of Peace

The 'Due Restraint' proviso, more commonly referred to as the 'Peace Clause', contained in Article 13 of the Uruguay Round Agreement on Agriculture (AoA), shields countries granting subsidies which conform with the conditions specified in the Agreement from being challenged under other WTO agreements, particularly Articles 6.3(a)-(c) and 6.4 of the Subsidies and Countervailing Measure (SCM) Agreement and related provisions. This Clause expired at the end of 2003, however there appears to be disagreement with regard to the exact expiration date. According to Article 13, this moratorium is supposed to last for the duration of the implementation period of the AoA. Implementation period in this context, according to Article 1 of the AoA which deals with definitions, means *"the six-year period commencing in the year 1995, except that, for the purpose of Article 13, it means the nine-year period commencing in 1995."* For the majority of WTO Member States, as well as senior officials of the Secretariat (Dr Supachai), the nine-year period expired at the end of 2003. Of late, however, another interpretation as regards the actual expiration date of the Peace Clause was advanced by the US and the EU, which sees expiration at sometime in 2004.

Although the deadline has elapsed, Members are still expected to decide whether or not to support an extension of the Peace Clause. In the absence of an extension of the Peace Clause, countries would have recourse to the relevant provisions of the SCM Agreement to challenge the use of certain subsidies, which were insulated from challenge. In the event of such a scenario, the most likely development would be a proliferation of dispute settlement challenges.

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**A MOFTIC BULLETIN - ISSUED BY THE CARICOM MINISTERIAL SPOKESPERSON WITH RESPONSIBILITY FOR SUPERINTENDING THE NEGOTIATIONS AT THE WTO**

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 This bulletin has been prepared under the responsibility of the Minister of Foreign Trade and International Co-operation of Guyana in his capacity as CARICOM Ministerial Spokesperson on WTO Issues. It does not purport to convey in any way the views of the Caribbean Community (CARICOM) nor the Regional Negotiating Machinery (RNM)

Several of the now 148 members of the multilateral trading body have openly expressed support for and against the renewal of the Peace Clause<sup>1</sup>. The Cairns Group of agricultural exports is the most resistant to any extension, while the US and the EU are at the other extreme of this spectrum<sup>2</sup>. It is therefore expected that, with the expiration of the Peace Clause, and in the event countries decide to invoke the relevant provisions of the SCM Agreement, the members of the Cairns group will be among the first to launch challenges against large subsidy-granting countries, particularly the US and the EU.

In determining what position to adopt with respect to the Peace Clause, developing countries in general, but CARICOM countries in particular, have to answer several fundamental questions. These include, *inter alia*, how has the Peace Clause benefited us thus far? How has it hurt us? What are the advantages and disadvantages of supporting/rejecting an extension, taking into account, among other things, the concerns of net food importing countries, preferences and the quest for increased market access for product of current and potential export interest to developing countries? If an extension is to our inconvenience, what concessions should be made available to developing countries, particularly small resource-limited states? Should the Peace Clause be modified, and if yes how? Finally, how would the

non-renewal of the Peace Clause ultimately affect small developing states?

This article attempts to address the questions posed above and it is hoped that this discussion will initiate interactive deliberations on this very important subject, which thus far has been insufficiently examined

The first task at hand would be to establish a link between the Peace Clause and the subsidies granted to products of export and domestic interest to the region. In so doing, special emphasis will be placed on the European Union-African, Caribbean and Pacific group of countries relationship, as well as the EU's reform to its Common Agricultural Policy (CAP). Invariably, when one speaks about the Peace Clause-subsidies link, the products that come to mind for many, particularly in the Caribbean are the Protocol products, especially sugar under the Sugar Protocol. However, there are two schools of thought with respect to the legal separateness of the Peace Clause and the Sugar Protocol.

It is important to first focus our attention for a moment on this issue, with a view to clarifying whether the maintenance of the benefits under the Sugar Protocol after the expiration of the Waiver is in anyway contingent on the continuation of the Peace Clause. Sugar is considered to be the most

<sup>1</sup> See proposals at [www.wto.org](http://www.wto.org)

<sup>2</sup> The members of the Cairns Group include:- Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, Philippines, South Africa, Thailand and Uruguay.

important agricultural product for some CARICOM states and as such it is important this issue be investigated. Clarifying this issue would also assist in the investigation as to whether there are any direct benefits from the existence of the Peace Clause.

