Implementation of WTO Commitments in the Caribbean Community

CARICOM/IDB Project

REPORT ON COMPLIANCE WITH THE WTO AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES (TRIMs) IN CARICOM STATES

Consultant: Anthony Halliday

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Ramesh Chaitoo
Lead Consultant
Centre for Trade Policy and Law
Carleton University
Ottawa, Canada

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LIST OF ACRONYMS

ASCM	Agreement on Subsidies and Countervailing Measures
DSM	Dispute Settlement Mechanism
EIEA	Export Industry Encouragement Act (EIEA)
FTAA	Free Trade Area of the Americas
GATT	General Agreement on Tariffs and Trade
IADB	Inter-American Development Bank
IBRD	International Bank for Reconstruction and Development (World Bank)
IIA	Industrial Incentives Act
LVA	Local Value Added
TRIMs	Agreement on Trade Related Investment Measures
TPRM	Trade Policy Review Mechanism
UNDP	United Nations Development Program
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

EXECUTIVE SUMMARY

1. Background

This report examines the compliance of CARICOM countries with the WTO *Agreement on Trade Related Investment Measures* (TRIMs) and related provisions in the WTO *Agreement on Subsidies and Countervailing Measures* (the ASCM).

It is a major premise of this report that to the extent that both the TRIMs and ASCM Agreements deal with and prohibit measures that promote the use of domestic products as inputs, their obligations overlap. The TRIMs prohibition is broader in scope, embracing measures falling outside the definition of subsidy in the ASCM. But measures maintained by governments that are relevant to the ASCM prohibition on content subsidies will also be relevant to the TRIMs Agreement. Violations of the ASCM prohibition could also be considered a violation of the TRIMs Agreement by the WTO.

In the CARICOM region, virtually all measures examined in this survey fall into the category of fiscal incentives to investors conditioned on "local value added" (LVA) and are pertinent to both TRIMs and ASCM obligations. Compliance assessments are made jointly for the two Agreements. Moreover, because of commonalities in the structure of the two Agreements in terms of "transitions" for developing countries and notifications, options for future implementation obligations are similar.

2. Definitions

(a) "TRIM"

The terms "investment measure" is not explicitly defined. However, from the review of notifications and jurisprudence it is evident that the term is deliberately intended to be very broadly defined. It seemingly would encompass any government measure that determines whether a private investor will make an investment and the form that such an investment would take. Examples would include measures by governments in relation to:

- Fiscal incentives available to investors in the form of reduced direct or indirect taxes;
- Approval of foreign investment, both "greenfield" and takeovers;
- Discretionary access to lands;
- Discretionary access to scarce resources both physical (forests, minerals, restricted imports) and financial (foreign exchange); and
- Discretionary enforcement of regulations, including environmental and labour standards.

An investment measure constitutes a prohibited "TRIM" when the approval of an investment or an "advantage" for the investor is conditional upon fulfilment of trade-distorting performance requirements that promote use by the investor of domestic products over imports in a manner that conflicts with GATT rules contained in the following:

- Article XI:1 which bans the use of measures other than the customs tariff to restrict imports; and
- Article III:4 which bans the use of internal regulations to provide better treatment for local products than for imports.

Thus the prohibition contained in the TRIMs Agreement is circuitous and depends on an interpretation of the scope of the GATT Articles themselves.

(b) Prohibited Subsidies

For the purposes of the ASCM, the term "subsidy" is well defined. Any form of "financial contribution" that confers a benefit on a specific industry or company is considered a "subsidy". Such subsidies are prohibited if they are conditioned on either:

- export performance, or
- use of local products as inputs.

Under the ASCM, prohibited subsidies are deemed to be "specific".

This report addresses only the second prohibition. The status of export subsidies in the CARICOM region is examined in a separate project report on trade remedies.

3. Obligations, Transitions and Notifications

Under the TRIMs Agreement, Members are obliged: (i) not to introduce any new TRIM; (ii) notify, by April 1995, any existing TRIM.

Under the Agreement's transition arrangements, a developing country notifying a TRIM in 1995 was entitled to maintain that TRIM until 2000 and, with the assent of the WTO, beyond that date.

The ASCM prohibits subsidies that are conditioned on "the use of domestic over imported goods". In accordance with the ASCM's transition arrangements, this prohibition did not apply to developing country Members for a period of **five** years (i.e. until January 1, 2000). Thus, the five year "transition" for developing countries with respect to the removal of notified TRIMs and prohibited "local content" subsidies is the same. However, unlike TRIMs, the ASCM provides for no extension of the five year transition.

Notification of a TRIM is tantamount to accepting that a prohibited measure is being maintained and that the measure will eventually have to be removed. The ASCM also requires notification of subsidies but, in contrast to TRIMs, there is explicit recognition in the Agreement that notification does not prejudge the legal status, effects or nature of the measure notified.

4. Notifications by CARICOM Members

Only one CARICOM country (Barbados) notified a TRIM that was discontinued before the expiry of the five-year transition period for developing countries.

Until recently, notifications under the ASCM by CARICOM Members were sparse. However, in 2002 there has been a spate of notifications by CARICOM and other developing countries in response to developments in the WTO:

- The transition period for the maintenance of **export** subsidies by developing countries expires in December 2002. However, extensions of transition may be sought.

- The Doha Ministerial Meeting agreed to procedures whereby developing countries maintaining **export** subsidies could seek extensions.

Under the new procedures approved at Doha, ten CARICOM members have notified subsidies falling under the ASCM. (See Annex III to this report). Of relevance to this study, eight of the notifications covered fiscal incentives.

5. Prevalence of Fiscal Incentives in CARICOM

Fiscal incentives are a feature of investment promotion policy throughout the region. Incentives are available for investors, foreign and domestic, in all countries in the region.

The English-speaking countries in CARICOM have "**Fiscal Incentive Acts**" that are remarkably similar in content, date from a same period (the early to mid 1970s) and clearly reflects a common policy genesis. Eligibility for fiscal incentives is usually, but not invariably, **conditioned on achievement of specified levels of domestic content** ("Local Value Added" (LVA)); the higher the LVA the more valuable the incentive is to the investor.

6. Basis for Assessing Compliance

For the purposes of this review, compliance assessments are based mainly on the **plain language meaning** of the relevant texts of TRIMs and ASCM, reinforced by an examination of GATT and WTO jurisprudence. On the basis of a plain language analysis, and with reference to the available jurisprudence, the consultant is reasonably satisfied that the compliance assessment of the report accurately reflects the WTO legal status of the measures reviewed. It is important, however, to emphasise that alternative assessments might be made and that ultimately only WTO Dispute Settlement proceedings involving a Panel, in a detailed examination of the law and its application, can make a definitive ruling on compliance.

Subject to this caveat, the following summarizes the basis for the finding of non-compliance of *Fiscal Incentives Acts.*

is this related to 1973 Incentives Agreement?

- A remission of tax, direct and/or indirect, related to an investment, confers a beneficial "financial contribution" and would be considered a subsidy under the ASCM and an "advantage" under the TRIMs.

- To the extent that such financial contributions or "advantages" are conditioned upon achievement of explicit or implicit LVA, the measure would likely be found to violate GATT Articles III and XI and thus be considered an illegal TRIM as well as a subsidy prohibited by Article 3(1)(b) of the ASCM.

- CARICOM Members are developing countries and as such were eligible to take advantage of the five-year transition periods in both Agreements, extendable in the case of TRIMs with the approval of the WTO.

- In the case of the TRIMs Agreement, the exercise of transition rights (and any extension of these rights) was conditional upon notification under Article 5.1 of the Agreement. Of CARICOM Members, only Barbados notified a TRIM under Article 5.1 (now discontinued), which was unrelated to fiscal incentives.

- In the case of the ASCM, transition rights for developing countries were not linked to any notifications requirement and persisted for all Article 3(1)(b) prohibited subsidies until, but not beyond, the end of 1999.

- There is no procedure in the TRIMs Agreement for retroactive notification of prohibited measures.

- The ASCM allows for ongoing notification of subsidies without prejudice to their Article 3 status. However, notification of a subsidy measure in no way affects its legal status under Article 3(1)(b).

- Consequently, for developing countries, including those in CARICOM, any non-notified TRIM, and any subsidy prohibited under ASCM Article (3)(1)(b) would constitute violations of WTO obligations.

Findings

Antigua and Barbuda, Barbados, Dominica, Grenada, Jamaica, St. Kitts and Nevis, St Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago have provisions in their Fiscal or Industrial Incentives Acts or related regulations that prescribe levels of local value-added. This would be considered a violation of their obligations under the TRIMs Agreement and/or the ASCM.

7. Overview of Policy Options

If they accept the non-compliance findings of this report, CARICOM Governments, will want to take into consideration the following options available to them.

(a) Policy Change

CARICOM governments with LVA-linked fiscal incentives programs could achieve conformity with TRIMs and ASCM obligations by:

- Removing all tax holidays and other investment incentives;
- Retaining investment incentives, but removing any explicit or implicit value-added conditionality; or
- Retaining local content conditionality, but limiting the value-added to be achieved to wages paid to domestic labour or through purchases of services produced in the domestic economy, thereby removing conditionality linked to purchases of goods.

There is, therefore, a compelling case for any examination of **industrial policy** to be conducted at the **regional** level. CARICOM is in fact actively contemplating a revision of its industrial policy, and is collaborating with the IDB in the "Investment Harmonization" project.

The recommendations arising out of the "Investment Harmonization" project cannot be anticipated. Nor is it clear that CARICOM governments will see merit in amending their industrial policy instruments so as to bring them into early WTO compliance. Accordingly, the examination now turns to available options in the event of continuing violations of existing WTO rules.

(b) Waiver

The theoretical option exists for CARICOM Members to jointly seek a waiver under Article IX:3 of the *Agreement Establishing the World Trade Organization* that would permit them to retain existing fiscal incentives. Such a course would face formidable difficulties. It would be strongly resisted by developed countries who will be broadly opposed to waivers for developing countries as a means of circumventing the obligations of existing WTO Agreements.

Even if negotiable, any waiver granted would be premised on the assumption that CARICOM Members only need a short transition (e.g., 3-5 years) to bring their regimes into conformity with existing Agreements.

