THE ANALYSIS OF COOPERATION AND DISPUTE SETTLEMENT MECHANISMS IN RESPECT OF COMPETITION POLICY WITHIN THE CARIBBEAN COMMUNITY (CARICOM)

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A. Introduction

In 2001, the Caribbean Community ("CARICOM") including the CARICOM Single Market and Economy ("CSME") was established by the Revised Treaty of Chaguaramas ("the Treaty"). CARICOM comprises fourteen Member States and five Associate States, all of which can be considered developing countries or small economies. This was in part an attempt to meet the challenges posed by globalization and liberalization to the international competitiveness of these countries and to promote "the highest level of efficiency in the production of goods and services" in order to improve variety and increase the quantity of products and services. As production and trade increase, it is likely that the number of cross border disputes will increase and parties will be required to seek ways to settle their disputes.

CARICOM’s competition policy was developed to ensure that the benefits that were expected from the establishment of the CSME, would not be frustrated by anti-competitive business conduct that could restrict or distort competition in the Member States and within the region. The CARICOM Heads of Government recognized that smaller economies such as the CARICOM states are faced with peculiar challenges such as ensuring that the local businesses do not engage in anti-competitive conduct whilst affording them protection from large multi national corporations that operate within the region. They therefore sought to apply and converge national competition policies as well as provide for cooperation amongst the competition authorities in the Community.

To date, Jamaica, St. Vincent and the Grenadines, Barbados, Guyana and Trinidad and Tobago have passed legislation. St. Vincent and the Grenadines, Guyana and Trinidad and Tobago have yet to proclaim their Acts and Jamaica and Barbados are the only two States to have established Fair Trading Commissions. The commonality of the challenges faced, underscores the need for cooperation within CARICOM in respect of competition policy.

The aim of this paper is to (i) identify the legal framework within which cooperation and dispute settlement in competition policy is treated in the Treaty (ii) analyze cooperation in competition policy in CARICOM (iii) analyze dispute settlement mechanisms available under the Treaty in respect of competition policy and (iv) recommend measures to overcome any limitations to the cooperation and dispute settlement mechanisms currently in place in respect of competition policy in CARICOM.

B. The legal framework under the Treaty

Cooperation

Cooperation in respect of competition policy within CARICOM is governed by Chapter 8 of the Treaty. Article 170 1(b)(i) encourages Member States to cooperate in the determination of competition legislation as it requires them to “take the necessary legislative measures to ensure consistency and compliance with the rules of competition
and provide penalties for anti-competitive business conduct.” This cooperation was reflected in the preparation of a CARICOM Model Bill which Member States used as the basis for the preparation for their national competition legislation.

The Treaty also provides for cooperation between national authorities in Member States and the Community Competition Commission (“CCC”), the regional competition authority to be established under Article 171iv. Article 170 (3)(a) mandates that “Every Member State shall require its national competition authority to co-operate with the Commission in achieving compliance with the rules of competition.” Article 173 Subsections (e) – (h) puts the onus on the Commission to cooperate with the national authorities, provide support to them and to “facilitate the exchange of relevant information and expertise.”

Co-operation between the national competition authorities in the different Member States is covered under Article 170 (3)(c). This Article states that “Every Member State shall require its national competition authority to co-operate with other national competition authorities in the detection and prevention of anti-competitive business conduct, and the exchange of information relating to such conduct.”

**Dispute Settlement**

Within CARICOM, there is only one method of dispute settlement that is specific to competition policy and that is the CCC. Article 173(2)(a) provides that the CCC will monitor anticompetitive practices of enterprises operating in the CSME and investigate and arbitrate cross border disputes.

There is nothing in the Treaty that mandates that a dispute in respect of competition policy may only be resolved by way of the CCC. As such, it is submitted that parties may also have recourse to the dispute settlement mechanisms set out in Chapter 9 of the Treaty as long as the dispute concerns the interpretation and application of the Treatyv. Article 188 provides that Member States may settle the disputes set out in Article 187 only by recourse to one of six modes of dispute settlement: good offices, mediations, consultations, conciliation, arbitration and adjudication. Article 188(2), however, provides some flexibility to Members. Where Members attempt to settle a dispute using a mode other than arbitration or adjudication and fail to settle; either party may have recourse to another mode. Article 188(3) allows parties that are attempting settlement by arbitration or adjudication to have recourse, subject to the procedural rules of those proceedings; to settlement by good offices, mediation or conciliation.

