APPLYING INTERNATIONAL TRADE REMEDY LAWS IN THE CARIBBEAN: A FRAMEWORK FOR PROTECTION

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I. INTRODUCTION

> What happens in the WTO is part of a broader pattern of neocolonialism in the global economy. This has two strands. The first is the self-interest of the major powers; their close ties with multinational companies ... and their willingness to use their political and economic strength to achieve their ends ...
>
> The second strand is a combination of ideology, paternalism and missionary zeal. The true believers in globalization and liberalization feel sure that they know best—that markets work and globalization benefits all—but that the poor benighted heathens of the South have yet to realize this. The Enlightened Ones, armed with the Gospel According to Adam Smith, therefore have a duty to spread the Word—and to do whatever it takes to bring the unbelievers to the Promised Land of the globalize economy for their own good, even if they don't realize they want to be there.[1]

It is accurate to describe the manner in which the FTAA is being marketed as reflective of a missionary zeal to convert the protectionists to the religion of globalization. Since 1995 with the advent of the WTO, the religion of globalization has spread in the Caribbean, converting the heathens of the closed economies. Through the vehicle of international law in a multilateral trading system, in which the invisible hand of the free market economy is the undercurrent for trade and investment, the cloistered virtues of Caribbean economies were slowly pried open. The workings of the free market economy is not only espoused in such global instruments such as the World Treaty Organization ("WTO"/GATT), but also in bilateral and regional free trade arrangements such as the North American Free Trade Agreement, the subject of this conference. These are the vehicles by which it is hoped we will all be transported to the Promised Land of the globalize economy.

However, the landscape of the Promised Land is as yet unknown. Perhaps those in the Caribbean rushing headlong to it may not yet realize whether they want to be there at all, or may soon realize it was all a mirage. It is true that the open embrace of these international instruments by our domestic institutions have resulted in the creation of a landscape which is open and liberal, but for small vulnerable territories the trading landscape is also being characterized by increasing unemployment, local jobs being exported, closure of "globally uncompetitive" industries, dependence on foreign supply and governments slowly losing control over national economies. In the face of the drastic gaps

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1. FATOUMATA JAWARA & AILEEN KWA, BEHIND THE SCENES AT THE WTO: THE REAL WORLD OF INTERNATIONAL TRADE NEGOTIATIONS 269-70 (Zed Books 2003).

in development and economic performance between future member states in the FTAA, the words of Caribbean governments to its manufacturers to become more competitive and to exploit market access opportunities will be hollow words if there are no adequate mechanisms in this Agreement to guarantee to the Caribbean equal access to markets, fair competition and equity in international trade.

The approach by Latin America and the Caribbean ("LAC") to these international treaties, however, is maturing over the years and is reflected in the present state of negotiations for the FTAA. The LAC is now part of a groundswell critically re-examining the treaties through which globalization is being exported. This groundswell, which has gathered force since the Doha Declaration and to a large degree was responsible for the collapse of the Cancun Ministerial, is a demand by the developing world for equity in trading laws and treaties that shape any regional Free Trade Area. It is difficult for small, vulnerable economies to accept the invitation to participate in free trade. It opens them to surges of imports or of dumped or subsidized imports, which will destroy, impede, or retard its local production of goods, thereby destroying that members' export capability or potential and stunting economic growth. Moreover, the Caribbean must also focus on larger institutional efficiency issues, which must be addressed if they are to realistically compete in an environment such as the FTAA.

It is submitted that equity in international law can only be delivered through adequate pressure valves and safety nets that will provide adequate market defense mechanisms while providing the opportunity to exploit new market access. By this means the gap in development between territories will be minimized and there will be an effective leveling of the playing field. There is a rare opportunity therefore to ensure that the final shape of the treaty caters for this need of the Caribbean.

This paper will demonstrate that even in a Free Trade Area such as the FTAA, the application of international trade remedy law of anti-dumping ("AD") actions, Countervailing Duty ("CD") actions and Safeguard actions, as permitted in the WTO system, is necessary to maintain equity in liberalization and enhance a country's competitiveness. This paper will examine the extent to which this law has been utilized in the Caribbean and whether ultimately in a regional Free Trade area these mechanisms provide an adequate framework for protection in international trade or need to be abandoned altogether if we are all to pass through the "pearly gates" of the Promised Land of the globalize economy.

II. THE OFFICIOUS PARENT-GATT/WTO:

The Marrakech Treaty establishing the WTO sets out the general structure in which a multilateral system of trade and investment is expected to function.[2] CARICOM was notified to GATT under Article XXIV as an interim agreement. By 1995[3], almost all the members of CARICOM have ratified the WTO agreements. Insofar as they are now members of the WTO, the GATT and the various agreements have served as guides in their trading practices and trading agreements and much of their legislation is being brought in line with the international trade law. Because the world has become a trading playground, the Caribbean recognizes that it must now play by a new set of rules and principles.

The principles of the WTO, establishing the features of a new global trading landscape, lay the foundation of an equitable trading system. The preamble to the 1947 GATT sets out the ideology for this global trading landscape:

> Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of

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2. *See* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement]; Final Act Embodying the Result of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter Final Act] (including the WTO Agreement, the Ministerial Declarations and Decisions, and the Understanding on Commitment in Financial Services, annexed thereto). Representatives (ministers) of the "124 Governments and the European Communities participating in the Uruguay Round of Multilateral Trade Negotiations" declared that their "signature of the 'Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations' and their adoption of associated Ministerial Directions initiates the transition from the Gatt to the WTO." Decision on Acceptance of and Accession to the Establishing the World Trade Organization, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND 33 I.L.M. 1265 (1994). *See also* Multilateral Agreements on Trade in Goods, Apr. 15, 1994, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1154 (1994); General Agreement on Tariffs and Trade, Apr. 15, 1994, Annex 1A, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1154 [hereinafter GATT 1994] (incorporating the provisions of the General Agreement on Tarriffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 700, 55 U.N.T.S. 194 [hereinafter GATT] "(excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement").

3. The following members of CARICOM are also members of the WTO: Antigua and Barbuda, Jan. 1, 1995; Barbados, Jan. 1, 1995; Belize, Jan. 1, 1995, Dominica, Jan. 1, 1995; Grenada, Feb. 22, 1996; Guyana, Jan. 1, 1995; Haiti, Jan. 30, 1996; Jamaica, Mar. 9, 1995; St. Kitts & Nevis, Feb. 21, 1996; St. Lucia, Jan. 1, 1995; St. Vincent & the Grenadines, Jan. 1, 1995; Trinidad & Tobago, Mar. 1, 1995. As of April 2003, the Bahamas was listed as an Observer government. *See* Understanding the WTO: The Organization, Members and Observers, *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last modified Oct. 13, 2004).

> living ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods;
>
> Being desirous of contributing to these objectives by entering into reciprocity and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce[4]

The objective of the multilateral system for trade in goods created by the WTO is to provide industries and business enterprises from different countries a stable and predictable environment in which trade and investment can be conducted under conditions of free and fair competition. This open and liberal trading system is expected to promote, through increased trade, greater investment, production and employment and thus facilitate the economic development of all countries.

The most fundamental set of principles of the WTO which are expected to dot the landscape of the globalize economy are transparency, equity and due process. These principles are reflected in some basic tenets under the WTO:

1) The "MFN" rule: The Most Favoured Nation rule requires that a product made in one member country is treated no less favourable than a "like" (very similar) good that originates in any other country.[5] This basic pillar allows for equity among larger and smaller nations and theoretically puts them on the same level.
2) Reciprocity: Reciprocal concessions are a feature of the negotiating process. It ensures that the gain from negotiating is greater than the gain available from liberalization. Hence a reduction in import barriers will be matched, theoretically, with sector specific export gains. Market access commitments are implemented and maintained by tariff commitments enumerated in schedules of concessions establishing ceiling bindings where the members concerned cannot raise tariffs above bound levels without negotiating compensation with the principal suppliers of the products concerned. Once tariff commitments are bound a member ought not to resort to any other non-tariff measures that have the effect of nullifying or impairing the value of the tariff concession save for as provided in the GATT in trade

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4. GATT, pmbl.
5. *Id.* arts. I-III.

remedy mechanisms such as anti-dumping and countervailing duties.

3) Transparency: The multilateral system must come with the assurance that there is a transparent system of enforcement of the rules in which none can be discriminated against. If a member State perceives that actions by other governments have the effect of nullifying or impairing negotiated market access it may commence bilateral discussions. Failing this it can invoke the dispute settlement procedures under the WTO. This involves the establishment of panel of experts charged with determining whether a contested measure violates the WTO. Dispute settlement procedures play a central and invaluable role in ensuring that trade conflicts are settled fairly, in accordance with the rule of law and on a timely basis.

Whether this treaty is binding on the Caribbean member states without it being expressly incorporated into municipal law is not as important as the political sanction for failure to play by the rules of international trade. To this extent the Dispute Settlement Procedure established under the WTO is a powerful tool for compliance and can be a big stick wielded by the more powerful nations more adept in utilising the dispute mechanisms in international trade.

The WTO administers the trade agreements negotiations by its members principally the GATT[6], the GATS ("General Agreement on Trade and Services") and the TRIPS. However in spite of the rulings of the Dispute Bodies the WTO can be characterized as typically an officious parent scolding its children with the best of intentions but without the necessary legal efficacy to adequately keep its members within the path to the Promised Land. In the recent Panel report in "United States-Sunset Reviews of Anti-dumping Measures on Oil Country Tubular Goods from Argentina,"[7] the Panel reviewing a sunset review undertaken by the USITC against imports of tubular oil from Argentina concluded that, in certain aspects, the USITC breached the obligations under the Agreement. The action taken by the USITC to extend the imposition of an anti-dumping duty against imports of tubular oil from Argentina was considered prima facie to constitute a case of nullification of impairment of benefits under that Act. It recommended that the DSP request the United States to bring its measures into conformity with its obligations under the WTO. However, it saw no reason to accede to Argentina's request to revoke the anti-dumping order and repeal or amend its laws and regulations

6. Report of the Appellate Body, Argentina – Safeguard Measures on imports of Footwear, WT/DS121/AB/R, at 26 (Dec. 14, 1999).

