Implementing Effective Competition Policy Through Regional Trade Agreements

The case of CARICOM

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INTRODUCTION

Competition policy refers to the 'full array of government policy measures that influence competition in domestic markets'.[2]These include instruments of trade policy such as tariffs but also effective implementation and enforcement of competition law.[3] For our purposes competition policy is treated as the body of rules, regulations, decisions, administrative guidelines, and other

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[2] See paper by Hassan, Qaqaya, Competition Policy and its Relevance to Trade and Development, Regional Seminar on Trade and Competition: Prospects and Future Challenges for Latin America and the Caribbean, Caracas, Venezuela, 20 - 21 April 2009
[3] Ibid.

policy instruments whereby the integrity of the competitive process is safeguarded for market participants and consumers.

Effective competition policy depends on the goals being pursued and the mechanisms established for achieving these goals. These may include market integration through harmonization, a competitive market structure, consumer welfare, efficient allocation of resources, but also enforcement of competition policy with flexibilities to factor special and differential treatment. Doubtless, effective competition policy combines many of these goals neither being mutually exclusive to the other. Governance mechanisms for achieving these goals may be centralized or decentralized.

Within a regional trading arrangement, the governance structure chosen may be centralized, decentralized or represent a hybrid. The typology sometimes employed in this structure is between voluntary and mandatory forbearance.[4]

The competition provisions of the Treaty of Chaguaramas and the governance arrangements established pursuant to the treaty represent a hybrid in the enforcement of competition policy. In addition, although the governance arrangements for enforcement of competition policy in regional trading arrangements is often referred to as exemplifying a distinction between voluntary and mandatory forbearance, the governance arrangements in CARICOM incorporates these two features whereby anticompetitive conduct with cross border effects is to be disciplined at the regional level and anti-competitive conduct that is confined in its effect to a particular Member State is to be governed by national competition laws.[5]

Below I examine the governance arrangements in CARICOM under the RTC and the extent to which these foster the effective enforcement of competition policy, the role of the Community Commission and its relationship with other bodies, and particular challenges for meeting some of the objectives of effective enforcement of competition law and policy.

[4] Michal Gal, Regional Competition Law Agreements: An Important Step for Antitrust Enforcement, New York University Law and Economics Working Paper, 2009.

[5] Although national competition laws are to govern anti-competitive conduct confined within a Member State the national competition laws must be consistent with regional competition law in Chapter VIII of the Revised Treaty of Chaguaramas.

Of the goals identified for effective competition policy in regional trading arrangements with developing countries, two can be identified as possibly necessary conditions, namely, fostering market integration through harmonization and the existence of policy flexibility for special and differential treatment. However, while these two objectives are often complementary, the governance arrangements in CARICOM do not necessarily avoid the possibility of conflict in giving effect to these objectives.

Market integration is one of the central objectives of competition policy under the Revised Treaty of Chaguaramas.

Modeled on EU governance arrangements, the RTC involves both positive and negative integration, that is, the elimination of obstacles to the free movement of goods, services and factors of production and the adoption of common policies to ensure the effective operation of market forces.

The competition rules provided for in Chapter VIII of the RTC allow for minimal harmonization[6] whereby minimum rules and standards are set for Member States to implement in domestic legislation, but also allowing Member Sates flexibility in the adoption of more stringent ones.

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

[6] For a discussion on the taxonomy of regulation for harmonization at the supranational level see, C. Barnard, *The Substantive Law of the EU*, Oxford: Oxford University Press, 2004. The taxonomy includes full harmonization, minimal harmonization and optional harmonization.

(iv) being a Highly-indebted Poor Country designated as such by the competent inter-governmental organisation; [7]

The less developed countries may also apply to 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.[8]

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,[9] Article 51(2) (h) of the RTC with respect to the objectives of the community industrial policy[10], 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.[11]

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.

In addition to the substantive rules, particular Community organs are enjoined to develop community competition policy and this is supplemented with the establishment of the Caribbean Court of Justice (CCJ) to adjudicate on trade disputes in its original jurisdiction.

