COMMODITY TRADING, RULE AND DISPUTATION: THE CASE OF CARIBBEAN SUGAR QUOTAS

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Throughout Caribbean history, arrangements for the sale of goods have been a prime determinant of regional welfare. Sometimes, in the elucidation of these arrangements the Caribbean had a passive involvement; at other times, it played a more central role. Whatever the case though, the rules of exchange were always subject to interpretation and the resulting disputation always likely to introduce an element of risk and uncertainty, to put the Caribbean on the defensive and to increase its vulnerability. This paper attempts to demonstrate this tendency by an examination of two issues affecting Caribbean sugar, one in the US and the other in the EU.

The American question itself is composed of two parts: firstly, the commitment given by Mexico in a side-letter on the eve of its accession to NAFTA which purported to limit its entry to the US sugar market; and secondly, attempts from across the Canadian border to circumvent the system of fees, quota and other restrictions to garner a share of the premium available on the US market through the trade in so-called 'stuffed molasses'. These matters have an impact on the preservation of levels of access for the Caribbean as well as other traditional offshore suppliers. The disputation, which came to embrace a yet to be settled WTO antidumping case on high fructose corn syrup, a NAFTA panel on the side-letter, as well as a continuing US Customs case on molasses, reveals how shifting political and other alignments can imperil Caribbean prospects. The EU question concerns the so-called EBA (everything but arms) initiative released on 20 September 2000 by the European Commissioner for Trade, a proposal to grant duty free and quota free access to the EU market for all products but arms originating from the LDCs. This pits Caribbean countries against their partners in the ACP and puts them in the uncomfortable situation of having to appear to be stalling an initiative, arguably for the benefit of the poorest countries. Nevertheless, coming at a time when the ink is barely dry on the

ACP/EU Partnership Agreement signed in June 2000 in Cotonou, this proposal from the EU demonstrates the treadmill quality of trade negotiations, the slippery ground underfoot, and the recurring effort to preserve positions supposedly won at the bargaining table. These issues provide a salutary lesson for Caribbean negotiators, to keep an eye on text and meaning, but also to anticipate likely disputes and to plan for their resolution.

1. THE US MARKET ISSUE

The details of the US sugar program are well documented and need not concern us here. The salient point is that it is designed to promote the national interest of the United States. Thus, access to the US market has been used as a foreign policy tool, and in the domestic sphere, the sugar program operates to strengthen the rural economy and to buttress US agriculture. The program itself inevitably has its supporters and detractors, and while both sides can usually manage to couch their arguments in ideological or even policy terms, this ordinarily fails to mask the heavy element of self-interest that is involved. In this situation, the twists and turns that have been observed over time merely mark the balance of influence at any given moment.

In 1990, after a successful GATT challenge by Australia, the US instituted a tariff rate quota, allocated on a country-by-country basis, with the continued objectives of regulating the volume of sugar imports to maintain domestic prices at levels that prevent forfeiture of government loans and of providing traditional suppliers with a level of access required by US international obligations. The entry of Mexico to NAFTA threatened to disrupt the carefully constructed bases of the US sugar program. Consequently, in the negotiations on Mexican accession, various interest groups sought to impose limits of one kind or another on the movement of Mexican sugar. These were crystallized in a 'side-letter' purportedly delivered by Mexico at the eleventh hour. US administration spokesmen maintain that without the conditions contained in that document, the entry of Mexico to NAFTA would not have been approved.

The conditions included a phased timetable for Mexican entry, allowing for imports into the US of 250,000 metric tons of sugar by quota year 2001 (with unlimited access by 2008.) This was further conditional on the deliveries being judged to comprise Mexico's exportable surplus production. At the time of the negotiations, Caribbean sugar producers, like other off shore suppliers to the US market, were apprehensive that unlimited Mexican access would have destroyed their own share of the US market, or would have reduced to non-remunerative levels the available preference premium. Thus, there was a sense of relief when the 'side-letter' was concluded.

That relief would dissipate in short order. It was not long before Mexico, chaffing under the restrictions, began to argue that the letter was invalid. Various suggestions were put forward: that it was not an official document, that it was merely a fax, that in any case it had not been signed by the competent authority, and that it was not included in the bundle of text when the legislature in Mexico ratified the NAFTA treaty. Further, even if the side letter was admitted, Mexico claimed that it was flawed, for there had been no agreement on the role of corn fructose in the formula to be used to calculate Mexico's export surplus and that in the absence of agreed clarification, the text of NAFTA, without more, was to prevail. Given the political importance of sugar in Mexico, it was not surprising that interventions were made at the highest levels. However, the US agencies involved – USTR, State and USDA – remained resolute in their stand that a deal was a deal, and that Mexico should live up to its side of the bargain.