(c) Pursue Rule Change

CARICOM Members, working with other developing countries, could seek to amend existing rules. In principle, the ongoing round of multilateral negotiations agreed at the Doha Ministerial provides this opportunity. However, there are severe constraints on adopting this course.

(d) Take No Action

The risk of another WTO Member initiating dispute settlement proceedings against a fiscal incentive program maintained by one or more CARICOM countries is probably quite low and certainly would not, at this time, require CARICOM governments to remove measures that are found here to constitute violations of WTO obligations.

8. Recommendations

It appears that in the short term, CARICOM States may not need to take any action regarding TRIMs issues. However, all CARICOM WTO Members must eventually implement their obligations and remove the prohibited TRIMs from their domestic investment incentives regimes.

1. Despite the various options that can be pursued by national Governments, given the mandate of this project, it is recommended that WTO compliance issues be taken into consideration:

   (a) by the CARICOM Secretariat in the "Investment Harmonization" project, to ensure that the output of that project takes into account the findings from this diagnostic report on compliance with WTO obligations;

   (b) by national Governments in implementing changes to their industrial/investment policies.

2. Since it is seems highly unlikely that CARICOM Governments will remove all tax holidays and other investment incentives, Governments with LVA-linked fiscal incentive programs should achieve conformity with TRIMs and ASCM obligations by:

   - Retaining investment incentives, but removing any explicit or implicit value-added conditionality; or
   - Retaining local content conditionality, but limiting the value-added to be achieved to wages paid to domestic labour or through purchases of services produced in the domestic economy, thereby removing conditionality linked to purchases of goods.

9. Technical Assistance

At this juncture, it is not feasible to make specific recommendations regarding immediate technical assistance until individual governments decide on a course of action regarding compliance with their obligations under the TRIMs Agreement. It is worthwhile for CARICOM Governments to await the results of the IDB funded "Investment Harmonization" project. When those become available, we recommend that the CARICOM Secretariat convene a regional round table with national officials from trade, industry and finance ministries to consider the appropriate policy changes to comply with the TRIMs Agreement.

It may then become necessary to recruit technical experts to advise the CARICOM Secretariat and national Governments on the most appropriate means of revising their investment incentives to make them consistent with the WTO rules. It would also be worthwhile at that stage to request the participation of technical experts from the WTO Secretariat.

I. INTRODUCTION

The objective of this study was to analyse the status of implementation in CARICOM Member States of the WTO Agreement on Trade-Related Investment Measures (TRIMs) and aspects of the Agreement on Subsidies and Countervailing Measures (ASCM) and to recommend actions both at national and regional level to facilitate full and faithful implementation of the two agreements in all Member states. The main steps involved were: 1) to identify the obligations of each CARICOM member country; 2) to determine the status of implementation of the obligations; and 3) to make recommendations for actions to be undertaken to facilitate full implementation.

I.1 BACKGROUND: TWO RELATED AGREEMENTS

The *Agreement on Trade Related Investment Measures* (TRIMs) emerged from the Uruguay Round negotiations as one of the World Trade Organization's (WTO) trade in goods Agreements. The TRIMs Agreement is often described as the first multilateral investment agreement and in its final clause refers to future possible negotiations on investment rules[1]. However, the rules on TRIMs are very limited in scope. They are intended simply to impose a permanent ban on the use of trade distorting investment measures to achieve trade policy or industrial objectives[2]. The Agreement does provide, however, a "transition" for developing countries for the introduction of the ban.

The TRIMs Agreement applies to a wide if undefined range of measures that confer "advantages" on investors. Such measures would evidently include, but are certainly not limited to, **subsidies**.

The *Agreement on Subsidies and Countervailing Measures* (the ASCM) is also a creation of the Uruguay Round. It clarifies and expands on the obligations of WTO members in relation to subsidisation[3], previously covered only by the vague rules of GATT Article XVI. The ASCM defines subsidies that are "actionable" i.e., subsidies that may legitimately be the subject of "countervail" investigations by another WTO Member or that may be challenged in special dispute settlement procedures by another WTO Member.

1 Article 9 of TRIMs provides for a review of the Agreement in 2000 in the course of which the Council for Trade in Goods considered inconclusively whether the Agreement should be complemented with provisions on investment policy and competition. However, both investment and competition are topics falling within the Work Program agreed at Doha in November 2001.

2 In essence, TRIMs is a codification of a GATT Panel report which found against provisions of Canada's Foreign Investment Review Act which linked approval of foreign investments to undertakings by foreign investors that might include purchasing of Canadian origin inputs. The Panel found that by establishing such requirements Canada's former review regime constituted a violation of GATT Articles XI (no restriction on imports other than duties) and III ("national treatment" in the application of internal measures).

3 The ASCM also establishes rules for the application of countervail measures, a topic not touched upon here but dealt with in a separate document under this project: *Report on the Status of Implementation of the WTO Agreements on Trade Remedies (Antidumping, Subsidy Countervail and Safeguards) in CARICOM States.*

The ASCM imposes only two substantive obligations on the use of industrial[4] subsidies by WTO Members. Industrial "subsidies", as defined in the ASCM, should not be applied if they are conditioned on:

- export performance[5], or
- the use of local products as inputs.

To the extent that both Agreements deal with and prohibit measures that promote the use of domestic products as inputs, WTO Members have overlapping obligations under the *Agreement on Trade Related Investment Measures* (TRIMs) and the *Agreement on Subsidies and Countervail Measures* (ASCM). Under the ASCM, the prohibition is stated in Article 3(1)(b) and applies to subsidies as defined in Articles 1 and 2 of the Agreement. Under the TRIMs Agreement, the prohibition applies to a broad range of measures that would seem to include, but are certainly not restricted to, subsidies that would fall under the ASCM's Article 3(1)(b) prohibition. Because of the overlap in the substantive coverage of the two Agreements, measures maintained by governments that are relevant to the ASCM Article 3(1)(b) prohibition will also be relevant to the TRIMs Agreement. Violations of the ASCM prohibition would likely be found to constitute a violation of the TRIMs. The TRIMs prohibition is broader in scope embracing measures falling outside the definition of subsidy in the ASCM.

In the CARICOM region, most Acts examined in this survey fall into the category of fiscal incentives to investors and are pertinent to both TRIMs and ASCM obligations. Compliance assessments are made jointly for the two Agreements. Moreover, because of commonalities in the structure of the two Agreements in terms of "transitions" and notifications, options for future implementation action are the same.

I.2 METHODOLOGY

In undertaking the assessment of compliance with obligations, the consultant proceeded as follows:

1. Submitted a Questionnaire to each government in the survey. The Questionnaire was designed to elicit information on measures maintained that might have conferred financial benefits[6] or other "advantages"[7] on companies on condition that they achieved domestic content objectives. The text of this questionnaire is reproduced in Annex III.

2. Reviewed available national legislation that might contain TRIMs or Article 3(1)(b) prohibited subsidies. Laws reviewed are listed in Annex I and include those:

4 "Industrial" meaning here "non-agricultural"; agricultural subsidization is covered by the separate WTO *Agreement on Agriculture.*

5 The ASCM rules relating to export subsidies are not dealt with here. They are covered in the separate *Report on Trade Remedies* under this project.

[6] Measures that might be both a TRIM and a subsidy.

[7] Measures that might be a TRIM but not a subsidy.

- Submitted for review by CARICOM Governments (often in relation to the review of implementation of the WTO's *Agreement on Trade in Services*), and
- Described in Subsidy Notifications to the WTO in the series G/SCM/N/71and 74.

3. Examined material designed for potential investors by Ministries and Investment Promotion agencies. Such promotional material frequently contains information relating to the incentives available to investors.

4. Finally, in some Member states visited[8], the consultants obtained additional material and insights from interviews with responsible officials.

This methodology faced certain constraints:

(a) There were few responses to the Questionnaire and those received provided little information; the reasons for this are not clear but quite possibly involve the following factors:

- Recipients in coordinating Ministers were unaware of the relevance of the questions posed re WTO obligations;
- Recipients may not have known which "economic" Ministries to approach for answers; and
- The matter was assigned "low priority" in Ministries with scarce personnel resources.

(b) In the Questionnaire, contacts were asked to "indicate and supply the laws/regulations under which the identified requirement/incentive measures are maintained and any policy statements pertaining to their administration". However, in practice it was rare for any instruments other than principal Acts to be supplied. The reasons for a relatively sparse response are probably the same as those referred to above.

(c) The legislative review was based on national laws relating to investment, essentially those providing fiscal incentives to investors in the form of income tax holidays, remission of customs duties and internal taxes, and free zone facilities. It is possible, but unlikely that other laws or regulations may be relevant. In any event, officials could not identify other relevant instruments.

Notwithstanding the limitations, the consultant is reasonably satisfied that the Acts available for review contain the major portion of measures that might be considered prohibited TRIMs or "content" subsidies prohibited by the ASCM.

[8] Barbados, Belize, Grenada, Guyana, Jamaica, St. Kitts and Nevis, St. Lucia, Suriname, St Vincent and the Grenadines, and Trinidad and Tobago.

II. OVERVIEW OF OBLIGATIONS UNDER THE WTO RULES

II.1 DEFINING THE TERMS

What constitutes a "TRIM"?

The term "investment measure" is not explicitly defined in the Agreement. However, from the review of notifications and jurisprudence it is evident that the term is, and indeed is deliberately intended to be, very broadly defined. It seemingly would encompass any government measure that influences a private investor in determining whether to make an investment and the form that such an investment would take.

Examples would include discretionary acts by governments in relation to:

- Approval of foreign investment, both "greenfield" and take-overs;
- Allocation of incentives in the form of reduced direct or indirect taxes;
- Discretionary access to lands;
- Discretionary access to scarce resources both physical (forests, minerals, restricted imports) and financial (foreign exchange); and
- Discretionary enforcement of standards, including environmental and labour.

It is not the existence of such measures themselves that raise issues of WTO compliance. They are the stuff of industrial policy in any state. It is their potential for trade distortion that explains their coming under international trade rules. As shown in the "Illustrative List" of TRIMs annexed to the *TRIMs Agreement*, an investment measure constitutes a prohibited "TRIM" when the approval of an investment or an "advantage" for the investor is conditional upon fulfilment of trade-distorting performance requirements.