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[7] Pursuant to Article 4 of the RTC the more developed of the developing countries are those listed in subparagraphs (b), (c), (g) (h) (m) and (n) of Article 3. These are The Bahamas, Barbados, Guyana, Jamaica, Suriname and Trinidad and Tobago. By virtue of Article 4 of the RTC, the remainder of the countries listed in Article 3 is to be considered less developed countries. These are Antigua and Barbuda, Belize, Dominica, Grenada, Montserrat, St. Kitts and Nevis, Saint Lucia, and St. Vincent and the Grenadines.

[8] Article 164 of the RTC.

[9] Article 49 of the RTC provides as follows: '*Where in this Chapter the Member States or competent Organs are required to remove restrictions on the exercise of the rights mentioned in paragraph 1 of Article 30 the special needs and circumstances of the Less Developed Countries shall be taken into account'*

[10] Article 51(2)(h) of the RTC stipulates that one of the objectives of the community industrial policy is to secure ' *balanced economic and social development in the CSME bearing in mind the special needs of disadvantaged countries, regions and sectors within the meaning of Article 1…'*

[11] Article 52(2) of the RTC provides that '*The Community shall establish a special regime for disadvantaged countries, regions and sectors.'*

Instrumental in the decision making process is the Community Commission that is mandated to decide competition issues that have cross border effects. Its relationship with other CARICOM bodies in the development of competition policy and the adjudication of disputes is critical for effective enforcement in terms of harmonization and the recognition of special and differential treatment in the application of competition law and policy. The particular relationship with the governance organs within CARICOM are outlined below.

Conference Heads of Government and the Council for Trade and Economic Development (COTED)

The Conference Heads of Government (CHG), composed of the Heads of Government of the Member States, may be involved in the development of Community Competition Policy in accordance with Article 20 of the RTC.[12] Article 20(1) of the RTC provides for cooperation among community organs in the development of community policy where the policy to be developed impacts on the spheres of competence of another community organ.[13]

The Community Organs are referred to in Article 10 of the Revised Treaty as the Conference of Heads of Government and the Community Council of Ministers (as the principal organs); and the subordinate organs include the Council for Finance and Planning, the Council for Trade and Economic Development (COTED); the Council for Foreign and Community Relations; and the Council for Human and Social Development.

In the relationship between the CHG and COTED, there is likely to be some impact on the latter with regard to policy developed by the former that would require their cooperation in accordance with Article 20 of the RTC. This is so because Article 12(2) of the RTC stipulates that the CHG '*shall determine and provide policy direction for the Community*', and Article 12(7) of the RTC provides that the CHG '*may issue policy directives of a general or special character to the other Organs and Bodies of the Community concerning the policies to be pursued for the achievement of the objectives of the Community and effect shall be given to such directives*'.

[12] See Article 20 of the Revised Treaty of Chaguaramas (RTC).
[13] Article 20(1) of the RTC provides as follows:

Relationship between COTED and the Community Commission

Development of competition policy

Article 15 of the RTC provides that COTED is the body charged with the promotion of trade and economic development of the Community. Pursuant to Article 152 of the RTC COTED is charged with developing and establishing appropriate policies and rules of competition within the Community.

While COTED is charged with the development of competition policy in the Community, the Community Commission also plays an advisory role in the development of competition policy. For example, Article 173(2)(b) of the RTC requires the Community Commission to '*keep the Community Competition Policy under review and advise and make recommendations to COTED to enhance its effectiveness'*.

COTED and a national investigation agency

The relationship between a national competition authority and COTED is indirect in the sense that COTED, in accordance with Article 15 of the RTC, is charged with the promotion of trade and economic development of the Community. However, this broad mandate is likely to impact the operation of national competition authorities in terms of COTED's power to exclude particular sectors from the provisions relating to prohibited conduct under Article 177 of the RTC and which are to be incorporated into the domestic law of CARICOM Members.

In addition to this general relationship, there is the more specific relationship contemplated under Article 182 of the RTC whereby COTED is the body charged with developing and establishing appropriate policies and rules of competition within the Community that are to be adopted by national competition agencies. Pursuant to Article 182 of the RTC COTED is charged with developing special competition rules for particular sectors. This broad mandate doubtless may translate into the development of competition rules that factor other policy concerns for the development of CARICOM Members including the community industrial policy.