Nobody expected however that Mexican production would have increased as quickly as it apparently did. There had always been some concern that Mexico could have achieved 'net exporter status' by substituting HFCS for cane sugar in its domestic soft drinks industry, but when the broader picture is considered, it does seem that there was a substantial amount of new investment after 1995 and that this was fuelled by political support and market possibilities. With hindsight, it might seem that Mexico was determined in sugar to play the free trade game for all that it was worth. There are difficulties in getting to the bottom of the Mexican statistics, and the USTR, citing their own calculations, announced in September 2000 that it was limiting Mexico to 105,000 tons, which it thought to be their true exportable surplus.

For the Caribbean, however, a key question was whether Mexican access would be accommodated out of, or above, the minimum level of 1,117,195 metric tons to which the US is committed under the Uruguay Round Agreement. Mexico had raised the ante by imposing in June 1997 anti-dumping duties on HFCS from the US, and the whole issue was further complicated by prevailing low world market sugar prices. The US domestic industry had made common cause with offshore producers in seeking to limit Mexican access, but, since their first concern was to preserve prices, they were more anxious to keep imports to a minimum than to worry about where it was coming from. In this situation, the sugar industries of the CBI group of countries had to resort to vigorous lobbying and other efforts to preserve their quotas.

These efforts were grounded on the fact that the CBI industries supplied about 65% of US sugar imports under the TRQ, and that as traditional suppliers, they had played this role for decades. It was stressed that the principle of non-discriminatory access provided in GATT Article XIII required that increased exports from Mexico pursuant to NAFTA not result in diminished access by traditional quota holders. Moreover, while the US was entitled to pursue a free trade arrangement with Mexico, GATT Article XXIV authorized such arrangements only to the extent that they did not erect barriers to the trade of other parties. There was an implied threat of pursuing rights under the WTO if traditional access was circumvented or diminished, though it is difficult to say how much that weighed in the bargain. In any event, when the USDA announced the quotas for fiscal year 2001, the amount allocated to Mexico was not taken out of the bound minimum.

The dispute over the side letter has been referred to a NAFTA dispute panel. Whether this is merely a tactical or a substantive claim on Mexico's part is a matter of controversy. One argument is that the real intention is to gain some leverage in the WTO case brought by the US against Mexico on the imposition of anti-dumping duties against HFCS. In that case Jamaica (and Mauritius) had reserved their third party rights, and had argued that the anti-dumping duties were themselves imposed by Mexico to gain some leverage in pressing for sugar access. Whichever way one looks at it, all the issues are interrelated, and show how dispute itself has become a mechanism for furthering trading policies.

This is demonstrated too in the molasses issue, which basically represents the latest in a line of attempts, this time by a company called Heartland By-Products Inc, to circumvent US border barriers. For example, in the early 1980s there was a rapid growth in imports of certain sugar-based blends and other mixtures from Canada that were not covered by the sugar quota. This resulted in emergency action to stop the entry of the blends, and later, in 1984, to a US Customs ruling that certain blends were to be considered 'commingled' merchandise and classifiable on the basis of their individual components, which made them subject to the applicable quota restraints. Other blends which had a "valid commercial identity" and which were "actually used in commerce in the US, whether as consumer products or for further manufacturing in the same form in which" they entered were exempt from treatment under the commingled products classification. Exploiting what might be considered the loopholes in the classification exercise, Heartland constructed an artificial product, stuffed molasses, which it initially persuaded US Customs to classify under a particular sub-heading that made it exempt from the TRQ for sugar. Vigorous lobbying followed, and Customs was persuaded that it had erred, and that the stuffed molasses had no valid commercial identity except for its unstuffing and hence for the extraction of sugar in the US. Predictably, Heartland went to the Court of International Trade, and perhaps not so predictably, persuaded a judge that Customs had really erred when it overturned its initial ruling. The matter is now in the US Court of Appeals for the Federal Circuit. What is at issue at the moment is the entry into the US market of about 100,000 tons of sugar in the laced molasses, though depending on how the Court eventually decides, this could be but the trickle before the deluge. It is just as well that it was announced on 4 October, 2000 that forfeitures to the US government amounted to one million short tons, or about 12.2% of US domestic sugar production for the fiscal year 2000. The government now has the headache of deciding what to do with this inventory, but already spokesmen for the US domestics have begun to change their rallying cry from being 'no cost' to being 'least cost' to the Budget.