7. See World Trade Organization, Report of the Panel, United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina, WT/DS268/R (July 16, 2004).

at issue. As will be discussed below, the WTO is by and large a moral figure in international trade where the sanctions for not playing by the rules may be distortions in trade and investment through retaliatory action by other member states rather than through orders or rulings from the Dispute bodies.

In the Report of the Panel in Guatemala, titled "Anti-dumping Investigation Regarding Portland Cement from Mexico"[8] the Panel noted that, pursuant to the provisions of the DSU[9] where measures taken by a member state are inconsistent with the WTO agreement, the panel shall recommend that the member concerned bring the measure into conformity with that agreement. In addition to its recommendation the panel may suggest ways in which the member concerned could implement the recommendations. The panel noted that such suggestion is not part of the recommendations and not legally binding on the affected member.

Recourse to a multilateral body is intended to minimize unilateral retaliations and re-emphasize the credibility of a rules-based international trading system. In reality, the application of these principles creates very little confidence that the multilateral system is essentially free and fair. For the local manufacturer, as a complainant of unfair international trade, in such a system it is paradoxical that it is denied access to the highest tribunal where decisions, rulings, concessions, and negotiations may be made which are prejudicial to the complainant's interests. In this respect, it is assumed that the interests of the member state and the local party are the same. When actually, in the mix of policy and negotiations, it is not. The recent WTO rulings in Cotton Subsidies and the Byrd Amendment illustrate the difficulty of enforceability and the "non-binding" nature of these treaties. Where there is a different application of the law to other members, an inequality in the system is set up.

The United States has clearly demonstrated that the WTO cannot assert itself on that nation. WTO agreements have no direct effect on U.S. law. Section 102 of the Uruguay Round Agreement Act provides, "No provision of any of the Uruguay Round Agreements nor the application of any such provision to any person or circumstance that is inconsistent with any law of the United States shall have legal effect."[10] *In Hyundai Electronic Co. v. United States*, the United States Court of International Trade concluded that WTO dispute settlement reports have no binding effect on a U.S. court. In our

8. See World Trade Organization, Report of the Panel, Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico, WT/DS60/R (June 19, 1998).

9. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 14, 1994, art. XIX, para. 1, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay round 33 I.L.M. 1226 (1994) [hereinafter DSU].

10. 19 U.S.C. § 3512 (2004).

jurisdiction, domestic legislation is necessary to determine whether a treaty becoming part of municipal law is binding on the courts.[11]

However it is debatable in our jurisdiction as to whether the rulings of the Dispute Settlement Body and the organs of the WTO are to be followed by the local courts. The true view may be that it will seldom do so where there is a conflict with municipal law. More importantly however for smaller states it is not so much a legal question as to whether the ruling is binding but a political one. In *Endo v Japan*,[12] the Court stated, "A violation of a provision of GATT pressures the country in default to rectify the violation by being confronted with a request from another member country for consultation and possible retaliatory measures. However it cannot be interpreted to have more effect than this."[13]

Therefore, it would seem that those with the political and economic strength to withstand a finding by an international court of a violation of the international obligations may be better off than those who cannot. Even though territories such as the Caribbean may be right in the law not to follow or adopt the findings of that Court it is impossible to imagine that in a real world of economic dependency on trade and investment with the other litigants that it would not.

To illustrate this example one need only to examine two cases: United States safeguards on steel and Trinidad anti-dumping investigation into imports of pasta and spaghetti. In the former, the WTO has clearly stated that the measure is inconsistent with international law. This has prompted no change in that country's desire to protect its local industry by maintaining the bar and litigating it to the highest level. They certainly have the resources to do so. In the latter case, an anti-dumping investigation was conducted by the authorities of the Government of Trinidad and Tobago at the request of "Cereal Products Limited" against imports of pasta from a Costa Rican company, "Roma Prince Sociedad Anónima" of Costa Rica. A provisional measure was imposed against the imports of pasta and spaghetti from Costa Rica. However, the Government of Costa Rica requested consultations with the Government of Trinidad and Tobago.[14] Costa Rica alleged that the measures were inconsistent with the

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11. See *generally* Footwear Distributors and Retailers of Am. v. United States, 852 F. Supp. 1078, 1096 (Ct. Intl. Trade 1994) ("However cogent the reasoning of the GATT panels... it cannot and therefore does not lead to the precise domestic judicial relief for which the plaintiff prays."); see also Canada v. Attorney General 1937 A..C. 326, 347 (H.L.) ("Within the British empire there is a well established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action.").

12. 530 Hanrei Taimuzu (Kyoto Dist. Ct. 1984).

13. *Id.*

14. DSU, *supra* note 9, art. IV; GATT art. XII, para.1; *See generally* Agreement on Implementing of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND TABLE, 1994, 33 I.L.M. 1154 (1994) [hereinafter Anti-Dumping Agreement], *available at* http://www.wto.org/english/docs_e/legal_e/19-adp.pdf.

obligations of Trinidad and Tobago under the Anti-dumping Agreement. Although no official results of the consultation had been submitted to the Anti-dumping Committee, the Government of Trinidad and Tobago appeared to have retreated by removing the duties and eventually terminating that investigation to the detriment of the local industry. Clearly the State did not have the resources or political will to defend its action to the highest level under the WTO system. Moreover it is reasonable to assume that the overall trading relationship with Costa Rica was given priority over the need to protect one manufacturing sector. This way many manufacturers for whose benefit this trade remedy legislation were enacted may discover that ultimately they have no or no effective voice in the final resolution of these disputes in the international arena. In *Development, Trade, and the WTO*, the authors' state, "no one can claim that the WTOs dispute settlement system compensates for an unequal distribution of economic power in the world, but it must be emphasized that this system gives small Members a fair chance they otherwise would not have to defend their rights."[15]

This "better than nothing" approach inspires little confidence in the future credibility of the multilateral system. To achieve equity in international trade and investment, the rules must be applied across the board and with the same legal effect. Fully recognized Institutions and Courts must be part of the ultimate package of the Promised Land of a globalize economy that will adjudicate finally on matters of international trade with binding effect on members. Until then international law will be inequitably applied to members ascribing to the same agreements.

III. THE FTAA OFFSPRING?

Within the WTO there have recently emerged several regional agreements which also seek to spread the notion of free trade. Some commentators have viewed the FTAA as a strategic dimension far beyond mere commercial and regional aspects.[16] There is a view that its genesis lies in obtaining leverage in a global world against other trading blocks and in the WTO system as well. The FTAA certainly represents the rise of a new order being the largest economic block on the world. It can also spark a new initiative by other members in the WTO to realign their economic ties in other huge trading blocks to counteract the impact of the FTAA.

The present stall in the FTAA negotiations has spawned even more bastard offspring of bilateral trade agreements between the United States and other

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15. Bernard Hoekman et al., Development, Trade and the WTO: A Handbook 71 (The World Bank 2002).

16. *See generally*, Paul Vizentini & Marianne Wiseeborn, Free Trade for the Americas? The United States' push for the FTAA Agreement, (Zed Books 2004).

Latin America countries. It will perhaps be difficult to say that the WTO fathered the FTAA. However, with the huge market capabilities and force of the Far East in the form of China, Japan, Indonesia it is not stretching the imagination to view the FTAA as an effective tool to counteract the juggernauts of the East and mount some economic leverage here in the West in the WTO.

The GATT recognizes free trade areas within the multilateral trade system: Article XXII (4) of the GATT provides the following:

> The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free trade area should be to facilitate trade between the constituent territories and not to raise barriers to trade of other contracting parties with such territories.[17]

However, insofar as the FTAA has its members in a favourable position in relation to non-FTAA members, it is not consistent with the MFN rule and Article XXIV of the GATT. In the Appellate Body Report, "Turkey-Restrictions on Imports of Textile and Clothing Products"[18], Turkey attempted to use trade remedy action in the form of safeguards on textiles and clothing and defended its use by reference to the development of a free trade area. The Appellate Body held that Article XXIV can justify the application of such a measure "only if it is introduced upon the formation of a customs union or free trade area and only to the extent that the formation of the customs union would be prevented if the introduction of the measure was not allowed." It was not demonstrated that the formation of the customs union would be prevented if the measure was not allowed and set strict guidance as to how issues of developing free trade areas should be approached.

The FTAA must therefore, theoretically, be compatible with WTO rules and it is difficult to imagine any properly documented regional agreement being WTO inconsistent. This will certainly set up a strain between globalisation and regionalism. The WTO imposes three basic obligations on member states if they wish to enter into regional trade agreements such as the FTAA:

1) An obligation to notify the agreement to the WTO;
2) An obligation not to raise the overall level of protection and make access to products of third parties not participating in the FTAA more onerous (external trade requirement);

17. GATT art. XXII, para. 4.

18. Report of the Appellate Body, Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/AB/R (Oct. 22, 1999).

3) An obligation to liberalise substantially all the trade among the constituents of the agreement (internal trade requirement).

It is apparent from the Turkey case that the WTO will monitor the measure implemented by a member of a Free Trade Area and the defence of the existence of a FTA will lose currency. For this reason, the trade remedy actions contemplated by the FTAA must be WTO compliant. Furthermore, where there is need for reform of these safety measures, it should be advocated at both the FTAA and WTO levels.