This broad mandate is also apparently designed to ensure that common competition rules apply to particular sectors throughout the community thereby fostering harmonization of competition policy.

However, there is no provision for *directives* to be issued to a national competition authority from COTED when it recommends the adoption of particular competition policy or special rules for particular sectors. Arguably, this loophole may contribute to Member States maintaining different rules for particular sectors consistent with their development objective, and this doubtless can affect the harmonization process.

COTED and the Caribbean Court of Justice (CCJ)

Decisions of COTED can be examined by the CCJ, although it is doubtless that this would apply to policy directives. Article 187(c) of the RTC permits suits to be brought against an organ of the Community on the ground that it has acted *ultra vires*. This power to review decisions of COTED is limited to situations where COTED has exercised a discretion. (See, *Trinidad Cement Company Limited v. The Caribbean Community* [2009] CCJ 4 (OJ), para. 41. Moreover, Article 211 of the RTC gives the CCJ jurisdiction to decide disputes between Member States and the Community which includes community organs.

The exercise of discretion on purely political policy questions may not be justiciable, and it is, therefore, to be expected that disputes between Member States and community organs on political questions regarding development policy will remain largely unresolved, if not by conciliatory means at the level of the conference heads of government.

Undoubtedly, absence of governance mechanisms for definitive resolution of policy disputes among Member States provides flexibility for special and differential treatment in competition policy, but this goal may be achieved at the expense of harmonization, unless individual action by Member States is constrained by general policy positions for which agreement has already been obtained by the conference heads of government.

Community Commission and the CCJ

Article 175(12) of the RTC provides that "*a party that is aggrieved by a determination of the Commission under paragraph 4 of Article 174 in any matter may apply to the Court for a review of that determination*".

Paragraph 4 of Article 174 of the RTC refers to orders or directives that the Commission makes to remedy or penalize anti-competitive conduct referred to in Article 177 of the RTC. Pursuant to Article 174 (4) of the RTC, the Commission may order the termination or nullification of agreements, conduct, activities or decisions prohibited by Article 170.[14] The Commission may also direct the enterprise to cease and desist from anti-competitive business conduct and to take such steps as are necessary to overcome the effects of its abuse of dominance in the market or any other business conduct inconsistent with the principles of fair competition in Chapter VIII of the RTC.[15] In addition, the Commission may order the payment of compensation to persons affected[16], and impose fines for breaches of the rules of competition.[17]

Although Article 175(12) seems confined to orders or directives issued by the Commission for compliance with its findings, it is arguable that an aggrieved party may also challenge the particular findings as the basis on which the orders or directives were made.

Importantly, where the Commission determines that there is anti-competitive business conduct and requires a party to take the necessary action to remove the effects of the anti-competitive conduct, the party to whom the directive is given is to take the appropriate remedial course of action within 30 days of notification by the Commission.[18] If the enterprise cannot comply with the Commission's order within the 30 day period and fails to inform the Commission, the Commission may apply to the CCJ for an order.[19]

However, it is unclear whether there is any limitation to the specific order for which the Commission may apply to the CCJ. For example, Article 175(11) of the RTC does not stipulate

[14] Article 174(4) (a) of the RTC.
[15] Article 174(4) (b) of the RTC.
[16] Article 174(4) (c) of the RTC.
[17] Article 174(4) (d) of the RTC.
[18] Article 175(10) of the RTC.
[19] Article 175(11) of the RTC.

whether the order to be applied for is limited to a declaration of breach of the competition provisions in the RTC or would encompass an order for compliance with the determination of the Commission.

Noteworthy is the fact that where the CCJ's order includes an order for compliance with the determination of the Commission this may not be achieved because the existing governance mechanism does not *require* a decision of the CCJ to have direct effect and enforceable within a CARICOM Member and against a CARICOM national found to have breached the competition provisions of the RTC.

The Caribbean Court of Justice Act incorporated in several of the various CARICOM states provides for the compulsory jurisdiction of the CCJ to be given effect in CARICOM States whether in the CCJ's original or appellate jurisdiction but does not require decisions of the CCJ that are directed at a Member State or a national of a Member State to have direct enforcement in the domestic legal order of CARICOM Members.

