

## **CARIBBEAN ADJUDICATION OF TRADE DISPUTES-THE CCJ's COMPULSORY AND EXCLUSIVE JURISDICTION**

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Before addressing the substantive issue of the Caribbean Court of Justice' (CCJ's) jurisdiction in adjudicating trade disputes under its original jurisdiction, it is perhaps useful or convenient to begin with an understanding of the CCJ's jurisdiction (compulsory and exclusive) under the Revised Treaty of Chaguaramas.<sup>1</sup>

The question of jurisdiction and exclusive jurisdiction of the CCJ implicates notions of what issues the court can adjudicate on and what it cannot adjudicate on, and what it alone can adjudicate on.<sup>2</sup>

This distinction is admittedly arbitrary because in practical terms the jurisdiction of the CCJ is not foreclosed by any such distinction, except in the case of whether the CCJ is competent to resolve an underlying substantive issue. Article 216 of the RTC, for example, authorizes the court to determine if it has jurisdiction on the issue of whether it has jurisdiction.<sup>3</sup>

Jurisdiction also connotes notions of the period in which the court would be permitted to adjudicate on a matter if, for example, there are other dispute settlement bodies within the institutional framework established by a treaty to which the resolution of the dispute should first be directed, or there is a particular procedure for dispute settlement to be met before final resort to a court.<sup>4</sup>

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<sup>1</sup> Hereafter, the RTC.

<sup>2</sup> I am greatly indebted to the late Professor Ralph Carnegie whose seminal writings on this issue spurred my ongoing research interest to engage the topic from other perspectives which hopefully dovetail and elucidate some of the questions he posed in his paper '*How Exclusive is "Exclusive" in Relation to the Original Jurisdiction of the Caribbean Court of Justice? A Consideration of Recent Developments*', Paper Presented at the University of the West Indies Faculty Workshop Series 2009-2010.

<sup>3</sup> Article 216 (2) of the RTC provides that 'In the event of a dispute as to whether the Court has jurisdiction, the matter shall be determined by decision of the Court'.

<sup>4</sup> For example, the procedure for dispute settlement under a treaty arrangement typically involves recourse to consultations as a first step before resort to a court or arbitral proceedings, or the use of other tribunal proceedings before resort to the court. See, for example, Article 4 on the Understanding on the Rules and Procedures Governing the Settlement of Disputes, (DSU), Annex of II of the Agreement Establishing the World Trade Organization (the WTO)

Although these bases do not exhaust the concept of jurisdiction, the question of *locus standi* of a private party to enforce treaty rights to its benefit also looms large for when the CCJ can exercise subject matter jurisdiction given recent decisions regarding the maintenance and implementation of a common external tariff.

### **Exclusive jurisdiction**

The question of the CCJ's exclusive jurisdiction in relation to its Original Jurisdiction has drawn much attention, notably on the meaning of 'exclusive' in Article 211.1 of the RTC, given other modes of dispute settlement referred to in Article 188.1 of the RTC such as good offices, mediation, consultations, conciliation and arbitration, and the fact that Article 211.1 of the RTC prefaces the conferral with the words 'Subject to this Treaty', which presumably is in reference to other modes of dispute settlement in the RTC.

The difficulty of determining the meaning of 'exclusive' is also said to be problematic because other modes of dispute settlement recognized in the RTC are qualified by the same term 'Subject to the provisions of this Treaty', and 'without prejudice to the exclusive and compulsory jurisdiction of the Court in the interpretation and application of this Treaty under Article 211'.

The reference to other modes in the RTC, however, is not accompanied by the term 'exclusive jurisdiction' unlike the reference to the jurisdiction of the CCJ with respect to dispute settlement and this must bear some meaning in relation to the other modes. It may mean that the other modes are not exclusive whether there is agreement by the parties for the settlement of dispute by these other modes, especially since Article 188.1 expressly excludes the CCJ and arbitration, and the exclusion is presumably in reference to the special character of the CCJ or an arbitral panel as competent to make binding final decisions.

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Agreement); Article 2003 of the North American Free Trade Agreement (NAFTA), Annex III of the Treaty of Asuncion (MERCOSUR Agreement).

Without suggesting a dogmatic approach to resolving this question, the meaning of 'exclusive' can be understood to refer to the CCJ's competence in resolving disputes where the other modes of dispute settlement do not resolve the underlying dispute.<sup>5</sup>

We may suggest ways in which this question can be approached, that is, whether other modes have resolved the dispute. Other modes may not have been invoked in which event the CCJ's competence is not in dispute, since there is no use of the term exclusive regarding the other modes; but other modes may have been invoked and there is yet no resolution of the dispute.

In the latter scenario, the parties may agree on one of the other modes to resolve a dispute but this mode proves unsatisfactory. However, the dispute may have been settled by this mode but a private party claims that their rights under the RTC have been breached, notwithstanding the settlement of the dispute between Members in the chosen mode.

Here, one may suggest that the exclusion of arbitration in Article 188.1 does not mean that the CCJ would not have jurisdiction to resolve a dispute submitted to arbitration, unless the finding of the arbitral panel is final and binding even if the decision is arrived at based on an error of law or some other body than the CCJ is given the competence to overturn the finding and award.

### **Subject matter jurisdiction of CCJ under the RTC**

Under Article 211 of the RTC, the jurisdiction of the CCJ is recognized in 4 specific cases:

1. Disputes between Members States;
2. Disputes between Member States of the RTC and the Community;
3. Referrals from national courts of the Member States parties to the RTC;
4. Applications by persons in accordance with Article 222 concerning the interpretation and application of the treaty.

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<sup>5</sup> As seen below this is but a tentative observation because it is questionable whether resolution of the dispute by other modes forecloses the CCJ's jurisdiction with respect to a claim by a private party under Article 222 of the RTC if, for example, the dispute in any of the other modes is resolved without recourse to applicable principles of law and a private party claims that its right under the RTC (or rights to enure to its benefit) have been breached.