Those who argue that there is indeed a link between the flexibilities provided by the Peace Clause and the benefits derived from the Sugar Protocol see Article 1 of the General Agreement on Tariffs and Trade (GATT 1947) on Most-Favoured-Nation Treatment (MFN) as being the legal basis. To summarise, the MFN Clause requires members to accord any advantage, favour, privilege or immunity granted to one party for any product immediately and unconditionally to the like product originating from all other contracting parties. The exceptions include:

- customs unions and free trade agreements; and
- preferential trading agreements pre-dating the implementation of the original GATT in 1947.

All other preferences, such as Lome/Cotonou, must be subject to explicit waivers. A waiver was granted in 2001 at the Fourth Ministerial Conference held in Doha, Qatar, until 31 December 2007.

The Sugar Protocol, which is the successor to the

Commonwealth Sugar Agreement of 1951, took effect on 28<sup>th</sup> February 1975. Hence, the argument here is that both agreements post date GATT 1947, and consequently are not covered among the exceptions.

However, for beneficiaries of this arrangement, the Sugar Protocol is a separate international treaty between the EU and each of the nineteen ACP states which are signatory to it for an indefinite duration. The Protocol provides remunerative prices and agreed quantities of cane sugar originating from contracting ACP states. It is regarded as neither a quota nor a tariff preference arrangement. The legal position regarding the indefinite life of the Sugar Protocol is that it is a stand alone agreement which is not lawfully reliant on the existence of the Lome Convention, or now, the Cotonou Agreement. According to Article 8(2) of the Sugar Protocol, “...*in the event of the convention ceasing to be operative, the sugar supplying states .... Shall adopt the appropriate institutional provisions to ensure the continued application of the provisions of this Protocol.*” The argument here therefore is that given that none of the principles enshrined in the WTO agreements can abrogate an existing treaty, the Sugar Protocol is regarded as compatible, once the contracting parties find it valuable. Since its genesis, Caribbean countries have benefited significantly from this arrangement in terms of revenue earnings.

Another issue which should be noted with regard to sugar is that the European Communities in its Uruguay Round concessions did not make any export subsidy reduction commitments on sugar of ACP and Indian origin. This, however, does not mean that these subsidies are immune from challenge. Since export subsidies are an integral part of the EU sugar regime, then their elimination would mean less favourable preferences, since there would then be no basis for maintaining the high internal prices from which we benefit.

The value of the Peace Clause can also be viewed from another perspective, that of net food importing countries. Subsidies help to keep food prices low and thus benefit net food importing countries, since less foreign exchange will be necessary to satisfy any given demand. The benefit from a net food-importing country perspective is foreign exchange saved. Since the Peace Clause helps to keep those subsidies in place, it therefore can be argued that the Peace Clause is beneficial to net food importing countries. However, in recognition of the possible negative effects in terms of the availability of adequate supplies of basic foodstuffs from external sources on reasonable terms and conditions, including short-term difficulties in financing normal levels of commercial imports of basic foodstuffs, in the Uruguay Round Ministers adopted a “Decision on measures Concerning the Possible Negative Effects of the reform

Programme on Least-Developed and Net Food-Importing Developing Countries (LDC) (NFIDC)<sup>3</sup>. This Decision basically sets out a four response mechanism:

- Food aid;
- Short-term financing of normal levels of commercial imports;
- Favourable terms on agriculture export credits; and
- Technical and financial assistance to improve agricultural productivity.

However, several of the elements in the aforementioned Decision are yet to be implemented, hence establishing a strong case for the agreed mechanisms to be implemented rather than trying to address the negative effects to NFIDC by allowing trade-distorting subsidies.