IV. GLOBAL TRADE REMEDY INSTRUMENTS

There are three trade protection instruments or trade remedies permitted under WTO rules allowing for the adoption of import measures in specific circumstances:[19]

1) Article VI of the GATT 1994 and the WTO Anti-dumping Agreement, authorising the implementation of anti-dumping duties or price undertakings in situations of discriminatory pricing;[20]
2) Article VI of the GATT 1994 and the WTO Subsidies and Countervailing Measures Agreement, authorising countervailing duties or price undertakings where countervailable subsidies are found;[21]
3) Article XIX of the GATT 1994 and the Agreement on Safeguards, authorising the adoption of safeguard measures where there is a surge of imports. Measures can take the form of either additional duties or quotas or both.[22]

Generally the objectives of these agreements are to provide relief to affected industries against unfair trade and protect the indigenous supply of goods on the local market and to prevent injury to the local industry from the effects of dumping; to protect the establishment of a local industry from unfair trade (section 3A and to ensure the integrity of the trade remedy process as agreed by the AD Agreement).

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19. GATT, art. XXII, § 4.

20. GATT 1994, art. VI.

21. GATT 1994, art. VI; Agreement on Subsidies & Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND 33 I.L.M. 1154 (1994), *available at* www.wto.oag.org.

22. GATT 1994, art. XIX; Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND 33 I.L.M. 1154 (1994), *available at* www.wto.oag.otg.

The triggering mechanism for each of these remedies is the concept of injury caused to a local industry due to market distortions caused by exporters and international traders. In the first two actions such distortions are caused by price discrimination or price differentials in the latter, sheer volume of imports creates an "unfair" or uncompetitive trading environment.

The provisions of the GATT and the Agreement on Anti-dumping Subsidies and Safeguard exist as separate instruments and are to be given legal effect. In examining these provisions, legal effect is to be given to all the relevant terms of the WTO agreement consistent with the principle of effectiveness "at rest magisvlaeat quam pereat" in the interpretation of treaties: In the Report United States-Gasoline the panel stated:

> One of the corollaries of the "general rule of interpretation" in the Vienna convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing the clauses or paragraphs of a treaty of redundancy or ignitibility.[23]

In those matters on which the agreement is silent, or ambiguous, or allows room for flexibility in adopting a rule, liberalists argue that national authorities should adopt a less restrictive rule or practice.[24] This would permit local legislators to capitalize on the ambiguity or uncertainty of some aspects of the AD Agreement to provide further protection for the local industry without contravening its WTO obligations.

These global laws are useful tools in a member's armoury to maintaining equity in international trade, transparency in the trading process and reciprocity. They are a formidable tool to restrict any unfair international trading practices. In using the anti-dumping remedy for instance Vermulst observed the following in *E.C. Anti-dumping Law and Practice*:

> Nevertheless it must be recognized that while anti-dumping duties have a marginal effect on international trade in general they can have drastic consequences for individual suppliers (and for certain industries such as steel, chemicals, consumer electronics, office automation equipment and ... textiles) Imposition of an anti-dumping duty of say 40% to be paid by the importer will in most instances force the importer to shift sources of supply and indirectly drive the foreign

23. World Trade Organization Report of the Appellate Body in United States, *Standard for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (May 20, 1996).

24. *See generally* Bruce A. Blonigen & Chad P. Brown, *Anti-Dumping and Retaliation Threats*, J. OF INT'L ECON. (forthcoming).

exporter out of the importing country market. In this way the anti-dumping law is effective.[25]

A. Anti-Dumping and Countervailing Duty Actions

Article VI maps out the broad criteria for the determination of the circumstances in which an additional tariff can be imposed against another member who is found to be dumping or subsidising its exports. As this is an exception to the MFN rule, the circumstances in which such a measure is to be imposed will therefore be carefully monitored by the WTO.

Article VI, Paragraph One of the GATT (hereinafter referred to as "The Anti-dumping Agreement") states:

> The contracting parties recognize that dumping by which products of one country are introduced into the commerce of another country at less than the normal value of the products is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry ....

The critical feature of the anti-dumping remedy is that it prevents the price discrimination of the exporter from threatening or effecting material injury on local industries that produces like goods.

Dumping is broadly defined as the sale of a good at a price less than its "normal value," the price for the good in the home market. In other words the export price is below home market prices, fair market prices, normal values, or its cost of production.[26]

Article VI, Paragraph Two also sets out the governing provision for Countervailing Duty actions:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the

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25. ANTI-DUMPING LAW AND PRACTICE (Sweet & Maxwell 1996).

26. Gary N. Horlick, *How the GATT Became Protectionist: an Analysis of the Uruguay Round Draft Final Anti Dumping Code*, 27 J. WORLD TRADE 5, 5-17 (1993); Anti-Dumping Agreement, *supra* note 19, art. 2.1. Article 2.1 defines dumping as:

> a product is to be considered dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

Anti-Dumping Agreement, *supra* note 25, art. 2.1.

> manufacture, production or export of such product in the country of origin or exportation including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production of export of any merchandise.[27]

This provision was incorporated into Part V of the Subsidies and Countervailing Measures Agreement ("SCM Agreement") and represents the current WTO law on CD actions.[28] A subsidy is broadly defined as a benefit that is not earned. It is defined in the SCM Agreement. This subsidisation may take different forms by a Government in the country of export such as the subsidisation of productions costs or free grants of land. It is of note that Article 14 of the Agreement on Subsidies and Countervailing Measures do not include government provision of equity capital as conferring a benefit unless the investment decision can be regarded as inconsistent with the usual investment practice or private investors in the territory.[29] The loan from the government to be considered as conferring a benefit must be preferable to that obtainable on a comparable commercial loan. The Agreement does not set out the methodology of calculating the subsidies and is left to members to work this out in their various enactments.

The counteraction of subsidies in international trade to prevent subsidised exports from threatening or effecting material injury on local industries, that provide like or similar goods, is another form of preventing economic "distortions" in international trade.

Under the Anti-dumping Agreement and SCM agreement an anti-dumping or countervailing duty measure shall only be applied under the circumstances provided for in the Agreement, and pursuant to an investigation initiated and conducted in accordance with the provisions of those agreements.

There are several aspects of these international agreements that are beyond the scope of this paper. In understanding these Agreements as setting an international framework for protection, we should be familiar with the concept of the entity entitled to protection, the triggering mechanism for invoking these remedies, and the scope of the relief available. In doing so we appreciate that the cornerstone of these Agreements is the elimination of injury to domestic industries that may occur when trade barriers have been eliminated as a result of globalisation.

The entity that is entitled to invoke these trade remedies is the domestic industry, which is materially injured by the dumping or countervailing duty.

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27. GATT, art. VI(2).
28. Agreement on Subsidies and Countervailing Measures Agreement, *supra* note 21, at part V.
29. *Id.* art. 14.

The domestic industry is defined as "domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products."[30]

The complainant however excludes producers that are related to, or affiliated with, exporters of importers of the project in question or is itself an importer of the product. Those entities are not deserving of relief under WTO law. The complainant must also be a producer of "like products." Hence the focus of the relief is to those industries that wish to participate in the global economy and need protection from unfairly traded goods which are in direct competition with its own products.

A finding of dumping or subsidies however is not determinative of the issue as to whether an anti-dumping or countervailing duty would be imposed on the exported product subject to the investigation. It is the dumping or subsidisation of goods on the international market that causes injury to a local industry in another market producing the same or like goods that is objectionable under the global law. Indeed injurious dumping is inconsistent with the principles on which the WTO was established which was that trade is to be conducted with a view to "raising standards of living ensuring full employment and growing volume of demand."[31] Such injury is also inconsistent with the principles we observed that informed the signing of the GATT 1947 as amended. The impact of dumping on many local industries in small or developing markets can be disastrous if left unchecked. This has been the experience recently in the Caribbean.

A finding of injury is made based on an objective examination of positive evidence of both price effects i.e. the effects the dumped goods has on the prices on the local market, and financial effects, i.e. the effect on the economic performance of the local industry.[32] Price effects: An investigation or price cuts analyzes whether the dumped products undercut the prices of like goods on the local market, caused the suppression and/or depression of local prices of

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30. *See* Anti-Dumping Agreement, *supra* note 14, art. 41.

31. *See* WTO Agreement, pmbl., which indicates that the parties to the Agreement recognized that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with The objective of sustainable development, seeking both to protected and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concurs at different levels of economic development.

32. Anti-Dumping Agreement, *supra* note 14, art. 3.1. A determination of injury for purposes of Article VI of GATT VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the evolve of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products and (b) the consequent impact of these imports on domestic producers of such products.

like products on the local market.[33] In examining economic effects, the investigative authority would also examine the economic performance of the local industry and in so far as a causal link can be made between the dumping of the good and the poor economic performance of the local industry the anti-dumping duty will be imposed. The examination of the impact of dumping on the local industry would involve an analysis of several economic factors, including actual and potential decline in sales, profits, output, market share, productivity, return on investment, cash flow, inventories, employment, wages, growth, and ability to raise capital or investments. Article 3.4 states that "this list is not exhaustive nor can one or several of these factors necessarily give decisive guidance."[34]

Indeed, in working out the principles to determine material injury the Australian Customs Services has declared "an industry which at one point in time is healthy and could shrug off the effects of the presence of dumped products in its market could at another time, weakened by other events, suffer material injury from the same amount and degree of dumping."[35]

The investigative authority may also find that, although the dumping may not have caused material injury, it threatens to cause material injury to the local industry. In making this assessment, the authority would consider principally whether there was a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation, the sufficiently freely disposable or imminent substantial increase in capacity of the exporter indicating the likelihood of substantially increased exports to the importing member's market, whether the imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices and likely to increase the demand for further imports. In *the Final Determination by the Anti-dumping and Subsidies Commission pursuant to section 30 of the Customs Duties (Dumping and Subsidies) Act 1999* in respect of dumped cement originating from Thailand, dumped onto Jamaica, the Commission held that although the dumped cement had not caused material injury to the local industry it threatened to cause material injury on account of the exporter's ability to potentially increase the supply of dumped imports into the Jamaican market. The Commission concluded "there is a likelihood of

33. Anti-Dumping Agreement, supra note 14, art. 3.2. With regard to the effect of the dumped import on prices the investigating authority shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing member or whether the effect of such imports is otherwise to depress prices to a significant degree or print price increases, which otherwise would have occurred to a significant degree. No one or several of these factors can necessarily give decisive guidance.