Article 188.1 sets out other modes of dispute settlement which affects the period in which the CCJ can exercise jurisdiction in a dispute. Other available modes can be chosen, but resort to another mode, including adjudication, is to be taken if the dispute is not resolved by the mode of dispute settlement initially chosen other than arbitration or adjudication. Where the parties have decided to embark on another mode of dispute settlement other than the one initially chosen, excluding arbitration and resort to the CCJ, the CCJ's jurisdiction may arguably be preempted until resolution of the dispute by this mode or until it is clear that the dispute cannot be resolved by this chosen mode.<sup>6</sup>

Jurisdiction may be pre-empted when there are obligations intended to create a modicum of policy space for Members without, for example, some benefit to private parties envisaged before the obligation is performed.

Policy space for Members is observed when there is some grace period between ratification and incorporation of a treaty to allow a party to determine the appropriate means by which to give effect to its international obligations. This also obtains between the period of a finding of a breach of an obligation and the measure to be implemented to rectify the breach of an obligation if no specific recommendation or measure is stipulated for addressing the breach. The concept also includes the standard of review to determine when a measure is in violation of treaty obligations.<sup>7</sup>

Here we take the concept of policy space to connote the demarcation between policy and law reflecting the institutional balance between policy formulation bodies under the RTC and mechanisms for adjudication of disputes that are binding and final.

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<sup>6</sup> There is no textual support in the RTC for this proposition but the Rules seem to contemplate this outcome by provision for an application for stay of proceedings.

<sup>7</sup> The issue of the CCJ's jurisdiction or exclusive jurisdiction is not addressed from the perspective of policy space in terms of the standard of review to determine the legality of a measure, since the application of the relevant standard of review by an adjudicating body already presupposes the exercise of the jurisdiction of the adjudicating body.

In the case of policy formulation and implementation (for example, the appropriate grace period for assumption of an obligation in domestic law as determined by a designated body such as COTED or the Conference)<sup>8</sup>, it is arguable that the CCJ's jurisdiction is pre-empted.<sup>9</sup>

To be sure, policy formulation as such is not barred from review by the CCJ. Article 187 of the RTC can be interpreted as providing for review of policy formulation issues if a proposed measure would be inconsistent with the objectives of the Community,<sup>10</sup> the purpose or object of the RTC is being frustrated or prejudiced, or an organ or body of the Community has acted *ultra vires*.

On the latter point, the CCJ has held that review of decisions of an organ of the Community is permissible where the organ exercises a discretion. Concededly, policy formulation is inherently an exercise of discretion but there may be no legal criteria for the exercise of that discretion to permit review of an affirmative or negative finding or a decision taken by the policy making body.

This may be the case where the policy formulating, implementing, or monitoring organ has wide latitude in the steps to be taken or the process by which Members are to be committed to give effect to obligations under the RTC.

Although the court did not address the nature of the discretion that is generally reviewable, it would seem that this would at least apply whereby the discretion to be exercised must be done in

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<sup>8</sup> This would include, for example, issues regarding removal of restrictions on establishment, the implementation of competition law and policy in domestic legislation, or obligations in respect of trade law and policy such as non-discrimination whereby periods may be established for obligations to be phased in based on a Member's level of development or by virtue of public interest concerns.

<sup>9</sup> This is so especially if the period for the performance of the obligation has not elapsed or the obligation has not yet been incurred. Here we make an appropriate distinction between policy formulation at the regional as opposed to the domestic level, the latter providing no justification for breach of treaty obligations. See, for example, Article 18 of the Vienna Convention on the Law of Treaties on the obligation of parties to a treaty not to do any act which frustrates the purpose of the treaty before the treaty takes effect, and Article 27 of the Vienna Convention on the Law of Treaties regarding the limitation of domestic law as a defence to a breach of treaty obligations.

<sup>10</sup> See Article 187(a) of the RTC. There is no express exemption for measures arising from policy decided at the regional level by the relevant body. Indeed, it would be difficult for an argument to be sustained that such discretion for policy formulation is shielded from review in respect of whether treaty obligations are being met given Article 18 of the Vienna Convention on the Law of Treaties referring to the obligation of parties to a treaty to refrain from any action that would frustrate the object and purpose of the treaty and the CCJ's resort to the VCLT in its interpretation of the obligations to be met by Members under the RTC in recent decisions. See for example, *Hummingbird* (supra) at para. 45 and para. 17 respectively, whereby the CCJ resorted to Article 31 of the VCLT in opining that a treaty must be interpreted in its context and in light of its object and purpose, and to principles such as *pacta sunt servanda* stipulated in Article 26 of the VCLT as applicable in relation to Members' obligation under the RTC.

accordance with some legal criteria established by the treaty.<sup>11</sup> In the case of *TCL v. The Caribbean Community*, the relevant discretion (suspension of the CET) had to be determined in view of the obligation in Article 82 for establishment and maintenance of a Common External Tariff and the criteria for suspension of same under Article 83 of the RTC, and was thus reviewable.<sup>12</sup>

Where there are no identifiable legal criteria in the text of the treaty for the exercise of the discretion, it is doubtful that the CCJ would hasten to review, despite its broad holding in *TCL v. The Caribbean Community* that decisions of Community organs are reviewable, unless the discretion exercised is to be challenged on the usual bases available in administrative law regarding policy formulation.<sup>13</sup>

The CCJ has had occasion to comment on its reviewing role in the demarcation between policy making bodies performing policy making functions and policy making bodies performing functions subject to administrative review.