The TRIMs Agreement is also deliberately vague as to what constitutes "trade distortion". In the Annex to the TRIMs Agreement, investment measures fall within the scope of the prohibition if they violate Articles III and XI of GATT 1994. Thus, the prohibition contained in the TRIMs Agreement is circuitous and depends on an interpretation of the scope of the GATT Articles themselves.

As it may not be clear what measures violate these Articles, it is evident that those negotiating the TRIMs Agreement text in the Uruguay Round deliberately sought to leave the scope of the Agreement open-ended. The "open-ended" nature of a TRIM is well illustrated in a brief survey of measures that a range of WTO developing country[9] Members have notified under the notification procedures of the TRIMs Agreement. These measures include:

[9] No developed country has notified a TRIM.

a) Fiscal incentives:

i. Income tax holidays: Thailand extends income tax holidays for food processing firms using domestic agricultural products;
ii. Relief from customs and excise duties: Indonesia provides investors in the automotive sector with relief of import duties provided they local value-added targets;
iii. South Africa: Remission of excise duties proportional to domestic content in the automotive sector (exports included as "local content"); and
iv. Eligibility for "free zone" status: Dominican Republic requires a minimum of 25 percent local content for firms seeking eligibility for "free zone" treatment.

b) Approval of foreign investments in "protected sectors":

Indonesia has local content requirements for approval of investments in the automotive and "utility boiler" sectors.

c) Access to restricted imports:

i. Dominican Republic allows imports of lean pork, provided minimum fixed quantities of domestic production used;
ii. Indonesia allows imports of milk products and soybean cake on condition of use of local production; and
iii. South Africa allows imports of tea and coffee for local processors absorbing domestic production.

d) Approval of equipment

South Africa: Minimum 50 percent domestic content required for licensing of telecoms equipment.

"Prohibited" Subsidies

Identifying a prohibited subsidy under the *Agreement on Subsidy and Countervailing Measures* (ASCM) is much simpler than detecting a "TRIM". The term "subsidy" as used in the Agreement is well defined in Articles 1 and 2. In terms of the Article 1.1 definition, "subsidies" occur when a government makes a "financial contribution" that "benefits" a "specific" firm or industry.

According to Article 1, "financial contributions" can result from:

- direct transfers of funds by government;
- forgiveness by government of taxes due; [10]
- provision of goods or services at prices below market price; and
- purchases by government above market price.

[10] Emphasis added. This is the type of "financial contribution" conferred under the Fiscal Incentive Acts that feature prominently in the industrial policy regimes of CARICOM countries.

The provision of "beneficial" "financial contributions" is not in itself the subject of any ASCM discipline[11]. However, when such contributions are subject to trade distorting conditions identified in ASCM Article 3, they are prohibited. The ASCM's prohibitions applies to subsidies to firms or industries [12] that are:

- contingent on export performance; or
- contingent on the use of domestic over imported goods.

The first category - prohibited export subsidies - is not covered in this report. They are dealt with in the separate report under this project dealing with trade remedies.

The second prohibition, which parallels the prohibition in the TRIMs Agreement, is covered in this survey.

II.2 TRIMs Agreement Obligations

The TRIMs Agreement prohibits the use of "any Trade Related Investment Measure (TRIM) that is inconsistent with the provisions of Article III or Article XI of GATT 1994."

Trade-related investment "measures" are prohibited where, for example, they are accompanied by conditions that require the beneficiary to use locally produced inputs and/or achieve a designated level of local value-added. Such conditions could constitute trade distortions in that:

- contrary to Article III:4, they promote, through internal regulation, discrimination against imports; or
- contrary to Article XI:1, they provide non-tariff protection for local production against imports.

Under the TRIMs Agreement, Members are obliged to:

a) Not introduce any new TRIM (Article 2.1);
b) Notify, by April 1995[13], any existing TRIM (Article 5.1);
c) Remove any notified TRIM by the end of a designated transition period, which for developing countries, was January 2000 (Article 5:2). The "transition period" for developing countries to remove a notified TRIM may be extended for countries that can demonstrate "particular difficulties in implementation" (Article 5:3)[14];

[11] ASCM applies only to non-agricultural products. Agricultural subsidies are subject to the disciplines of the WTO *Agreement on Agriculture.*
Subsidies covered by the definition of "subsidy" in Articles 1. and 2. of the ASCM are however "actionable" whether through countervail duties by other governments or special dispute settlement action under Part III of the ASCM.
[12] In accordance with Article 2.3 of the ASCM any subsidy prohibited in Article 3 is deemed to be "specific".
[13] A significant number of notifications were made after the expiry of the deadline.
[14] Although technically the deadline for the removal of TRIMs by developing countries has expired, the issue of extension is being addressed as an "Implementation" issue within the Work Program adopted at Doha in November 2001.

d) During the transition period, countries notifying TRIMs, are obligated not to:
   - increase the incidence of an existing TRIM (Article 5:4); and
   - apply an existing TRIM to another firm unless it is producing the same product as a firm enjoying an existing TRIM and where this is necessary to avoid distortion of competition. Such extensions of a TRIM are to be notified (Article 5:5);

e) Members are to notify the WTO Secretariat of the publications in which TRIMs are to be found (Article 6:2); and

f) Under Article 4, developing countries are permitted to deviate "temporarily" from the obligation to avoid introducing a TRIM to the extent that an introduced measure falls within the following exceptions to GATT Articles III and XI:
   - GATT Articles XII and XVIII (B): "Balance of Payments" exceptions to Article XI;
   - GATT Article XVIII (C), a rarely used exception to Article XI permitting developing countries to introduce temporary quantitative restrictions for development purposes;[15] and
   - The "Enabling Clause"[16].

II.3 ASCM OBLIGATIONS

Under the ASCM, subsidies [17]" that are conditioned on "**the use of domestic over imported goods**" are covered by the prohibition in Article 3(1)(b) and (2) of the ASCM[18]. In accordance with Article 27.3, "the prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of **five** years (i.e., until January 1, 2000). Thus, the five year "transition" for developing countries with respect to the removal of notified TRIMs and prohibited "local content" subsidies are the same. However, unlike TRIMs, the ASCM provides for no extension of the five-year transition[19].

In terms of Article 25.2 of the ASCM, all subsidies as defined in Article 1.1 and Article 2 of the ASCM are to be **notified**.[20] However, "Members recognize" (Article 25.7) that notification does not prejudge the legal status, effects or nature of the measure notified.

[15] Subject to consultation with the WTO and approved "retaliation" for trade damage.
[16] Decision of GATT CONTRACTING PARTIES of 28 November 1979. The inclusion of this particular "deviation" is difficult to explain in that exceptions permitted under the "Enabling Clause" seem limited to Article I (MFN).
[17] "Subsidy" is defined in Articles 1 and 2 of the ASCM.
[18] The ASCM also prohibits, under Article 3 (1)(b), export subsidies. The compliance of CARICOM Members with the ASCM rules on export subsidies are covered in the separate project paper "*Diagnostic Report on Trade Remedies*".
[19] The extension of time for notification of prohibited subsidies agreed in the Doha Ministerial process applies only to export subsidies.
[20] The requirements of the ASCM in relation to "notification" of subsidies is described in the separate *Diagnostic Report on Trade Remedies.*

II.4 LEGAL AND PRACTICAL IMPLICATIONS OF OBLIGATIONS

1. The lack of clear definitions of key terms used in the TRIMs Agreement meant that WTO Member Governments were called on, in 1995, to determine whether:

   - measures they maintained fell within the definition of "investment measures";
   - "advantages" were conferred; and
   - GATT Article III and/or XI rules were violated[21].

2. Notification of a TRIM has international legal implications. Essentially, by notifying a TRIM, a country is conceding that the measure it maintains is inconsistent not only with the obligations of TRIMs itself but also with GATT Articles III and/or XI. Thus, in a dispute before a panel established under the WTO's Dispute Settlement Mechanism (DSM) involving a notified measure, the country concerned would be at a disadvantage in defending its measure. The fact that the notifying country had indicated that its measure was a TRIM would mean that it was vulnerable to challenge on the grounds that measure violated GATT Articles III and/or XI obligations[22].

3. By contrast, notification of a subsidy under ASCM Article 25 carries few negative implications. Members "recognize that notification of a measure does not prejudice its legal status", either under GATT 1994 or the ASCM (Art. 25.7).

4. Under TRIMs, but not the ASCM, a country notifying a measure would assume an obligation to remove it by the end of its transition period. TRIMs notifications generally contain no mention of a decision to remove the notified measure. The WTO Council for Trade in Goods has not yet responded to requests from a number of developing countries to extend the deadlines for the removal of notified TRIMs. This issue now becomes part of the "Implementation" work program agreed at Doha. In the meantime, all TRIMs notified by developing countries are, in principle, illegal. Some indeed have already been challenged under WTO dispute settlement provisions.

5. It is not surprising that under the circumstances, measures notified under TRIMs 5.1 have been sparse and probably fall well short of the number of measures that would be considered TRIMs in dispute settlement. Nevertheless, as already noted, notifications have been made by a number of developing countries.

6. Similarly, notifications under Article 6.2 are few. Governments are naturally reluctant to notify publications in which TRIMs may be found when they have either not notified under Article 5:1 or have notified that they maintain no TRIMs.

7. Because they carry no negative legal implications, notifications by WTO Members, including CARICOM Members, under ASCM Article 25 have been much more numerous than those under TRIMs 5.1.

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[21] GATT jurisprudence confirms that interpretation of Article III in particular is frequently contentious.

[22] In an effort to overcome this problem, the notifying country have in a few instances, indicated that the notification does not prejudge the legal status of the measure under the TRIMs Agreement

II.5 TRIMs NOTIFICATIONS BY CARICOM MEMBERS

As noted in Section 1.2 of this survey,

- All existing TRIMs were to have been notified by the end of March 1995 (Article 5:1);
- Expansion of application of an existing TRIM to a "competing" company should be notified (Article 5:5); and
- Members were supposed to notify the Secretariat of the publications in which TRIMs are to be found (Article 6:2).

The notification record for CARICOM countries is as follows below.