34. *Id.* arts. 3, 4.

35. Customs Act, 1901, part XVB (Austl.), http://www.customs.gov.au/webdata/resources/files/submission_summary_one1.pdf.

substantially increased dumped imports from Indonesia to the Jamaican market in the near future and that this will affect the domestic industry's ability to supply its product to the market and consequently its viability."

Anti-dumping investigations are an important feature of this "global law." The investigations are triggered only by a dumping margin that is more than two percent (the *de minmis* rule) and a volume of dumping that is more than three percent of the imports of the like product in the importing member (i.e. dumping that is not negligible).[36] The global law, therefore, permits the dumping of goods into another member, even if it causes injury to the local industry, in circumstances where the dumping margin is less than two percent or the volume is less than three percent of the total imports of the good.

B. Relief Available

Both anti-dumping duties, to counteract injurious dumping, and countervailing duties to counteract injurious subsidies, are imposed in addition to the customs duties imposed on imports from the source regardless of the bound rate of the tariff discussed above. Immediately one recognizes these measures as tools to re-create barriers to trade pre-WTO.

The objective of the exercise from the part of the complainant, the local industry, is to secure the imposition of a final anti-dumping or countervailing duty to protect its market from dumping in any form whether it is by way of predatory or long term dumping or subsidisation. It is imposed on a non discriminatory basis on imports of the good from all sources found to be dumped or subsidised and causing injury.[37] For anti-dumping duties the actual amount of the duty would not be more than the assessed dumping margin and in some territories the "lesser duty rule" has been implemented which requires the anti-dumping duty to be no more than is necessary to eliminate the margin of injury.

C. Provisional Duties

This is perhaps the first objective of an anti-dumping investigation or countervailing duty for a complainant. Within the first three months of an anti-dumping or countervailing investigation, the authority is competent to impose a duty based on its preliminary findings on the dumping margins or subsidisation and its assessment of injury. The purpose of this duty is to eliminate any further injury during the course of the investigation.[38]

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36. *See* Anti-Dumping Agreement, *supra* note 14, art. 5.8.

37. *Id.* art. 9.2.

38. *Id.* art. 5.8.

Retroactive duties are rarely imposed. This is the most draconian of the remedies available under the "global law" exposing "guilty" importer to duties levied retroactively on dumped goods entering before the final determination is made and after the date of initiation of the investigation.[39]

These laws are thus focused not on the motives of trade but on the effects of certain strategies on domestic trade. In this way it is different from competition policy and fair-trading legislation.

D. Safeguard Actions

Unlike the actions examined above, the safeguard action is perhaps a weapon of mass destruction sparingly used against competing traders in the global market. A safeguard measure can take the form of either an increase in import tariffs or quota restrictions on the good under investigation imported from all sources. It is only to be applied if it is found than the good is imported into a territory in such increased quantities absolute or relative to domestic production and under such conditions as to cause or threaten to cause serious injury to the domestic industry.[40]

The underlying principle of the safeguard measure is reflected in the Report of the Appellate body in United States—Circular welded carbon quality line pipe:

> Safeguard measures are extraordinary remedies to be taken only in emergency situations. Safeguard measures are remedies imposed in the form of imports restrictions in the absence of any allegation of unfair trade practice. Safeguard measure may be imposed on the fair trade of other WTO members and, by restricting their imports, will prevent those WTO members form enjoying the full befit of trade concessions under the WTO agreement.[41]

These remedies are extremely flexible and timely instruments. Its provisions can be broadly interpreted, and the extent of the protection depends in a large degree on the policy of the government, such as whether it is committed to protecting its manufacturers or to providing the consumers with wider and cheaper alternatives and encouraging FDI. The interests of the developing countries of the Caribbean are theoretically addressed in Article 15:

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39. *Id.* art. 10.

40. Agreement on Safeguards, *supra* note 22, art. 2.1.

41. World Trade Organization Appellate Body, United States, *Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R (Feb. 15, 2002).

> It is recognized that special regard must be given by enveloping country members to the special situation of developing members when considering the application of anti-dumping measures under this agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country members.[42]

This, however, is of little practical assistance because it is vague and ambiguous, and given little efficacy in the WTO. In *EC-Bed Line* the panel ruled that EC violated Article 15 by failing to explore the possibility of "constructive remedies" in the form of price undertakings. Much could be done, however, to improve special and differential treatment such as re-examining the de minimise test and the burden of proof on complainants to prove a case of dumping or subsidization.

V. OPENING THE PANDORA'S BOX

These trade remedy laws have given new life to the protectionists in the WTO. There has been an increase in the use of trade remedy laws directly proportional to the increasing levels of liberalisation of economies. It is now widely recognized that the increased usage of these laws offers protection to local industries but naturally restricts trade and foreign investment.

Since 1995 several WTO members have quickly implemented and updated its trade remedy laws to maximize their use of the international framework of protection set in the WTO. With regard to the anti-dumping remedy in 1995, fifty-six WTO members had implemented and put into practice legislation in conformity with the AD Agreement. By 2002, that number had risen to 94. In fact China, a country the subject of numerous anti-dumping complaints, recently implemented anti-dumping legislation.

The WTO Secretariat reported that in the period July 1st to December 31st 2001 nineteen members initiated 186 anti-dumping investigations against exports from a total of fifty-five different countries or customs territories. During the corresponding period of 2000, eighteen WTO members initiated 187 anti-dumping investigations.[43] During the first six months of 2002, there were 111 anti-dumping investigations initiated by member states. Chinese exports are topping the list of the countries most subject to anti-dumping investigations. In this survey, the good that is subjected to the most anti-dumping investiga-

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42. Anti-Dumping Agreement, *supra* note 14, art. 15.

43. *See* Press Release, WTO News, WTO Members Report on Anti-Dumping Activity (Apr. 22, 2002).

tions was base metals followed by chemicals, and machinery, and electronics sector.

TABLE 1

Anti-dumping investigations initiated globally [44]

Year	1995	1996	1997	1998	1999	2000	2001
No of cases	156	221	242	232	339	251	348

Safeguard investigation initiated globally[45]

Year	1995	1996	1997	1998	1999	2000	2001
No of cases	2	5	3	10	15	26	53

This trend suggests that increasingly trade remedy legislation is becoming a fact of life in international trade. It is a natural corollary to the open market economy and is now the most popular form of protecting local markets. Even the Caribbean nations have signified their intention of not being left behind in the implementation of trade remedy law. It must be noted that in the Western Hemisphere the most active and effective users of trade remedy law are the United States and Canada. In spite of the pillars of the WTO of the "MFN rule" and reciprocity, the use of trade remedies is the newest form of "legitimate" inter-trade warfare. The following chart demonstrates, at least in this region, the nature of this warfare and confirms the view that the anti-dumping trade remedy is viewed as one of the ways to equitably level the playing field among trading nations.

44. R. CRYNBERG & E. TURNER, MULTILATERAL AND REGIONAL TRADE ISSUES FOR DEVELOPING COUNTRIES.

45. *Id.*

ANTI-DUMPING ACTIVITY IN THE WESTERN HEMISPHERE

1995-2001

COUNTRY	MEASURES		INITIATIONS
MEASURES	IMPLEMENTED	AGAINST	AGAINST
USA	192	115	67
Argentina	120	14	8
Canada	67	22	8
Brazil	55	68	51
Mexico	55	29	17
Venezuela	24	6	9
Peru	17	2	++
Colombia	11	6	2
Chile	6	21	11
Trinidad and Tobago	5	3	3
Jamaica	3	++	++
Paraguay	1	++	2
Nicaragua	1	1	++
Guatemala	1	++	++
	1	++	++[46]

VI. Implementation Of International Trade Remedy Law In The Caribbean: Brief Comparative Analysis

From this global perspective, one can analyze how, in terms of procedural and substantive law, Trinidad and Tobago and Jamaica have implemented the global trade remedy law into their local trading landscape and whether they remain effective tools to promote equity in the international trading system. Although Trinidad and Tobago is a more active user of trade remedy law, Jamaica has been the more careful but creative user. In spite of this there are WTO non-compliant provisions and gaps in both countries' legislation, which should be addressed to make it a more viable and effective remedy.