2. THE EU MARKET ISSUE

This concerns the proposal dated 20 September 2000 from the European Commissioner for Trade and approved by the College of Commissioners on 27 September in the form of an EBA (everything but arms) initiative to accelerate duty- and quota-free access to EU markets for all products from all LDCs ahead of the timetable envisaged at June 2000 in the Cotonou accord between the EU and the ACP. Though that accord had supported improved access for the ACP LDCs by 2005, it was written to exclude sensitive agricultural products with the qualifying phrase in the Joint Declaration on Market Access of 'essentially all.' Moreover, the Cotonou agreement contemplated prior consultation and impact assessment.

If the EBA were implemented, sugar would be phased in, starting in January 2001, in annual stages of 20%, 50% and 80% reductions with full duty- and quota-free access achieved by 2004. The focus of the EBA proposal appears to be on sugar (and rice and bananas) since for 99% of LDC trade flows to EU markets, the LDCs already enjoy duty- and quota-free access.

Without tonnage restriction the potential quantity of extra sugar supply to the EU would destabilize minimum support prices on the internal EU market and hence undermine the price advantage of preferential ACP access. The first casualty would be the Special Preferential Sugar quotas (of about 75,000 tons for SAC industries in the English-speaking Caribbean). The more important Sugar Protocol exports quantities are part of a mutual commitment, but the price would be destabilized in short order. Although the LDCs are globally net importers of sugar, the potential for LDC exports to the EU is in the region of two million tones of raw and white sugar.

Whichever way one looks at it, the EBA proposal puts the entire future of the Caribbean sugar industry in immediate jeopardy. It introduces a major element of risk and uncertainty at precisely the time when SAC industries are engaged in attempting to prepare for the competition which is likely from developments in the WTO, and in attempting to devise policies applicable to the regional sugar market. Moreover, the proposal puts the stability ordinarily provided by long-term contracts with European refiners in peril. This is to say nothing about the likely effect on ACP solidarity, given the fact that five current signatories to the Sugar Protocol are themselves LDCs (Malawi, Zambia, Uganda, Madagascar and Tanzania). Any undermining of ACP solidarity would make united ACP action on sugar, which has proved so useful in the past, almost impossible to achieve in the future.

The EBA proposal not only cuts across the explicit assurances in Cotonou but also the proposals for the reform of the EU sugar regime. It destroys any possibility of achieving a cohesive sugar policy. The GSP regulations, which EBA seeks to amend, do contain provisions for safeguard measures in the event of serious disruption to the EU market, but even if it were possible to apply safeguard measures against LDC sugar, the damage would already have been done to SAC industries and to the EU refiners. The intended beneficiaries – the poor in the LDCs – will in all probability not in fact be the ones to benefit. Ultimately, those who will really gain are likely to be the large world market sugar exporters such as Brazil and Australia, investors in sugar producing assets, and certain sugar traders.

In presenting this proposal, the EU obviously hoped to proceed with speed and so to present the ACP with a *fait accompli*. In fact, Trade Commission staff confirmed to this writer that speed was necessary to prevent lobbies from consolidating their opposition. The EU scheduled a meeting in Gabon with ACP LDCs on 13 November 2000, apparently hoping to secure an endorsement at this time of the EBA proposal. They will also hope to sell the idea to the non-LDC ACP that they have nothing to fear, that this is the start of a multilateral initiative, not just an EU one, and that market access was one thing, but effective market access was an altogether different thing. Non-trade concerns, such as health as well as supply-side constraints in the LDC, they might argue, would mean that the effects which the Caribbean anticipate might be longer in coming.

Of course, all of this is cold comfort, and not commensurate with the Cotonou assurances. Indeed, it appears that two major elements of Cotonou are being interpreted in ways that are troublesome: consultation, and impact assessment. Trade Commission staff said that before the EU Council had made a decision, there could be no consultation, since they could not be sure what would come out of Council. And they claimed that there could be no impact assessment before there was an impact, or it would be merely a theoretical exercise. Neither of these interpretations can be countenanced. Together, they show how it is one thing to prevail at the bargaining table, but another to prepare for the endgame that is always around the corner.

At the time of writing, there is no certainty about how any of the matters discussed here will be resolved. What is certain, though, is that the world of global trading plays the Caribbean like an accordion, now expanding to show the possibilities, but at other times moving in for the squeeze. The EBA initiative comes hard on the heels of the continuing banana wrangle, and measures to cripple offshore financial institutions located in the Caribbean. What is won on the swings is always subject to being lost on the roundabout.