II.5.1 Article 5:1 - Existing TRIMs; Notifications in Series G/TRIMs/N/1/* (Existence of a TRIM)

Barbados: G/TRIMs/N/1/BRB/1. Barbados' notification reads as follows:

> *"...permission is granted to pork processing enterprises to import pork from regional as well as extra-regional sources provided that the said processors purchase a percentage of pork from local pig producers."*

Notification of "no TRIMs"

- Jamaica G/TRIMs/N/1/JAM/1
- St. Lucia G/TRIMs/N/1/LCA/1
- Trinidad and Tobago G/TRIMs/N/1/TTO/1

II.5.2 Article 5:5 - Extension of an existing TRIM; Notifications in series G/TRIMs/N/3/*

No notification by Barbados the only CARICOM country notifying a TRIM. (There have in fact been no notifications by any WTO Member under Article 5:5).

II.5.3 Article 6:2 - Publications; Notifications in series G/TRIMs/N/2/*

- Antigua G/TRIMs/N/2/ATG
- Jamaica G/TRIMs/N/2/JAM
- Suriname G/TRIMs/N/2/SUR
- Trinidad and Tobago G/TRIMs/N/2/TTO

II.6 NOTIFICATIONS BY CARICOM MEMBERS UNDER ASCM

Until recently, notifications under the ASCM Article 25[23] have been sparse. Of CARICOM Members, only Jamaica and St. Kitts Nevis notified any subsidies before 2001. However, in recent months there has been a significant increase in the volume of notifications from developing countries.

This can be explained by two principal factors:

1. The transition period for the maintenance of **export** subsidies by developing countries expires in December 2002. However, under Article 27.4 extensions of transition may be sought.

2. The Doha Ministerial Meeting agreed to procedures whereby developing countries maintaining **export** subsidies could seek Article 27.4 extensions (G/SCM/39)[24].

Since the beginning of 2002, all CARICOM Members except Guyana and Trinidad and Tobago have submitted notifications which name specific Acts that confer export subsidies. In all cases, notifications, which are listed in Annex II to this report, refer to G/SCM/39. However notifications include Acts, such as Fiscal Incentive Acts, that provide for incentives that are conditioned on LVA and have served as material for assessments of compliance with the TRIMs Agreement and Article 3(1)(b) of the ASCM.

II.7 IMPLICATIONS OF CARICOM NOTIFICATIONS

(A) TRIMs

As already noted, Barbados is the only CARICOM Member to have notified a TRIM. Barbados authorities have advised that the notified TRIM has been withdrawn.

The other CARICOM Members are either explicitly, by notifying that they maintain no TRIMs or implicitly, by failing to notify under Article 5:1, in the legal position within the WTO where they have no TRIMs. Consequently, measures that may reasonably be judged to constitute TRIMs have to be considered "violations" of obligations under the TRIMs Agreement.

(B) ASCM

Notifications under Article 25 of the ASCM are, by reason of Article 25.7, without legal consequences. Notifications carry no inference that the Government concerned considers its subsidy measures as conforming to the provisions of Article 3. However, recent notifications that refer explicitly to the procedures outlined in G/SM/39 imply that the notifying Government

[23] Legally separate notification requirements exist under Article XVI:1 of GATT 1994. The ASCM clarifies and greatly expands upon Article XVI (as well as incorporating rules relating to countervail duties). Notifications to the WTO Committee on Subsidies and Countervail refer both to GATT Article XVI;1 and Article 25 of the ASCM.
[24] The situation as regards export subsidies, and the impact of the procedures outlined in G/SCM/39 is described in the separate project report on *Trade Remedies.*

considers that pieces of legislation notified contain provisions that might be considered export subsidies, prohibited under Article 3(1)(a) but, subject to approval, might be retained after the expiry of the transition for developing countries ending in 2003. Notification under these procedures is not relevant to "content" subsidies covered by Article 3(1)(b). Irrespective of notifications, such subsidies became prohibited for developing countries at the end of the five-year transition period in December 1999. No procedures are in place for the re-instatement of the transition.

It should be noted that some of the measures notified under the procedures of G/SM/39, while they may have elements of export subsidisation[25], are considered here under the compliance assessment conducted for ASCM Article 3(1)(b) subsidies (as well as the TRIMs Agreement).

[25] The impact of notifications made under G/SM/39 for export subsidies is explored in the separate report on *Trade Remedies*.

III. ASSESSMENT OF COMPLIANCE BY CARICOM STATES

III.1 FISCAL INCENTIVES

Overwhelmingly, TRIMs and prohibited "content subsidies" present in the trading regimes of CARICOM take the form of fiscal incentives. In the region, the availability of "fiscal incentives" are referred to in Income Tax Acts; but terms and conditions are detailed in three sets of Acts:

(a) "General" Fiscal Incentives Acts applying in the manufacturing and processing sectors;
(b) Specialized Industry Acts applying to specific industries – notably mining and forestry; and
(c) Hotel Aids Acts applying to the most important of the region's services sectors[26].

"General" Fiscal Incentives

Fiscal incentives are a feature of investment promotion policy throughout the region. Incentives are made available for investors, foreign and domestic.

For most of the English-speaking countries in CARICOM, there are "Fiscal Incentive Acts" that are remarkably similar in content, date from a similar period (the early to mid 1970s), and clearly reflect a common policy genesis.

The essential purpose of Fiscal Incentive Acts is to promote domestic employment opportunities in countries where traditionally jobs have been few and where, as a consequence, pressures to emigrate have been intense.

Under Fiscal Incentives Acts, approved investors are eligible for some or all of the following types of fiscal incentives:

- Corporate income tax holidays for approved investors;
- Carry forward of losses incurred in holiday period to offset profits in post-holiday period;
- Exemptions of dividends from personal taxation;
- Time-limited or permanent duty and sales tax exemptions for capital goods, raw materials, and manufactured inputs; and
- Concessional credit from domestic public investment institutions.

Eligibility for fiscal incentives is generally, conditional on achievement of specified levels of domestic content (Local Value Added). The higher the LVA, the more valuable is the incentive.

[26] The review of services-related Acts undertaken in connection with the implementation of the *General Agreement on Trade in Services* has not revealed the availability of incentives for services suppliers other than hotel developers and managers.

Fiscal Incentive regimes have a secondary goal of promoting regional integration. Target levels of LVA may be achieved through purchase of inputs (raw materials and components) from other CARCICOM partners as well as domestic products. Moreover, employment of CARICOM nationals contributes in the same way as employment of nationals to the upward adjustment of LVA levels. In some States (e.g., St. Vincent and the Grenadines), domestic taxpayers are exempt from personal taxes with respect to income derived from dividends paid by companies operating under a fiscal incentive regime in another CARICOM State, if the nationals of that State are also exempt.

Fiscal Incentive Acts provide for favourable tax treatment for "enclave industries", whose products are sold entirely outside the CARICOM region. The consistency of such provisions with the ASCM prohibition on Export Subsidies (Article 3(1)(a)) are considered in the separate diagnostic report under this project on Trade Remedies.

Typically, Fiscal Incentive Acts incorporate the following "standard" elements[27]:

1. Domestic or foreign owned companies are "approved" by the appropriate authority to produce "an approved product". Criteria for approval of products take into consideration employment effects in numbers and gross wages.

2. The main benefits that are offered to prospective investors are exemption from income tax and relief from customs duty over a period of between 11 and 15 years, which is referred to as the tax holiday period. Approved enterprises are eligible for exemptions from corporation tax as well as customs duties and value-added tax on plant, equipment, machinery, spare parts, raw materials or components. Dividends paid by approved enterprises may also be exempt from personal and withholding taxes. Any net losses incurred by the enterprise during the tax holiday period may, upon cessation of that period, be carried forward and set off against the profits and gains chargeable to income tax for a period of five years following the cessation.

3. Approved Enterprises receive relief from taxes according to prescribed formulae related to local value-added. In the case of Barbados, the following formula is used:

	Local Value Added	Years
Group I	50% and over	15
Group II	25% and under 50%	13
Group III	10% and under 25%	11
Enclave and Highly Capital Intensive Industries		15

[27] This description of the "standard" regime is based on the Barbados *Fiscal Incentives Act* CAP 71A and the notification by Barbados (G/SCM/N/71/BRB):

4. Local value-added is defined "negatively" as value of sales minus the sum of:

    - Value of raw materials, component fuels and services[28] imported from outside the CARICOM region[29];
    - Wages and salaries paid to nationals from outside the region;
    - Profits remitted outside the region;
    - Interest, management fees paid to outside-region residents; and
    - Depreciation.

5. In calculating percentage local value for purposes of determining category of tax holiday entitlement (Group I to III), the figure derived from the above "sales minus" formula is adjusted upward by an amount proportional to the wages and salaries paid to nationals and nationals of other CARICOM Member States.

Fiscal Incentives to Specific Industries

In addition to the "standard" fiscal incentive Acts, individual countries have introduced incentive schemes through separate legislation for specific industries. No such Acts have been reviewed. A number are listed in the TPRM report for Jamaica (paras. 97 and 98). However most deal with subsidies to agricultural products and would seemingly be considered under the WTO Agreement on Agriculture rather than the ASCM. Because there is no mention in the TPRM report of eligibility conditioned on LVA targets, the mentioned Acts are unlikely to raise issues of TRIMs compliance.

Hotel Aids Acts

Legislation varies as to the incentives offered. Typically, they would include:

- Income tax holidays;
- Duty free treatment for designated items of hotel equipment (including drawback of duties paid on imported items purchased locally);
- Remission of sales taxes on such items; and
- Automatic import licensing for designated restricted imports[30].

Generally the incentives are not linked to LVA conditions. There are no overall "local value-added targets. However, in some countries, applicants for benefits under Hotel Aids Acts are required or encouraged to demonstrate "linkages" to the local economy by purchases of local equipment items.

[28] The inclusion of CARICOM origin services inputs as contributing to LVA provides an element of discrimination in favour of CARICOM services suppliers. The status of such a procedure under GATS MFN obligations is discussed in the separate *Report on Compliance with the WTO General Agreement on Services (GATS) in CARICOM States.*

[29] It is not explicit in the Barbados fiscal Incentives Act whether CARICOM origin goods inputs are considered "local" for the purposes of calculating LVA. However from the structure and logic of the Section this would appear to be the case.