A. Anti-dumping and Countervailing Duty actions:

In Trinidad and Tobago the anti-dumping law is set out in the following legal instruments: the Anti-dumping and Countervailing Duties Act 1992, the Amendment to the Anti-dumping and Countervailing Duties Act 1995, the Anti-dumping and Countervailing Duty Regulations 1996. In Jamaica, the legal

46. WTO secretariat

instruments are the Customs Duties (Dumping and Subsidies) Act 1999 (CDDS Act) 1999 and the Customs Duties (Dumping and Subsidies) (Determination of Fair Market Price, Material Injury and Margin of Dumping) Regulations 1999. Unlike its Trinidad and Tobago counterpart the Jamaican legislation specifically incorporates certain aspects of the Anti-dumping Agreement and in particular Annexure II of the Agreement.[47] In both jurisdictions the legislation repeals the previous customs legislation governing dumping and subsidies, thereby taking the process of determining whether an anti-dumping or countervailing duty is to be imposed away from the Comptroller of Customs.[48]

Instead, both countries vest a special tribunal with authority to determine whether dumping or subsidisation exists and whether there is a causal link between the material injury alleged to be suffered by or threatened to the local industry producing like goods and the subsidisation or dumping. In Jamaica, the tribunal is known as the Anti-dumping and Subsidies Commission (hereinafter referred to as "the Commission").[49] It is an independent Commission. In Trinidad and Tobago the authority is vested with the Minister of Trade and the Anti-dumping Authority. The Anti-dumping Authority (the Authority) has the power to initiate an investigation but thereafter its role is limited to making preliminary and final recommendations to the Minister of Trade. The Minister of Trade is then responsible for the making of the determinations as to the imposition of anti-dumping or countervailing duties. In Trinidad and Tobago, the mix of politics in this legal process is evident. This might perhaps explain the higher usage of the anti-dumping remedy in Trinidad and Tobago than in Jamaica. However, an intricate and involved process such as dumping and subsidy investigations may overwhelm the limited resources of a government

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47. Customs Duties (Dumping and Subsidies) Act, 1999 (Jamaica), http://www.mct.gov.jm/mcst_documents.htm. The long title of both laws is of particular interest: Jamaica "An Act to repeal and replace the Customs Duties (Dumping and Subsidies) Act to establish the Anti-Dumping and Subsidies Commission and for the implementation of Article VI of the General Agreement on Tariffs and Trade for connected matters." *Id.*

48. *See id.* § 36; Republic of Trinidad and Tobago, Act No. 11 (1992), www.sice.oas.org/antidumping/legislation/trinidad/ACT11.asp.

49. Customs Duties (Dumping and Subsidies) Act, 1999 (Jamaica). The Commission is comprised of a chairman and four other members appointed by the Minister. It carries out its investigations independently and makes independent determinations. The Commission is staffed with legal advisers and economic consultants. The Anti-Dumping Authority of Trinidad and Tobago is not as independent. Pursuant to section 16 of the Anti Dumping and Countervailing Duties Act the Minister designates his Permanent Secretary or such other person as he thinks fit "to be the Anita Dumping Authority." Republic of Trinidad and Tabago, Act No. 11, c. 11 (1992). Although the functions of both the Authority and the Commission are essentially the same ("to investigate into the existence, degree and effect of the alleged dumping or grant of subsidies of any goods"), the Authority advised the Minister as to the margin of dumping or the nature of subsidies in relation to goods. *Id.* at part 2. It is the Minister who by section 5 is charged with the responsibility of imposing a duty based upon the recommendations of the Authority. In contrast it is the Commission which makes the finding that the dumping and subsidising of goods has caused or is likely to cause material injury.

Ministry. In any event, both jurisdictions have not gone the way of bifurcating the process, like the United States has done. One body make its findings of dumping as well as injury and causal link. Interestingly in Trinidad and Tobago the anti-dumping or countervailing duty is expressly made a duty of customs for which the Comptroller shall be responsible for the collection of duties whereas an anomaly exists in the Jamaican legislation as no express power is given to the Commission to impose the duty itself.

To date, neither jurisdiction has reported countervailing duty investigations. The comparison that follows, therefore, will focus on anti-dumping investigations. The important phases of an anti-dumping investigation under the respective legislation is the initiation of the investigation, the making of preliminary findings on dumping and injury (the preliminary determination) and the final determination as to whether final anti-dumping or countervailing duties are to be imposed on the goods that are the subject to the investigation (the final determination).

Both these bodies are to be regarded as having their own degree of skill and expertise in trade remedy law. This is an important criterion, especially in matters of appeal or judicial review of their decisions and deference will be made to such a body's findings of fact and it is expected that the same standard of review of specialist tribunal will apply. Article 13 of the Anti-dumping Agreement states that:

> Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination of review in question[50]

In *Harricrete v Minister of Trade*, Myers, J., was of the view that mere "Wednesbury" unreasonableness of a decision of the Authority is not sufficient to warrant an application for judicial review of its decision without resort to the appellate mechanisms set out in the Act. This is an important decision as it recognizes the need to have issues of dumping and material injury to be determined by a specialized tribunal. This highlights the unique nature of the appeal provisions in the Jamaican legislation. It is submitted that the provisions to review a final determination under Section 33 of the CDDS Act, although described as an application for judicial review in fact confers more powers on

50. Anti-Dumping Agreement, *supra* note 14, art. 13.

the Court and is almost appellate in nature.[51] However insofar as both the Tax Appeal Board in Trinidad and Tobago and the Supreme Court in Jamaica are not staffed with the requisite expertise and specialist knowledge in trade remedy and international law the timing may be right for recourse to specialized trade courts such as the CCJ as a possible court of appeal for reviews of final determinations.

B. The Triggering Mechanism

In both pieces of legislation, the onus is on the complainant to establish a case of dumping, injury, and a causal link before triggering the investigative functions of the Commission and Authority. Article 5.6 of the Agreement provides that investigations are initiated on "sufficient evidence" of dumping or subsidization, injury, and causal link. [52] This is in reality an "anti-harassment" provision and is designed to prevent the notification of frivolous and vexatious complaints. The ruling of the Panel in *Softwood Lumber* sets the standard of proof as "evidence that provides a reason to believe that dumping exists and that the local industry is injured as a result of the dumped imports."[53]

It will appear that the standard of proof in Trinidad is higher than in Jamaica. In Jamaica, the Commission must be "satisfied" that a complaint is "properly documented," as defined in the Act.[54] There is evidence that the goods are or have been dumped or subsidized, and it discloses "a reasonable indication" that the dumping or subsidizing of the goods has caused is causing or is likely to cause material injury.[55] In Trinidad and Tobago, however, the Authority must be satisfied that there is "sufficient *prima facie* evidence" of dumping or the giving of a subsidy and of the quantum actionable injury, and a causal link between such imports and the alleged actionable injury. It is submitted that if the Authority is empowered to investigate the existence, degree, and effect of dumping the standard of proof on a complainant cannot be high at the initiation stage. In practice, the Authority applies the test liberally. Also, there is no formal approach to the conduct of the investigation as pertains in Jamaica. A clarification of this threshold test would open the doors to expedited initiations and remedies being made available to the local industry.

Related to this evidential issue is the use of the information available to make determinations where the exporters and producers in the country of export fail to participate in the investigation or where there is conflicting evidence. In

51. *See* Customs Duties (Dumping and Subsidies) Act, 1999, c. 34(1) (Jamaica).

52. *See* Anti-Dumping Agreement, *supra* note 14, art. 5.6.

53. World Trade Organization, Panel Reports, United States, *Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 31, 2004).

54. *See* Anti-Dumping Agreement, *supra* note 14, art. 5.5.

55. *See* Custom Duties (Dumping and Subsidies) Act, § 22(1)(c) (Jamaica).

these cases, the investigating authority is empowered to make adverse inferences against those parties or rely on the information contained in the complaint. To do otherwise would be to reward parties for their failure to comply with the importing country's trade remedy laws.[56] Although Annexure II of the AD agreement sets out in detail the manner in which an authority will rely upon the facts available which is expressly incorporated in the Jamaican legislation. However, the Authority in Trinidad and Tobago appears more willing to make adverse inferences or rely on the complainant's information where exporter's or foreign producers fail to participate in an anti-dumping investigation than the Commission in Jamaica. One of the difficulties the Authority will frequently encounter is the weight to be attached to the Customs invoices and declaration of the exporter or importer in determining export prices. In Jamaica the AD legislation dilutes the significance of invoices and underscores that the dumping determination is an assessment of all the evidence available.[57] However the Authority seems more prepared to ignore invoices than the Commission and act on other evidence available where the exporters fail to corroborate the importers assessment of the export price adequately or at all. The assessment of evidence in a trade remedy case where foreign parties refuse or fail, as they usually do, to participate will continue to be a source of great controversy in the application of these laws in these jurisdictions.

C. The Scope of the Relief Available

In anti-dumping and duty actions, the legislation provides relief to the local industry by the imposition of provisional, final and retroactive duties. The AD Agreement recognizes that there are circumstances in which injury may be incurred by a local industry during an investigation and which would need interim protection by means of a provisional duty.

The power to impose provisional measures is governed by Sections 24 and 25 of the Trinidad and Tobago Act and Section 15 of the CDDS Act.[58] This is as close to interlocutory relief as can be obtained under the legislation. It is an attempt to preserve the status quo by imposing anti-dumping duties during the investigation to prevent further injury to the local industry. It sanitizes the trading environment to allow for further investigations to take place in a neutral trading environment.

The imposition of provisional anti-dumping duties dramatically affects the importer and exporter. Some importers have adopted the strategy of seeking

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56. *See* Anti-Dumping Agreement, *supra* note 14, art. 6.8.

57. *See* Custom Duties (Dumping and Subsidies) Act, c. 19 ("The export price of goods sold to an importer in Jamaica 'notwithstanding any invoice or affidavit to the contrary…").

58. *See* Customs Duties (Dumping and Subsidies) Act, c. 15; Republic of Trinidad and Tobago, Act No. 11, § 12.

judicial review at that stage. In light of the Judicial Review Act 2002 (Trinidad and Tobago) and the recent judgment in HCA 1042 of 2000 *Harricrete Limited v Minister of Trade* to successfully challenge the Minister's decision at that stage the applicant must show exceptional circumstances exist to resort to judicial review rather than exhaust the alternative remedy allowing the investigation ought not to run its course to a final determination.

