

The Bahamas and the World Trade Organization

Portia J Nicholson with Darron Pickstock
pnicholson@higgsjohnson.com

On 12 and 13 April 2007 the Director General of the World Trade Organization ("WTO") met with Trade Ministers of the Caribbean Community in Kingston Jamaica to discuss the status of implementation of WTO rules and provide political impetus to restart the suspended global trade talks. This article takes a look at the WTO and examines the Bahamian position on accession.

About the WTO

Headquartered in Geneva, Switzerland, the WTO is the international body formed to promote free trade by promulgating and policing international trade rules and resolving trade disputes between member states. It was established in 1995 to succeed the General Agreement on Tariffs and Trade (GATT).

The WTO's stated mission is "*to increase international trade by promoting lower trade barriers and providing a platform for the negotiation of trade.*" Its principal aim is to promote an international trading system with the following characteristics:

- i. non-discrimination in the sense that one country cannot favour a particular trading partner above others within the system, nor discriminate against foreign products and services;
- ii. fewer tariff and non-tariff trade barriers;
- iii. predictability, with foreign companies and governments assured that trade barriers will not be raised arbitrarily and that markets will remain open;
- iv. greater competitiveness;
- v. accommodations for less developed countries, giving them more time to adjust, greater flexibility, and more privileges.

Despite the last stated objective, many develop-

ing countries have limited experience in negotiating and implementing international trade agreements and feel disadvantaged in the WTO arena. Indeed, limited institutional capacity in this regard has been cited by The Bahamas as one of the biggest challenges to be overcome. In order to assist developing countries in overcoming their limited expertise in WTO law and in managing complex trade disputes, an Advisory Centre on WTO Law was established in 2001. The aim is to level the playing field by enabling less developed countries to have a full understanding of their rights and obligations under the WTO Agreement.

Many developing countries feel disadvantaged in the WTO arena.

One of the most important structures of the WTO is its Dispute Settlement Body (the "DSB") which John H. Jackson in his book, *The World Trading System*, describes as "an achievement that may be the core linchpin of the whole trading system." The DSB adjudicates trade disputes between countries. There is compulsory jurisdiction and decisions are binding on the parties. Sanctions may be imposed if decisions are not observed. More than eight cases were brought before the DSB in its first two years and more than 270 cases shortly thereafter. It is thought that this activity demonstrates widespread confidence in the system and places political pressure on all states to comply with DSB rulings.

However, whilst sanctions may be imposed, these often cannot be effectively enforced against economically powerful states or trading blocs such as the United States or the European Union, and sanctions applied by economically weak states against stronger ones, are often ignored. A current example is the successful case brought against the United States by Antigua and Barbuda, which alleged that the USA (continued pg 2)

Inside

- 1 The Bahamas and the World Trade Organization
- 3 Did You Know: The Bahamas' Probate Process
- 3 Recent Legislation Amendments to Facilitate Consolidated Supervision
- 4 Real Property, Real Tax: What An Owner Should Know
- 5 An Emerging Market for Title Insurance
- 6 Case Report: Attorney General v. Rivkin, Kennedy, Richardson et al
- 6 Higgs & Johnson Continues Expansion with Opening of Another Satellite Office
- 8 H&J and Industry News

The information contained in this newsletter is provided for the general interest of our readers, but is not intended to constitute legal advice. Clients and the general public are encouraged to seek specific advice on matters of concern. This newsletter can in no way serve as a substitute in such cases.

For additional copies of FOCUS, please contact Calise Barry at 242 502 5200 or at cbarry@higgsjohnson.com.

The Bahamas and the WTO cont'd

was in effect using discriminatory prosecution against cross border Internet gambling as a protectionist measure. Despite a clear ruling in favour of the tiny Caribbean nation, there is some doubt that it will receive compensation.

Procedure for Accession

The process for gaining membership of the WTO commences with the submission of a formal written request for accession by the applicant. This request is reviewed by the General Council of the WTO, which establishes a Working Party to examine the application and submit its findings to the General Council for approval. Any member of the WTO is free to be a part of this Working Party. The applicant government is required to submit to the Working Party, a memorandum covering all aspects of its trade and legislative regime. This memorandum forms the basis for detailed fact findings by the Working Party.