Article 191 provides that Member States may agree to employ the “good offices of a third party” to settle the dispute and that good offices may begin or end at any time. Article 192 governs mediation. It allows for Member States to agree on a mediator or request that the Secretary General appoint a mediator. Mediation may begin or end at any time and the proceedings are to be confidential. Consultations are covered by Articles 193 and 194.
**Articles 195 to 203** set out the procedure to be followed upon the initiation of conciliation proceedings. The Secretary General of CARICOM is required to establish and maintain a **List of Conciliators**. **Article 197** provides for the constitution of a Conciliation Commission from time to time, the functions of which are set out in **Article 199**. The procedure to be followed by this Commission is set out in **Article 200**. Based on the provisions of the Treaty, no report, recommendation or conclusions is required from an attempt of settlement by good offices, mediation or consultations. However, **Article 201** provides that, in respect of conciliation, the Commission must submit a report that would include any agreements, reached; the conclusions of the Commission on all questions of law or fact relevant to the matter and recommendations for an amicable settlement. None of the conclusions or recommendations, however, would be binding upon the parties. It is therefore submitted that the first four dispute settlement mechanisms under the treaty, that is; good offices, mediation, consultation and conciliation should be considered non-binding modes of settlement.

**Article 203** states that each Member State that is a party to the dispute shall bear the fees and expenses of the conciliation commission. In contrast, there is no provision in the Treaty addressing the issue of fees and expenses in respect of settlement by good offices, mediation or consultation.

Arbitration is governed by **Articles 204 to 210**. The Secretary General of CARICOM is required to maintain a **List of Arbitrators**, each of whom, inter alia, must “have expertise or experience in law, international trade, other matters covered by this treaty, or the settlement of disputes arising under international trade agreements;” and “be independent of, and not be affiliated with or take instructions from any Member State.” Like conciliation, arbitration is a more stringent procedure. **Articles 206 and 207** set out how an Arbitral Tribunal should be constituted and the rules of procedure governing the operation of such a Tribunal. Unlike the non-binding dispute settlement mechanisms, decisions of the Arbitral Tribunal shall be final and binding on the Member States that are parties to the dispute. The expenses of arbitration are to be borne equally by the Member States that are parties to the dispute unless the arbitral tribunal determines otherwise.

Adjudication is governed by **Articles 211 to 222**. Subject to the Treaty, the Caribbean Court of Justice (“the Court”) shall have compulsory and exclusive jurisdiction to hear and determine disputes relating to the interpretation and application of the Treaty. Under the Treaty all “Member States, Organs, Bodies of the Community, entities or persons to whom a judgment of the Court applies, shall comply with that judgment promptly.”

In addition to the 6 modes of dispute settlement, the Treaty also makes provision for alternative dispute settlement. It requires Member States to “the maximum extent possible, encourage and facilitate the use of arbitration and other modes of alternative disputes settlement for the settlement of private commercial disputes among Community nationals as well as among Community and nationals of third States.” It also requires
Member States to “provide appropriate procedures in [their] legislation to ensure⁴xiv that the agreements to arbitrate are observed and that arbitral awards that are granted in respect of such disputes are enforced.

The Treaty also gives the Conference of Heads of Government which is constituted of the Heads of Government of the Member States and is the supreme Organ of the Community, the power to “consider and resolve disputes between Member States.”⁵ xv

C. Analysis of Cooperation mechanisms in respect of Competition Policy within CARICOM

Central to the discussion of competition policy are the issues related to cooperation in regional free trade agreements (“FTA”), particularly agreements involving small and developing countries such as the member states of CARICOM. The importance of cooperation in the harmonizing of competition rules in regional trade agreements is endorsed by José Tavares de Araujo, Jr., and Luis Tineo. They state, “The harmonization of competition rules is achievable not through mercantilist negotiations, but essentially through cooperation among national competition agencies in the enforcement of their respective domestic laws.”⁶xvi Within CARICOM, only four (4) Member States have enacted competition policy legislation, and only two (2) States have established Fair Trading Commissions (“FTCs”). Cooperation agreements are not formalized in the existing FTCs in CARICOM. However, there has been informal cooperation in the areas of technical assistance, consultations and information exchange on investigations.