In *Trinidad Cement Limited v. The Caribbean Community*,<sup>14</sup> for example, the CCJ elaborated on its reviewing role in the following manner:

*'In carrying out such review the Court must strike a balance. The Court has to be careful not to frustrate or hinder the ability of Community organs and bodies to enjoy the necessary flexibility in their management of a fledgling Community. The decisions of such bodies will invariably be guided by an assessment of economic facts, trends and situations for which no firm standards exist. Only to a limited extent are such assessments susceptible of legal analysis and normative assessment by the Court. But equally, the Community must be accountable. It must operate within the rule of law. It must not trample on rights accorded to private entities by the RTC and, unless an overriding public interest consideration so requires, or the possibility of the adoption of a change in policy by the Community was reasonably foreseeable, it should not disappoint legitimate expectations that it has created.'*

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<sup>11</sup> See, for example, *Trinidad Cement Limited (TCL) v. The Caribbean Community*[2009] CCJ 4(OJ), at para.41.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> [2009] CCJ 4 (OJ).

*The Court must seek to strike a balance between the need to preserve policy space and flexibility for adopting development policies on the one hand and the requirement for necessary and effective measures to curb the abuse of discretionary power on the other; between the maintenance of a Community based on good faith and a mutual respect for the differentiated circumstances of Member States (particularly the disadvantages faced by the LDCs) on the one hand and the requirements of predictability, consistency, transparency and fidelity to established rules and procedures on the other.’<sup>15</sup>*

Given this broad formulation on the institutional balance to be maintained between organs carrying out policy making functions and organs carrying out functions requiring particular legal criteria to be met for the exercise of discretion, categories of obligations permitting policy space and limited review by the CCJ arguably include provisions relating to the enforcement of competition law, removal of restrictions on establishment, special and differential treatment for disadvantaged territories in CARICOM, and decisions taken in the public interest.

## **1. Enforcement of competition law**

In the case of competition law enforcement, Chapter VIII of the RTC seems to provide a modicum of policy space for Members by not requiring Members without national competition authorities to establish same within a definite period.

In this scenario could a claim be brought against a Member for breaching its obligation under the RTC to establish a competition authority and the body of law to govern such an institution to prohibit what a private party alleges to be a restrictive business practice under the competition provision of the RTC? Would the CCJ have jurisdiction in such matters?

Conceptually, this situation is arguably no different from an unincorporated treaty since the competition authority as a creature of statute would presumably be required to be governed by a body of law consistent with the competition provisions in the RTC, in particular Article 170 thereof.

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<sup>15</sup> Ibid., paras.39-40.

Yet, founding jurisdiction on this basis would be problematic, absent a grounding in some constitutional provision to be invoked such as ‘protection of law’ or ‘due process of law’, or some ‘legitimate expectation’ similar to *Thomas*<sup>16</sup> and *Lewis*<sup>17</sup> in the one, and *Boyce*<sup>18</sup> in the other, in the case of international human rights treaties.

However, this doctrine or practice of incorporation by judicial intervention which is said to offend the separation of powers doctrine is at the moment available with regard to international human rights treaties and within that genre of treaties to death penalty cases.<sup>19</sup>

By contrast where the treaty is incorporated in domestic law but the competition provisions in the treaty are not yet promulgated in specific competition legislation no issue of jurisdiction on whether the treaty obligation has been met arises.

This can arise where the later Act purportedly incorporates treaty provisions but those provisions require competition legislation to be promulgated to give full effect to the treaty provisions, but also where the specific competition legislation has to be amended to give effect to the treaty.

This invites a discussion as to whether the later general Act intending to give effect to the competition provisions in the RTC takes precedence to the earlier specific competition legislation that is not specifically amended in keeping with the later Act.<sup>20</sup>

As is well known domestic legislation is no bar to enforcement of treaty obligations, but in the context of competition law enforcement the absence of specific provisions in the particular competition legislation may give rise to enforcement challenges.

For example, in some jurisdictions the definition of a market is confined to the domestic market as opposed to referring to a regional market, which has implications for the competence of the national

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<sup>16</sup> *Thomas v. Baptiste*, [2000]2 AC, 1.

<sup>17</sup> *Lewis v. the Attorney General of Jamaica* [2005] 2 AC 50.

<sup>18</sup> *Boyce v R* [2005] 1 AC 400.

<sup>19</sup> See for example, Judge Patrick Robinson “*Achieving the ‘Admittedly Desirable Result’: Difficulties in Constructing Bridges to the Unincorporated Treaty*”, *West Indian Law Journal*, vol. 36, no. 1, May 2011, p.99.

<sup>20</sup> The resolution of this issue is outside the scope of this paper. However, the doctrine of implied repeal, if the later Act does not expressly repeal the earlier competition legislation, could be invoked to the extent of any inconsistency between the earlier competition legislation and the later general Act giving effect to the RTC competition provisions. See, for example, *General Legal Council v. The Fair Trading Commission*, Suit No. E 35 of 1995.

investigating authority to investigate alleged anti-competitive conduct with cross-border effects pursuant to a referral from the Community Commission.

The CCJ's ability to resolve the underlying substantive issue of whether there is a breach of the RTC by the refusal of the national investigating authority to conduct the investigation would not be affected since the obligation would not have been met to effect legislation consistent with the terms of the RTC.

## **2. Removal of restrictions on establishment**

Policy space is also provided to Members in the case of removal of restrictions on right of establishment.

Article 33 of the Revised Treaty provides for COTED in consultation with other bodies to monitor the removal of restrictions to the right of establishment. There is also provision for special and differential treatment in satisfying this obligation. The Revised Treaty, therefore, contemplates that CARICOM Members will need some time to harmonize domestic laws with their obligations under the Revised Treaty.

An entirely different view is possible with respect to domestic legislation which violates Article 32 of the Revised Treaty regarding the '*prohibition on new restrictions on the right of establishment*'.