[30] A reflection of past restrictive trade regimes.

III.2 OTHER "TRIMS"

As already noted, Barbados is the only country to have notified a TRIM. The measure notified applied to an investor intending to process pork. The "advantage" conferred was the right to import pig-meat, on condition that an assigned quantity of domestic pig-meat was purchased. This TRIM is no longer in force.

The Questionnaire reproduced in Annex III was designed to elicit information on TRIMs, but the process did not produce adequate data for assessing whether TRIMs might be present in trade regimes.

Interviews conducted in a number of countries did not reveal any non-fiscal TRIMs.

III.3 BASIS FOR ASSESSMENT OF COMPLIANCE

In arriving at an assessment that finds widespread violation of WTO obligations by most CARICOM Member countries, it is particularly important to explain the basis for the findings. For the purposes of this review, assessments are based mainly on the **plain language meaning** of the relevant texts of TRIMs and ASCM. However, an examination of GATT and WTO jurisprudence reinforces the findings made.

It is recognized that in the case of TRIMs at least, compliance assessments entail an interpretation of Article III and XI of GATT 1994, subjects of considerable litigation both under the GATT and WTO.

GATT jurisprudence relating to Canada's Foreign Investment Review Act is the direct antecedent of the TRIMs Agreement. The Act provided for review of proposals by foreign investors to invest in Canada. Approval was based on whether the proposed investment would "benefit" Canada. One of the tests of "benefit" related to local value-added that could be varied in negotiations with the investor. The GATT case hinged on whether the undertaking on LVA entered into by foreign investors to obtain approval for their proposed investment constituted a violation of Canada's Article III and Article XI obligations. The TRIMs codify the Panel's findings.

Recent WTO disputes, notably those involving LVA-related incentives to investment in the automotive sector in Canada and Indonesia, confirm the linkages between TRIMs, ASCM and the national treatment provision of GATT Article III.4. In the Canadian case, all three Agreements were included in the dispute, but the findings were based on violation of Article III with the Panel determining that there was no need to proceed to findings on TRIMs or ASCM compliance.

On the basis of a plain language analysis, and with reference to the available jurisprudence, the consultant is satisfied that the following assessment accurately reflects the WTO legal status of the measures reviewed. It is important however to emphasise that alternative assessments might reasonably be made and that ultimately only WTO Dispute Settlement proceedings involving a

Panel in a detailed examination of the law and its application can make a definitive ruling on compliance.

Subject to this caveat, the following summarizes the basis for the national assessments that follow:

a) A remission of tax, direct and/or indirect, related to an investment, confers a beneficial "financial contribution" and would be considered a subsidy under the ASCM and an "advantage" under the TRIMs.

b) To the extent that such financial contributions or "advantages" are conditioned upon achievement of explicit or implicit LVA, the measure would likely be found to violate GATT Articles III and XI and thus be considered an illegal TRIM as well as a subsidy prohibited by Article 3(1) (b) of the ASCM[31].

c) CARICOM Members are developing countries and as such were eligible to take advantage of the five-year transition periods in both Agreements, extendable in the case of TRIMs with the approval of the WTO.

d) In the case of the TRIMs Agreement, the exercise of transition rights (and any extension of these rights) was conditional upon notification under Article 5.1 of the Agreement. Of CARICOM Members, only Barbados notified a TRIM under Article 5.1, now discontinued, which was unrelated to fiscal incentives.

e) In the case of the ASCM, transition rights for developing countries were not linked to any notifications requirement and persisted for all Article 3(1)(b) prohibited subsidies until end of 1999.

f) There is no procedure in the TRIMs Agreement for retroactive notification of prohibited measures. The ASCM allows for ongoing notification of subsidies without prejudice to their Article 3 status. Notification of a subsidy measure in no way affects its legal status under Article 3(1)(b).

g) Consequently, for all developing countries, including those in CARICOM, where TRIMs and prohibited ASCM Article (3)(1)(b) subsidies are found to exist they would constitute violations of WTO obligations.

h) At least to the extent that they are applied to goods producing investors, fiscal inventive measures listed in Section 3.2 of this report would, in dispute settlement, almost certainly be found to be prohibited TRIMs and prohibited subsidies under Article 3(1) (b) of the ASCM and thus constitute violations of WTO obligations[32].

[31] It is notable in this regard that Canada's automotive tariff remission scheme, under which import duties were waived on condition that local assembly and value-added targets were met, was challenged in dispute settlement under the WTO's DSM as both a TRIM and a prohibited subsidies under the ASCM. The Panel ultimately found the measure a violation of Article III and so did not consider it necessary to examine whether violations of TRIMs or ASCM Agreement had occurred.

[32] As in the case of Canada's automotive tariff remission programme, a Panel might find them violations of Article III and XI and of GATT 1994, without adjudication of their status under the TRIMs or ASCM Agreements.

Although it seems probable that provisions of the standard "Fiscal Incentives" Acts would, if applied, be found to constitute *prima facie* violations of TRIMs and ASCM Agreements, it would be possible for CARICOM Governments to deploy defensive arguments in the unlikely event that the WTO's Dispute Settlement Mechanism is invoked.

In particular it should be noted **that the prohibitions in both the ASCM and TRIMs Agreements are designed to prevent distortions in trade in goods. There would be no violation of the prohibitions if the local content conditions for receiving incentives did not cover goods**. Thus, for example, if a hypothetical fiscal incentive measure stipulated that incentives would be made available to companies whose "local value-added" was at least 50 percent, with that percentage made up entirely by the wages to local workers and costs of local services, there would be no violation of ASCM nor TRIMs.

By extrapolating from this it might be possible to mount a defence of standard regional fiscal incentives, which include costs of locally produced goods in value-added calculations, if it could be demonstrated that **as a matter of fact**, it was quite possible to achieve the minimum amount of value-added stipulated through wages and costs of local services alone.

While not without some force, this argument is unlikely to sway a dispute settlement Panel whose findings are likely to be based on the terms of the Act itself. It is possible, however, that any calculation of damage caused by incentives would need to take into account only the value of goods purchased on the local market by recipients of the incentives.

On the basis of the preceding analysis, the following approach was adopted in assessing compliance of the legislation reviewed for each of the countries surveyed.

TRIMs

Where legislation reviewed provides for incentives to any investor on condition of explicit or implicit LVA this will be considered a violation of the prohibition in the TRIMs Agreement.

ASCM

Where legislation reviewed provides for incentives to an investor establishing to produce non-agricultural goods, on condition of explicit or implicit LVA, this will be considered a violation of the prohibition in Article 3(1)(b) of the ASCM.

III.4 FINDINGS RE NATIONAL COMPLIANCE WITH TRIMS RULES IN CARICOM

Antigua and Barbuda, Barbados, Dominica, Grenada, Jamaica, St. Kitts and Nevis, St Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago have provisions in their Fiscal or Industrial Incentives Act or related regulations that prescribe levels of local value-added relating to goods. This would be considered a violation of their obligations under the TRIMs Agreement and/or the ASCM.

The legislation and regulations listed below have been:

- received in hard copy or electronically,
- reviewed by the consultant on site
- or are described in WTO Subsidy notifications in the series G/SCM/N/71 and 74.

Antigua and Barbuda

- *Fiscal Incentives Act Cap 172* - "Standard": *violates* TRIMs and ASCM Article 3 (1) (b) prohibitions.
- *Free Trade and Processing Zone Act No. 12 of 1994* - Export subsidy only.

Barbados

- *Fiscal Incentives Act* - "Standard": *violates* TRIMs and ASCM Article 3 (1) (b) prohibitions.

Belize

- *Fiscal Incentives Act* - Not standard; no LVA conditionality[33]. - *Compliant*.
- *Export Processing Zone Act* - Export subsidy only.
- *Commercial Free Zone Act* - Export subsidy only.
- *Conditional Duty Exemptions Facility* - Program involves remission of duties to farmers and small businessmen. Remission is not conditional on LVA. - *Compliant.*

Dominica

- *Fiscal Incentives Act No. 42 of 1973* - "Standard": *violates* TRIMs and ASCM Article 3 (1) (b) prohibitions.
- *Aid to Development Enterprises Act* - Remission of customs duty. Discretionary. No LVA cited. Probably compliant.
- *Hotels Aid Act* - Incentives not conditioned on LVA. - *Compliant.*

Grenada

- *Fiscal Incentives Act no. 41 of 1974* - "Standard": *Violates* TRIMs and ASCM Article 3 (1) (b) prohibitions.
- *Qualified Enterprises Act No. 18 of 1978* - Supplements tax benefits under *Fiscal Incentives Act* for beneficiaries under that Act. *Violates* TRIMs and ASCM Article 3 (1) (b) prohibitions.
- *CARICOM Common External Tariff, Statutory Rules and Order No.37 of 1999* - (In order to benefit from tariff remissions, an enterprise must have a local value-added of 40 percent and over, create employment for ten or more persons, or generate export earnings). *Violates* TRIMs and ASCM Article 3(1)(b) prohibitions.

33 Belize in notifying the Act indicates "While initially there was a specific interest in the development of industries that utilize domestic raw materials, this is not a current requirement either in law or in administrative practice"

- *Investment Code Incentives Law:* 13 of 1983: Implemented in conjunction with *Fiscal Incentives Act*[34] but itself imposes no LVA conditionality for fiscal incentives. - *Compliant.*
- *Hotels Aid Act* CAP 138 of 1954 consolidated to 1980. Local employment requirement but no LVA. – *Compliant.*

Guyana

- No subsidy notification recorded on WTO Web site.
- No legislation found for review.

According to the "Investment Guide" (3.6), Guyana offers fiscal incentives to the general manufacturing sector in the form of duty and consumptions tax remission and accelerated depreciation for corporate income tax. It also applies reduced rates of corporate income tax with percentage reductions graduated in accordance with the ratio of extra-CARICOM export sales to total sales. The Guide makes no mention of tax holidays linked to LVA under general manufacturing programs.

However, conditions for obtaining permits for exploitation of forest resource include "linkages and/or integration with other economic activities; the incentive programme is provided to encourage linkages. Incentives to the tourism industry are also conditional upon "strengthening linkages between tourism and other sectors of the economy". Without reviewing the relevant Acts, it is unclear how much "conditionality" is attached to the programs.