Robertson Anderson suggests that at the regional level, cooperation “can play a useful role in technical assistance and the fostering of common approaches to the context and application of competition policy.”⁷xvii Likewise, Rajan Dhanjee writing on forms of cooperation for developing countries in the area of competition policy confirms that technical assistance is “the starting-point for international cooperation.”⁸xviii As such, it is a vital form of cooperation for an individual FTC as well as the CCC in CARICOM. Thus, Dhanjee postulates that technical assistance is essential for “adopting, reforming or enforcing competition law and policy.”

The Barbados Fair Trading Commission (“BFTC”) has benefited from technical assistance in the “developing of systems and procedures”⁹xix by collaborating with the Australian Competition and Consumer Commission (“ACCC”). In this case technical assistance was the attachment of an officer from the ACCC to the BFTC for three (3) months. The ACCC officer was able to provide expert guidance on the procedures to be adopted by the FTC as well as train staff.

In Trinidad and Tobago, technical assistance has been received at the stage of drafting competition law and policy and sensitizing government officials, the business community and the legal fraternity in the said area. In 1996, the Government of Trinidad and Tobago contracted the firm, Maxwell Stamp PLC, to draft a green paper entitled ‘A Competition Law for Trinidad and Tobago – A proposal for A Fair Trading Act’ and a Legislative
Brief. The green paper outlined the proposals to be incorporated in the Fair Trading Bill whereas the Legislative Brief highlighted the areas of Competition Policy to be enacted into law.

Government officials from the Ministry of Trade and Industry in Trinidad and Tobago (“MTI”) were exposed to Competition Law and Policy issues by attending workshops and seminars conducted by the World Trade Organization (“WTO”), CARICOM, the United Nations Conference on Trade and Development (“UNCTAD”) and the Sir Arthur Lewis Institute of Social and Economic Studies (“ISER”) of the University of the West Indies (“UWI”). Approximately ten workshops were attended during the period 1999 to February 2006. However, capacity building within the MTI was not achieved, as the participating officers are no longer based in the Unit responsible for competition policy matters. With the passage of Trinidad and Tobago’s Fair Trading Act (“TTFTA”) on June 23, 2006, it is envisaged that technical assistance would be needed to train commissioners, staff, judges, attorneys-at-law and other stakeholders. It is hoped that this technical assistance would be forthcoming from regional experts; established competition policy commissions; multilateral organizations and academic institutions.

Cooperation in the form of consultations may be observed from four (4) perspectives in CARICOM, that is, between the following parties:

(i) member state FTC and member state FTC;
(ii) member state FTC and extra-regional FTC;
(iii) member state FTC and CARICOM; and
(iv) CARICOM and countries with bilateral free trade agreements (FTA).

(i) Consultations between Member State FTC and Member State FTC
Cooperation between Barbados and Jamaica’s FTCs is observed through consultations on an informal basis. Stewart endorses this view and documents that “the Barbadian FTC said that the most informal cooperation and assistance they have received have been from the Jamaican FTC.”xx Both Commissions anticipate that consultations would increase, especially in respect of the investigating of anti-competitive behaviour. Recently, Trinidad and Tobago joined the JFTC and the BFTC in consultations on establishing its FTC. Trinidad and Tobago has requested that officials from the MTI visit the offices of both the JFTC and BFTC with the intention of learning from their experiences in designing an appropriate organizational structure and sourcing regional and international experts for technical assistance and training. Both Commissions have acceded to this request.