## **3. Special and differential treatment for disadvantaged territories in CARICOM**

Special and differential treatment is also another goal pursued. The RTC recognizes that CARICOM states include countries at different stages of development and provides for policy flexibility in accordance with a special and differential principle. Thus Article 1 refers to disadvantaged countries in the following terms:

(a) the Less Developed Countries within the meaning of Article 4; or

(b) Member States that may require special support measures of a transitional or temporary nature by reason of:

- (i) impairment of resources resulting from natural disasters; or
- (ii) the adverse impact of the operation of the CSME on their economies; or
- (iii) temporary low levels of economic development; or
- (iv) being a Highly-indebted Poor Country designated as such by the competent intergovernmental organization;

The less developed countries may also apply to the Council for Trade and Economic Development (COTED), as a temporary measure to promote industrial development, for suspension of community origin treatment of eligible imports on the ground that the product is produced in one of their territories.

Further recognition and acceptance of the principle of special and differential treatment is observed in Article 49 of the RTC regarding removal of restrictions on the right of establishment, Article 51(2) (h) of the RTC with respect to the objectives of the community industrial policy, and Article 52(2) of the RTC concerning a special regime for the implementation of the community industrial policy that factors the special needs of disadvantaged regions.

In the context of the enforcement of competition law, there is no express provision recognizing special and differential treatment for less developed countries in the application of the prohibitions against anti-competitive conduct. Nonetheless, there are provisions in the RTC which permit this flexibility. Article 183 of the RTC, for example, empowers COTED to suspend or exclude the application of Article 177<sup>21</sup> of the RTC where it determines that special rules are to apply to particular sectors<sup>22</sup> or if it determines that the exclusion or suspension is in the public interest.<sup>23</sup>

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<sup>21</sup> Article 177 of the RTC specifies general rules regarding anti-competitive conduct (such as anti-competitive agreements and abuse of a dominant position) that Members are enjoined to incorporate in domestic legislation.

<sup>22</sup> Article 183(1) of the RTC.

<sup>23</sup> Article 183(2) of the RTC.

#### **4. Public interest exception**

The term ‘public interest’ is not defined in the RTC and, more importantly, decisions made on this basis, whether by COTED under Article 183 of the RTC or by individual Member States under Article 31 of the RTC, appear not to be justiciable because such decisions are within the purview of policy and not subject to any legal criteria for their exercise.

Article 183, for example, provides that COTED may, on its own initiative, or pursuant to an application by a Member State, exclude the application of Article 177 prohibitions for any sector or enterprise in the public interest.

#### **OTHER POSSIBLE BASES OF PRE-EMPTION OF JURISDICTION**

The reviewing jurisdiction of the CCJ may also be preempted whereby decision making is carried out by a tribunal whose decision is binding and final as in the case of disputes resolved by arbitration, although, as discussed below, a decision of an arbitral panel need not settle the substantive issue as to preempt review by a private party.

#### **Arbitration of disputes**

Settlement of disputes by arbitration is provided for in Article 204 of the RTC. Because decisions of the arbitral tribunal are binding and final with regard to the parties to the dispute,<sup>24</sup> the jurisdiction of the CCJ may be preempted in resolving the underlying issue addressed by the arbitral panel.<sup>25</sup>

It does not seem, however, that a private party would be foreclosed from challenging the finding of an arbitral panel where the finding is in breach of provisions of the RTC.<sup>26</sup> In the case of trade remedies, for example, a dispute submitted to arbitration involving the imposition of anti-dumping duties by a national investigating authority may resolve the lawfulness of the imposition of the duty

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<sup>24</sup> Article 207(7) of the RTC.

<sup>25</sup> The assumption here is that the finding of the arbitral panel is not being challenged on bases that can vitiate the finding such as fraud, duress etc.

<sup>26</sup> Article 207(7) of the RTC refers to the binding and final ruling of the arbitral panel to the parties to the dispute.

without sufficient consideration of the substantive law of the WTO Antidumping Agreement on material injury (for example, failure of the arbitral panel to take into account the issue of whether the investigating authority's report examined all factors in Article 3.4 of the WTO Antidumping Agreement in the assessment of whether there is material injury to a domestic industry).<sup>27</sup>

In the case of safeguards remedies, an arbitral panel may conclude that a safeguard measure is lawful without a consideration of Article XIX of GATT 1994 because of the absence of this provision or reference thereto in the RTC giving rise to a challenge of the lawfulness of the safeguard measure by a private party affected. The absence of a GATT Article XIX obligation may be taken to mean that it was not intended that this obligation is to be met or that a surge in imports resulting from greater integration of regional markets is to be viewed as developments foreseen.

In view of the requirement that regional trading agreements must satisfy the requirements of GATT Article XXIV, however, it is conceivable that a challenge to an arbitral finding that ignores GATT Article XIX in addressing the lawfulness of a safeguard measure could be entertained whereby the CCJ would be called upon to interpret and apply Article 217(1) of the RTC that *'The court in exercising its original jurisdiction under Article 211, shall apply such rules of international law as may be applicable.'*<sup>28</sup>

This would be particularly applicable in the case of a safeguard measure that results from a surge in imports to a CARICOM Member from both intra-regional and extra-regional and is therefore to be applied on an MFN basis consistent with Article 2 of the Agreement on Safeguards to avoid a challenge.

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<sup>27</sup> Articles 126 and 127 of the RTC mirror the provisions of the WTO Antidumping Agreement and would seem to permit consideration of the interpretation of the WTO Antidumping Agreement to inform the interpretation to be accorded to Articles 126 and 127 of the RTC.

<sup>28</sup> This assumes that the reference to international law in Article 217 of the RTC could be interpreted to include the WTO Agreement and that this interpretation could result in the application of Article XIX of GATT 1994 in preference to the WTO-minus provision on safeguards measures in the RTC.