Further, in the event that an order of the CCJ includes an order for compliance with a determination of the Commission and the route chosen for enforcement of this order is by way of provisions in domestic legislation requiring decisions of the Commission to be binding in the domestic legal order of CARICOM Members, compliance with the order may be frustrated by reluctance to incorporate provisions requiring decisions of the Commission to be made binding in the domestic legal order of CARICOM Members.[20]

Importantly, several CARICOM countries have passed legislation to give effect to the RTC provisions on competition law and policy, but this action by itself is insufficient to give effect to these provisions without the necessary promulgation or amendment to domestic legislation to incorporate specifically the provisions of the RTC.

This is because some provisions of the RTC are drafted in mandatory terms that would take effect on the promulgation of the relevant law to give effect to the RTC and other provisions, although

[20] Pursuant to Article 174(6) of the RTC CARICOM Member States are to enact legislation to ensure that determinations of the Community Commission are enforceable in their domestic legal order.

drafted in mandatory terms, contain a permissive component in the language or may be directory by requiring a further legislative act other than the one to give effect to the Revised Treaty. For example, section 3 of the Caribbean Community Act, 2004 of Antigua and Barbuda provides that '*Subject to this Act, the Treaty, the text of which is set out in the Schedule, shall have the force of law'*.[21]

In this context consider Article170 (b) of the RTC.

(b) the Member States shall:

> *(i) take the necessary legislative measures to ensure consistency and compliance with the rules of competition and provide penalties for anti-competitive business conduct;*
>
> *(ii) provide for the dissemination of relevant information to facilitate consumer choice;*
>
> *(iii) establish and maintain institutional arrangements and administrative procedures to enforce competition laws; and*
>
> *(iv) take effective measures to ensure access by nationals of other Member States to competent enforcement authorities including the courts on an equitable, transparent and non-discriminatory basis.*

Another example is Article 170(2) which provides that:

Every Member State shall establish and maintain a national competition authority for the purpose of facilitating the implementation of the rules of competition.

Yet another example is that provided in Article 177 of the RTC which states:

1. A Member State shall, within its jurisdiction, prohibit as being anti-competitive business conduct, the following:

> *(a) agreements between enterprises, decisions by associations of enterprises, and concerted practices by enterprises which have as their object or effect the prevention, restriction or distortion of competition within the Community;*
>
> *(b) actions by which an enterprise abuses its dominant position within the Community; or*
>
> *(c) any other like conduct by enterprises whose object or effect is to frustrate the benefits expected from the establishment of the CSME.*

[21] Another example may be noted, that is, section 3 of the Barbados Caribbean Community Act, 2003. Section 3 provides that: '*Subject to this Act, the Treaty shall have the force of law in Barbados'*.

These provisions are in mandatory terms but require some further action on the part of Member States beyond the promulgation of the terms of the treaty as an Act of Parliament. Because the language used is directory in nature the passage of an Act to give effect to the treaty cannot result in these provisions having direct legal effect in as much as further action is required.

By contrast, some provisions are drafted in mandatory terms that can take effect when the treaty is promulgated in domestic law. For example, the general exemption provision of Article 168 with respect to the scope of Chapter VIII of the RTC excludes negative clearance rulings and collective bargaining arrangements.

To ensure community competition law and policy is harmonized, Article 174(6) of the RTC provides that "*Member States shall enact legislation to ensure that determinations of the Commission are enforceable in their jurisdiction*". This provision establishes a positive obligation with respect to determinations by the Commission, albeit not with respect to the Commission's other powers, for example, powers exercisable pursuant to Article 174:2 (a) and 174:2 (b) of the RTC.[22]

It is not clear whether *all* determinations of the Commission should be enforceable in CARICOM Member States or those determinations relating to a dispute involving an enterprise incorporated in the particular Member State.

That not all determinations are included in this obligation coupled with the requirement of further action by CARICOM Members to implement the necessary enactments to give effect to decisions of the Commission provides some modicum of flexibility for CARICOM Members to pursue competition law and policy consistent with their particular development objective.

[22] That is, securing the attendance of any person to give evidence and requiring the discovery or production of any document or part thereof. These powers are to be exercised in 'accordance with applicable national laws…' but without a requirement that the national laws provide for the exercise of these powers.