Submission of the memorandum is followed by a 'Q&A session' between WTO members and the applicant, which marks the start of substantive negotiations to determine the terms and conditions of accession. The applicant simultaneously engages in bilateral negotiations on concessions and market access for goods and services. The results of these negotiations and bilateral agreements are consolidated into a final "accession package," which includes a Protocol of Accession, a Draft Report by the Working Party and market access commitments.

These documents are presented to the General Council for adoption and to decide if the applicant's membership is accepted. If accepted, the applicant is free to sign the Protocol of Accession stating that it accepts the approved "accessions package" subject to ratification in its national parliament. When the country's accession is ratified, the applicant becomes a full Member of the WTO.

The Bahamian Position

On 10 May, 2001, The Bahamas submitted its request for accession. A Working Party of the General Council was established on 18 July, 2001 to examine its application but no chairperson has been designated. The Ministry of Trade

and Industry has compiled and tabled before Cabinet the required memorandum for review and debate. In 2006, former Foreign Minister Fred Mitchell declared that the Bahamas' movement toward accession had been frozen. The Bahamas is still at the preliminary stages of accession into the WTO and at present, has only observer status.

In his information paper to the government, Trade Ambassador Leonard Archer put forward the following arguments in favour of The Bahamas becoming a WTO member:

- i. New rules governing trade in services are about to be written by WTO members. With the two main industries in The Bahamas being tourism and financial services, (together accounting for some 60% of the Gross Domestic Product) it is important that The Bahamas protect its interest by participating in the formulation of trade rules affecting these industries.
- ii. The Bahamas' trading partners are WTO members, and will subject The Bahamas to WTO rules.
- iii. If The Bahamas becomes a part of the Free Trade Area of the Americas it will be in a trading arrangement where the members will apply even stricter rules and disciplines than those of the WTO.
- iv. As a member of the WTO, The Bahamas would be able to obtain favourable terms and conditions in the FTAA, which allows for special and differential treatment to be given to small countries, particularly those that are a part of a regional economic grouping, like the Caribbean Single Market and Economy.

But not everyone is equally sanguine about the results of membership. Critics argue that WTO rules favour developed countries at the expense of smaller developing ones forcing them to open their markets to unfair competition. Of particular concern to The Bahamas and other Caribbean countries, are agriculture subsidies which give agricultural exports from the developed world an unfair advantage against similar products from developing nations. (continued pg 9)

Regardless of one's viewpoint, the WTO will doubtless have a big impact on The Bahamas.

FOCUS Editorial Committee

Heather L Thompson (chair)
 Sterling H Cooke
 N Leroy Smith
 Shasta L Treco-Moxey
 Samantha S J Knowles-Pratt
 Portia J Nicholson
 Nadia J Taylor
 Melanie D Hutcheson
 Calise D Barry

Did You Know: The Bahamas' Probate Process

Jillian T Chase-Jones
jchase@higgsjohnson.com

Most people are familiar with the virtues of having a will, but did you know that there is a formal process which must be followed before property can be distributed to a deceased person's beneficiaries, whether or not he or she left a will? We set out below brief details of the requirements:

A Bahamian Will

If the deceased person died with a Bahamian Will then the Executor named in the Last Will and Testament of the deceased person must make an application to the Probate Court for a Grant of Probate/Letters of Administration with the Will Annexed, which is a Certificate declaring that the Last Will and Testament of the deceased person is valid under the laws of the Bahamas and that the Executor has the authority to administer the Estate of the deceased person in the Bahamas.

Intestate and Domiciled in a non-Commonwealth Member Country

If the person died without a Will or was domiciled in a civil law jurisdiction (with the exception of certain states of the United States of America) then an application must be made to our Courts to obtain a Grant of Letters of Administration, by which the Legal Heir(s) is/are recognised in the Bahamas and has the authority to administer the

estate of the deceased.