Guyana's investment regime, as described in "the Guide", is *compliant* as it relates to the general manufacturing sector.

Jamaica

- *Export Industry Encouragement Act* - Export subsidy only.
- *Foreign Sales Corporation Act* - Applies only to (US) Foreign Sales Corporations and provides special taxation regime. *Compliant* with TRIMs and ASCM Article 3(1)(b)
- *Export Free Zones Act* - Export subsidy only.
- *The Industrial Incentives Act* was not reviewed. According to Jamaica's TPRM report incentives available under the Act are "based on the degree of domestic value-added". The Act therefore *violates* TRIMs and ASCM Article 3(1)(b). However the TPRM indicates that "the application of this program has been suspended"[35].
- *Industrial Incentives (Factory Construction)* - Applies to approved builders to construct factories for manufacturers eligible for incentives under the Export Industry Encouragement Act or the Industrial Incentives Act. - *Compliant.*

[34] See paragraph 45 of Grenada's TPRM report.
[35] Para 96.

St. Kitts and Nevis

- *The Fiscal Act No. 17 of 1974* - Contains "Standard" provisions. *Violates* TRIMs and ASCM Article 3(1)(b) prohibitions.
- *Hotel Aid Ordnance 1956* – Incentives (including those provided to licensed hoteliers under in Income Tax Ordinance of 1966) not conditioned on LVA - *Compliant.*

St. Lucia

- *Fiscal Incentives Act* - "Standard": *Violates* TRIMs and ASCM Article 3 (1) (b) prohibitions
- *Micro and Small Scale Business Enterprises Act* - Eligibility for incentives related to LVA: *Violates* TRIMs and ASCM Article 3 (1) (b) prohibitions.
- *Free Zone Act* - Export subsidy only.

St. Vincent and Grenadines

- *The Fiscal Incentives Act No. 5 of 1982* - "Standard": *Violates* TRIMs and ASCM Article 3 (1)(b) prohibitions.
- *Hotels Aid Act No. 16 of 1988* Incentives not conditioned on LVA. - *Compliant.*

Suriname

Based on notifications, there appear to be discretionary incentives available. However, there is no suggestion in available written material or in information derived from discussions that incentives are linked to LVA.

On the basis of available information, the regime is considered *compliant.*

Trinidad and Tobago

- *Fiscal Incentives Act 22 of 1979* - "Standard": *Violates* TRIMs and ASCM Article 3(1)(b) prohibitions.
- *Tourism Development Act 9 of 2000* – Recipients of incentives "must show linkages" (S7(e)) *Violates* TRIMs and ASCM Article 3(1)(b)
- *Free Zones Act 19 of 1988* - Export subsidies only.
- *Free Zones (Amendment) Act 33 of 1995* - Export subsidies only.
- *Free Zones (Amendment) Act 4 of 1997* - Export subsidies only.

III.5 Implementation Issues re TRIMs Obligations

No CARICOM Government has previously assessed the implications of its obligations under the TRIMs Agreement for its investment policy measures. This is largely due to the lack of technical personnel to address such matters and perhaps a lack of awareness of the deeper implications of the Agreement as well. Also, many national officials are not aware of the technical details of their incentive regimes and how these have operated over time. Most CARICOM states have never even assessed whether their investment incentives are meeting their original objectives.

This might be a useful exercise for planning purposes and in order to consider policy changes. Perhaps the development objectives of CARICOM Governments can be achieved by policy measures other than local value-added requirements.

Since the TRIMs Agreement does not require the creation of any administrative or institutional elements per se, implementation was not generally considered in terms of practical action by most developing countries. The Agreement does not state what Governments should do, but only what measures should not be maintained or introduced. It is therefore not surprising that officials had no comments on their experience with implementation of this Agreement to date. It is also not an area in which a need for technical assistance was originally envisaged. No previous technical assistance was provided in this area.

It should also be noted that due to the significant financial and human resource limitations of all CARICOM Governments, and the demands placed on trade officials in simply keeping up with discussions in various forums, implementation of Agreements such as TRIMs is not a priority concern. The findings of this review, which is the first effort at assessing WTO-compliance in CARICOM, will provide a basis for the consideration of appropriate action.

IV. CONCLUSIONS AND RECOMMENDATIONS

IV.1 SUMMARY OF COMPLIANCE

The analysis conducted in the previous chapter indicates a substantial degree of non-compliance among CARICOM countries with the obligations of the TRIMs Agreement and the ASCM. Of the twelve countries examined, nine have Fiscal Incentives or Industrial Incentives Acts, that, on their face, violate obligations under one or, more probably, both Agreements.

IV.2 VULNERABILITY TO DISPUTE SETTLEMENT

Member violating WTO obligations are vulnerable to a complaint under the process described in the WTO's *Understanding on Rules and Procedures Governing the Settlement of Disputes* and commonly known as the Dispute Settlement Mechanism (DSM). If a "complainant" WTO Member demonstrates successfully that a measure maintained by another Member (the "respondent") violates obligations, the latter will be required by the terms of the *Understanding* to remove the non-compliant measure or, failing this, pay compensation or face retaliation.

If they accept the non-compliance findings of this report, CARICOM Governments will want to take into consideration their apparent vulnerability to dispute settlement action under the WTO. In this regard the following factors appear relevant:

1. It is a generally accepted principle of GATT and WTO dispute settlement jurisprudence that allegations of "nullification and impairment" should be based on actual trade damage resulting from the implementation of a measure rather than on the notional damage that might result from some hypothetical future action based on the simple existence of a provision in legislation. Thus, the appearance of a violation of a TRIMs or ASCM obligation in legislation would not in and of itself lead to findings of "nullification and impairment" by a WTO dispute settlement panel. DSM panels would normally require some evidence that a measure, available in law, was in fact being applied with actual harmful effects on the trade interests of a complainant WTO Member(s) [36].

2. It is certainly worth noting in relation to the previous point that recourse to the WTO's DSM is expensive, even for wealthy developed countries. Accordingly, initiation of complaints before the DSM will be avoided if the trade/investment damage is minimal. In the normal course, CARICOM Members can expect concerns over a particular measure to be expressed through diplomatic channels and in non-litigious WTO contexts long before any initiation of dispute settlement. The force and persistence of diplomatic representations will provide an indication of the risk of action under the DSM.

[36] See in this regard the "Analytical Index": *Guide to GATT law and Practice: A*rticle XXIII: II.1.(3) "*Discretionary Legislation*"

3. Moreover, it is also relevant in this context to observe that the fiscal incentives available in the CARICOM region will frequently benefit companies from the major industrialized countries, notably the USA and EU Member States. Accordingly, it seems unlikely that there will be unified domestic pressures in a developed country to institute dispute settlement proceedings. Developed countries may conclude that overall their commercial interests suffer no harm from the existence of fiscal investment incentives even if they cause some trade distortion.

4. More broadly, developed countries may be reluctant, in the face of only minimal trade damage, to initiate a DSM complaint against developing countries seeking to promote industrial development through subsidy programs while such incentives are still widely available in the industrial world[37].

IV.3 AVAILABLE OPTIONS

(A) Policy Change

CARICOM governments with LVA-linked fiscal incentives programs could achieve conformity with TRIMs and ASCM obligations by:

- Removing all tax holidays and other investment incentives;
- Retaining investment incentives, but removing any explicit or implicit value-added conditionality; or
- Retaining local content conditionality, but limiting the value-added to be achieved to wages paid to domestic labour or through purchases of services produced in the domestic economy, thereby removing conditionality linked to purchases of goods[38].

Any major overhaul of incentives programs would evidently entail a changed direction in an industrial policy that has been a cornerstone of economic development throughout most of the region since the 1970s. Moreover, as noted, fiscal incentive programs have served as instruments of regional integration. Clearly, changes in national regimes could have economic implications for CARICOM partners since:

- They could result in shifts in the relative attractiveness of individual countries as locations for investment; and
- Where "local" value-added is defined in a manner that treats the products of CARICOM partners as "local", modifications in national programs could result in the loss of favourable access for CARICOM partners.

[37] Perhaps the most likely set of circumstances leading to a dispute settlement challenge to the measures would arise from FTAA negotiations in which CARICOM Governments resisted United States pressures for rules that:
- Called for immediate removal of LVA-related fiscal incentives; and
- Identified existing Acts falling into this category.

[38] It is the effect of fiscal incentives on trade in goods that lead to violations of the TRIMs Agreement and the ASCM. See Section III.3 above.

There is therefore a compelling case for any examination of **industrial policy** to be conducted at the **regional** level. CARICOM is in fact actively contemplating a revision of its industrial policy, and is being supported by the IDB in the "Investment Harmonization" project[39].

The recommendations arising out of the "Investment Harmonization" project cannot be anticipated. Nor is it clear that CARICOM governments will see merit in amending their industrial policy instruments so as to bring them into early WTO compliance. Accordingly, the examination now turns to available options in the context of continuing violations of existing WTO rules.

(B) Waiver

The theoretical option exists for CARICOM Members to jointly seek a waiver under Article IX:3 of the *Agreement Establishing the World Trade Organization* that would permit them to retain existing fiscal incentives. Such a course would face formidable difficulties. It would be strongly resisted by developed countries that will be broadly opposed to waivers for developing countries as a means of circumventing the obligations of existing WTO Agreements.

Even if negotiable, any waiver granted would be premised on the assumption that CARICOM Members only need a short transition (e.g., 3-5 years) to bring their regimes into conformity with existing Agreements.

(C) Pursue Rule Change

CARICOM Members, working with other developing countries, could seek to amend existing rules. In principle, the ongoing round of multilateral negotiations agreed at the Doha Ministerial provides this opportunity. However, there are severe constraints on adopting this course.

Neither the TRIMs Agreement nor ASCM Agreements have been identified as elements in areas of the Work Program or the related "Implementation" package agreed at Doha. Even if negotiations in these two areas were undertaken[40] it seems unlikely that developed countries would agree to any changes in existing rules other than, perhaps, extended "transitions" for developing countries.