Community Commission and national investigation authority

Under Article 176(1) of the RTC, national competition agencies are enjoined to conduct a preliminary examination of conduct of a business enterprise within the CSME on the request of the Commission where the Commission is of the view that business conduct within the CSME prejudices trade, and prevent, restricts or distorts competition with the CSME.

This obligation under the RTC will often require amendment to domestic law for effect to be given to it. In some jurisdictions, for example, Jamaica, there is no provision in the competition legislation for investigations to be conducted at the request of an external body. In the case of Jamaica, section 5 of the FCA requires the FTC to conduct investigations at the request of the relevant Minister, and it is arguable that a request by the Commission for a preliminary examination of business conduct could be done through this medium.

This approach, however, leaves much discretion to Members when Article 176(1) was not intended to provide such discretion but rather an obligation for the conduct of such preliminary examinations. Through such discretion national objectives can be pursued with flexible policy options at the expense of community objectives for competition policy.

This is not to suggest that Members have no discretion with respect to the conduct of an investigation. The discretion is however confined to jurisdictional disputes as to whether a national investigating authority or the Commission is to conduct an investigation, as opposed to a preliminary examination, where the Commission finds that further investigation is warranted, following its dissatisfaction with the outcome of a request for a preliminary examination of business conduct to be done by a national investigating authority.

Amendment to domestic legislation may also be required where the preliminary examination to be conducted involves companies whose conduct has an effect on a market other than the market of the territory of the investigating authority.

For example, section 2(3) of the Fair Competition Act (FCA) of Jamaica states that:

> *Every reference in this Act to the term 'market' is a reference to a market in Jamaica for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.*

Given that a preliminary examination requested by the Commission is in respect of conduct that has an effect within the CSME or affects the operation of the CSME, it is not inconceivable that a request for such an examination can be made regarding conduct whose effect is limited to the territory of the investigating authority since the market of each CARICOM state is a part of a Single market. But, if the term cross-border effects connotes conduct whose effect is not limited to a particular territory, it is unclear as to what the basis for a request for the conduct of a preliminary examination would be where the conduct and its effect is confined to a particular Member State.

It may be that the term 'cross-border effects' denotes, as an example, anti-competitive conduct that has an effect outside of the Member State where the conduct originates. If this is so, community competition policy, to the extent that the promotion of this objective is largely within the mandate of the Commission, may not address adequately domestic anti-competitive conduct that frustrates market access.

In addition, the investigative function of the Commission may be affected due to the absence of competition laws and functioning competition authorities in some CARICOM Member States. Article 174(2) of the RTC provides for the Commission to carry out its investigations in accordance with applicable national laws.[23] This may require domestic legislation to compel nationals of CARICOM States against whom investigations are to be conducted to appear before the Commission to provide evidence, and for the Commission, whether by itself or in association with a national competition authority, to be able to conduct discovery and to require the production of documents to conduct its investigation.

However, many CARICOM States have not promulgated competition legislation and, while legislation may exist in some countries, there are but two fully functioning competition authorities in the region, that is, in Jamaica and Barbados.

[23] Article 174(2) of the RTC. Among the provisions contemplated for the Community Commission to conduct investigations effectively are those providing for the attendance of any person to give evidence before it and for the discovery or production of documents or other evidence.

This state of affairs has, by default, provided CARICOM Members with maneouvring space to fashion competition law and policy for their particular development objective. Although this would not necessarily be in keeping with satisfying the application of the special and differential principle endorsed by developing countries in operationalizing competition law and policy, absence of the required legislation or substantial delays in their promulgation and the functioning competition institutions to facilitate effective community competition policy, provide incentives for the pursuit of development objectives tailored to national concerns.

This too will affect the process of harmonization which is regarded as critical for community competition policy.

Challenges in effective enforcement of competition policy in CARICOM

The existing relationship between the governance organs within CARICOM suggests challenges for effective enforcement of competition policy. The smooth resolution of jurisdictional issues between competition and regulation and between the mandate of national investigation authorities and the Community Commission is not readily apparent.