The present power to impose a provisional duty is only exercisable within 60 days after an investigation has been initiated.[59] However, the Commission is more adept at maintaining this deadline than the Authority in Trinidad. In Trinidad and Tobago all three applications for judicial review of the Minister's preliminary determination in different anti-dumping investigations were challenged. One of the grounds of challenge was the illegality of the Minister's making of his determination beyond the 60-day deadline. In Trinidad and Tobago the Authority has argued that the word "shall" in making its preliminary determination is not mandatory but directory only. There is recent case law to suggest that this view is correct but it has yet to be finally determined in those courts.

It is submitted however that the legislators in both territories must explore ways of providing more meaningful interim relief to the local industry such as in the EC. In the EC there is an "immediate intervention" clause.[60] Through this provision, beleaguered industries or industries comprising total production can petition the investigative bodies to impose provisional duties immediately upon initiating an investigation. These provisions must be exercised with care so as not to expose the authorities to allegations of breaches of WTO obligations.

D. Retroactivity

Anti-dumping and countervailing duties are to be prospectively imposed without discrimination. However, retroactive imposition of duties can occur however where 1) there is a history of dumping causing injury and the importer should or was aware goods dumped and dumping would cause injury; or 2) there were substantial dumped imports in relatively short period of time preclude it from recurring. It is to be imposed on goods entered for home consumption ninety days prior to the preliminary determination.[61]

In some scenarios this restriction blunts the effectiveness of the Act as a trade remedy. Anti-dumping and in these scenarios for small market economies ought to be made retroactive to capture shipments which injured the local industry imported prior to the initiation of the investigation. In the Jamaican

59. *See* Customs Duties (Dumping and Subsidies) Act, c. 15(3).

60. *See* Article 7(5) of the EC; Herbicide from Romania [1979] O.J. L44/8.

61. *See* Customs Duties (Dumping and Subsidies) Act, c. 34(1)(c).

legislation the 90-day period is not restricted by the date of initiation and it is probable that duties may be applied retroactively before the date of initiation of the investigation even though this may not be consistent with Article 10.8 of the Anti-dumping Agreement.

E. Availability of Civil Remedies

There is no right to pursue civil remedies against importers who are found to have dumped goods in circumstance where they knew the goods to have been dumped and/or have a history of dumping in this territory. It is regarded as the basic purpose of the anti-dumping and countervailing duties as not to compensate for past injuries only to stop distortion of competition arising from unfair commercial practices like dumping and subsidization. This premise however is defeated by the very condition which satisfies a retroactive duty assessment. In that scenario the commercial practices of the importer and exporter have crossed the border of being merely unfair to being oppressive. The criteria alone that the "importer was aware that the goods were dumped and that the dumping would cause injury" to the local industry satisfies a tortuous ingredient of conspiracy or trading with the intention to dump to cause injury and thereby obtain a competitive advantage to the detriment of the local producer. This may qualify as an economic tort.[62] It can arguably qualify as a "dishonest practice" under the Protection from Unfair Trade Act.

F. Qualifications

There are however two different qualifications to the relief available under the respective jurisdiction in AD and CD. In Jamaica, Section 11 of the CDDS Act incorporates the "lesser duty rule" stated in Article 9 of the Anti-dumping Agreement.[63] In Trinidad the amount of the anti-dumping duty is no more than the dumping margin. In practice the dumping margin will represent the dumping duty imposed. In Jamaica there is discretion to impose a lesser duty "as is considered adequate to compensation for the injury."[64] It is difficult to foresee a case where an industry, which is complaining of material injury caused by goods dumped at a margin of 90%, will not expect such a duty to be imposed to illuminate the benefits obtained by the importer of such huge price

62. Section 801 of the American Revenue Act of 1916 mandates the imposition of treble damages if it could be proven that foreign producers sold their products in the United States with the intent to destroy or injure a United States industry or retrain its development. 15 U.S.C. § 72 (2004).

63. *See* Anti-Dumping Agreement, *supra* note 14, art. 9.1 (stating, *inter alia*, that "[i]t is desirable that the imposition be permissive in the territory of all Members and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the local domestic industry") These provisions are also incorporated in Article 7(2) and 9(4) of the EC.

64. *See* Custom Duties (Dumping and Subsidies) Act, c. 11(2)(b).

differentials. To do otherwise will allow the margins enjoyed by the importer to still unfairly compete with the local industry. The practice in Jamaica thus far does not appear to be settled. In the four anti-dumping cases determined since 1999, the lesser duty rule was discussed in one but not applied, as the dumping margin was less than the margin of injury.[65] In any event, there are no binding rules in the AD agreement on how injury margins are to be calculated. It is submitted that the power is discretionary and may not be invoked at all in suitable cases.[66]

Secondly, unlike Jamaica, an anti-dumping or countervailing duty will be imposed if it is in "the public interest" in Trinidad and Tobago. Interestingly no express "public interest" requirement exists in the AD Agreement. Like the EC, however, this is a manifestation of the requirement under the AD agreement that duties be permissive even where there is dumping and resulting injury. The practice in the EC is to assume that protective remedies are necessary unless there are submissions made to the contrary. Some of the public interest factors include user interest, importer's interest, maintaining competition on the local market and maintaining and developing technology. In Fluorspar the Commission stated, "The Commission considered that the purpose of anti- dumping duties is in general to stop distortion of competition arising from unfair commercial practices and thus to re-establish open and fair competition on the Community market, which is fundamentally in the Community interest."[67]

To date, the public interest requirement has only been applied in one anti-dumping investigation. However no reasons were provided to refuse to impose a final anti-dumping duty in the public interest although there was a finding of injury caused by dumping.[68]

G. Problems of Enforcement

Although other territories have made guidelines to deal with circumvention of anti-dumping duties, similar guidelines are conspicuously absent in the legislation of both jurisdictions. There is no definition of circumvention. However, the legislations of both jurisdictions describes the process or changes in patterns of trade between one country and another country with the

65. *See* the *Investigation into the Dumping of OPC from Indonesia*, Ref. No. AD-01-2002 (July 2, 2002) [hereinafter *Indonesia Duming Investigation*], http://www.jadsc.gov.jm/adsc/adsc.nsf/f821ed001c66976e85256e270009449e/a706a45d2539a9da05256e5800762004/$FILE/ATT2T16C/Final%20SOR%20CCCL%20FD.pdf. In the dissenting opinion of Mrs. B Morgan the lesser duty analysis was applied. *Id.*

66. *See The Investigation into the Dumping of OPC from China.*

67. Commission Regulation (EEC), 1993 OJ L 226, *Fluorspar from China* (Sep. 1, 1993) (provisional).

68. *See* the *Investigation into the Dumping of Lead Acid Batteries from Thailand.*

predominant or sole purpose by the exporter or importer to circumvent the imposition of the duty and to undermine the remedial effects of the duty.

The review provisions in both Acts are clearly inadequate to deal with issues of circumvention. One example is the 1989 imports of photocopiers for the Ricoh plant in California. In spite of the American point of assembly, the photocopiers were found not to have lost their Japanese origin of manufacture and the Commission of the EC took a decision that photocopiers produced by Ricoh in the United States should denied United States origin. The practical effect was that those imports assembled in the United States were subject to a thirty percent duty applicable to photocopiers originating from Japan. What is noteworthy of this investigation is that it was done on the official initiative and not on the receipt of any complaint form interested parties. This is the example of protectionism at work in EC we too to be competitive must protect our markets.

An important factor emerging from the final determination in the investigation into ("OPC") from Indonesia is the Commission's disapproval of "source switching." "The practice where an importer switches to a new source, subsequently determined to be a dumped source, after anti-dumping measures have been applied against its previous source, is a practice commonly termed as 'source switching' and is not regarded in a positive light by this Commission." Therefore, it is apparent that anti-dumping investigating bodies even in the Caribbean are mindful of the realities of international trade and is committed to the prevention of injurious dumping and the circumvention of its protective measures. With the increasing globalization of the world economy anti circumvention cases would be an unavoidable aspect of investigations and reviews and need to be incorporated in the local legislation.

VII. ENGAGING THE ENEMY: RECENT CASES

In the Caribbean there are several recent trade remedy cases, which raise important issues in international trade:

A. Country of origin

In a globalize economy goods are transhipped and distributed from many different sources as distinct from the country of manufacture.[69] The dispute between prices in the country of origin and the country of export in reference to the cement exports was recently examined in the *AD 01 2000 Final*

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69. *See Anti-Dumping Agreement*, supra note 14, art. 2.5 (providing for a comparison to the price in the country of origin where the products are "merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export").

Determination by the Anti-dumping and Subsidies Commission under section 30 of the Customs Duties (Dumping and Subsidies) Act 1999 (June 11 2001). This was an investigation into the Dumping of Ordinary Portland Grey cement originating from Thailand into Jamaica over the period 1999 to 2000. In that case the Anti-dumping Commission also investigated "indirect shipments" of cement from Thailand which were routed to Jamaica via Trinidad. The Anti-dumping Commission ruled however that the normal value to be utilised was the price of the cement in Trinidad regardless of the country of origin of the cement. The Commission ruled that the cement was "not merely transhipped through Trinidad. The cement entered Trinidad in February 1999. It cleared Trinidad customs and sat in Harricrete's warehouse for, in some cases seven months before being shipped to Jamaica." No doubt the debate as to whether goods are transhipped or exported from one territory to another will feature prominently in future anti-dumping cases.