Usually, a Declaration of Heir(s) (or such similar order) has already been filed with the court in the country in which the deceased resided confirming his or her Legal Heir(s). The Declaration of Heir(s) (or such similar order) will have to be submitted to our Probate Court for approval.

Testate and Domiciled in a Commonwealth Member Country or in a state of the United States of America

If the deceased was domiciled in a Commonwealth country then a Resealed Grant will have to be obtained from our Courts. By obtaining a Resealed Grant in The Bahamas, the Executor/Personal Representative is recognized in the Bahamas and has the authority to administer the estate of the deceased.

This process requires that a Grant (or such similar order) has already been issued by the court in which the deceased person resided (e.g. Great Britain or any part of the Commonwealth or in the United States of America) to the Executor/Personal Representative of the estate of the deceased person. The Grant (or such similar order) will have to be submitted to our Probate Court for approval. A Grant is issued within 3 to 6 months for each type of application •

Recent Legislative Amendments to Facilitate Consolidated Supervision

Samantha SJ Knowles-Pratt
sknowles-pratt@higgsjohnson.com

Recent amendments to various pieces of financial services legislation now specifically provide domestic regulators with the ability to share information with one another to facilitate consolidated supervision and the regulation of the financial services sector.

The External Insurance (Amendment) Act, 2007, The Insurance (Amendment) Act, 2007, The Central Bank of The Bahamas (Amendment) Act, 2007, The Banks & Trusts Companies Regulation (Amendment) Act, 2007, The Investment Funds (Amendment) Act, 2007 and The Securities Industry (Amendment) Act, 2007 empower the Registrar of Insurance Companies, the Governor of the Central Bank of The Bahamas and the Securities Commission of The Bahamas respectively, to share information acquired in the

course of their duties or in exercising their functions where they consider cooperation or information to be a necessary part of a framework for consolidated supervision, oversight or regulation of the financial services sector.

The Financial and Corporate Service Providers (Amendment) Act, 2007 now specifically empowers the Inspector of Financial and Corporate Services and The Financial Transactions Reporting (Amendment) Act, 2007 now specifically empowers the Compliance Commission to cooperate with any regulatory authority in The Bahamas by sharing information in the same manner set out above for the Registrar of Insurance Companies, the Governor of the Central Bank and the Securities Commission. The amendments to the various pieces of legislation were assented to on 20 March 2007 and retroactively came into effect as of 2 January 2007 •

Real Property, Real Tax: What an owner needs to know

Shasta Treco-Moxey with Portia J Nicholson
streco-moxey@higgsjohnson.com

With real estate in The Bahamas becoming ever more valuable, it is essential that property owners become fully aware of their real property tax obligations, available exemptions and what actions they need to take to ensure that their property is protected.

Under The Real Property Tax Act (the "Act") real property owned by Bahamians is taxable if it is located in New Providence and contains improvements valued at \$5000 or more. No tax is levied in respect of unimproved land in New Providence or land (whether or not improved) in the Family Islands if these are owned by Bahamians. For the purposes of the Act, a Bahamian is (a) a citizen of The Bahamas, or (b) a company registered under the Companies Act, 1992, which has not less than 60% of its shares beneficially owned by Bahamians. An "improvement" is defined in the Act as any physical addition or alteration to the land for its benefit not including agriculture or horticulture. Real property owned by non-Bahamians is subject to tax whether or not the land is improved and whether located in New Providence or the Family Islands.

Real property tax is charged on the market value of land. Property owners are required to submit a Real Property Tax Declaration Form (the "Declaration") to the Ministry of Trade and Industry, Valuation Section (the "Valuation Section") no later than the 31 December of each year advising the Chief Valuation Officer of any improvements made to the property or change in its ownership, the owner's address, zoning, use or market value of the property.

Exemption on Owner-Occupied Property

Owner-occupied property owned by Bahamians and non-Bahamians is exempt from the payment of real property tax up to a value of \$250,000. To the extent that the value of the property exceeds \$250,000, a reduced rate of tax is charged on the excess amount.