In instances where there is domestic production on any particular product, invariably the implications are harmful, both economically and socially. But, by and large, in the fewest possible words, the aforementioned arguments represent the benefits of the Peace Clause, and therefore are seen as legitimate reasons for the continuation of the benefits arising therefrom. This argument however may only be well-founded for non-competing imported products.

On the subject of how the Peace Clause has hurt us, it is necessary to revisit the arguments posited

<sup>3</sup> The full text of the Decision can be found at: [http://www.wto.org/english/docs\\_e/legal\\_e/35-dag\\_e.htm](http://www.wto.org/english/docs_e/legal_e/35-dag_e.htm)

for net food importing countries. As mentioned in passing, on occasions where there is domestic production, the flexibility made available by the Peace Clause could result in displacement of domestic production and industries, or restrict commercial expansion possibilities in both traditional markets, as well as emerging markets. The Peace Clause was created to basically facilitate the reduction process, but there are instances where the protection provided by this clause has resulted in countries using the shield provided to create market share. Agricultural products eligible for inclusion in this category include poultry and fisheries products.

The foregoing paragraphs for the most part, in highlighting the benefits and cost of the Peace Clause simultaneously acknowledge the advantages and disadvantages of supporting and rejecting the Peace Clause, respectively. Consequently, arising from the existence of the Peace Clause, beneficiary countries would undoubtedly be disposed to support the continuation of the moratorium or some other mechanism.

Notwithstanding the obvious limitations of this analysis, it is sufficient to say that either a renewal or rejection of the Peace Clause will cause some degree of inconvenience, since there are benefits as well as costs associated with either option. While it is acknowledged that a comprehensively quantitative examination would provide a more

lucid picture with regard to the costs and benefits, thereby facilitating a decisive pronouncement, preliminary evidence suggest that an extension would be to our short to medium term advantage and benefit. By rejecting the Peace Clause, non-conforming subsidies would have to be eliminated immediately or amended appropriately to remove their undesirable effects, thereby forcing the EU to reconsider its position with regard to preferences, etc. In the absence of an adequate transition period, the adjustment costs could be insurmountable. From a Caribbean perspective, the extension of the Peace Clause has to be looked at in tandem with the agreed time frame for the establishment of an Economic Partnership Agreement with the EU, as well as the CAP reform, particularly the shift from price support measures with direct aid payments – beef a case in point.

The fact that there are disadvantages associated with the renewal of the Peace Clause leads to an important question, that is, should the Peace Clause be modified? Further, what concessions should be sought? If the former question is answered in the affirmative, the next logical question is, how should the Peace Clause be modified? No attempt would be made to definitively pronounce on whether or not the Peace Clause should be modified. Such a question is best approached after a detailed quantitative analysis. Instead, at this juncture, we will proceed on the theory that modification is necessary.

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Operating on that premise, possible adjustments to the Peace Clause would be suggested. One important possible amendment which comes to mind, relates to the category of subsidies shield from challenge by Article 13. The idea here is to establish stringent disciplines on those subsidies that cause injury to us, with the possibility of excluding them from the protection presented by the Peace Clause. Or, it may also be desirable to subject certain payments to the due restraint principle which are currently non-actionable for the purpose of imposing countervailing duties. Some have advocate a modification of Article 13 to exclude certain subsidies, notably Green Box measures used by developed countries under paragraphs 5-7 of Annex 2 of the AoA – direct payments to producers, decoupled income supports and government financial participation in income insurance and income-safety-net programmes. It therefore means that, operating on the basis that an extension is granted, say for x duration, at the end of that period, the payments alluded to would have to be either subject to reduction commitments or eliminated altogether.

This brings us to the question of concessions. There is an emerging school of thought which suggests that, should a renewal be necessary, developing countries should request in return a clear decision on Special Safeguards, which would enables all developing countries to have recourse to such a facility for all agricultural

products, regardless of whether or not there was tariffication<sup>4</sup>. However, recourse to the Special Safeguard Mechanism (SSM) is only effective with respect to imports in a country's own domestic market. It does not provide security in third countries market, especially net food importing countries which might be an important market and source of revenue earnings for developing countries. Nevertheless, this SSM would provide some level of relief to developing countries farmers against the large subsidies provided by developed countries<sup>5</sup>.