Drawing a precise line for the operation of competition law and regulation is often difficult in practice given established rules of statutory interpretation that do not readily favour statutory construction of ordinary legislation that results in one ordinary legislation taking precedence over another in a similar category.

Consequently, competition legislation may be drafted in general terms to cover particular activities but challenges arise for the legislation to apply to such activities when the statute is construed.

Jurisdictional issues of this sort that have implications for enforcement of competition law may occur in the following situations:

1. Where another legislation authorizes conduct that is forbidden by the governing competition legislation;

2. Where the governing competition legislation exempts conduct governed by another legislation;
3. Where the governing competition legislation exempts a particular conduct or activity altogether;
4. Where a particular sector is regulated by special legislation with the oversight body having discretion to transfer the matter for determination under the governing competition legislation;
5. Where one legislation governs particular conduct but is silent as to the application of the governing competition legislation regarding the same conduct;

Doctrine of Implied repeal

In resolving these jurisdictional issues resort is usually had to the doctrine of implied repeal. The doctrine of implied repeal holds that where conduct is governed by two pieces of legislation and the legislations are inconsistent, one must be held to have repealed the other. On the other hand, if the legislations are not inconsistent or can be applied harmoniously there is no implied repeal. However, regardless of the position taken, that is, whether there is an implied repeal or not, the result is an all or nothing approach as to the legislation to be applied. That is to say, one piece of legislation will apply to the conduct or person.

For example, in *FTC v. General Legal Council*[24], the Court of Appeal of Jamaica held that the Legal Profession Act and the FCA could be applied harmoniously and that there was therefore no implied repeal of the Legal Profession Act by the FCA. Consequently, in the court's view, the Legal Profession Act and not the FCA applied to the dispute thereby ousting the jurisdiction of the Fair Trading Commission.

The case concerned the relationship between an earlier special and a later general legislation in terms of their application to a person and the conduct of that person, that is, the General Legal Council and its conduct of prescribing fees for practicing attorneys. In this case the earlier special legislation governing both the person and conduct of the person took precedence to the later general legislation.

[24] *The General Legal Council v. The Fair Trading Commission*, Suit No. E 35 of 1995.

In this case there was no examination of whether the legislations were fundamentally inconsistent such that one must be held to have repealed the other. This is perhaps unsurprising given that it is a later legislation that in all likelihood that would fit within that category. That is, an implied repeal can only be found in respect of a later general or special legislation in its relationship to an earlier special or general legislation.

Conduct vs. classification of conduct

No distinction is usually drawn between the conduct and the classification of the conduct in terms of *who* or which body should properly classify the conduct for purposes of determining which legislation applies. In other words there is no requirement that the jurisdictional question be determined in terms of, or be conditioned on, which body is the proper body for classifying the particular conduct.

Thus, a body authorized to set fees under a particular legislation is shielded from the FCA even if its conduct could be classified as anti-competitive by another body and regardless of whether another body is given the authority to classify the conduct as anti-competitive.

Therefore, an argument to the effect that a particular body has express authority under a particular provision to examine a specific conduct is not determinative of the jurisdictional issue.

What then determines which legislation applies? And, what if a later specific legislation makes reference to an earlier general legislation, but there is no reference to the conduct sought to be governed by the earlier general legislation? Does the all or nothing approach apply? Should one make a distinction between the subject and the subject matter or conduct governed by the legislation to decide which legislation applies?

The general rules applied are that a later special legislation takes precedence to an earlier general legislation and an earlier special legislation takes precedence to a later general legislation. Unless there is some specific reference in one legislation about another legislation and the extent to which

one qualifies the other, these principles will be applied to determine which legislation should govern particular conduct.

The specific reference that is necessary is one which safeguards the jurisdiction of another body for conduct governed by special legislation. This can be done in the general legislation or in the special legislation, although the preference is for it to be done in the latter. One example of this is section 73 of the Telecommunications Act, 2000 of Jamaica.

Section 73 provides as follows:

> *(1) The provisions of the Fair Competition Act shall not affect an agreement between the Minister and a universal service provider in relation to the universal service obligation or any agreement approved by the Office after consultation with the Fair Trading Commission;*
> *(2) Except as provided in subsection (1) nothing in this Act shall be construed as affecting the right of any person to refer a matter to the Fair Trading Commission in accordance with the Fair Competition Act.*

Notwithstanding this provision, the reference to the right of any person to refer a matter to the FTC is distinct from whether in a particular case the FCA would apply to the conduct in question from a jurisdictional standpoint.