(ii) Consultations between Member State FTC and extra-regional FTC
Cooperation between the JFTC and the United States Fair Trading Commission (USFTC) commenced in 1999 as the JFTC sought assistance from officers in the USFTC to address consumer related issues.xxx In 2004, the JFTC was able to assist in acquiring information on the remittance sector in Jamaica at the request of the United States Department of Justice (USDOJ) while investigating Western Union.xxxi It is interesting to note that this reciprocal form of exchange, challenges the traditional view that a relatively new
commission in a developing country may not be able to offer assistance to a mature commission in a developed country.

(iii) Consultations between member state FTC and CARICOM
Both the JFTC and the BFTC have been instrumental in establishing the CCC. The first meeting to establish the CCC was held in Suriname from April 26-27, 2005. At that meeting a task force comprising the JFTC and BFTC as well as representatives from Suriname, Guyana, St. Lucia, the Organization of Caribbean States (OECS) Secretariat, the CARICOM Secretariat, the UWI and Trinidad and Tobago was established. Representatives from the commissions were able to make valuable contributions on substantive issues relating to the potential impact of mergers, acquisitions and cartels on competition in the CSME. Moreover, Trinidad and Tobago gained insight in addressing pertinent issues in finalizing its Fair Trading Bill. At subsequent meetings held in December 2005 and May 2006, the Task Force drew on the FTCs’ experiences in developing an organizational chart for the CCC.

(iv) Consultations between CARICOM and countries with Bilateral Free Trade Agreements (FTA).
CARICOM has engaged in a number of bilateral free trade agreements which address the issue of cooperation. The FTA between CARICOM and the Dominican Republic speaks to the discouragement of anti-competitive business practices and the need to prevent this behaviour by adopting common provisions. Both parties are to ensure competition policy is promoted and applied. The CARICOM – Cuba FTA has no provisions on cooperation with respect to competition policy. Notwithstanding this, the agreement highlights the need for parties to encourage competition policy and prevent anti-competitive business practices. The prevention of such behavior is echoed in the CARICOM-Costa Rica FTA. Cooperation is not addressed in this agreement, however Stewart endorses that the FTA “includes soft provisions on competition policy.”

The Member States of CARICOM recognize that the gains of introducing cooperation agreements extend beyond technical assistance, consultations and information exchange. It is advocated that formal cooperation agreements provide the assurance that companies will notify on enforcement activities and assist in investigations in specific areas such as anti-competitive conduct, joint investigations and legal queries.

For formal cooperation provisions to be effective in Member States of CARICOM it is imperative to analyze its limitations. The Member States of CARICOM are an association of sovereign States therefore limitations on a State’s sovereignty should not arise. Nonetheless, Ivor Caryll expresses the view that “the legal ramifications for the administration of competition policy and law in the future Single Market is not clear at this time. What is certain is that sensitivities regarding sovereignty have a decisive influence over the substance and powers of institutions which will apply the rules.” By cooperating with the CCC, Member States foresee a loss of flexibility in addressing competition policy issues. These factors may act as a deterrent for Member States to fast track domestic competition policy legislation for fear of foregoing its national interest. In this regard, Member States may find it difficult to balance foreign market access and
domestic interest when seeking cooperation agreements. Also, it is onerous for Member States to conform to the rules of a regional FTA as opposed to its domestic legislation.

FTCs in CARICOM, especially the OECS, may shy away from pursuing cooperation agreements as the exchange of information and consultations may prove to be costly and a burden on limited resources to gather information from more established FTCs. Additionally, information exchange tends to revolve around non-confidential information which limits the investigative arm of the FTC in proving anti-competitive activity. Limited resources coupled with the lack of experience in anti-competitive behaviour weaken the bargaining positions of Member States’ FTCs with international firms engaging in cross-border activity such as export cartels.

Instead of pursuing cooperation agreements in regional FTAs, small developing countries may opt to advance bilateral agreements as they may be more effective in achieving the desired level of cooperation. Further, it is a complex exercise to address levels of cooperation when negotiating agreements between a small developing country’s FTC and a developed country’s FTC. Stewart articulates this point and indicates that “existing models of cooperation agreements are premised upon the exchange between competition authorities of equal strength and experience.” It is observed that this is not the case for agreements between a small developing country’s FTC and a developed country’s FTC. Therefore it is critical to negotiate special and differential treatment (SDT) provisions in cooperation agreements.