Another possible concession could be linking the renewal of the Peace Clause to tighter disciplines on some types of export competition measures, including food aid provision.

The final issue which will be analysed is the likely consequences to countries, specifically with regard to small developing countries in the event of the non-renewal of the Peace Clause? The non-renewal of the Peace Clause means that all countries that utilise actionable subsidies will be vulnerable to challenges under the Dispute Settlement mechanism. In an actual challenge, a country has to demonstrate that:

- a. the exports from another member is causing injury to its domestic agriculture; or

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<sup>4</sup> See article by Bhagirath Lal Das, entitled "The Peace Clause in WTO's Agriculture Agreement", available at [www.twinside.org.sg](http://www.twinside.org.sg)

<sup>5</sup>

- b. the subsidy used by a member is causing serious prejudice to its exports.

However, most developing countries, especially small developing countries such as those in CARICOM use of subsidies is negligible, because of, *inter alia*, lack of resources and Bank and Fund commitments. Further, the subsidies used by these countries tend to conform to the commitments in the WTO agreements. Moreover, given that proof of injury is a precondition for getting a favourable judgment, it would be extremely difficult for a developed country to prove that serious injury is being caused to a domestic industry in the developed country as a result of subsidies used by a developing country, especially a small developing country. Proving the opposite will be a less difficult task, since developed countries do have the financial resources and do significantly subsidise, their farmers (see footnote #4).

Based on the above investigation, it is very difficult to definitively pronounce on whether the Peace Clause should be renewed or not although preliminary evidence supports a renewal. In many instances, more in-depth analysis of the various issues raised is necessary, particularly with respect to the effects of subsidies on domestic markets, *inter alia*. What is important nonetheless is that most of the factors that need to be taken into consideration prior to any decision making have been identified. Whether it is possible to complete the necessary in-depth analytical work that is required before a decision is required on whether or not to renew the Peace Clause is a guess, since this will be determined to a large extent by the availability of resources and accurate data. It is however being strongly recommended that the region re-examine the issue more in-depth.

## Trade in Services: The need for rules on Subsidies

Roger W. Rogers, Foreign Trade Officer, Guyana

### Introduction

When the WTO was established in 1995, with the conclusion of the Marrakech Agreement, among the objectives (and one may add the most important) of this premiere trade organisation was to enhance trade amongst its members. More specifically for developing countries it states that the purpose of trade is to contribute to sustainable development<sup>6</sup>. However, an assessment of the

work of the WTO since 1995 suggests that this objective has certainly become a formidable challenge, which has prompted the conclusion from many that sustainable development through trade is but an illusion. Therefore, the question that arises for developing countries is precisely how this can be achieved?

In the area of services, the conclusion of an agreement on rules to discipline the use of

<sup>6</sup> What works? Trade, Policy and Development: C. Mohamed; pg. 1

Developed countries (the EU, US and Japan) subsidize their farmers to the amount of US\$300 billion yearly.

subsidies in the services sectors will have important implications for sustainable development, particularly for developing countries.

Such disciplines are necessary *albeit* not sufficient for ensuring much sought market access and for creating a more equitable multilateral trading regime which would redound to the benefit of developing countries. Disciplines are even more important given that generally developing countries do not have the resources as most developed countries to utilize domestic support in their trading regimes.

### The Mandate

WTO Members have conceded that subsidies may have distortive effects on trade in services. This is explicitly recognized by Article XV of the GATS. Members were therefore mandated to:

- ? hold negotiations “with a view to develop the necessary multilateral disciplines to avoid such trade-distortive effects”;
- ? consider “the appropriateness of countervailing procedures”;
- ? recognise the “role of subsidies in relation to the development programmes of developing countries”;
- ? take into account the “needs of Members, particularly developing countries” for flexibility; and

? for the purpose of the negotiations, “exchange information concerning all subsidies related to trade in services”.

However, this mandate lacked an initial a deadline. This situation was later changed with the approval of the services Negotiation Guidelines. The ‘Guidelines’ for the current services negotiations contain a ‘best endeavour’ deadline to develop multilateral disciplines for such subsidies prior to the conclusion of the Doha Round ‘single undertaking’ (market access negotiations) negotiations in January 2005.