In any event, the amendment process is generally a long one and expediency may recommend amendment through the general legislation as against each piece of legislation that governs a particular sector. It has been suggested, for example, that jurisdictional issues could be resolved in this way by words in the general Act to the effect that the Act applies to all other Acts unless expressly exempted by the general Act.

This recommendation is unsatisfactory for at least three reasons. First, it is unlikely that this approach will be embraced or be practical. Embracing this recommendation is premised on the view that there is the desire or will for competition law and policy to trump other values of governance. Second, governments, in particular developing countries, have not agreed at the multilateral level on the exact scope or coverage of competition law and policy in their domestic

domain as the failure of the incorporation of the WTO Singapore issues into a multilateral framework demonstrates.

Third, many developing countries have only agreed to a minimalist approach for the operation of competition law and policy in the domestic domain. The General Agreement on Trade in Services (GATS), being the only WTO Agreement that expressly addresses competition law and policy, for example, requires domestic implementation of only abuse of dominance provisions and, particularly, in respect of a monopoly supplier of services doing business in sectors for which specific commitments are made at the multilateral level. Consequently, a monopoly supplier of a service can abuse its dominance in sectors in which it operates and for which no specific commitments are made at the multilateral level.

It seems unlikely that this minimalist and piecemeal perspective for the implementation of competition law and policy will change sooner than later if, as suspected, competition law and policy is not regarded as high on the agenda of priorities of developing countries as other concerns and is therefore more likely than not to be used as a negotiating strategy to obtain concessions on concerns that are higher on the agenda of priorities.

Fourth, even if amendment of the general legislation in the manner suggested above were approved it is doubtful that it would defeat the application of the implied repeal doctrine. This is so because some sectoral specific legislation expressly authorize conduct that may be otherwise deemed to be anti-competitive. In this situation, a conflict emerges between the general legislation and the special legislation that would be resolved through application of the doctrine of implied repeal since actual repeal cannot be found on the face of the general legislation, as regards the special legislation, without some particular reference to the special legislation in the general legislation.

This observation presumes that actual repeal and implied repeal require a reference to the specific legislation to be repealed. To be sure, existing case law do no more than sustain the application of the doctrine when the two statutes are necessarily inconsistent or there is some express reference to the previous legislation.

Notwithstanding the above, it is worth noting the prevailing exceptions to the application of the doctrine. It has been held, for example, that the doctrine does not apply to constitutional statutes or statutes bearing on fundamental rights. As Lord Steyn has observed extra-judicially:

> '*What is the significance of classifying a right as constitutional? It is meaningful. It is a powerful indication that added value is attached to the protection of the right. It strengthens the normative force of such rights. It virtually rules out arguments that such rights can be impliedly repealed by subsequent legislation. Generally only an express repeal will suffice*'.[25]

This doctrine was recently applied in *Thoburn v. Sunderland City Council*[26] where, in the United Kingdom Divisional Court, the issue arose as to whether the European Communities Act, 1972, (which gave the executive the power to amend primary legislation to be consistent with European Community Directives) was impliedly repealed by the Weights and Measures Act, 1985 which permitted the use of imperial and metric measurements in trade.

The appellants argued that by permitting the use of imperial measurements in trade, the Weights and Measures Act of 1985 impliedly repealed the broad powers contained in the European Communities Act and that consequently the Units of Measurement Regulations 1994 that purported to amend the Weights and Measures Act 1985 by forbidding the use of imperial measurements was *ultra vires*.

The Court found against the appellants holding that the European Communities Act, 1972,is a constitutional statute and as such could not be impliedly repealed. In identifying which statutes which may fit this classification, the Divisional Court proposes a test which denotes a constitutional statute as one that 'conditions the legal relationship between citizen and the state in some general, overarching manner, or enlarges or diminishes the scope of fundamental constitutional rights'.[27]

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25 The Rt. Hon. Lord Steyn, 'The Intractable Problem of the Interpretation of Legal Texts', (2003) 25 (1) Sydney Law Review. See also, *Thoburn and Others v. Sunderland City Council and Others* [2002] 3 WLR, 247.
26 *Thoburn and Others v. Sunderland City Council and Others* [2002] 3 WLR, 247.
27 Ibid.para.62.