## **JURISDICTION FOR TRADE DISPUTES**

The original jurisdiction of the CCJ is involved in the resolution of trade disputes under the RTC but its jurisdiction is not exclusive with regards to disputes arising under other agreements such as the EPA or the WTO Agreement where similar provisions are implicated and there is no bar to access to the dispute settlement mechanism under those agreements.

This possibility is not merely theoretical even if CARICOM Members do not indicate a willingness to resolve trade disputes amongst themselves before the WTO. A foreign company incorporated in a CARICOM Member may initiate proceedings for a breach of the RTC in respect of a trade issue under Article 222 of the RTC and simultaneously pursue dispute settlement proceedings before the WTO at the option of its government. A decision from the latter tribunal if implemented may be inconsistent with a prior or existing CCJ ruling (which may have been or is to be implemented) on the same issue giving rise to a conflict of obligations.

## **ADVISORY OPINIONS**

Article 212 of the RTC grants the CCJ advisory jurisdiction concerning the interpretation or application of the RTC at the request of a Member or the Community. This jurisdictional basis may be used to resolve potential trade disputes particularly in situations whereby a Member proposes to enter into a bilateral treaty which could impact its obligations under the RTC or to obtain an opinion on the likelihood of Members' obligations under the RTC for treaties to be concluded on behalf of the Community.

## **JURISDICTION FOR TRADE DISPUTES INVOLVING A PRIVATE PARTY**

Article 222 stipulates the conditions to be met for the CCJ to have subject matter jurisdiction on a claim brought by a private litigant.

Article 222 provides as follows:

Persons, natural or juridical, of a Contracting Party may, with the special leave of the Court, be allowed to appear as parties in proceedings before the Court where:

(a) the Court has determined in any particular case that this Treaty intended that a right or benefit conferred by or under this Treaty on a Contracting Party shall enure to the benefit of such persons directly; and

(b) the persons concerned have established that such persons have been prejudiced in respect of the enjoyment of the right or benefit mentioned in paragraph (a) of this Article; and

(c) the Contracting Party entitled to espouse the claim in proceedings before the Court has:

(i) omitted or declined to espouse the claim, or

(ii) expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled; and

(d) the Court has found that the interest of justice requires that the persons be allowed to espouse the claim.

Firstly, subject matter jurisdiction of the CCJ under this provision requires the applicant to have an arguable case. The arguable case may be premised on the alleged breach of an RTC obligation without proof of same at the preliminary stage of the application to appear in the proceedings before the court. The obligation should be one which reflects a right or benefit intended to enure to the benefit of the applicant directly.

At this preliminary stage, there is no determination of the merits of the alleged breach of the obligation of the RTC, the court noting that at this stage of the proceedings it does not seek *'to make definitive findings of fact, especially since ultimately other Member States may wish to join the proceedings, if leave is given, and to adduce facts not before the Court at this stage'*.<sup>29</sup>

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<sup>29</sup> *Hummingbird Rice Mills Ltd. v Suriname and the Caribbean Community* [2012] CCJ 1(OJ)

It is not clear whether any obligation imposed on a Member State under the RTC will be interpreted as conferring a right or benefit on a natural or juridical person directly, but an obligation under Article 82 of the RTC to establish and maintain a common external tariff has been held to be ‘*of potential benefit to all legal or natural persons carrying on business in the Community*’<sup>30</sup> and in particular to a producer or manufacturer of cement,<sup>31</sup> and a producer of flour.<sup>32</sup>

One test suggested to determine if provisions in a treaty are intended to benefit non-parties or individuals is the so-called ‘intent to benefit test’ premised on textualism<sup>33</sup> as opposed to purposivism<sup>34</sup> whereby an evaluation of the treaty is conducted to see if it specifies a class of persons or individuals to be direct beneficiaries and the remedy claimed by the applicant and whether the applicant falls within that class of intended beneficiaries.

The CCJ has apparently rejected this test preferring purposivism as the governing approach by the application of a ‘potential benefit’ test, and not whether the applicant falls within a class of beneficiaries expressly articulated by the RTC, beyond the general reference to natural or juridical person in Article 222 of the RTC.

Given this privileging of purposivism, it would seem that the formulation of the applicable principle under Article 222(a) need not be interpreted as being limited to producer interests whereby the CCJ held in *TCL and TGI v. Guyana (No.1)* that the establishment and maintenance of a common external tariff was of ‘*potential benefit to all legal or natural persons carrying on business in the Community*’.

In *Hummingbird (supra)*, for example, the applicant which the CCJ found to have met the test in Article 222 of the RTC was not the producer of flour but was engaged in its sale and distribution as a part of ‘affiliated corporations’ producing the flour it sold and distributed.<sup>35</sup>

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<sup>30</sup> *TCL and TGI v Guyana (No.1)* CCJ 1 OJ

<sup>31</sup> *Ibid.*

<sup>32</sup> *Hummingbird Rice Mills Ltd.* (supra).

<sup>33</sup> Textualism connotes ascertaining meaning by virtue of the text of the treaty and de-emphasizing intent by reliance on extrinsic aids such as the negotiating history of the treaty.

<sup>34</sup> Purposivism implicates notions of the broader purpose of the treaty and whether the maintenance of a private cause of action furthers the purpose of the treaty.

<sup>35</sup> *Hummingbird Rice Mills Ltd.v. Suriname and the Caribbean Community*, [2012] CCJ 1 (OJ) at para. 4.

Arguably, the application of purposivism need not be interpreted as well as being limited to an applicant carrying on business in the Community to the extent that specific interests are identified in the RTC as interests to be protected in the implementation of the RTC.

On this view, a ‘consumer’ as defined in Article 184 of the RTC<sup>36</sup> could fall within the provisions of Article 222 because of the express protection of consumer interests in Article 185 of the RTC.