### What is a subsidy?

The issue of what is a subsidy has engaged substantial discussion within the Working Party on GATs Rules (WPGR). There has been a number of views expressed, ranging from one extreme to the other. However, the discussions are far from being resolved. While many Members are supportive of a simple working definition, others are of the view that a special definition is required for the particular case of services<sup>7</sup>. The latter catering to what may be termed “the peculiarities of the services sector.”

Countries supporting the use of a simple definition argue that the WTO Agreement on Subsidies and Countervailing Measures (SCM) contain a useful definition for services<sup>8</sup>. On the other hand, some Members argue that the definition contain in Articles 1 and 2 of the SCM Agreement is not

<sup>7</sup> Rediscovering Subsidies in the Services negotiations

<sup>8</sup>

adequate. A view in support of this position was articulated by Professor Marc Benitah, who argued that the principle of territoriality applied to subsidies rules in goods is not helpful in the area of services<sup>9</sup>. He argued that because most subsidies in services are provided locally, and this does not preclude a subsidised entity from providing services by other modes of supply to, or within, third countries. This conceptual difference makes the notion of an 'export subsidy' more ambiguous and less useful than it is in the goods sector<sup>10</sup>.

This is a valid argument and strengthens the need for developing countries to have this important issue resolved. For developing countries therefore, any definition of subsidy in the services sector, while it may contain all the basic elements of the definition contained in Article 1 of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), must also reflect the particular nature of the services trade and the nexus to sustainable development.

### **The GATS and Subsidy**

The General Agreement on Trade in Services (GATS) does have some general provisions which can be construed as limitation on the use of subsidies by WTO Members. It provides for example that if, a member when depositing a commitment under the GATS, does not exclude granting subsidies from the application of the most-favoured nation (MFN) and the national

treatment (NT) principles, these subsidies must be subject to non-discrimination. This was done by a number of developed countries (e.g. US, EU, Japan).

The provision contained in Article XXIII.3 of the GATS has some theoretical value in disciplining the use of subsidies. This article by allowing the deposit of additional commitments, a Member could include not granting or phasing-out subsidies. However, this is only applicable in specific sectors. In the final analysis, these provisions are woefully inadequate in the current GATS rules and do not sufficiently discipline the use of subsidies, either on an across-the-board basis or with respect to the amount of subsidies, or the areas to which a subsidy is being granted.

### **Public Policy Objectives**

Article XV of the GATS provides that only subsidies with 'distortive effects' should be subject to possible multilateral disciplines. In economic theory, all subsidies are considered trade distorting since they are interventions that impinges on the natural conditions of a competitive market<sup>11</sup>. However, at the same time subsidies (active policies) are an important tool for achieving sustainable development objectives. Therefore, in certain cases priority must be given to developing countries' justifiable aim to pursue public policy and by extension development objectives in favour of avoiding trade distortions.

<sup>9</sup> ditto

<sup>10</sup> book name

<sup>11</sup> ditto

Therefore, there is an urgent need to create and preserve spaces for public policy objectives.

In this regard, many WTO Members support this fact and argues that subsidies necessary to achieve certain public policy objectives should be exempted from general subsidy disciplines. This is supported by the GATS, which provides that Members' needs for flexibility in the area of subsidies are to be taken into account.

In addition to this general concern, many developing countries are calling for greater policy spaces for development policies for developing countries only. This is to be included under the provisions for special and differential treatment (S&D). These countries are of the view such S&D must be part of the final results of the Doha Round, to give meaning to the Development dimension envisage. In other words, the conclusion of the Doha Round WTO agreements should provide policy spaces to allow the undertaking of 'active' policies by developing countries, including those related to subsidies.

### **Conclusion**

While developing countries may not yet have a big share of the services trade, they are pursuing options to create opportunities for diversifying production and exports towards increased value-added and knowledge intensity. If the services trade evolves along the lines as trade in goods, many developing countries will gradually be in a position not only to be competitive, but possible overtake developed countries in certain services sectors in terms of competitiveness. The issue of Subsidies would then become a major stumbling block, which could seriously hamper the economic development of developing countries.