Resolving jurisdictional issues under the doctrine of implied repeal

As shown above, a later statute will not prevail over an earlier one if there is no indication that the legislature intended the later statute to have that preference.[28] One way to resolve jurisdictional issues raised by the doctrine of implied repeal is to treat some statutes as 'constitutional statutes'. Under this doctrine a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of fundamental constitutional rights.

As applied in *Thoburn*, the European Communities Act was included under the first limb and treated as a statute to which the doctrine of implied repeal would not apply. Recent attempts to treat treaties governing economic relations as constitutions or as giving rise to constitutional rights suggest some possibilities for the application of this doctrine if such treaties are incorporated in domestic legislation.[29] However, this position is not yet recognized in local jurisprudence.

A related possibility is for the treatment of Acts passed to give effect to treaties governing economic relations, and which may be classified as Acts which 'conditions the legal relationship between citizen and the state in some general overarching manner', as being covered by the constitutional statute criterion.

Judicial Review of agency determinations

Judicial review of agency determinations may also present challenges for enforcement of competition law. Judicial review proceedings are contemplated in national competition agency determinations in those Caricom Member states that have instituted competition laws. The law to be applied in a particular case may be difficult to discern if the dispute concerns a question that has not been addressed by the Community Commission. Where the matter has been addressed by the Community Commission but was not referred to it by the Member state faced with a similar matter, the issue arises as to whether the jurisprudence developed there should be taken into account, in the absence of a domestic provision to give direct effect to such rulings. Article 174(6) of the Revised

28 For more on this view see, for example, Andrew Butler, 'Implied Repeal, Parliamentary Sovereignty and Human Rights in New Zealand', *Public Law* , p. 586, 2001.

[29] See for example, Deborah Cass, The Constitutionalisation of the World Trade Organization, Oxford, Oxford University Press, 2005.

Treaty provides that Member States "*shall enact legislation to ensure that determinations of the Commission are enforceable in their jurisdiction*". It is not clear whether this to be done in such a way that all determinations should have direct effect or only those involving a particular Member.

The Caribbean Court of Justice Original Jurisdiction Act of 2005 (CCJ Act) contemplates that these questions may be referred to the CCJ for a ruling that can then be enforced by an order from the CCJ. But the legislation affords much discretion to the judge in determining whether these questions ought to be referred at all, particularly if the position is taken that the local dispute does not involve cross-border issues that implicate the application of the provisions of the Revised Treaty. Section 7 of the CCJ Act of 2005 provides, for example, that:

> *7(1) Where a court or tribunal is seized of an issue whose resolution involves a question concerning the interpretation or application of the Treaty, the Court or tribunal concerned may, before delivery of its judgment in the matter in writing request the designated authority to refer the question to the Court for an advisory opinion to be given.*[30]

The discretion here is considerable, presumably covering situations where the court makes a determination whether the interpretation or application of the Revised Treaty is in issue to one where, even if it is in issue, a determination can be made as to whether the resolution of the issue involves the application of the Revised Treaty.

CONCLUDING REMARKS

Chief among the goals of community competition policy in CARICOM are market integration through harmonization and the operationalization of special and differential treatment.

The governance arrangements in CARICOM provides flexibility for achieving these two important goals but the flexibility provided exposes potential conflicts in meeting these objectives.

[30] This provision reflects the text of Article 214 of the RTC.

In addition, challenges for effective enforcement of community competition policy in CARICOM threaten the integration process. The Community Commission is enjoined to investigate and adjudicate cross-border disputes and in this regard the establishment of a centralized body can assist in achieving the goals of harmonization and special and differential treatment in the application of competition policy, bearing in mind the the Community Commission's mandate in the development of community competition policy.

However, the relationship between the Community Commission and other community organs does not necessarily ensure that either goal can be met harmoniously since policy flexibility which supports the one can militate against the achievement of the other.