On the question of prejudice in the enjoyment of the right or benefit, the CCJ has held that failure to perform the obligation to establish and maintain a common external tariff is of potential prejudice to beneficiaries of the CET.<sup>37</sup> There need not be at the stage of the application to appear in the proceedings particulars of the damages claimed for the alleged breach of the RTC obligation, although the CCJ cautioned that it is good practice for claimants ‘*to give sufficient particulars of the damages claimed in the proposed Originating Application*’.<sup>38</sup>

The Member entitled to espouse the claim must have either declined to or consented to the private party bringing the claim.

Regarding the interests of justice requirement, the CCJ has held this factor to be satisfied where a Member declines to espouse a claim on behalf of its national and where the issues raised for resolution at the substantive hearing are of general importance.

Below is a further consideration of some of the provisions of the RTC that are potentially implicated under 222(b) of the RTC.

## **PROVISIONS PROVIDING FOR MARKET ACCESS**

Provisions for market access would conceptually fall within provisions intended to benefit a private party. Many of these provisions are specified in Chapter III of the RTC and include obligations relating to the right of establishment, prohibition on new restrictions regarding the right of

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<sup>36</sup> Article 184 of the RTC defines a consumer as meaning any person ‘*to whom goods or services are supplied or intended to be supplied in the course of business carried on by a supplier or potential supplier and who does not receive the goods or services in the course of a business carried on by him*’.

<sup>37</sup> *TCL v. Guyana (No. 1)*, [2009] CCJ 1 (OJ). See also, *Hummingbird Rice Mills v. Suriname and the Caribbean Community*, [2011] CCJ 1 (OJ), at para. 23.

<sup>38</sup> *Ibid.*, at para. 25.

establishment, removal of restrictions on provision of services, prohibition of new restrictions on the provision of services, and the removal of and prohibition of new restrictions on banking, insurance and other financial services and of the movement of capital and current account transactions.

Market access provisions (potentially or conceptually for the benefit of private persons under Article 222(b) of the RTC) must however be balanced against exceptions to such provisions which can be invoked as a defence in proceedings to enforce market access obligations.

### **SECURITY EXCEPTIONS**

Article 225 of the RTC specifies security exceptions to obligations incurred under the RTC. No legal criteria are established for an assessment of whether security exceptions are satisfied and this may suggest a jurisdictional bar to determine the lawfulness of measures taken under the security exception given the absence of an obligation to provide relevant facts to the CCJ on which to make a legal assessment.

This view is but tentative, if, as is posited regarding Article XXI of GATT 1994 national security exceptions, the WTO has authority to interpret such exceptions even though WTO Members retain authority to define terms in the provision such as ‘national security’, ‘necessity’ and ‘essential interests’.<sup>39</sup>

There is no gainsaying that the body exercising the discretion of whether these circumstances exist is subject to review, but the jurisdictional competence allocated in the determination of if and when the applicable circumstances exist (national security etc.) and whether information is to be provided to make an assessment could effectively amount to a *de facto* jurisdictional bar.

### **JURISDICTION REGARDING GENERAL EXCEPTIONS UNDER THE RTC**

Article 226 of the RTC specifies applicable general exceptions for breach of obligations under the RTC. The standard of review for examining such exceptions may amount to a jurisdictional bar in

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<sup>39</sup> Schloemann and Ohloff, ‘Constitutionalization’ and Dispute Settlement in the WTO: National Security as an Issue of Competence’ 93 American Journal of International Law (1999) 242.

practice, though not according to the text of the RTC, if substantial deference is accorded to a Member's determination of when these exceptions are met.

As discussed below no substantial deference is accorded to determinations by Member States as to be tantamount to a *de facto* jurisdictional bar.

Of particular importance are Article 226(i) and Article 226(j) of the RTC regarding measures necessary to prevent or relieve critical food shortages and measures relating to the conservation of natural resources or the preservation of the environment, due to the view that states should have greater regulatory autonomy in the use of such measures. The terms prevent or relieve in Article 226 (i) seemingly provide an open ended approach to determining when a critical shortage exists.

For a useful analogy of the deference that may be claimed, consider for, example, the case of *China-Measures Related to the Export of Various Raw Materials*,<sup>40</sup> whereby China, in justifying export restrictions on selected minerals, argued that since there are no criteria in Article XI:2 (a) of GATT 1994 to determine when a critical shortage exists much leeway is given to WTO Members to make this determination depending on its particular circumstances and to take preemptive measures to avoid a critical shortage.

Similarly, the text of Article 226 (i) of the RTC provides no guidance on the criteria to be factored in this determination, but to the extent that export restrictions to other Members are contemplated as a measure to be applied the discipline governing quantitative restrictions would seem to be applicable.

If WTO jurisprudence is to be of any guidance<sup>41</sup> quantitative restrictions when applied must be applied on a non-discriminatory basis. Article 91 of the RTC, unlike Article XI of GATT 1994 does

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<sup>40</sup> WT/DS394/R, WT/DS395/R, WT/DS398/R, 2 September, 2011.

<sup>41</sup> Article 217 of the RTC enjoins the CCJ to apply rules of international law in resolving disputes. On the question of whether WTO law merits the nomenclature of international law or is to be seen as a distinct branch of international law see, for example, Joel Trachtman, "The Domain of WTO Dispute Resolution", *Harvard International Law Journal*, vol. 40, no.2, Spring 1999, p.333-77, esp. p. 341. For a contrary view, see, for example, Palmeter and Mavroidis, "The WTO Legal System: Sources of Law", 92 *American Journal of International Law*, 398, 399 (1998). Notwithstanding the above, it is not entirely clear at this point whether the CCJ will adopt a liberal approach to resorting to WTO law as a branch of international law (given Article 38(1) of the Statute of the International Court of Justice (ICJ) regarding the sources of international law) in interpreting the RTC, unlike other dispute settlement tribunals under other regional

not stipulate general non-discriminatory norms for Members *inter se* but refers to non-discriminatory norms as between Members and third states whereby an obligation exists for treatment to be no less favourable to Members than to third states as though the comparison is between a Member, on the one hand, and a third state, on the other hand.