"Owner-occupied property" is any property which the owner occupies as his primary residence and may consist of a single-family dwelling house, a condominium or a multi-family complex (i.e., a duplex, triplex etc.). Where the owner-occupied property is a multi-family com-

plex, the exemption applies only to the unit which is occupied by the owner, provided the unit is valued at \$250,000 or less. The other units will be taxable.

The beneficial owner of a company may benefit from the owner-occupier exemption by submitting a Declaration to the Chief Valuation Officer indicating that (i) the property in question is used exclusively as a dwelling house and (ii) the company holds no other property on behalf of the beneficial owner which is used as a dwelling house and for which an exemption has already been granted.

An owner who is granted an exemption on the basis that his property is owner-occupied has an obligation to disclose to the Chief Valuation Officer any circumstances or facts of which he is aware which disentitle the property to the exemption. Failure to do so could lead to the property owner being charged with an offence and render him liable on summary conviction to a fine of \$1,000 or imprisonment for a term of three months or to both such fine and imprisonment. In addition, the court will order the offender to pay tax at double the amount which would have been payable had the disclosure been made.

Assessments

The Chief Valuation Officer is required periodically (but not more than once in every 5 years) to re-assess property values. The names of owners whose properties have been re-assessed are published in the Gazette. The onus is on the property owner to ascertain from the Valuation Section the property's re-assessed value and the applicable tax rate. The Chief Valuation Officer may, upon serving a notice of reassessment, assess property retrospectively for a period of up to 10 years where such property has not been assessed during that period.

Rates of Tax

Prevailing tax rates are set out in Chart 1 on pg 5.

Surcharges

Failure to pay real property tax when it is due could result in a surcharge being applied from the due date to the date of payment as follows:

- a. where the tax is overdue for up to 90 days, the surcharge is at the rate of 5% per annum of the outstanding amount; and (continued pg 5)

"Owner-occupied property" is any property which the owner occupies as his primary residence and may consist of a single-family dwelling house, a condominium or a multi-family complex (i.e., a duplex, triplex, etc).

The maximum annual tax payable is capped at \$34,000 per annum

Real Property, Real Tax cont'd

Chart 1: Rates of Tax

Property Type	Value Range	Tax Rate
<i>Owner-occupied residential</i>	Up to \$250,000	NIL
	Exceeding \$250,000 up to \$500,000	0.75% of the value per annum
	Exceeding \$500,000	1% pf the value per annum
<i>Unimproved</i>	Owned by Bahamian	NIL
	Non-Bahamian owned by up to \$3,000	\$30
	Non-Bahamian owned exceeding \$3,000 up to \$100,000	1% of the value per annum
	Non-Bahamian owned exceeding \$100,000	1.5% of the value per annum
<i>Commercial and other</i>	Up to \$500,000	1% of the value per annum
	Exceeding \$500,000	2% of the value per annum

- b. in any other case, the surcharge is at the rate of 10% per annum on the outstanding amount.

In addition, where real property tax remains unpaid for 30 days after becoming due, the Treasurer may initiate legal proceedings against the

property owner to recover the tax.

With low tax rates and high property values, The Bahamas is considered one of the premier places in which to own property. A prudent owner will ensure that his tax obligations are met on a timely basis to avoid the imposition of onerous penalties and surcharges (see Chart 1 above) •

An Emerging Market for Title Insurance

Naurel E Watkins
nwatkins@firstbahamastitle.com

In the course of buying and selling real estate, serious and potentially expensive problems can arise as a result of defects in title, especially when dealing with unregistered land. As a result, a market has emerged in The Bahamas for title insurance.

Title insurance is meant to protect an owner or lender's financial interest in real estate against loss due to title defects, liens or other matters. It will defend against a lawsuit attacking the title as it is insured, or reimburse the insured for actual monetary loss incurred.

Title insurance is a premium agreement that protects a policy holder in amounts not exceeding the face value of the property for losses caused by either (i) on record defects which are found in the title; or (ii) interest in the insured property that existed on the date on which the policy was issued.

The title insurance policy indemnifies or secures the insured against a loss; holding the insured harmless by reimbursing for a loss previously inflicted by a third party. However, title insurance is not a warranty of the state of title.