B. Self initiation- China

After years of experience in Jamaica, signs of a maturing investigation system have been exhibited. The Commission self initiated its own anti-dumping investigation into the dumping of OPC from China. Article 5.6 of the Anti-dumping Agreement provides "[i]f in special circumstances the authorities concerned decide to initiate an investigation (ex officio) they shall proceed only if they have sufficient evidence of dumping, injury and a causal link to justify the initiation of an investigation."[70] This is a power sparingly used as there is little authority on guidelines by the WTO.

Jamaica however recently successfully self initiated this investigation in much the same manner in which a complainant is expected to prove its case. The material that triggered the investigation appeared to have been obtained while the Commission was conducting a safeguard investigation. Regardless of source the Commission demonstrated an ability to act on credible information in the interests of the local industry and in conformity with the objectives of the CDDS Act.

C. Jamaican Safeguards

Jamaica created a new first in trade remedy law in initiating the only safeguard action on imports of cement. At the time of writing this article, the final determination was due to be published by the Commission.

70. Anti-Dumping Agreement, *supra* note 14, at art. 5.6.

D. Inconsistent Approaches in the Caribbean

One can argue that the application of trade remedy law should produce the same results in both territories. However in the most recent investigations conducted and completed in 2002 into the dumping of cement originating from Indonesia into the markets of Jamaica and Trinidad there have been inconsistent results. The Anti-dumping Commission of Jamaica imposed an anti-dumping duty of 9.98% on all cement originating from Indonesia imported into the Jamaican market and on February 2003 the Minister imposed an anti-dumping duty of fifty-four percent on all cement originating from Indonesia imported into the Trinidad market. Both investigations were essentially conducted on similar transactions. It would appear that the essential difference between the two findings was the exercise of the discretion of both authorities to make adverse inferences against non co-operating foreign parties. The decision in Jamaica is presently subject to an application for judicial review by the local industry before the Supreme Court of Jamaica.

The Authority in Trinidad and Tobago was of the view that the dumped imports caused material injury. In Jamaica, the Commission determined that there was a threat of material injury and no actual injury. Both bodies were investigating similar local industries, markets, and similar systems of export. The finding that there was a threat of material injury by the Commission was made after a consideration of three factors. First, the exporter and importer's ability to potentially increase the supply of dumped Indonesian imports into the Jamaican market. The Commission also considered the Exporter and Importer's ability to indirectly affect the local industry's ability to supply its product to the Jamaican market and remain competitive. Finally, any other factors that may be deemed relevant in the circumstances whether specific to the firm's operations or economy wide are prevalent. In this aspect of the investigation, it appears that the Commission has sent a signal to exporters that the more exporters search or are perceived to be searching for new markets to penetrate globally on indiscriminately the more likely will they be susceptible to the imposition of anti-dumping duties (provided of course that the exporter has been found to be dumping the product). It also confirms the international view towards campaigns of long term or short term dumping of cement to other territories as a means of "loading" excess stock.

VII. AREAS FOR REFORM

The TTMA represents many complainants who have utilized the Anti-dumping legislation from 1996 to the present in Trinidad and Tobago. Their complaints of material injury were made against the dumping of goods from countries from as far as China to as close as Venezuela. The goods that were the subject to anti-dumping investigations ranged from polyethylene bags, to

pasta, to batteries, to biscuits, cheese, and cement. Many members however have expressed some degree of exasperation in the use of this legislation. The general concerns to be addressed are delay, enforceability, and scope of remedy.

Key areas of reform that need to be urgently addressed are (1) the effective and uniform use of the best information available; (2) reducing the standard of proof to initiate an investigation; (3) implementing anti circumvention of remedies; and (4) providing for immediate relief mechanisms and imposing retroactive duty impositions beyond the date of initiation.

IX. THE FTAA TRADE REMEDY LAW

Having regard to the fact that some of the active users of trade remedy action are in the West, it is no surprise to learn that trade remedy law is preserved in the FTAA. It must be recognized at the outset that the FTAA differs from the EC which dismantled all internal barriers to trade and substituted trade remedy law in the internal market for competition policy to regulate market forces. Trade remedy law in the EC therefore applies only to non EC states. Dumping theoretically is impossible in a common market. The Messina Conference Report states, "An enterprise can only practice dumping on other markets to the extent to which its own national market is protected. The simultaneous and reciprocal removal of obstacles to trade within the Common Market will tend to eliminate the problem of intra Community dumping automatically."[71]

FTAA trade remedy law is of limited application. It also competes for its viability with conflicting competition policy, which seeks to regulate the internal market rather than restrict trade generally. It is submitted, however, that the competition policy should have more credence in a customs union rather than in a free trade area.

The trade remedy law preserved in the FTAA incorporates Anti-dumping and Countervailing Duty measures and safeguards remedies. In the Draft Chapter on Subsidies, Anti-dumping and Countervailing Measures it would appear that the minimum set of rights under this chapter to enforce the trade remedy is enshrined in the WTO. One version of Article 1.1 provides "[E]xcept as otherwise provided in this Chapter, the Marrakech Agreement Establishing the WTO and any successor agreements, shall govern the rights and obligations of the parties in respect of subsidies and the application of anti-dumping and countervailing duties."[72]

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71. 1956 Messina Conference Report.

72. FTAA – Free Trade Area of the Americas, Draft Agreement, Chapter on Subsidies, Anti-Dumping and Countervailing Duties, Nov. 1, 2002, art. 1.1, FTAA.TNC/w/133/Rev.2.

The trade remedies have been dramatically watered down in the FTAA and if the Caribbean is looking towards these laws as viable means of protecting their local industries either strong negotiation or re-thinking is needed.

(a) First, it is envisaged in the FTAA that anti-dumping and countervailing duties will be phased out "when the free trade area is established and goods circulate among countries of the FTAA fundamentally free of restrictions." This is perhaps the Promised Land to which no one can set any definite time frame.

(b) In the interim, the ability to trigger the anti-dumping or countervailing duty has been made more arduous. This is seen in the material injury determination. Article 3.5, as presently framed, states as follows:

> In order to determine the existence of material injury there shall normally be a requirement that the domestic industry incur losses during the determined period. The determination of material injury in the presence of positive earnings may be an exception provided that it is justified in terms of special circumstances.[73]

This eliminates or makes it difficult for an industry, which distinguishes declining profitability and making losses, to make a case that it is suffering material injury. Their case will now be focused on proving threat of material injury or will not be able to cross the bar at all.

Furthermore the onus of proof on the complainant before initiation is greater than previously existed under the Agreement. Previously,

> [i]In addition to the provisions of Article 3.5 of the WTO Anti-dumping Agreement and Article 15.5 of the WTO agreement on Subsidies and Countervailing Measures before anti-dumping or countervailing duties can be imposed proof shall be submitted that the dumped or subsidized imports constitute the principal or dominant cause of the injury caused to the domestic industry.[74]

This is expressly stated to be a "WTO plus" requirement and eliminates the "causal link" determination under the Agreement. Additionally, for a positive injury determination to be made the exporter must be found to have a substantial market power in the country of origin or receive a subsidy which enables the practice of dumping.[75] This certainly eliminates the possibility of

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73. *Id.* art. 3.5.

74. *Id.* art. 3.7.

75. *Id.*

The investigating authority shall determine that the dumped exports cause or threaten to cause injury if the exporters under investigation as a whole have substantial market power in the country of origin or

successfully bringing actions against rogue exporters, middlemen and distress shipments.

The requirement to produce strong evidence before an authority initiates is also expressed in the requirement to impose a provisional measure in Article 7.1:

> With regard to article 7.1 of the WTO Anti-dumping Agreement a preliminary affirmative determination shall be based on evidence establishing a strong *prima facie* case and that there is a substantial issue to be investigated. In principle preliminary measures shall not be imposed unless authorities judge that the consequent injury to a domestic industry is not adequately compensable unless interim relief is granted and that the balance of interests favors the granting of the relief sought. In exceptional cases where the threat of consequent injury affect a critical growth industry in an FTAA small economy special flexibility shall be accorded.[76]

(c) It is now made mandatory under Article 9.1 of the FTAA to apply the "lesser duty rule." However, the exception for developing countries under Article 12.1 appears to be illusory and of no practical effect.

(d) Article 5 sets firm time limits for the completion of an investigation of eighteen months. This is consistent with the Anti-dumping Agreement. However in Article 5.6 should these time limits be exceeded the investigation will be automatically terminated. Trinidad and Tobago and any other country with limited resources to conduct investigations will do well to take note of this provision.

(e) Although the *de minimis* margin has been increased it is submitted that some qualification should be made for the developing countries.[77]

(f) It is noted that the FTAA provides for its own mechanisms for Dispute Settlement. However, it is debatable whether these procedures will have any binding effect. Article 14.11 provides that "[w]hen a dispute settlement mechanism provided for under this Agreement determines that an anti-dumping or countervailing measure is incompatible with this Chapter, it may recommend to the importing Party the way and time in which it shall bring its measure into conformity with the Agreement."

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receive a subsidy which enables the practice of dumping. The exporters as a whole will be considered to have substantial market power if they have the capacity to fix the sale price and displace their competitors in the market of origin.

76. *Id.* art. 7.1

77. *Id.* art. 5.5; *see id.* art. 12.3.

In such an environment it is still open to the more powerful economies to resist rulings arrived through the dispute settlement procedure, an option which has not to date been contemplated by smaller territories.