D. Analysis of dispute settlement mechanism in respect of competition policy

Despite the benefits that may accrue as a result of the broad range of functions of the CCC, at least one major problem is anticipated. There are no provisions in the Treaty for appeals from decisions of the Commission. To date, there is no consensus even within CARICOM as opinions are divided as to whether appeals from the CCC should go to the CCJ or to COTED. Member States may prefer to keep decisions at the Governmental level which they would be able to do if appeals are made to COTED, especially since at this time COTED seems to be the forum of choice for inter state dispute settlement. It is submitted, however that the CCJ would provide for greater transparency in the appeal process.

The variety of dispute settlement mechanisms available under Chapter Nine of the Treaty allows Member States flexibility in determining the mode that would be most appropriate to their particular problem and the challenges that they all face as small developing states. For example, a Member may determine that the ‘diplomatic’ methods may prove faster, less costly and less complex. These are important considerations for States that may have more pressing needs for the use of their financial resources. The Treaty only speaks to expenses in respect of conciliation and arbitration but in both cases both of the Member States would be jointly responsible for the cost of the procedure.
Mechanisms that involve some third party, such as good offices or mediation, may alleviate the fears of the Less Developed Countries within CARICOM\textsuperscript{xxvi}, that within any dispute settlement process, the odds would already be stacked against them as a result of their smaller size as well as their lack of resources and capacity. The involvement of third parties would put the Member States on a more equal footing.

The use of the ‘diplomatic’ dispute settlement mechanisms would also allow the Member States a better chance of maintaining their relationship with each other in areas other than the one in dispute as opposed to more adversarial methods of settlement.

Utilization of the mechanisms provided for under Chapter Nine poses various problems for the Member States. It is quite likely that Member States may lack capacity particularly if either arbitration or adjudication is the chosen method of settlement.

Delays in settlement may also be a problem as where a dispute has not been settled by certain methods, Member States may have recourse to another mode\textsuperscript{xxvii}. As a result, even if parties take years to attempt to settle a matter by good offices for example, if the matter is not settled, they can still enter into some other method that may take just as long. In the context of competition policy, this can lead to great injustice to businessmen, particularly small and medium sized enterprises, for whom the consequence of delay may be economic loss that could shut down their business.

Although Article 189 is titled ‘Expeditious settlement of Disputes,’ it only speaks to parties proceeding expeditiously to the exchanging of views for the purpose of agreeing on:

\begin{itemize}
\item[(a)] a mode of settlement and where an agreed mode has been terminated, to another mode of settlement;
\item[(b)] a mutually satisfactory method of implementation where a settlement has been reached and the circumstances require consultations regarding its implementation.
\end{itemize}

It does not require that the actual process of settlement be done expeditiously. CARICOM does not have a history of expeditious settlement of disputes. One example of this is the Trinidad and Tobago/Barbados maritime dispute for which parties entered into discussions in the 1970’s and which was only decided before an International Court in 2005.

The fact that most of the mechanisms are non-binding could lead to an abuse of the dispute settlement processes. Parties may be tempted to use the mechanisms to ‘fish’ for information or as a delaying tactic. Also, Parties might be unwilling to go through a procedure where at the end of it, they are still unsure that the settlement arrived at, will be honoured.

To date, Member States seem reluctant to utilize the dispute settlement mechanisms provided in Chapter 9 of the Treaty, perhaps because of the political ramifications associated with such actions. They tend to favour the diplomatic means of settlement. One example is a longstanding territorial dispute between Guyana and Suriname. The two countries have been in talks for a long time in an attempt to settle this dispute and
have made use of the good offices of the Chairman of the Conference\textsuperscript{xxviii}. At times the States bypass the mechanisms provided in the Treaty in favour of international Tribunals\textsuperscript{xxix}. This type of behaviour could lead other States to question the efficacy of the mechanisms under the Treaty.