Typically, the real property interests that are insured are freehold (ownership in fee simple) and leasehold interests.

Types of Title Insurance

There are two types of title insurance, loan policy and owner's policy. The loan policy, also known as a lender's policy is issued to mortgage lenders only; and protects the lender's interest in the property.

The owner's policy insures a purchaser that (a) the property's title is vested in the purchaser (b) it is free from all defects, liens and encumbrances; with the exception of those listed in the policy; or excluded from the scope of the policy's coverage. The insured amount is typically the purchase price paid for the property.

Title Insurance vs. Other Insurance

Generally, insurance is a contract that indemnifies or guarantees against specific types of loss (i.e. death or accident). Title insurance is different from other types of insurance as it: (i) is not based on predictions of a future event by an actuary or statistician; (ii) is based on a search of the public records for past events with future consequences; and (iii) defects found are exceptions from coverage. (continued pg 9)

Higgs & Johnson Continues Expansion with Opening of Another Satellite Office



ABOVE: H&J personnel with Edison Key (far right), Member of Parliament for South Abaco.



RIGHT: Building supervisor and assistant place signage above new office.

RIGHT: Primary service providers for the Abaco office include Partner Stephen J Melvin (third from right) flanked by Real Estate & Development attorneys Tessa L Turnquest and Karen S Brown. Also pictured L-R: Edison Key, Member of Parliament for South Abaco; Elizabeth Eldon, H&J intern; Cheryl Cooke, Personal Assistant; and Vidalia Knowles, Acting Personal Assistant.



ABOVE LEFT: Senior Trusts and Estate Planning attorney Dr. Earl A Cash welcomes clients to a reception marking the office's opening.
ABOVE RIGHT: real estate attorney Stephen J Melvin

On 25 June 2007 Higgs & Johnson officially opened new offices at Marsh Harbour, Abaco – the firm's third satellite facility in the Family Islands and fourth nationwide.

Located in the heart of The Bahamas' third largest economic hub, the new chambers will draw on the extensive legal resources of the firm's head office to offer a comprehensive range of services to clients, but is specially constituted to focus on the island's rapidly growing independent wealth management niche and increasing demand for advice in real estate transactions and mortgage financing, trusts, estate planning and litigation matters.

Managing Partner John KF Delaney said: "For many years we have been strengthening our business relationships on the island and are excited by the opportunities presented by the growing appeal of Abaco. Establishing a permanent presence here is the latest stage in our strategy to expand our network of services throughout The Bahamas."

Higgs & Johnson began operations in Nassau almost 60 years ago and is pleased to be of service to Abaco and the Northern Bahamas region.



At 3 storeys, the WmH building, home of H&J's newest office, is the tallest on the quaint island of Abaco



H&J Managing partner John KF Delaney with Mr. Key.

Photos by Beulah Wong

Real Property, Real Tax cont'd

Life of a Title Insurance Policy

Title insurance lasts as long as the insured has some interest in the property.

Frequency of Premiums

A premium is paid once. The premium is due when you buy. You will never pay it again.

Insuring Title to Real Estate

Insuring title to real estate generally consists of

two distinct steps:

1. the issuance of a preliminary report that describes title conditions, which will serve to limit the title insurance if issued; and
2. the final title insurance policy that may have all or some of the limitations spelled out in the preliminary title report ●

The Bahamas and the WTO cont'd

Other grounds of opposition to the WTO have been:

1. The WTO is overly powerful and violates national sovereignty by forcing states to conform to its trade rules.
2. The WTO forces poor countries to open their markets to products from the developed world but does not ensure that these poor countries have equal market access for their products. Further it ignores economic and developmental imbalances which make equal trade impracticable
3. The Agreement on Trade-Related Aspects of Intellectual Property Rights limits the ability of developing countries to benefit from international scientific and technological developments.
4. WTO rules do not sufficiently address the impact of free trade on workers' rights, child labor, the environment and health.
5. Trade disputes are resolved in private sessions, and therefore lack transparency.

that area's competitive advantage. Further, in a 1999 ruling in relation to Barbados, the WTO decided that certain offshore services such as foreign sales corporations amounted to an export subsidy. Such a ruling could have a potentially devastating effect on the Bahamas as an offshore financial and corporate services jurisdiction.