X. FINDING HARMONY WITH CSME:

The establishment of a single market and economy by the Revised Treaty of Chaguaramas seeks, in terms of market integration, to incorporate the previous arrangement of a common external tariff but with a move to eliminate impediments to the free movement of goods in the region. Notwithstanding this, it has preserved supporting mechanisms to protect the local industry in laws in relation to subsidies and anti-dumping. Draft legislation is found in Chapters 3, 4 and 5 in Part 5 of the Treaty. It is very likely those Caribbean legislators will face a tough task in harmonising these laws with FTAA requirements in their present form. For instance the Anti-dumping Law of the CSME already sets up obligations, which are inconsistent with FTAA requirements. It is interesting to note that Part 5 of the Revised Treaty of Chaguaramas does not expressly recognize the Anti-dumping Agreement as setting out the minimum bundle of rights in regional Anti-dumping Law. It is difficult to imagine that the CSME will not be WTO complaint. However, its provisions do walk a thin line between strict compliance with WTO and breach of international obligations in certain aspects.

Part 5 sets up a different system altogether for the enforcement of this trade remedy law by allowing investigations to be conducted by both the investigating authority of a member state and COTED. The initiation of an anti-dumping investigation will consist of two phases. First, the local investigating authority may initiate a "preliminary investigation" to verify the existence of dumped imports and injury caused or the existence of a serious threat of injury as the case by a domestic industry.[78] It is noted that in using the term "preliminary investigation" the framers of this anti-dumping law must take cognizance of Article 5.5 of the Anti-dumping Agreement which states that

78. In Article 12, a member state may take action against dumped imports if such imports cause injury or pose a serious threat of injury to a domestic industry. There is no definition of what constitutes a "serious" threat of injury and it seems to create a higher threshold for the domestic industry in its complaint. Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the Caricom Single Market and Economy, July 5, 2001, art. 125, Caribbean Community (CARICOM) Secretariat [hereinafter Revised Treaty of Chaguaramas], http://www.caricom.org/archives/revisedtreaty.pdf. However, Article 127 defines "injury" to mean material injury to a domestic industry and "threat of material injury to a domestic industry" or material retardation of the establishment of such an industry. *Id.* art. 127. This is the definition presently used in the TT legislation. It would appear that the requirement to prove "serious" threat of injury is an alternative requirement to imposing anti-dumping duties. It can be argued on a practical level to be an unnecessary requirement unless there is a specific remedy to be imposed if a complainant demonstrates "serious threat of injury."

> The Authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. However after receipt of a properly documented application and before proceeding to initiate an investigation the authorities shall notify the government of the exporting Member concerned.[79]

While this is a procedural requirement, a breach of this Article is deemed to be a breach of the obligations under the WTO and can jeopardize an investigation. In the Panel Report on Guatemala the serious nature of this Article was examined and explained.

The use of the word "preliminary" must be a matter of semantics, not meant to convey as a matter of substantive law that the Authority has not yet decided to initiate a full investigation. The Authority would have at that time already satisfied itself that there is a properly documented complaint and has in fact initiated an investigation which is two pronged in nature. The first prong, the preliminary investigation, leads to preliminary orders and findings. The second prong, the "investigation," leads to the final order and findings.

This interpretation would explain Article 129.4 and 129.5. The decision to initiate a preliminary investigation is made public by notice. If the investigation provides sufficient evidence of dumping and serious injury or injury to a domestic industry, the local authority may submit to the appropriate authority of the exporting Member State a request for consultations. The request shall be forwarded to COTED. The purpose of this request is to establish the fact that dumping has occurred, and injury has been caused or threatened, and that there is a causal link between the injury and the dumping. This is an innovative step. It allows the local authority the ability to more effectively acquire information on dumping such as normal values, export prices, and sales information. The local authority is also able to acquire information to affect a better comparison of sales, identity of the producer and their individual dumping margins. The issue of a causal link should still be an issue to be determined in the round, not solely with consultation with a member state. A member state can only provide information, such as volume, and frequency of past and future exports, plans for acquisition, and investment in the local market. Beyond this, it cannot meaningfully add to the effect of dumping on the local industries' prices and financial performance.

There must also be provision for the individual complainant to participate in the consultations. At the very least, the complainant should be permitted to respond to the submissions made by the member states. The request for

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79. *See* Anti-Dumping Agreement, *supra* note 14, art. 5.5.

consultations provides the respondent member state to participate in the investigation at an early stage, and assist the local authority in its deliberations. The powerful motivating factor to do this is the local investigating body's authority to impose provisional anti-dumping duties against the member states and refer the request for investigation to COTED if the state fails to "make satisfactory efforts to afford consultations, to provide requested information or otherwise unreasonably impede an investigation."[80]

It is at this state that COTED assumes the responsibility for the further conduct of the anti-dumping investigation and making final findings on injury and the anti-dumping measure to be imposed against a member state. Unlike the Anti Dumping agreement, the duration of the final anti dumping measure is in the discretion of COTED. COTED also has the discretion to authorize the imposition of anti-dumping measures if it is satisfied of the existence of dumping and "if the parties alleged to be responsible for dumped imports refuse to co-operate within the time specified so as to frustrate or otherwise impede an investigation." This measure is to ensure compliance by exporters with the anti-dumping investigation. The final measure itself will be "to the extent necessary to eliminate the margin of dumping."[81] Neither the lesser duty rule nor public interest requirement is authorized in this regime.

The determination of whether injury exists is different from that contemplated by the FTAA. In this regard, it is more in line with the WTO. It remains to be seen whether the early involvement by a member state to actually engage in consultations may have the effect of minimizing the desire of a member state to take action regardless of the position of the local industry. Indeed Article 133.3(f) will dampen the resolve of local authorities to take action against a member state. Article 133.3(f) provides:

> If however the investigations reveal that injury was not caused by dumped imports as alleged, but the provisional measures have materially retarded exports of the Member State complained against, COTED shall, upon application by such State, assess the effects of the provisionally applied duties and determine the nature and extent of compensation which is warranted and require the Member State applying provisional measures to withdraw the measure and pay compensation in accordance with its assessment.[82]

There is a conflict to the extent that the FTAA is making it more onerous on complainants to make a case for the imposition of anti-dumping duties, the CSME is attempting to provide more powers to investigating authorities, and

80. Revised Treaty of Chaguaramas, *supra* note 78, art. 129.9.

81. *Id.* art. 133.3(a).

82. *Id.* art. 133.3(f).

COTED to impose anti-dumping duties. Under the CSME, COTED will be the body entrusted with the power to investigate allegations of dumping and injury made by a member of CSME against a non-member state. This provides the local industry in the CSME a more advantageous position against other FTAA members. The advantage comes from having the technical expertise and resources of COTED at its disposal rather than its own investigative body established under its municipal laws to undertake the investigation. Furthermore, members of CSME, other than Jamaica and Trinidad, with no or little experience in anti-dumping and trade remedy law will benefit from this provision and provide an adequate interim safety net for market protection against unfairly traded goods from the other FTAA members.

XI. FUTURE OF TRADE REMEDY LAW FOR THE CARIBBEAN IN FTAA&CSME

Reactionary protective trade remedies form part of the framework of the new trading landscape. The establishment of a Free Trade Area will not necessarily decrease the level of trade remedy activity. A useful example is the use of the trade remedy action in particular AD actions within Latin American countries. The trade remedy action was frequently employed between Argentina and Brazil within Mercusor. NAFTA also allows the continued use of anti-dumping and countervailing duty actions by members against their free trade partners. Although the principle behind a FTA is to integrate markets so that domestic and foreign markets are considered one and the same with equal treatment, unlike the European Free Association, the European Union and the Australian New Zealand Closer Economic Relations Trade agreement, both the FTAA and the CSME hold out the AD and CV actions perhaps as an olive branch to those territories suspicious of the benefits of free trade.

Presently in the FTAA, Chile and the Andean Community are the only two groups vocal on the issue of the interaction of trade and competition policy. One of the compromises that may emerge is the inclusion of public interest clauses to balance the competing interest of the consumer and the manufacturer.

For industries with multinational production experience the FTAA may prove to be a stomping ground through tariff jumping FDI. The example of Kodak is the often quoted example that demonstrates this. In August 1993 Eastman Kodak Company filed a US AD petition absent United States imports of photographic paper originating form plants owned by Fuji Photo Film (Fuji) in Japan and the Netherlands. By October 1993, a preliminary decision in the case found dumping margins of over 300% against Fuji plants and ruled that the imports were injuring the domestic industry. Fuji soon established a photographic paper manufacturing plant in the United States. The plan was operational by March 1996. Less than a year after its United States plant

opening, Fuji's share of the United States photographic paper market had surpassed the market share of Fuji had enjoyed before the United States AD petition was filed by Kodak.

The use of trade remedy law will therefore be the natural reflex of countries entering the FTAA. It is anticipated that their use may decline with the increased patronage of the concept of competition policy. The use of trade remedies may also decline through FDI when members realize that an overworked trade remedy agenda may ultimately cause the collapse of a FTA.

XII. CONCLUSION

Trade remedy laws may not be intended as a feature of the future FTAA landscape. However, until we reach the "Promised Land" of completely free trade, FTAA trade remedy mechanisms will feature prominently as one of the useful tools of the Caribbean to regulate trade and investment. In stark contrast to the EU, the FTAA and CSME cannot truly be seen as a common market by maintaining this resort to protectionist measures against member states. It is predicted that the initial reaction to the FTAA would be the creative use of the existing trade remedies to protect existing markets for local industries to deal with internal competitive forces and external competitors. Trade remedy actions may spark friction among the trading partners in the region but this is a small price to pay for maintaining equity in international trade.

Until we arrive at the "Promised Land," trade remedy law must remain a tool in the Caribbean's competitive armory. Perhaps the globalization zealots may even recognize the need to confer real benefits to smaller territories if they are to participate in the FTAA.