The text of the RTC, however, would doubtless be interpreted, in regard to export restrictions, to give effect to non-discriminatory norms articulated in the RTC (for example, provisions forbidding discrimination on the grounds of nationality only),<sup>42</sup> MFN treatment as between a third Member and third states,<sup>43</sup> and non-discriminatory norms in the Chapeau of Article 226, that is, the relevant measure is not to constitute arbitrary or unjustifiable discrimination between Member States where like conditions prevail or a disguised restriction on trade within the Community.<sup>44</sup>

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trading arrangements, such as the North American Free Trade Agreement (NAFTA) or the Treaty on the Functioning of the European Union (TFEU). Under Article 103(2) of NAFTA, for example, NAFTA rules take priority over other agreements to the extent of any inconsistency, representing a contracting out of Article 30(3) of the Vienna Convention on the Law of Treaties (VCLT) regarding the relationship between an existing and a successor treaty involving the same parties. By contrast, the European Court of Justice (ECJ) has held that the EC Treaty prevails over GATT and the WTO Agreement on two important bases; in relation to GATT that GATT 1947 is not directly effective in the law of the member states since the "spirit, the general scheme and the terms" of the Agreement do not import such effect. (See, for example, *International Fruit Company N.V. v. Produktschap voor Groenten en Fruit (No. 3)*, Case 21-24/72, *Court of Justice of the European Communities*, Dec. 12, 1972.); and second that GATT 1947 does not bind the EC in its relations with its member states. (*Germany v. Council (Bananas -- Common organization of the market -- Import regime)*, Case C-280/93, Judgment of the Court, 5 Oct. 1994.) In *Germany v. Council*, Germany invoked the GATT 1947 to challenge the lawfulness of the EC banana regulations. It argued that the EC's adherence to the GATT precluded the Council from adopting and applying regulations which were GATT-illegal, and that Germany had the right to rely on these GATT obligations in a dispute with the Council. The ECJ held that Germany was bound by Community legislation - even if it had cast its vote against that legislation - and that the Council had the inherent power to act in a GATT-inconsistent manner if it chose to do so. In *Portugal v. Council* (Case C-149/96 *Portugal v. Council* [1999] ECR I-8395) the ECJ adopted the 'direct effect' theory of international obligations to hold that as the WTO Agreement has no direct effect in the EC legal order, Community law would take precedence to WTO law in the event of inconsistency.

There is at best some indication that the CCJ may be minded to adopt, or be guided by, the jurisprudence of the WTO regarding the institutional balance to be maintained between legislative and political organs established by the RTC in respect of the standard of review for measures instituted by Members to ensure appropriate policy space is retained for policy making organs under the RTC. See, for example, *Hummingbird Rice Mills Ltd. v. Suriname and the Caribbean Community* [2012] CCJ 1 (OJ) at para. 32. where the CCJ referred to the WTO case of *European Communities-Measures Affecting Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (16 January 1998) whereby the Appellate Body noted (at para. 115) that the standard of review must reflect the balance between the jurisdictional competence conceded by the Members of the WTO and the jurisdictional competence retained by the Members for themselves.

<sup>42</sup> Article 7 of the RTC.

<sup>43</sup> Article 8 of the RTC.

<sup>44</sup> The purposive approach adopted by the CCJ in *Trinidad Cement Limited and TCL Guyana Incorporated v. Guyana* [2009] CCJ 1 (OJ) in interpreting Article 222 (c) of the RTC indicates the likely approach of the court in future decisions interpreting provisions that would produce a restrictive effect by strict reliance on the literal rule. Here the

As to the latter, there is much jurisprudence from other international tribunals governing the interpretation of terms such as arbitrary or unjustifiable discrimination and disguised restriction on trade.

Under Article XX (b) of GATT 1994, in similar terms to Article 226 of the RTC, a measure to be justifiable as an exception to trade liberalizing principles in the GATT must be necessary. A necessary measure is one that is either indispensable or somewhere between being indispensable for and contributing to the objective of the measure. Where the measure falls in the middle zone, the Appellate Body balances and weighs several factors. These include: (1) the relative importance of the common interests or values pursued by the measure, (2) the contribution made by the measure to the realization of the measure's objective, and (3) the restrictive impact of the measure on international commerce.<sup>45</sup>

Therefore, if the measure is necessary, in that it is indispensable, there is no balancing and weighing of the factors above. Where the weighing and balancing of factors is required, the defendant government bears the burden of adducing evidence to permit a panel to carry out the weighing and balancing.

Although there is a distinction between necessary measures that require balancing and weighing of factors and those that do not, the distinction is but arbitrary and is not borne out by the prevailing jurisprudence. Thus, where the complaining government alleges that a less trade restrictive alternative is 'reasonably available',<sup>46</sup> a balancing test is done to determine the extent to which the proposed alternative satisfies the measure's objective.<sup>47</sup>

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CCJ rejected the contention of Guyana that Article 222 (c) must be met, despite the clear wording of the provision, where a claim is brought by a CARICOM national against its own state. The CCJ held that to prohibit a person from bringing such a claim on the express wording of Article 222 (c) requiring the state concerned to have the option of espousing the claim or to give its consent to the espousal of the claim by the private party (both options being unrealistic in the case of a claim by a private party against its own state, in any event) would defeat the purpose of the RTC and in particular would be in violation of Article 7 of the RTC regarding the prohibition of discrimination on the grounds of nationality.

<sup>45</sup> *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, 11 December 2000.

<sup>46</sup> Whether or not a measure is necessary in the sense of being indispensable depends on whether there is a less trade restrictive alternative to the measure being adopted.