It might be noted that prospective, but as yet not agreed, negotiations on investment might also create a negotiating forum for establishing new rules relating to investment incentives. Any such negotiations would create a context in which CARICOM Members could press for rules that established a right for developing countries to offer LVA-related fiscal incentives to investors. It could be made clear that such a right would be legally superior to the disciplines imposed by the TRIMs and ASCM Agreements.

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[39] The consultant commends the suggestion of the IDB (in comments on a draft of this report) that the proposed investment framework emanating from that project should be reviewed for WTO compliance and should take note of the findings of this report on compliance issues regarding current investment incentives.

[40] It is possible that the negotiating mandate for the Doha Round might be expanded in the "mid-term review" by Ministers scheduled for 2003.

In the context of negotiating new investment rules, developing countries would enjoy greater bargaining leverage than they would enjoy within a review of the rules of the ASCM or TRIMs Agreement. Nevertheless, it remains unclear whether there will be multilateral negotiations on investment rules and whether, if there were negotiations, developed countries would agree to provisions that effectively superseded TRIMs and ASCM prohibitions.

CARICOM Governments will be mindful of the fact that FTAA negotiations on investment rules will precede any agreed new investment rules in the WTO. It may be possible for CARICOM Members to press for FTAA rules that established a right, perhaps through "exceptions", to maintain existing LVA-related fiscal incentive programs. However, strong resistance can be anticipated from the United States. In this regard, it is relevant to note that NAFTA Article 1106.3(a) prohibits establishing, as a condition for the receipt of an "advantage", in connection with an investment, compliance with a requirement "to achieve a given level or percentage of domestic content[41]".

(D) Take No Action

As noted above, the risk of another WTO Member initiating dispute settlement proceedings against a fiscal incentive program maintained by one or more CARICOM countries is probably quite low and certainly would not at this time **require** CARICOM governments to remove measures that are found here to constitute violations of WTO obligations.

IV.4 RECOMMENDATIONS

It appears that in the short term CARICOM states may not need to take any action regarding TRIMs issues. However, all CARICOM WTO Members must eventually implement their obligations and remove the prohibited TRIMs from their domestic investment incentives regimes.

1. Despite the various options that can be pursued by national Governments, given the mandate of this project, it is recommended that WTO compliance issues be taken into consideration:

   a) by the CARICOM Secretariat in the "Investment Harmonization" project to ensure that the output of that project take into account the findings from this diagnostic report on compliance with WTO obligations;

   b) by national Governments in implementing changes to their industrial/investment policies.

2. Since it is seems highly unlikely that CARICOM Governments will remove all tax holidays and other investment incentives, all Governments with LVA-linked fiscal incentive programs should achieve conformity with TRIMs and ASCM obligations by:

[41] NAFTA negotiations concluded a year before the end of the Uruguay Round which resulted in the TRIMs Agreement and the ASCM.

- Retaining investment incentives, but removing any explicit or implicit value-added conditionality; or
- Retaining local content conditionality, but limiting the value-added to be achieved to wages paid to domestic labour or through purchases of services produced in the domestic economy, thereby removing conditionality linked to purchases of goods.

Technical Assistance

The reform of industrial policy is a complicated and sometimes politically sensitive process. It is not simply a matter of revising laws. As CARICOM implements the Single Market and Economy (CSME) and as individual Governments review their investment regimes they should make the necessary legislative changes to remove the investment measures that are inconsistent with their WTO obligations. It is clear that the investment measures contained in the various Fiscal Incentive Acts across CARICOM were part of a common regional strategy. Any changes to these Acts should also be coordinated at the regional level to ensure consistency and coherence in the context of the CSME.

At this juncture, it is not feasible to make specific recommendations regarding immediate technical assistance until individual governments decide on a course of action regarding compliance with their obligations under the TRIMs Agreement. It is worthwhile for CARICOM Governments to await the results of the IDB funded Investment Harmonization project. When those become available, we recommend that the CARICOM Secretariat convene a regional round table with national officials from trade, industry and finance ministries to consider the appropriate policy changes to comply with the TRIMs Agreement.

It may then become necessary to recruit technical experts to advise the CARICOM Secretariat and national Governments on the most appropriate means of revising their investment incentives to make them consistent with the WTO rules. It would also be worthwhile at that stage to request the participation of technical experts from the WTO Secretariat.

ANNEX I - LIST OF DOCUMENTS REVIEWED

Antigua and Barbuda
Hotel Aids Act 10 of 1952 as amended to 1989

Barbados
Fiscal Incentive Act CAP 71 A LRO 1978
Fiscal Incentives Regulations (Subsidiary Legislation)
Fiscal Incentives (Declaration of Approved Enterprises) Orders, 1975-1988
Fiscal Incentives (Approved Products) Orders, 1974-1991
Hotel Aids Act, CAP 72 LRO 1985

Belize
Fiscal Incentives Act CAP 54

Dominica
Aid to Development Enterprises Act 14 of 1973
Fiscal Incentives Act 42 of 1973
Hotels Aid Act 4 of 1958

Grenada
Investment Code Incentives Law: 13 of 1983
Hotels Aid Act CAP 138 of 1954 consolidated to 1980

Guyana
No legislation received.
Incentives described in Chapter III of *"The Guyana Investment Guide"*

Jamaica
Export Free Zones Act 18 of 1982 as amended to 1996
Industrial Incentives (Factory Construction) Act 9 of 1961 as amended to 1991

St. Kitts and Nevis
Fiscal Incentives Act 1974
Hotel Aid Ordnance 1956

St. Lucia
Fiscal Incentives Act No.15 of 1974
National Development Corporation Act 23 0f 2001
Tourism Incentives Act 7 of 1996

St. Vincent and the Grenadines
Fiscal Incentives Act
Hotels Aid Act 16 of 1988
Hotels Aid (1969) Customs Duty Concession) Regulation S.R.O. 4 of 1972 amended in 1980
"Investment Guide"

Trinidad and Tobago
Fiscal Incentives Act 1985
Tourism Development Act No.9 of 2000
Free Zones Act 19 of 1988
Free Zones (Amendment) Act 33 of 1995
Free Zones (Amendment) Act 4 of 1997

World Trade Organization
"Coordinated WTO Secretariat Annual Technical Assistance Plan, 2002." (WT/COMTD/W/95/Rev.1), 6 February 2002.

"Updating of the Listing of Notification Obligations and the Compliance Therewith as Set Out in Annex III of the Report of the Working Group on Notification Obligations and Procedures." (G/L/223/Rev.8), 5 June 2002.

Trade Policy Review: Barbados - Report by the Secretariat (**Error! Unknown document property name.**), 10 June 2002.

Trade Policy Review: OECS-WTO Members - Report by the Secretariat. (WT/TPR/S/85), 7 May 2001.

Trade Policy Review: Jamaica - Report by the Secretariat. 1998.

CARICOM Secretariat
Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy. Signed July 5, 2001.

ANNEX II - LIST OF CONTACT PERSONS

BARBADOS

Ministry of Foreign Affairs and Foreign Trade
Mr. Louis Woodroffe
Mr Agard Evans

BELIZE

Ambassador Eamon Courtenay, Executive Chairman
Ms. Haydee Alonzo, Economist
BELTRAIDE

CARICOM

Mr. Maurice Odle
Ms. Evelyn Wayne
Ms. Constance Vigilance
Ms. Valerie Alleyne-Odle

GRENADA

Ministry of Foreign Affairs and International Trade
S.H. Allyson Francis, Trade Counsel
Gregory Renwick

GUYANA

Mr. Neville B. Totaram. Coordinator, NACEM Ministry of Foreign Trade,
Ms. Bevon McDonald, FSO, Ministry of Foreign Trade
Ms. Sonya Roopnauth, Permanent Secretary, Ministry of Tourism, Industry, and Commerce

Private Sector Commission of Guyana
David Yankana, Director
Avalon Jagnandan, Research Officer

JAMAICA

Ministry of Foreign Affairs
Ms. Marcia Thomas, Deputy Director Trade
Mr. Dale Jones, Project Contact
Ms. Gail Mathurin, Senior Director for Trade

Mr. Lincoln Price, JAMPRO
Ms. Beverly Rose-Forbes, Director, Ministry of Industry and Technology

ST KITTS AND NEVIS

Ministry of International Trade and CARICOM Affairs
Mr. Horatio Versailles Permanent Secretary,
Ms. Terry Nesbitt, Ministry of International Trade and CARICOM Affairs

Ministry of Commerce and Consumer Affairs
Ms. Gloria Williams, Permanent Secretary
Mr. Perry Peets, Assistant Director
Ms. Hilary Awatty, Permanent Secretary

ST. LUCIA

Mr. Steven Fevrier Ministry of Foreign Affairs and International Trade
Ms. Avril Edwin , Manager of Investment Promotion Division
Mr. Cosmos Richardson, Permanent Secretary, Ministry of Commerce, International Financial Services and Consumer Affairs

Chamber of Commerce
Ms. Vela Samuel

ST VINCENT AND THE GRENADINES

Ministry of Foreign Affairs and Foreign Trade
Mrs. Shirley Francis, Permanent Secretary
Nathaniel Williams, Trade Officer

Ministry of Telecom, Science, Technology and Industry
Ellison Clarke
Clarence Harry, Economist II

SURINAME

Ministry of Trade and Industry
Dr. J Tjong Tjin Joe, Minister
Mr. Mauro Tuur, Permanent Secretary
Ms. Henna Djoseiko, Deputy Director of Trade
Ms. Arielle Delprado
Ms. Melanie Groenefelt

Chamber of Commerce and Industry
Robert L.A. Ameerali, President
Ginmardo B. Kromosoeto, Executive Board Member
G. Ommaren, Secretary
Ministry of Finance
Mrs. A. Pershad-Rampersad, Legal Tax Advisor
Ms. O. Hoogdorp

TRINIDAD AND TOBAGO

Ministry of Trade and Industry:
Ms. Donna De Four
Mr. Wayne Punnette
Mr. Roger Moore
Ms. Christine Mahato

Ministry of Finance
Mrs. Ava Jordan

Non Government
Mr. Alan Nobie, Trinidad and Tobago Chamber of Commerce (South)
Mr. Anthony Beaubrun, and Mr. Michael Redhead, Trinidad and Tobago Chamber of Commerce
Mr. Sean Ifill, CEO, The Caribbean Association of Industry and Commerce (Inc)
Mr. Michael Leschaloupe, CEO, Trinidad and Tobago Free Zones Company Ltd.