Regardless of one's viewpoint, the WTO will doubtless have a big impact on the Bahamas, whether or not the country becomes a member. For example, with the expiration of the Cotonou Agreement between African Caribbean and Pacific (ACP) countries and the European Union (EU), the Bahamas will have to negotiate a WTO-compatible arrangement to replace the existing system of preferences. Products that will be affected include rum, crawfish and polystyrene products. The EU on 4th April 2007 announced that it will eliminate all tariffs and quotas for ACP countries but will not immediately impose a requirement for equivalent market access. However, each country will be expected to negotiate its own Economic Partnership Agreement with the EU and it is clear that this is a temporary position, and over time reciprocity in terms of market access will have to be achieved.

With the recent change in political administration, it will be interesting to see whether the Bahamas will now move ahead with its application for accession. ●

HIGGS & JOHNSON

Counsel & Attorneys-at-Law

Nassau
Lyford Cay
Freeport
Marsh Harbour

Web: www.higgsjohnson.com
E-mail: info@higgsjohnson.com

For the Bahamas, the mandated reductions in import tariffs would pose a budgetary challenge since the country, as an income tax free jurisdiction, relies heavily on these impositions to fund government expenditures. In addition, preferential tax arrangements applicable to the Freeport area under the Hawksbill Creek Agreement would be threatened, potentially undermining

Update: Amendments to Financial Services Legislation

Updates to legislation respecting the Bahamian Foundation and Purpose Trusts was passed by The Bahamas government in 2007 to improve the competitiveness of both products.

The Purpose Trust (Amendment) Act, 2007 (the "Amendment"), which became effective 3 April 2007 is the most recent amendment to the Purpose Trust Act. The Amendment clarifies that individuals can benefit from an authorised purpose trust irrespective of whether they are connected or associated with any of the authorised purpose by providing that a trust may create an authorised purpose trust of capital or income of any property which may have a fixed interest, discretionary interest, or a combination of both. The capital or income of the authorised purpose trust may be disposed of in any of the following ways:

- to persons who may be of any number;
- for purposes which may be of any number or kind, charitable or non-charitable; or
- to any combination of persons or purposes aforementioned.

The amendment will be particularly useful in the context of commercial trusts.

Amendments to the Foundations Act, 2004 came into effect on 30 May 2007 and provide for the appointment of a foundation agent with responsibilities similar to those of a Registered Agent of an IBC; make a foundation council mandatory in the event that a foundation agent but no officer is appointed; makes provision for the foundation agent to be excused from all liability except fraud; clarifies that initial assets can be transferred to a foundation after registration; limits a beneficiary's access to information and documents to those relating to his own vested interest; simplifies accounts for the foundation; and provides that the names of the founder and foundation council need not be of public record.

H&J Supports Safety Initiative



H&J recently continued its involvement as one of several scholarship sponsors of Chevron Texaco (Bahamas) Ltd's annual road safety speech competition. H&J litigator Vann P Gaitor (far left) is pictured with 3rd place finalist Rashad Rolle and Retail District Manager for Chevron Caribbean Inc. Armando Vegas. The H&J donation will afford a scholarship to Mr. Rolle, an aspiring commercial attorney.



H&J Partner Discusses 'Potential Pitfalls' of Using Trust Precedents at STEP Caribbean Conference 2007

In a presentation entitled "The Potential Pitfalls of Using Trust Precedents", Heather L Thompson, partner of the firm's Private Client and Wealth Management Group, recently explored the pros and cons of paint-by-numbers trust template documents during the 2007 STEP Caribbean Conference. This year's event was sold out, with over 310 participants, including delegates from as far away as South America, Asia and Europe. Next year's Conference will be held in Panama City, Panama. Ms Thompson (centre), a past Chairman of the Caribbean Conference, is pictured here with John Lawrence, Chairman, STEP Caribbean and Latin American Region; and Richard Pease, Chairman, STEP Worldwide.