<sup>47</sup> *EC-Asbestos*, Appellate Body Report, para. 171.

On the other hand, where a less trade restrictive measure satisfies the measure's objective this may suffice for a finding that the measure is not necessary.<sup>48</sup>

If the measure is necessary it must also meet the test of the Chapeau of Article XX, that is the measure must not be a disguised restriction on international trade or amount to arbitrary or unjustifiable discrimination.

### **MEANING OF ARBITRARY DISCRIMINATION**

Arbitrary discrimination in the application of a measure may result from the rigidity or inflexibility of the measure if exporting countries are required to adopt the same measure without any regard for the particular conditions prevailing in those countries.<sup>49</sup> Further, where the application of the measure involves a determination to be made and there is no flexibility in how officials make this determination, this too may be classified as an instance of arbitrary discrimination.<sup>50</sup>

### **UNJUSTIFIABLE DISCRIMINATION**

In *US-Shrimp*, the Appellate Body held the application of a measure to be unjustifiable between countries where the same conditions prevail if the country applying the measure essentially requires other countries to put the same measure in place without taking into account different conditions that would impact on the appropriateness of the use of such measures.<sup>51</sup>

Another important consideration is whether the country imposing the measure has engaged in negotiations with those countries affected by the measure with a view to concluding bilateral or multilateral agreements. It seems that serious efforts at negotiations to conclude such agreements

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<sup>48</sup> Ibid. para. 172.

<sup>49</sup> Para. 177

<sup>50</sup> Para. 177.

<sup>51</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October, 1998.

must be demonstrated before the imposition of the measure,<sup>52</sup> although there is no requirement that an agreement be concluded before the imposition of the measure.

## **DISGUISED RESTRICTION ON INTERNATIONAL TRADE**

A disguised restriction on international trade covers the same issues as arbitrary or unjustifiable discrimination.<sup>53</sup> At the very least it involves discrimination between the country applying the measure and other countries or how the measure is applied between countries. The AB clarified the term in the following manner:

*It is clear to us that "disguised restriction" includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of "disguised restriction." We consider that "disguised restriction", whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable discrimination", may also be taken into account in determining the presence of a "disguised restriction" on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.<sup>54</sup>*

In addition, the term *necessary* in relation to any measure adopted under Article 226 is not within the exclusive discretion of the Member but is subject to legal criteria as developed in the jurisprudence elsewhere to which the CCJ may resort.

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<sup>52</sup> Para. 167.

<sup>53</sup> *United States-Standards for Reformulated and Standard Gasoline*, WT/DS2/AB/R, 29 April, 1996, p. 25.

<sup>54</sup> *Ibid.*

The term *necessary* is now interpreted, at any rate in WTO jurisprudence, to incorporate notions of the least restrictive means or a less restrictive means of attaining a legitimate objective underlying a measure.<sup>55</sup>

The similarity in the provisions in the RTC regarding general exceptions and those in the WTO Agreement could doubtless lead to the adoption of or resort to WTO jurisprudence in the interpretation of such provisions to inform the interpretation of similar provisions in the RTC.

On this view, no substantial deference is accorded to a Member's determination of these questions as to amount to a *de facto* jurisdictional bar even in the case of the national security exception.

## **CONCLUDING REMARKS**

There is no exclusivity of the CCJ's jurisdiction in competition matters, the Community Commission having jurisdiction to determine if conduct by an enterprise is in breach of Chapter VIII of the RTC.

The jurisdiction of the CCJ is also not exclusive in relation to trade matters, especially where the provisions of the RTC are similar to other treaty provisions and the disputants are parties to that treaty and are not prevented from having the dispute resolved under the dispute settlement mechanism provided in that forum.

To the extent that policy space is provided for Members in the implementation of obligations under the RTC, the CCJ's jurisdiction is arguably preempted where those obligations are not put into effect at the domestic level.

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<sup>55</sup> Much discretion is given to states in determining whether a measure is for a legitimate objective such as protection of health, human animal and plant life. The WTO Appellate Body, for example, accords substantial deference to what Members may determine to be a legitimate objective justifying a measure under such exceptions. See, for example, *EC-Asbestos*, whereby the AB held health protection as a legitimate objective to justifying a ban on asbestos related products. However, the discretion or policy space to determine what is a legitimate objective underlying a measure is often delimited by the application of the measure, that is, the measure should not amount to arbitrary or unjustifiable discrimination or a disguised restriction on trade, and the measure should not be applied in a manner which is inconsistent with its identifiable underlying objective where, for example, an exemption is claimed in the application of the measure to some countries pursuant to an agreement for the non-application of the measure to those countries and even if the non-application of the measure pursuant to such an agreement is re-confirmed by virtue of a court order or an injunction to prevent the application of the measure in accordance with the relevant agreement. On this last, see, for example, *Brazil-Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December, 2007.

With respect to the issue of compulsory jurisdiction, the CCJ's jurisdiction is compulsory in the sense of there being a prior agreement among Members to submit to the jurisdiction of the CCJ regarding disputes under the RTC as provided in Article 216 of the RTC.<sup>56</sup> This, however, is without prejudice to the settlement of disputes by alternative modes within the RTC, and very likely, to modes of dispute settlement external to the RTC, particularly those under separate but interlocking treaty relationships with the RTC,<sup>57</sup> permitting dispute settlement under those modes where that option is undertaken.

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<sup>56</sup> See, for example, Stanimir A. Alexandrov, *The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is it?*, Chinese Journal of International Law, vol. 5, no. 1, p.29-38, 2006. Here, reference is made to 'compulsory jurisdiction' in terms of a prior agreement of parties to a treaty consenting to the jurisdiction of a court.

<sup>57</sup> As in the case of WTO consistent provisions or those provisions confirming WTO obligations.