TIDCO
Dr Carla Noel, Vice President/Director of Tourism:
Mr. Lawrence Placide, Acting VP, Trade and Industry
Ms. Janet Furlonge, Senior Investment Facilitation Officer

ANNEX III – SUBSIDY NOTIFICATIONS

Antigua and Barbuda (G/SCM/N/71/ATG)

- *Fiscal Incentives Act Cap 172*;
- *Free Trade and Processing Zone Act No. 12 of 1994*

Barbados (G/SCM/N/71/BRB and Corr.1)

- *Fiscal Incentives Act*

Belize (G/SCM/N/74/BLZ and Suppl.1)

- *Fiscal Incentives Act*
- *Export Processing Zone Act*
- *Commercial Free Zone Act*
- *Conditional Duty Exemptions Facility under the Treaty of Chaguaramas*

Dominica (G/SCM/N/74/DMA/ and Corr.1)

- *Fiscal Incentives Act No. 42 of 1973*
- *Aid to Development Enterprises Act*
- *Hotels Aid Act*

Grenada G/SCM/N/71/GRD/Suppl 1

- *Fiscal Incentives Act no. 41 of 1974*
- *Qualified Enterprises Act No. 18 of 1978*
- *CARICOM Common External Tariff, Statutory Rules and Order No.37 of 1999*

Guyana

WTO website does not record a notification in the series G/SCM/N/71 or 74.

Jamaica G/SCM/N/71/JAM

- *Export Industry Encouragement Act*
- *Jamaica Export Free Zones Act*
- *Industrial Incentives (Factory Construction) Act*
- *Foreign Sales Corporation Act*

St. Kitts and Nevis G/SCM/N/74/KNA and G/SCM/N/71/KNA

- *The Fiscal Act No. 17 of 1974 (Text Annexed to notification)*

St. Lucia G/SCM/N/71/LCA[42]

- *Fiscal Incentives Act*
- *Micro and Small Scale Business Enterprises Act*
- *Free Zone Act*

St. Vincent and Grenadines G/SCM/N/74/VCT[43] and G/SCM/N/71/VCT

- *The Fiscal Incentives Act No. 5 of 1982*
- *Hotels Aid Act No. 16 of 1988*

Suriname G/SCM/N/71/SUR (March) The document states: "We have to emphasise that the Government of Suriname does not provide any form of subsidy to any sector or firms".

G/SCM/N/74/SUR - The document indicates: "In this connection, I would like to inform you that the Government of Suriname provides subsidies when it is necessary and this provision is not based on legislation."

G/SCM/N/74/SUR/Suppl.1 - Exemptions from internal taxes – no subsidy.

Trinidad and Tobago

WTO Web site does not record a notification in the series G/SCM/N/71 or 74.

[42] Includes following text: "Where programmes mentioned in our earlier report are not included, it is because analysis reveals that they are not required, according to Article 27.4. As such, the attached notifications do not include reference to the *Tourism Incentives Act, No. 7 of 1996*, and the *Special Development Areas Act, No. 2 of 1998.*

[43] Notification based on TPRM report.

ANNEX IV - TRIMs QUESTIONNAIRE

1. Please indicate whether your government maintains any measures in the following categories applying to investments in the production of goods or services that are conditioned on any of the economic performance requirements of the type listed in paragraph 2 below. If a requirement (e.g., approval or authorization) is dependent only on meeting a fiduciary or prudential standard (e.g., good character, absence of a criminal record, adequate experience, adequate capital, etc.) there would be no need to include the requirement in your response.

   (A) Requirements

   - Discretionary authorization of any investment (pre-establishment, establishment, acquisition, expansion);
   - Separate specific discretionary approval of foreign investments;
   - Environmental Assessments; and
   - Other requirements for an investment (please specify).

   (B) Incentives

   - Fiscal incentives for investors/manufacturers/services provider e.g., corporate tax reductions, corporate tax holidays, appreciated depreciation, remission of customs and excise duties, and internal taxes;
   - Direct subsidies available to reduce costs of establishment, production or marketing, access to restricted imports;
   - Access to restricted imports;
   - Eligibility for public procurement contracts;
   - Preferential access to local transportation/communication carriers;
   - Eligibility to exploit local resource (fishing, forestry, agriculture and industrial estates);
   - Participation in a free trade zone and eligibility of a free trade zone investor to supply the domestic market;
   - Access to (or retention of) foreign exchange for importation or profit remission;
   - Access to restricted domestic and export credit and export credit insurance on concessional terms;
   - Preferential access to products imported by a government agency;
   - Access to domestic equity markets;
   - Relaxations in environmental or labour standards; and
   - Other incentives applying to investors (with description).

2. For each identified investment measure, please indicate the "economic" conditions imposed for meeting a requirement or in establishing eligibility for an incentive, whether legislated or "negotiated" case by case. For example, the

    - Requirements for local sourcing of goods and services;
    - Minimum domestic (or regional) content requirements
        (i) by value,
        (ii) by volume,
        (iii)by percentage of sales,
        (iv)by percentage of per unit price or cost;
    - Minimum export performance
        (i) by value,
        (ii) by volume,
        (iii)by percentage of sales;
    - Trade balancing obligation (e.g., exports to offset wholly or partially investor's imports);
    - Product mandates for foreign investments (commitments to exclusively produce and market part of foreign investor's product range);
    - Technology transfer;
    - Joint venture requirement with or without specified minimum levels of domestic participation;
    - Minimum domestic employment levels;
    - Employment of nationals in senior positions;
    - Local representation on Boards of Directors;
    - Establishment in a particular location; and
    - Other conditions, with description.

(iv) Please indicate and supply the laws/regulations under which the identified requirement/ incentive measures are maintained and any policy statements pertaining to their administration.

ANNEX V - CONSULTANT'S TERMS OF REFERENCE

TERMS OF REFERENCE
Field Consultants

Objective:

1. Analyze the status of implementation in CARICOM Member States of the **WTO Agreement on Trade-Related Investment Measures (TRIMs).**

2. Recommend actions both at national and regional level to facilitate full and faithful implementation of the relevant agreement(s) in all member states.

Specific Activities:

1) For each individual WTO agreement mentioned above, prepare a report including a detailed review, by country and in comparable form, of the following issues:

   a) The obligations of CARICOM members (as listed in Annex 1 a, b, and c of the Marrakesh Final Act); identifying clearly what obligations apply to what countries and from what provisions some or all countries are temporarily or permanently exempted.

   b) Status of implementation for each of these obligations in each CARICOM country, including the following:

      i) obligations fully implemented, mentioning in detail, when appropriate, implementation of market access commitments; adoption of new (or modification of existing) legislation or regulation, establishment of appropriate institutional mechanisms when required, etc.;
      ii) obligations not yet (or only partially) implemented to date, indicating actions that would be required to achieve full implementation, including implementation of market access commitments; adoption and/or modification of new/existing legislation/regulations; establishment of appropriate institutional mechanisms, etc.;
      iii) when establishment of contact points is required by the relevant agreement(s), prepare a specific section on the accomplishments made so far, indicating suggestions and/or specific technical assistance required in order to comply with the set-up of national contact points;
      iv) status of notification requirements, including availability of mechanisms for reviewing notifications by other WTO members. The issue of notifications will be presented as a separate section and will include information on problems faced by countries to comply with notifications requirements or to review notifications by other WTO members, and specific suggestions for streamlining obligations and procedures for submitting and reviewing notifications in the relevant areas.

c) Review relevant ongoing donor activities related to implementation of WTO commitments in the relevant agreement(s).

d) Recommendations for actions to be undertaken to facilitate full and faithful implementation of the relevant agreement(s) in all member states, clearly indicating which obligations or particular areas require immediate attention. In particular, the consultant will identify:

i) issues/problems that constitute an obstacle for implementation including institutional capacity limitations;
ii) areas/issues where further technical assistance and/or training is required in order to facilitate implementation;
iii) to what extent recommended actions could be undertaken at the regional versus the national level;
iv) a listing of priority actions and the resources required for implementation.

2) In order to complete their work, the consultants will undertake the following steps:

a) Prior to field trip:

(i) Preliminary research: desk review of relevant documentation regarding the implementation of WTO commitments in CARICOM countries, including WTO documents and publications, CARICOM/OECS reports, legislation and other documents available on individual countries and other relevant material. The consultant will also review ongoing initiatives to support developing countries' implementation of the relevant WTO agreement(s), particularly those undertaken and/or supported by WTO bodies, multilateral and bilateral donor agencies.
(ii) Provide input to the Lead Consultant for preparation of summary Implementation Matrix for each agreement.
(iii)Prepare and dispatch, to national counterparts and contact persons (with copy to the CARICOM Secretariat), a questionnaire prepared in collaboration with the Lead Consultant.
(iv)Obtain results of the questionnaires.
(v) In cooperation with the CARICOM Secretariat and the relevant national contact persons, ensure that proper conditions are in place in each country to maximize the outcome of the field trip.

b) Field trip: country interviews and research based on the desk research and survey results mentioned above, and using the Implementation Matrix and the questionnaires. The consultant will travel to the OECS Secretariat and individual OECS countries as necessary, as well as each of the non-OECS WTO members in CARICOM, over a period of two months, to consult with relevant government officials, gather information relating to the respective issue areas and review the legal, institutional and administrative arrangements that are in place.

c) Post-field trip:

(i) Prepare draft report based on the information gathered and in line with the outline established in conjunction with the Lead Consultant, including detailed information on each of the issues mentioned under Specific Activities, Point 1) above.
(ii) Submit draft report to CTPL.
(iii) Meet with Lead Consultant to fine-tune draft report before it is submitted by the CTPL to the CARICOM Secretariat.
(iv) Revise draft report in accordance with comments received from the CARICOM Secretariat/IDB.
(v) Submit final report to CTPL that is acceptable to CARICOM Secretariat/IDB.

Expected Results:

For each of the WTO Agreements mentioned above, a detailed report on the status of implementation of the relevant agreement in each of the 12 CARICOM member states that are also WTO members, including recommendations for actions to support full implementation of the relevant obligations and commitments.