Therefore, developing countries should push for a resolution on the desirability of services subsidy disciplines. Moreover, a definitive time frame should be established by which negotiations on subsidies in services must conclude. Finally, services subsidies negotiations should end before Members table their final offers, as Members can only then undertake an adequate evaluation of the actual value of the offers received from trading partners.

## **VIEWS ON THE PROCESS**

**Dr Supachai Panitchpakdi, Director General, WTO**

November 2003

“The sluggish performance in global trade and the prospects for weak trade expansion in 2003 reinforces the already pressing need for WTO

member governments to get global trade negotiations back on track.”

**Don Mc Kinnon, Secretary-General, Commonwealth Secretariat**

November 2003

“After the breakdown of trade talks in Cancun, all the players must reconsider their positions and

realise that everyone stands to lose from another failure.”

**Ambassador Carlos Perez del Castillo, Chairman of the General Council**

December 2003

“We have made progress towards a full re-launching in a sense of doing by the 15 December what ministers failed to do in Cancun (Mexico). “But we are not yet there and we will need some more time.” “I would not call it a failure, I would call it unfinished

business.” I hope with a little bit more time available .....we will be able to make progress in the next few months and finally we will be able to get this process that everyone wants .....completely back on track early next year.”

**WTO Trade Talks To Resume on 11-12 January 2004**

At an Informal Heads of Delegation (HOD) meeting on 9 December, the Chairman of the General Council, Ambassador Carlos Perez del Castillo updated members on the status of informal talks he had, as well as outlined the way forward. Instead for producing a new draft, which several members would prefer, the Chair instead issued a report at the General Council’s December 15 meeting, mandated by ministers in Cancun at the fifth Ministerial Council.

The report dealt with three issues, namely – a substantive review of progress made thus far, identification of key issues that emerged during

the consultations with member states; and finally a sense of the way forward. Since the collapse of talks consultations were held on the four issues that have been identify by the Chairman (14 October) as being the most contentious in his view – agriculture, non-agricultural market access, Singapore issues (investment, competition policy, transparency in government procurement and trade facilitation) and cotton subsidies.

Chair Perez del Castillo encouraged all of the Doha development Agenda bodies to resume work early in 2004 once the Chairmanship issue is settled.

**Statement by Hon Cement J. Rohee Minister of Foreign Trade and International Cooperation and CARICOM Spokesperson on WTO Issues on Recent developments pertaining to the WTO Negotiations**

As CARICOM'S Spokesperson for WTO issues, I welcome the recent positive statements by several WTO Member States and group of countries, especially the developed countries such as the United States, the European Union and the G 20, urging the revival of the Doha Round of trade talks, so as to ensure a successful conclusion by January 1, 2005.

Having engaged in an extended period of reflection, it is essential that all members return to the negotiating table, so as to resolve the difficult issues that have plagued the Round for some time. However, such a resolution can only be accomplished by demonstrating flexibility, while simultaneously ensuring that the developmental dimension of the Doha Round is adequately accommodated. We owe it to our constituencies to find innovative ways to resolve the contentious issues expeditiously.

CARICOM remains committed to the Doha

negotiating process and continues to examine all proposals advanced thus far. In this regard, at a meeting in Georgetown in November 2003 with the Director General of the WTO, as well as the Chairman of the Cancun Ministerial Conference, CARICOM Trade Ministers indicated their willingness to be flexible with regard to the "Singapore issues". The Ministers emphasised that the "Singapore issues" should be considered secondary to the resolution of the core issues, especially Agriculture, Non-agriculture Market Access and Special and Differential Treatment for small economies.

Progress cannot be made if members continue to adopt rigid positions articulated in the pre-Cancun process, and at the Cancun Ministerial Conference. The first meeting of the WTO General Council is scheduled for 11-12 February 2004. It is important that we all demonstrate the political will to resume the negotiations with a renewed sense of purpose and commitment.

**January 23, 2004, Georgetown**

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