One of the most critical limitations to the dispute settlement mechanisms under the Treaty in respect of competition policy is that only States can be parties to the disputes. In competition policy, it is businesses that would suffer injury. Their ability to access the mechanisms would be affected by their knowledge of the domestic procedures required to engage the regional mechanism\textsuperscript{xxx}. It would also mean that businesses would be required to rely on their governments to ‘fight for their cause’, a cause which the Government itself may not have a significant interest in. The only instance in which an individual or company would have standing would be pursuant to Article 222, which allows those persons, who are from one of the Contracting Parties to appear, with leave of the CCJ, as parties in proceedings in certain set circumstances\textsuperscript{xxxi}. It should be noted that since its establishment, the CCJ has not made any decisions involving disputes between two Member States.

\textbf{E. Conclusion}

A thorough analysis of the co-operation and dispute settlement mechanisms in respect of competition policy within the CARICOM is difficult at this stage given the fact that there are only two national competition authorities that are functioning within the region.

Nonetheless the analysis has shown that small developing countries need to overcome the limitations cited above in order to benefit from cooperation agreements in competition policy. What is required is a shift away from the traditional thinking of the parties involved. Formal cooperation agreements should articulate provisions such as, sharing of confidential information between commissions, embracing positive comity and the initiating of investigations by the developed countries’ FTCs on behalf of small developing countries especially in cases involving cross-border anti-competitive activities. Focus should also be placed on increasing the technical assistance that is provided to these states as well as on strengthening the capacity of the FTCs of CARICOM. This can be accomplished with the assistance of developed countries’ FTCs and academic institutions in the form of financial aid, staff exchanges programmes and the organizing of courses in competition policy and law. These mechanisms would facilitate innovative means of deepening cooperation agreements to the mutual benefit of both parties.

Effective use of dispute settlement mechanisms in respect of competition policy in CARICOM requires a true commitment by Member States to the effective enforcement of competition policy. All States need to take action to bring the Agreement establishing the CCJ into force at the national levels. Member States should also seek to cooperate to ensure the speedy establishment of both national competition authorities as well as the CCC and to source technical assistance and aid for the development of capacity and competencies in this field. It is only when CARICOM Member States fully and
effectively utilize the opportunities for cooperation and the dispute settlement mechanisms provided in respect of competition policy that competition policy within the region will contribute positive to the creation of the competitive environment that was envisaged by the Heads of Government at the signing of the Treaty in 2001.
These are Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago.

These are Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands and the Turks and Caicos Islands.

Preamble of the Revised Treaty of Chaguaramas

Article 171 of the Revised Treaty of Chaguaramas establishes a Competition Commission for the purposes of the implementation of the Community Competition Policy.

Article 187 provides that these disputes may include:

(a) allegations that an actual or proposed measure of another Member State is, or would be, inconsistent with the objectives of the Community;
(b) allegations of injury, serious prejudice suffered or likely to be suffered, nullification or impairment of benefits expected from the establishment and operation of the CSME;
(c) allegations that an organ or body of the Community has acted ultra vires; or
(d) allegations that the purpose or object of the Treaty is being frustrated or prejudiced

The Caribbean Court of Justice, CARICOM’s judicial tribunal, was established by the Agreement Establishing the Caribbean Court of Justice on February 14, 2001.

These include:

(a) disputes between the Member States parties to the Agreement;
(b) disputes between the Member States parties to the Agreement and the Community;
(c) referrals from national Courts of the Member States parties to the Agreement;
(d) applications by persons in accordance with Article 222 [by which private entities may, with special leave of the Court, in certain set circumstances, may be allowed to appear as parties in proceedings before the Court.]

concerning the application of this Treaty.

These are Antigua and Barbuda, the Bahamas, Belize, Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines

Article 188(2)


The maritime dispute between Trinidad and Tobago and Barbados concerning the delimitation of maritime boundary and an appropriate fisheries regime was taken before an Arbitral Tribunal of the United Nations Convention on Law of the Sea.

It should be noted that cross border disputes in respect of competition policy matters would be dealt with by the Community Competition Commission. Appeals though would have to be made to the Caribbean Court of Justice and in that case would usually have to be pursued by the individual or company’s Member State.

These are 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.